ASIC
Australian Securities & Investments Commission

Senate inquiry into forestry managed investment schemes

Submission by the Australian Securities and Investments Commission

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Contents

A Executive summary

1 ASIC welcomes the opportunity to make a submission to the Senate inquiry into forestry managed investment schemes.

2 As the financial services regulator, we have responsibility for investor and consumer protection in financial services. We administer the Australian financial services (AFS) licensing regime and conduct risk-based surveillance of financial services businesses to ensure that they operate efficiently, honestly and fairly. These businesses include the responsible entities of registered managed investment schemes, including forestry managed investment schemes (forestry schemes).

3 A 'forestry scheme' is a type of agribusiness managed investment scheme (agribusiness scheme) operated for the purposes of investment in forestry. Investors' money (or money's worth, such as land) is either pooled, or contributed, towards a common enterprise. Typically, such schemes are formed under the latter 'common enterprise' structure, where members' contributions are used towards a common enterprise, without those contributions being pooled together under the scheme (except on harvest, where the harvest is typically pooled for marketing).

4 The financial services regime implemented following the recommendations of the 1997 Financial System Inquiry (Wallis Inquiry) includes specific types of financial regulation (conduct and disclosure regulation) to ensure:

(a) markets operate in a sound, orderly and transparent manner, participants act with integrity and the price formation process is reliable; and

(b) retail customers have adequate information, are treated fairly and have adequate avenues for redress.

5 The regime includes some additional investor protections to help address situations where consumers are likely to be at a particular disadvantage relative to industry participants. An example of this is the system of internal and external dispute resolution, which provides a free, accessible, fair and efficient process for retail investors and financial consumers. However, the effectiveness of these protections is limited because of the limitations of professional indemnity (PI) insurance as a compensation tool and in situations where entities are in external administration.

6 Conduct and disclosure regulation for financial products, including Australia's own regulatory system, has traditionally not been considered to involve 'merit' regulation. Regulation has traditionally focused on the transparency of the sales process (through disclosure) and the conduct of the intermediaries involved in the sale. Unlike regulation for many non-financial products, conduct and disclosure regulation is typically not concerned with the 'safety' or quality of a financial product and the services associated with

it. This is partly due to the acceptance that consumers must take on some level of risk for investment products.

7 There is currently growing international interest in redirecting financial services regulation to more actively influence the quality of financial services and products provided to investors and financial consumers. We have addressed this recently through our submissions to the 2014 Financial System Inquiry where we support a shift to a regulatory philosophy and regime that acknowledges that different tools will be needed to address different problems, and focuses on the development of a detailed understanding of specific market problems as they arise. This is often referred to as a 'product intervention approach'.

8 Over the past five years, there has been a significant decrease in the number of forestry schemes being operated and promoted to investors, and in the number of responsible entities operating these schemes. In the past three years, we have only registered seven forestry schemes, compared with nine schemes in 2007–08.

9 The collapse of a number of responsible entities of forestry schemes has highlighted issues with this type of investment and the way forestry schemes were promoted to investors. While a small number of responsible entities are still operating in this space, they do not appear to be reliant on the sale of managed investment schemes to fund their business operations in the same way as responsible entities such as Timbercorp Securities Limited and others.

10 We see the effect of such losses first hand, and we understand how such losses can affect the economic wellbeing and confidence of Australians. That is why a key focus of our regulatory activity is minimising the risk of loss for investors and financial consumers.

11 However, our regulatory role does not involve preventing all consumer losses or ensuring compensation for consumers in all instances where losses arise. Our underpinning statutory objectives, regulatory tools and resources are not intended to prevent many of the losses that investors and financial consumers will experience. This is true of every financial market regulator.

12 While the legislative framework for managed investment schemes has been the subject of a number of reviews and a significant amount of work in developing potential refinements, it has remained largely the same.

13 We see some merit in considering potential reforms; however, any such reforms should be considered within the broader work that has been done in developing potential refinements to the regime as a whole. As a result, we have identified some potential areas for reform that relate to the specific business model of common enterprise schemes, and forestry schemes in particular, as well as potential areas for reform across the broader managed investment scheme sector.

14 We have responded to the issues arising out of the collapse of a number of responsible entities of forestry schemes through regulatory interventions, such as:

(a) increasing surveillance of the sector, including ongoing engagement with external administrators of responsible entities;

(b) introducing disclosure guidance for issuers of interests in agribusiness schemes and issuing guidance for investors about these schemes;

(c) revising the land-holding AFS licence condition applied to responsible entities of agribusiness schemes; and

(d) contributing to reviews of the legislative framework—for example, through the review undertaken by the Corporations and Markets Advisory Committee (CAMAC).

15 This submission sets out information relevant to specific terms of reference (TOR). It focuses on background information about the operation of forestry schemes. It also notes some policy issues raised by the terms of reference and provides some discussion on potential areas of reform in relation to:

(a) the availability of these types of schemes in the future;

(b) the adoption of particular recommendations arising from CAMAC's review of managed investment schemes;

(c) the governance and risk arrangements that apply to managed investment schemes;

(d) the licensing regime by which entities are authorised to provide financial products and services;

(e) the business models of these forestry schemes;

(f) arrangements for the transfer of viable schemes away from a financially stressed responsible entity; and

(g) the introduction of a statutory compensation scheme.

B ASIC's role and regulatory principles (TOR 2)

Key points

ASIC regulates Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit. As the financial services regulator, we have responsibility for investor and consumer protection in financial services.

We also promote financial literacy to ensure investors and financial consumers can have greater control and confidence when buying financial services and are able to make sensible and informed financial decisions.

Financial services regulation includes specific regulation to ensure markets operate efficiently and retail consumers have adequate information, are treated fairly and have avenues for redress.

Conduct and disclosure regulation for financial products has traditionally not been considered to involve 'merit' regulation; however, there is currently growing interest in redirecting financial services regulation to more actively influence the quality of financial services and products.

Our role in the financial system

16 ASIC regulates Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.

17 The *Australian Securities and Investments Commission Act 2001* (ASIC Act) requires ASIC to:

(a) maintain, facilitate and improve the performance of the financial system and entities in it;

(b) promote confident and informed participation by investors and financial consumers in the financial system;

(c) administer the law effectively and with minimal procedural requirements;

(d) enforce and give effect to the law;

(e) receive, process and store, efficiently and quickly, information that is given to us; and

(f) make information about companies and other bodies available to the public as soon as practicable.

18 As the financial services regulator, we have responsibility for investor and consumer protection in financial services. We administer the AFS licensing

regime and conduct risk-based surveillance of financial services businesses to ensure that they operate efficiently, honestly and fairly. These businesses typically deal in superannuation, managed investment schemes, deposit and payment products, shares and company securities, derivatives, and insurance.

19 As the consumer credit regulator, we license and regulate people and businesses engaging in consumer credit activities (including banks, credit unions, finance companies, and mortgage and finance brokers). We ensure that Australian credit licensees meet the standards—including their responsibilities to consumers—that are set out in the *National Consumer Credit Protection Act 2009* (National Credit Act).

20 As the markets regulator, we assess how effectively financial markets are complying with their legal obligations to operate fair, orderly and transparent markets. We also advise the Minister about authorising new markets. On 1 August 2010, we assumed responsibility for the supervision of trading on Australia's domestic licensed equity, derivatives and futures markets.

21 As the corporate regulator, we ensure that companies (including responsible entities), registered managed investment schemes and related entities meet their obligations under the *Corporations Act 2001* (Corporations Act). We register and regulate companies and registered managed investment schemes at every point from their incorporation through to their winding up, and ensure that officers comply with their responsibilities. This 'cradle to grave' approach enhances regulatory oversight.

22 We also register and, where necessary, take disciplinary action against company auditors and liquidators. We monitor the financial reporting and disclosure and fundraising activities of public companies and registered managed investment schemes.

23 We also promote financial literacy, to ensure investors and financial consumers can have greater confidence when buying financial services, and are able to make sensible and informed financial decisions.

Principles underpinning our role

24 The economic philosophy on which the Wallis Inquiry based its recommendations, and on which the current Australian financial services regulatory regime is based, is that:

(a) free and competitive markets can produce an efficient allocation of resources, and provide a strong foundation for economic growth and development;

(b) where any factor impedes a market from producing efficient outcomes, there may be a case for government to regulate participation in, or operation of, that market; and

(c) the financial system warrants specialised regulation to ensure that market participants act with integrity and that consumers are protected, due to:

(i) the complexity of financial products;

(ii) the adverse consequences of market participants breaching financial promises; and

(iii) the need for low-cost means to resolve disputes.

25 The basic features of the current financial services regulatory regime were developed following these principles, and favour:

(a) efficient and flexible allocation of risk and resources;

(b) promotion of competition, innovation and flexibility; and

(c) retail investors having access to a wide range of products.

26 This approach accepts that regulation is necessary to deal with factors that prevent the market operating efficiently, as long as such regulation is set at the minimum level necessary to respond to market problems. Factors that prevent the market operating efficiently include information asymmetries, which can enable fraudulent conduct by industry participants and anti-competitive conduct, or manipulative conduct not in the best interests of the market as a whole (e.g. insider trading).

27 These information asymmetries also create opportunities for conflicts of interest on the part of the people (product providers, distributors, advisers, and other gatekeepers) on whom consumers are relying for help. Their information advantage gives opportunities to institutions and intermediaries to profit at the expense of investors and financial consumers.

28 In the most extreme cases, institutions or intermediaries can use their information advantage to defraud their customers by deliberately misleading them.

Conduct and disclosure regulation

29 While the objectives of financial system regulation are similar to those applying in all markets (i.e. to prevent a range of possible market failures), the means of achieving them often need to take specific forms due to the nature and complexity of financial products.

30 For this reason, the financial services regime implemented following the Wallis Inquiry's recommendations includes specific types of financial regulation (conduct and disclosure regulation) to ensure:

(a) markets operate in a sound, orderly and transparent manner, participants act with integrity and the price formation process is reliable; and

(b) retail customers have adequate information, are treated fairly and have adequate avenues for redress.

31 The financial services regime's conduct regulation includes rules aimed at ensuring industry participants behave with honesty, fairness, integrity and competence. The regime uses a licensing system to control who can operate within the industry, and, if they do not meet conduct standards, exclude them by licence suspension or cancellation, or by banning individuals from providing financial services.

32 The financial services regime's disclosure regulation includes rules designed to:

(a) overcome the information asymmetry between industry participants and investors by requiring disclosure of information required to facilitate informed decisions by investors; and

(b) promote transparency in financial markets, and the efficient and appropriate pricing of assets and risks—for example, through continuous disclosure by companies of price-sensitive information.

33 Finally, the regime includes some additional investor protections to help address situations where consumers are likely to be at a particular disadvantage relative to industry participants. An example of this is the system of internal and external dispute resolution, which provides a free, accessible, fair and efficient process for retail investors and financial consumers: see Section H for more details. This system recognises that retail investors and financial consumers might otherwise find it difficult to resolve market disputes (e.g. through the courts), being non-expert and infrequent disputers with relatively few resources.

34 Conduct and disclosure regulation for financial products, including Australia's own regulatory system, has traditionally not been considered to involve 'merit' regulation. Regulation has traditionally focused on the transparency of the sales process (through disclosure) and the conduct of the intermediaries involved in the sale. Unlike regulation for many non-financial products, conduct and disclosure regulation is typically not concerned with the 'safety' or quality of a financial product and the services associated with it. This is partly due to the acceptance that consumers must take on some level of risk for investment products.

35 There is currently growing international interest in redirecting financial services regulation to more actively influence the quality of financial services and products provided to investors and financial consumers.

Financial System Inquiry (2014)

36 The Financial System Inquiry (2014) is considering whether the current underpinnings should remain in place. The committee is charged with examining how the financial system could be positioned to best meet Australia's evolving needs and support Australia's economic growth.

37 As part of its terms of reference, the inquiry is to consider among other things the philosophy, principles and objectives underpinning the development of a well-functioning financial system, including:

(a) balancing competition, innovation, efficiency, stability and consumer protection;

(b) how financial risk is allocated and systemic risk is managed;

(c) assessing the effectiveness and need for financial regulation, including its impact on costs, flexibility, innovation, industry and among users;

(d) the role of Government; and

(e) the role, objectives, funding and performance of financial regulators including an international comparison.

38 We have made two submissions to this inquiry and identified options for reform in areas relevant to forestry schemes, including:

(a) lifting standards for financial advice;

(b) managing systemic risk;

(c) a more flexible regulatory toolkit to assist in overcoming the limitations of disclosure; and

(d) more effective penalties that provide greater incentive for good conduct.

C Business models and structures of forestry schemes

Key points

A 'forestry scheme' is a primary production managed investment scheme where investors' money (or money's worth, such as land) is generally contributed towards a common enterprise involving forestry without those contributions being pooled together under the scheme (except on harvest, where the harvest is typically pooled for marketing).

Investment in forestry schemes is generally made through an upfront or deferred fee arrangement through which investors are issued rights to a return from the produce grown on land leased from third parties. Some investors have borrowed to invest in these schemes.

The availability of taxation incentives for investment in these products may have encouraged levels of investment that may otherwise not have been achieved.

Relationship between investors and the responsible entity

39 Each forestry scheme is different but, in general, they operate such that investors (generally called 'growers') pay an upfront (tax-deductible) application price to acquire interests in the scheme. 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 scheme.

40 Such rights acquired by growers vary and depend on the constitution of the particular managed investment scheme, but it is generally accepted that in forestry schemes the trees on the land are usually the property of the individual growers.

41 The size of a grower's investment determines the size of the land they are allocated. On harvesting the assets on the land, growers receive a portion of proceeds (net of fees payable to the responsible entity) in accordance with the size of their investment.

42 Forestry schemes are structured around a contract (formed under the constitution of the scheme). The contract is between the grower and the responsible entity.

43 The contract includes a sub-lease of land by the grower from the responsible entity 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 responsible entity often contracts these activities out to other entities, which may be associated with them.

44 Responsible entities either acquire or lease land for the purpose of creating forestry schemes.

Growers' ownership rights

45 The contracts that give effect to the forestry scheme generally confer on growers' ownership rights in the trees. The 'scheme' or project of a forestry scheme 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 product ruling from the Australian Taxation Office (ATO). These contracts typically include the constitution of the managed investment scheme, sub-leases of the land on which the forestry activities take place, and management agreements for planting, husbandry and harvest.

46 The effect of the winding up of a forestry scheme (which involves undoing these contracts) on these ownership rights is not always clear as a matter of law. This has resulted in external administrators seeking judicial guidance on the winding up of these schemes.

Fee structures

47 Fee structures differ among managed investment schemes. However, forestry schemes have generally required an upfront fee from investors with an obligation to pay a deferred rental and management fee out of proceeds of the harvest (8–25 years later). Some forestry schemes use an upfront fee structure, but also require growers to make annual lease and management payments.

48 Fee structures that rely on upfront payments and payments out of proceeds from harvests have presented issues for the sector. This structure requires the responsible entity (or its ultimate parent) to absorb a sustained period of negative cash flows until the forestry scheme produces enough income to meet its costs.

Revenue and cash flow sources

49 To continue as a going concern, the responsible entity must have sources of revenue to fund its ongoing operations and working capital requirements. Structuring and promoting managed investment schemes were a considerable part of the business of the larger responsible entities that promoted forestry schemes.

50 This reliance on revenue from the sale of managed investment schemes can be compared to other (but not all) responsible entities of forestry schemes. Some have a more diverse revenue base. For example, some responsible entities are also involved in downstream paper production industries, rural services or other financial services.

Application money

51 When a grower applies for interests in a forestry scheme, their application money is generally held on trust until interests in the scheme are issued. At this point, application money held by the responsible entity is often transferred to another group entity for the purposes of conducting the forestry operations.

52 In these circumstances, money invested by growers is not generally segregated by the responsible entity for the purpose of ensuring it fulfils its contractual obligations to growers over the life of the forestry scheme. Instead, grower application money is (in most cases) diverted into the general working capital of the parent entity. The parent entity manages this money to meet expenses associated with all of its operations, including maintaining, cultivating and harvesting each scheme.

53 Where a responsible entity of a forestry scheme is reliant on scheme sales for a substantial part of revenue for working capital, an interruption to scheme sales revenue could have significant implications for the responsible entity, and its ability to fulfil its contractual obligations owed to growers. We have seen that where scheme sales reduce suddenly, some responsible entities have not had sufficient reserves to fulfil their obligations to growers.

Taxation rulings

54 Critical to establishing a forestry scheme is obtaining a product ruling from the ATO so as to provide investors certainty on the taxation treatment of the scheme.

55 In obtaining a product ruling, the responsible entity must provide the ATO with an extensive amount of information supporting the profitability underpinnings of the project. This includes, among other things, cash flow

forecasts, budgeted profit and loss statements, expert reports supporting those forecasts, and proposed marketing materials for the project.

56 To ensure the forestry scheme makes a significant contribution to primary production, the ATO sets 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 as an investment. Further, the ATO gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

57 It is our experience that the availability of upfront taxation deductions for amounts contributed to a forestry scheme, whether for forestry or management services or the right to use land, may result in issues such as:

(a) investors using these products to deal with short-term taxation issues without considering the longer term economic impacts of their investment;

(b) increased use of gearing to multiply the short-term taxation payoffs;

(c) the use of artificial structures that introduce complexity into the products to ensure passive investors are treated as conducting a forestry business;

(d) an illusion of certainty of returns, which is inconsistent with the speculative nature of the investment;

(e) enabling marginal schemes to attract capital where they otherwise may not be able to;

(f) failing to give appropriate reward for success by treating any gains on the sale as taxable income rather than being capital;

(g) a lack of diligence in monitoring the performance of the responsible entity and the scheme in circumstances where the investor has already received a benefit or their benefit is not dependent entirely on the returns from the investment; and

(h) investors failing to have regard to warnings we have issued about these products to educate investors about the risks associated with these schemes.

Loans to investors

58 Forestry scheme growers are generally offered finance to make their investments. Leverage assists to maximise taxation benefits. In some cases, entities associated with the responsible entity have provided direct finance to growers, while others have entered into arrangements with financial institutions to originate finance for growers. It has not been uncommon for growers to gear their entire investment in forestry schemes.

59 The loans to growers used to finance their interest in forestry schemes 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 various responsible entities have noted, the collapse of these groups has not relieved growers from their obligations under these loans.

60 The fact that these loans are full recourse is significant because it indicates that the risks associated with the investors' 'property' resulting from the actual investment in the forestry scheme were perhaps too great for financiers. This resulted in them seeking alternative security from the borrowers.

Common factors in the collapse of forestry schemes

61 The risks of investing in agribusiness schemes have been highlighted since the global financial crisis, with the collapse of several operators of large forestry schemes. These failed schemes include Environinvest Limited, Timbercorp Securities Limited, Great Southern Managers Australia Limited, FEA Plantations Limited, Rewards Project Limited and Willmott Forests Limited.

62 A number of factors have been identified as contributing to the collapse of responsible entities of agribusiness schemes. These include:

(a) declining global asset values;

(b) tightening credit;

(c) economic downturn;

(d) drought;

(e) reliance by the responsible entity on the support of its ultimate holding company for financial support and resources, such as staff, in circumstances where the parent entity is under excessive financial strain;

(f) lack of willing external funders;

(g) inability to obtain adequate working capital;

(h) reduced capacity to recover outstanding debtors;

(i) restructuring attempts, including challenging equity raisings that are ultimately unsuccessful;

(j) employing a business model that is heavily reliant on upfront payments from investors for working capital and proves insufficient to service the ongoing operations of the business;

(k) the obligations of the schemes being onerous and a significant drain on cash;

(l) a limited ability to increase annual management fees to adequately fund future costs from other sources of funding; and

(m) in the case of more recent collapses, reduced investor confidence in forestry schemes as a result of earlier collapses.

63 Since these collapses, we have been working to ensure that the interests of retail investors in failed managed investment schemes are preserved, despite difficult commercial situations. Alongside this work, and following consultation with industry, we have, among other things:

(a) released regulatory guidance with new disclosure benchmarks and principles for agribusiness schemes to improve investor awareness of the risks associated with these products;

Note: See Regulatory Guide 232 *Agribusiness managed investment schemes: Improving disclosure for retail investors* (RG 232).

(b) issuing guidance for investors about agribusiness schemes;

Note: See *Investing in agribusiness schemes? Independent guide for investors about agribusiness schemes.*

(c) revised the financial resource requirements for responsible entities of managed investment schemes; and

Note: See Regulatory Guide 166 *Licensing: Financial requirements* (RG 166).

(d) revised the land-holding AFS licence condition for responsible entities of agribusiness schemes.

Note: See Regulatory Guide 133 *Managed investments and custodial or depository services: Holding assets* (RG 133).

D Legislative regime for managed investment schemes (TOR 3)

Key points

Managed investment schemes with more than 20 members must generally be registered with ASIC if interests are offered to retail clients and operated by a responsible entity that is a public company and holds an AFS licence.

The responsible entity of a forestry scheme is subject to a number of obligations under the Corporations Act and its AFS licence, including the requirement to meet financial resource requirements and take steps to protect the rights of growers to the use of the land on which the scheme is operated.

Even though the legislative regime for managed investment schemes has undergone numerous reviews and inquiries identifying potential refinements, the legislative framework has remained largely the same.

Current legislative framework

64 'Investment funds', 'managed funds' or 'collective investments' are generally referred to in Australia as 'managed investment schemes'. This is a broadly defined term under the Corporations Act as encompassing most arrangements (regardless of their legal form) involving passive investors contributing money or money's worth to be pooled, or used in a common enterprise, to produce a financial or property-related benefit to the contributor.

65 The primary regulation governing managed investment schemes is contained in Chs 5C and 7 of the Corporations Act, supplemented by policies and guidance released by ASIC. While the legislation does not distinguish between types of managed investment scheme (e.g. equity funds, property trusts and mortgage schemes), we have issued specific regulatory guides and class orders to provide added guidance and flexibility to ensure effective regulation of the broad classes of products available.

66 The term managed investment scheme is defined in s9 of the Corporations 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) 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).

67 A managed investment scheme (with more than 20 members) must generally be registered by ASIC under s601ED of the Corporations Act if interests are to be offered to retail investors. A managed investment scheme must also be operated by a public company—the responsible entity.

68 The responsible entity must hold an AFS licence and must prepare the following documents governing the operation of the managed investment scheme before registering the scheme:

(a) a constitution, setting out the legal relationship between members of the scheme and the responsible entity; and

(b) a compliance plan, setting out a range of measures the responsible entity is to apply in operating the scheme to ensure compliance with the Corporations Act and the constitution. If the majority of the directors of the responsible entity are not external, the compliance plan and the responsible entity's compliance with it must be monitored by a compliance committee. The compliance committee must have at least three members and a majority of them must be external. Compliance with the compliance plan is also subject to an annual external audit.

General obligations of a responsible entity

69 As the holder of an AFS licence, the responsible entity is subject to a number of general obligations under s912A of the Corporations 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.

70 As an AFS licensee a responsible entity must meet the base level financial requirements in RG 166. These require the responsible entity to have:

(a) positive net assets and be solvent;

(b) sufficient cash resources to cover 12 months of expenses with cover for contingencies; and

(c) information about compliance with the financial requirements in their annual audit report to ASIC.

71 Responsible entities must also meet a net tangible assets (NTA) requirement, with requirements for holding cash or cash equivalents and liquid assets.

72 Generally, a responsible entity must hold at all times minimum NTA of the greater of $10 million, or 10% of the average responsible entity and investor directed portfolio service (IDPS) revenue, for each registered managed investment scheme operated, unless the responsible entity uses a custodian.

73 If a custodian is used, the responsible entity must hold at all times minimum NTA of the greater of:

(a) $150,000;

(b) 0.5% of the average value of scheme property of the registered managed investment scheme(s) it operates (if any) up to $5 million NTA; or

(c) 10% of the average responsible entity revenue.

74 In the majority of forestry schemes, members are treated as having custody of their trees, through the contracts entered into, until the trees are harvested. Therefore, the responsible entities of forestry schemes are generally subject to the lower NTA requirements unless they hold the harvested timber or proceeds from the sale of the timber.

75 The responsible entity (and its officers) are also subject to a number of specific statutory obligations in Ch 5C of the Corporations Act. Under s601FC, the responsible entity of a registered managed investment scheme must (among other obligations):

(a) exercise the degree of care and diligence that a reasonable person would exercise if they were in the position of the responsible entity;

(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 managed investment scheme is to be offered to retail investors, prepare a Product Disclosure Statement (PDS). The Corporations Act does not prescribe or proscribe particular product features or characteristics, so long as the nature of the investment is disclosed in the PDS.

76 Responsible entities of forestry schemes are subject to an AFS licence condition relating to protection of the rights of growers to use the land on which the scheme is operated. This condition was revised in November 2013. The key changes to the previous requirements include:

(a) the removal of a previous requirement that allowed the responsible entity to register interests in land within 15 months of receipt of applications for interests in the scheme;

(b) introducing an obligation to do all things that can be done that are necessary to ensure that, following the registration of interests in the land, those interests cannot be adversely affected in any way that is

material to the operation of the scheme by the interest of any other person in the land other than an interest or right of the Crown;

(c) introducing a requirement that the constitution of the scheme has to give the responsible entity the power to require members to make payments that may be required to be paid under any instrument providing rights to investors to the use of land;

(d) introducing an obligation to hold on trust any money paid by investors under the constitution of the scheme, as affected by the requirements outlined in paragraph 76(c), until this money is used to meet the relevant payment obligation; and

(e) that the instrument under which the rights are provided must exclude any action by any other party to the instrument that would have a materially adverse impact on the interest of the investor without the responsible entity having at least three months notice and that the responsible entity must notify investors if they receive such notification and inform members of their right to requisition a meeting.

77 The revised requirements apply to any offer of interests in a registered scheme that is made to retail clients on or after 2 January 2014, and that is made with, or includes, an offer of rights attaching to or arising from the land on which the scheme will occur.

78 The condition requires the responsible entity to:

(a) take reasonable steps to ensure that any regulatory approvals necessary to carry out the primary production activities involved in the scheme are obtained and maintained;

(b) protect the rights of members to have use of the relevant land on which the primary production occurs, including the rights sufficient to enable access, cultivation, transmission, exploitation, maintenance, and harvesting or obtaining output from a scheme, as relevant to the scheme and for the expected duration of the scheme through an appropriate registered interest in the land under state or territory land title laws;

(c) register the interest in such a form and in such a way that it cannot be adversely affected either by the interests of others in the land or, as far as possible, by any future interests, unless the interests of others were properly created by the responsible entity in accordance with its duties or were interests of which the responsible entity was not aware after reasonable inquiry; and

(d) ensure that, if the registered interest is a lease or an instrument that confers the right to use land that requires regular payments to be made:

(i) the constitution of the scheme gives the responsible entity the power to require members to make payments to meet the obligations under the terms of any lease or instrument;

(ii) any amounts paid by members are retained in relation to the lease or instrument on trust until the money is used to meet lease or rental payments relating to the land necessary for the continuity of a required registered interest;

(iii) the terms of the lease or instrument are not less favourable to the scheme than on an arm's length basis and exclude any action by the lessor or a head lessor in connection with the lease or instrument that would adversely affect the interests of members without the responsible entity having at least three months written notice; and

(iv) on receipt of a notice under paragraph 78(d)(iii), affected members are promptly notified in writing and advised of members' rights to requisition a meeting.

79 The interest must be:

(a) registered in the name of the members collectively or in the name of a company controlled by scheme members;

(b) held by each member in relation to that portion of the land on which the primary production business in which the member has an interest is being conducted;

(c) held by the asset holder or other person entitled to hold scheme property as trustee for members, or in trust for the responsible entity if it holds the beneficial interest in trust for members; or

(d) held by the responsible entity as trustee for members.

80 If the notice of the trust cannot be registered on that register, we expect the responsible entity to lodge a caveat and the trust deed with the land titles registrar where possible and when it would be of assistance in reducing risk.

81 We consider that operating a registered managed investment scheme if the scheme is subject to risks of failure, because of inadequate protection of the rights to use the land for the scheme for the expected duration of the scheme, is inconsistent with the obligation of a responsible entity to do all things necessary to ensure that it operates a scheme efficiently, honestly and fairly. We consider the rights of members requiring protection in relation to the land include the rights sufficient to enable access, cultivation, transmission, exploitation, maintenance, protection, repair, refurbishment, and harvesting or obtaining output from the scheme, where relevant to the scheme.

Reviews and inquiries

82 The legislative framework for managed investment schemes has undergone numerous reviews and inquiries, including:

(a) a review of the *Managed Investments Act 1998*, commissioned by the Government in 2001;

(b) the Parliamentary Joint Committee on Corporations and Financial Services (PJC) inquiry into financial products and services in Australia (2009), which covered managed investment schemes among other matters;

(c) the PJC inquiry into agribusiness managed investment schemes (2009);

(d) the PJC inquiry into the collapse of Trio Capital (2011–12); and

(e) CAMAC's report, *Managed investment schemes* (2012) (CAMAC report).

Note: CAMAC also released a second discussion paper, *The establishment and operation of managed investment schemes*, in March 2014. The key principle underlying CAMAC's views within the discussion paper is that the regulatory regime for managed investment schemes should be aligned with that for companies, unless there are compelling reasons for treating schemes differently. We have engaged with this review and will consider the issues raised after this work is completed.

83 Despite these reviews and a significant amount of work in developing potential refinements, the legislative framework for managed investment schemes has remained largely the same.

84 Actions taken by ASIC to respond to these reviews and inquiries are outlined in Appendix 1 and Appendix 2.

E ASIC's role in regulating forestry schemes (TOR 2)

Key points

ASIC has responsibilities under the Corporations Act in relation to managed investment schemes to license the responsible entity and register certain managed investment schemes.

We take a risk-based approach to our surveillance of the conduct of responsible entities and the disclosure issued for managed investment schemes.

We have issued detailed guidance for responsible entities of agribusiness schemes about disclosure for retail investors in these schemes.

Our role in relation to credit for investment purposes is limited to our jurisdiction under the ASIC Act to administering broad standards of conduct that are at best an imperfect tool for a regulator seeking to address systemic or widespread issues.

Licensing the responsible entity

85 We *must* grant an AFS licence to anyone who applies, in accordance with s913B of the Corporations Act, where:

(a) all documentary requirements with the application were submitted by the applicant;

(b) we have no reason to believe that the applicant is likely to contravene the obligations that will apply under s912A if the licence is granted;

(c) we are satisfied that there is no reason to believe that the applicant, or in the case of a body corporate its responsible officers, is not of good fame or character or that the applicant's ability to provide the financial services covered by the licence would nevertheless not be significantly impaired;

(d) the applicant has provided ASIC with any additional information that we have requested; and

(e) the applicant meets any other relevant requirements prescribed by regulations.

86 Importantly, the 'no reason to believe' test requires actual evidence the applicant has been involved in illegal activity and not just mere suspicion.

87 To enable us to form a view on this, we collect 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. We impose conditions on the AFS licence (such as conditions relating to minimum financial resources) to address these matters.

88 In deciding whether to license a responsible entity, we conduct a review of documents provided in support of the licensing application. The level and type of documentation required depends on our assessment of the risks associated with the application. For example, if the application is to vary an existing AFS licence to include additional financial services, our assessment of the application would generally focus on the additional services; or if the licensee is one with a history of significant compliance issues, we would assess the applicant more broadly before making a decision.

89 The documents required would generally set out the proposed compliance arrangements and operating capacity of the responsible entity. We also assess the people involved in operating the responsible entity, known as the 'responsible managers'. This assessment takes into account the responsible managers' knowledge (qualifications) and skills (experience) against the requirements of 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.

90 We may also assess:

(a) the financial accounts of the responsible entity to ensure the entity meets the financial resource requirements that would apply to the AFS licence under RG 166;

(b) the adequacy of the responsible entity'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; and

(c) whether the responsible entity proposes to use an external custodian to hold scheme assets and, if a custodian is to be used, we ensure the custodian has a minimum NTA of the greater of $10 million or 10% of average revenue.

91 We may vary the conditions of a responsible entity's AFS licence under s914A of the Corporations Act after giving the licensee an opportunity to appear or be represented at a private hearing and make submissions to ASIC about the matter.

92 We may suspend or cancel a responsible entity's AFS licence immediately under s915B in certain circumstances, including where:

(a) the responsible entity ceases to conduct a financial services business;

(b) the responsible entity becomes externally administered;

(c) members have suffered or are likely to suffer loss or damage because the responsible entity has breached the Corporations Act or a financial services law; or

(d) the responsible entity lodges an application to suspend or cancel the licence.

93 We may suspend or cancel a responsible entity's AFS licence after offering a hearing where:

(a) the responsible entity has not complied with its obligations under s912A of the Corporations Act;

(b) we have reason to believe that the responsible entity will contravene its obligations under s912A of the Corporations Act;

(c) the responsible entity's officers are no longer of good fame and character; or

(d) a banning or disqualification order is made against:

(i) the responsible entity; or

(ii) a representative of the responsible entity and we consider that the representative's involvement in the provision of the responsible entity's services will significantly impair the responsible entity's ability to meet its obligations under Ch 7 of the Corporations Act.

94 The AFS licences held by six responsible entities of forestry schemes have been cancelled since 2010. We are continuing to engage with the remaining responsible entities in relation to compliance with their obligations under the Corporations Act.

Registering the managed investment scheme

95 Under the Corporations Act, we *must* register a managed investment scheme within 14 days of lodgement of an application, unless it appears to us that:

(a) the proposed responsible entity is not a public company that holds an AFS licence that authorises it to operate the scheme; and/or

(b) the application does not meet the requirements in s601EA of the Corporations Act by including:

(i) an application form, which states the name and address of the proposed responsible entity and the person who has consented to

be the auditor of the compliance plan (see Form 5100 *Application for registration of managed investment scheme*);

(ii) a constitution that meets the requirements in s601GA and 601GB;

(iii) a compliance plan that meets the requirements in s601HA; and

(iv) a statement by the directors certifying that the application complies with the scheme constitution and that the compliance plan complies with the Corporations Act.

96 There is no prescribed form for the constitution or the compliance plan. However, the application must state which provisions of the constitution address the matters in s601GA and 601GB of the Corporations Act.

97 In deciding whether to register a managed investment scheme, we conduct the following assessments:

(a) a general assessment of the application and the responsible entity to ensure:

(i) the constitution and compliance plan are executed appropriately;

(ii) appropriate ASIC forms are filed (including Form 5103 *Directors' statement relating to application for registration of a managed investment scheme*, which is a statement signed by the directors of the responsible entity stating that the scheme constitution and compliance plan comply with the Corporations Act); and

(iii) 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 Corporations Act;

(b) an assessment of the scheme's constitution to ensure it complies with s601GA and 601GB of the Corporations Act. These provisions are supported by ASIC policy and deal with:

(i) consideration to be paid to acquire an interest in the scheme;

(ii) powers of the responsible entity to make investments or otherwise deal with scheme property and to borrow or raise money;

(iii) dealing with complaints;

(iv) winding up the scheme;

(v) rights of the responsible entity to fees and indemnities out of scheme property;

(vi) rights of members to withdraw from the scheme; and

(vii) ensuring the legal enforceability of the constitution; and

(c) an assessment of the scheme's compliance plan to assess whether it meets the content requirements of s601HA of the Corporations Act. This provision requires that the compliance plan includes measures to

ensure compliance with the Corporations Act and the scheme's constitution, including arrangements for:

(i) identification and segregation of scheme property;

(ii) a compliance committee if less than half of the directors of the responsible entity are external directors;

(iii) valuation of scheme property;

(iv) an annual audit of the compliance plan; and

(v) keeping adequate records of the scheme's operations.

98 Appendix 3 contains details of the number of schemes registered by ASIC each year since the introduction of the managed investment scheme regime in 1998.

Provision of guidance

99 We issue regulatory guides to give guidance to regulated entities by:

(a) explaining when and how we will exercise specific powers under legislation (primarily the Corporations Act);

(b) explaining how ASIC interprets the law;

(c) describing the principles underlying our approach; and

(d) giving practical guidance (e.g. describing the steps of a process, such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

100 For example, we responded to a number of issues arising out of the collapses of responsible entities of forestry schemes by issuing guidance in January 2012 on disclosure for agribusiness schemes in RG 232.

101 RG 232 sets out our benchmarks and disclosure principles for improved disclosure to retail investors in agribusiness schemes. Responsible entities should:

(a) address the benchmarks on an 'if not, why not' basis within the first few pages of a PDS, by stating that the responsible entity or scheme either meets the benchmark or does not meet the benchmark and explaining why not and how the responsible entity deals with the concerns underlying the benchmark in another way; and

(b) clearly and prominently disclose a summary of the information identified in the disclosure principles within the first few pages of a PDS with cross-references to where further information can be found in the PDS.

102 These benchmarks are designed to help retail investors and their advisers make informed investment decisions. The benchmark disclosure regime highlights key risks of agribusiness scheme investments and requires prominent and clear disclosure about how a responsible entity proposes to manage those risks. It is intended that the benchmarks will illuminate the positive and negative aspects of commercial structures chosen by responsible entities of agribusiness schemes when they offer investments to retail investors.

103 Responsible entities should disclose against the benchmarks and apply the disclosure principles in any PDS dated on or after 1 August 2012. Table 1 outlines the benchmarks and disclosure principles contained in RG 232.

Table 1: ASIC benchmarks and disclosure principles for agribusiness schemes

Benchmark/disclosure principle	Summary of information required
Fee structures	Benchmark 1 addresses how the responsible entity structures the fees it charges to members of the agribusiness scheme and how the responsible entity ensures that contributions of investors are only available for the agribusiness scheme.
Responsible entity or related party ownership of interests in the agribusiness scheme	Benchmark 2 addresses the ownership of interests that the responsible entity and its related parties have in the agribusiness scheme.
Annual reporting to members	Benchmark 3 addresses the provision of relevant information about the performance of the agribusiness scheme and its assets to members at least annually.
Experts	Benchmark 4 addresses the independence and qualifications of experts engaged by the responsible entity, and the disclosure of opinions.
Appointing and monitoring service providers	Benchmark 5 addresses how the responsible entity appoints and monitors parties providing services to the agribusiness scheme.
Investor financing arrangements	Disclosure Principle 1 addresses disclosure if the responsible entity or a related party offers or arranges finance for investors.
Track record of the responsible entity in operating agribusiness schemes	Disclosure Principle 2 addresses the track record of the responsible entity in operating agribusiness schemes and whether those schemes have produced positive returns for investors.
Responsible entity's financial position	Disclosure Principle 3 addresses the financial position and arrangements of the responsible entity.
Land, licences and water	Disclosure Principle 4 addresses the arrangements put in place to secure access to the resources and infrastructure to be used by the agribusiness scheme.
Replacement of the responsible entity	Disclosure Principle 5 addresses the risk of the structure of the agribusiness scheme frustrating or preventing the appointment of a replacement responsible entity.

Risk-based surveillance of disclosure

104 Interests in a registered managed investment scheme must generally be offered to retail investors through a 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 responsible entity and need not be signed by the directors. We may (and do) examine PDSs in the market on a risk-assessed basis and may require corrective disclosure or we may issue a stop order for defective disclosure.

105 The Corporations Act gives ASIC the power 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). We may issue interim or final stop orders. An interim order generally lasts for around 21 days. However, a final stop order can only be issued following a hearing where interested parties are given the opportunity to make submissions as to whether the stop order should be made.

106 Our actions do not always result in stop orders. In cases where we believe a PDS is defective, the issuer may rectify their disclosure document by issuing a supplementary PDS.

107 Our stop order powers also extend 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.

108 We reviewed compliance with RG 232 in 2013. We found that the PDSs that had been issued since 1 August 2012 had substantively adopted the guidance in RG 232, disclosing against the benchmarks and applying the disclosure principles.

Risk-based surveillance of responsible entity conduct

109 We take a risk-based approach to surveillance of the conduct of a responsible entity and its officers, to check whether they are complying with their legal obligations in relation to the managed investment schemes they operate. This is often triggered by a breach notification from the responsible entity, a report from a compliance plan auditor or compliance committee, a person reporting misconduct, or our targeted surveillance of entities or sectors identified as problematic.

110 Where an entity is targeted for surveillance, the approach towards that entity varies with the circumstances. We may initiate an active dialogue with the entity's senior executives and conduct meetings to ascertain information. We

may also use our powers under s601FF of the Corporations Act to conduct surveillance checks.

111 When conducting a surveillance of a responsible entity, we may:

(a) go to the premises of the responsible entity and conduct interviews with its officers and examine documentation it maintains;

(b) request documents from the responsible entity and conduct assessments of those documents;

(c) request disclosure documents from a larger population of the industry and examine the PDSs;

(d) write to a responsible entity requiring it to respond to the issues we have raised; and

(e) set up regular reporting periods by which a responsible entity provides ASIC with updates as to how it is dealing with any issues we have identified.

Administering broad conduct standards on the provision of credit

112 Loans made for the purposes of investment (other than for investment in retail property) are not covered by the legislative protections of the Uniform Consumer Credit Code (UCCC) or the National Credit Act introduced in 2010.

113 However, as these loans are credit facilities that are financial products under the ASIC Act, we do have some jurisdiction limited to administering broad standards of conduct, including prohibitions on unconscionable conduct, misleading and deceptive conduct, and undue harassment and coercion.

114 The law on unconscionable conduct continues to evolve. However, the courts have set a high bar for establishing unconscionability, particularly for commercial transactions. A general power imbalance between the parties or a contract that favours one party more than the other is not sufficient to support a claim of unconscionable conduct.

115 The enforcement of these prohibitions depends on the particular facts and circumstances of individual cases. Findings that they have been breached tend to be specific to each case and rarely set a general rule or precedent. The conduct standards in the ASIC Act are therefore at best an imperfect tool for a regulator seeking to address systemic or widespread issues.

116 In 2013, Treasury consulted on proposals for the regulation of, among other things, lending for the purposes of investment (other than for investment in residential properties, which is already covered). However, a final policy decision has not been made on these proposals.

F Impact of external administration (TOR 3)

Key points

It has been difficult for external administrators of responsible entities of forestry schemes to identify a replacement responsible entity.

External administrators are faced with competing obligations to creditors of the responsible entity and members of the managed investment schemes. The courts have held that liquidators have a duty to act impartially between the various parties interested in the property and liabilities of the company.

We proactively engage with external administrators of responsible entities to ensure the rights of members are considered during the administration.

We have had input into the review undertaken by CAMAC about responsible entities and managed investment schemes in financial difficulty, and have recommended that the inquiry consider the report issued by CAMAC in July 2012.

Challenges in finding a replacement responsible entity

117 In our experience, external administrators of responsible entities that operate forestry schemes are faced with a complex web of arrangements with limited resources available for the continued operation of the schemes. They also face conflicts in their responsibility to creditors and their duties to members of the schemes.

118 It takes an external administrator some time to understand the arrangements of the entities that they have been appointed to and potential avenues for dealing with the schemes. External administrators will generally obtain reports from experts about the viability of schemes, while also commencing campaigns to determine whether there are any responsible entities interested in becoming the responsible entity for some or all of the schemes the responsible entity operates.

119 Historically, it has been difficult for external administrators to find replacement responsible entities. This is due to a number of issues, including:

(a) the effect of s601FS and 601FT of the Corporations Act to transfer the rights and obligations of the existing responsible entity to any replacement responsible entity in the context of an enterprise scheme where the extent of the liabilities and obligations are extensive, or at least uncertain;

(b) the lack of funding available to the replacement responsible entity for the continuing operation of the scheme;

(c) doubts about the viability of the scheme(s); and

(d) a limited number of potential responsible entities with the experience and resources to take on the scheme(s).

120 Where a replacement responsible entity cannot be found, a scheme may need to be wound up. Generally, external administrators have sought directions from the courts about the winding up of forestry schemes because it generally involves dismantling arrangements with a variety of parties, including land owners and investors to sell assets (such as land owned by the responsible entity or other third party on which trees are planted) to meet the claims of creditors of the responsible entity and members of the scheme.

121 Where a replacement responsible entity is found and installed by members through a members' meeting, the replacement responsible entity will generally only consent to be appointed subject to amendments being made to the constitution of the scheme requiring members to pay amounts to the responsible entity on an upfront and ongoing basis for the maintenance of the scheme. In some cases, members have also had to fund court actions taken by the replacement responsible entity to secure their rights (e.g. to the use of land). The issue of tenure of access to the land is one of significant concern to members of forestry schemes, particularly given recent court decisions that have found that liquidators can disclaim the leases that secure the rights to access the land used for the operation of schemes.

122 CAMAC considered a number of these issues in its July 2012 report and identified a number of potential areas for reform that are relevant in the context of forestry schemes. We highlight a number of these in Section I as options for reform that we support.

Duties of external administrators

123 When the responsible entity of a managed investment scheme goes into external administration, control of the company and its operations passes from the directors to the insolvency practitioners appointed to conduct the administration. Where the responsible entity is in liquidation, the external administrator is not required to continue to prepare financial statements for the responsible entity and schemes where there are insufficient funds to cover the costs of preparation.

124 If the external administrator is in control of the responsible entity as a controller or administrator, the requirement to lodge accounts with ASIC survives. Regulatory Guide 174 *Externally administered companies: Financial reporting and AGMs* (RG 174) outlines the manner in which administrators or receivers can seek relief from lodging accounts, if required.

125 Under the Corporations Act, we may suspend or cancel the AFS licence of a responsible entity that becomes an externally administered body corporate. Generally, we would discuss this with the external administrator to determine whether such action could potentially cause issues with the ongoing operation of the schemes. We monitor the conduct of responsible entities in external administration where we have not cancelled the AFS licence, including monitoring compliance with key conditions of the licence.

126 Depending on the nature of the external administration, the insolvency practitioner may be an administrator (appointed by the directors or a secured creditor under the voluntary administration regime in Pt 5.3A of the Corporations Act), a receiver, or a receiver and manager of the property of the responsible entity (usually appointed by a secured creditor), or a liquidator.

127 When a company is insolvent, the interests of its creditors come to the fore in deciding where the company's interests lie.

128 Secured creditors of the responsible entity often have security over the land that is used by growers in the managed investment 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 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. The external administrator of a responsible entity has 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) growers, whose ultimate interest is to realise the long-term production of their crops.

129 The Corporations Act imposes an overriding duty on the responsible entity and its officers under s601FC and 601FD to act in the best interests of the members of the scheme and prefer the members' interests if there is a conflict. This duty has been considered by the courts as to the position of liquidators winding up a responsible entity.

130 In *Timbercorp Securities Limited v WA Chip & Pulp Co Pty Ltd* [2009] FCA 901, Finklestein J (at [8]–[11]) stated that, as a fiduciary, the liquidator must act impartially between all those who are interested in the winding up. This has been subsequently applied in other cases, including in *Re Willmott Forests Ltd (ACN 063 263 650) (receivers and managers appointed) (in liq) and Others (No. 2)* [2012] VSC 125, Davies J (at [96]), as meaning the liquidators have imposed on them a duty to act at all times with complete

impartially between the various persons interested in the property and liabilities of the company.

131 In *Rivercity Motorway Pty Ltd (administrators appointed) (Receivers and managers appointed) v Madden (No. 3)* [2012] FCA 313, Logan J (at [38] to [40]) found that an administrator or receiver is not an officer for the purposes of Ch 5C of the Corporations Act.

132 In practice, particularly for receivers and liquidators, difficulties arise in managing the tension between their obligations to scheme members and their obligations to the creditors of the responsible entity.

133 In recent failures in the sector, it is apparent that (whatever the legal position) the fact that there is no person charged solely with representing members' interests has undermined investors' confidence in the capacity of the existing insolvency laws to protect their position.

Our general approach to the appointment of external administrators

134 Our approach to the appointment of external administrators to a responsible entity generally involves:

(a) engaging with external administrators to:

(i) discuss the terms of appointment and identify whether they are independent and sufficiently resourced to conduct the administration;

(ii) establish lines of communication and contact points between ASIC and the external administrator;

(iii) inform the external administrator of our expectations in relation to the administration, including having due regard to the interests of members of the schemes operated by the responsible entity; and

(iv) obtain information about the entities involved and the potential impacts on investors;

(b) consideration of proposals about the future of the schemes, where appropriate;

(c) consideration of the responsible entity's AFS licence and what action we should take in response to the administration; and

(d) monitoring the administration generally through regular meetings with the external administrators.

135 It was determined, based on experience with the collapses of Timbercorp and Great Southern, that ASIC contact would be ongoing as part of our powers to check that the responsible entity (under the control of the external administrator) is continuing to discharge its statutory duties to members. In

this regard, we meet with external administrators and, if necessary, receivers on a regular basis.

136 In addition to these actions, we have made submissions on and are contributing to the development of proposals in response to the review of managed investment schemes undertaken by CAMAC, which made a number of recommendations to Parliament on potential amendments to the legislative framework that applies to managed investment schemes, including voluntary administration proposals for these schemes.

G Promotion of forestry schemes (TOR 4)

Key points

Forestry schemes have been historically distributed through a range of advisory channels, with advisers receiving significant commissions for the sale of these products.

Recent amendments to the Future of Financial Advice (FOFA) provisions in the Corporations Act mean that commission payments for new managed investment schemes will be banned.

Research houses involved in rating these products must hold an AFS licence.

Distribution of products and quality of advice

137 Forestry schemes have been historically distributed through:

(a) the responsible entities of the schemes through their own authorised representatives (which may include accountants and employees of the responsible entity);

(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 representatives of an AFS licensee.

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

138 We have long been concerned about the quality of financial advice provided to consumers and about conflicts of interests in the financial advice industry. This is reflected in a number of our reports and submissions to Government, including in:

(a) our main submission to the Senate inquiry into the performance of ASIC (October 2013); and

(b) our submission on the Financial System Inquiry interim report (August 2014).

139 Where advice is poor, one of the common problems is a conflicted remuneration structure (e.g. product commissions and percentage asset-based fees) affecting the type of advice, recommendations and the quality of advice. In the past, this has been a particular issue with forestry schemes.

140 As outlined in our submission to the PJC inquiry into agribusiness managed investment schemes, the remuneration structures employed in the sale of

agribusiness schemes (including forestry schemes) resulted in significant conflicts. For the purposes of this submission, we have defined:

(a) 'marketers' as anyone who promoted agribusiness schemes, but did not sell the schemes; and

(b) 'distributors' as anyone who sold agribusiness schemes with or without providing advice. Distributors include AFS licensees, financial advisers and accountants.

141 Historically, the most common forms of remuneration paid out by agribusiness schemes were:

(a) commissions;

(b) overrides;

(c) marketing allowances; and

(d) soft dollar incentives.

142 These are generally paid to distributors and, in some cases, to marketers.

143 A typical feature of remuneration to distributors of these schemes was the payment of commissions. Commissions were usually based on a fixed percentage of the amount invested. The average commission rate payable to distributors of agribusiness schemes was about 10% of the amount invested.

144 Distributors of agribusiness schemes may also have received remuneration in the form of overrides (bonuses) in addition to the commissions paid. The override payment was generally determined by a specific factor that might include the overall volume of sales or the maturity of the relationship between the responsible entity and the distributor. For example, if a new party was engaged to distribute a scheme, they may be offered an override for the first 12 months of distributing the product. Override payments tended to range between 1% and 5% of the amount invested.

145 Another common form of remuneration that may be paid to both distributors and marketers was a marketing allowance. The allowance was paid to cover the costs of running seminars and other promotional events.

146 Soft dollar incentives were 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.

147 Where a distributor or marketer is providing a financial service (i.e. providing advice or dealing), 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: see s912A(1)(aa).

148 All forms of remuneration payments have the potential to lead to conflicts of interest and, if not managed appropriately, may ultimately have an impact on the quality of advice.

149 With the recent amendments to the FOFA provisions in the Corporations Act, commissions paid in relation to a new client with whom an adviser enters into a new relationship after 1 July 2014 are banned. Commissions paid in relation to new products acquired by old pre-1 July 2014 clients will also be banned. However, advisers will continue to be paid any commissions that fall outside the scope of this ban.

Rating of products by research houses

150 A number of research houses have published research on forestry schemes. The main research houses we have identified that have provided information on agribusiness schemes include:

(a) Australian Agribusiness Research (AAG)—undertakes feasibility studies, due diligence studies and investment analysis on proposed or existing agribusinesses;

(b) Adviser Edge—specialises in providing agribusiness, property and structured product investment research; and

(c) Lonsec—appears to be one of the dominant research providers for dealer groups.

151 In the past, we have seen that investment products that failed (including agribusiness schemes) were either highly rated or the subject of very recent positive recommendations by research houses just before the product failure.

152 The PJC inquiry into the collapse of Trio Capital considered the role of research in its inquiries. In its final report, the inquiry noted the 'expectations gap' that exists between what is expected of research by users and the limitations of the research on offer.

153 Our Regulatory Guide 79 *Research report providers: Improving the quality of investment research* (RG 79) and other related ASIC guidance (e.g. Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175)) aim to improve the quality of research and user's understanding of the role research plays in the preparation of personal financial advice.

154 To improve the quality and reliability of investment research in Australia, we consider it is important that users (and prospective users) of research, be they retail or wholesale clients, have clear, comparable and meaningful information about:

(a) the different research report providers in the market;

(b) the strengths and limitations of different research approaches; and

(c) a clear understanding of how research recommendations or ratings are produced and what they mean.

155 Factual and relevant information about the research service gives important context to the research, improves users' ability to understand the research and decide whether to use and rely on it, and to what extent.

156 Our guidance in RG 79 gives providers flexibility in how they communicate this information to users and prospective users of their research services. Some disclosures are appropriate for the broader market, while others are specific to the research report. Consistent with international regulators, our objective with this guidance is to create 'an environment where the research produced by analysts for clients is objective, clear, fair and not misleading'.

Note: See Technical Committee of the International Organization of Securities Commissions, *IOSCO statement of principles for addressing sell-side securities analyst conflicts of interest* (IOSCOPD150), statement, IOSCO, 25 September 2003, p. 2.

What is a research house?

157 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 investment schemes, structured products, superannuation funds and insurance products). They may rate quoted or unquoted products.

158 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 investment schemes, structured products);

(b) those that mainly focus on superannuation and insurance products; and

(c) those that cover niche markets such as agribusiness schemes.

159 In RG 79 we define a research report provider as an AFS licensee that provides research reports to other persons (clients). This includes situations where the licensee causes or authorises another person (e.g. an authorised representative of the licensee) to provide research reports to other persons (clients).

160 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 Corporations Act.

Users of research houses

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

162 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.

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

164 For superannuation products, some research houses offer their subscription services direct to retail clients. We understand that some research houses also intend to offer subscription services (e.g. on 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.

H Compensation arrangements (TOR 5)

Key points

An AFS licensee that provides services to retail clients and consumers must have a compliant dispute resolution system and have adequate compensation arrangements in the form of professional indemnity (PI) insurance.

The effectiveness of these measures is limited where an AFS licensee is in external administration and more generally as a result of the limitations of PI insurance as a consumer protection mechanism.

We have discussed the option of a last resort compensation scheme in our submission on the Financial System Inquiry (2014) interim report.

Importance of access to compensation for financial loss

165 Having efficient and effective dispute resolution and compensation mechanisms is integral to promoting the confident and informed participation of consumers in the Australian financial services system (one of ASIC's key objectives in s1 of the ASIC Act).

166 While effective internal dispute resolution (IDR) and external dispute resolution (EDR) are essential requirements of the AFS legislative regime, they will only be effective where there is a licensee and funds available to compensate clients. Where this is not the case, consumers may have no access to dispute resolution and compensation mechanisms. This has occurred in the context of some forestry schemes.

167 We have played a key role in establishing and shaping the dispute resolution system for the financial services industry. Despite its limitations, it is widely regarded as one of the best systems in the world, and has responded effectively to incidents ranging from the global financial crisis to natural disasters. Our dispute resolution policy reflects an oversight role spanning 15 years.

168 Consumer research commissioned by ASIC's Consumer Advisory Panel and published in Report 240 *Compensation for retail investors: The social impact of monetary loss* (REP 240) highlighted the social impacts of retail investors not being fully compensated for monetary loss suffered as a result of their AFS licensee's misconduct.

169 REP 240 identified the different avenues investors and financial consumers can use to seek compensation when they suffer monetary loss as a result of the misconduct of their financial services provider or credit service provider: see Table 2.

Table 2: Avenues for obtaining compensation

Avenue	Process
Internal dispute resolution (IDR)	Investors and financial consumers can approach the financial services provider or credit service provider directly to seek a resolution.
Self-initiated private action	The investor or financial consumer can sue the financial services provider or credit service provider in court or attempt to obtain an outcome through private negotiation, mediation or arbitration.
Join a private class action	The investor or financial consumer can start or join a class action where others who have suffered loss from the same type of misconduct bring a group action. Such an action may be on a 'no-win, no-fee' basis.
Through the winding-up process of a financial services provider (external administrator)	Where a company may no longer be a viable business, an external administrator may be appointed to wind up the company. In doing so, the external administrator will generally assess the liabilities/debt, assets and income of the company to work out whether the company can recover, should be sold or needs to be wound up. If the company is wound up, the external administrator will decide which creditors are paid out of the remaining assets or funds. Creditors with secured interests (such as banks) will usually have first priority in being paid out.
ASIC action	ASIC can take action through: • negotiations with the AFS licensee; and • legal action or other enforcement action, including under s50 of the ASIC Act. ASIC may, if it is in the public interest to do so, bring a representative proceeding for compensation or recovery of damages for fraud, negligence, default, breach of duty or other misconduct.

Requirement to have a compliant dispute resolution system

170 All AFS licensees (including responsible entities and financial advisers) that provide services to retail clients and consumers must have a compliant dispute resolution system as a general obligation of their licence. This dispute resolution system must be able to cover complaints about the licensee's representatives (including both authorised representatives and other representatives such as employees).

171 The dispute resolution system must consist of both:

(a) an IDR procedure that meets ASIC's approved standards and requirements; and

(b) membership of an ASIC-approved EDR scheme.

Internal dispute resolution

172 Effective and timely IDR procedures are the first element of an effective dispute resolution system because the AFS licensee or credit licensee is generally best placed to deal with complaints from its own retail clients and consumers. A licensee's IDR procedures must comply with standards or requirements made by ASIC.

173 We have set out our standards for IDR in Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165). This draws on Australian Standard AS ISO 10002–2006 and stresses the need for timeliness and good communication with clients and consumers.

174 In addition to resolving client or consumer complaints in a timely manner, IDR provides AFS licensees with the opportunity to:

(a) consider emerging business risks or product/service problems;

(b) manage and maintain ongoing customer relationships; and

(c) resolve matters before incurring further costs at an EDR scheme.

175 Where a licensee becomes externally administered, the external administrator may put in place arrangements to deal with inquiries from investors. However, the responsiveness of the external administrator to consumer complaints at IDR and to EDR schemes can be variable.

External dispute resolution

176 AFS licensees must be a member of one or more ASIC-approved EDR schemes that covers, or together cover, complaints made by retail clients or consumers in relation to the financial services provided (other than complaints that may be dealt with by the Superannuation Complaints Tribunal).

177 We provide detailed guidance on the dispute resolution requirements and our approval of EDR schemes in RG 165 and Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139).

EDR scheme remedies

178 The remedies available to EDR schemes are not limited to making awards for financial compensation. For example, in resolving a dispute, a scheme can require:

(a) the payment of a financial award in accordance with the scheme's rules;

(b) the waiver, variation or repayment of a fee or interest rate on a loan;

(c) the forgiveness or variation of a debt or release of a security;

(d) the reinstatement or rectification of a contract;

(e) the payment, variation or review of a claim under an insurance policy (other than PI insurance); or

(f) amendments to policy wordings, disclosure documents or advertising materials.

179 It is worth noting that where a member of an EDR scheme becomes insolvent, they generally lose their membership. However, the EDR schemes will consider complaints for a period of 12 months after the appointment of an external administrator. If, in that time, a liquidator agrees to pay the membership fee, the complaints are dealt with. However, a decision about accepting complaints is on a case-by-case basis. If there are unlikely to be assets available to pay the award or pay the fees for the matter to be considered, it is less likely the complaint will be dealt with.

180 In these cases, it may be that the existence of an EDR scheme does not provide any more assistance than private litigation in circumstances of insolvency.

Requirement to have compensation arrangements (PI insurance)

181 AFS licensees must have adequate arrangements for compensating retail clients and consumers for loss or damage due to breaches of the financial services laws.

182 The Corporations Regulations 2001 (Corporations Regulations) mandate that the key form of compensation an AFS licensee must have is an acceptable contract of PI insurance.

183 Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126) discusses the key features a PI insurance policy for an AFS licensee must have for it to be 'adequate' (and that we may approve other alternative compensation arrangements and how the licensee may approach ASIC to do so).

184 Generally, an AFS licensee's PI insurance cover must:

(a) be adequate, having regard to the licensee's business (the volume of business, the number and kinds of clients or consumers, the kind of business and the number of representatives) and the maximum liability to compensation claims that realistically might arise;

(b) cover EDR scheme awards;

(c) cover fraud or dishonesty by directors, employees, other representatives and other agents of the licensee; and

(d) have a limit of at least $2 million for any one claim and in the aggregate for licensees with total revenue from financial services or credit services provided to retail clients and consumers of $2 million or less.

185 Responsible entities must have PI insurance cover with a limit of at least $5 million for any one claim and in the aggregate.

The limitations of PI insurance

186 Given the role PI insurance plays in the Australian dispute resolution and compensation framework for the financial services industry, it is important to recognise its limitations as a consumer protection mechanism. PI insurance is designed to protect AFS licensees against business risk, and not to provide compensation directly to investors and financial consumers. It is a means of reducing the risk that a licensee cannot pay claims because of insufficient financial resources, but has some significant limitations, including where there are insolvency issues, or multiple claims against a single licensee. In addition, directors may access PI insurance to defend legal proceedings, which may reduce the amount available for investors.

187 Gaps in, and caps on, PI insurance cover will also inevitably remain a problem, given the limits on our capacity to compel commercial providers of the product to adapt it to a purpose different from and beyond the purpose for which it was designed.

Uncompensated loss

188 Uncompensated loss in the regulated financial services sector can happen for a number of reasons, including where the consumer has suffered loss but cannot access an EDR scheme because their loss exceeds current monetary limits and they cannot afford to take legal action.

189 Within the EDR scheme jurisdiction, PI insurance can also fail to adequately compensate consumers and investors when it is needed most—that is, when an AFS licensee's misconduct is so serious or systemic that it affects a medium to high number of clients at the same time so as to cause the licensee to become insolvent.

190 The Financial Ombudsman Service (FOS) has recently contributed to the publicly available information about uncompensated loss. FOS reports that, between 1 January 2010 and 30 June 2014, 22 financial services providers have been unable to comply with 105 determinations exceeding $10.2 million.[1]

191 These unpaid consumer compensation claims have arisen almost exclusively in the financial advice sector, and in most of these cases, the AFS licensee has become insolvent and/or ceased business. We understand that a number

[1] FOS, 'Unpaid determinations: Update', *The Financial Ombudsman Service Circular*, issue 18, 2014, www.fos.org.au/the-circular-18-home/fos-forum/unpaid-determinations-update.jsp.

of the determinations that remain unpaid relate to poor advice with respect to agricultural schemes including forestry schemes.

192 The effectiveness of IDR and EDR as mechanisms to deliver compensation to investors is limited where the AFS licensee is insolvent and the PI insurance is not responding. In these circumstances there is generally no realistic prospect of investors obtaining any compensation.

193 PI insurance did not compensate consumers because of policy exclusions or because multiple clients suffered monetary loss at the same time, thereby exhausting the limit or maximum aggregate limit of the licensee's PI insurance policy and any capital reserves it may have had.

194 Measures to address the issue of uncompensated loss, such as introducing additional requirements that expand mandatory PI coverage, may impose additional cost and regulatory burden, but fail to adequately address the problem. This is because PI insurance requirements are focused at the individual AFS licensee level and are not intended nor designed to be comprehensive compensation mechanisms for retail consumers and investors of financial products.

195 Growing levels of uncompensated loss arising out of unpaid EDR determinations threaten to erode trust and confidence in the financial services sector and the effectiveness of the dispute resolution system. The concentration of these unpaid determinations in the small- and medium-sized advisory services sector potentially also places these licensees at a competitive disadvantage to larger AFS licensees, which are more likely to be able to ensure compensation (through self-insurance) for their clients.

196 One option that has been suggested to address this issue, which we have discussed in our submission on the Financial System Inquiry (2014) interim report, is the introduction of a last resort compensation scheme, with a narrow focus (i.e. to provide compensation where all other options have truly been exhausted). It has been suggested that this would create a more level playing field between different financial advice business models when it comes to compensating investors and financial consumers for financial loss caused by poor advice.

I Options for reform (TOR 7)

Key points

The legislative framework for managed investment schemes has been the subject of a number of reviews and a significant amount of work in developing potential refinements; however, it has remained largely the same. Consideration should be had to the recommendations of these various reviews and inquiries when considering options for reform.

ASIC has made submissions to address where possible recommendations of prior inquiries and reviews, including the ongoing review undertaken by CAMAC.

Forestry schemes only make up a small and reducing proportion of the overall managed investment scheme sector.

We have taken action within our powers to improve disclosure to retail investors and amend the financial resource requirements and land-holding requirements that apply to responsible entities of forestry schemes; however, there are aspects of the business model of these types of schemes that are potential areas for reform.

Outcomes of prior inquiries and reviews

197 As noted in paragraphs 82–83, the legislative framework for managed investment schemes has undergone numerous reviews and inquiries. Despite these reviews and a significant amount of work in developing potential refinements, the legislative framework for managed investment schemes has remained largely the same. Our response to specific recommendations made about agribusiness managed investment schemes can be found in Appendix 2.

198 Considerable work has been undertaken by CAMAC in relation to proposals for reform regarding managed investment schemes that are under financial stress, and into the regulation of those schemes more broadly. We have had significant input into this review. We consider that any reform proposal for forestry schemes should consider the proposals put forward by CAMAC as a result of its review.

> Note: CAMAC has also released a second discussion paper, *The establishment and operation of managed investment schemes*, in March 2014. The key principle underlying CAMAC's views within the discussion paper is that the regulatory regime for managed investment schemes should be aligned with that for companies, unless there are compelling reasons for treating schemes differently.

199 While there may be a basis for legislative reform in forestry schemes, we recommend caution in making legislative reform based on problems in a small part of the managed investment scheme sector.

Note: We note the distinction made in the CAMAC report between pooled schemes and common enterprise schemes, which historically include forestry schemes.

200 The CAMAC report outlined a series of proposals to address issues about:

(a) changing the responsible entity of a viable scheme;

(b) restructuring a financially stressed scheme;

(c) winding up a scheme; and

(d) other proposals to improve Ch 5C of the Corporations Act.

Actions by ASIC

201 We have taken a number of actions to address the risks highlighted by the collapse of responsible entities, including responsible entities of forestry schemes. These actions include:

(a) introducing benchmarks and disclosure principles for agribusiness schemes, as outlined in RG 232, and issuing guidance for investors about agribusiness schemes;

(b) revising the financial resource requirements of responsible entities of managed investment schemes in RG 166;

(c) revising the land-holding licence condition applied to responsible entities of forestry schemes in RG 133;

(d) conducting surveillance of responsible entities and disclosure in the sector; and

(e) contributing to the review of the managed investments legislation by CAMAC.

Legislative regime for managed investment schemes

202 As a result of (at least in part) the failure of a number of agribusiness managed investment schemes, CAMAC made a range of proposals to address issues arising in circumstances where schemes come under financial stress.

203 In its report, CAMAC distinguished between common enterprise schemes and pooled schemes. CAMAC acknowledged the significant issues arising in the context of common enterprise schemes, and proposed a prospective prohibition on common enterprise schemes and that consideration be given to the introduction of an alternate regime for the regulation of schemes in its

'separate legal entity' proposal. We believe these proposals warrant careful consideration, noting that we are of the view that the current arrangements for pooled schemes are adequate.

204 In principle, we also support a number of the CAMAC recommendations in the context of common enterprise schemes and believe that these also require careful consideration: see Table 3.

Table 3: CAMAC recommendations

Topic	Recommendation
Operation of the scheme	A definitive register of the affairs and property of the scheme should be maintained. The ASIC record of registration identifying the responsible entity or temporary responsible entity of the scheme should be definitive. Any provision in a scheme constitution, or otherwise, that affords a responsible entity an indemnity for any form of maladministration on its part in relation to that scheme should be unenforceable.
Changing the responsible entity of a viable scheme	An incumbent responsible entity or temporary responsible entity should provide reasonable assistance to a prospective responsible entity in certain circumstances. Controls should be introduced to prevent a responsible entity from becoming entrenched. The court should be given a general power to adjust the duties and liabilities of a temporary responsible entity to particular circumstances.
Restructuring a financially distressed scheme	A definition of an insolvent scheme should be included in legislation. A voluntary administration regime for insolvent schemes should be introduced.
Winding up a scheme	The court should have the power to give directions whenever it thinks it appropriate to do so, including in relation to any particular matter arising under the winding up of a solvent or insolvent scheme. The court should have the power to wind up a scheme if it is insolvent. Legislation should provide for a statutory order of priorities in the winding up of a scheme—based on that provided for companies in s556 and adjusted, where necessary, for schemes—and provide a first priority for payments to a temporary responsible entity.
Other matters	ASIC should not have the power to convene a meeting of members.

205 In March 2014, CAMAC released a further discussion paper on managed investment schemes as part of its ongoing review into the sector. The paper deals primarily with the establishment and ongoing operation of schemes and raises a broad range of governance, disclosure and regulatory issues. These matters also warranted consideration more broadly.

206 In addition to the CAMAC recommendations, we consider there are other areas of potential reform that warrant detailed consideration including those arising from the PJC inquiry into the collapse of Trio Capital. The committee recommended that the Government investigate options to:

(a) improve the oversight and operation of compliance plans and compliance committees and, in particular, the need for:

(i) more detail to be included in compliance plans;

(ii) qualitative standards by which compliance plan auditors must conduct their audits;

(iii) liability for the responsible entity and its directors for any contravention of the compliance plan, rather than only for material contraventions, as is currently the case;

(iv) legislative requirements for committee members to have certain experience, competence or qualifications;

(v) regulatory or member oversight of the appointment of compliance committee members;

(vi) an approval process for compliance plan auditors so that ASIC has the power to remove or impose conditions on such approval; and

(vii) governance arrangements to be clearly stated in relation to the proceedings of the compliance committee; and

(b) protect investors in the case of theft and fraud by a managed investment scheme, and to strengthen the regulatory regime by requiring higher standards of risk management systems for managed investment schemes, as envisaged by the St John inquiry into compensation for consumers of financial services. We support the introduction of higher standards of risk management systems and have outlined proposals for increased guidance for responsible entities in Consultation Paper 204 *Risk management systems of responsible entities* (CP 204).

Business models

207 RG 232 identified key risks that contributed to the collapse of responsible entities of agribusiness schemes, which perhaps were not highlighted to investors at the time they invested in these schemes. Many of these risks relate to the business models of the responsible entities and schemes involved, and there is room to consider options for reform of the legislative framework for the business models to improve investor protections.

208 If the recommendations of CAMAC are not adopted, we consider there is room for greater intervention in these schemes, such as requiring the business model to include particular elements to address the range of risk factors identified in RG 232. For example:

(a) requiring these schemes to have in place measures to ensure sufficient cash flow and capital are maintained within the scheme to meet its ongoing financial obligations;

(b) structuring the payments for leases in a way that protects investors' interests in the land and other assets required to operate the scheme, while also recognising the interests of the land owner; and

(c) enabling the more effective transfer of viable schemes away from a responsible entity in external administration.

Licensing arrangements

209 As outlined in paragraph 85, ASIC must grant an AFS licence to anyone who applies in accordance with s913B of the Corporations Act, subject to them meeting certain requirements.

210 We believe consideration should be given to whether:

(a) the licensing regime, which sets the threshold for obtaining an AFS licence relatively low and the threshold for cancelling an AFS licence relatively high, currently establishes appropriate entry criteria for AFS licensees;

(b) the current focus of the regime on the AFS licensee is adequate to enable ASIC to respond appropriately to misconduct by officers and representatives of a licensee as well as the licensee; and

(c) the licensing regime results in a gap between investor expectations and the requirements of the licensing regime.

211 Under the Corporations Act, a person or entity that carries on a financial services business in Australia must obtain an AFS licence from ASIC covering the provision of the relevant financial services, unless an exemption applies. A key exemption is for those who provide services as a representative of a licensee. Essentially, representatives are employees, directors, authorised representatives (including corporate authorised representatives) of the licensee. ASIC does not approve representatives. In addition, a person acting as an employee or agent is not themselves treated as providing the financial service of operating a registered management investment scheme.

212 This means that the AFS licensing regime generally focuses on the AFS licensee, rather than the directors, employees or agents in relation to operating a registered management investment scheme. However, officers involved in the decision making of a licensee are subject to tests of good fame and character (e.g. police checks) when a licence is granted. Also, when a licence is granted, and at other times in surveillance, there is an assessment of key persons nominated by the licensee for the relevant financial service business.

213 In addition, the conduct and disclosure obligations of the Financial Services Reform (FSR) regime are largely imposed on the AFS licensee (i.e. the entity), not the representatives who work for that entity.

214 This focus on the entity limits our ability to restrict individual participants in the financial services industry where, for example, they might have worked for another entity that, in turn, is suspected of engaging in questionable conduct.

215 Consistent with the economic philosophy underlying the FSR regime, the legislative framework is designed to let entities enter the market. We cannot refuse an application for an AFS licence for reasons beyond the relevant criteria (e.g. we cannot refuse to grant a licence on the basis of the licensee's proposed business model). At most, the licensing process seeks to ensure that an entity is confined to providing financial services that it has adequate resources and is competent to provide at the time of application. It does not involve an endorsement of the business models adopted by the applicant.

216 A key issue concerning the licensing regime is to what extent it should operate as a 'gatekeeping' mechanism to maintain market integrity and protect investors by keeping out participants who may otherwise lack the competence, integrity or resources (i.e. adequate financial resources, systems and processes) to provide the relevant financial services.

217 After a licence is granted, we only have the power to suspend or cancel a licence in limited circumstances, as set out in paragraphs 92–93.

218 Our decision to suspend or cancel a licence can be appealed to the Administrative Appeals Tribunal. In practice, ASIC has found it very difficult to establish before the Tribunal that a licensee will not comply with obligations in the future. This makes it difficult to remove licensees who may potentially cause investor losses in advance of an actual breach.

219 Licensing may create a gap between investor expectations and the actual requirements of the licensing regime, which has a relatively low threshold for obtaining an AFS licence, a relatively high threshold for removing a licence and a focus on the licensed entity, rather than the directors, employees or other representatives of that entity. Licensing does not mean that the licensee has been approved by ASIC or indicate some level of the quality of financial services provided by the licensee.

220 The current remedies for AFS licensees and their representatives could be more proportionate. The way key provisions are framed, and the remedies attaching to those provisions, do not always properly respond to the range of misconduct in the market place.

221 We see a range of misconduct in the financial services sector, in terms of the actors, products and behaviour involved. We also see a wide range in terms

of severity and impact on consumers and the market as a whole. It is an important principle of regulatory practice that the regulator can and does respond proportionately to conduct in the market.

Statutory compensation scheme

222 As outlined in our submission on the Financial System Inquiry (2014) interim report, we support consideration of the introduction of a limited statutory compensation scheme as part of a suite of measures to:

(a) improve competency and standards among financial advisers;

(b) address conflicts of interest; and

(c) increase access to safe and appropriate financial advice.

223 We do not have the direct power to award or compel the payment of compensation where the conduct of an AFS licensee has clearly caused direct financial loss to consumers. An independent statutory compensation scheme would supplement PI insurance and the formal determination of claims by EDR schemes.

224 There are different possible models for such a statutory compensation scheme but, at a minimum, we would expect that the scope of any scheme would be limited to cover non-prudentially regulated entities.

Appendix 1: ASIC action in the agribusiness schemes sector

225 Our submission to the PJC inquiry into agribusiness managed investment schemes (2009) (agribusiness inquiry) discussed a number of actions we have taken in the agribusiness schemes sector. These actions included:

(a) 67 individual surveillances into issues raised about agribusiness schemes in the three years leading up to 2009;

(b) a disclosure campaign aimed at addressing whether there was adequate disclosure by responsible entities of risks associated with their business models, resulting in corrective disclosure in relation to 12 schemes;

(c) 11 s13 investigations into responsible entities of agribusiness schemes since 1999, with a range of outcomes; and

(d) a specific review of the quality of advice and disclosure of agribusiness schemes in 2003 and publication of a report of our findings: see Report 17 *Compliance with advice and disclosure obligations: Report on primary production schemes* (REP 17). This report found that, in many cases, calculations and key assumptions underpinning projections were not supported by qualified independent experts.

226 Since 2009, we have increased our surveillance of the agribusiness schemes sector. Actions have included:

(a) surveillances of 10 large responsible entities managing between them 139 agribusiness schemes to confirm compliance with key AFS licence obligations, consider compliance and risk management arrangements, and review the continuous disclosure of these entities. This resulted in:

(i) three responsible entities taking action to rectify breaches of licence conditions or exiting the industry;

(ii) eight responsible entities improving their compliance arrangements;

(iii) all 10 responsible entities reviewing their risk management arrangements; and

(iv) corrective disclosure being made in relation to five PDSs;

(b) engagement with external administrators of responsible entities of agribusiness schemes;

(c) monitoring the actions of responsible entities winding up schemes;

(d) reviewing compliance by two responsible entities of forestry schemes with revised financial resource requirements; and

(e) a disclosure campaign aimed at addressing whether industry had adopted the disclosure guidance in RG 232. Our review found that, for

each of the PDSs issued after the implementation date for RG 232, there was substantive compliance with the guidance.

227 Since 1998, we have issued four final stop orders and 27 interim stop orders in relation to forestry scheme disclosure documents, and eight final stop orders and 51 interim stop orders on agribusiness schemes other than forestry schemes.

228 Since 2010, the AFS licences of six responsible entities of forestry schemes have been cancelled.

229 In respect of Timbercorp Securities Limited (Timbercorp) and Great Southern Managers Australia Limited (Great Southern), we also:

(a) tested whether the advice given to clients by their advisers was appropriate. We conducted surveillance of the top sellers of both the Timbercorp and Great Southern products and looked at advice provided between 2006 and 2009. We found there was not widespread mis-selling of these products; however, there were pockets of mis-selling and these were addressed through follow-up action, resulting in:

(i) one AFS licensee ceasing to provide financial services to retail investors;

(ii) four AFS licensees agreeing to additional or varied licence conditions about the maintenance of client files;

(iii) 15 AFS licensees writing to clients about the advice received and alerting the clients to the availability of IDR and EDR arrangements; and

(iv) ASIC pursuing banning actions against several advisers for the advice they provided in connection with Timbercorp and Great Southern products; and

(b) commenced s13 investigations into Timbercorp's and Great Southern's past actions, with a focus on whether any past actions of directors breached s180 (directors' duty of care and diligence) and s184 (directors' duty to act in good faith). We determined to take no further action as a result of our investigations.

Appendix 2: Summary of ASIC's response to recommendations from relevant previous inquiries

PJC inquiry into agribusiness managed investment schemes

230 The PJC inquiry into agribusiness managed investment schemes (agribusiness inquiry) was conducted in 2009. It considered a number of terms of reference with overarching reference to the collapses of Timbercorp Securities Limited and Great Southern Managers Australia Limited.

231 The agribusiness inquiry terms of reference were similar to those being considered in the current forestry schemes inquiry and included:

(a) business models and scheme structures of agribusiness schemes;

(b) the impact of past and present taxation treatments and rulings relating to agribusiness schemes;

(c) any conflicts of interest for the board members and other directors;

(d) commissions, fees and other remuneration paid to marketers, distributors, related entities and sellers of agribusiness schemes to investors (including accountants and financial advisers);

(e) the accuracy of promotional material for agribusiness schemes, particularly information relating to claimed benefits and returns (including carbon offsets);

(f) the range of individuals and organisations involved with agribusiness schemes, including the holders of the relevant AFS licence;

(g) the level of consumer education and understanding of agribusiness schemes;

(h) the performance of agribusiness schemes;

(i) the factors underlying the then recent agribusiness scheme collapses;

(j) the projected returns and supporting information, including assumptions on product price and demand;

(k) the impact of agribusiness schemes on other related markets; and

(l) the need for any legislative or regulatory change.

232 The agribusiness inquiry published its report in September 2009. The report contained three recommendations. Table 4 outlines the recommendations that were specific to ASIC and provides details of our response to the recommendations.

Table 4: Agribusiness inquiry recommendations

Recommendation	Our response
Recommendation 2 That the government amend the Corporations Act to require ASIC to appoint a temporary responsible entity when a registered managed investment scheme becomes externally administered or a liquidator is appointed.	We note that this is a matter for law reform. The Corporations Act currently provides that ASIC or a member of the scheme may apply to the court for the appointment of a temporary responsible entity of the scheme if the scheme does not have a responsible entity that is a public company that holds an AFS licence authorising it to operate the scheme.
Recommendation 3 That ASIC require agribusiness schemes to disclose the qualifications and accreditation of third parties that provide expert opinion on likely scheme performance.	In January 2012 we released RG 232 along with an investor guide about agribusiness schemes. RG 232 sets out ASIC's benchmarks and disclosure principles for improved disclosure to retail investors to help them understand and assess agribusiness schemes, while maintaining the flexibility of the public fundraising process. RG 232 contains a specific benchmark aimed at addressing this recommendation. In line with RG 232, a responsible entity of an agribusiness scheme should disclose on an 'if not, why not' basis whether they meet the following benchmark: Where the responsible entity engages an expert to provide a professional or expert opinion on the agribusiness scheme, and the expert opinion is disclosed to retail investors in a way that may lead them to place reliance on the expert's expertise, the responsible entity only engages an expert that is independent. In response to RG 232, the responsible entity should also disclose other information, including the qualifications and experience of the expert.

PJC inquiry into financial products and services in Australia

233 The PJC inquiry into financial products and services in Australia (financial services inquiry) was conducted in 2009. This inquiry considered issues associated with a number of financial product and services provider collapses, such as Storm Financial, Opes Prime and other similar collapses, with particular reference to:

(a) the role of financial advisers;

(b) the general regulatory environment for these products and services;

(c) the role played by commission arrangements relating to product sales and advice, including the potential for conflicts of interest, the need for appropriate disclosure, and remuneration models for financial advisers;

(d) the role played by marketing and advertising campaigns;

(e) the adequacy of licensing arrangements for those who sold the products and services;

(f) the appropriateness of information and advice provided to consumers considering investing in these products and services, and how the interests of consumers can best be served;

(g) consumer education and understanding of these financial products and services;

(h) the adequacy of PI insurance arrangements for those who sold the products and services, and the impact on consumers; and

(i) the need for any legislative or regulatory change.

234 The financial services inquiry published its report in September 2009. The report contained one recommendation that had implications for responsible entities of forestry schemes. Table 5 outlines the recommendation that was specific to ASIC's role and provides details of our response to the recommendation.

Table 5: Financial services inquiry recommendation

Recommendation	Our response
Recommendation 7 The committee recommends that, as part of its licence conditions, ASIC require agribusiness scheme licensees to demonstrate they have sufficient working capital to meet current obligations.	In 2011 we revised the financial resource requirements imposed on responsible entities of managed investment schemes. These requirements are addressed at paragraphs 70–73.

235 Compliance with financial resource requirements is generally considered whenever ASIC undertakes a surveillance of a responsible entity.

Appendix 3: Analysis of the current forestry schemes market

236 In our submission to the PJC inquiry into agribusiness managed investment schemes (agribusiness inquiry), we estimated that, since the introduction of the managed investment scheme regime in 1998, agribusiness schemes had raised approximately $8 billion. In the five years leading up to 2009, we estimated that approximately $5 billion was invested in agribusiness schemes by over 75,000 investors. Of this, we estimated forestry schemes represented approximately $3.7 billion.

237 At that time, ASIC's records indicated that 416 agribusiness schemes had been registered by 70 different responsible entities. Taking into account schemes that had been deregistered or wound up, there were 371 agribusiness schemes registered to operate in Australia. Those 371 included 198 forestry schemes.

238 Since then, there have only been a small number of forestry schemes offered to retail investors. In addition, we have seen a reduction in the number of registered forestry schemes as a result of the winding up and deregistration of a number of these schemes.

239 Table 6 shows the current population of forestry schemes registered with ASIC as at 1 August 2014.

Table 6: Current population of forestry schemes by status

Status	No. of forestry schemes
Registered	114
Winding up	21
Total	**135**

Source: ASIC registry.

240 ASIC's records show that there are currently 3,649 managed investment schemes with the status of 'registered'. Forestry schemes currently make up less than 4% of the number of schemes registered with ASIC.

241 Table 7 shows the number of forestry schemes registered in each financial year since 2007–08 compared to the total number of schemes registered in each financial year. The table also shows the drop-off in the number of forestry schemes registered by ASIC since the collapses in 2009.

Table 7: Number of forestry schemes registered compared to the total number of schemes registered, by financial year

Financial year	No. of forestry schemes registered	Total no. of schemes registered
2007–08	9	513
2008–09	9	293
2009–10	5	247
2010–11	3	236
2011–12	2	192
2012–13	2	211
2013–14	3	242

Source: ASIC registry.

242 ASIC's records show that there are currently 485 responsible entities authorised under an AFS licence to operate registered managed investment schemes. There are 17 responsible entities operating or winding up forestry schemes. Of these:

(a) seven are in external administration and subject to regular monitoring by ASIC;

(b) three have recently been the subject of surveillance for compliance with, among other things, financial resource requirements;

(c) one is in the process of considering the corporatisation of its schemes through member meetings; and

(d) one has no registered schemes and has applied to have its licence cancelled.

243 Table 8 sets out some key metrics for each of the significant responsible entities of forestry schemes that are currently in external administration. The information covers the entire agribusiness operations of the entity, including forestry and non-forestry managed investment schemes.

Table 8: Key metrics of collapsed responsible entities of forestry schemes

Responsible entity	Size of operations (ha)	No. of registered managed investment schemes	No. of growers	Funds raised ($m)	External administrator	Date of appointment
Timbercorp Securities Limited	120,000	11	18,400	1,095	KordaMentha	23 April 2009
Great Southern Managers Australia Limited	240,000	54	47,000	1,800	Ferrier Hodgson	26 May 2009
FEA Plantations Limited	71,000	18	14,000	426	BRI Ferrier	14 April 2010
Rewards Projects Limited	12,419	27	8,000	291	Ferrier Hodgson	16 May 2010
Willmott Forests Limited	53,000	8	8,000	400	PPB Advisory	16 October 2010
Gunns Plantations Limited*	223,000	51	48,984	1,800	PPB Advisory	25 September 2012

* Data includes nine of the former Great Southern schemes, with funds raised of $1.28 billion and 39,000 investors that Gunns acquired in December 2009.

Appendix 4: Related information—Confidential

To assist the Inquiry, ASIC has provided further information in a separate confidential appendix (Appendix 4).

The material in this appendix has been provided to the inquiry on a confidential basis so as not to prejudice ASIC's ongoing investigations or breach ASIC's legal obligations under s127 of the ASIC Act.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
agribusiness inquiry	PJC inquiry into agribusiness managed investment schemes (2009)
agribusiness scheme	A managed investment scheme that engages in primary production activities, including forestry
AS ISO 10002-2006	Australian Standard AS ISO 10002–2006 *Customer satisfaction—Guidelines for complaints handling in organizations* (ISO 10002:2004, MOD)
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ASIC-approved EDR scheme, EDR scheme or scheme	An external dispute resolution scheme approved by ASIC under RG 139
ASX	ASX Limited or the exchange market operated by ASX Limited
ATO	Australian Taxation Office
authorised representative	A person authorised by an AFS licensee, in accordance with s916A or 916B of the Corporations Act, to provide a financial service or services on behalf of the licensee Note: This is a definition contained in s761A.
CAMAC	Corporations and Markets Advisory Committee
CAMAC report	CAMAC's report, *Managed investment schemes* (2012)
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7)
common enterprise scheme	A managed investment scheme that involves the use of member contributions in a common enterprise that constitutes the scheme, without those contributions being pooled. Schemes of this type are typically established as contract-based arrangements, with scheme members playing an active entrepreneurial role to some degree

Term	Meaning in this document
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
distributor	Anyone who sells agribusiness schemes with or without providing advice. Distributors include AFS licensees, financial advisers and accountants
EDR	External dispute resolution
EDR scheme (or scheme)	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Credit Act (see s11(1)(a)) in accordance with our requirements in RG 139
external administrator	For a company, means a voluntary administrator, deed administrator, controller, provisional liquidator or liquidator. For a disclosing entity that is neither a company nor managed investment scheme, means the person taking responsibility for ensuring the disclosing entity is wound up in accordance with its constitution, rules and applicable laws
financial services business	A business of providing financial services Note: This is a definition contained in s761A of the Corporations Act. The meaning of 'carry on a financial services business' is affected by s761C.
financial services inquiry	PJC inquiry into financial products and services in Australia (2009)
financial services laws	Has the meaning given in s761A of the Corporations Act
Financial System Inquiry (2014)	The financial system inquiry announced in December 2013 to examine how the financial system could be positioned to best meet Australia's evolving needs and support Australia's economic growth
FOFA	Future of Financial Advice
forestry scheme	An agribusiness scheme involved in forestry
forestry schemes inquiry	Senate inquiry into forestry managed investment schemes (2014)
Great Southern	Great Southern Managers Australia Limited
grower	An investor in an agribusiness scheme

Term	Meaning in this document
IDPS	Investor directed portfolio service, as defined in [CO 13/763]
IDR	Internal dispute resolution
IDR procedures, IDR processes or IDR	Internal dispute resolution procedures/processes that meet the requirements and approved standards of ASIC under RG 165
interim report	*Financial System Inquiry: Interim report*, released by the inquiry on 15 July 2014
licensee obligations	The obligations of an AFS licensee as set out in s912A and 912B of the Corporations Act and the requirement to be of good fame and character as included in s913B of the Corporations Act; and the obligations of a credit licensee as set out in s47 and 48 of the National Credit Act
managed investment scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
marketer	Anyone who promotes agribusiness schemes, but does not sell the schemes
National Credit Act	*National Consumer Credit Protection Act 2009*
NTA	Net tangible assets required to be maintained by an AFS licensee as a condition of the licence
PDS	Product Disclosure Statement
PI insurance	Professional indemnity insurance
PJC	Parliamentary Joint Committee on Corporations and Financial Services
pooled scheme	A managed investment scheme that involves contributions by scheme members being pooled and becoming scheme property, for use in scheme investments or otherwise to operate the scheme. Schemes of this type are typically established as trust-based investment arrangements, with scheme members playing no active role in the affairs of the scheme.
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.

Term	Meaning in this document
provide a financial service	A person provides a financial service if they: • provide financial product advice; • deal in a financial product; • make a market for a financial product; • operate a registered scheme; or • provide a custodial or depository service Note: This is a definition contained in s766A of the Corporations Act.
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
responsible entity	Has the same meaning as in s9 of the Corporations Act. For a registered scheme, means the company named in ASIC's record of the scheme's registration as the responsible entity or temporary responsible entity of the scheme
retail client	A client as defined in s761G of the Corporations Act and associated Corporations Regulations
retail investor	For the purposes of this submission, a retail client who invests in an agribusiness scheme
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)
s601EB (for example)	A section of the Corporations Act (in this example numbered 601EB), unless otherwise specified
Timbercorp	Timbercorp Securities Limited
TOR	Terms of reference
unconscionable conduct	Conduct that is prohibited by s12CA and 12CB of the ASIC Act
Wallis Inquiry	Financial System Inquiry (1997)

Related information

Headnotes

AFS licensees, agribusiness, compensation, external administration, forestry, managed investment schemes, responsible entities

Regulatory guides

RG 79 *Research report providers: Improving the quality of investment research*

RG 105 *Licensing: Organisational competence*

RG 126 *Compensation and insurance arrangements for AFS licensees*

RG 133 *Managed investments and custodial or depository services: Holding assets*

RG 139 *Approval and oversight of external dispute resolution schemes*

RG 165 *Licensing: Internal and external dispute resolution*

RG 166 *Licensing: Financial requirements*

RG 174 *Externally administered companies: Financial reporting and AGMs*

RG 175 *Licensing: Financial product advisers—Conduct and disclosure*

RG 232 *Agribusiness managed investment schemes: Improving disclosure for retail investors*

Cases

Timbercorp Securities Limited v WA Chip & Pulp Co Pty Ltd [2009] FCA 901

Re Willmott Forests Ltd (ACN 063 263 650) (receivers and managers appointed) (in liq) and Others (No. 2) [2012] VSC 125

Rivercity Motorway Pty Ltd (administrators appointed) (Receivers and managers appointed) v Madden (No. 3) [2012] FCA 313

Consultation papers and reports

REP 240 *Compensation for retail investors: The social impact of monetary loss*

REP 17 *Compliance with advice and disclosure obligations: Report on primary production schemes*

Media and other releases

10-73AD *ASIC consults to improve agribusiness scheme disclosure* (8 April 2010)

12-09AD *ASIC releases investor guide and disclosure guidance for agribusiness schemes* (30 January 2012)

ASIC forms

Form 5100 *Application for registration of a managed investment scheme*

Form 5103 *Directors' statement relating to application for registration of a managed investment scheme*

Investor guides

Investing in agribusiness schemes? Independent guide for investors about agribusiness schemes, January 2012