Submission to the Parliamentary Joint Committee Inquiry into Agribusiness Managed Investment Schemes

Background

The PJC must be aware that the single biggest creditor in the collapses of the Agribusiness Managed Investment Schemes is and will be the Government and Taxpayers of Australia.

Research provided by the Australian Agribusiness Group* estimates the total tax benefits paid by the ATO over the past 5 years have been $2,242 m and a total investment across the industry in excess of $5 bn.

Total future revenues projected were in excess of $25 bn and the implied tax revenue to be collected from investors on the project income was expected to be in excess of $11 bn. This does not take into account Payroll, Company Tax and GST.

If Great Southern & Timbercorp do represent 50% of the industry over the past 5 years then the Government stands to risk $5 bn in foregone revenue.

This does not take into account the impact on Rural Communities where in many cases the MIS schemes were the major or only employers.

The industry should not be allowed to fail the economy and the Government cannot afford to let it fail and yet neither ASIC nor the Government has taken the obvious opportunity to exercise its powers to soften the failure.

The failures that we have seen in the industry have been caused by the credit failure of the promoters not the actual projects and the losses to the investors and the Government can be laid directly at the feet of the failure of the Responsible Entity arrangements.

Submission

The key area of legislative or regulatory change that is required is in regard to the Responsible Entity arrangements.

The Responsible Entity (RE) is supposed to be in place to protect the interests of the Investors/Growers however in the failures of Timbercorp, Great Southern & Palandri it has not provided any protection and the entire arrangement has been a manifest failure.

In the case of Timbercorp we have an Administrator KordMentha who have taken the role of the Responsible Entity for the schemes and are seeking to declare them not viable on the grounds that the RE is itself insolvent when an RE is not intended to hold assets beyond the licence requirements imposed by ASIC.

In the case of Great Southern the Receiver Managers McGrath Nicol who are acting solely for the secured creditors have assumed the duties of the Responsible Entity despite not acting as a Receiver for any of the projects. They have already started to forecast that the projects are not viable.

In the case of Palandri the liquidator acted as the Responsible Entity and the liquidator sold the only viable assets to a consortium that included the previous directors. The land the projects were on has we presume also been sold and the investors will not see any distribution from the sale of the vines or improvements to the property that were on the leased land at the time.

In the existing legislation the RE has the dual role of Manager and Trustee of the scheme and should in the event of a collapse of the main entity have sufficient ability to preserve the interests of the investors and find where appropriate or possible a new manager and trustee.

The common theme in the current failures is that the RE was simply just another entity of the promoter and far from acting or even having the ability to act in the interests of the investors the RE is absorbed into the rest of the entities under external control and at the very time it should be required to be looking after the interests of the investors is sidelined.

The present RE legislation simply requires the RE to be an Australian Public Company holding an AFSL with the Authorisation to act as a Responsible Entity and have minimum Net Tangible Assets of 0.5% 0f the schemes assets to a maximum of $5 m. This requirement is to enable the RE in the event of a failure to source an alternative Management provider.

In all 3 cases mentioned above the RE has had no liquid asset available to enable the RE to find alternative Managers to enable the schemes to carry on.

It is difficult to state whether the simple access to $5m by the RE would change the end result however what it would provide for is:

- A proper analysis of the viability of the individual schemes - at the moment we are expected to accept the Administrator or Receiver's analysis which in the case of KordaMentha suggesting that $300m was required to undertake the 2009 harvest which is patently ridiculous. Even if the insolvency practitioners were to undertake the harvest themselves at their inflated hourly rate it wouldn't amount to $300m. The evaluation of an Agricultural scheme is a specialised skill and needs to be valued on the whole not just at a financial point in time. If we applied a purely financial reasoning to most farms and rural businesses they would all be insolvent for much of the time.
- Protection to the investor as we currently have the Receiver Manager invoicing investors from the RE for on-going management without any requirement to apply those funds raised against the actual projects. McGrath Nicol are invoicing investors in the Sylvatech 2005 project (subsequently acquired by Great Southern) for on-going management fees and they have no obligation to account for those fees against the project that they are invoicing for. The right to invoice for those ongoing management fees stems from the appointment as the RE not because they hold any security over the Sylvatech projects.

ASIC have the legislated authority to step in and appoint a temporary RE in cases such as this but have been reluctant to use that power which is to the detriment of all concerned.

Recommendations

1. ASIC use their powers to appoint temporary RE funded by the administrators and receiver managers for a period of 90 days to carry out the assessment and seek alternatives for each individual project.
2. The licensing process for an RE to provide that the NTA requirement is held separate from all related company assets or by Bank Guarantee to ensure that at the very time those funds are required they are actually available for the protection of investors (not compensation).
3. That the Directors and Officers of the RE Companies hold the required Professional Indemnity Insurance that in the event they fail in their duties as an RE finds are available for the protection of the investors. The PI Insurance is again not for compensation, instead it is for protection of the ability to carry out the duties of the RE which may in the end still mean the scheme fails but at least investors have the protection they have been promised in the PDS.

Michael Butler

*Source Australian Agribusiness Group Media release Tuesday 19th May 2009