

# Chapter 8

## Reforms

8.1 As property investment advice is outside the regulatory framework for other financial services, people who provide such advice are not required to be licensed or to meet any standard of education or training.

8.2 In this chapter, the committee considers the adequacy of the regulatory regime for investment property advice and recommendations for legislative changes intended to improve consumer protection available to investors, for both direct and indirect property investments.

### **Investing in property and consumer protection**

8.3 Almost 10 per cent of Australians invest in property,<sup>1</sup> but there are no specific laws protecting Australians from receiving bad property investment advice. Instead, there are various national and state and territory laws which may, depending on the circumstances, protect consumers.

8.4 The different treatment of property regulation is largely a legacy of constitutional powers, as the states and territories have residual power in relation to real estate property. Thus the power to regulate property has remained with the states and territories, and real estate property is not defined as a financial product under the Corporations Act.<sup>2</sup> In contrast, the states and territories referred their constitutional powers to the Commonwealth for financial products regulated under the Corporations Act. As such, advice provided to investors in Market First's schemes who invested through off-the-plan contracts of sale would not have been covered by the Corporations Act, as off-the-plan developments are regulated by the state and territory governments. As discussed earlier, ASIC has commenced proceedings in the Federal Court of Australia in relation to 21<sup>st</sup> Century Group's land banking schemes offering options, arguing that the schemes are unregistered managed investment schemes and the 21<sup>st</sup> Century Group companies and Mr McIntyre have been unlawfully carrying on an unlicensed financial services business.

### ***Australian Consumer Law***

8.5 The Australian Consumer Law (ACL) covers consumer protection and fair trading, and replaced a wide range of national and state and territory laws which previously existed. The ACL commenced on 1 January 2011 and is jointly

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1 Reserve Bank of Australia, 'Proportion of Investment Housing Relative to Owner-Occupied Housing', June 2015, <http://www.rba.gov.au/publications/submissions/inquiry-into-home-ownership/proportion-investment-housing-relative-owner-occ-housing.html>.

2 Section 763B, *Corporations Act 2001*.

administered by the states and territories and the national government (through the Australian Competition and Consumer Commission (ACCC)). Under the *Australian Securities and Investments Commission Act 2001*, ASIC administers mirrored consumer protection provisions to financial products and services.

8.6 The state and territory governments regulate property transactions, including the conduct of licensed real estate agents. While licensed real estate agents are subject to disclosure and conduct requirements, these do not apply to (unlicensed) property spruikers and do not regulate property investment advice.

8.7 State and territory regulation of property transactions vary slightly from jurisdiction to jurisdiction. Some states are active in attempting to address misconduct that is occurring in the real estate sector. For example, Consumer Affairs Victoria informed the committee about protections under the *Sale of Land Act 1962* (Vic) (Victorian Sale of Land Act) to address schemes which were promoted by property spruikers in the early 2000s, including vendor terms and rent-to-buy schemes:

The protections under this act include a right for purchasers who enter vendor terms contracts to require vendors to transfer land in exchange for a mortgage back. The vendor terms contracts are those where a purchaser makes multiple payments to a vendor before a property is transferred to them. The Sale of Land Act also prohibits sellers from mortgaging their property after they have entered into a vendor terms contract and entitles buyers to recover their moneys where this occurs. The protections in the Sale of Land Act for off-the-plan sales include limiting the deposit to 10 per cent, requiring any moneys paid by a buyer to be held in trust and giving buyers the right in certain circumstances to rescind a contract and receive a refund for any moneys they have paid.<sup>3</sup>

8.8 While the Victorian Government has regulated to address loopholes in the Victorian Sale of Land Act for past spruiking schemes, it has not yet responded to the concerns raised about land banking schemes. Instead, Mr Cohen from Consumer Affairs Victoria told the committee the land banking schemes would be considered in a review of the Victorian Sale of Land Act as part of a broader review of the Victorian consumer property regulatory framework.<sup>4</sup> The review will be conducted by Consumer Affairs Victoria and focus on:

- the sale of land and real estate transactions in Victoria;
- the management, powers and functions of owners corporations; and

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3 Mr Simon Cohen, Director, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 1.

4 Mr Simon Cohen, Director, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 2.

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- licensed professionals who assist with the sale of land and real estate transactions, and professional owners corporations and managers.<sup>5</sup>

8.9 Under its terms of reference, the review does not have a specific focus on the unlicensed persons who assist with the sale of land in Victoria.<sup>6</sup> In considering the concerns posed by land banking schemes, which have mostly been located in Victoria, it may be of value for the review to investigate the regulations governing persons who are currently unlicensed but who are influential in the sale of land and the provision of property investment advice.

8.10 The ACCC informed the committee that generally:

...with fair trading agencies at a State/Territory level, the ACCC is more likely to pursue matters that involve national conduct and/or involve national traders, whereas fair trading agencies may be more likely to target the conduct of businesses and individuals where the conduct is contained, originating or primarily within their State or Territory.<sup>7</sup>

8.11 Although the schemes covered by the committee's inquiry were mainly located in Victoria (one was in Queensland and there was the proposed development in the Pilbara, Western Australia), the marketing of those schemes extended beyond that state's borders. Clearly there is a national aspect to land banking schemes.

8.12 Mr Cohen, Director of Consumer Affairs Victoria, acknowledged that the ACL provides some protections to investors who get caught up in schemes that are marketed in misleading or deceptive ways.<sup>8</sup> When expressing concerns about property spruikers, Mr Cohen also noted that their conduct includes conduct that is outlawed by the ACL with regard to false or misleading representations and unconscionable conduct.<sup>9</sup>

8.13 One of the general protections available under the ACL is against misleading or deceptive conduct. Section 18 of the ACL prohibits a person, in trade and commerce, from engaging in misleading or deceptive conduct. While this section is drafted broadly, the penalties for such conduct are weaker than those under the

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5 The Hon. Jane Garrett, MP, Victorian Minister for Consumer Affairs, Gaming and Liquor Regulation, 'Long Overdue Review of Consumer Property Acts', Media release, 21 August 2015.

6 Consumer Affairs Victoria, 'Consumer property law review', <https://www.consumer.vic.gov.au/resources-and-education/legislation/public-consultations-and-reviews/consumer-property-law-review> (accessed 25 January 2016).

7 ACCC, answer to written question on notice, Nos. 7–9, p. 4.

8 *Committee Hansard*, 30 September 2015, p. 4.

9 *Committee Hansard*, 30 September 2015, p. 3.

Corporations Act or elsewhere in the ACL—civil penalties and criminal sanctions do not apply, but remedies include injunctions, damages and compensatory orders.<sup>10</sup>

### ***The Corporations Act***

8.14 In contrast, advice on financial products, such as securities and managed investments, is regulated under the Corporations Act, which is enforced by ASIC. Moreover, the FOFA reforms and continuing attempts to increase the professional and ethical standards of financial advisers have significantly strengthened the consumer protection regime around the provision of financial advice. Property investors do not enjoy the same level of protection.

8.15 Moreover, further reforms are contemplated in the financial services sector as indicated in the government's response to the Financial System Inquiry. They include developing legislation to:

- confer on ASIC a product intervention power;
- allow ASIC to ban individuals from management positions within financial firms; and
- replace the term 'general advice' with one that clarifies the distinction between product sales and financial advice.

### ***Delegations between the ACCC and ASIC***

8.16 The delineation of ASIC's and ACCC's regulatory responsibilities in relation to property investment matters is not always clear-cut. The ACCC advised the committee that the two agencies do, however, have the capacity to delegate powers in relation to specific matters or to establish standing cross delegations in relation to particular areas. It also noted that ASIC and ACCC were currently engaged in discussions about the possibility of cross delegations in relation to property investment matters.<sup>11</sup>

## **Developments in Australia's consumer law**

8.17 Reviews conducted by various governments and regulators over the past two decades have recognised that some advice on direct property investment provided by financial advisers, accountants, real estate agents and spruikers is similar to advice provided by financial services professionals on securities and managed investments. On this basis, those reviews have argued, to varying degrees, that it would be both fair and efficient to regulate property investment advice on the same basis as other

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10 ACL (Schedule 2 of the *Competition and Consumer Act 2010*), Chapter 5. Also refer to the findings of the Victorian Parliament Law Reform Committee, *Inquiry into Property Investment Advisers and Marketeers*, Final Report, April 2008, p. 70.

11 ACCC, answer to written question on notice, No. 9, p. 5.

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investment advice as defined in the Corporations Act.<sup>12</sup> Despite this recognition, there has been little progress in strengthening the regulatory regime for property investment advice or bringing it broadly into line with the significantly stronger regulatory regime for non-property investment advice.

8.18 Several of the major reviews, inquiries and other developments that relate to or have addressed the regulation (or lack thereof) of property investment advice are outlined below.

### ***The Wallis Inquiry***

8.19 The Wallis Financial System Inquiry in 1997 considered that real estate agents who promoted negatively-g geared investment packages were providing retail financial advice and recommended that the adequacy of the regulation of property investment advice be reviewed:

The existing regulation of real estate agents should be reviewed. Real estate agents providing investment advice should be required to hold a financial advisory licence unless the review clearly establishes the adequacy of existing regulation.<sup>13</sup>

### ***ASIC's 1999 review of the financial advising activities of real estate agents***

8.20 In 1999, following the recommendation made by the Wallis Financial System Inquiry, ASIC reviewed the financial advice provided by real estate agents for direct property investment. ASIC distinguished between three different types of advice provided by real estate agents:

- (a) information about the property itself, such as title details, sale or expected price and details relating to the sale transaction;
- (b) general information or advice relating to the financial viability of a real estate transaction such as likely capital gains, likely rental income and marketability of the property; and
- (c) advice about the suitability of the investment to a particular intending purchaser which is or purports to be tailored to the particular circumstances of the purchaser, such as the affordability of the purchase based on the purchaser's income and taxation circumstances and negative gearing benefits.<sup>14</sup>

8.21 In this report, the committee is concerned with the types of advice provided in categories (b) and (c). ASIC was of the view that the argument for comparable

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12 Sections 762A, 763A and 764, *Corporations Act 2001*.

13 Australian Government, *Financial System Inquiry Final Report*, March 1997, p. 37, Recommendation 16.

14 ASIC, *Review of the Financial Advising Activities of Real Estate Agents—Interim Report*, July 1999, pp. 16–17.

regulation (with financial services legislation) through greater regulatory intervention was strongest in respect of category (c).<sup>15</sup>

8.22 ASIC found that there was a strong functional similarity between financial advice about real estate and securities for two main reasons:

- although the underlying products—real estate and securities—have product specific differences, the financial considerations that have a direct bearing upon any decision to acquire, hold or divest such products are often the same (for example, the financial circumstances or investment needs of the investor); and
- investments in real estate and securities are interchangeable investment alternatives.<sup>16</sup>

8.23 ASIC's report did not consider the regulation of other people who also provide financial advice on real estate, referred to as 'real estate marketers'. ASIC noted, however, that it had become aware of significant concerns regarding the activities of these marketers. In its view, there appeared to be no logical reason for such persons being exempt from similar regulatory regimes where the potential effect of their activities on consumers was akin to that of the activities of real estate agents.<sup>17</sup> Concerns about the activities of property investment spruikers have been reported to ASIC and the ACCC for many years.

### ***Mr Henry Kaye's misleading and deceptive conduct***

8.24 In October 2003, the ACCC instituted legal proceedings against Mr Henry Kaye and his company, the National Investment Institute Pty Ltd, alleging misleading and deceptive conduct over the promotion of a 'millionaires' property investment strategy.<sup>18</sup>

8.25 Mr Kaye was a provider of property investment courses through the National Investment Institute (NII). The primary program was called the 'Investment Mastery Program', a 12-month property investment strategy course that cost at least \$15,000.<sup>19</sup>

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15 ASIC, *Review of the Financial Advising Activities of Real Estate Agents—Interim Report*, July 1999, p. 17.

16 ASIC, *Review of the Financial Advising Activities of Real Estate Agents—Interim Report*, July 1999, p. 14.

17 ASIC, *Review of the Financial Advising Activities of Real Estate Agents—Interim Report*, July 1999, p. 10.

18 ACCC, 'ACCC institutes against Henry Kaye, National Investment Institute Pty Ltd over property investment "Millionaires" promotion', 1 October 2003, <http://www.accc.gov.au/media-release/accc-institutes-against-henry-kaye-national-investment-institute-pty-ltd-over-property> (accessed 6 January 2016).

19 *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 at paragraph 4.

In September 2003, Mr Kaye launched his 'Henry Kaye \$1 million' challenge, which consisted of free seminars where Mr Kaye would choose one attendee from each seminar and teach them 'to become property millionaires, in six months'.<sup>20</sup> Mr Kaye also claimed that he would turn 1,000 ordinary Australians into property millionaires within 12 months.<sup>21</sup> In radio and newspaper advertisements, Mr Kaye expanded on his promise:

The critics say Henry Kaye can't turn ordinary Australians into millionaires...

Well, be there when he proves them wrong!

He'll teach five volunteers to become property millionaires, in just 6 months ...without using their own money, or taking on the risk of debt.

And if he fails, he'll give a MILLION DOLLARS to charity.<sup>22</sup>

8.26 In its decision on this case, the court noted the contents of such advertisements and found that Mr Kaye and the NII had engaged in misleading and deceptive conduct, that:

- the strategies did not enable ordinary Australians to become millionaires;
- neither Mr Kaye nor NII had reasonable grounds for claims that an ordinary Australian would, if they followed Mr Kaye's strategies, become a millionaire; and
- neither Kaye nor NII had reasonable grounds for claims that five volunteers provided training by Mr Kaye would become property millionaires in six months without using their own money or taking on a risk of debt.<sup>23</sup>

8.27 The then ACCC Chairman, Mr Graeme Samuel, announced that the court's decision 'stands as a warning to all other property investment spruikers and the general public that the ACCC will not hesitate to take court action where it feels that consumers have been deceived by untruthful advertising'.<sup>24</sup>

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20 *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 [6].

21 *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 [6].

22 *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 [7].

23 *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 and ACCC, 'Federal Court finds Henry Kaye misled over 'millionaires' advertising', 22 October 2004 <http://www.accc.gov.au/media-release/federal-court-finds-henry-kaye-misled-over-millionaires-advertising> (accessed 6 January 2016).

24 ACCC, 'Henry Kaye drops Full Federal Court appeal against ACCC', 5 April 2005 <http://www.accc.gov.au/media-release/henry-kaye-drops-full-federal-court-appeal-against-accc> (accessed 6 January 2016).

8.28 As noted earlier, the penalties available for breaches under the misleading and deceptive provisions (including under the equivalent pre-ACL provisions) are not as broad ranging as those available under the Corporations Act. While the ACCC was granted an injunction and declaratory relief to mark the court's disapproval of the conduct, the judge declined to order Mr Kaye to conduct a corrective advertising campaign, as it would be 'punitive'.<sup>25</sup> The ACCC therefore had a mostly successful outcome from the case but there was no relief for Mr Kaye's victims who suffered financially, both from the fees paid to attend related seminars and the poor advice provided to attendees.

### *Ministerial Council on Consumer Affairs working party, 2003–2006*

8.29 In 2003, the intergovernmental Ministerial Council on Consumer Affairs (MCCA) established a working party to develop a regulatory framework for advice about property investment. The Ministerial Council comprised national, state and territory consumer affairs ministers.

8.30 The working party released a discussion paper in August 2004 outlining three options for regulatory reform: maintaining the existing regulatory framework, but placing greater emphasis on its use; a 'medium intensity' regulatory scheme with additional disclosure and conduct requirements for advisors; and a 'high intensity' licensing regime for advisors with mandatory training and competency requirements, as well as disclosure and conduct requirements.<sup>26</sup>

8.31 In 2006, following a subsequent consultation process, the Ministerial Council reported that the states and territories supported a national approach, with a national regulatory regime for property investment advice, but the federal government wanted to continue to investigate other, more light-touch options for reform. There was no further mention of the matter in the Ministerial Council's communiques, and subsequent inquiries by a Victorian parliamentary committee revealed that jurisdictions were ultimately unable to reach agreement on the level of intervention required in the market.<sup>27</sup>

8.32 The lack of progress by the MCCA was evidently a source of frustration for some industry observers and participants. In its 2008 review of Australia's Consumer Policy Framework, the Productivity Commission quoted the Real Estate Institute of Australia, which had observed:

...in August of 2003 as a result of the Henry Kaye activities, MCCA, quite rightly in our view...decided to review licensing of property investment

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25 *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 [205].

26 See Victorian Parliament Law Reform Committee, *Inquiry into Property Investment Advisers and Marketeers*, Final Report, April 2008, pp. 2–3.

27 Victorian Parliament Law Reform Committee, *Inquiry into Property Investment Advisers and Marketeers*, Final Report, April 2008, p. 3.



advisers...in March 2007 we are still waiting on the report from MCCA, nearly four years after the event. This is simply not good enough and the reasons for this inactivity should be addressed.<sup>28</sup>

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

8.33 In 2005, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) tabled a report, *Property Investment Advice—Safe as Houses?* In its report, the committee recognised that property was a very important asset class in Australia yet the property investment advice profession seemed 'poorly organised and developed when compared with other areas of investment advice such as the financial planning profession'.<sup>29</sup> It found:

Unfortunately many consumers have learnt, to their cost, their investment in property can be a complex matter, with considerable risks for the uninitiated.<sup>30</sup>

8.34 In addition to a number of recommendations aimed at strengthening consumer protections against property spruikers, improving financial literacy with regard to property investment, and improving lending practices as they applied to investment properties, the PJC's recommendations included:

- that the regulation of property investment advice, but not of real property or real estate transactions generally, should be a Commonwealth responsibility;
- that Chapter 7 of the Corporations Act be amended to include real property as a separate asset class;
- that a definition of property investment advice be inserted into the Corporations Act—this definition, it was suggested, would make clear that property investment advice encompasses representations about the future value of, or income from, a property, but would not include statements about the past or present income from the property; and
- that anyone providing property investment advice should have an AFSL (with some specific exceptions made for certain professionals and circumstances).<sup>31</sup>

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28 Productivity Commission, *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report, Volume 2—Chapters and Appendixes, No. 45, 30 April 2008, p. 55, <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf> (accessed 5 January 2016). See also, Real Estate Institute of Australia, Submission on Review of Australia's Consumer Policy Framework, 11 May 2007, paragraph 46 which stated 'Some four years after the event, the real estate industry is still awaiting a report from MCCA. Meanwhile, property investment 'advisers' often referred to as spruikers, may continue to operate in the marketplace'.

29 Parliamentary Joint Committee on Corporations and Financial Services, *Property Investment Advice—Safe as Houses*, June 2005, paragraph 2.17.

30 Parliamentary Joint Committee on Corporations and Financial Services, *Property Investment Advice—Safe as Houses*, June 2005, paragraph 2.19.

8.35 The PJC report noted that instituting barriers to entry for those advising on property investment, through requiring a licence, would assist regulators to enforce standards in the sector:

A better solution would be to make it difficult for spruikers to commence operating in the first place, and to continue operating, by giving regulatory agencies the abilities to act quickly and proactively. The Committee considers that including real property under FSR [Financial Services Regulation] will mean that spruikers promoting property will need an AFS licence and be subject to all the related codes of conduct and probity. While no absolute guarantee against unscrupulous behaviour, it will be much more difficult for spruikers to operate.<sup>32</sup>

### *Victorian Parliament Law Reform Committee's review*

8.36 In 2008, the Victorian Parliament's Law Reform Committee undertook a comprehensive analysis of the regulatory framework for property marketeering and the provision of property investment advice. It identified a number of weaknesses in the state and territory consumer protection laws, which are also relevant to the ACL:

- the provisions are 'corrective' in nature because they deal with misconduct after it has already taken place;
- enforcement of the laws relies heavily on regulators, who may prosecute only the most egregious conduct;
- they do not provide barriers to entry into the market;
- they deal only with unfair conduct, not with the quality and appropriateness of advice or conflicts of interest;
- it can be difficult to prove breaches of the law in this area; and
- businesses who breach the law may continue to operate, often by 'resurfacing' under a different name.<sup>33</sup>

8.37 The Law Reform Committee's preferred position was for the Commonwealth Government to regulate property investment advisers under its financial services laws in the same way as financial advisers.<sup>34</sup> Accordingly, it made a number of recommendations including that the Victorian Government should propose to the MCCA at its 2008 meeting, that:

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31 Parliamentary Joint Committee on Corporations and Financial Services, *Property Investment Advice—Safe as Houses*, June 2005, paragraphs 2.97, 3.54–3.56.

32 Parliamentary Joint Committee on Corporations and Financial Services, *Property Investment Advice—Safe as Houses?*, June 2005, p. 44.

33 Victorian Parliament Law Reform Committee, *Inquiry into Property Investment Advisers and Marketeers*, Final Report, April 2008, p. 70.

34 Victorian Parliament Law Reform Committee, *Inquiry into Property Investment Advisers and Marketeers*, Final Report, April 2008, p. xxviii.

- the Commonwealth Government regulate property investment advisers;
- real estate or property transaction should continue to be regulated by the states and territories;
- the Commonwealth Government amend the *Australian Securities and Investments Commission Act 2001* (Cth) and chapter 7 of the *Corporations Act 2001* (Cth) so that advice about direct property investment is included in the financial services regime; and
- the Commonwealth regulation of property investment advisers should:
  - include advice about investment in all types of direct property in the Commonwealth regulation of property advisers; and
  - define the purchase of direct property as an investment where the property was purchased for the predominant purpose of obtaining a financial benefit.

8.38 Notably, both parliamentary committees recommended a national regime and also a functional approach to regulation rather than an occupation approach. That is, rather than specifying that real estate agents or marketers be regulated, a certain type of advice about property investment should be regulated.<sup>35</sup>

### *Evidence before committee*

8.39 Evidence before this committee is consistent with that of previous inquiries and strongly supports their findings. For example, Mr Ben Kingsley, chair of the Property Investment Professionals of Australia (PIPA), told the committee that the lack of a comprehensive regulatory framework for property investment advice was harming consumers. In his assessment, there were some bad apples in the industry that had the potential to destroy the good name of reputable operators, explaining:

...it is more than a handful who operate in the property investment space, because it is unregulated. Even with regulation we still see some gaps appearing...The financial value that households put into buying bricks and mortar or investing in bricks and mortar is a significant investment. We are talking about this land banking being \$40,000, \$50,000 or \$60,000, but we are talking \$500,000 or three quarters of a million dollars to invest in a property and they may be taking advice from someone who has just put on a suit and gone for a one-day or a half-day how to sell property course and are advocating things to family friends at barbecues.<sup>36</sup>

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35 Parliamentary Joint Committee on Corporations and Financial Services, *Property Investment Advice—Safe as Houses?*, June 2005, p. 31.

36 Mr Benjamin Kingsley, Chair, Property Investment Professionals of Australia, *Committee Hansard*, 30 September 2015, pp. 55 and 57. The Property Investment Professionals of Australia (PIPA), a not-for-profit association established in 2005 to promote the professional standards and accreditation of the practitioners in the property investment advice industry. PIPA has 149 corporate and individual members, which could represent more than 1,000 practitioners.

8.40 According to Mr Kingsley, the industry as a whole is 'an immature industry'. He stated further:

I think it has representations from mum-and-dad investors who have done well out of their investments and have looked to potentially enter the industry to provide advice without fundamentally understanding risk profiles and without the general level of knowledge and education people need to provide advice to others.<sup>37</sup>

8.41 Mr Kingsley was adamant that regulation was required for a 'sustainable, professional' property investment advice industry.<sup>38</sup> Comparing property investment advisers to mortgage brokers, Mr Kingsley told the committee that he had seen the mortgage broking industry cleaned up with the introduction of the *National Consumer Credit Protection Act 2009*.<sup>39</sup> In his view, the aim of any regulation should be to ensure that consumers were receiving appropriate advice, not to remove responsibility completely from consumers:

So they [consumers] need to go in with their eyes wide open, but, from an industry point of view and from a professional practitioner's point of view, we need to make sure that they are getting the most appropriate advice from the most appropriate adviser as opposed to going to see their tax accountant, who says property investment is great, or speaking to uncle Frank at a barbecue.<sup>40</sup>

8.42 In regards to the regulations that should be implemented, Mr Kingsley told the committee that if the dominant purpose of the property purchase is to invest in property for a return, whether it is for rental income or a capital gain, advice about this purchase should fall under the Corporations Act.<sup>41</sup> This would occur if real property was classified as a financial product under the Corporations Act.<sup>42</sup> PIPA further recommended that:

- to be a 'qualified property investment adviser', persons should be required to meet minimum qualification requirements with a specialisation in property investment advice;

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37 Mr Benjamin Kingsley, Chair, Property Investment Professionals of Australia, *Committee Hansard*, 30 September 2015, p. 55.

38 Mr Benjamin Kingsley, Chair, Property Investment Professionals of Australia, *Committee Hansard*, 30 September 2015, p. 55.

39 Mr Benjamin Kingsley, Chair, Property Investment Professionals of Australia, *Committee Hansard*, 30 September 2015, p. 58.

40 Mr Benjamin Kingsley, Chair, Property Investment Professionals of Australia, *Committee Hansard*, 30 September 2015, p. 58.

41 Mr Benjamin Kingsley, Chair, Property Investment Professionals of Australia, *Committee Hansard*, 30 September 2015, p. 56.

42 Property Investment Professionals of Australia, *Submission 144*, p. [2].

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- existing financial advisers should complete units of study on property investment advice to be authorised to give property investment advice;
  - licensed real estate agents (or 'selling agents') should be banned from providing property investment advice, while licensed real estate agents who act as 'buyers agents', accountants and mortgage brokers who wish to give property investment advice should be required to meet the minimum requirements as a qualified property investment adviser; and
  - the negotiation for purchasing the property should continue to fall within state and territory regulation of licensed real estate agents.<sup>43</sup>

8.43 Elements of this recommendation are similar to the recent and successful push to have better educated and trained financial advisers.

8.44 To be financially successful does not require an academic qualification, but the government and ASIC have repeatedly recognised the importance of ensuring that financial advisers (who are required to hold an AFS licence) meet minimum education and training standards to ensure they have sufficient knowledge to provide appropriate financial advice.<sup>44</sup>

8.45 Unfortunately, it took many years of strong advocacy and far too many examples of consumer loss through unsound financial advice before measures to improve standards of financial advisers were finally adopted. The government has announced its intention to increase the professional standards financial advisers are required to meet to hold an AFS licence, which will further separate the competency and qualifications of professional (financial adviser) and non-professional (property spruiker) roles in the investment advice field.

8.46 On 3 December 2015, the Minister for Small Business and Assistant Treasurer, the Hon Kelly O'Dwyer MP, announced that the government had released exposure draft legislation to give effect to reforms to raise education, training and ethical standards for financial advisers.<sup>45</sup>

8.47 The committee urges the industry and governments not to delay and to start implementing measures immediately to lift the standard of advice on investment in property.

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43 Property Investment Professionals of Australia, *Submission 144*, pp. [1–3].

44 As part of the government's response to the Financial System Inquiry, the government is currently developing legislation to lift the professional standards of financial advisers: see Australian Government, *Improving Australia's financial system: Government response to the Financial System Inquiry*, October 2015, p. 7.

45 The Hon Kelly O'Dwyer MP, Minister for Small Business and Assistant Treasurer, Media Release, 'Raising professional standards of financial advisers, 3 December 2015, <http://kmo.ministers.treasury.gov.au/media-release/033-2015/> (accessed 19 December 2015). Parliament is expected to consider the legislation in early 2016, before the establishment of a new standard setting body.

## Early intervention

8.48 Recent developments in the marketing of land banking schemes demonstrates that spruikers are active in the property investment industry and continue to employ their ingenuity to promote such products, particularly to unwary investors. Regulators appreciate that, as they clamp down on one type of scheme or promotion, property spruikers move on to another one intended to escape attention. Mr Cohen from Consumer Affairs Victoria told the committee about the challenges regulators face in keeping abreast of the activities of property spruikers. Mr Cohen observed:

...there have been previous schemes that have had particular modus operandi. Particular examples we give are the rent-to-buy schemes and the vendor terms contract schemes. As regulation and regulators have caught up with those schemes there have been changes to the way in which these schemes might operate.<sup>46</sup>

8.49 Mr Cohen conceded that for regulators there was a catch-up period and highlighted the importance of being alert to the mode in which changes are taking place in the promotion and nature of these schemes:

New schemes emerge; investors get caught up in those schemes; they come to the attention of regulators, who are often looking backwards rather than looking forwards to catch those matters. So, to that extent, the need to continually be looking at those modus operandi and be looking at whether the framework in place to respond to those is appropriate is a key element of it.<sup>47</sup>

8.50 While there are some regulatory protections which are relevant to the activities of property spruikers, it is evident that regulators in this space often play a 'cat and mouse' game with those property spruikers who seek to benefit at the expense of investors.<sup>48</sup> Thus, any proposed reforms must also take account of the resourcefulness of property spruikers and their talent for devising ways that allow them to operate on the margins of, or outside, the regulatory frameworks.

8.51 The committee is also concerned that spruikers renowned for their involvement in property investment scams are allowed to continue to provide property investment advice. In this regard, the committee notes the propensity of rogue operators to reinvent themselves and to continue promoting property scams even after being exposed for such activities. In this regard, the ACCC noted that the capacity for individuals or corporations to resurface was a broader challenge for the ACCC in its compliance and enforcement efforts. It noted that the commission was 'assisted by the capacity to seek injunctions against entities including individuals and banning orders

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46 *Committee Hansard*, 30 September 2015, p. 3.

47 *Committee Hansard*, 30 September 2015, p. 4.

48 Mr Simon Cohen, Director, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 3.

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preventing individuals from taking management roles for a period of time. It stated further:

The courts have demonstrated willingness to make such orders. We can and have taken contempt action against those who breach such orders with material sanctions that can apply. This said, there remains challenges as identified in the Committee's query.<sup>49</sup>

8.52 The ACCC expected these challenges may be considered under the 2016 ACL Review but could also 'involve broader regulatory framework issues including practices loosely referred to as "phoenix behaviour"'. According to the ACCC, reviews may also consider the adequacy of penalties or other sanctions that 'may deter or prevent repeat behaviour'.

### *Committee's view*

8.53 Despite the number of reviews recommending that property investment advice be regulated, no concrete action has been taken toward the introduction of a uniform regulatory framework that would include property investment advice, which remains exempt from the Corporations Act.

8.54 The committee endorses the principle that if two products are functionally similar investments, they should be regulated in a similar manner. In this regard, the committee considers that the functionally similar nature of advice about property and other investment types, as well as the effect of the regulatory framework for financial services on the property spruiking sector, more than justifies the extension of the Corporations Act to advice on investment property. Australians are entitled to expect property investment advice to be appropriate and in the best interests of the potential investor. This objective can be achieved by ensuring that there are barriers to entry for advisers and that they are required, among other things, to act in the best interests of their clients, as is the case for financial advisers under the Corporations Act.

8.55 The extension of the Corporations Act to advice on direct property investment would provide the licensing, disclosure and conduct obligations the committee considers are required, and eliminate the regulatory gap between direct property investment advice and financial product advice. The committee recognises that there may need to be appropriate exemptions for particular services associated with property investment and adjustments to the educational and training requirements to make them more appropriate for people providing property investment. The PIPA's recommendations about the minimum qualification requirements for a property investment adviser provides an appropriate model.<sup>50</sup>

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49 ACCC, answer to written question on notice Nos. 15–18, 22, p. 7.

50 See paragraph 8.42.

## Recommendation

**8.56** The committee recommends that the government, in consultation with the states and territories, should strengthen the regulatory framework of the property investment industry to bring it into line with regulations applicable to the financial investment industry. Specific areas include:

- making the regulation of property investment advice a Commonwealth responsibility (recognising that services provided by licensed real estate agents would remain under state and territory regulation);
- inserting a definition of property investment advice into the Corporations Act and the Australian Securities and Investments Commission Act; and
- requiring that anyone providing property investment advice should hold an Australian Financial Services Licence (with appropriate exceptions).

**8.57** In respect of the last recommendation, the committee suggests that the independent industry-established standards setting body for financial advisers could set the educational and training requirements for property investment advisers and the code of ethics to which they would subscribe.

## Opportunities to advance reforms

**8.58** Work underway through the COAG process presents an opportunity to build on the work of previous inquiries and to introduce much needed reform in the property investment sector.

### *Consumer Affairs Forum*

**8.59** At their MCCA meeting in April 2010, ministers noted the importance of adequate investor advice specifically related to property and that the Commonwealth was considering options for regulating property investment advice. In June 2014, the MCCA's successor, the Legislative and Governance Forum on Consumer Affairs (the Consumer Affairs Forum), discussed property spruikers.<sup>51</sup> They did so again the following year, also noting progress over the previous 12 months on a project by Consumer Affairs Australia and New Zealand (CAANZ), which is to conduct a statutory review of the provisions of the ACL in 2016. CAANZ is to provide a final report in March 2017.<sup>52</sup>

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51 Like the MCCA, the Consumer Affairs Forum consists of all Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading and consumer protection laws.

52 CAANZ supports CAF and consists of the most relevant senior officer of Commonwealth, State, Territory and New Zealand government agencies responsible for consumer affairs or fair trading. It provides COAG with an annual report on decisions taken as a result of its legislative or governance responsibilities and changes made to legislation or agreements.



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*Consumer Affairs Australia and New Zealand (CAANZ) review of the ACL*

8.60 On 12 June 2015, Consumer Affairs Ministers reached agreement on the terms of reference for the ACL review.<sup>53</sup> Under the terms of reference, CAANZ will assess the effectiveness of the provisions of the ACL, whether these provisions are operating as intended and address the risk of consumer and business detriment at an appropriate level of regulatory burden. Consideration of these provisions will include but not be limited to:

- general prohibitions against misleading or deceptive conduct, unconscionable conduct and unfair terms in consumer contracts;
- prohibitions against specific 'unfair practices', including bait advertising, referral selling, unsolicited supplies of goods and services, pyramid selling and component pricing;
- the system of statutory consumer guarantees;
- the national product safety framework; and
- enforcement powers, penalties and remedies applying under the ACL.

8.61 The review will also:

- assess whether the existing institutional, administrative and regulatory structures underpinning the ACL, such as the 'multiple regulator model' and the coordinated enforcement, education, policy, research and advocacy approach of the Commonwealth and states and territories, are effective and efficient in supporting a single national consumer policy framework;
- consider the interface between the national consumer policy framework and other legislation, its jurisdiction and reach, including whether there are legislative gaps, duplication or inconsistencies with industry-specific and other laws, and opportunities to reduce unnecessary compliance costs on businesses, individuals and the community while maintaining adequate levels of consumer protection;
- examine changes in consumer and business awareness of their respective rights, protections and obligations, including access to information about dispute resolution and consumer issues, since the implementation of the ACL; and
- assess the flexibility of the ACL to respond to new and emerging issues to ensure that it remains relevant into the future as the overarching consumer policy framework in Australia.<sup>54</sup>

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53 Australian consumer law, Review of the Australian Consumer Law <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/> (accessed 6 January 2016).

54 Australian consumer law, Review of the Australian Consumer Law, Terms of reference, <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/terms-of-reference/> (accessed 6 January 2016).

8.62 While the terms of reference of this review are comprehensive, some have direct relevance to the matters raised during this inquiry. The committee strongly supports the review taking into account the concerns outlined in this report and making recommendations designed to bring advice on investment in property in line with the regulations governing financial advice. In the committee's view, it is important that the matter of advice on property investment receives close attention in this comprehensive review of the Australian consumer law.

### **Recommendation**

**8.63 The committee recommends that Consumer Affairs Ministers consider the terms of reference for the review of the Australian Consumer Law with a view to inserting a specific reference to advice on property investment in term of reference no. 1.**

#### *National review project targeting property spruikers*

8.64 Between 2013 and 2014, ACCC and ASIC in collaboration with the states and territories participated in a project by the Compliance and Dispute Resolution Advisory Committee (CDRAC) concerned with property spruiking. The national project focused on a number of high risk property spruiking industry participants. Consumer Affairs Victoria informed the committee that, as part of this project, 66 property spruikers had been investigated, with disciplinary action taken including education and warning letters, substantiation notices, enforceable undertakings and a prosecution.<sup>55</sup> The ACCC provided more detailed information on results of the project that has led to twenty traders receiving legal notices to substantiate claims made in advertisements and at seminars, which in turn prompted legal action against at least 10 entities and their associates including:

- Benjamin David Chislett, Creative Property Australia Pty Ltd and Benny Bull Pty Ltd (led by Consumer Affairs Victoria)
- No Loan Home Pty Ltd trading as Perth's Easyhomes WA, Filip Butkovic, Nikola Butkovic, Patricia Susilo, Bryan Susilo and Rowan Lines (led by Consumer Protection Western Australia (CPWA))
- We Buy Houses Pty Ltd and Rick Otton (led by ACCC)—Mr Otton failed to substantiate marketing claims. The court enforceable undertakings prevent Mr Otton and his companies from running seminars and promoting their schemes in WA for two years. CPWA also commenced proceedings against people who had attended Mr Otton's seminars and implemented the business models, resulting in Supreme Court of WA rulings against No Home Loan Pty

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55 Mr Simon Cohen, Director, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 2.

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Ltd in May 2012 and Patricia and Bryan Susilo in February 2014 as noted above.<sup>56</sup>

According to ACCC, regulators issued 67 education and warning letters and seven traders gave regulators legally-enforceable undertakings to modify their behaviour.<sup>57</sup>

8.65 Victoria is now leading a national review project in collaboration with state and territory consumer affairs agencies and the ACCC to examine consumer protection and property laws across Australia to 'identify legislative gaps and propose options for reform'.<sup>58</sup> The directive for this project came from the Consumer Affairs Forum.<sup>59</sup> The project targets misleading behaviour in relation to property investment spruikers and is considering:

...education, compliance and regulatory strategies aimed at preventing consumer and investor detriment resulting from property spruikers targeting prospective investors with promises of easy and quick wealth creation through property investment and other techniques such as rent-to-buy schemes.<sup>60</sup>

8.66 Consumer Affairs Victoria is also working with the other ACL regulators to raise awareness among consumers about property spruikers and the risks of obtaining investment advice from wealth-creation seminars. The purpose is 'to educate consumers about property spruikers and rent-to-buy schemes and particularly conduct that contravenes the ACL and targets vulnerable consumers'.<sup>61</sup> This project complements the other national work underway including the compliance project to combat misleading behaviour by property spruikers and identify legislative gaps and propose options for reform.<sup>62</sup>

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56 Consumer Affairs Australia and New Zealand, *Implementation of the Australian Consumer Law, Report on progress IV* (2013–14), December 2014.

57 ACCC, answer to written question on notice Nos. 1–6, 12–15, 21, p. 6.

58 Dr Elizabeth Lanyon, Director, Regulation and Policy Division, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 1.

59 Mr Simon Cohen, Director, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 5.

60 Australian consumer law, 'ACL National Projects', <http://consumerlaw.gov.au/acl-national-projects/> (accessed 4 January 2016).

61 Consumer Affairs Victoria, 'Working with other Australian Consumer Law regulators', <https://www.consumer.vic.gov.au/annual-report/our-achievements/a-modern-and-effective-consumer-law-framework/working-with-other-australian-consumer-law-regulators> (accessed 21 January 2016).

62 Consumer Affairs Victoria, 'Working with other Australian Consumer Law regulators', <https://www.consumer.vic.gov.au/annual-report/our-achievements/a-modern-and-effective-consumer-law-framework/working-with-other-australian-consumer-law-regulators> (accessed 21 January 2017).

8.67 Other consumer affairs administrators across Australia have also commented publicly on the work of the national review project into property spruikers. For example, NSW Fair Trading Commissioner, Mr Rod Stowe, warned that consumers were often being misled into the financial benefits of buying into a particular scheme, stating:

Regulators across Australia have initiated court action to stop promoters who promise financial benefits they cannot deliver on or who fail to tell people about their cooling-off rights to get out of a service they were pressured into buying at a 'free' seminar.<sup>63</sup>

8.68 Mr Stowe has been reported as observing that property spruiking is 'an area that falls between the cracks somewhat' between real estate agents who are regulated under state and territory property legislation and the financial services legislation administered by ASIC.<sup>64</sup>

8.69 Dr Lanyon from Consumer Affairs Victoria told the committee about an important conceptual change in the way the consumer affairs agencies were approaching the problems posed by property spruikers:

While previous work had defined property spruiking as being mainly about the provision of investment advice, we are looking at the schemes that are being spruiked and the risks and detriments arising for consumers.

8.70 As noted in chapter 3, in the past, these schemes had been mainly rent-to-buy and vendor terms. While Dr Lanyon explained that those legal forms are not in themselves problematic, they target those with limited access to mainstream finance, are 'often underemployed or commonly underemployed, have low financial literacy and are generally in need of easy or quick financial gains'. She informed national work was underway to identify 'the unique consumer risks' with these schemes.<sup>65</sup>

8.71 The committee acknowledges the importance of looking at the particular schemes on offer. Evidence provided to the committee shows that property developers and promoters will continually reinvent schemes and the way in which they are marketed to circumvent situations where the regulatory regime closes a loop-hole or strengthens consumer protections for a particular *modus operandi*. To illustrate this point, Consumer Affairs Victoria advised the committee that while representatives from all the states and territories consumer protection agencies had attended property spruiking seminars to understand their operation as part of the project, the seminars

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63 NSW Department of Finance, Services and Innovation, 'Property spruikers put on notice by regulators', Media release, 30 July 2015.

64 Amy Bainbridge, 'Property investment spruikers on notice to abide by consumer law', *ABC News*, 30 May 2014, <http://www.abc.net.au/news/2014-05-30/property-spruikers-on-notice-to-abide-by-consumer-law/5487542> (accessed 3 December 2015).

65 Dr Elizabeth Lanyon, Director, Regulation and Policy Division, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 2. See also, paragraph 3.11.

were more of the get-rich-quick type of schemes and not land banking.<sup>66</sup> As such, the major surveillance of property spruikers in the last few years missed the harm reported to this committee about land banking schemes.

*Focus on right to a cooling-off period*

8.72 As part of the national review project, there has also been a focus on reminding consumers about their rights in regard to cooling-off periods.<sup>67</sup> Some state governments have sought to remind property spruikers about their obligations and consumers about their right to a cooling-off period. A media release from the Western Australian Consumer Protection division noted that consumers respond to advertisements and attend 'free' seminars on the understanding that they are getting information or advice to help them invest in the property market. It stated that they do not envisage 'a high pressure sales environment where they are expected to buy a training package or other sales material but typically that is the case'. It advised that:

The ten business day cooling off period, which is mandatory for unsolicited sales under the Australian Consumer Law (ACL), applies if the consumer is sold a product or service during the seminar, which was not the promoted purpose of the seminar. I have issued a letter to property spruikers in WA to remind them of their legal obligations....

The consumer must be informed in writing of their right to terminate the signed contract under the ACL. Failure to do so will render the promoter liable for penalties of up to \$50,000 for a corporation and up to \$10,000 for an individual.

8.73 The release reminded promoters of the ACL's fundamental requirement that 'only true and accurate information' be given during the presentations at these seminars. It stated, 'ACL regulators will be monitoring content for any false or misleading representations and will expect any claims made to be verifiable and breaches of the law in this regard could lead to fines of up to \$1.1 million for a corporation and up to \$220,000 for an individual.'<sup>68</sup> The NSW government issued a similar media release.<sup>69</sup>

8.74 The cooling-off period available under the ACL is an improvement on the remedies available under the previous state and territory regimes, which were

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66 Dr Elizabeth Lanyon, Director, Regulation and Policy Division, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 6.

67 ACL (Schedule 2 of the *Competition and Consumer Act 2010*), section 82. Under the ACL, there is a single national law covering unsolicited sales practices, including direct selling and investment seminars. In particular, consumers have the right to terminate unsolicited agreements during specified time periods.

68 Western Australia Department of Commerce, 'Property spruikers must offer a cooling off period', Media release, 12 June 2014.

69 NSW Government Fair Trading, 'Property spruikers must offer a cooling off period', Media release, 2 June 2014.

inconsistent and not applied across the board. For example, under the *Fair Trading Act 1999* (Vic) the cooling-off rights for off-business-premise sales did not apply to sales in hotels or similar venues where property spruikers typically held their seminars.<sup>70</sup> In the case of land banking schemes, however, by the time some investors become concerned about the nature of the schemes, the cooling-off periods may have long passed. Even so, the committee sees value in the work being done to educate the consumer about their rights when it comes to the marketing of property investments and the obligations of the promoters.

### *Committee view*

8.75 The national review project on property spruikers is a positive development. It is important that this project result in recommendations that not only address existing legislative gaps but strengthen laws to address consumer protection issues inherent in the way spruikers operate and the particular scheme they are peddling at the time.

8.76 Importantly, the work of the national review project should feed into the review of the ACL that is commencing in 2016 and reporting in early 2017.<sup>71</sup> The review, being undertaken by CAANZ, is the appropriate vehicle to highlight the need for any changes to consumer protection law and to make recommendations to ensure consumers are adequately protected from unscrupulous property spruikers. This is the first comprehensive review since the ACL was introduced in January 2011 and the continued concerns raised about property spruikers should be addressed as part of this review.

### **Recommendation**

**8.77 Having regard to recommendation one, the committee recommends that Consumer Affairs Australia and New Zealand, in its review of the Australian Consumer Law, give serious consideration to:**

- **the options for reform proposed by the national review project into property spruikers;**
- **whether investment property advice rightly belongs under the same regime as financial products and financial advice and, if not, how consumer safeguards available to investors in financial products can be replicated for investors in property;**
- **measures needed to prevent property investment spruikers with demonstrably compromised integrity from continuing to operate in the business;**

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70 See Victorian Parliament Law Reform Committee, *Inquiry into Property Investment Advisers and Marketeters*, Final Report, April 2008, p. 85.

71 Australian Government, *Australian Consumer Law—Terms of Reference*, <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/terms-of-reference/> (accessed 3 December 2015).

- **introducing a licensing regime for those providing advice on property investment which would include minimum qualifications and a code of conduct to which they would subscribe; and**
- **increasing the penalties for misleading and deceptive conduct, including the introduction of civil penalties and criminal sanctions.**

### **Strengthening reforms**

8.78 This report has referred to recent reforms to improve and make the regulatory regime around the provision of financial advice more robust. Based on its work in other inquiries, the committee has formed the view that there is still scope for improvement in this area. Because the committee is recommending that investment advice be considered as a form of financial advice, it refers to one particular area that, in its view, still requires attention—provision of general advice.

8.79 The report on managed investment schemes will deal comprehensively with this matter. But, because the provision of general advice is relevant to land banking and property investment advice more generally, the committee makes some observations.

#### ***General advice***

8.80 The PJC report observed that 'Property spruikers appear to have been able to operate because the regulatory regime which governs property investment advice is not well defined'.<sup>72</sup> As noted previously, advice is only a financial service if it is advice on a *financial product* (this is called 'financial product advice'). In effect:

- an investment seminar about investing directly in property would not be financial product advice, as investment property is not a financial product under the Corporations Act; and
- an investment seminar about ways to purchase property indirectly *may* be financial product advice if the investment vehicle is regulated as a financial product under the Corporations Act. For example, if the seminar recommended investing in property through a managed investment scheme, the seminar would be providing financial product advice.

8.81 It should be noted that, even if an investment seminar gives advice on a financial product, consumers may not receive the full suite of protections available under the Corporations Act for personal advice as investment seminars are usually classified as giving 'general advice'.

8.82 There are two types of financial product advice:

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72 Parliamentary Joint Committee on Corporations and Financial Services, *Property Investment Advice—Safe as Houses?*, June 2005, pp. 13–16.

- Personal advice is given in circumstances where the provider has, or should have, considered the person's objectives, financial situation and needs.<sup>73</sup> Only one aspect of the person's relevant circumstances needs to have been considered for the advice to be personal advice.<sup>74</sup> Examples of advice that is likely to be personal advice include strategic investment advice and advice on retirement income planning.<sup>75</sup>
- General advice is advice that is not personal advice, that is a recommendation or opinion that does not consider a person's relevant circumstances.<sup>76</sup> Typically, advice provided at investment seminars and the advice in marketing brochures advertising a particular financial product or product range will be general advice.<sup>77</sup>

8.83 ASIC makes the following distinction:

General advice about a financial product will not be personal advice if you clarify with the client at the outset that you are giving general advice, and you do not, in fact, take into account the client's objectives, financial situation or needs.<sup>78</sup>

8.84 Under the FOFA reforms in Part 7.7A of the Corporations Act, personal advice provided to retail clients is generally subject to higher consumer protections than general advice provided to retail clients.<sup>79</sup>

8.85 The Economic Legislation Committee's inquiry into the Corporations Amendment (Streamlining of Future Financial Advice) Bill 2014 received submissions and testimony expressing concern that consumers were unaware of the nature of general advice.<sup>80</sup> For example, Mr Alan Kirkland, CEO of CHOICE, took the view that it was unrealistic to expect all consumers to understand the differences in the regulation of general advice and personal advice:

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73 Subsection 766B(3), *Corporations Act 2001*.

74 ASIC, Regulatory Guide 175, *Licensing: Financial product adviser—conduct and disclosure*, October 2013, paragraph RG 175.45.

75 ASIC, Regulatory Guide 244, *Giving information, general advice and scaled advice*, December 2012, p. 53.

76 Subsection 766B(4), *Corporations Act 2001*.

77 ASIC, Regulatory Guide 175, *Licensing: Financial product advisers—conduct and disclosure*, October 2013, p. 98.

78 ASIC, Regulatory Guide 244, *Giving information, general advice and scaled advice*, December 2012, paragraph RG 244.43.

79 For example, the ban on conflicted remuneration, under Division 4 of Part 7.7A, applies to both general and personal advice given to retail clients but the best interests duty obligations, under Division 2 of Part 7.7A, only apply to retail clients who receive personal advice.

80 The committee tabled its report in the Senate on 16 June 2014.



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We depend on consumers to work out, 'That's general advice, so there is a lower bar and I should be much more cautious'...It is just not realistic to expect the consumer to understand that distinction between personal and general advice.<sup>81</sup>

8.86 Noting the concerns about the possible misuse or misunderstanding of the term general advice, the committee recommended that:

...the government give consideration to the terminology used in the Explanatory Memorandum and legislation (for example, section 766B), such as information, general advice and personal advice, with a view to making the distinction between them much sharper and more applicable in a practical sense when it comes to allowing exemptions from conflicted remuneration.<sup>82</sup>

8.87 Similarly, the Financial System Inquiry's final report recommended 'renaming general advice' but did not suggest a particular term to replace general advice. Instead, the final report recommended a more appropriate term be chosen through consumer testing.<sup>83</sup> The government, in its response to the Financial System Inquiry, agreed to rename general advice to improve consumer understanding after consulting with a wide range of stakeholders and conducting consumer testing.<sup>84</sup>

8.88 The investment seminars considered by the committee usually featured disclaimers, including warnings about the general nature of the advice (despite the repeated protestations from Mr McIntyre that his company did not provide financial advice). The committee considers that the current general advice warning is insufficient to convey to consumers that the advice does not take into account their relevant circumstances and is not required to meet the same level of protection as personal advice. This is particularly true for investment seminars, which are typically high pressure environments where participants can be rushed into making a decision by charismatic spruikers.

8.89 The committee considers that a nondescript label such as 'financial information' or 'general financial information' is unlikely to convey to consumers that general advice does not take into account their relevant circumstances and is subject to lower regulatory standards but is still attempting to influence their financial decision-making.

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81 *Committee Hansard*, 22 May 2014, p. 17.

82 Senate Economics Legislation Committee, *Corporations Amendment (Streamlining of Future of Financial Advice Bill 2014 [Provisions]*, June 2014, p. 77.

83 Australian Government, Financial System Inquiry, *Final Report*, November 2014, Recommendation 40, pp. 271–272.

84 Australian Government, *Improving Australia's financial system: Government response to the Financial System Inquiry*, October 2015, p. 22.

## **Recommendation**

**8.90** The committee recommends that the Australian Government give due consideration to:

- the characteristics of investment seminars, wealth education programs and similar product sales environments when consulting with stakeholders and conducting consumer testing to rename general advice;
- whether the general advice warning needs to be strengthened to ensure consumers are aware that general advice is not required to meet the higher regulatory obligations applying to personal advice; and
- whether the obligations on those providing general advice should be strengthened in regard to misleading information.

## **Borrowing to invest**

8.91 The committee notes that in some of the promotional material for the land banking schemes, reference was made to the provision of finance, in some cases 100 per cent.<sup>85</sup> For example, in one of its brochures, Market First advertises:

Through our 100% financing option, it's possible to qualify to invest with virtually no money down. This is a true revolutionary game-changer for property investing in Australia.<sup>86</sup>

8.92 This type of offer immediately set alarm bells ringing. Although the matter of borrowing to invest in such schemes did not arise during the course of the inquiry, the committee takes this opportunity to highlight the risks associated with any such finance.

8.93 In its inquiry into forestry managed investment schemes, the committee heard many accounts of retail investors finding themselves in dire financial straits because of borrowing to invest. The committee takes this opportunity to emphasise that when investors combine leverage and investment, they expose themselves to higher risk, as gearing accentuates any loss stemming from the failure of the investment. There are many traps for the unwary investor when it comes to property investment. The committee recognises the critical importance of financial literacy as a means of assisting potential investors to make informed choices.

## **Financial literacy**

8.94 In its 2005 report on property investment advice, the PJC underscored the need for consumers to protect themselves against spruikers:

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85 See Chapter 3, Figure 1 and paragraph 3.37.

86 Market First, *'Secure Your Wealth' Property Investment System*, attachment to *Submission 150*, p. 39.

No regulatory scheme, without being tyrannical in nature, can completely shut down the use of deceit and manipulation in commercial practice. While the proposed regulations will make operation more difficult for spruikers, it is inevitable that they will remain and do their best to skirt this, or any other, regulatory scheme.

Once the regulatory scheme is in place, it will remain necessary for consumers to be alert, to look to their own interests, and to approach anything which looks 'too good to be true' with a healthy scepticism.<sup>87</sup>

8.95 The committee underscores the importance of investors being alive to the risks of investing in property and equipped to make informed decisions and to protect their interests. As Mr Kingsley, chair of PIPA, told the committee: 'There is no such thing as a sure thing. You know that. If it is too good to be true, it often is'.<sup>88</sup>

### ***Check the internet first***

8.96 One of ASIC's main financial literacy tools is the *MoneySmart* website, which ASIC created to help consumers and investors take steps to improve their personal finances. ASIC informed the committee that their *MoneySmart* webpage on land banking, which outlines the risks associated with land banking schemes, went live on 6 August 2015.<sup>89</sup> This webpage outlines useful information about:

- land banking;
- how land banking is sold to investors;
- what can go wrong in a land banking scheme; and
- checks to do before investing in a land banking scheme.<sup>90</sup>

8.97 *MoneySmart* webpages are optimised so that search engines place the webpage at the top of relevant search results; in other words, if someone googled 'land banking' they would see the *MoneySmart* land banking webpage as the third item in the search results.<sup>91</sup> For this tool to be effective, the information needs to be available when consumers are making their decisions. In the case of land banking, this information was available too late to assist investors in 21<sup>st</sup> Century Group's and

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87 Parliamentary Joint Committee on Corporations and Financial Services, *Property Investment Advice—Safe as Houses?*, June 2005, p. 45.

88 Mr Benjamin Kingsley, Chair, Property Investment Professionals of Australia, *Committee Hansard*, 30 September 2015, p. 56.

89 ASIC, *Answers to Question on Notice*, 30 November 2015, p. 4; ASIC, *Land banking*, <https://www.moneysmart.gov.au/investing/investment-warnings/land-banking> (accessed 8 December 2015).

90 ASIC, *Land banking*, <https://www.moneysmart.gov.au/investing/investment-warnings/land-banking> (accessed 8 December 2015).

91 ASIC, answer to written question on notice, 30 November 2015, p. 4; Google search was conducted on 8 December 2015.

Market First's schemes. These investors would, however, have been able to read some useful tips about attending investment seminars.<sup>92</sup>

8.98 Education through *MoneySmart* is central to ASIC's action plan for its National Financial Literacy Strategy 2014–17 and an important tool to combat the influence of people intent on exploiting investors.<sup>93</sup>

8.99 As noted earlier, however, regulators are often reactive and issue warnings long after consumers have invested in a particular scam or purchased an unsafe product. In respect of land banking, there were early warning signs in 2013 and ASIC became aware of concerns about the schemes around May 2014.<sup>94</sup>

8.100 Consumer Affairs Victoria has a warning on their website about land banking schemes with 'tips to protect yourself'.<sup>95</sup> To alert consumers to the risks involved in property investment, the committee suggests that Consumer Affairs Victoria insert in its home page a major heading 'investment property' alongside the existing ones (Housing and accommodation, Shopping, Cars etc).<sup>96</sup> The consumer affairs agencies for the other states and territories should also review their websites to ensure that guidance on investment in property is easy to access.

8.101 The ACCC has a website *ScamWatch*, which outlines a number of risks for people who attend investment seminars and contains information providing warnings to consumers relating to investment schemes.<sup>97</sup>

8.102 The committee notes that *ScamWatch* does not have as much detail or helpful advice on investment seminars as ASIC's *MoneySmart*, which is unusual given that the activities of property spruikers would generally come under the ACCC's jurisdiction. *ScamWatch* also does not cite ASIC's webpage.

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92 ASIC, *Investment seminars*, <https://www.moneysmart.gov.au/investing/investment-warnings/investment-seminars> (accessed 8 December 2015).

93 ASIC, *National Financial Literacy Strategy 2014–17: Action plan*, ASIC Report 404, August 2014, p. 7.

94 Mr Tim Mullaly, Senior Executive Leader, ASIC, *Committee Hansard*, 30 September 2015, p. 60.

95 Consumer Affairs Victoria, 'High-risk property investments', <https://www.consumer.vic.gov.au/housing-and-accommodation/buying-and-selling-property/buying-property/high-risk-property-investments> (accessed 25 January 2016).

96 Consumer Affairs Victoria, *High-risk property investments*, <https://www.consumer.vic.gov.au/housing-and-accommodation/buying-and-selling-property/buying-property/high-risk-property-investments> (accessed 8 December 2015).

97 ACCC, answer to written question on notice Nos. 19 and 20, p. 8.

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### *Committee view*

8.103 The internet is one the primary ways consumers research information and opinions, which provides regulators with an efficient and relatively low-cost way to increase financial literacy. Regulators must ensure their websites are up-to-date and warn consumers about relevant risks and provide general information about risky products or strategies. Where an investigation into particular products or companies is still active, the regulator should still alert consumers to risks in such a way as to not compromise the investigation or infringe the rights those under investigation.

### **Recommendation**

**8.104 The committee recommends that ASIC, the ACCC and state and territory regulators have a stronger focus on providing up-to-date and accessible information alerting consumers to risks arising from the activities of spruikers as part of their efforts to improve the financial literacy of Australians and to encourage the early reporting of concerns about property investment seminars and schemes.**

### **Conclusion**

8.105 Many of the behaviours exhibited by the promoters of land banking schemes outlined in this report, such as high pressure selling techniques and referrals to conflicted lawyers and other services, are also found in schemes operated by other spruikers, including 'financial education' programs teaching people how to invest in the share market. The committee has made a number of recommendations for regulatory reform aimed at protecting consumers, and some recommendations in the Australian Consumer Law and national consumer credit law space that would increase protections for the victims of spruikers of non-property investments, in addition to property investment.

8.106 The committee is optimistic that the recommendations made in this report, if implemented, would provide greater consumer protections from the operations of spruikers. With the great strides made in the regulation of other financial services over the last 15 years, governments and regulators must turn their attention to fringe activities, such as property spruiking, which for legacy reasons have been left outside the financial services laws. In addition, the committee emphasises that, regardless of the effectiveness of regulation, consumers will always need to protect their own interests.

8.107 Given the established obligations and penalty regime under the Corporations Act, consumers would arguably be better protected if land banking schemes, and advice on property investment generally, came under the Corporations Act. Should the Australian and state and territory governments decide that investment property advice should remain under the ACL, then reforms are necessary to strengthen that regulatory regime as it relates to investment property and investment property schemes. The FOFA reforms to the Corporations Act provide a sound model on which to base changes to the ACL.

**Senator Chris Ketter**  
**Chair**