

## **Appendix 2**

### **Witnesses who gave evidence at the public hearing**

**Canberra, 15 July 2009**

#### **ATO**

Mr Bruce Quigley, Second Commissioner of Taxation

Ms Stephanie Martin, Deputy Commissioner of Taxation

Mr Des Maloney, Deputy Chief Tax Counsel

#### **Treasury**

Mr Paul McCullough, Acting Executive Director, Revenue Group.

Mr Geoff Miller, General Manager, Corporations and Financial Services Division

#### **ICAA**

Mr Hugh Elvy, Head of Financial Planning and Superannuation

Mr Jonathan Forrest, Member

#### **CPA Australia**

Mr Paul Drum, General Manager Policy and Research

#### **Financial Planning Association**

Ms Jo-Anne Bloch, CEO

Mr David Haintz, Director

Mr Rod Davies (Private capacity)

Dr David McKenzie (Private capacity)

**A3P and NAFI**

Mr Alan Cummine, Manager Plantation Investment, A3P

Mr Alan Hansard, CEO National Association of Forest Industries

Mr Richard Stanton, CEO Australian Plantation Products and Paper Industry Council

**Plantall Forestry Consultants**

Mr David Wettenhall

**Macquarie Agricultural Funds Management**

Mr Anthony Abraham, CEO

**Horticulture Australia**

Mr Stuart Swaddling, Chair

Ms Kris Newton, CEO

**ASIC**

Mr Tony D'Aloisio, Chairman

Mr Greg Medcraft, Commissioner

Dr Pamela Hanrahan, Senior Executive Leader - Investment Managers

---

## Answers to Questions on Notice

### 1. ASIC

#### ASIC 1 – Hansard p. 112

CHAIR—Have you had any concerns in the past where there have been directors who have actually resigned from either the responsible entities or the boards because they had concerns that there was no independence, that they were not meeting their obligations and they found no other mechanism to deal with those issues bar resigning? Have you heard of or read of or are you aware of something like that?

Mr D’Aloisio—We would need to check that. Certainly none come to my mind. I could ask my team to look at that and give you a more specific answer.

CHAIR—I am referring specifically to the two that have collapsed, Great Southern and Timbercorp.

#### ASIC 2 – Hansard pp. 112-113

Senator BOYCE—Regarding section I, where you mentioned the promotional material and what you have done, particularly in relation to PBSs, I was having some difficulty working out ‘and then what happens?’, looking for instance at 115(c), (d) and (e). Does ASIC attribute motive to these failures?

Mr D’Aloisio—What would typically happen is that if, for example, there was a misleading statement in something we would clearly speak to the entity first and assess that. Let us assume we concluded that it was misleading. Then, either the entity itself would correct it then and there without a stop order or alternatively we would issue a stop order and it would be corrected and then the stop order would cease to apply. We would need to look at the specific cases, but generally these are ways of getting things fixed so that fundraising and so on can continue on a better and informed basis.

Senator BOYCE—What I am not picking up there is whether we are talking about entities or organisations with a history of needing to be ‘picked up’, so to speak, or whether we are talking about quite isolated incidents.

Mr D’Aloisio—It would depend. We can look at those numbers in more detail for you and give you a more specific answer and look at the five matters and the three matters that are listed there.

**Answer ASIC 1 – Hansard p. 112**

ASIC records do not indicate that, prior to the appointment of external administrators, any directors of Great Southern or Timbercorp raised concerns with us over independence issues where they found no other mechanism to deal with those issues bar resigning.

We are aware of media articles suggesting 2 directors former directors of Great Southern Managers Australia Limited had resigned due to concerns over conflicts of interests (and other issues) they were concerned about.

For example, we note the following media articles which raise these concerns:

- How timber chief cashed in his chips, Australian Financial Review, Angus Grigg and Cameron Rhodes, 10 June 2009; and
- Auditors mislead in Great Southern scandal, Australian Financial Review, Angus Grigg and Andrew Burrell, 2 July 2009.

**Answer: ASIC 2 – Hansard pp. 112-113**

When ASIC conducts a surveillance activity, the issues and outcomes of those activities are recorded in databases which is relied upon by compliance staff and management to identify future work that may be necessary to continue to improve the relevant sector that that entity is in. For example, through analysis of our databases we may be able to ascertain that a particular group of financial service providers is over-represented in terms of the work we do. That over-representation may lead us to develop specific compliance programmes to address the on-going issues we are seeing. An example of this was a series of concerns raised in the mortgage funds sector led ASIC, in September 2008, to require operators of mortgage funds to provide enhanced disclosure when selling their products.

In terms of the 67 surveillance activities we have conducted over the past 3 years in the agribusiness MIS market, the distribution of entities is as follows:

- We conducted one surveillance on 31 entities;
- We conducted two surveillances on 12 entities (24 surveillance activities); and
- We conducted three surveillances on 4 entities (12 surveillance activities).

The information above suggests there was a degree of repetition with some entities in the agribusiness MIS sector, however a majority of actives were isolated. Where we have conducted more than one surveillance on an entity, it is more a case that we conducted ongoing monitoring of that entity following an initial concern being acted upon. For example, on several occasions because we had identified disclosure issuers with an agribusiness MIS PDS in one year, we conducted a review of that

---

entity's PDS in the following year automatically. That second review generated a separate surveillance activity.

## 2. ATO

**Topic:** How many MIS product rulings has the ATO produced?

**Hansard Page:** CFS 13-14

**Question:**

**Mr ROBERT**—How many MIS product rulings has the ATO produced?

**Ms Martin**—In the last year—

**Mr ROBERT**—No, since you started product ruling.

**Ms Martin**—I do not have the total figure. I can get it for you.

**Mr ROBERT**—Can you also, when you come back on notice, tell us for each of the product rulings how long it took between when the product ruling was requested and when the ATO actually publicly released it. If there have been 20 product rulings, how long was it from request to when it was released? You might want to provide some comment, for example there might have been some back and forwarding between the person who requested it and therefore the delay might have been caused by the requestor.

**Mr Quigley**—Is that for each product ruling?

**Mr ROBERT**—For each MIS product ruling.

**Answer:**

### **(a) How many MIS Product Rulings has the ATO produced?**

As explained in the ATO's submission to the Committee, product rulings were introduced by the ATO in 1998 to provide certainty about the taxation consequences of participating in a particular scheme. The ATO has issued 1,351 product rulings from 23 September 1998 to 30 June 2009, of which 1,055 were in relation to the agribusiness industry, across the following categories:

Category	Product Rulings
Horticulture	546
Forestry	509
Film	56
Finance	132
Non Commercial Losses	108
Total	1,351

There are several factors that need to be considered when comparing the number of product rulings issued by the ATO with the number of managed investment scheme (MIS) arrangements offered in the market place. For example:

1. The relevant provisions in the *Corporations Act 2001* relating to product disclosure statements for managed investment schemes require a statement about the taxation consequences of the relevant arrangement. However, this does not require that this statement be based upon a Product Ruling, although many entities do apply for a product ruling to meet this requirement.
2. Prior to 2002 participants entered into schemes through a prospectus which had a 13 month life. The *Corporations Act 2001* was amended by the *Financial Services Reform Act 2001* which introduced product disclosure statements from 11 March 2002 that have an unlimited life. MIS managers then designed schemes that accepted participants in more than one year and provided for a variety of classes of participant. The ATO then commenced issuing product rulings for each year and for each class of participant covered by the product disclosure statement. Since 1 July 2003 the ATO has published 526 product rulings for 279 agribusiness (forestry and horticulture) MIS; and
3. To deal with previously issued product ruling arrangements covered by the non-commercial loss provisions applying from 1 July 2000, the Tax Office issued a number of product rulings in 2002 and 2003. These product rulings exercised the Commissioner's discretion to not defer losses for MIS participants where there was an objective expectation that the scheme would produce taxable income within a period that was commercially viable for the industry concerned.

**(b) How long does it take the ATO to consider and issue a product ruling after an application is received?**

In the 2009 financial year;

1. 65 per cent of product rulings, being 30 of the 46 that issued, were considered and issued within 90 days from when sufficient information was provided for the Tax Office to consider; and

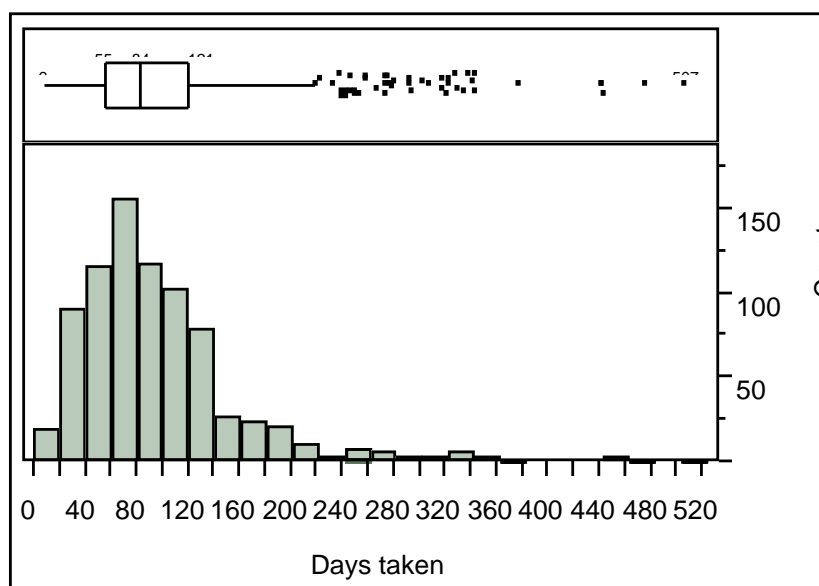
2. on average 24 per cent of the product ruling case time was in relation to the ATO waiting for further information from the applicant.

The average time for the year ended 30 June 2009 from when sufficient information for the Tax Office to consider an agribusiness MIS application and a ruling being issued was 73 days. Approximately one week of this timeframe is taken for the publication and gazettal process for each product ruling.

The following graph shows the distribution of time taken to issue all agribusiness product rulings during the period 23 September 1998 to 30 June 2009 from the date they came into the office with sufficient information for the ATO to proceed with the application. The information does not include finance, film or non commercial loss product rulings.

### **Distribution of time taken (days) to issue Agribusiness product rulings.**

The diagram below provides the length of time taken to issue each of the agribusiness related product rulings.



Delays in the issue of Product Rulings may be caused by a number of factors, including;

1. the submission of additional or updated material by the applicant. Applicants sometimes make changes to the draft product disclosure document and supporting agreements during the application process, such as to offer finance to the growers or change the contractual arrangements;
2. applicants taking a significant period of time to respond to ATO requests for additional clarifying information. This may also lead to the applicant making subsequent changes to the arrangement, the underlying agreements or fee structure; and

3. the presence of complex technical issues that may not have a precedent and which require detailed analysis by the ATO.

**Topic:** Cost to the tax system of managed investment schemes

**Hansard Page:** CFS 19-20

**Question:**

**CHAIR**—Unless you have got this data at hand, you can take this question on notice. Can you get back to the committee with a percentage or a number as to the return to the tax system from MI schemes in comparison to the deductions, the cost to the tax system, of MI schemes.

**Ms Martin**—I am not sure we will have that data. It is only under the forestry measures that we can identify the actual deductions claimed. That is only in relation to the new forestry measures in division 394. Similarly, when the income is returned it is not always singled out separately. So I will check, but I suspect that we will not be able to give you that specific answer.

**CHAIR**—Could you not only check but also have a look at the system in terms of making that determination. I am not making a judgment on the tax treatment, I am just making the point that there is a cost to the tax system and, therefore, the taxpayer in these schemes. And there would be an expectation of a return in the future through the growth, viability and returns that are expected of these schemes and the tax that is paid by the RE. I would like any information, any data, any quantification of that ratio and any other information around that. I am particularly interested in how that might work. I would like to see either historical data or data on your expectations for the future.

**Answer:**

A check of ATO systems confirms that there is no basis upon which to determine the amount of deductions claimed by participants in agribusiness managed investment schemes (MIS), or the income flows resulting from such investments. This is because deductions claimed for expenditure in MIS and income derived from these schemes are recorded in income tax returns as part of the normal business activities of the participant taxpayers (who are each running their own small business according to the case law) and cannot be segregated from other non-MIS small businesses.

**Topic:** Discretion in relation to ‘long tail arrangements’

**Hansard Page:** CFS 20-21

**Question:**

**Mr Maloney**—There is another discretion in relation to what I will call ‘long-tail arrangements’—for example, a hardwood forestry plantation. If you make an investment now, it is going to be many years before that investment returns assessable income, so the income test will not be satisfied. But where the



---

commissioner thinks it is reasonable that, because of the particular kind of arrangement that has been entered into, there will be income in the future, but it does not satisfy the test this year, he can exercise a discretion as well.

**Mr Quigley**—I think we have given a ruling on that.

**Mr Maloney**—We have got a ruling.

**CHAIR**—Can those provisions be abused in any particular way by the scheme itself or by the RE? Is there a way for that to be manipulated? I am particularly interested in two things. Again, maybe you can take it on notice and come back to us. One is whether it is either used or abused by the RE or the scheme managers in any particular way to create losses. The other might be whether the scheme is ever commercially viable. If that is not the case then the non-loss provisions become part of the scheme itself rather than in the event of, as you say, a drought, a flood or some other mitigating circumstances.

**Mr Maloney**—I think the essence of your question really goes to when is the commissioner satisfied that his discretion ought to be exercised. In relation to agribusinesses, we take advice from industry experts in relation to the expectations that are put to us about income derivation over time.

**CHAIR**—Maybe you could just take that question on notice about the commercial viability in terms of any losses, with a bit more information about how the ATO actually treats that particular area. That would be helpful.

**Mr Maloney**—Sure.

**Answers:**

For agribusiness managed investment schemes (MIS), the Tax Office usually considers the operation of the non-commercial loss provisions in the income tax law as part of its consideration of each application for product ruling made by Responsible Entities (REs). Applicants request the Commissioner to exercise a discretion in the provisions which in effect allows the losses to be claimed from the first year rather than be deferred until net profit is derived in a later year. The Commissioner has the discretion to allow these losses to be claimed if a net profit is objectively expected within a commercially viable period, which is

“... based on evidence from independent sources (where available) that, within a period that is commercially viable for the industry concerned, the activity will ... produce assessable income for an income year greater than the deductions attributable to it for that year ...” (subparagraph 35-55(1)(b)(ii) *Income Tax Assessment Act 1997*)

In considering whether to exercise the discretion, the Tax Office takes into account estimated cashflows over the life of the project provided by the RE and requests reports by industry experts about what would be an appropriate period for such a project for the relevant produce in the particular geographic area (based upon industry expertise and comparison with other businesses producing similar produce). The Tax Office has issued two Taxation Rulings on the operation of the non-commercial business loss regime, including its application in the context of agribusiness MIS (Taxation Rulings TR2001/4 and TR 2007/6).

The Tax Office has identified some instances where the subsequent implementation of the project has failed to achieve a net profit for investors in the year when the exercise of the Commissioner's discretion expires (for example, in year six when the Commissioner has granted a five year period for the discretion). Where this has occurred, the Tax Office has advised the RE and the investors that the subsequent year deductions for the losses will be deferred until the project produces net assessable income.

Other arrangements have also been identified by the Tax Office which involve the potential creation of losses for consolidated groups of entities containing the RE. There may also be related tax risks for investors in either the MIS project or associated land trusts. The Tax Office issued a Taxpayer Alert (TA 2008/11) on such an arrangement on 6 June 2008 and is following up with appropriate compliance action.

### **3. CPA and ICAA**

Question on notice: "What percentage of the accounting profession is either not a member of CPAs or not a member of Chartered Accountants?"

We refer to the question on notice above, and now provide the following joint response on behalf our respective organisations. Determining the size of the accounting industry, the number of individuals who refer to themselves as accountants and the market share of the respective professional accounting bodies – in particular CPA Australia and the Institute of Chartered Accountants in Australia (the Institute) - is not readily determinable as the term ~accountant" is widely used. However, the following provides the Committee with an indication via the current available data.

#### **A. The accounting profession, and Australian members**

The Institute and CPA Australia view the accounting profession as comprising those individuals who are appropriately qualified and have been admitted by way of membership of one of the professional accounting organisations. These professional organisations include the Institute and CPA Australia. In this regard, we distinguish the *accounting profession* as the leading component of the broader and larger generic category of *accountants*.

As advised on 15 July 2009, our members work in a diverse range of fields including:

- industry and commerce
- not for profit sector
- public sector (government)
- academia, and
- public practice

The current Australian memberships of the Institute and CPA Australia are as follows:

the Institute of Chartered Accountants in Australia	50,000
CPA Australia	85,000 <sup>2</sup>

Also as discussed during the Inquiry on 15 July 2009, while the term accountant is not a regulated term in Australian law, and there are a large numbers of individuals who refer to themselves as accountants this does not mean that accountants are by and large unregulated. For example, accountants are, depending on their field of practice, subject to a wide range of legislative regulation, for example:

- registered company auditors
- registered tax agents
- registered insolvency practitioners

Further, professional members of the InstiMe and CPA Australia are also subject to professional and ethical standards issued by the APES Board as well as their respective organisation's by-laws.

## **B. Data available regarding numbers of accountants In Australia**

There are a number of statistical sources that can provide an indication of the market and market share. For example according to [Joboutlook.gov.au](http://Joboutlook.gov.au)<sup>3</sup>, there were 157,000 accountants in Australia in August 2008. This category only includes: Accountant, Management Accountant and Taxation Accountant.

Conversely, according to the most recent Australian Bureau of Statistics (ABS) data<sup>4</sup> there are 123,214 people who described themselves as accountants. However ABS also has other similar categories, for example accountants, auditors and corporate treasurers (536), accounting clerks (90,534), auditors (9547), branch

accountants and managers (13,967), company secretaries (974), and corporate treasurers (2029) amongst others. In total these add up to 240,810. We expect that many of these would not call themselves accountants. However many would be viewed generically as accountants in the market.

As can be seen from the data provided above and depending on how it is categorised and interpreted it can result in different outcomes, and therefore it is indicative only.

### **C. Determining market share**

As previously stated determining market share for accountants in Australia between the professional accounting organisations is not readily determinable. For example, the Institute and CPA Australia have members who have membership of both professional bodies. Accordingly adding the total membership of the Institute and CPA Australia would overstate the number of professional accountants and overstate the market share when compared to the ABS data.

Notwithstanding the above comments and observations, membership of the two professional bodies do make up a significant and important segment of the accounting industry.

### **D. Summary**

The data provided above provides an outline of both the number of the Institute and CPA Australia members, and the number of those who as per the ABS data who may consider themselves to be accountants. Based on this data and other data available it is not possible to provide a more definitive answer to the Joint Committee's question.

We trust this information is of use to the Joint Committee, and if the Joint Committee has any further queries please advise.

## **4. FPA**

### **FPA Submission and evidence concerning Agribusiness Managed Investment Schemes**

Further to the FPA's appearance at the PJC Hearing on Wednesday 15 July 2009 and to your message of 23 July, I wish to provide the following additional information arising in response to the Committee's questions to the FPA.

### **Number of authorised representatives involved in promoting either Great Southern or Timbercorp**

Our understanding is that there were 380 individuals identified by ASIC that operated directly as authorised representatives of Great Southern. We have been able to confirm that three (3) were FPA members. In addition, there were Australian Financial Services Licensees who had their own authorised representatives that were

---

recommending agribusiness MIS. This number is much harder to quantify because of the broad number of AFSLs, and authorised representatives, operating in Australia. We are not sure of the relevant number that were authorised by Timbercorp.

### **Results of FPA investigations into members' exposure to Great Southern**

Mr Robert asked if we would be prepared to provide the results of FPA investigations into the exposure of FPA members that are corporate bodies, known as FPA principal members. This information was contained in the copy of the survey attached to my previous letter dated 20 July and is provided again for convenience as an attachment to this letter.

### **FPA survey of Principal Members**

The FPA conducted a survey of its Principal Members between 21 and 25 April 2009. Details of the survey and results are contained in the attached report.

### **Complaints concerning Agribusiness financial advice**

In the course of the FPA's oral testimony before the committee I was asked about the number of complaints the FPA has received about Agribusiness advice. I wish to inform the Committee that we have in fact received one (1) complaint concerning Agribusiness.

The matter is in the inquiry phase of our Professional Accountability Process. Our initial inquiries indicate whilst the consumer concerned was a financial planning client of our member, he received advice and recommendations to invest in Great Southern investment projects from a different firm of accountants whose principals were authorised representatives of Great Southern Securities Limited. Nevertheless, until the process is complete we treat this as a complaint against the member, and I wish to formally correct the record.

## **5. Macquarie**

### **Macquarie 1 Hansard p. 97**

Mr Abraham-In Macquarie Agricultural Funds Management our independent forester provides us with an annual assessment on what is happening. They review the practices and they report to the board. That is independent of forestry or indeed of us, who manage the business.

Senator BOYCE-So they report straight to the board. Do you publish their reports?

Mr Abraham-We put out a summary of their report. I think we put their report on our website. If you like, I can confirm that for you. We generally make things

like that available to our investors.

### **Response - Macquarie Agricultural Funds Management**

Macquarie engages an expert forester to conduct an annual assessment of the silvicultural performance of each of the Macquarie Forestry Investment plantations. Macquarie provides its investors with a summary of the key findings from the expert forester report in its annual agribusiness newsletter which is sent to investors and made available via the Macquarie agribusiness website. The full copy of the report is used primarily for internal management purposes and is not provided to investors.

In addition, Macquarie engages an expert forester to conduct an annual review to assess the performance of each of its forestry plantation managers in each of the regions in which the Macquarie Forestry Investments operate. Expert foresters are also engaged to provide a quarterly report to the Boards of the Responsible Entities regarding plantation performance and any relevant issues affecting the plantations. This is done on a quarterly basis to ensure the Boards have oversight over the plantation operations. These quarterly board updates are for internal management purposes and are not published to investors.

## **6. Treasury**

### **Question: Treasury 1**

#### **Topic: The '70 per cent rule' for forestry MIS**

Senator Boyce asked: Has the 70 per cent total expenditure figure gone now or does it still exist? Why is it 70 per cent?

Answer:

Division 394 of the *Income Tax Assessment Act 1997* provides for investors in forestry managed investment schemes to receive a tax deduction equal to 100 per cent of their contributions, provided that there is a reasonable expectation that at least 70 per cent of the scheme manager's expenditure under the scheme, calculated at arm's length prices, is expenditure attributable to establishing tending and felling trees for harvest (Direct Forestry Expenditure or DFE).

The 70 per cent requirement is designed to ensure that most of the funds contributed by investors are spent on activities directly related to establishing, tending and felling trees for harvesting.

### **Question: Treasury 2**

#### **Topic: Secrecy and disclosure provisions in the tax law**

---

Senator Farrell asked: Is there any need to incorporate new exceptions into the tax laws to allow for greater cooperation in matters that are only of a civil nature?

Answer:

The *Review of Taxation Secrecy and Disclosure Provisions* (the Review) was first announced in August 2006. While its principal goal was to consider the possibility of consolidating, into a single framework, taxation secrecy and disclosure provisions currently found across numerous taxation Acts, it has also considered the need to introduce new disclosure provisions where the public interest in disclosure outweighs the impact on taxpayer privacy.

One such new disclosure is reflected in the exposure draft *Tax Laws Amendment (Confidentiality Taxpayer Information) Bill 2009* (the Bill) released for public consultation in March of this year. Of relevance, the Bill proposes to remove restrictions on the Australian Taxation Office's (ATO) ability to provide taxpayer information to the Australian Securities and Investments Commission (ASIC).

Under the existing taxation law, taxpayer information can be provided to ASIC to enable it to perform its law enforcement function but only where it relates to an indictable offence. Under the proposed new framework, ASIC would be able to obtain taxpayer information to fulfil its broader law enforcement role – that is, in relation to all criminal offences and all provisions that ASIC administers that impose a pecuniary penalty.

In the course of the Review, no concerns have been raised regarding the limitations that taxation secrecy provisions impose on the ability of the ATO to disclose information to the Australian Competition and Consumer Commission. The Bill is currently being revised to take into account the results of public consultation.