Thynne Macartney

KIDWORTH STATION CASE STUDY SUBMISSION

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Introduction

Thynne + Macartney commends James Walker on the Agrihive and Kidworth Station Case Study initiatives and appreciates the opportunity to present this submission.

Thynne + Macartney is a proudly independent, commercially-focused law firm with offices in Brisbane and Sydney. Founded in 1893, the firm has established a reputation for partnering with its clients to provide value beyond mere legal advice. Our modern business practices support innovation and provide direct access to some of Australia's most experienced lawyers in their fields. Thynne + Macartney's lawyers place great emphasis on understanding the specific objectives of their clients, taking a commercial approach and delivering value for money.

Agribusiness team

Thynne + Macartney's Agribusiness team, headed by partners, Bill Loughnan, Peter Kenny and Ari McCamley, services the entire spectrum of businesses involved in primary production, from listed companies to family operations and small to medium enterprises. The firm has the largest rural client base of any in Australia with more than 1,200 clients operating in the rural sector in Queensland, the Northern Territory and the border areas of northern New South Wales.

In recent times, the firm has acted in many of Queensland and the Northern Territory's headline rural property transactions, including multi-million dollar sales and purchases for the following clients:

▪ Australian Pastoral Group	▪ Camm Agricultural Group
▪ Clyde Agriculture Ltd	▪ Consolidated Pastoral Company Pty Limited
▪ The North Australian Pastoral Company Pty Limited	▪ Paraway Pastoral Company Limited (Macquarie Pastoral Fund)
▪ PrimeAg Australia Limited	▪ S. Kidman & Co Ltd
▪ Stanbroke Pty Ltd	▪ Western Grazing Company

Thynne + Macartney's Agribusiness team has particular expertise in:

- sales and purchases of grazing and farming properties, including pre-contract advice, structuring of purchasing entities, contract negotiation, due diligence and applications for governmental approvals
- sales and purchases of water entitlements, livestock and other rural business assets
- auctions and tender processes and documentation

- resource management arrangements, including leases, agistment agreements, horticultural licences, share farming agreements and management and consultancy agreements
- the unique land tenures in rural Australia and tenure conversion
- land access and compensation arrangements for resources activities and statutory resumptions
- succession planning for and restructures of family-owned and corporate agricultural businesses
- livestock export and livestock processing agreements
- vegetation clearing and other environmental regulations
- native title and Aboriginal cultural heritage
- taxation and revenue implications of transactions, including transfer duty, land tax, GST and CGT

Case Study Submission

Thynne + Macartney supports the Kidworth Station Case Study initiative because we recognise the potential for better collaboration between agricultural businesses in Australia and the potential profits for businesses than can identify and exploit emerging opportunities while managing the perennial challenges of agriculture.

We will leave it to the entrepreneurs responding to the Case Study to suggest the enterprise development and marketing initiatives that could increase the Kidworth family's revenues.

It is clear that unless a fundamental improvement in the Kidworth family's revenues from its current assets can be achieved, the Kidworth enterprise will need to be restructured to become sustainable.

As lawyers to rural Australia, we will, drawing on our experience acting for successive generations of farming families, focus on the broader issues the Kidworth family should consider when developing and executing a plan to achieve resilience and sustainability.

What are the family's objectives/options?

Rob, Marg and Chelsea should first consider their personal objectives.

It might be that Rob and Marg are looking to move into town, or to a smaller block, and transition to retirement. Chelsea, having already left the family property, may have decided to pursue an alternative career with a potential continuing connection to her rural heritage.

The Kidworth family also needs to quickly ascertain its existing financier’s support for both the current enterprise and any proposed plans. Without that support, the family will either need to look for alternative debt finance or adopt a plan that involves increased reliance on external equity.

The following are examples of the way in which families in agriculture have dealt with similar challenges. Each example should be considered in the context of the others. One or more options might ultimately be combined to achieve the Kidworth family's objectives.

	Outright sale of property	Sale of property with leaseback	Sale of interest in property to form joint venture
Examples	▪ Market and sell the property to a third party	▪ Sell land to extract remaining equity and capitalise a stock-owning enterprise operating on a lease of the land from the buyer	▪ Joint venture with passive investor (for example, foreign fund or institution) ▪ Joint venture with strategic synergies (for example, with a neighbour or an investor with existing business interests in other parts of the supply chain)
Benefits	▪ Immediate return of capital ▪ Avoids the costs and risks associated with further borrowings to fund other proposals ▪ Equity realised from sale could provide Rob and Marg's retirement and a start for Chelsea in a new business venture	▪ Immediate return of majority of capital ▪ Business continuity (preservation of intellectual property and business systems) ▪ Maintenance of connection with property ▪ Secure tenure for a period of time to allow the family members to transition to next stages of their lives/careers	▪ Replacing debt with equity reduces debt servicing requirements ▪ Business continuity (preservation of intellectual property and business systems) ▪ Maintenance of connection with property ▪ Ability to utilise skills and economies of scale provided by joint venture partner
Disadvantages	▪ Connection to family property lost ▪ Net proceeds of sale may not be sufficient to meet each family member's future requirements or meet capital requirements of future business initiatives	▪ Financial security of the family remains tied to seasonal conditions ▪ Livestock prices likely to be high once rain event occurs resulting in high cost base for replacement livestock	▪ Greater responsibility and accountability to external stakeholders ▪ Need to develop mechanisms to share control
Externalities	▪ Challenging market conditions across Queensland ▪ May be able to increase marketability if offered for sale with neighbouring properties		▪ Attractiveness to investors (scale, diversification and business synergies)

	Outright sale of property	Sale of property with leaseback	Sale of interest in property to form joint venture
Important considerations	▪ Seller due diligence ▪ Engagement of suitable professional advisors ▪ Identifying target market and prospective purchasers ▪ Choice of agent and mode of sale	▪ Seller due diligence ▪ Engagement of suitable professional advisors ▪ Identifying target market and prospective purchasers ▪ Choice of agent and mode of sale ▪ Sustainability of lease arrangements ▪ Terms of lease	▪ Finding the “right” equity with compatible and aligned expectations ▪ Seller due diligence ▪ Engagement of suitable professional advisors ▪ Terms of joint venture, including exit mechanisms ▪ Exit strategy

	Sale of part of property	Refinance	Lateral Diversification
Examples	▪ Sell part of the property (after potential boundary reconfiguration)	▪ Concessional start-up (for Chelsea) or exceptional circumstances loans from QRAA at concessional interest rates ▪ Chelsea might be able to access finance to fund an acquisition of the remaining herd or an interest in the property, which might enable her to explore some of the other options presented in this submission	▪ Eco-tourism or farm stay ▪ Declaration of conservation area/environmental offset arrangement ▪ Carbon farming ▪ Wind farming ▪ Off-farm employment

	Sale of part of property	Refinance	Lateral Diversification
Benefits	▪ Immediate return of some capital ▪ Reduction in scale of enterprise to be financed and managed	▪ Ability to acquire replacement livestock ▪ Reduced cost of debt	▪ Regular source of income and/or immediate capital injection ▪ Reduced reliance on seasonal conditions and commodity prices
Disadvantages	▪ Reduced production capacity and economies of scale ▪ Potential reduction in marketability of property upon future sale	▪ Continued reliance on debt finance for an already heavily-indebted enterprise	▪ Potential capital requirements for establishment ▪ Ongoing compliance costs ▪ Potential reduction in production capacity ▪ Time commitments
Externalities	▪ Economic viability of sale portion (unless sold to a neighbour)	▪ Demonstrable ability to service new debt ▪ New financier's loan approval criteria ▪ Support of existing financier	▪ Suitability will depend on geographic and other factors ▪ Skill-set and employability of each family member
Important considerations	▪ Seller due diligence ▪ Engagement of suitable professional advisors ▪ Identifying target market and prospective purchasers ▪ Choice of agent and mode of sale	▪ Servicing ability ▪ Choice of suitable lender and facility ▪ Priority arrangements with existing financier ▪ Security requirements	▪ Compatibility with existing enterprise and planned developments ▪ Compatibility with third parties involved

Considerations in dealings with existing financier

Ultimately, the Kidworth family's plan is likely to involve the repayment of most, if not all, of the existing debt. It might also involve new borrowings from the family's existing financier or a new lender.

In circumstances such as those faced by the Kidworth family, family businesses often ask how they can compel their existing financier to offer support in the form of bridging finance, deferred interest, debt forgiveness or simply time to restructure or recover.

In almost every situation, the best starting point will be to try to maintain open and effective channels of communication with the existing financier. It will generally be much more cost effective to execute a plan with an existing financier's support, and the chances of successfully executing that plan will be exponentially higher.

In circumstances where that communication breaks down or the bank's support is questionable, there are three legal pathways that might assist to resolve deadlocks.

1. Litigation

Although it would typically be a last resort, a borrower may be able to challenge loan agreements, guarantees, mortgages and other security documents. A common obstacle to success is that the suite of interlocking documents will have been drafted for the bank by the bank. Usually, by the time the relationship with the bank is coming to an end, the borrower has usually signed its life away.

Success will generally turn on whether the borrower can demonstrate some "special disadvantage" and some objectionable conduct by the bank which overtook the borrower's will or ability to make decision for itself and was to the borrower's detriment. For example, the borrower might argue that bank's conduct was unconscionable because it loaned moneys in circumstances where it should have known that the only way to repay the loan would be to sell the mortgaged property (not from income).

However, there is a strong presumption that anyone who signs a document has read it and understood it. The costs and time involved in litigation against a bank would also defeat most. From claim to trial, legal costs could be in excess of $250,000. Further, a bank would ordinarily have the ability to appoint a receiver to sell the borrower's property early on so that the fight, in the end, would only be about an award of monetary damages rather than the survival of the business.

2. Financial Ombudsman Service

Most banks subscribe to the Financial Ombudsman Service Terms of Reference (TOR). The TOR are legally enforceable as an external dispute resolution process.

The TOR provide that the bank must have an internal dispute resolution process and FOS operates as an external dispute resolution service.

Unfortunately, the Financial Ombudsman Service of limited use to many primary producers because the jurisdiction has several tests to qualify, including a $500,000 monetary jurisdiction (within which the Financial Ombudsman Service can only order relief up to $260,000). For most agricultural businesses to obtain meaningful relief from a bank, the bank would need to set aside debt or security worth more than $500,000.

Further, there is a residual discretion within the TOR for the Financial Ombudsman Service to elect not to deal with a complaint if the Financial Ombudsman Service feels the complaint is too complex or its resources would be taken up.

To try and avoid falling foul of jurisdictional limit, complaints can sometimes be framed as seeking an investigation only into the conduct of a bank (in breach of the Code of Practice etc), and not for a specific dollar amount. The resulting jurisdictional arguments can be complicated, time consuming and costly.

3. Queensland Farm Finance Strategy

The Queensland Farm Finance Strategy is an initiative involving the Queensland Farmers Federation, AgForce Queensland and the Australian Bankers' Association. It is a subscription scheme but most banks that lend to primary production businesses subscribe.

The Strategy only applies to borrowers with debts between $50,000 and $10,000,000.

One of the Strategy's objectives is to promote resolutions of disputes including by a mediation service (and mediation protocols are included with the Strategy). The form of relief is usually limited to forbearance arrangements giving the borrower a limited period of time to restructure or recover. Under these arrangements, the bank agrees to hold off, but at the same time seeks acknowledgements and undertakings from the borrowers/ guarantors that the bank's security is enforceable and that possession will voluntarily be handed over in case of a default. As such, the deals are usually "double-edged swords".

The Strategy strongly encourages rural operators to take specialist independent legal and accounting advice at all stages, from borrowing to dispute resolution.

The Strategy also protects the bank's underlying interests and it provides that the bank is not stopped from taking enforcement action if the bank considers assets are at risk of dissipation or diminution in value.

Conclusion

The Kidworth family's financial situation is not dissimilar to that of many family-owned primary production businesses in rural Australia. If anything, the Kidworth family's affairs are simplified by the fact that there is only one member of the next generation to consider. Many families must not only address the challenges facing the Kidworth family but also, often concurrently, manage the expectations of several members of at least two generations.

We hope that initiatives such as the Kidworth Case Study assist producers to identity the opportunities in every situation and encourage greater dialogue within the industry.

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