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**ASIC**

Australian Securities & Investments Commission

# **Parliamentary Joint Committee on Corporations and Financial Services**

## **Inquiry into Agribusiness Managed Investment Schemes**

### **Submission**

July 2009

#### **About this paper**

This paper sets out ASIC's submission to the PJC Inquiry's terms of reference.

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## A Introduction

- 1 The Australian Securities and Investment Commission (*ASIC*) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into Agribusiness Managed Investment Schemes (the *Inquiry*). The Inquiry sets out a number of terms of reference with overarching reference to the recent collapses of Timbercorp Limited (*Timbercorp*) and Great Southern Limited (*Great Southern*).
- 2 The submission sets out information relevant to specific terms of reference.<sup>1</sup> It focuses on background information about the operation of agribusiness managed investment schemes (*MIS*) and the agribusiness MIS industry as a whole. It also notes some policy issues raised by the terms of reference.
- 3 Following this introduction, the paper sets out information about the way MIS are regulated – the legal regime, the policy underpinning that legal regime and information about the profile of investors who have participated in the agribusiness MIS market.
- 4 The information in Appendix 1 provides an overview of the MIS with specific focus on the agribusiness sector.
- 5 Parts of the submission have been marked confidential because:
  - Our inquiries are ongoing, and disclosure of these parts of our submissions may prejudice our inquiries; and
  - Some confidential information in these parts of our submissions was obtained by ASIC in the performance of its functions or the exercise of its powers under the *Corporations Act 2001* and ASIC is under a legal obligation to prevent unauthorised use or disclosure of such information.
- 6 As we have requested, was ask that the Committee will direct that the confidentially marked documents be treated as evidence taken *in camera*. Those documents are:
  - Performance of the schemes (TOR 8 in Appendix 2);
  - Factors underlying recent scheme collapses (ie. TOR 9 in Appendix 3);
  - Timbercorp (Appendix 4); and
  - Great Southern (Appendix 5).

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<sup>1</sup> Note: The submission does not contain sections on, the projected returns and supporting information on the impact of past and present taxation treatments and ruling related to MIS (TOR 3), product price and demands (TOR 10) and the impact of MIS on other related markets (TOR 11). ASIC does not wish to make specific observations about these terms of reference. However, information contained in the various sections of the submission may be relevant to these terms of reference.

- 7 ASIC is also making a separate submission to the PJC Inquiry into Financial Products and Services. Our submission to the Inquiry into Financial Products and Services will set out the legal framework and ASIC's role in more detail, particularly in relation to the provision of financial advice, which might be helpful to the Committee when considering the issues raised by this Inquiry. Some of the policy proposals in our 31 July submission may also be relevant to this Inquiry. In general, where a matter is relevant to both this Inquiry and the Inquiry into Financial Products and Services, we will deal with it in our submission to the Inquiry into Financial Products and Services.

## B The legal regime for MIS

- 8 MIS is the generic term used to describe a variety of structures for the creation and operation of collective investment ‘schemes’ or projects.
- 9 The *Corporations Act 2001* (the *Act*) and ASIC policy does not generally distinguish agribusiness schemes from other types of managed investment schemes (for example equity funds, property trusts and mortgage schemes). There is one point of distinction reflected in the licensing regime administered by ASIC which relates to responsible entities of agribusiness MIS. An explanation of this point is set out in paragraphs 20-21 of this paper.
- 10 The term MIS is defined in s9 of the Act as having the following features:
- (a) people contribute money or money’s worth as consideration to acquire rights (*interests*) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
  - (b) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the *members*) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders); and
  - (c) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).
- 11 A MIS (with more than 20 members) must generally be registered by ASIC under s601EDB of the Act if interests are to be offered to retail investors. A MIS must also be operated by a public company, the responsible entity (*RE*).
- 12 The RE must hold an Australian Financial Services (*AFS*) Licence and must prepare the following documents governing the operation of the MIS, prior to registering the MIS:
- (a) a constitution – setting out the legal relationship between members of the MIS and the RE<sup>2</sup> ;
  - (b) a compliance plan – setting out a range of measures the RE is to apply in operating the MIS to ensure compliance with the Act and the

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<sup>2</sup> ASIC Regulatory Guide: [RG 134] *Managed Investments: Constitutions* sets out ASIC's approach to assessing constitutions of managed investment schemes.

constitution.<sup>3</sup> If the majority of the RE's directors are not external to the RE, the compliance plan and the RE's compliance with it must be monitored by a compliance committee. The compliance committee must have at least 3 members and a majority of them must be external. Compliance with the compliance plan is also subject to an annual external audit.

### Registration of Schemes

- 13 The Act requires that ASIC register a MIS within 14 days of receipt of an application for registration, unless:
- (a) Documentary requirements for the application are not satisfied;
  - (b) The RE is either not a public company or does not hold an appropriate AFS licence;
  - (c) The scheme's constitution does not meet statutory content requirements or is not legally enforceable;
  - (d) The scheme's compliance plan does not meet statutory content requirements (or is unsigned); or
  - (e) The scheme has not had an auditor engaged to audit the RE's compliance with the scheme's compliance plan.
- 14 ASIC undertakes a limited assessment when registering a MIS. The steps in that assessment are set out in paras 30-33 of this paper.

### General Obligations

- 15 As the holder of an AFS licence, the RE is subject to a number of general obligations under s912A of the Act. Such duties include the obligation to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly, to comply with conditions of the licence and to comply with financial services laws.
- 16 As AFS Licensees, REs are required to meet base level financial requirements set out in RG 166. These require the RE to have:
- (a) positive net assets and be solvent;
  - (b) sufficient cash resources to cover 3 months expenses with cover for contingencies; and
  - (c) maintained audit compliance.

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<sup>3</sup> ASIC Regulatory Guide: [RG 132] *Managed Investments: Compliance Plans* sets out ASIC's approach to assessing compliance plans of managed investment schemes

17 REs must also maintain minimum net tangible assets of \$5 million unless the RE uses a custodian. If a custodian is used, the RE must maintain 0.5% of assets of the registered schemes it operates with a minimum requirement of \$50,000 and a maximum requirement of \$5 million.<sup>4</sup>

18 This minimum NTA requirement is imposed under RG 166 as a continuation of the NTA requirement that applied under s784(2A) of the Act as it applied from the commencement of the *Managed Investments Act 1998* until the commencement of the *Financial Services Reform Act 2001*. The NTA requirement in s784(2A) was similar to that which was proposed in the report of the Australian Law Reform Commission and the Companies and Securities Advisory Committee in Report No 65, entitled *Collective Investments: Other People's Money*, 1993. That report had proposed a capital requirement for scheme operators of 5% of the value of the assets of their schemes with a minimum of \$100,000 and a maximum of \$5 million.

19 The RE (and its officers) are also subject to a number of specific statutory obligations within Ch 5C of the Act. Under s601FC of the Act, the RE of a registered scheme must (among other obligations):

- (a) exercise the degree of care and diligence that a reasonable person would exercise if they were in the RE's position;
- (b) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and
- (c) where a MIS is to be offered to retail investors, prepare a PDS.

The Act does not prescribe or proscribe particular product features or characteristics, so long as the nature of the investment is disclosed in the PDS.

20 REs of agribusiness MIS are subject to a licence condition relating to protection of land for agricultural schemes. The condition requires the RE to ensure an instrument is registered on the title of the land to be used by the MIS, that gives rights for the land to be used for the purpose of the MIS. This protection is necessary because the land itself is not generally scheme property that is held on trust for members under the Act, and it is generally impracticable for the members to have their own distinct proprietary interests in land.

21 The condition was intended to:

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<sup>4</sup> See ASIC Regulatory Guide [RG 166] *Licensing: Financial Requirements*

- (a) reduce the risk that the value of members interests will be adversely affected by financial failure by the RE causing a loss of rights to land necessary for the operation of the scheme; and
- (b) reduce the risk that a secured creditor, or liquidator of the RE would use proprietary rights in relation to the land in a way that denied to members the opportunity to obtain the produce that the scheme was to produce.

22 This licence condition was not intended to:

- (a) address the risk that the RE could not continue its operations (and this would affect the operation of the scheme other than because of the failure to have access to land); or
- (b) address the risk that a RE holding a lease would fail to pay the rent and this would adversely affect the access to land.



## C What is ASIC's role in regulating MIS?

23 Following a strategic review of ASIC's operations, 4 functional directorates were abolished in favour of 20 outwardly focused stakeholder and deterrence teams covering the financial economy. One of these stakeholders teams, referred to as Investment Managers, was given the responsibility of regulating the MIS industry. Another, stakeholder team known as Financial Advisers was given the responsibility of regulating providers of financial advice in Australia. The Investment Managers team discharges ASIC's responsibilities under the Act to:

- (a) Register MISs;
- (b) Monitor disclosure of MISs; and
- (c) Supervise the conduct of the REs.

24 While the licensing of REs is conducted by a separate business unit within ASIC, the Investment Managers teams provides advice and support to enable the licensing team to make informed decisions about whether to grant an AFS Licence.

25 The following section is a summary of the manner in which ASIC discharges its responsibilities under the Act to regulate MIS entities.

### **Licensing the RE**

26 ASIC must grant a licence to anyone who applies, in accordance with s913B of the Act. This provision requires ASIC to grant an AFS Licence where:

- (a) All documentary requirements with the application were submitted by the applicant;
- (b) ASIC has no reason to believe that the applicant will not comply with the obligations that will apply under section 912A if the licence is granted;
- (c) ASIC must be satisfied that there is no reason to believe that the applicant is not of good fame or character;
- (d) the applicant has provided ASIC with any additional information requested by ASIC; and
- (e) the applicant meets any other requirements prescribed by regulations made for the purposes of this paragraph.

27 To enable it to form a view on this, ASIC collects information from the applicant about its responsible officers and about its organisational expertise, compliance arrangements, training supervision and monitoring of representatives, adequacy of financial, human and IT resources, dispute

resolution systems, and risk management practices. It imposes conditions on the licence (such as conditions relating to minimum financial resources) to address these matters.

28 In deciding whether to licence an RE, ASIC conducts a review of documents provided in support of the licensing application. These documents set out the RE's proposed compliance arrangements and operating capacity. ASIC also assesses the people involved in operating the RE, known as the "responsible managers". This assessment takes into account the responsible managers' knowledge (qualifications) and skills (experience) against the requirements of ASIC Regulatory Guide 105, *Licensing: Organisational competence* (RG 105). The responsible managers (minimum of two) need to have experience and knowledge (either individually or collectively) in both:

- (a) operating a managed investment scheme (legal obligations and responsibilities); and
- (b) in the underlying assets.

29 ASIC also:

- (a) reviews the proposed RE's financial accounts to ensure the entity meets the financial requirements set out above;
- (b) assesses the adequacy of the RE's professional indemnity and fraud insurance arrangements – by assessing a certificate of currency issued by the insurer. The certificate of currency sets out the limitations of the insurance coverage;
- (c) assesses whether the RE proposes to use an external custodian to hold scheme assets and then, if a custodian is to be used, ASIC ensures the custodian has a minimum net tangible assets of \$5 million.

### **Registering the scheme**

30 In deciding whether to register a managed investment scheme ASIC conducts the following assessments:

*A general assessment of the application and the RE to ensure:*

- (a) the constitution and compliance plan are executed appropriately;
- (b) appropriate ASIC forms are filed (including a Form 5103 which is a statement signed by the directors of the RE stating that the scheme constitution and compliance plan comply with the Act); and
- (c) the proposed responsible entity is a public company that holds an AFS licence authorising it to operate the managed investment scheme in accordance with the Act.

*An assessment of the scheme's constitution to ensure it complies with s601GA and s601GB of the Act.*

- 31 These provisions are supported by ASIC policy and deal with:
- (a) unit pricing;
  - (b) powers of the responsible entity to make investments or otherwise deal with scheme property and to borrow or raise monies;
  - (c) dealing with complaints;
  - (d) winding up the scheme;
  - (e) rights of the responsible entity to fees and indemnities out of scheme property;
  - (f) rights of members to withdraw from the scheme; and
  - (g) ensuring the legal enforceability of the constitution.

*An assessment of the scheme compliance plan to assess whether the compliance plan meets the content requirements of s 601HA of the Act.*

- 32 This provision requires that the compliance plan includes measures to ensure compliance with the Act and the scheme's constitution, including arrangements for:
- (a) identification and segregation of scheme property;
  - (b) a compliance committee if less than half of the directors of the responsible entity are external directors;
  - (c) valuation of scheme property;
  - (d) annual audit of the compliance plan; and
  - (e) keeping adequate records of the scheme's operations.

- 33 In 2007 and 2008, ASIC registered 559 and 382 managed investment schemes respectively. ASIC has registered 106 schemes to 30 June 2009.

### **Monitoring disclosure**

- 34 Interests in a registered MIS must generally be offered to retail investors through a complying PDS. Unless the scheme is listed on a financial market, there is no requirement for a PDS to be lodged with ASIC. PDSs do not expire, but are subject to an obligation to update for substantial changes. The PDS is issued by the RE and need not be signed by the directors. ASIC may (and does) examine PDSs in the market on a risk- assessed basis and may require corrective disclosure or issue a stop order for defective disclosure.

- 35 The Act gives ASIC the powers to issue a stop order in respect of a PDS where the document is defective (because it is misleading or defective, or

does not contain material information). ASIC can only issue a stop order following a hearing where interested parties are given the opportunity to make submissions as to whether the stop order should be made.

36 ASIC's actions do not always result in stop orders. In cases where ASIC believes a PDS is defective, the issuer may rectify their disclosure document by issuing a supplementary PDS.

37 ASIC's stop order powers also extends to advertisements or statements made by product issuers where the advertisement or statement is defective. This power permits ASIC (subject to a hearing where interested parties have the right to make submissions) to order that the advertising be removed from publication.

38 ASIC's work in monitoring disclosure of agribusiness MIS is set out in TOR 5.

### **Supervising conduct**

39 ASIC supervises the conduct of the RE and its officers, to check whether they are complying with their legal obligations in relation to the scheme. This supervision is done on a risk-assessed basis, and will often be triggered by a breach notification from the RE, a report from a compliance plan auditor or compliance committee, a complaint, or ASIC's targeted supervision of entities or sectors identified as problematic.

40 Where an entity is targeted for ASIC's supervision, the approach towards that entity varies with the circumstances. ASIC may initiate an active dialogue with the entity's senior executives and conduct meetings to ascertain information. ASIC may also use its powers to s601FF of the Act to conduct surveillance checks.

41 In supervising conduct of REs, ASIC may:

- (a) go to the premises of a licensee and conduct interviews with officers of the RE and examine documentation maintained by the RE;
- (b) request documents from the REs and conduct assessments of those documents;
- (c) request disclosure documents from a larger population of the industry and examine the PDSs;
- (d) write to REs requiring them to respond to the issues we have raised; and
- (e) set up regular reporting periods by which REs provide ASIC with updates as to how they are dealing with any issues identified by ASIC.

42 ASIC's work in supervising conduct of agribusiness MIS is set out in TOR 5.

## D What is the economic philosophy underlying the regulatory regime?

- 43 The economic philosophy underlying the Australian financial services regulatory (*FSR*) regime<sup>5</sup> is that markets drive efficiency and that markets operate most efficiently when there is a minimum of regulatory intervention. This philosophy can be loosely called 'efficient markets theory'.
- 44 Efficient markets theory has been the foundation of Australian financial services regulatory policy since, at least, the Australian Financial System Inquiry of 1981 (the Campbell Inquiry). Its influence continued through to the Financial System Inquiry in 1997 (the Wallis Inquiry).
- 45 The basic features of the current FSR regime were developed following the principles set out in the Financial System Inquiry Report 1997 (the *Wallis Report*). The Wallis Report, in accordance with efficient markets theory, states that:
- "[i]n designing regulatory arrangements, it is important to ensure minimum distortion of the vital roles of markets themselves in providing competitive, efficient and innovative means of meeting customer's needs."<sup>6</sup>
- 46 The Wallis Report recognised that, given the complexity of financial products and the adverse consequences of breaching financial promises, there must be some regulatory intervention in the market to ensure that market participants act with integrity and that consumers are protected. That is, the underlying philosophy accepts that regulation is necessary to deal with factors that prevent the market operating efficiently (e.g. fraudulent conduct by market participants, information asymmetries and anti-competitive conduct). However, that regulation should be the minimum necessary to respond to market failures.

### How does this economic philosophy shape the regulatory regime?

#### ASIC conduct and disclosure regulation

- 47 As a result of this underlying economic policy, the FSR regime administered by ASIC is designed to promote market integrity and consumer protection solely through conduct and disclosure regulation i.e:

<sup>5</sup> 'Australian financial services regulatory regime' primarily refers to Ch 7 of the *Corporations Act 2001*. It also includes Chps 5C and 6D, as well as the financial services provisions of the *Australian Securities and Investments Commission Act 2001*.

<sup>6</sup> Wallis Report, p.15

- (a) conduct regulation – rules designed to ensure industry participants behave with honesty, fairness, integrity and competence, as well as rules relating to the settlement of disputes between market participants and investors; and
- (b) disclosure regulation – rules designed to:
  - (i) overcome the information asymmetry between industry participants and investors by requiring disclosure of information required to facilitate informed decisions by investors; and
  - (ii) promote transparency in financial markets.

Efficiency, flexibility and innovation in the financial services industry are promoted by ensuring that these rules are at the bare minimum.

- 48 Conduct and disclosure regulation does not involve any guarantee that regulated products and institutions will not fail and that promises made to retail investors will be met. Under a conduct and disclosure regime retail investors are still subject to significant risks and retail investor losses are accepted.
- 49 The outcome of this regulatory setting is:
- (a) efficient and flexible allocation of risk and resources and a low cost of capital;
  - (b) promotion of competition, innovation and flexibility; and
  - (c) retail investors having access to a wide range of products.
- 50 On the other hand, under these regulatory settings investors may carry greater risk because:
- (a) they have access to all financial products (including high-risk products) offered in the market;
  - (b) they can choose the extent of diversification for their investments (including an inappropriately undiversified set of investments); and
  - (c) the regulation does not aim to prevent failure of these products.

#### **APRA prudential regulation**

- 51 The Wallis Report accepted that some areas of the financial system require more regulatory intervention than conduct and disclosure regulation. They require financial safety regulation in the form of prudential regulation. The intensity of that prudential regulation should be greatest where the systemic risks and the intensity of the financial promises, and hence the risk of market failure, are greatest. However, as regulation imposes costs both directly and on the wider economy, this more intense form of regulation should not be extended to all participants in the financial markets or all financial products.

- 52           The Wallis Report recommended, and the Government agreed, that Authorised Deposit-taking Institutions and General and Life Insurers and larger superannuation funds should be subject to prudential supervision by the Australian Prudential Regulation Authority (APRA), but not other financial institutions or products. It did not recommend that market linked investments like MIS products ask by subject to prudential regulation.

## E What is the profile of agribusiness MIS investors

- 53 ASIC is still in the process of gathering information about the types of investors who invested in the Timbercorp and Great Southern schemes. In order to build a robust investor profile we are gathering individual investor information including:
- (a) Investor age;
  - (b) Total assessable income and corresponding marginal tax rate;
  - (c) Total percentage of portfolio invested in the Timbercorp/Great Southern/other agribusiness MIS; and
  - (d) Whether monies were borrowed to fund investments in the schemes.
- 54 At this stage, we have only been able to construct a preliminary picture of the types of people who invested in the Timbercorp and Great Southern schemes between 2006 to 2009. We have done this by analysing the 2006 to 2009 scheme registers for both the Timbercorp and Great Southern schemes.
- 55 Based on our analysis, we have found that:
- (a) Between 2006 to 2009, 6180 investors invested in the Timbercorp schemes and 17,833 investors invested in the Great Southern schemes;
  - (b) The majority of investors in both the Great Southern and Timbercorp schemes were retail investors;
  - (c) 89% of investors in the Great Southern schemes between 2006 to 2009 had less than \$100,000 invested in the Great Southern schemes with the median investment amount being \$24,000 and the mean investment amount being \$50,447.
  - (d) 80% of investors in Timbercorp schemes between 2006 to 2009 had less than \$100,000 invested in the Timbercorp schemes with the median amount being \$37,500 and the mean investment amount being \$71,318;
  - (e) Victorians were the largest investors in both the Timbercorp and Great Southern schemes; and
  - (f) The majority of Timbercorp and Great Southern scheme investors only invested in one Timbercorp or Great Southern scheme respectively. We do not have data on whether these investors invested in schemes operated by other REs.

Note: More detailed analysis of the scheme registers is contained in Appendices 4 and 5.



- 56 We have also conducted an analysis on the types of investors who invested in the listed Timbercorp (ASX: TIM) and Great Southern (ASX: GTP) entities. This analysis shows that:
- (a) There were 11,744 holders of ordinary shares in GTP as at 23 December 2008. Of these holders:
    - (i) 8,988 held 10,000 shares (\$20,000 or fewer based on the peak price in 2008 of \$2);
    - (ii) 56.96% of shares were held by the top 20 shareholders.
  - (b) There were 14,239 holders of ordinary shares in TIM as at 30 November 2008. Of these holders:
    - (i) 10,510 held 10,000 shares (\$15,000 or fewer based on the peak price in 2008 of \$1.50);
    - (ii) 43.34% of the shares are held by the top 20 shareholders.

## F Business models and scheme structures of MIS (TOR 1)

### Key points

This section provides an overview of:

- The development of agribusiness MIS
- The key features of scheme structures in agribusiness MIS

- 57 ASIC's response to this term of reference is made at a time when we are still considering a number of issues raised by the recent collapses of Great Southern and Timbercorp. While we have not reached final conclusions on a number of issues, the following submissions are based on our assessment to date.

### The development of agribusiness MIS

#### Forestry MIS

- 58 In 1997, the Government (Federal and States) formed Plantations for Australia: The 2020 Vision, in an effort to strengthen the forestry plantations industry through industry and government commitment to plantation development. The key goals of the project were to increase plantation timber output to service Australia's and global demand for paper and, in so doing, provide economic benefits such as jobs and revenue.
- 59 At the time, the government recognised the central impediment to plantation investment was that an upfront investment would not produce revenue for between 8 – 25 years. The response was to stimulate private ownership of forestry plantations through taxation incentives which permitted expenditure on MIS project establishment to be 100% tax deductible under the general businesses deductions provisions, contained in section 8-1 of the *Income Tax Assessment Act 1997*. This means that for eligible plantation, establishment and management costs are fully tax deductible. However, the tax benefit is only available where the project meets a minimum direct investment test.
- 60 The industry responded by structuring forestry investments using a MIS structure. MIS structures have taken over as a leading plantation land owner; they now account for approximately 34% of total plantations in Australia. Superannuation funds own 11%.

## Non-forestry agribusiness MIS

- 61 Non-forestry MIS were in operation from the commencement of the MIS regime in 1998 but increased significantly in 2004. This increase was largely associated with Timbercorp's expansion into this sector. Non-forestry agribusiness MIS have focused on horticultural crops involving olives (for oil), almonds and wine grapes. Other horticultural crops include; macadamia nuts, citrus fruit, stone fruit, tomatoes, olives, table grapes, mangoes, avocados, truffles and wheat. Other non-horticultural agricultural MIS investments were structured to give investors exposure to livestock projects such as cattle and chicken, aquaculture products such as abalone and pearls.
- 62 Like forestry MIS, these schemes are structured around a tax benefit received at point of initial investment and then subsequent revenue commencing at a variable time later, such as 4-5 years later when the crops reach maturity.
- 63 The viability of the non-forestry MIS industry was significantly affected by a decision of the Australian Taxation Office (ATO) to cease providing product rulings from 1 July 2008. Without a product ruling investors do not have certainty in respect to claiming a tax deduction for their investment. Further, the ATO published the view in TR2007/8 that it would administer the law on the basis that tax deductions were not available. This view, contained in TR 2007/8 was judicially tested in *Hance v. Federal Commissioner of Taxation*; *Hannebery v. Federal Commissioner of Taxation* [2008] FCAFC 196; 2008 ATC 20-085. On 19 December 2008, the Full Federal Court handed down its decision and found that the expenses incurred by the applicants pursuant to the scheme were: incurred in the course of carrying on a business; and had the character of outgoings on revenue account rather than capital account. TR2007/8 was withdrawn in February 2009.
- 64 AdviserEdge<sup>7</sup> estimates that the majority of MIS horticulture development has occurred in Victoria in the Sunraysia Region. This region has around 18,000 Ha of horticultural developments. Other MIS operations have been developed in south-east Queensland, the Riverland in South Australia, the Hillston and Murrumbidgee Regions of NSW and the Margaret River and South-Western regions of Western Australia.
- 65 Non-forestry horticultural schemes are more labour and capital intensive than forestry schemes. They also require an initial infrastructure investment to prepare the crops before investments are received.

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<sup>7</sup> AdviserEdge Submission to the Treasury Review of Non Forestry Managed Investment Schemes. October 2008.

- 66 Horticultural schemes (almonds, wine grapes and olives) are marketed in Australia as being fully income producing after 5 years. They then generally have a revenue producing life of up to 22 years.
- 67 ASIC has also registered 4 cattle breeding schemes. Three of these schemes were operated by Great Southern, and a final one has total assets of around \$7.5 million.

## Key features of Agribusiness MIS

### Relationship between investors and the Responsible Entity, as operator of the MIS

- 68 Each agribusiness MIS is different, but in general, they operate such that investors (generally called 'growers') pay an upfront (tax-deductible) application price to acquire interests in a MIS. Interests issued to growers do not represent any physical asset, but rather a right to be provided with services and to derive returns from the enterprise conducted on a specified parcel of land allocated to the grower. In addition, the grower will acquire property rights in relation to the outputs of the agribusiness.
- 69 Such rights acquired by growers vary and depend on the Constitution of the particular MIS, but it is generally accepted:
- In forestry MIS – the trees on the land are usually the property of the individual growers;
  - In horticultural MIS – growers are entitled only to the crops produced by the horticultural assets (olives, wine, grapes and almonds etc) not the actual trees, plants, vines or other infrastructure used to produce the crops.
- 70 The size of a grower's investment determines the size of the land they are allocated. Upon harvesting the assets on the land, growers receive a portion of proceeds (net of fees payable to the RE in accordance with the size of their investment).
- 71 Agribusiness MIS are structured around a contract (formed under the constitution of the MIS). The contract is between the grower and the RE.
- 72 The contract includes a sub-lease of land by the grower from the RE and the grower's right to have particular services undertaken on the land leased by the grower: i.e. operating, harvesting, marketing and selling the crop. The RE often contracts these activities out to other entities, which may be associated with them.

- 73 REs either acquire or lease land for the purpose of creating MIS projects. Having sourced land for forestry or horticultural projects, the REs use MIS to raise funds to cultivate that land.

### **Fee structures of MIS**

- 74 Fee structures differ amongst MIS. However, we note the following general practices adopted by the industry:
- (a) Forestry projects – require an up-front fee from investors, and the MIS RE receives a deferred rental and management fee out of proceeds of the harvest (8 – 25 years later). Some forestry MIS use an up-front fee structure, but also require growers to make annual lease and management payments.
  - (b) Horticultural projects – require an upfront fee from growers and either:
    - On-going rental and management fees on an annual basis; or
    - Rental and annual fees paid out of net proceeds from harvests (for typical horticultural MIS, returns are generated after 4-5 years).
- 75 Fee structures which rely on up-front payments and payments out of proceeds from harvests have presented issues for the sector. This structure requires the RE (or its ultimate parent) to absorb a sustained period of negative cashflows until the project produces enough income to meet its costs.

### **Example**

A pulpwood forestry MIS usually has a life of 8 to 12 years. If the RE uses an up-front fee structure without on-going fees, it does not receive any additional capital from investors until the pulpwood is harvested and/or sold. All cultivation and harvesting expenses incurred during this period of time may have to be absorbed by the RE, which is only entitled to commissions after the pulpwood is disposed. An example of the investment return for investors before and after tax is shown in Table 1 :

Table 1: Investment returns – example only

	2009	2010	2011	2012	2013	2014	2018	2022	Total
	Year 0	Year 1	Year 2	Year 3	Year 4	Year 5	Year 9	Year 13	
<b><u>Cash Flow Summary</u></b>									
<b>PROJECT SALES</b>									
Sales from Woodlots	-	-	-	-	-	-	17,062	86,959	104,021
<b>Total sales from all projects</b>							<b>17,062</b>	<b>86,959</b>	<b>104,021</b>
Sales – GST Effect	-	-	-	-	-	-	(1,551)	(7,095)	(9,457)
<b>Total Sales, net of GST</b>							<b>15,511</b>	<b>79,054</b>	<b>94,565</b>
<b>PROJECT FEES</b>									
Total Woodlot Fees	(37,400)	-	-	-	-	-	(2,559)	(13,044)	(53,033)
<b>Total Fees from all projects</b>	<b>(37,400)</b>						<b>(2,559)</b>	<b>(13,044)</b>	<b>(53,033)</b>
Fees – GST Effect	3,400	-	-	-	-	-	233	1,186	4,819
<b>Fees, net of GST</b>	<b>(34,000)</b>						<b>(2,326)</b>	<b>(11,858)</b>	<b>(48,185)</b>
<b>CASH INFLOW / (OUTFLOW), Net of GST, Pre-Tax</b>	<b>(34,000)</b>						<b>13,185</b>	<b>67,195</b>	<b>46,380</b>
									<b>Pre-Tax IRR: 7.26%</b>
<b>CASH INFLOW / (OUTFLOW), Net of GST, Post-Tax</b>	<b>(18,190)</b>						<b>7,054</b>	<b>35,950</b>	<b>24,814</b>
									<b>Post-Tax IRR Ungeared: 7.26%</b>
<b>All Financial Summary</b>									
Principal Drawdown	37,700	-	-	-	-	-	-	-	37,700
Capitalised Borrowing Costs	(300)	-	-	-	-	-	-	-	(300)
Uncapitalised Borrowing Costs	-	-	-	-	-	-	-	-	-
Total Repayments	-	(9,391)	(9,391)	(9,391)	(9,391)	(9,391)	-	-	(46,955)
Net Cash Flow from Borrowing	37,400	(9,391)	(9,391)	(9,391)	(9,391)	(9,391)	-	-	(9,555)
<b>Cash INFLOW / (OUTFLOW), with Finance</b>	<b>3,400</b>	<b>(9,391)</b>	<b>(9,391)</b>	<b>(9,391)</b>	<b>(9,391)</b>	<b>(9,391)</b>	<b>13,185</b>	<b>67,195</b>	<b>36,826</b>
									<b>IRR: 6.98%</b>
<b>After-Tax Cash Flow (With investments)</b>									
<i>Total Sales, Net of GST</i>	-	-	-	-	-	-	<b>15,511</b>	<b>79,054</b>	<b>94,565</b>
Investment Income	-	-	-	-	-	-	15,511	79,054	94,565
Investment deductions (1)	-	(3,199)	(2,613)	(1,971)	(1,270)	(502)	-	-	-
Investment deductions (2)	(34,000)	-	-	-	-	-	(2,326)	(11,858)	(48,184)
<b>Total Income (Deductions)</b>	<b>(34,000)</b>	<b>(3,199)</b>	<b>(2,613)</b>	<b>(1,971)</b>	<b>(1,270)</b>	<b>(502)</b>	<b>13,185</b>	<b>67,196</b>	<b>36,826</b>
<i>Tax rate at 46.5%</i>	<b>19,210</b>	<b>(7,903)</b>	<b>(8,176)</b>	<b>(8,474)</b>	<b>(8,800)</b>	<b>(9,158)</b>	<b>7,054</b>	<b>35,950</b>	
									<b>After-tax IRR: 11.08%</b>
(1) Interest Expense									
(2) Fees									

76 The table above shows the after tax net cashflows for a hypothetical forestry MIS investment. It shows the tax effect of using leverage to acquire the investment for an investors who is in the highest tax bracket. The loan is a principle and interest loan which is repaid after 5 years. The table also shows two years where income is produced from:

- income from trimmings after year 9; and
- income from complete harvest after year 13.

77 While the RE, as an AFS licensee, is subject to ASIC's base level financial requirements set out in Regulatory Guide 166, *Licensing Financial requirements (RG166)*, under the Australian regulatory regime it is not subject to any form of prudential regulation.

### **Revenue and cash flow sources**

78 To continue as a going concern, the RE must have sources of revenue to fund its ongoing operations and working capital requirements. Structuring and promoting agribusiness MIS was a considerable part of both Timbercorp's and Great Southern's businesses. In their operations, MIS sales formed the primary source of revenues and cash flows. From the 2008 financial accounts of both groups application fees accounted for:

- (a) Great Southern – 76% of revenue; and
- (b) Timbercorp – 87% of revenue.

79 This reliance on MIS revenue can be compared to other (but not all) agribusiness MIS participants, who have a more diverse revenue base. For example, some MIS operators are also involved in downstream paper production industries, rural services or financial services.

### **Application money**

80 When a grower applies for interests in an agribusiness MIS, their application money is generally held on trust until interests in the MIS are issued. At this point, application money held by the RE is often transferred to another group entity for the purposes of conducting the forestry or horticultural operations. The RE may not hold any application money in its own right, or on trust for MIS growers.

81 In these circumstances, money invested by growers is not generally segregated by the RE for the purpose of ensuring it fulfills its contractual obligations to growers over the life of the scheme. Instead, grower application money is diverted into the general working capital of the parent entity.

- 82 The parent entity manages application money to meet expenses associated with all of their operations, including maintaining, cultivating and harvesting each MIS project. Where an agribusiness MIS operator is reliant on MIS sales for a substantial part of revenue for working capital, an interruption to MIS sales revenue could have significant implications for the RE, and its ability to fulfill its contractual obligations owed to growers. If MIS sales reduce suddenly, MIS operators may not have sufficient reserves to fulfill their obligations to growers.

### **Tax ruling**

- 83 Critical to establishing a forestry or horticultural MIS is obtaining a product ruling from the ATO so as to provide investors certainty as to the tax treatment of the MIS.
- 84 In obtaining a product ruling, the MIS operator must provide the ATO with an extensive amount of information supporting the profitability underpinnings of the project. This includes cash flow forecasts, budgeted profit and loss statements, expert reports supporting those forecasts and proposed marketing materials for the project. In order to ensure the MIS makes a significant contribution to primary production, the ATO set minimum forestry and horticultural expenditure requirements for a person's investment. The ATO makes an express representation in every product ruling it issues that it does not sanction nor guarantee any product.

### **Leverage**

- 85 Agribusiness MIS growers are generally offered finance to make their investments. Leverage is used to maximise tax benefits, and both Timbercorp and Great Southern provided direct finance to growers. Great Southern also used a partnership with a financial institution to originate finance for growers. It is common for investors to gear their entire investment in agribusiness MIS.
- 86 The loans to growers used to finance their interest in the agribusiness MIS are generally full recourse. That means a grower's personal assets may be used to discharge their debt if they are in default of their loan. As the external administrators of both Timbercorp and Great Southern have noted, the collapse of these groups has not relieved growers from their loans.

### **Growers' ownership rights**

- 87 The 'scheme' or project of an agribusiness MIS is constituted and conducted through a series of interlocking contracts, which are structured to ensure the activities carried on by the grower come within the terms of the relevant ATO product ruling. These contracts typically include the constitution of



the MIS, sub-leases of the land on which the forestry or horticultural activities take place, and management agreements for planting, husbandry and harvest. The contracts generally confer on growers ownership rights in the trees (in the case of forestry) or the crop (in the case of horticulture). The effect of the winding-up of an MIS (which involves undoing these contracts) on these ownership rights is not always clear as a matter of law.

### **Are MIS ponzi schemes?**

- 88 Ponzi schemes are illegal investments promising high returns where part of the money deposited by early investors is then used to pay the first dividends or interest. Promoters generate interest in these schemes by establishing a brief track record of paying high dividends. If allowed to continue, a ponzi scheme will continue to use investors funds for the purpose of funding dividends to other investors. No meaningful economic enterprise underpins the investment, and they inevitably collapse leaving investors with significant or total losses of their investments.
- 89 Agribusiness MIS do not share the characteristics of a ponzi scheme. Agribusiness MIS are not illegal financial products. Investors in these schemes generally acquire an interest in a scheme which gives them rights to derive returns from a specific forestry, horticultural or other primary production project. Returns provided to investors are linked to their investment in a specific project and depend on the realised output of that project.
- 90 Agribusiness MIS operators have been criticised for adopting business models which rely on receipts from application fees for revenue. We have indicated that this business model may be unstable if the flow of new MIS sales is interrupted.

## G Any conflicts of interest for the board members and directors (TOR 2)

### Key points

This section provides an overview of

- General observations;
- Potential conflicts faced by directors in agribusiness MIS; and
- Potential conflicts on external administration.

### General observations

- 91 The Inquiry's second term of reference relates to any conflicts of interests for the board members and directors of the companies that operate or are involved in the operation of agribusiness MIS. For the reasons explained below, individual officers of these companies may (depending on their personal circumstances) be in situations where their personal interests can conflict with the proper performance of their duties to the company or to the growers (or both). More broadly, all officers of these companies are faced with situations of 'conflict of duties', where their duty to the RE or to another company involved in the scheme can conflict with their duty to act in the best interests of growers. This conflict of duties is inherent in the agribusiness MIS model.
- 92 The following discussion addresses the potential conflicts of interest and duty, and conflicts of duties, faced by all 'officers' of REs and other related companies (such as landowning companies and project management companies) involved in the operation of agribusiness MIS. It is important to understand that this includes not only the directors and senior management of the company, but also a receiver, or receiver and manager of the property of the company, an administrator or the company, and a liquidator of the company.

### Potential conflicts faced by directors in agribusiness MIS

- 93 Directors of companies involved in agribusiness MIS face three potential conflicts:
- (a) Where their personal interest (for example, as a substantial investor in a entity providing land or services to a scheme) may conflict with their

statutory duties, as officers of the RE, to the RE or to the growers – see para 97 below;

- (b) Where their duty to act in the best interests of the RE conflicts with their duty to act in the best interests of the growers – see paras 98 and 99 below; and
- (c) Where their duty to act in the best interests of a related company (such as the landholder company or the project management company) conflicts with their duty to act in the best interests of the RE or the growers – see para 100 below.

94 Although the structure is not standard, many agribusiness MIS involve a number of companies that are related to the parent agribusiness company and that share some or all directors in common with each other and with the parent. These are:

- (a) The RE, that offers and operates the MIS;
- (b) A landholding company, that owns (or holds the head lease for) the land on which the project is conducted; and
- (c) A project management company, that operates the project.

95 The RE is usually a subsidiary of the parent. The landholder company may be either a subsidiary of the parent; an unlisted public company owned by retail shareholders who subscribed for shares under a prospectus issued in conjunction with the PDS for the project; or itself the RE of registered property trust MIS. In all three cases the directors are typically chosen by the parent – in the second and third case the board may include some independent directors. The project management company will typically be a subsidiary of the parent company – it may contract with an (unrelated) orchard or plantation manager to conduct the actual horticultural or forestry activities and to provide harvesting, processing and marketing services.

96 Each of these companies may have its own creditors. In particular, the landholder company may have borrowed money to acquire land and granted security over the land to its lenders.

### **Nature of the conflicts**

97 An RE director may face a conflict of interest if he or she has a personal interest (such as a financial interest) in a matter relating to the MIS, that might impact on the disinterested exercise of his or her powers as a director of the RE. For example, if the director has a substantial ownership share in a company providing goods or services to the MIS, or owns land leased into the MIS, a conflict may arise. The conflicts are fact specific and depend on the individual circumstances of the director. These conflicts must be disclosed and dealt with in the manner provided for in s191 of the Act.

- 98 All RE directors also face a conflict of duties that is inherent in the MIS structure. In all cases there is a potential for conflict between their duty contained in s181 of the Act, to exercise their powers and discharge their duties as directors in the best interests of the RE as a corporate entity, and their duty (contained in s 601FD of the Act) to act in the best interests of members of the scheme operated by the RE (that is, the growers).
- 99 Where such a conflict arises, the Act requires the directors to resolve it in accordance with s601FD(1)(c). Section 601FD(1)(c) says that a director ‘must act in the best interests of the [scheme] members and, if there is a conflict between the [scheme] members’ interests and the interests of the responsible entity, give priority to the [scheme] members’ interests’. In practice this may at times be a difficult obligation to discharge.
- 100 As explained in Section F, agribusiness MIS typically involve a web of contracts made by the grower, the RE and other entities in the RE’s corporate group. Where there are common directorships between the RE and other related entities with whom the RE contracts, this can place the director in a position of ‘three-way’ conflict – between his or her duties to the RE as a corporate entity, to the investors, and to the other entities.

## Potential conflicts on external administration

- 101 When the RE of an agribusiness MIS goes into external administration, control of the company and its operations passes from the directors to the insolvency practitioners appointed to conduct the administration. Depending on the nature of the administration, the insolvency practitioner may be an administrator (appointed by the directors under the voluntary administration regime in Pt 5.3A of the Corporations Act), a receiver or receiver and manager of the property of the RE (usually appointed by a secured creditor) or a liquidator.
- 102 The individual insolvency practitioner is an ‘officer’ of the RE within the meaning of the Corporations Act and at general law. This means that the person is subject to the same duties as a director of the RE explained above - including a duty to act in the best interests of the RE as a corporate entity and a separate (prevailing) duty to act in the best interest of the members of the schemes (that is, the growers).
- 103 When a company is insolvent, the interests of its creditors come to the fore in deciding where the company’s interests lie.
- 104 Secured creditors of the agribusiness group often have security over the land that is used by growers in the schemes. The secured creditors will generally have a significant commercial interest in ‘un-encumbering’ the land over which they have security. The encumbrances on the land include leases and

forestry and horticultural crops of varying degrees of value and maturity which are held by investors or by the responsible entity subject to an obligation to hold in accordance with its duties to members on their investment. External administrators of the RE have to manage the competing claims of:

- (a) Secured creditors, whose ultimate interest may be having the schemes (which relates to the land) wound up if the effect is to free the land from these encumbrances; and
- (b) Investors, whose ultimate interest is to realize the long term production of their crops.

105 An RE, even one under external administration, must act in the best interests of growers and, if there is a conflict between the growers' interests and the RE's interests, give priority to the growers' interests. As noted, an administrator, receiver or liquidator of an RE is under a personal obligation to act in the best interests of growers and, if there is a conflict between the growers' interests and those of the RE, give priority to the members' interests. This personal duty overrides any conflicting duty the person has as an officer of the company under the directors' duty provisions of the Corporations Act. However in practice, particularly for receivers and liquidators, difficulties may arise in managing the tension between their obligations to growers and their obligations to the RE's creditors. In recent failures in the sector, it is apparent that (whatever the legal position) the fact that there is no person in there charged solely with representing their interests has undermined growers' confidence in the capacity of the existing insolvency laws to protect their position.

## H Commissions, fees and other remuneration paid to marketers, distributors, related entities and sellers of MIS to investors (TOR 4)

### Key points

This section provides an overview of the common commissions, fees and other remuneration paid in connection with agribusiness MIS.

Attached to this submission is a confidential report on the commissions, fees and other remuneration paid in connection with Timbercorp and Great Southern schemes.

- 106 For the purposes of this submission we have defined:
- (a) *Marketers* as anyone who promoted agribusiness MIS, but did not sell agribusiness MIS; and
  - (b) *Distributors* as anyone who sold agribusiness MIS with or without providing advice. Distributors include licensees, financial advisers and accountants.
- 107 The most common forms of remuneration paid out by agribusiness MIS are:
- (a) Commissions, para 108 ;
  - (b) Overrides, para 109;
  - (c) marketing allowances, para 110; and
  - (d) soft dollar incentives, para 111.
- These are generally paid to Distributors, and in some cases, to Marketers.
- 108 A typical feature of agribusiness remuneration is the payment of commissions to Distributors of the schemes. Commissions are usually based on a fixed percentage of the amount invested. The average commission rate payable to Distributors of agribusiness MIS is about 10% of the amount invested.
- 109 Distributors of agribusiness MIS may also receive remuneration in the form of overrides (bonuses) in addition to the commissions paid. The override payment is generally determined by a specific factor that might include the overall volume of sales or the maturity of the relationship between the RE and the Distributor. For example, if a new party is engaged to distribute a scheme, they may be offered an override for the first 12 months of

distributing the product. Override payments tend to range between 1-5% of the amount invested.

- 110 Another common form of remuneration that may be paid to both Distributors and Marketers is a marketing allowance. The allowance is paid to cover the costs of running seminars and other promotional events.
- 111 Soft dollar incentives are also often paid to Distributors and Marketers. These might be in the form of entertainment, golf days, sporting events or dinners. Sponsored research trips may also be provided to help educate Distributors and Marketers about the agribusiness industry generally and about the individual schemes specifically.
- 112 Where a Distributor or Marketer is providing a financial service (i.e. providing advice or dealing) then the law requires that they hold an AFS Licence or be authorised by an AFS Licensee. Under the general obligations of an AFS Licensee, the licensee must have in place adequate measures to manage conflicts of interest<sup>8</sup>. In addition, where personal advice is being provided by a Distributor then remuneration must be disclosed.
- 113 All forms of remuneration payments have the potential to lead to conflicts of interest and if not managed appropriately may ultimately impact on quality of advice.

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<sup>8</sup> Section 912A(1) of the Act

## I The accuracy of promotional material for MIS, particularly information relating to claimed benefits and returns (including carbon offsets) (TOR 5)

### Key points

This section provides an overview of ASIC's concerns and guidance on disclosure in agribusiness MIS.

Attached to this submission are confidential reports on ASIC's past and current activities in relation to Timbercorp and Great Southern schemes.

### Surveillances over the past 3 years

- 114 Over the past 3 years, ASIC has conducted 67 surveillances into issues raised by agribusiness MIS. This represents around 3% of all surveillances ASIC carried out over the identified period (across all sections of the financial economy).
- 115 A summary of the outcomes of those surveillances is as follows:
- (a) 16 matters are continuing surveillances. These matters mainly relate to present assessments associated with Timbercorp and Great Southern and issues with PDS documents issued by other agribusiness MIS REs for the 2009-2010 financial year;
  - (b) 11 matters related to a defective PDS or advertising and the product issuer responded by fixing their disclosure through a supplementary disclosure document (before ASIC issued a stop order). ASIC identified the following concerns with PDSs:
    - (i) misleading statements about the name of the scheme and insufficient information about the structure of the scheme;
    - (ii) failure to comply with s1018A(1) of the Act which requires an advertisement for a financial product to identify the issuer of that product disclosure statement should be referred to in deciding whether to acquire the product;
    - (iii) misleading representations about past performance of a scheme;
    - (iv) failure to adequately disclose management fees, tax information and misleading statements about risk and performance expectations;



- (c) 5 matters resulted in ASIC issuing a stop order on defective PDS disclosure. These matters related to the following issues:
  - (i) Misleading or defective statements in a PDS about prospective financial information;
  - (ii) Disclosure of fees was misleading and potentially not presented in a clear, concise and effective manner.
- (d) 3 matters resulted in ASIC sending a letter of findings to the MIS entity setting out areas of concerns. These matters related to concerns about inadequate disclosure about the impact of water allocation, taxation benefits of the scheme, the risk of product liability, the nature of the investment and includes forecasts about future yields without the appropriate warnings.
- (e) 4 matters resulted in other action (including in one case, the removal of the PDS from being offered to retail investors); and
- (f) 22 matters resulted in ASIC taking no further action in respect of the concerns raised.

### **Deterrence Action**

116 In terms of deterrence action, since 1999 ASIC has commenced 11 investigations into operators of agribusiness managed investment schemes. The results of those actions are as follows:

- (a) In 2001, a director of an agribusiness MIS operator was convicted of misleading and deceptive conduct and fined;
- (b) In 2003, ASIC brought administrative proceedings against an RE of agribusiness MIS for misleading and deceptive conduct. In that matter a delegate decided to take no action in respect of the RE;
- (c) In 2005, an accountant was banned from providing financial services for 3 years for setting up illegal managed investment schemes;
- (d) A director was acquitted of charges of stealing from an agribusiness MIS operator in 2008;
- (e) Two matters which commenced in 2008 relating to dishonest conduct and misleading and deceptive conduct are ongoing.
- (f) In respect of 5 matters, ASIC decided to take no further action following investigation.

### **Illegal Schemes**

117 ASIC has taken action to close illegal managed investment schemes (not specifically agribusiness MIS). Over the last 3 financial years ASIC has acted against 179 managed investment schemes or companies for illegally raising funds involving around 7,330 investors and \$401 million.

## Disclosure Campaign May – June 2009

- 118 In the two months leading up to the end of the 2009 financial year, and following the collapse of Timbercorp and Great Southern, ASIC assessed all 20 agribusiness MIS being marketed in the lead up to the end of the financial year. ASIC requested improved disclosure for 12 MISs operated by the seven largest participants in the sector. Each operator was required to provide better disclosure to address some or all of the issues (set out below) that ASIC considered necessary for retail investors to know before investing in agricultural MISs. In agreeing to provide updated disclosure, 7 MIS operators were all required to give previous applicants to the projects the opportunity to withdraw their applications. ASIC focused its campaign on the following three issues:
- (a) Risk associated with the viability of the RE;
    - (i) risks that investors' investment might be adversely affected if the RE (or its ultimate parent) encounters financial difficulty. This risk is exacerbated by the time lag between the initial investment and the point at which the investment is expected to derive a return; and
    - (ii) the manner in which the RE ensures it has sufficient working capital to cultivate and maintain the project over the life of the project and how the RE manages its financial position to ensure it is able to meet the terms of the contract established under the scheme's constitution.
  - (b) Risks associated with the RE's reliance on annual MIS sales to provide working capital; and
  - (c) Information about yields that might be achieved by the MIS.
- 119 ASIC's Regulatory Guide 170, *Prospective Financial Information (RG 170)* requires issuers of disclosure documents to ensure they have reasonable grounds for any forecast statements, to consider the extent to which the information is relevant and reliable, and the risk of the likelihood such information may be misleading. In the PDS, a forestry MIS operator (issuer) typically does not include any direct statement or information about forecast project returns. Rather, the information is set out in an independent expert's report (which is included in the PDS). In the report, an independent expert (a forestry consultant) provides the following information:
- (a) an average yield figure for the project; and
  - (b) an expected price for the timber.
- 120 Generally, the report contains limited information about material underlying assumptions or the methodology used to obtain the yield or price. Additionally, there is generally no sensitivity analysis to illustrate the impact of changed assumptions on the yield or price. As no information about

different case scenarios is disclosed, a retail investor might simply multiply the yield and price figures provided in the report to calculate the project's total return.

121 It seems that by referring to the expert's opinion in the PDS, the issuer effectively relies on the independent expert to provide forecast information, or to endorse the issuer's methodology of estimating yields

122 Where past MIS projects have failed to achieve forecast yields, the forecast information contained in subsequent disclosure documents may have not included details of past yields that have not met forecast projections.

123 ASIC has clear guidance that care should be taken when showing past performance information in PDS. ASIC's guidance suggests that past performance figures should not be based on hypothetical or reconstructed past performance. They should not be used to overstate performance where market changes mean future returns will be significantly less. However, it may be arguable that details of actual past yields that fell short of forecasted projections may be information relevant to a decision whether to acquire the MIS product and on that basis should be contained in the disclosure document: s1013E of the Act.

124 We note that it is common for agribusiness MIS disclosure documents to contain reference to potential income from carbon benefits. In general, a term of the MIS constitution establishes a contract between the grower and the RE, appointing the RE to market and commercialise any carbon benefits associated with the MIS projects. In return, the contract provides for the RE to be paid commissions as a percentage of the proceeds from carbon benefit sales. Disclosure of these arrangements within the sector generally states that there is no certainty that the MIS will generate any returns from any carbon benefits produced by the project.

### **Other ASIC actions**

125 ASIC conducted a specific review of the quality of advice and disclosure of agribusiness MIS in 2003 and published a report of its findings: Report 17 – *Compliance with advice and disclosure obligations: Report on primary production schemes (Report 17)*. This report found that in many cases, calculations and key assumptions underpinning projections were not supported by qualified independent experts.

### **Complaints**

126 Over the last 3 years, ASIC has received and responded to a total of 120 complaints in relation to agribusiness MIS (excluding Timbercorp and Great Southern) complaints.

- 127 For Timbercorp and Great Southern, ASIC has received and responded to the following number of complaints:
- 2006-2007 – 41 complaints;
  - 2007-2008 – 18 complaints; and
  - 2008-2009 – 708 complaints.
- 128 We have set out in appendices 4 and 5 how ASIC has responded to the concerns raised in the complaints made in relation to Timbercorp and Great Southern.

## J The range of individuals and organisations involved with agribusiness schemes (TOR 6)

### Key points

This section provides an overview of:

- How agribusiness MIS are commonly distributed to investors; and
- The role of research houses.

Attached to this submission is a confidential report on how Timbercorp and Great Southern were distributed to investors.

### Distribution of agribusiness products

- 129 Agribusiness MIS are typically distributed through:
- (a) The REs of the schemes via their own authorised representatives (which may include accountants and employees of the RE);
  - (b) Financial advisers acting under their own AFS licence or as representatives of an AFS licensee; and
  - (c) Accountants acting under their own AFS licence or as a representative of an AFS licensee.

Distribution can be made with personal advice, general advice or without advice.

### The role of research houses

- 130 A number of research houses publish research on agribusiness MIS. The main research houses we have identified that provide information on agribusiness schemes are:
- (a) Australian Agribusiness Research (AAG): AAG uses a three star rating process;
  - (b) Adviser Edge: specialises in providing agribusiness, property and structured product investment research. Adviser Edge uses a five star rating process; and

- (c) Lonsec: appears to be the dominant research provider for dealer groups. It provides a weighted average score out of 100 with anything scoring less than 65 being rated as 'not approved.'

### What is a research house?

131 There is no established definition of a research house. However, they can be broadly defined as firms that provide ratings (except credit ratings), recommendations or opinions on financial products (e.g. managed funds, structured products, superannuation funds and insurance products). They may rate quoted or unquoted products.

132 Research houses may be generally grouped into three broad categories:

- (a) those that provide product ratings across a broad range of financial products (e.g. managed funds, structured products etc);
- (b) those that mainly focus on superannuation and insurance products; and
- (c) those that cover niche markets like agribusiness MIS.

### Users of research houses

133 Financial advisers are the main users of research houses. They use product ratings to filter the large number of financial product offerings.

134 AFS licensees also use research houses in constructing approved product lists, from which advisers or authorised representatives select the financial product they recommend to retail clients. An investment-grade rating is required for inclusion on approved product lists.

135 Product issuers and fund managers also commission research as a way to promote their products or funds.

136 Some retail clients also use research house reports and product ratings when making decisions about financial products. Financial advisers sometimes include part or all of a research report in their Statements of Advice when recommending a financial product. Retail clients are also exposed to product ratings that are published in newspapers or quoted in advertisements. In response to this development, ASIC has recently published guidance on the use of ratings in property and mortgage scheme advertising.

Note: see Regulatory Guide 45, *Mortgage schemes - improving disclosure for retail investors* (RG 45) at RG 45.129-RG 45.13,0 and Regulatory Guide 46, *Property schemes - improving disclosure for retail investors* (RG 46) at RG 46.129-RG 46.130.

137 For superannuation products, some research houses offer their subscription services direct to retail clients. ASIC understands that some research houses also intend to offer subscription services (e.g. via their website) direct to retail clients across a broader range of financial products (e.g. managed

funds). This will make explanation and comparability of product ratings from different research houses more important

### **Business models**

138 Most research houses operate a combination of issuer-pays (i.e. product issuers pay a fee to be rated) and subscription-based business models.

139 We understand that the three agribusiness MIS research houses generally charged a flat fee for their research on the Timbercorp and Great Southern schemes.

### **Rating systems**

140 There is no consistent approach to the ratings system used by research houses. Some research houses use an alpha style rating system (e.g. AA), while others use star rating systems, recommendation systems (e.g. highly recommended, recommended etc) and buy/sell recommendations. In some cases, product ratings may be presented in the form of a 'ranking' of product providers, rather than an absolute assessment of quality.

141 Given these differences in rating systems, comparing product ratings between research houses may be difficult.

142 Adviser Edge, Lonsec and Australian Agribusiness all use slightly different rating systems. As such, it is not possible to directly compare their ratings of Timbercorp and Great Southern schemes.

### **Regulation of research houses in Australia**

143 Research houses that give financial product advice by publishing product ratings must hold an AFS licence with the appropriate authorisation. As AFS licensees, research houses have general obligations similar to those for licensed financial advisers: see s912A of the Act.

144 In October 2008, ASIC and Treasury released a joint report on the regulation of credit rating agencies and research houses. This report identified a number of key regulatory issues related to the regulation of research houses.

Note: See, Review of crediting rating agencies and research houses – A joint report by the Treasury and the Australian Securities and Investments Commission, October 2008.

145 In response to the report, it was confirmed that research houses were providing financial product advice and as such were required to hold an AFS licence unless an exemption applied. It was also recommended that research houses be required to produce and submit to ASIC a compliance report.

## K Consumer education and understanding of MIS (TOR 7)

### Key points

This section provides an overview of:

- Types of investors suited or not suited to an investment in an agribusiness MIS; and
- The types of independent (ASIC) consumer education materials available to agribusiness investors.

Attached to this submission is a confidential report on the types of investors who invested in Timbercorp and Great Southern.

### Types of investors suited / not suited to an agribusiness MIS

- 146 An investment in an agribusiness MIS is not suitable for every investor. This is because an investment in an agribusiness MIS carries with it a number of specific risks including:
- (a) The relatively lengthy investment horizon;
  - (b) Specific agricultural risks;
  - (c) Limited ability to withdraw from the investment; and
  - (d) The tax driven nature of the investment.
- 147 We have constructed a very simple table as a guide to the types of investors for whom an investment in agribusiness MIS might have been suitable. We stress this is a guide only and does not provide a definitive view on suitability.

**Table 2: Characteristics of potentially suitable investors**

Characteristic of potentially suitable investors	Examples investors with this characteristic
<b>Tax driven</b> – sole purpose is to reduce taxation obligations provided the underlying investment also provided commercial viability	<ul style="list-style-type: none"> <li>• Higher income earners in tax brackets 40% and above</li> <li>• Those with large capital gains tax</li> <li>• Those with other tax liabilities that can be reduced</li> </ul>



Characteristic of potentially suitable investors	Examples investors with this characteristic
<b>Investment driven</b> – sole purpose is to invest in a tax effective manner for a specific purpose	<ul style="list-style-type: none"> <li>• Wealth accumulators aged 30 to 50 – debt reduction, children's education, commencement of investment planning</li> <li>• Pre retirees aged 50 - 65 – debt reduction, secondary source of retirement income, additional funding for super, individuals who expect income and tax liabilities in 10+ years to be significantly lower than at present e.g. Investors approaching retirement</li> <li>• Retirees aged 65+ - diversity of income streams, concerns with longevity risk</li> </ul>
<b>Diversification driven</b> – sole purpose is to diversify investment portfolio into other asset classes	<ul style="list-style-type: none"> <li>• Those with majority exposure to one asset class</li> <li>• Those wishing to increase negative correlation between different asset classes</li> <li>• Those seeking diversity of portfolio returns i.e. income versus capital gains</li> </ul>

## Independent consumer education materials available to agribusiness MIS investors

148 ASIC has published a number of publications on its consumer website, [www.fido.gov.au](http://www.fido.gov.au) which deal with the issues associated with an investment in an agribusiness MIS. These publications include: *Investing in agricultural investment schemes*; *Investing to reduce your tax? Watch out!*; and *Investment schemes: Buyers beware.*<sup>9</sup>

149 Extracts from these publications are included below to illustrate the type of information available to investors. All of this information is freely available on ASIC's consumer website [www.fido.gov.au](http://www.fido.gov.au).

### How safe is your money?

Many of these schemes lose all or some of your money or fail to make a better return than money in a bank account. Crops can fail and plants and animals can lose value as more people invest in them. Of course, some schemes will succeed but you need skill to pick the good ones and even experts make mistakes.

<sup>9</sup> <http://www.fido.gov.au/fido/fido.nsf/byheadline/Tax%2C+welfare+benefits+and+investing?openDocument>

## **Tax traps**

You can only get tax deductions for the interest you have paid on borrowed money if the asset is intended to produce an income. If there is no income from the scheme, the Australian Taxation Office (ATO) could decide the scheme was not really intended as an income producing asset. It would then disallow your tax deductions and you would have to pay them back.

Tax driven schemes usually take a long time before they earn any income (5 to 20 years). If you get all your tax deductions in the first year, any income you earn later is taxable.

If the scheme goes well, you are likely to be left with a large tax bill that you didn't plan for when the investment matures. These schemes are not usually tax saved, just tax postponed.

## **Leases not always safe**

Agricultural schemes usually grow the product on land which the grower leases, but does not own. The land could be sold or mortgaged without any notice to you, unless the lease is registered on the land title, or some form of caveat (a special warning clause) is placed on the title. Without this safeguard, you could lose your investment.

## **Information before you invest**

Before you consider investing, ask the scheme promoter for their current product disclosure statement.

Get advice from your professional taxation adviser – not the same person who is promoting the scheme.

## **What is the reputation of the managers of the scheme?**

If your investment is going to profit, the product must be managed and nurtured for the full term of the investment. If the manager fails to manage the project adequately or becomes insolvent, the product will probably not reach maturity. You need to know about the reputation of the manager and the arrangements to see that the manager stays involved and properly cares for your investment.

## **Questions to ask about a scheme**

1. Is there any mortgage or other form of security taken over my investment?

2. Is there an Australian Taxation Office opinion about the tax deduction available from this investment? Can I have a copy of that opinion?
3. What does the State's Agriculture Department say about growing the type of crops in the region specified for investment?
4. Can I sell my investment before the end of its term?
5. At the end of the investment period, what do I own?
6. What is the net present value of my projected return for the investment? What discount rate does this projection use?
7. Do I actually need to be personally involved in the scheme activity?
8. Has a caveat or similar security been lodged over the land I have leased under this scheme?
9. What happens to my investment if the landowner sells the property where my product is growing?
10. Is there any mortgage or other security held over the land by any third party?
11. What agreements are in place with buyers for the commodity I am producing?
12. Are the agreements at arm's length and on commercial terms?
13. What contingency plans are in place for continuous management? Has any money been put aside in case the manager fails?
14. What assessable income, taxation and cash flows outcomes do I face when my investment matures?

### **Before you sign**

Wait! Do not make a verbal agreement to invest. Do not sign up for the investment at the first meeting with your adviser. Get answers to your questions in writing. Check that the written documents contain a full discussion of all the risks involved with the investment.

Are you happy that:

- The scheme suits your particular situation?
- You know what all the terms used mean?
- Everything makes sense to you?
- You understand all the risks of the investment?

150 ASIC's Fido website also contains a wealth of information on investing generally and on managed investment schemes in particular. ASIC's submission to the Financial Services and Products PJC Inquiry will provide more information on ASIC's actions in relation to financial literacy and investor education.

## L Need for legislative and regulatory change (TOR 12)

### Key points

ASIC does not propose particular issues for law reform.

We also refer to our work on financial requirements.

- 151 Law reform is a policy matter for Government.
- 152 ASIC does not propose to make particular recommendations for reform at this stage while we conduct a number of inquiries associated with the collapse of both Great Southern and Timbercorp.
- 153 Many of the issues raised by this Inquiry and the collapses of Timbercorp and Great Southern are the same as those raised in relation to the PJC Inquiry into Financial Products and Services, e.g.:
- (a) whether the economic philosophy underlying the Australian financial services regulatory regime needs to be re-evaluated, so that there is greater intervention in the market to support investor protection;
  - (b) whether the licensing regime is adequate;
  - (c) whether advice and information provided to consumers is appropriate; and
  - (d) how to improve consumer education and understanding of financial products and services.
- 154 ASIC intends to deal with those issues in our submission to the PJC Inquiry into Financial Products and Services.

## Appendix 1: Market Context

### A snapshot of the Australian MIS Industry

155 There are 5,200 registered MIS in Australia, operated by 674 licensed REs.

156 Statistics on total funds under management vary according to the way they are compiled, however, the Australian Bureau of Statistics (ABS) suggests that managed funds (in public unit trusts) total \$251 billion. The overall funds management market in Australia is about \$1.17 trillion<sup>10</sup> and is illustrated in the table below:

**Table 3: Funds Management Market in Australia**

	\$ bn
Superannuation funds	705
Public Unit Trusts	251
Life Insurance	157
Other managed funds	56
<b>TOTAL</b>	<b>1,169</b>

Most registered MIS are unlisted but there are 110 MIS listed on the Australian Securities Exchange (ASX).

157 Market data provider Morningstar estimated that the amount of retail investor money in MIS as at September 2008 was \$113.4 billion. The Morningstar data is from a different period to the ABS data, however, the following table illustrates the value and proportion of retail investments in various asset categories:

**Table 4: Source –Assets of MIS covered by Morningstar, March 2009**

Asset Type	\$bn	% of assets
Cash	37.6	33.2
Bonds	3.7	3.3
Australian equities	21.7	19.1

<sup>10</sup> Australian Bureau of Statistics, Managed Funds, Australia March 2009 – 5655.0

Asset Type	\$bn	% of assets
Global equities	21.7	19.1
Property	2.4	2.1
Mortgages	7.7	6.8
Alternatives	1.2	1.0
Multisector	15.4	13.5
Miscellaneous	2.0	1.8
<b>Total</b>	<b>113.4</b>	<b>100</b>

Source: *Morningstar Market Share Report*, March 2009

## Agribusiness MIS

- 158 Agribusiness MIS is a term used to describe various primary production MIS. Traditionally, the industry has distinguished agribusiness MIS between those that conduct forestry plantations and those involved in non-forestry activities. Non-forestry MIS activities are primarily focused on horticultural enterprises, but also include other primary industries such as beef cattle, aquaculture and poultry.
- 159 When a RE makes an application to ASIC to register a MIS, the RE enters on a standard form<sup>11</sup> information as to what type of scheme is proposed to be registered. Based on this information provided by REs, ASIC's records indicate that 416 agribusiness MIS have been registered by 70 different REs. Taking into account MIS that have been deregistered or wound up, there are 371 agribusiness MIS registered to operate in Australia. Those 371 are divided as follows:
- 198 - Forestry MIS;
  - 162 - Horticultural MIS; and
  - 11 - Other categories of agribusiness MIS.
- 160 ASIC has assessed the various horticultural MIS that have been registered and the majority in number are involved in the production of grapes (45.11%), almonds (16.95%) and olives (14.13%). The following table shows a full break up of registered horticultural schemes.

<sup>11</sup> ASIC Form 5100

**Table 5: Horticultural Schemes**

Type	Number	%
Grapes	83	45.11
Almond	31	16.85
Olives	26	14.13
Mango	8	4.35
Truffle	6	3.26
Citrus	4	2.17
Wheat	4	2.17
Coffee	3	1.63
Walnut	3	1.63
Mixed horticultural scheme	3	1.63
Eucalyptus	2	1.09
Berries	2	1.09
Tomato	2	1.09
Apple	2	1.09
Apricot	1	0.54
Avocado	1	0.54
Cherries	1	0.54
Cotton	1	0.54
Macadamia	1	0.54
<b>TOTAL</b>	<b>184<sup>12</sup></b>	<b>100</b>

161

The following table shows the break-up of other types of agribusiness MIS operating in Australia:

<sup>12</sup> The total is 184 because this includes 6 deregistered schemes and 16 schemes being wound up. There are 162 operating schemes as at the date of this submission.



**Table 6: Other Agricultural Schemes**

Type	Number
Cattle	4
Chicken	1
Pearl	3
Abalone	3
<b>TOTAL</b>	<b>11</b>

162 ASIC estimates that since the introduction of MIS regime in 1998, agribusiness MIS have raised approximately \$8 billion. In the past five years, approximately \$5 billion has been invested in agribusiness MIS by over 75,000 investors. Of this, forestry MIS represent \$3.7 billion and non-forestry MIS represent for \$1.7 billion. Agribusiness MIS represent around 3.2% of Australia's retail MIS industry (as estimated by the ATO).

### Recent collapses related to Agribusiness MIS

163 Three corporate collapses have impacted upon the agribusiness MIS sector in the recent past: Environinvest Limited, Timbercorp Limited and Great Southern Limited.

164 Before discussing those collapses it is important to recognise that the RE has a legal character in its own right (as a public company) and a separate legal character when it acts in its capacity as the RE of a MIS.

165 A MIS itself is not a legal entity; it cannot, for example, enter contracts or borrow money. The insolvency of the RE does not automatically mean the MIS that RE operates is insolvent. It is quite possible for the RE to be insolvent while the scheme itself remains a going concern.

166 In such a situation the Act contemplates mechanisms for the replacement of a RE or the appointment of a temporary RE. We acknowledge that the insolvency of a RE may destabilise the operation of a scheme, however it is not always the case that when the RE fails, the scheme fails.

### Environinvest

167 Environinvest Limited was the RE of nine MIS involved in forestry plantation projects. The Environinvest schemes raised approximately \$70 million from 320 investors. On 19 September 2008 Jim Downey was appointed as administrator of companies in the Environinvest Group (including the RE). A secured creditor appointed Craig Shepard and Mark

Mentha as Receivers and Managers of the Environinvest Group on 22 September 2008.

168 On 12 February 2009, the Victorian Supreme Court made orders that 3 forestry MIS be wound up by a liquidator appointed by the Court. On 10 March 2009, the Growers lodged an appeal against the Courts decision. The matter had a directions hearing on 29 June 2009 and will have another directions hearing in September 2009. The viability of the remaining 6 forestry MIS is under the review of the administrator.

### Timbercorp

169 Timbercorp Securities Ltd (TSL) is an AFS licensee and the RE of 34 registered forestry and horticultural MIS. TSL schemes have approximately 18,400 investors who have invested \$1.095 billion. On 23 April 2008 TSL, its ASX-listed parent Timbercorp Limited (Timbercorp) and around 40 other associated entities appointed voluntary administrators, Korda Mentha.

170 On 4 June 2009, the administrators of TSL applied to the Victorian Supreme Court for a direction as to whether it was proper for TSL to make an application to wind up the 14 olive and almond MIS. On 17 June the Court made the direction, and as a result applications for the winding up of these schemes will be heard on 15 July 2009.

171 On 16 June 2009, the administrators of TSL advised growers of forestry MIS that unlike TSL horticultural MIS, forestry MIS had an intrinsic value dependent on age, quality and condition of the trees. The administrators advised that they would apply to the Court to seek early termination of forestry MIS and, if successful, commence a sale process of forestry assets.

172 The majority of TSL's agricultural assets were in forestry plantations in Albany, WA and the Green Triangle region spanning the Victorian and South Australian border. TSL also operates substantial horticultural operations (mainly almonds and olives) that are spread across the country. Table 7 below shows the size and location of TSL's agricultural operations.

**Table 7: Size and Location of TSL's Agricultural Operations**

Crop	Size	Location
<i>Forestry</i>		
Eucalypts	98,921 Ha	Albany, WA. Green Triangle Region, SA & VIC

Crop	Size	Location
<i>Horticulture</i>		
Almonds	11,909 Ha	Robinvale, VIC (Murray)
Olives	6,530 Ha	Boundary Bend, VIC, Boort, VIC (Murray)
Citrus	1,345 Ha	Bundaberg, QLD Renmark, SA
Avocadoes	1,207 Ha	Bundaberg, QLD Busselton, WA
Mangoes	816 Ha	Central North, NT Northern QLD Bundaberg, QLD
Grapes	412 Ha	Easton, NSW (Murray)
Tomatoes	8 Ha	Two Wells, SA
	121,148 Ha	

### Great Southern

- 173 Great Southern Managers Australia Limited (GSMAL) is an AFS licensee and RE of 43 registered forestry and horticultural MIS. GSMAL raised around \$2 billion over the past 5 years from 43,000 investors.
- 174 On 16 May 2009, Ferrier Hodgson was appointed as voluntary administrator of GSMAL, its ASX-listed parent Great Southern Limited (Great Southern) and 36 other associated entities.
- 175 On 19 May 2009, McGrath Nicol was appointed Receivers and Managers of Great Southern Limited, GSMAL and nine other related entities. Control of the business and assets of the receivership companies (including GSMAL) now rests with McGrath Nicol.
- 176 On 16 June 2009, the Administrators of Great Southern stated that the Receivers and Managers of GSMAL anticipate it will take 6 weeks to complete an assessment as to the viability of the GSMAL MIS.
- 177 The majority of GSMAL's agricultural assets are in forestry plantations located in Western Australia and the Green Triangle region. GSMAL also conducts substantial horticultural operations (olives, wine grapes and almonds) which are spread across the country. Table 8 below shows the size and location of GSMAL's agricultural operations.

**Table 8: Size and Location of GSMAL's Agricultural Operations**

<b>Crop</b>	<b>Size</b>	<b>Location</b>
<i>Forestry</i>		
Pulpwood	190,000 Ha	Albany, WA Northern, TAS Tiwi Islands, NT Green Triangle Region, SA and VIC
High Value Timber	5,760 Ha	Tropical North, QLD
<i>Horticulture</i>		
Olives	2,761 Ha	North East Perth, WA Riverina, NSW
Wine Grapes	2,300 Ha	SA and VIC
Almonds	1,065 Ha	Riverina, NSW
	201,886 Ha	