

The Senate

Economics
References Committee

Scrutiny of Financial Advice

Part I – Land banking: a ticking time bomb

February 2016

© Commonwealth of Australia 2016

ISBN 978-1-76010-373-6

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website:
<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>

Printed by the Senate Printing Unit, Parliament House, Canberra.

Senate Economics References Committee

Members

Senator Chris Ketter (Chair from 22 October 2015)	Queensland, ALP
Senator Sam Dastyari (Chair until 22 October 2015)	New South Wales, ALP
Senator Sean Edwards (Deputy Chair)	South Australia, LP
Senator Matthew Canavan	Queensland, NATS
Senator the Hon. Kim Carr (until 15 May 2015)	Victoria, ALP
Senator Jenny McAllister (from 15 May 2015)	New South Wales, ALP
Senator Nick Xenophon	South Australia, IND

Senators participating in this inquiry

Senator John Williams	New South Wales, NATS
(Substitute member replacing Senator Canavan for a public hearing on 7 July 2015)	

Secretariat

Dr Kathleen Dermody, Secretary
Dr Sean Turner, Principal Research Officer
Ms Lisa Cantlon, Senior Research Officer
Ms Morana Kavgic, Administrative Officer (until 27 February 2015)
Ms Ashlee Hill, Administrative Officer (from 23 February to 24 September 2015)
Ms Sarah Batts, Administrative Officer (from 25 September 2015)

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3540
Fax: 02 6277 5719
E-mail: economics.sen@aph.gov.au
Internet: www.aph.gov.au/senate_economics

TABLE OF CONTENTS

Membership of Committee	iii
Abbreviations	ix
Executive Summary	xi
Chapter 1.....	1
Introduction.....	1
Terms of reference.....	1
Inquiry into land banking	1
Background to inquiry	2
Scope and structure of report.....	4
Acknowledgements	6
Chapter 2.....	7
Land banking schemes—old and new.....	7
Land banking	7
Transparency	15
Disclosure	19
Timeframe for development approval and construction	22
Conclusion	24
Chapter 3.....	27
Promotion of land banking schemes.....	27
Property spruikers.....	27
Investment seminars and retail clients.....	28
Conclusion	41
Chapter 4.....	43

Legitimacy by association	43
Involvement of reputable third parties	43
Conclusion	54
Chapter 5.....	57
Referrals and independent advice.....	57
Commissions	57
One stop shop: 'independent' legal and financial advice	58
Conclusion	62
Chapter 6.....	63
Recourse	63
When land banking schemes do not deliver as promised.....	63
Making a complaint.....	66
Financial loss for investors	68
Loss of trust in the financial system and property development sector	70
Conclusion	71
Chapter 7.....	73
Managed investment schemes and self-managed superannuation funds.....	73
Managed investment schemes	73
Self-managed superannuation funds (SMSF).....	76
Conclusion	82
Chapter 8.....	83
Reforms.....	83
Investing in property and consumer protection	83
Developments in Australia's consumer law.....	86
Early intervention	96
Strengthening reforms	105

Financial literacy	108
Conclusion	111
Appendix 1	113
Submissions received	113
Appendix 2	117
Additional Information	117
Answers to questions on notice	117
Correspondence	117
Appendix 3	119
Public hearings and witnesses	119

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AFS	Australian Financial Services
AFSL	Australian Financial Services Licence
ASIC	Australian Securities and Investments Commission
CAANZ	Consumer Affairs Australia and New Zealand
CDRAC	Compliance and Dispute Resolution Advisory Committee
COAG	Council of Australian Governments
CPWA	Consumer Protection Western Australia
DOCA	Deed of Company Arrangement
FMIS	Forestry Managed Investment Schemes
FOFA	Future of Financial Advice
IGA	Intergovernmental Agreement
MCCA	Ministerial Council on Consumer Affairs
NII	National Investment Institute
PDS	Product Disclosure Statement
PIPA	Property Investment Professionals of Australia
PJC	Parliamentary Joint Committee on Corporations and Financial Services
PMA	Project Management (AUST) Pty Ltd
RE	Responsibility Entity
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SMSF	Self-managed superannuation fund

SOFA

Scrutiny of Financial Advice

Executive Summary

Investment in property is a long established and accepted strategy for Australians to build wealth. Heralded as a smart way to increase wealth, 'land banking' is a particular form of investment whereby an investor or company purchases a block of undeveloped land in the expectation of selling it in the future when its value has increased significantly. Investors with reputable property development companies generally purchase an off-the-plan development—a house and land package, or an apartment. Such companies may hold land until it increases in value before proceeding to the development stage. Not all schemes, however, are reputable.

In the context of this inquiry, concerns were raised about the number of Australians who have lost their investments at the hands of unscrupulous companies securing funds for highly speculative land banking schemes.

While some Australians were aware that they may have already lost their life savings, the committee is concerned that an unknown number of Australians are currently holding similar investments without realising that they may be worthless.

The committee found that inexperienced investors were persuaded to invest in risky property investments at great personal cost. In the specific cases examined during this inquiry, the areas chosen for land banking were often located on the outskirts of cities in anticipation of future urban development and rapid increases in land values. Investors were given the impression that the investment would be realisable over the short to medium term, when in fact there was little likelihood that the land would be rezoned or developed for several decades. As a result, investors were left with a share of land with little prospect of being developed and hence, unlikely to increase in value.

Although investors may still hold some limited value in property, there were land banking schemes of even greater concern involving the offer of 'options'. In this regard, the evidence shows clearly that some investors were unaware that they were purchasing an option to exercise a future purchase and had no claim on any physical asset. The committee found that they did not understand the difference between an option and a land purchase and in some cases did not have sufficient funds to exercise their option in the future. Worryingly, these types of schemes were targeted at inexperienced investors who did not have sufficient funds to purchase a property themselves and generally were not financially literate. In other words, the promoters were selling high risk investments to people who had very limited funds and little understanding of the financial arrangements into which they were entering.

It became evident to the committee that the spruikers of such schemes were able to entice vulnerable retail investors to sign up to deals without alerting them to the inherent risks of land banking in general or their particular land banking scheme.

During this inquiry, the committee became increasingly concerned about the promotion and marketing of land banking schemes associated with two companies in particular—21st Century Group and Market First. Both companies engaged in

practices prejudicial to investors' interests. The committee was particularly troubled by the spruikers of such schemes, who:

- received high commissions, with the inducement to sell the product irrespective of the investor's interests;
- took advantage of retail investors with poor levels of financial literacy and often limited funds by persuading them to invest in high risk inappropriate schemes, especially during 'wealth education' seminars—they did so by:
 - making investors feel special—offering so-called exclusive deals and privileged access to opportunities 'too good to be missed';
 - providing promotional material that wilfully underplayed risk and deceptively overstated the anticipated benefits and commercial robustness of the scheme they were promoting;
 - using endorsements from celebrities and testimonials from self-made millionaires who purportedly became wealthy using the tips and tricks taught at seminars;
 - associating their development with reputable companies, regardless of how tenuous that connection may be; and
 - employing high pressure marketing techniques at investment seminars intended to rush investors into a decision without first seeking independent advice;
- provided poor advice that runs contrary to the fundamentals of sound investment, for example advising an investor to place the majority of their funds in the one, often overvalued, asset;
- ignored the risk profile of clients and advised them to invest in risky products unlikely to deliver the promised returns;
- failed to provide investors with an accessible avenue to obtain redress (dispute resolution mechanisms) should things 'go wrong'; and
- re-surfaced in the industry under another guise, even after being exposed for unscrupulous conduct.

The committee also found that investments made in the form of 'options' are not required to be held in trust in the same way that land sales are. In such cases, the company selling the option was at liberty to spend the money raised without any regard to the interests of the investors who had provided it.

This inquiry into land banking also drew attention to the practice of investors with limited funds in superannuation using most of these funds to invest in land banking schemes through a self-managed superannuation fund (SMSF).

The problems associated with the marketing of property investment, evident in recent land banking schemes, have plagued the industry for decades. These schemes have highlighted the urgent need for reform and a much improved regulatory regime for the

provision of advice on property investment. The committee identified two ways to implement this regime:

- the Commonwealth assuming responsibility for property investment advisers; or
- strengthening provisions in the Australian Consumer law that would see the introduction of protections for retail investors mirror those for retail investors in financial products.

The committee prefers the first option. It endorses the principle that if two investment products are functionally similar, they should be regulated in the same way. 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.

The extension of the Corporations Act to advice on property investment would provide the licensing, disclosure and conduct obligations the committee considers is required, and eliminate the regulatory gap between 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 committee made the following recommendations. They are listed in order of priority with the most important recommendation first.

Recommendation

paragraph 8.56-8.57

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).

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.

Recommendation**paragraph 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;
- 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.

Recommendation**paragraph 8.63**

The committee recommends that Consumer Affairs Ministers consider the terms of the 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.

Recommendation**paragraph 6.26**

The committee recommends that state and territory governments consider requiring that moneys paid to purchase an option in a land banking scheme be held in trust consistent with the requirements for off-the-plan agreements.

Recommendation**paragraph 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.

Recommendation**paragraph 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.

Recommendation

paragraph 5.22

The committee recommends that the Victorian Legal Services Commissioner and Legal Services Board (and, where appropriate, other state and territory legal professional bodies) investigate thoroughly the conduct of lawyers involved in providing advice to investors in the land banking schemes considered in this report, as well as those lawyers who provided advice, and controlled trust accounts, for the operators of the schemes.

Recommendation

paragraph 5.23

The committee recommends that Consumer Affairs Victoria investigate whether Market First and/or other parties, including lawyers, breached the requirements in the *Sale of Land Act 1962* (Vic) in regards to off-the-plan contracts of sale for the Foscari and Veneziane developments.



Chapter 1

Introduction

Terms of reference

1.1 On 4 September 2014, the Senate referred an inquiry into the Scrutiny of Financial Advice (SOFA) to the Senate Economics References Committee for inquiry and report by the first sitting day of July 2015. On 2 March 2015, the Senate granted an extension to the committee to report by 1 February 2016 and subsequently to 31 August 2016.

1.2 The terms of reference are as follows:

Implications of financial advice reforms, with particular reference to:

- (a) the current level of consumer protections;
- (b) the role of, and oversight by, regulatory agencies in preventing the provision of unethical and misleading financial advice;
- (c) whether existing mechanisms are appropriate in any compensation process relating to unethical or misleading financial advice and instances where these mechanisms may have failed;
- (d) mechanisms, including a centralised register, that would ensure financial planners found to have breached any law or professional standards in their employment are transparent, for both the sector and consumers;
- (e) how financial services providers and companies have responded to misconduct in the industry;
- (f) other regulatory or legislative reforms that would prevent misconduct; and
- (g) any related matters.

Inquiry into land banking

1.3 On 14 May 2015, the committee resolved that activities associated with the promotion and sale of land banking and similar property investment schemes could come under the definition of a financial product and therefore be covered by the terms of reference for the SOFA inquiry. The committee, therefore, resolved that it would investigate land banking as part of its broader inquiry into financial advice. The committee held a public hearing in Melbourne on 30 September 2015 examining the specific matter of land banking and, after considering the evidence, resolved that it would table a report dealing specifically with this matter and advice on property investment more broadly. A list of witnesses who appeared at this hearing is at Appendix 3.

1.4 Although the committee did not call formally for submissions on land banking, it received seven submissions, which are listed separately at Appendix 1. The committee also received responses from the Australian Securities and Investments

Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and Slater and Gordon Lawyers to a series of written questions on notice. An index to the responses is at Appendix 2.

Background to inquiry

1.5 'Land banking' is a generic term that is associated with the widespread practice of buying and holding land in the hope of future capital growth. It is a well-established practice undertaken by many property developers to ensure a supply of land stock for future development. Investors with recognised reputable property development companies, such as the Meriton Group, generally purchase an off-the-plan development—a house and land package, or an apartment. Such companies may hold land until it increases in value before proceeding to the development stage.

1.6 Retail investing in land banking activities takes on various forms, including off-the-plan contracts for sale and the purchase of 'options' schemes. Options schemes, which are a relatively new phenomena in the land-banking space, are property investment arrangements that centre on selling 'options' to retail investors to purchase future land packages for farmland that has not yet gained residential development approval but is located near regional towns or on the outskirts of capital cities. Although the committee's interest in land banking covers both off-the-plan contracts for sales and options, the emergence of the options schemes in recent years has attracted particular attention from the media and ASIC.

1.7 In September 2013, the Fairfax media began to draw attention to potential problems with land banking. At that time, one report noted that over the past eighteen months, the property arm of Mr Jamie McIntyre had been marketing 'land banking' options on lots in a development on the outskirts of Bendigo on the Midland Highway, 12 kilometres from the town centre. It stated:

Investors may have paid up to \$34 million for 'options' in a supposedly idyllic rural housing development that is just a paddock, as Melbourne's recovering property market proves a boon to spruikers.¹

1.8 By early 2015, reports about land banking schemes marketed by two particular companies, 21st Century Group and Market First, had become more frequent. The media accounts were based on investigations by the Fairfax media which revealed that hundreds of Australians had invested in such schemes but there was no evidence that the land was being rezoned into residential land or being developed as promised.² Around the same time, committee members became aware of disquiet over land banking schemes. The land on offer was primarily in Victoria but

1 Simon Johanson, 'House 'idyll' just barren paddock', the *Age*, 29 September 2013, <http://www.theage.com.au/victoria/house-idyll-just-barren-paddock-20130928-2ulab.html#ixzz3wDfq41iM> (accessed 4 January 2016).

2 For example, Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

some developments were in other states, including Queensland. These growing concerns prompted this inquiry.³

1.9 Throughout 2015, the problems associated with land banking schemes continued to mount as investors became uneasy when property development milestones were missed and the land remained undeveloped.⁴ Worried investors, seeking to discuss their concerns, or get the money they invested reimbursed, reportedly had trouble contacting anyone in the companies that promoted and sold the projects.

1.10 Around May 2014, ASIC became aware of problems relating to land banking schemes when it received two reports—one concerning land options and the other from a potential investor in a 21st Century scheme.⁵ On 7 August 2015, ASIC announced that it had commenced court proceedings in the Federal Court of Australia against companies associated with Mr McIntyre and the 21st Century Group regarding their promotion and sale of interests in five land banking schemes in Victoria and Queensland. The proceedings are continuing, and on 3 December 2015 the Federal Court adjourned and re-listed the directions hearing for 5 February 2016.⁶ On 7 October 2015, the Federal Court made interim orders appointing provisional liquidators to companies associated with those land banking schemes.⁷ These court proceedings are a litmus test for whether ASIC has the regulatory powers required to regulate certain land banking schemes (or variations of such schemes) and protect affected investors under the *Corporations Act 2001* (Corporations Act).

1.11 The court proceedings and recent media reports have continued to shine a light on land banking schemes and highlighted the importance of the committee's inquiry. While the committee's interest is in land-banking specifically, it should be noted that the committee recognises that the land banking schemes it is concerned with have emerged within the context of an unregulated property investment advice industry that has long been plagued by questionable practices. In particular, property 'spruikers' have profited from the provision of advice—or, as the spruikers would have it, 'education'—on property investment that is often inappropriate to the circumstances and needs of their clients, and at times outright misleading. The promotion of land banking schemes is one of the more recent and concerning manifestations of wider problems in the property investment advice industry.⁸ As such, while this report is

3 *Committee Hansard*, 30 September 2015, p. 62.

4 For example, Royce Millar and Ben Schneiders, 'Government wants land money back', the *Age*, 3 September 2015, p. 2.

5 Mr Tim Mullaly, Senior Executive Leader, ASIC, *Committee Hansard*, 30 September 2015, pp. 60 and 63.

6 ASIC, 'ASIC acts against 21st Century Group and Jamie McIntyre land banking schemes', Media release 15-214MR, 7 August 2015 (including editor's note 8, updating media release).

7 ASIC, 'Jamie McIntyre and 21st Century land banking companies agree to the appointment of provisional liquidators and other interim orders', Media release 12-298MR, 7 October 2015.

8 See, for example, Australian Consumer Law, *Implementation of the Australian Consumer Law*, Report on progress IV (2013–14), December 2014, p. 8.

overwhelmingly concerned with matters specific to land banking, consideration is also given to the need for reforms to better protect Australians receiving property investment advice generally.

Scope and structure of report

1.12 In this report, the committee is interested mainly in: the nature and extent of harm caused by land banking schemes; the regulatory framework and consumer protection matters associated with land banking; and the effectiveness of national, state and territory legislation in addressing concerns about land banking schemes and property spruiking more generally. The report comprises eight chapters including this introduction:

- Chapter two considers the origins and characteristics of land banking, including the emergence of a new form involving the purchase of options; the attractiveness of such schemes to investors; and the risks associated with this type of investment.
- Chapter three examines the major concerns about the operation of land banking schemes including: the marketing techniques employed; the transparency of the operation of the schemes; disclosure of risks; use of disclaimers; investors' understanding of the arrangements they were entering; and the high-pressure sales tactics used at investment seminars.
- Chapter four explores further the marketing techniques of land banking schemes with a focus on the involvement of well-known companies in the operation, or provision of advice on, land banking schemes which lent an air of credibility and legitimacy to the developments.
- Chapter five analyses the use of referrals and the involvement of third parties purporting to provide investors with 'independent advice'.
- Chapter six reviews the avenues of redress for retail investors who feel as though they have received unsound investment advice from unscrupulous property spruikers.
- Chapter seven looks at two particular aspects of recent land banking schemes—whether they were in fact a financial product and the use of self-managed superannuation funds (SMSF) as a vehicle for investing in the schemes; and
- Chapter eight considers the adequacy of the current regulatory regime around advice on property investment, whether there is a need for a national approach to the provision of property investment advice, and, if so, the form it could take. This chapter also recognises the importance of financial literacy as a means of consumer protection.

1.13 This inquiry into property investment builds on the findings of previous government and regulator reports, including two comprehensive reports into property investment advice: the Parliamentary Joint Committee on Corporations and Financial Services (PJC) report, *Property Investment Advice—Safe as Houses?*, released in June

2005 and the Victorian Parliament Law Reform Committee's report, *Inquiry into Property Investment Advisers and Marketeers*, released in April 2008.

1.14 The committee took evidence from only a few investors out of the more than 2,000 people ASIC estimates have invested in land banking schemes over the last five years.⁹ Although ASIC would not speculate on the reasons it has not received many complaints, it observed that the schemes are 'such long-term investments, no-one has got to the point of actually losing out'.¹⁰ The committee understands that many investors may not yet realise the risky nature of their investment. An important aspect of this report is to alert investors to the need to exercise care and diligence with any venture involving land banking and property investment more generally.

1.15 A lack of cooperation from those involved in operating or promoting land banking schemes has hampered the committee's investigation. Mr McIntyre, who appeared before the committee at a public hearing and made a submission, is a notable exception. The committee repeatedly invited a number of people to appear before the committee but those invitations were either declined or went unanswered. The committee received no response from: Mr Henry Kaye; Ms Julia Feldman; Mr Fady Said (an accountant at Market First); Mr Darren Eliau (principal lawyer at Evans Ellis Lawyers); and Mr David Bracka (from Project Management (AUST) Pty Ltd). In addition, the following people declined the committee's invitation to appear before a hearing:

- Mr Rowan Burn, CEO of Market First;
- Mr Greg Klopper, managing director of Global1 Training Pty Ltd, who ran the investment seminars used by Market First to spruik their land banking schemes;
- Mr Adam Zuchowski, formerly a lawyer at Slater and Gordon (Mr Zuchowski provided a written submission to the committee);¹¹
- Mr Michael Grochowski, director of Project Management (AUST) Pty Ltd and potentially a shadow director of one of the land banking schemes known as Midland Hwy; and
- Mr Sam Herszberg, a property developer who holds interests in a number of holding companies which own the land offered as part of the schemes.¹²

1.16 The committee is disappointed but not surprised by the reluctance of the promoters and other participants in the land banking schemes to come forward and explain their role in the schemes. Their lack of cooperation speaks volumes.

9 ASIC, answer to written question on notice, 30 November 2015, p. 7.

10 *Committee Hansard*, 30 September 2015, p. 61.

11 Mr Zuchowski did make a submission to the inquiry, *Submission 145*, in response to remarks about his conduct made by witnesses at the hearing.

12 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

1.17 Despite some of the obstacles faced by the committee in gathering evidence about land banking schemes, the evidence it did receive is very troubling. At best, it appears that many unsophisticated investors were convinced through high-pressure selling techniques to invest in schemes they did not properly understand and that were inappropriate to their needs and circumstances. At worst, land banking scheme promoters may have intentionally misled 'mum-and-dad investors' about the prospects of land banking schemes in the knowledge they and other people involved in marketing and administering the schemes would be the ultimate beneficiaries of the money 'invested'. The committee again emphasises that most of the individuals involved in land banking schemes declined to cooperate with the inquiry or offer evidence in support of the schemes.

Acknowledgements

1.18 The committee thanks all those who assisted with the inquiry, especially the individuals and organisations who appeared before the committee and those who made written submissions. The committee appreciates that it was particularly difficult for investors in land banking schemes to tell their stories and acknowledges that their evidence was crucial to this inquiry.

1.19 The committee took the view that it was not its role to address individual cases involving consumers but rather to examine the overall regulatory scheme relating to the land banking schemes. However, the committee did take individual cases into account to the extent that their experience was able to shed light on what appears to be an emerging problem.

Chapter 2

Land banking schemes—old and new

2.1 Investment in property is a long established and accepted strategy for Australians to build wealth. Land banking is a particular category of property investment, and can take many forms: an individual entrepreneur who purchases a block of land for future sale, a land banking company that buys land and divides it into smaller plots to sell to investors or a company that holds the land or property as a collective investment on behalf of the investors. In this chapter, the committee provides insight into the nature of land banking schemes, particularly the 'innovative' use of options agreements to fund housing developments. It undertakes a detailed analysis of the way land banking schemes are promoted to investors with a particular emphasis on two companies involved in land banking schemes, 21st Century Group and Market First. The committee also considers matters dealing with transparency and disclosure in the marketing of these products.

Land banking

2.2 Land banking is a speculative venture whereby an investor purchases a block of undeveloped or underdeveloped land in the expectation of selling it in the future when its value has increased significantly. Ideally, the investor will wait until market conditions are favourable and then divide the block into smaller sections or into house and land parcels to sell at a profit. While often heralded as a smart way to increase wealth, this type of investment exposes the investor to the risk of losing significant amounts of money. For example, the areas chosen for land banking are often located on the outskirts of cities in the hope that urban development will over time boost the value of the land. Permission, however, may not be granted for the anticipated development and the investor is left with a plot that remains under restrictions and is unlikely to increase in value. There is also potential for the promoters of such schemes to entice investors to sign up to deals without alerting the investor to the inherent risks of land banking in general or their particular land banking scheme.

Options to purchase

2.3 In contrast to a number of 'get-rich-quick' schemes which have been promoted (and attracted the attention of regulators) in the past, land banking schemes have been described as a 'get-rich-slow' scheme. This is because of the long time frame between the contract being signed and the payment of the option fee or a deposit for an off-the-plan contract of sale.

2.4 Much of the committee's attention during the inquiry was focused on a land banking scheme that has unique features and is a relatively new type of investment scheme promoted by property spruikers—options to purchase.¹ The use of options

1 This report uses the term 'property spruikers' generically to refer to unscrupulous operators, marketeers and promoters of property investment schemes.

agreements as an investment strategy is the 'innovation' which distinguishes these land banking schemes from previous property investment schemes. Mr Simon Cohen, Director of Consumer Affairs Victoria, described this type of arrangement as:

...distinct from rent-to-buy or vendor terms contracts in that the contract a buyer enters may only be an option at some future point to purchase a plot of land subject to development approval.²

2.5 In other words, 'rather than getting an interest in the property per se, there is an option that may be exercisable at some future point after registration of a concept that is marketed to someone'.³ With the schemes using options, investors typically enter a contract that provides them with an option, but not an obligation, to purchase a plot of land subject to development approval. They pay a fee for the option at the outset. ASIC provided some general background on land banking schemes before explaining the more recent 'option' model:

Land banking is a real estate investment scheme involving the acquisition of large blocks of land by a promoter or developer of the scheme, often in undeveloped rural areas, who then offer portions of the land to investors.

Land banking companies typically promote the investment with representations of high potential returns if the land is redeveloped, or if plans for rezoning and development are finalised.

Investors either purchase a lot in the land, or acquire an option to purchase a lot of land in an unregistered plan of subdivision. The option agreement is triggered at a time that the necessary development is approved by the local council.⁴

2.6 According to media reports, options were commonly marketed as an affordable way to get a foothold in the property market, with substantial returns on the investment promised once the land was rezoned for residential development and converted into housing estates to meet future housing demand. The attraction for investors was that they would only need to outlay a small sum of money for the option fee and would later benefit from any appreciation in the value of the land once the land was developed.⁵

2 *Committee Hansard*, 30 September 2015, p. 2. Consumer Affairs Victoria described rent-to-buy schemes as one that targets lower income consumers or prospective buyers who are unable to obtain mainstream finance. It stated 'under a rent-to-buy scheme, the buyer enters into a rental agreement with the vendor where they are charged high rent (well above market rate). At the end of the rental period they may buy the property but ownership of the property does not pass to the buyer until they exercise the "option to Purchase" after the rental period has expired, and buyers have limited legal rights if something goes wrong'. Consumer Affairs Victoria, 'Working with other Australian Consumer Law regulators', and *Year in Review 2014–15*, p. 25.

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

4 ASIC, 'ASIC acts against 21st Century Group and Jamie McIntyre land banking schemes', Media release 15-214MR, 7 August 2015.

5 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

Companies involved in recent land banking schemes

2.7 The two companies involved in promoting the land banking schemes of particular interest to this committee are the 21st Century Group, operated by Mr Jamie McIntyre, and Market First, run by Mr Rowan Burn.⁶ It should be noted that both companies are being investigated by ASIC for their role in operating and promoting land banking schemes.⁷ The committee notes that there may be other companies involved in operating and promoting land banking, including schemes offering options.

2.8 In relation to the 21st Century Group and Market First land banking schemes, ASIC estimated that approximately 2,000 investors purchased either options or off-the-plan contracts of sale.⁸ Many investors, however, purchased multiple lots so the money invested is likely to be in the high tens of millions, if not more.

The 21st Century Group

2.9 In October 2015, Midland HWY Pty Ltd, the developer of a land banking scheme which was established on 7 September 2011, commenced selling option deeds and off-the-plan land sale contracts for parcels of land lots on the outskirts of Huntley near Bendigo, Victoria. The 21st Century Group marketed this development known as Hermitage Bendigo (formerly Acacia Banks) located at Midland Highway, Bagshot, Victoria.⁹

2.10 To protect the interests of investors, ASIC commenced proceedings in the Federal Court of Australia (Victoria) to freeze assets and wind up this development. Based on preliminary investigations, the administrators prepared a supplementary report to creditors, dated 14 October 2015, noting there were many issues concerning the Midland project that required further investigation by a liquidator. The administrators reported that Midland had spent the entire proceeds of the option fees and was without funds to repay the c\$24m Option Fees. It provided the following details:

- Midland received c\$24m from Option Holders and has spent those funds without completing its obligations under the Option Deeds.
- Only c\$1.7m of the c\$24m appears to have been applied specifically for planning permit and development purposes.

6 Mr Jamie McIntyre refers to his companies as the '21st Century Group'. 21st Century Group Pty Ltd (ACN 108 150 545) is not a defendant to the ASIC's court proceedings against 21st Century Group, and ASIC is not aware of any connection between 21st Century Group Pty Ltd and Mr McIntyre's 21st Century Group.

7 Mr Tim Mullaly, Senior Executive Leader, ASIC, *Committee Hansard*, 30 September 2015, p. 64.

8 ASIC, answer to written question on notice, 30 November 2015, p. 7, <https://www.ppbadvisory.com/uploads/i399-Midland-FAQ.pdf> (accessed 6 January 2016).

9 ASIC, 'ASIC acts against 21st Century Group and Jamie McIntyre land banking schemes', 15–214MR, 7 August 2015. Mr McIntyre, *Committee Hansard*, 30 September 2015, p. 23.

- Up to c\$22.3m of payments from Midland's bank accounts have been identified as likely to be voidable transactions or other potential claims which should be investigated by a liquidator:
 - c\$7.6m—in payments unrelated to the development of the land, including \$7.2m to companies associated with Midland's lawyers;
 - c\$2m—paid for which Midland appears not to have received any benefit;
 - c\$11.9m—for potential payments at 'above market rates', including:
 - \$7.3m—commission paid out of Option Holder payment proceeds;
 - \$4.6m—fees paid to Project Management (AUST) Pty Ltd (PMA), whose sole director and shareholder appears to be a Midland shadow director/de facto director; and
 - c\$761k—miscellaneous payments requiring further investigation.¹⁰

2.11 PPB Advisory partner, Mr Nicholas Martin, advised creditors that:

This is a very unfortunate situation for Midland Hwy investors, as our preliminary investigations have revealed that of the \$24 million invested in the scheme, just \$1.7 million has been spent on the planning and development of the project. While all option fees also appear to have been spent, the majority have not been applied to activities relating to the development of the land.¹¹

2.12 The administrators were unsure whether the land owner, Bilkurra Investments Pty Ltd, had sufficient financial resources to complete the land development.¹²

2.13 On 7 December 2015, the Federal Court of Australia made wind-up orders for the company.

2.14 As part of its wider investigation into land banking schemes, ASIC also launched proceedings in the Federal Court of Australia against companies associated with Mr McIntyre and the 21st Century Group in relation to their promotion and sale

10 PPB Advisory, 'Administrators Recommend Midland Hwy be Placed in Liquidation to Conduct Investigations and Maximise the Prospect of a Return to Investor', <https://www.ppbadvisory.com/news/d/2015-10-19/administrators-recommend-midland-hwy-be-placed-in-liquidation-to-conduct-investigations-and-maximise-the-prospect-of-a-return-to-investors> (accessed 4 January 2016). The small 'c' in front of \$ indicates 'circa'.

11 PPB Advisory, 'Administrators Recommend Midland Hwy be Placed in Liquidation to Conduct Investigations and Maximise the Prospect of a Return to Investor', <https://www.ppbadvisory.com/news/d/2015-10-19/administrators-recommend-midland-hwy-be-placed-in-liquidation-to-conduct-investigations-and-maximise-the-prospect-of-a-return-to-investors> (accessed 4 January 2016).

12 PPB Advisory, 'Administrators Recommend Midland Hwy be Placed in Liquidation to Conduct Investigations and Maximise the Prospect of a Return to Investor', <https://www.ppbadvisory.com/news/d/2015-10-19/administrators-recommend-midland-hwy-be-placed-in-liquidation-to-conduct-investigations-and-maximise-the-prospect-of-a-return-to-investors> (accessed 4 January 2016).

of interests to investors in five land banking schemes. ASIC alleges that the schemes are unregistered managed investment schemes and that the 21st Century Group companies and Mr McIntyre have been unlawfully carrying on an unlicensed financial services business. The five schemes were promoted and advertised as:

- Botanica, located at 805 Archer Rd, Kialla, Victoria (an area of the previously named Moira Park Green City development outside of Shepparton);
- Secret Valley Estate, located at 955 Old Sydney Road, Bylands, Victoria;
- Oak Valley Lakes Estate & Resort, located at 124 Booth Road, Brookhill, Townsville, Queensland;
- Bendigo Vineyard Estate & Resort, located at 51 Andrews Road, Bendigo, Victoria; and
- Melbourne Grove Estate, located at 1491 Dohertys Road, Mount Cottrell, Victoria.¹³

2.15 Over the course of the court proceedings against 21st Century Group, ASIC became increasingly concerned about the prospects of 21st Century Group's land banking schemes, informing the committee that:

ASIC's view is that it is unlikely that options investors in the 21st Century land banking schemes will be able to see their return on their investment or receive a refund of their option fee given that the developments do not appear to be capable of being completed because:

1. the relevant councils have stated that the underlying land in each development will not be, or is highly unlikely to be, rezoned as residential land for the foreseeable future;
2. the underlying land in each development is either:
 - i not yet owned by the 21st Century Group; and/or
 - ii financed by way of mortgage;
3. at present, there appears to be insufficient funds available to:
 - i complete the developments;
 - ii refund the money paid by investors if the developments cannot be completed; and/or
 - iii pay money, whether in respect of any debt, by way of damages or compensation or otherwise, or to account for financial products or otherwise, to investors.¹⁴

13 ASIC, 'ASIC acts against 21st Century Group and Jamie McIntyre land banking schemes', 15-214MR, 7 August 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-214mr-asic-acts-against-21st-century-group-and-jamie-mcintyre-land-banking-schemes/> (accessed 4 January 2016).

14 ASIC, answer to question on notice No. 6, 30 November 2015, p. 4.

2.16 Mr McIntyre, CEO of 21st Century Group, described his land banking schemes as a 'new strategy' that his company started selling four or five years ago.¹⁵ It has been reported that a Shepparton property developer, Mr Nejat Mackali, was the original creator of options agreements, which he used as an innovative method of funding the Moira Park Green City development outside of Shepparton, Victoria.¹⁶ Mr Mackali alleges that the 21st Century Group, which marketed the Moira Park Green City development, later used his options strategy as the funding model for other land banking schemes.¹⁷ As noted in the previous chapter, Mr McIntyre appeared before committee in public to give evidence relating to his involvement in land banking schemes. While Mr Mackali corresponded with the committee, he declined an invitation to give evidence at a public hearing.

Market First

2.17 Market First was the promoter of Foscari, located in Truganina, Victoria. Foscari was touted as having its own aura and a unique combination of attractions, 'wonderful in design, inspired by some of the world's most prestigious and luxury resorts'. Said to be located in one of Melbourne's hottest growth corridors, Foscari offered:

...an exclusive collection of individually designed luxury residences brought to you by internationally acclaimed Elevli Plus Peddle Thorp Architects.¹⁸

2.18 According to Market First's advertisements, the development had approval from the Council and 'millions of dollars of earthworks have already been done in preparation for the construction of the project'. Further:

The Developers are putting heart, soul—and lots of money!—into making this a landmark development. That's why I have no doubt it will win many awards for its ground-breaking design and amenities.

All of which will help to increase the potential returns of those Market First Members who wisely invested.¹⁹

2.19 On 21 December 2015, the Federal Court made freezing orders against Foscari Holdings with respect to selling, charging, mortgaging or otherwise dealing with or disposing of any property of Foscari Holdings until the hearing and determination of the proceeding or further order of the court. The court also ordered

15 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 29.

16 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

17 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

18 Foscari Holdings Pty Ltd, Brochure, *Foscari Beautiful Living*, 2013.

19 Market First website, 'Unique opportunities', <http://www.marketfirstgroup.com.au/latest-news-1/foscari-development-council-approved> (accessed 5 January 2016).

that Foscari Holdings be restrained from completing contracts of sale relating to Foscari (unless the prior written consent of ASIC was obtained).²⁰

2.20 It should be noted that some investors in Market First's schemes did not invest through options: instead, they invested through a more traditional property investment route, by paying a deposit for an off-the-plan contract of sale. For example, of the 197 Slater and Gordon clients who invested in Market First's schemes, 156 were off-the-plan contracts and the remaining 41 had purchased options.²¹



Rowan Burn at one of Market First's sites outside of Melbourne, which would apparently be transformed into a luxury housing development

2.21 There are more protections under state and territory laws around property transactions for off-the-plan contracts of sale, and these investors may stand a better chance of getting their deposit returned as it should have been held in trust. Whether off-the-plan investors will actually receive their deposit back is yet to be seen. Even so, ASIC was concerned that the development company was insolvent and that it was 'just and equitable' that the company be wound up. ASIC's investigations suggested that:

...investors may have invested in the land banking schemes on the basis of misleading representations and that option agreements entered into by

20 ASIC, 'ASIC takes action to freeze assets and wind up companies associated with land banking schemes', 15-401MR, 18 December 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-401mr-asic-takes-action-to-freeze-assets-and-wind-up-companies-associated-with-land-banking-schemes/> (accessed 4 January 2016).

21 See chapter 4, paragraph 4.18.

investors in Hermitage and Foscari purportedly allow for monies invested in the schemes to be used for any purpose whatsoever, and need not be used to progress the two land banking schemes.²²

2.22 ASIC was concerned that Foscari was not close to completion and appeared to be incapable of completion due to the financial position of the development company.²³

2.23 After an initial investigation, sparked by an awareness that one of its lawyers was providing advice on the schemes, Slater and Gordon Lawyers also became concerned about a number of matters related to the Foscari development and another one called Veneziane. Many of these concerns raised questions which remain unanswered, particularly around the opaque ownership of the developments.²⁴ Ms Sharon Taylor, Slater and Gordon Lawyers, informed the committee that her firm had concerns about a number of misleading presale representations made to investors, including representations made about the price of the investments:

We were particularly concerned about the idea that they were wholesale prices. Our investigations indicated they were not.

...

There was also the idea that people were paying for some sort of exclusive membership to give them the opportunity to look at hand-picked projects, and it appeared only two projects were on offer.²⁵

2.24 She added:

Some of the more extravagant lifestyle amenities were thought unlikely to be delivered. The bare registration of the plans of subdivision was considered to be possible, if the projects received Council approval. We were sceptical and put a number of specific questions on this issue to the vendor's solicitors [Evans Ellis Lawyers] in our letter dated 12 December 2013 to which they responded by a letter dated 19 December 2013.²⁶

22 ASIC, 'ASIC takes action to freeze assets and wind up companies associated with land banking schemes', 15-401MR, 18 December 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-401mr-asic-takes-action-to-freeze-assets-and-wind-up-companies-associated-with-land-banking-schemes/> (accessed 4 January 2016).

23 ASIC, 'ASIC takes action to freeze assets and wind up companies associated with land banking schemes', 15-401MR, 18 December 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-401mr-asic-takes-action-to-freeze-assets-and-wind-up-companies-associated-with-land-banking-schemes/> (accessed 4 January 2016).

24 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 46.

25 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 44.

26 Slater and Gordon Lawyers, answers to question on notice No. 7, 2 December 2015, p. 2.

2.25 Mr Rowan Burn, CEO of 21st Century, declined the committee's request to appear as a witness to answer questions relating to the operation of these land banking schemes. He informed the committee that he was currently using his time and energy contacting clients 'to ensure they have all the information they need'. According to Mr Burn, his focus was 'on having private discussions with option holders and off the plan buyers', who were also free to contact him 'to discuss their own circumstances as they always have been'. He was of the view that he could not provide 'any meaningful information' that would assist the committee's inquiry.²⁷

2.26 The committee takes a very different view. People with inside knowledge of those particular property schemes hold information vital to understanding the ventures and should do their utmost to impart such knowledge, especially where the interests of retail investors may be in jeopardy. Their reluctance to do so merely adds to the uncertainty and doubts around the credibility of the schemes and their promoters.

Transparency

2.27 Concerns about property investment schemes are not new, and there is some evidence that part of the problem associated with such schemes can be attributed to 'rogue traders' often with links to shady operators from the past. A number of people who were involved in property investment scams in the early 2000s (during the last property boom) are also allegedly involved in the schemes promoted by Market First and 21st Century Group, including notorious rogue trader Mr Henry Kaye and his sister Ms Julia Feldman.²⁸ Mr McIntyre denied Mr Kaye had ever worked with 21st Century Group, and told the committee that Ms Feldman had not worked for the group for around 18 months.²⁹ Prior to this time, Ms Feldman worked for 21st Century Group as a sales manager and trainer.³⁰ Ms Feldman reportedly held similar roles in Market First, and is one of many people linked to both Market First and 21st Century Group.³¹

2.28 The leadership and ownership structures around the less reputable land banking schemes are often opaque, so it is difficult to determine who is involved (often behind-the-scenes) in the companies that develop or promote the schemes. There are also other parties involved in the operation of the schemes: developers, project managers and land owners. The Midland HWY development provides a recent

27 Private correspondence, Mr Rowan Burn to the committee.

28 The Federal Court of Australia declared that Mr Kaye was involved in conduct that was misleading and deceptive in September 2004, in regards to claims Mr Kaye had made at property investment courses. Mr Kaye was later given a five year ban from managing corporations in 2010.

29 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, pp. 15-16.

30 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 24.

31 Simon Johanson, Royce Millar and Ben Schneiders, 'Land deal with Kaye link caves in', *Sunday Age*, 19 July 2015, p. 13.

example of this opacity and the murkiness that surrounds the identity of controlling and related entities.

Midland Hwy development—Hermitage Bendigo

2.29 The difficulty determining the parties involved in operating a land banking scheme can be illustrated through the Hermitage Bendigo land banking scheme.³² As previously noted, the developer of the project was Midland HWY Pty Ltd (Midland Hwy). The 21st Century Group was the principal marketer of Hermitage Bendigo. Mr McIntyre acknowledged that 21st Century Group had marketed around \$16 million of the approximately \$25 million invested in the project.³³

2.30 As noted earlier, Midland Hwy was placed into voluntary administration on 2 July 2015 and, following proceedings in the Federal Court commenced by ASIC, officers from PPB Advisory were appointed administrators.³⁴ Subsequently, on 7 December 2015, the Federal Court ordered the winding up of Midland Hwy and appointed PPB Advisory as liquidators.³⁵ The principal reasons for the court's determination were:

- Midland was insolvent—it had little in the way of assets but had substantial liabilities to the retail investors and third parties. Midland was not operating a business and appeared to be a shell.
- Midland had been used for shadowy purposes—substantial transactions and money flows involving Midland ranging from \$22.3 million to \$24 million required full investigation more appropriately carried out by a liquidator rather than by ASIC.
- Bilkurra Investments Pty Ltd, the proponent of the Deed of Company Arrangement (DOCA), was substantially implicated in the transactions that in the court's view required full investigation, as were the persons and entities associated therewith.
- The proposal propounded by Bilkurra to the creditors of Midland was embryonic and Bilkurra's capacity to implement the same was doubtful—indeed, according to the court, Bilkurra's own financial state was 'dubious to say the least'.
- It was doubtful whether the creditors of Midland who were the retail investors and option holders would receive any substantial benefit from the DOCA and, further, misleading representations were made to such creditors prior to their vote on the relevant resolution in order to procure their vote.

32 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 25.

33 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 24.

34 ASIC, 'ASIC takes action to remove administrators of failed land banking company', Media release 15-203MR, 31 July 2015.

35 ASIC, 'Failed land banking company Midland Hwy to be wound up following ASIC action', Media release 15-369MR, 7 December 2015.

-
- Generally, it was in the public interest that the administration of Midland come to an end and that Midland be wound up.³⁶

2.31 PPB Advisory, as the liquidator, is continuing to investigate the affairs of Midland Hwy and to determine whether any money can be recovered for creditors. However, as noted above, some concerning details have already been uncovered. In a supplementary report to creditors, PPB Advisory reported that \$24 million had been paid in options fees and around \$1.15 million had been paid under off-the-plan land sale contracts (with bank guarantees totalling a further \$433,000 in lieu of payments).³⁷ PPB Advisory reported that Midland Hwy had spent the \$24 million in option fees without completing its obligations under the option deeds, and only \$1.7 million of the money invested appeared to have been spent for planning permit and development purposes.³⁸

2.32 Evans Ellis Lawyers, who are linked with many different land banking schemes operated and promoted by both Market First and 21st Century Group, are acting as solicitors for both Midland Hwy and the company which owns the land, Bilkurra Investments Pty Ltd (Bilkurra). Evans Ellis Lawyers has refused to identify the individuals providing instructions to them on Bilkurra's behalf, and PPB Advisory suspects that someone other than the director of Bilkurra is providing instructions.³⁹

2.33 It should be noted that on numerous occasions the court referred to shady deals, and also noted the complex web of entities and transactions involving Midland. The court described Midland as a corporation that 'has been used and controlled by shadowy figures and entities'. Mr Michael Grochowski, according to the court, 'appears to have been the de facto or shadow director and the real controller of Midland' and also controlled PMA, which was appointed project manager for Midland in December 2011.⁴⁰

2.34 The committee asked Mr McIntyre about reports that the project manager for Hermitage Bendigo, PMA, received a significant amount of money from the options fees. PMA was appointed as project manager for Midland Hwy in December 2011 and

36 Australian Securities and Investments Commission v Midland Hwy Pty Ltd (administrators apptd) (2015) FCA 1360, <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2015/2015fca1360> (accessed 4 January 2016).

37 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 11.

38 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 2.

39 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 3.

40 Australian Securities and Investments Commission v Midland Hwy Pty Ltd (administrators apptd) (2015) FCA 1360, paragraphs 11, 15, 50, 76 and 80.

no other project manager was appointed subsequent to this date.⁴¹ Mr McIntyre informed the committee that he had no knowledge of, or links to, PMA.⁴² Instead, Mr McIntyre told the committee 'all we had heard of was Midland and the project manager'.⁴³ Further, Mr McIntyre distanced himself from the operation of Hermitage Bendigo: '[w]e were the marketer of this project. I know others would like to make allegations that somehow we are the developer, but we are not'.⁴⁴ It is unclear how Mr McIntyre knew of a project manager but did not know of PMA itself.

2.35 In addition, media reports linked Mr Henry Kaye to Hermitage Bendigo through the involvement of a number of Mr Kaye's associates.⁴⁵ Mr McIntyre maintained that 21st Century Group had 'never knowingly marketed his [Mr Kaye's] land projects'.⁴⁶ From Mr McIntyre's perspective:

There was speculation made around the Midland project, but we could never verify that. We ceased marketing anyhow, but I can tell you that the board at 21st Century would never have approved or signed off on marketing a Henry Kaye project.⁴⁷

2.36 It would seem, based on Mr McIntyre's evidence, that it can be difficult even for the companies who promote and sell the majority of lots in certain land banking scheme to determine who is involved in the operation of land banking schemes. The court concluded:

Midland received \$24 million from retail investors to be used ultimately for the purchase and development of the land. The \$24 million is missing ... Yet Bilkurra has the land, and other entities and individuals have received and had the benefit of most of the \$24 million. Midland now has nothing. The investors have nothing. All of this demands a proper investigation by a liquidator and appropriate recovery proceedings.⁴⁸

41 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 8.

42 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 24. Following the hearing, PPB Advisory reported that Mr Michael Grochowski, PMA's director, appeared to have acted as a shadow director/de facto director of Midland HWY, authorising payments of around \$24 million from Midland HWY's bank accounts, including around \$22.3 million in potential voidable transactions and other claims: PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 3.

43 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 24.

44 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 24.

45 For example, Simon Johanson and Royce Millar, 'McIntyre's collapsed land banking scheme faces liquidation', *the Age*, 19 October 2015, p. 21.

46 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 25.

47 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 25.

48 *Australian Securities and Investments Commission v Midland Hwy Pty Ltd* (administrators apptd) (2015) FCA 1360, [94].

Foscari Holdings Pty Ltd

2.37 As noted earlier, ASIC had concerns about Foscari Holdings Pty Ltd. The administrators, PPB Advisory, also identified a link between the 21st Century Group marketed Hermitage Bendigo project and Market First's Foscari project in Truganina, on the outskirts of Melbourne. Midland Hwy paid \$4.768 million to a holding company, Foscari Holdings Pty Ltd (Foscari Holdings).⁴⁹ There was no documentation or explanation for the payments.⁵⁰ Foscari Holdings appears to be owned by Evans Ellis Lawyers (who are also acting as solicitors for Midland Hwy and Bilkurra) through holding companies, and the identities of the beneficial owners of the holding companies are unclear.⁵¹ As noted in the previous chapter, the committee attempted to contact but received no response from Mr Darren Eliaou, the principal lawyer at Evans Ellis Lawyers, and thus did not have an opportunity to seek further information on this point.

2.38 The approaches taken by 21st Century Group and Market First to promoting options as a property investment strategy, and the financial links and business connections between the two organisations raise serious questions about whether the same (unknown) interests are behind most, if not all, of the land banking schemes that are currently raising concerns.

Disclosure

2.39 Options to purchase land are a complex product and potential investors should be properly informed about the proposal being offered to them. Evidence received by the committee, however, demonstrated that many investors were unaware of the risks and disadvantages of investing through option agreements. Instead, some investors thought that they were purchasing an interest in the land itself. The committee received as evidence DVD recordings of sessions from investment seminars where spruikers from both 21st Century Group and Market First promoted their respective land banking schemes.⁵² It should be noted that ASIC informed the committee that there were no off-the-plan investors in land banking schemes subject to the 21st Century proceeding.⁵³ Neither seminar fully explained the nature of options and the interest that investors who paid the option fee would actually be receiving.

49 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 18.

50 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 18.

51 Royce Millar, Ben Schneiders and Simon Johanson, 'State money in troubled homes plan', *the Age*, 9 January 2015, p. 8.

52 Ms Grazyna Monka, *Submission 148* (21st Century Property Direct, 1 Day Wholesale Land Release DVD: Homestudy); Mr & Mrs Jim and Alison Guy, *Submission 150* (Market First, 'Property Education Pack' DVD series).

53 ASIC, answer to written question on notice No. 7.

2.40 During the course of the inquiry, the committee heard evidence from four investors in land banking projects: Ms Grazyna Monka, who invested through 21st Century Group, and Mr Jim Guy, Ms Liesl Baxter and Mr Trevor Haynes, who invested through Market First. Only one of the four investors, Ms Monka, was aware that the investment involved options.⁵⁴ The three Market First investors had never heard of options agreements before; it is possible that they all had invested through off-the-plan contracts of sale.⁵⁵ Indeed, Mr Guy later provided a submission which indicated he had invested through an off-the-plan contract of sale.⁵⁶

2.41 In his submission, Mr McIntyre provided copies of correspondence allegedly from investors in 21st Century Group's projects to ASIC and/or 21st Century Group.⁵⁷ The investors were supportive of 21st Century Group and generally expressed the view that ASIC should discontinue its court proceedings if 21st Century Group provides investors with refunds or converts the options agreements into a managed investment scheme. Some investors made the point that they conducted ample due diligence on their options investment. They were under the impression, however, that they were making an investment into real property. For example, one investor contended:

My husband and I purchased an option in December last year in our SMSF after doing complete due diligence, going to the office to discuss the project and visiting the site.

...

If 21st Century has done the wrong thing by not 'registering' as an financial investment company (**I thought we were investing in land, not a financial product**) would it be possible for you [ASIC] to point out their mistake and assign them the correct paperwork you require so all the investors involved aren't taken to the wall?⁵⁸

2.42 In contrast to the lack of clarity in the marketing of the schemes, Mr McIntyre outlined for the committee the non-refundable and non-property nature of options, illustrated with an example from his own personal experience:

What is important to note about land banking and options? Option is a fee for service. Once you have bought an option, that is it. You have the right but not the obligation to use the option to acquire land in the future. There is a simple example. On one of my farms, three years ago, I sold an option to a mining company. They paid me \$90,000 for a three-year option. Once the mining companies pay that money it is mine to keep, regardless of whether they choose to exercise their option. They are not obligated to but

54 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 7.

55 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 35; Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 35; Mr Trevor Haynes, *Committee Hansard*, 30 September 2015, p. 39.

56 Mr & Mrs Jim and Alison Guy, *Submission 150*.

57 Mr Jamie McIntyre, *Submission 146*, pp. 55–75.

58 Mr Jamie McIntyre, *Submission 146*, p. 64. (emphasis added)

they cannot change their mind and ask for feedback or question where the money is. It is none of their business. They bought a non-refundable product.⁵⁹

2.43 In his submission to the inquiry, Mr McIntyre reiterated the point that once an investor pays for an option they cannot change their mind and get the fee back or even question where the money is as it is 'none of their business'.⁶⁰ He did note, however, that 21st Century was offering 'a 100% money back option if the project wasn't approved in 20 years' time.⁶¹

2.44 While Mr McIntyre is adamant that investors cannot change their mind about their investment, or, in his words, 'question where the money is', the fact that investors in these schemes are repeatedly asking those same questions points to a fundamental misunderstanding about the nature of the investment they were making.⁶²

2.45 The (potential) benefits of holding an option to purchase land differ significantly from the benefits of purchasing an interest in investment property. If the land received development approval and the option were, in effect, triggered, investors would then have the option to purchase the land or resell the option to another investor. To purchase the land (and a housing package to develop the land into residential housing) would require either a significant amount of money or access to credit. It is unclear how many investors would have been in a position to purchase and develop the land if the option were activated (that is, to take advantage of the benefit the option supposedly gave them). For example, Dr Elizabeth Lanyon from Consumer Affairs Victoria noted that the promoters of land banking schemes often targeted consumers who have limited access to mainstream finance.⁶³

2.46 One investor who spoke to the committee was already bankrupt when he purchased the options, and it appears unlikely that investors in such circumstances would have been able to purchase and develop the land if their options were triggered.⁶⁴ This is unsurprising given the land banking schemes appear to have been promoted to people who were looking for a more affordable way to purchase property.

2.47 The other approach, to resell the option to another investor, might be possible, assuming the option was actually triggered and the land had some value which would appeal to another purchaser. Prior to the option being triggered at some future point, the option has limited (if any) value as there appears to be no secondary market in

59 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 13.

60 *Submission 146*, p. 5.

61 *Submission 146*, p. 5.

62 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 13.

63 Dr Elizabeth Lanyon, Director, Regulation and Policy Division, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 2.

64 Mr Jim Guy, *Committee Hansard*, 30 September 2015, pp. 36–38.

which to sell the option. ASIC described the option as an illiquid investment as there 'is no market for it'.⁶⁵

2.48 For investors who erroneously thought that they were purchasing an interest in land, the complexities around the use of options were unlikely to have been considered when making decisions about the value and utility of investing in a land banking scheme.

Timeframe for development approval and construction

2.49 There was conflicting evidence before the committee about the likely timeframe for land banking schemes to be rezoned and receive development approval. This timeframe is central to land banking because only when the development approval is received are the options to purchase land triggered; as discussed earlier, options have limited (if any) value before they are activated.

2.50 Mr McIntyre advised the committee that land banking is a '10- or 20-year strategy' and that it would be 'absurd' for people to have made money in two, three or four years' time after purchasing an option.⁶⁶ When asked by the committee if 21st Century Group informed investors in the Moira Park Green City development, which entered into administration in 2012, that the land was not part of any future development plans, Mr McIntyre stated:

Absolutely. They bought a 10-to-15-year option because they know it could be 10, 15 or 20 years before it is developed.

...

When we acquired it—which was only 2013—we told them that this could be a 10-, 15- or 20-year plan. We do not expect the council to approve it within 10 years, and that is exactly what the council told us. Remember that this is a long-term strategy. They are buying an option; the longer it takes, the better off the option holder is. This is not like buying an option and waiting two or three years—there is no capital growth in that period. It is a 10- or 20-year strategy; that is what land banking is!⁶⁷

2.51 In 2012, with the aim of achieving financial security in her retirement, Ms Monka, when in her early 50s, purchased two options in the Moira Park Green City development through the 21st Century Group.⁶⁸ As noted above, this development has since fallen into administration.

2.52 Some investors in Market First's land banking schemes, including Foscari, were under a similar misapprehension about the timeframe. A glossy Market First marketing brochure promises:

65 Mr Tim Mullaly, Senior Executive Leader, ASIC, *Committee Hansard*, 30 September 2015, p. 62.

66 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 29.

67 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 21.

68 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 9.

You can delay settle[ment] for up to 3–7 years: This means you can secure your property now, then pay nothing more for up to 3–7 years. So you get any and all of the capital growth over this time, with a relatively small amount of money down.⁶⁹

2.53 Investors told the committee that Market First made representations at investment seminars indicating that the projects would receive development approval and be constructed in the short- to medium-term. For example, Mr Jim Guy told the committee:

We were told that it would be up to three years before the property would be developed and we could rent it out. Also, we were led to believe that there was a 10-year rental guarantee at the end of it. The only mention of an option to me later on was when we paid a deposit on the building of this particular thing, and it was only later, a few weeks ago, that I rang the lawyer who has our money and we found out that it has a six-year term in the contract that we had never even picked up on and no-one advised us of. So it is a six-year plan.⁷⁰

2.54 The circumstances are further complicated by Market First's attempts to convince investors that the land banking schemes they had invested in had received development approval, and additional money was required to proceed towards the construction phase. Mr Guy recounted for the committee how he was approached by Market First to make an additional investment:

Eventually, in 2014, Market First rang me and said that we needed to consider taking an option on the building. The option was not mentioned on the land, but on the building it was. We were to pay \$43,000 for that option. I said that we could not do that because I was a bankrupt at the time.⁷¹

2.55 Later, Mr Guy contacted Mr Burn to receive an update on the project's development. Mr Guy told the committee that Mr Burn said 'that it was all developing nicely and we would start developing by late last year [2014], but nothing has happened since I went there in February'.⁷² In December 2014, Mr Guy received an email from Market First stating that development approval had been received for the Foscari development, on the outskirts of Melbourne, and that construction would commence in mid-2015.⁷³ In February 2015, Mr Guy visited the site of the Foscari development and discovered it was still farmland.⁷⁴ Construction has not yet commenced on this development. Mr Haynes, who also invested in Market First's

69 Mr & Mrs Jim and Alison Guy, *Submission 150*, p. [49].

70 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 36.

71 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 36.

72 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 37.

73 Mr & Mrs Jim and Alison Guy, *Submission 150*, p. [5].

74 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

Foscari project, told the committee a similar story about being approached for additional investment money:

I did not put more money in, because much later on, when I thought things were not going very well, I got feverish calls from Market First representative Alex Baker. I had to put in \$40,000 quick smart because the building was ready, the roads had been done in the area and were waiting for drainage and it was not long before the development was to start. I took a step back and thought, 'If he wants my money so badly, there must be a problem, because there's been no hurried rush to date.' So I did not take that option for the \$40,000 deposit.⁷⁵

2.56 One investor, whose name is withheld from publication, provided the committee with correspondence they received from Market First which provides further evidence of Market First's requests for additional investment money. One email (dated 26 May 2014) from Market First informed the investor that builders (Creation Homes) had been appointed to the Foscari project and a house could be built on the lot for \$322,000; a detailed glossy brochure and a rental appraisal were attached to the email.⁷⁶ Despite the many promises to different investors that the development was progressing to the construction phase, the Foscari development is still farmland.

Conclusion

2.57 The problems associated with land banking schemes have become more apparent as investors raise concerns when property development milestones are missed and the land remains undeveloped.⁷⁷ Worried investors, who want to discuss their concerns, have reportedly had trouble finding anyone in the companies that promoted and sold the options and off-the-plan developments.

2.58 Investors were promised luxury housing estates with architect designed homes, helipads, walking paths and BBQ areas that were detailed in innovative conceptual drawings and marketing material. However, none of the land banking schemes discussed in this report has been developed into residential housing developments. Many sites are still farmland, while some, such as Market First's Foscari development, have had limited earthmoving work done so that they now have a few mounds of rubble.⁷⁸

2.59 As discussed earlier, there is disagreement between the investors and operators/promoters of these schemes as to the timeline for development. Many investors believe that construction should have already commenced on their development, if not already been completed, and have received regular updates from

75 Mr Trevor Haynes, *Committee Hansard*, 30 September 2015, p. 39.

76 Name withheld, *Submission 149*, pp. [8, 10].

77 For example, Royce Millar and Ben Schneiders, 'Government wants land money back', the *Age*, 3 September 2015, p. 2.

78 For example, Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

Market First and 21st Century Group promising that rezoning and construction was being progressed. Beyond the lack of physical signs of progress on the sites, many of the land banking schemes, as noted earlier, are now in liquidation or subject to court proceedings. For instance:

- the Moira Park Green City development, marketed by 21st Century Group, entered into administration in 2012;⁷⁹
- the Hermitage Bendigo project by Midland Hwy, also marketed by 21st Century Group, is currently in administration;⁸⁰
- five projects run by 21st Century Group— Botanica, Secret Valley Estate, Oak Valley Lakes Estate & Resort, Bendigo Vineyard Estate & Resort and Melbourne Grove Estate—are currently the subject of court proceedings initiated by ASIC, and provisional liquidators have been appointed;⁸¹ and
- ASIC is currently investigating matters relating to Market First, which has marketed the Foscari and Veneziane projects.⁸²

2.60 Land banking is a speculative venture that poses significant risks even for the experienced investor. At first glance, land banking as a strategy to build wealth has appeal. But the marketing of such schemes has the potential to attract promoters prepared to tout the 'apparent advantages' of land banking to unwary retail investors, poorly informed about the risks associated with their investment and unaware of the credentials of those pushing and developing such schemes. In the following chapter, the committee examines the techniques used by promoters to sell land banking schemes.

79 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

80 ASIC, 'ASIC takes action to remove administrators of failed land banking company', Media release 15-203MR, 31 July 2015.

81 ASIC, 'Jamie McIntyre and 21st Century land banking companies agree to the appointment of provisional liquidators and other interim orders', Media release 15-289MR, 7 October 2015.

82 Mr Tim Mullaly, Senior Executive Leader, ASIC, *Committee Hansard*, 30 September 2015, p. 64.

Chapter 3

Promotion of land banking schemes

3.1 All land banking schemes investigated by the committee were promoted and sold through investment seminars or wealth creation programs. Investors attended the seminars in person or were part of a wealth creation program and received 'study' materials straight to their home. Beyond the complicated nature of the options agreement and the land banking schemes themselves, significant risks are associated with investment seminars and wealth creation programs. In this chapter, the committee examines the marketing of land banking schemes.

Property spruikers

3.2 While the nature of the property investment schemes being promoted has changed over time, the behaviour of property spruikers is largely consistent across time. The significant problems associated with the provision of property investment advice were considered in two inquiries in the 2000s: the Parliamentary Joint Committee on Corporations and Financial Services report, *Property Investment Advice—Safe as Houses?*, released in June 2005 (PJC report) and the Victorian Parliament Law Reform Committee's report, *Inquiry into Property Investment Advisers and Marketeers*, released in April 2008 (Victorian Parliament report).

3.3 The PJC report and the Victorian Parliament report were both triggered by significant problems with the provision of property investment advice and 'wealth creation' services, such as investment seminars which arose during the property boom of the early- to mid-2000s. The recent property boom in Australia seems to have provided similar conditions for property spruikers seeking to exploit interest in the benefits of property investments, however tenuous that link may be in the case of land banking schemes. As Mr Cohen, Director of Consumer Affairs Victoria, told the committee:

Property spruikers have been of interest to national, state and territory agencies for a number of years. In our experience they generally emerge where rising prices create the opportunity for profit from property investment and where homeownership is less affordable—for example, property prices were rising in the early 2000s when Henry Kaye began offering get-rich-quick investment advice.¹

3.4 The use of the term 'property spruikers' has a particular connotation. The committee adopts the term used by the Australian Consumer Law National Project which defines property spruikers as:

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

...property investment promoters—usually not licensed as real estate agents or financial service providers—who run wealth creation seminars, and offer property investment.²

Investment seminars and retail clients

3.5 Investment seminars are often characterised as 'educational services' that provide advice on strategy. Few seminars appear to disclose at the outset that the focus will be on selling particular investments. Importantly, despite the seminars being about investment activities, they are not represented as providing 'financial advice'. Mr McIntyre, for example, was adamant that he was an educator and did not give financial advice:

I am an educator. There is a distinct difference. I am probably the biggest critic of the financial-planning industry in the country.³

3.6 According to Mr McIntyre, he educated people on a range of strategies and that it was not financial advice because, 'if you want financial advice, you go and see a financial planner'. He accepted that he received a commission on the options he sold and this was disclosed, stating that if 'we are selling a product, we disclose our interest'. He reiterated:

We do not give advice. We offer them [potential investors] an opportunity to go and do their due diligence. It is up to them to do that.⁴

3.7 Mr McIntyre agreed with the description that he was selling an opportunity.⁵

3.8 As a result of publicising these events as educational, the seminars attracted a wide range of attendees. Some people who attended were interested in learning more about potential investment strategies, whereas others were attracted by the offer of a free form of financial information.⁶

3.9 As mentioned earlier, the committee received a DVD copy of a recording of an investment seminar presented by 21st Century Property Direct in late 2010 or early 2011 promoting the Moira Park Green City development in Shepparton, Victoria.⁷ The Moira Park Green City development appears to be the first time the practice of

2 Australian consumer law, ACL National Projects, Property Spruikers/Rent to Buy schemes, <http://consumerlaw.gov.au/acl-national-projects/> (accessed 6 January 2016).

3 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 28.

4 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 28.

5 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 28.

6 Parliamentary Joint Committee on Corporations and Financial Services, *Property Investment Advice – Safe as Houses?*, June 2005, p. 10.

7 Ms Grazyna Monka, *Submission 148* (21st Century Property Direct, 1 Day Wholesale Land Release DVD: Homestudy).

selling options to purchase land was used.⁸ Mr Steven Molnar, who is reportedly a former business associate of Mr Kaye, presented the seminar.⁹ Asked at the start of the seminar as to why they were attending the session, audience members stated reasons including to:

- achieve a positive cash flow;
- provide for an early retirement;
- find a good investment with little money down;
- obtain information;
- learn some skills;
- have a better lifestyle; and
- take advantage of a special opportunity.¹⁰

3.10 In relation to how attendees became aware of the investment seminar, Mr Guy reported receiving an email about the seminar after somehow ending up on a marketing list for Global1 Training Pty Ltd, an event management company. Ms Baxter recounted seeing online advertisements promoting the seminar while she was researching property on a real estate website.¹¹

3.11 Investment seminars often targeted people keen to secure their future through acquiring a tangible asset such as property. Building retirement savings is one of the main reasons people invest in property. Market First's schemes, for example, were marketed as an opportunity 'to give you [the investor] the chance to invest in Australia's future blue chip suburbs, *today*'.¹² In particular, investment seminars were often aimed at people looking to build wealth but lacking investment experience. Previous property investment schemes promoted through investment seminars have often focused on 'get-rich-quick' schemes such as rent-to-buy and vendor terms.¹³ Dr Elizabeth Lanyon from Consumer Affairs Victoria described the types of people who have been singled out as potential investors in these schemes:

In the past, these schemes have been mainly rent-to-buy and vendor terms. Those legal forms are not in themselves problematic. However, consumers who are being targeted are those who have limited access to mainstream

8 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

9 Adele Ferguson and Simon Johanson, 'Delving into the dark side of shadow brokers', *Sydney Morning Herald*, 13 August 2011, p. 11.

10 Ms Grazyna Monka, *Submission 148*, around 5 minutes into DVD no. 1.

11 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 35; Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 40.

12 Market First, *Unique Benefits*, <http://www.marketfirstgroup.com.au/about> (accessed 18 September 2015).

13 See footnote 2 in chapter 2 for a description of rent-to-buy schemes.

finance, are often underemployed or commonly underemployed, have low financial literacy and are generally in need of easy or quick financial gains. Our national work is identifying the unique consumer risks that arise with these schemes.¹⁴

3.12 Those promoting land banking schemes have an arsenal of persuasive arguments designed to entice potential investors. These are explored below.

Privileged access

3.13 An important sales technique was to make the investor feel special by convincing them that they were being presented with a unique deal—an opportunity too good to be missed. The court presiding over the Midlands case cited the following examples of the marketing and promotional material used by Property Direct on behalf of Midland:

- (a) "a 'never seen before' property investment opportunity that enables you to secure prime land for a measly, tiny fraction of what others could ever negotiate";
- (b) "a fool-proof plan to grab seven properties over twelve years worth potentially millions of dollars—without relying on the banks or unmanageable payments";
- (c) "potential to make \$1.25m in return in 10 years time with the buy and hold strategy, or 125% return in two years if you want to sell out and cash it out early. Feel at ease, safe and secure with our no-risk exit strategy".¹⁵

3.14 When considered in isolation, the benefits and ease of investing in land banking schemes would appear to be 'too good to be true' to most people. In fact, spruikers often acknowledged that this strategy seemed unrealistic, but only because, they argued, 'mum and dad' investors do not usually have access to these opportunities.

3.15 Potential investors were encouraged to feel as though they had been given privileged access to special deals and opportunities not available to others due to the hard work of the schemes' promoters and developers. For example, one slide at the 21st Century Property Direct seminar was titled 'We are pleased to offer you an exclusive investment opportunity within one of Australia's fastest growing areas'.¹⁶ Mr McIntyre made the same point to the committee:

14 Dr Elizabeth Lanyon, Director, Regulation and Policy Division, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 2.

15 Australian Securities and Investments Commission v Midland Hwy Pty Ltd (administrators appointed); in the matter of Midland Hwy Pty Ltd (administrators appointed) [2015] FCA 1360, paragraph 15, <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2015/2015fca1360> (accessed 4 January 2016).

16 Ms Grazyna Monka, *Submission 148*, around 80 minutes into DVD no. 3.

What is land banking? Effectively, it has been around since medieval days; it is not actually new. It essentially [is] the banking of land for the future—ideally to be converted from farm land to residential, high-value use. The strategy is generally reserved in Australia for the very wealthy and is commonly used by them to create wealth.

...

The 21st Century Group, being a financial innovator that does not like strategies being monopolised solely by the rich and believes that it should also be accessible to the middle class, decided to innovate with the use of property options combined with land banking to help solve the housing affordability crisis that this country urgently faces.¹⁷

3.16 Investors were being offered relatively affordable option prices (around \$20,000 to \$40,000 each),¹⁸ which were often marketed as 'wholesale' options or at a cheaper price because of the buying power of the promoter of the scheme. Ms Liesl Baxter, an investor, heard the same sales pitch at three Market First investment seminars in Perth in 2013, explaining that the seminar was:

...an introduction to the idea of land banking, which they described as buying wholesale lots in potential development sites before planning approval was given, and then there would be a public release after that. The idea was to take advantage of the uplift that comes with the better use and development of urban fringe land. What I understood was that we were coming in at the ground level before the bulldozers came there. I am from a rural family. I have seen it done many times before where a paddock close to town is sold and then you cut it up into little bits...¹⁹

3.17 Mr McIntyre confirmed that this was part of the strategy for 21st Century Group informing the committee that the developer was effectively selling land at 'wholesale' in exchange for getting 'presales for its project in advance'.²⁰ Market First also made big claims about the discounted pricing of their developments in a marketing brochure:

We've been talking about the premium prices paid for 'Rolls Royce' high end properties. However, you may be thinking these properties must be way too expensive for the average investor to afford.

So here's possibly the best news about Market First: as our member you get heavily discounted 'pre-retail pricing'. In other words, you get 'Rolls Royce' properties at 'Holden prices'.²¹

17 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 12.

18 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 29.

19 Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 40.

20 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 13.

21 Mr & Mrs Jim and Alison Guy, *Submission 150*, p. [41].

Success stories

3.18 Spruikers often relied on assumptions about property as well as making selective and often unsubstantiated claims about the local area where the development was located to convince potential investors that the promoted scheme was a good deal.

3.19 For example, the main upside of investing in land banking options that Mr McIntyre outlined for the committee is that land in Australia generally increases in value over time.²² He gave the example of Mr Harry Triguboff of the Meriton Group, who:

...reportedly made \$200 million alone from increases in the value of his group's landholdings. Property options have also been used in the property industry for decades to acquire land—as a way to secure the land without needing to initially borrow or to be obligated to eventually purchase the land. Large land developers also use options regularly.²³

3.20 While this may generally be true (though there are exceptions), there was no evidence before the committee that the fee investors paid for their option to purchase land reflected its value. After all, investors who paid an option fee were not actually purchasing any land at the time they entered into the option agreement.

3.21 Spruikers built on these property success stories with unfounded promises of incredible returns. The suggested returns on land banking schemes were higher than the typical returns for property, which ASIC's *MoneySmart* website suggests are around 6 per cent per annum.²⁴ Notably, while the figures that were discussed at seminars or distributed to potential investors were very clear, the connection between the figures and the actual investment being promoted were not. For example, Market First provided one investor with two optimistic sets of calculations titled 'Property Investment Projections over 40 years' and 'Property Investment Analysis'.²⁵ The documents did not specify which property the calculations were about, but did estimate that a property valued at \$590,000 in year 1 would be worth an incredible \$38.351 million in 40 years.²⁶

3.22 Similarly, 21st Century Group's Moira Park Green City spruiker showed the audience slides outlining capital growth at 8, 10 and 12 per cent per annum—growth

22 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 13.

23 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 12.

24 ASIC *MoneySmart*, *Investment Seminars*, <https://www.moneysmart.gov.au/investing/investment-warnings/investment-seminars> (accessed 5 November 2015).

25 Name withheld, *Submission 149*, pp. [1–7].

26 Name withheld, *Submission 149*, p. [6].

which is both higher than average and which was not directly linked to the investment being promoted.²⁷

3.23 To justify the investment and the claims made about high returns, marketers often made assertions about the local area or the special features of the development that would increase the value of the investment. This was particularly the case with land banking schemes, as the land being proposed for redevelopment was located in regional or farmland areas that were inexpensive compared to the price of land in capital cities. 21st Century Group's Moira Park Green City spruiker highlighted a number of features of the Shepparton region that would apparently increase the value of the land, including fruit and vegetable farms in the region. One slide during the presentation stated:

It [Shepparton] is one of the wealthiest regions in Australia. Shepparton has more BMWs and Mercedes Benz per capita than anywhere else in Australia.²⁸

3.24 The connection between the abundance of farms, expensive motor vehicles and the outlook for the development, which was 8 kilometres outside of Shepparton, was left unexplained. Similarly, while discussing the environmentally sustainable design elements for the Moira Park Green City development, another slide stated that 'Residents are prepared to pay the same prices for properties outside of Melbourne, as for inner suburb properties if they are unique and different'.²⁹

3.25 Interstate investors unfamiliar with local market conditions were particularly susceptible to paying above market value for developments. For example, it appears that both Market First and 21st Century Group held many seminars in Perth during the mining boom; all four investors who gave evidence to the committee were Western Australians who invested in Victorian land banking schemes.

Risks

3.26 In addition to making unsubstantiated and exaggerated claims about the developments they were promoting, spruikers often failed to disclose risks associated with the schemes. The confusion about the nature of the investment in land banking schemes (discussed earlier) is a clear example of how investors were not aware of the complexities surrounding these highly speculative investments, including the timeframe for rezoning and development and the intricate web of mysterious people behind the schemes.

3.27 As well as being marketed as affordable and accessible, land banking schemes were often promoted as risk-free or very low-risk. For example, a 21st Century Group's salesperson, in a presentation on the Moira Park Green City development,

27 Ms Grazyna Monka, *Submission 148*, around 43 minutes into DVD no. 4.

28 Ms Grazyna Monka, *Submission 148*, around 82 minutes into DVD no. 3.

29 Ms Grazyna Monka, *Submission 148*, around 4 minutes into DVD no. 4.

compared options to putting purchases on 'layby' at a retail store because of the alleged maximum flexibility associated with options agreements.³⁰

3.28 Mr McIntyre told the committee that the biggest risk in land banking was that the project does not receive development approval (which often includes approval for rezoning). Most investors, he claimed, were willing to accept that risk:

The answer to the question 'What happens if it does not get rezoned and the development is not approved?' is that most investors are happy to take the risk, as the upside is very good and there is low potential downside'.³¹

3.29 Wealthy investors with diversified investment portfolios who make a small investment in start-ups, for example, may be prepared to wear the risk that they either lose or do not receive the expected return on their investment. The investors targeted by Mr McIntyre's land banking schemes were often those who did not have enough savings or access to credit to invest in an investment property. In most cases, the decisions made by investors in land banking schemes do not align with their risk profile and point to unsound advice on the part of the so-called 'educator'.

3.30 The messages emanating from investment seminars and promotional material were often designed to appeal to inexperienced investors aspiring to own property but lacking either the savings or the access to mainstream credit to purchase investment properties directly. For example, Mr Guy explained to the committee that he invested in a land banking scheme because of his financial situation:

My background is that in 2010 my company was liquidated and we had no money. We just went broke. What we tried to do was look for some future investment that could get us some long-term income and value, and this looked like a good opportunity, so we did that. However, when the bank knocked us back we thought we still had opportunities so we raised the capital ourselves out of our own cash. We supplied \$43,000, as directed, to another law firm.³²

3.31 In outlining one of 21st Century Group's land banking projects in Victoria, Mr McIntyre described the investors that the project was aimed at:

Our land banking division was able to offer home buyers and investors who might not be ready yet to build a home, or who cannot afford it but still want to be investors, the right to acquire land in the future in one of our planned estates.³³

30 Ms Grazyna Monka, *Submission 148*, around 47 minutes into DVD no. 4.

31 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 13.

32 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 35; Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 36.

33 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 12.

3.32 It is important to note, however, that it is not only clients who might be considered to be vulnerable who are caught out by these schemes. Some people with previous experience in property investment have invested in land banking schemes, and many of those who invested have experience in buying property through purchasing their residential home. It may be the case that people who have some experience with purchasing property think they understand property investment better than other investment options, such as managed investments.³⁴ Investors, of course, require some savings (either inside or outside superannuation) to invest in options or off-the-plan contracts, or assets with which to use as security for a bank guarantee. For example, Ms Liesl Baxter, an investor in a Market First project, had prior experience with property investing and went to the seminar because she was looking for a good investment opportunity:

I had had two very successful developments in Perth that I had been a part of where I had subdivided and built projects and made a reasonable amount of money through hard work and research, and I was looking for my third investment opportunity.³⁵

3.33 The Victorian Parliament report pointed out that even relatively well-educated consumers had been caught by rogue traders, with evidence suggesting that all consumers require extra protection in certain markets and situations.³⁶

Exclusive membership

3.34 Seminar attendees were encouraged to purchase education products like DVDs or books, and to become members of 'exclusive' clubs which offered special investment deals, mentoring and individualised property advice. For example, Market First's website promoted its membership program as 'first class membership with first class advantages':

Market First members get access to blue chip, A-grade, real estate at prices and terms the average investor could rarely negotiate or obtain.

These deals are only possible because our members' combined group buying power gives us the ability to negotiate mass discounts with property developers on behalf of our hundreds of members. The net result is our members can secure prestige properties at exceptional prices and terms.³⁷

34 Parliamentary Joint Committee on Corporations and Financial Services, *Property Investment Advice—Safe as Houses?*, June 2005, p. 6.

35 Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 40.

36 Victorian Parliament Law Reform Committee, *Inquiry into Property Investment Advisers and Marketeers*, Final Report, April 2008, pp. 45–46.

37 Market First, *Unique Benefits: First class membership with first class advantages*, <http://www.marketfirstgroup.com.au/about-us/first-class-membership-with-first-class-advantages> (accessed 18 September 2015).

3.35 In some cases, potential investors were told they needed to purchase a membership with 21st Century Group or Market First to gain access to the wholesale price. At one of its investment seminars, a 21st Century Property Direct spruiker (a related company to the 21st Century Group) told potential investors that to invest in the Moira Park Green City development, one of the earliest land banking schemes offering options, 'You have to join first and be a member—full stop, that is the bottom line'.³⁸

3.36 Similarly, Mr Guy, an investor in a Market First scheme, told the committee about his experiences at a Market First investment seminar in Perth in 2013:

We were told that it was also a private buying group—a small buying group—that we were buying into so that we could get the land at wholesale price, and we had to pay a \$5,000 platinum membership to be in that little group.³⁹

3.37 It is therefore unsurprising that all four investors who provided evidence to the committee paid membership fees for access to the land banking schemes; three investors became members after attending Market First investment seminars, while one investor (Ms Monka) became a member of 21st Century Group after receiving promotional material from 21st Century Group as a 'home study' participant.⁴⁰ A promotional Market First flyer provided to one investor promised a number of membership benefits, particularly for 'Platinum' members, including:

- a personalised strategy session;
- unlimited property purchases;
- residences and land with 3–5 year settlements;
- options settlement period 5–7 years;
- \$12,000 investment grant;
- up to 100 per cent finance for residences;
- up to 90 per cent finance for self-managed super fund (SMSF) residences;
- a consumer protection plan with a 10-year rental guarantee; and
- a value guarantee ('to cover any market downside at settlement').⁴¹

3.38 These were some of the many promises made to investors about the benefits and accessibility of land banking schemes. In an investment seminar titled 'Property Education Seminar 2013', Market First's CEO, Mr Burn, outlined his 'ultimate

38 Ms Grazyna Monka, *Submission 148*, around 75 minutes into DVD no. 3.

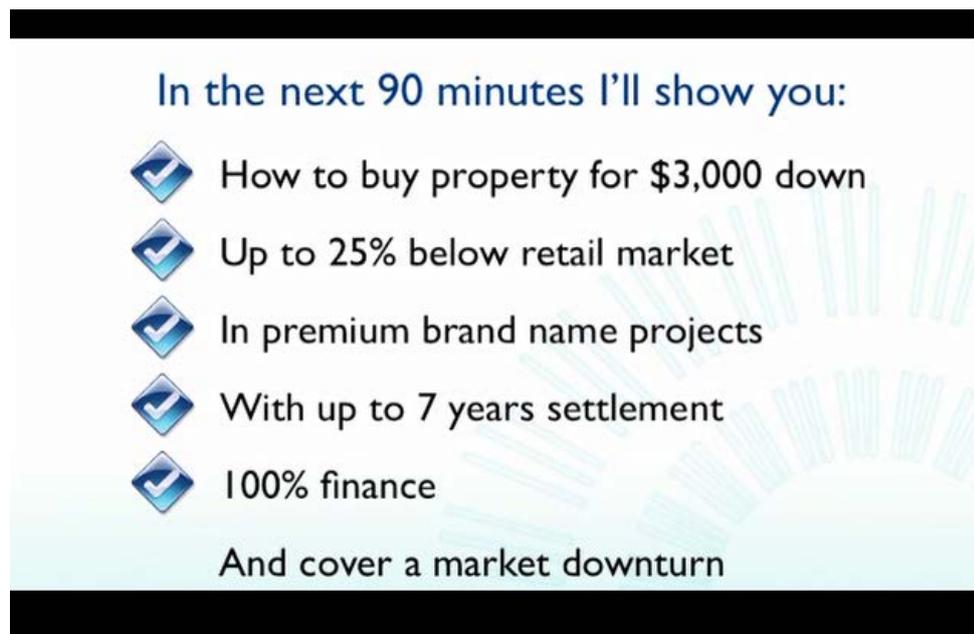
39 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 36.

40 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 36; Mr Trevor Haynes, *Committee Hansard*, 30 September 2015, p. 39; Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 40; Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 7.

41 Name withheld, *Submission 149*, p. [9].

property investment strategy' that centred on investing in Market First's Foscari or Veneziane developments on the outskirts of Melbourne. The promised benefits of the strategy are highlighted in Figure 1. These outlandish and unproven benefits are typical of those promised for land banking schemes operated and promoted by Market First and 21st Century Group. As ASIC's *MoneySmart* financial literacy website warns consumers: 'Big promises equal big risks'.⁴²

Figure 1: Slide from Mr Rowan Burn's presentation on Market First's land banking schemes⁴³



Endorsements and appearances by celebrities

3.39 Investment seminars often featured guest speakers who purportedly became wealthy using the tips and tricks taught at the seminar ('success stories') or who were well-known celebrities paid to promote the investment. For example, 21st Century Group brought Mr Arnold Schwarzenegger, famous film star and former Governor of California, to Australia to headline its 2013 'national tour' and give the event (and 21st Century Group) significant publicity.⁴⁴ In promotional material, Mr Schwarzenegger is reported as saying:

42 ASIC *MoneySmart, Investment Seminars*, <https://www.moneysmart.gov.au/investing/investment-warnings/investment-seminars> (accessed 5 November 2015).

43 Mr & Mrs Jim and Alison Guy, *Submission 150*, around 9 minutes into DVD no. 2.

44 21st Century Group, *21st Century Financial Education Summit*, <http://21stcenturyfinancialeducationsummit.com/#success> (accessed 18 September 2015).

Jamie McIntyre is an extraordinary human being who has helped hundreds of thousands of people achieve their full potential. I love that he has a PhD in results...⁴⁵

3.40 One investor, Mr Haynes, reported attending a Market First seminar primarily to watch Mr Richard Branson, renowned entrepreneur and founder of the Virgin Group, speak at the Perth Convention Centre. Attendees had to first sit through two days of presentations in the lead-up to Mr Branson's presentation. When asked what it meant that Mr Branson was appearing at this seminar, Mr Haynes told the committee:

It made it more legitimate than it was. He is obviously a person everyone admires in some way. By putting him on last, you had to put up with everyone else speaking first. I guess it is that simple.⁴⁶

3.41 Even for investors who were not drawn to the seminars because of the star speakers, the celebrity presentations often gave the scheme being promoted an air of authenticity and credibility. Mr Guy provided the committee with a poster of the 2014 'Property Millionaires Tour', which featured TV personalities, real estate agent Mr John McGrath and Mr Burn, Market First's CEO.⁴⁷ The tour was 'proudly supported' by Century 21 real estate agents and Smart Property Investment magazine.⁴⁸ The committee is not suggesting that these other parties had any improper involvement in land banking schemes, but their association was certainly intended to convince potential investors of the integrity and viability of the products.

3.42 Mr Benjamin Kingsley, Chair of the Property Investment Professionals of Australia, told the committee that spruikers hired celebrities to speak at investment seminars 'for instant social credibility'.⁴⁹ It appears that, in many cases, celebrity endorsements and appearances at investment seminars helped convince attendees of the legitimacy of the scheme and the probity and trustworthiness of the spruiker.

3.43 The celebrity endorsements and national seminar tours often continued to provide this sense of legitimacy long after investors had invested in their scheme. Ms Monka noted:

I was just thinking that he [Mr McIntyre] is getting his circle of very influential friends and it is just getting bigger, because at the time when I attended the seminar, it was only Tony Robbins, the motivational speaker.⁵⁰

45 'Jamie McIntyre', <http://jamiemcintyreexposed.com.au/> (accessed 14 January 2016).

46 Mr Trevor Haynes, *Committee Hansard*, 30 September 2015, p. 39.

47 Mr & Mrs Jim and Alison Guy, *Submission 150*, p. [1].

48 Mr & Mrs Jim and Alison Guy, *Submission 150*, p. [1].

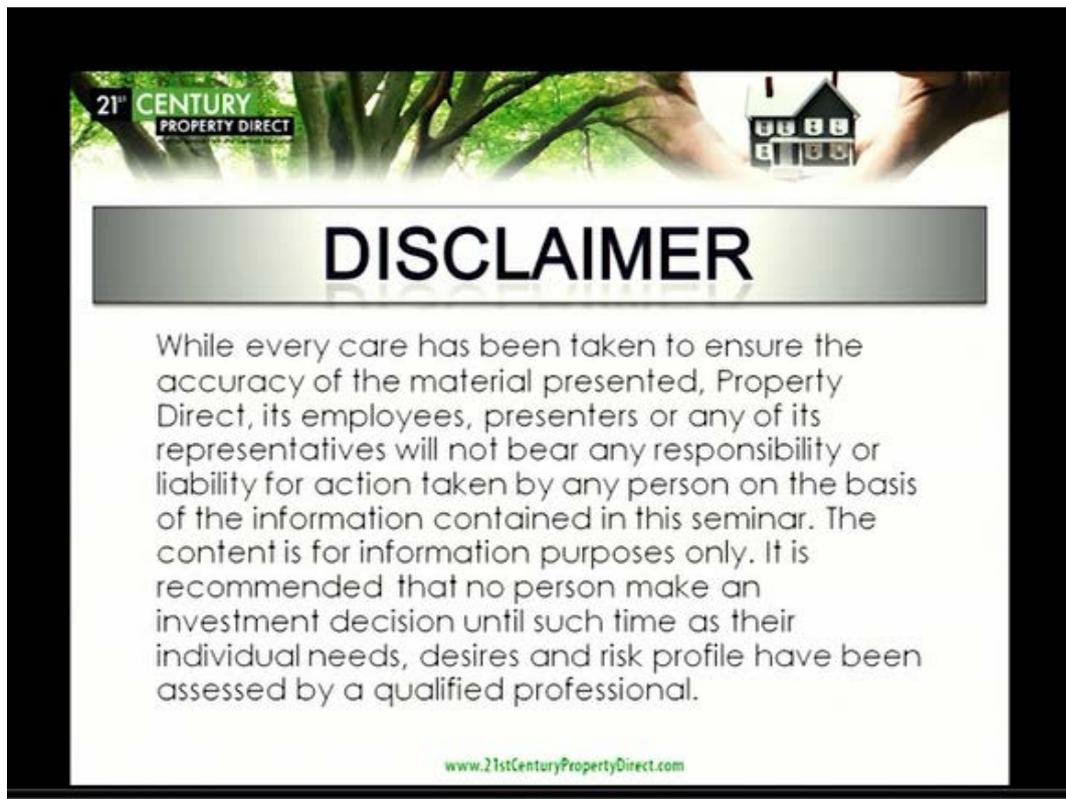
49 Mr Benjamin Kingsley, Chair, Property Investment Professionals of Australia, *Committee Hansard*, 30 September 2015, p. 57.

50 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 10.

Disclaimers—the fine print

3.44 The land banking schemes examined by the committee commonly included lengthy disclaimers at the start of investment seminars and on marketing brochures and other documents provided to investors. For example, the slide at Figure 2, which was displayed by a 21st Century spruiker illustrates the type of disclaimer used at seminars intended to alert attendees to the reliability of the information provided.

Figure 2: Slide from 21st Century Group's presentation on the Moira Park Green City development⁵¹



3.45 The slide was accompanied by the following statement by the presenter:

So basically I am here to give you lots of information, a lot of it is general in nature. I am going to tell you where we find this information so you can go and double-check it, triple check-it for yourself and get further updates on this information. At no point am I here to give you any specific financial advice for your specific situation. Is everyone ok with that? Please say yes. Alright, terrific.⁵²

51 Ms Grazyna Monka, *Submission 148*, around 1 minute into DVD no. 1.

52 Ms Grazyna Monka, *Submission 148*, around 1 minute into DVD no. 1.

3.46 Other examples of disclaimers can be found at the end of Market First's emails to investors and in Market First's marketing brochures.⁵³ One Market First brochure for the Foscari project included this disclaimer (extracted in part):

This is a conceptual brochure created for the purpose of providing information to both current and prospective purchasers. Accordingly, it is not to be relied on as to the accuracy, completeness and suitability of the information contained in this brochure and in the described materials ('the information'). The brochure is presented for illustrative and educative purposes and shall not be represented or treated as real estate advice, legal advice, investment advice, tax advice and other similar advices. The brochure does not and will not form part of an offer or contract between the parties.⁵⁴

3.47 The optimistic sets of calculations (discussed earlier) in the Property Investment Analysis documents provided by Market First to one investor both featured the same disclaimer, which acknowledged that these calculations were essentially speculations based on unknown assumptions:

Disclaimer: Note that the computer projections listed above simply illustrate the outcome calculated from the input values and the assumptions contained in the model. Hence the figures can be varied as required and are in no way intended to be a guarantee of future performance. Although the information is provided in good faith, it is also given on the basis that no person using the information, in whole or in part, shall have any claim against Market First Property Consulting Pty Ltd - Melbourne, its servants, employees or consultants.⁵⁵

3.48 While such disclaimers may be used as a device to protect the promoter from claims of misleading advertising, they are ineffective as a means of alerting investors to risks associated with the investment, especially considering the context in which disclaimers are issued.⁵⁶

High-pressure sales tactics

3.49 Having listened to compelling arguments to invest in a land banking scheme and been presented with testimonials extolling its virtues, attendees were often pressured to sign up to such schemes through high-pressure sales tactics. As noted earlier, potential investors were encouraged to feel as though they had exclusive access to the special deal on offer: that they would be the only ones to have heard

53 Mr & Mrs Jim and Alison Guy, *Submission 150*, [p. 6]; Name withheld, *Submission 149*, pp. [38, 121].

54 Name withheld, *Submission 149*, p. [38].

55 Name withheld, *Submission 149*, pp. [1, 6].

56 Notably, the use of disclaimers does not necessarily prevent a finding that these representations were misleading. For example, *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54.

about investment strategies usually available to wealthy people only, not 'mum and dad' investors.⁵⁷ Promoters would then emphasise the importance of grasping the opportunity before it slipped away. Thus, land banking schemes were often promoted with a sense of urgency, as potential investors were told they had to invest quickly, usually by signing up at the seminar, or otherwise risk missing out on the chance. For example, a 21st Century Property Direct spruiker emphasised that the time frame to invest in the Moira Park Green City development was limited and the demand high:

If you wait, guess what is going to happen? You are going to miss out, full stop. Because we have plenty of other people who want to see this around the country. You will still get your five years to buy your five blocks, or seven blocks, or how many blocks you've got going, no problem. But this deal will be gone. So this is why you have got to be thinking to yourself, you need to be thinking how do you get the maximum result from this, because this is a deal which can't actually be repeated.⁵⁸

3.50 Such practices negate any guidance offered in disclaimers to obtain independent professional assistance. Instead, potential investors were pressured into making decisions without first taking the time to reflect on their actions and without seeking outside professional advice.

3.51 ASIC recognised that property spruiking events and investment seminars were often high pressure environments where participants could 'be rushed into making a decision'. ASIC informed the committee of its concern that high pressure tactics employed by some promoters urging investors to sign up to arrangements, meant the investors were not given enough time to consider their investment carefully. They 'do not adequately read the agreements that they enter into to, or seek independent advice in relation to the scheme'.⁵⁹

3.52 In summary, while investors in land banking schemes were provided with an overwhelming amount of information and promises about the developments, this information and the way it was promoted was designed to persuade prospective investors to sign up to the scheme. None of the information provided by Market First or 21st Century Group was presented in a way that encouraged the investor to make an informed choice. In reality, investors were taken in by professional marketing techniques and overly optimistic predictions despite the ubiquitous use of disclaimers. They were rushed into making a decision without time to consider the investment or to consult other sources for guidance or information.

Conclusion

3.53 Land banking schemes were sold through property investment seminars or wealth creation programs and through glossy brochures. The seminars:

57 Ms Grazyna Monka, *Submission 148*, around 60 minutes into DVD no. 3.

58 Ms Grazyna Monka, *Submission 148*, around 77 minutes into DVD no. 3.

59 ASIC, answers to written questions on notice Nos. 13 and 18.

- were usually attended by retail clients who were interested in knowing more about property investment but who were not usually knowledgeable about the industry;
- offered privileged access to purported special deals;
- featured persuasive marketeers who relied on property myths, concept plans and unsubstantiated claims to make the schemes seem like a good deal;
- used endorsements and appearances by celebrities to attract attendees and to give legitimacy to the products being promoted and respectability to the promoters; and
- used high-pressure sales tactics to push 'exclusive' membership offers and make big promises.

3.54 Although it may not have been in their financial interest, consumers sometimes succumbed to the 'hype' generated by investment seminars, with their celebrity endorsements, offers of special 'exclusive' deals and high-pressure sale tactics. A legitimate property investment adviser would have no difficulty allowing a consumer time to speak to their friends and relatives about any proposed deal and to research the offer as well as encourage their client to seek advice from independent financial advisers, lawyers, accountants or brokers.

3.55 The overriding message coming out of the evidence is that consumers must be wary of trusting documents and material provided by spruikers and resist the pressure to sign up to a deal without first seeking independent advice. But, the developers and promoters of these schemes should also be held accountable for their actions.

Chapter 4

Legitimacy by association

4.1 Convincing potential investors of the legitimacy of a land banking project was central to the promotion of the scheme. The committee has noted the use of celebrities and testimonials from people who have increased their wealth through such ventures as an important part of marketing land banking schemes. In this chapter, the committee looks at the way in which promoters also linked reputable, well-known companies and government agencies to their schemes as another means of reassuring investors of their credibility and the commercial viability of the proposed development.

Involvement of reputable third parties

4.2 The committee has serious concerns about the practices of some property development companies, marketing agents, architects and other third-parties involved in providing advice on, or supporting the development of, some land banking schemes. The committee considers that the extravagant promises made by Market First and 21st Century Group about their respective developments would have seemed far less plausible were it not for the associations, often overstated, with brand name companies. In particular, the committee has concerns about the involvement of well-known or supposedly 'independent' companies in two respects:

- some well-known companies were repeatedly mentioned at investment seminars and in marketing material as being engaged with the planning or construction of the developments, but these companies later denied that they were substantively involved with the schemes; and
- investors were referred to lawyers and accountants who had pre-existing business relationships with Market First and 21st Century Group, a practice known as offering a 'one stop shop'.

Project partners

4.3 In their promotion of land banking schemes, both 21st Century Group and Market First referred to connections with respected third parties. For example, as part of his marketing strategy, Mr McIntyre linked his company's land banking schemes with those of the large, well-established companies in the property industry and certain government bodies.¹ One investor, Ms Baxter, told Fairfax Media:

I think the game plan is to construct a money-making scheme using the integrity that comes from reputable names within the building and legal industries, to gain the consumer's trust and confidence so they part with

1 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 12.

their money. Meanwhile, the developer has no intention to follow through with the project.²

4.4 The claimed involvement of reputable, brand name companies and government bodies is illustrated through the following case studies involving the Greater Shepparton City Council, SMEC Urban, Peddle Thorp architects, Slater and Gordon Lawyers, and the Victorian government's former Office of Living Victoria.

Moira Park Green City development: former Councillor Mr Milvan Muto

4.5 The 21st Century Property Direct investment seminar, which promoted the Moira Park Green City development outside of Shepparton, featured an influential presentation from Mr Milvan Muto, who at that time was an elected councillor for the Greater Shepparton City Council.³

4.6 In a pre-recorded presentation, Mr Muto outlined the factors that would contribute to Shepparton's future economic growth, including the need for housing construction to meet demand, the potential development of a fast train from Shepparton to Melbourne running at the speed of the Japanese *Shinkansen* bullet trains, and state and federal government funding.⁴ One of Mr Muto's final comments was:

In Shepparton, we only really have one growth corridor for residential and that's the southern growth corridor, which heads towards Melbourne and follows the river and the creek.⁵

4.7 While Mr Muto did not comment directly on or endorse the Moira Park Green City development, 21st Century Property Direct's spruiker, Mr Molnar, made a number of comments immediately after Mr Muto's presentation linking Mr Muto's remarks to the likelihood of the land being rezoned:

Ok, so you have managed to hear from council. What did you get from council? And he [Mr Muto] is obviously one of the councillors. There is only one area where Shepparton can grow and that's where? South corridor.

2 Royce Millar and Simon Johanson, 'Watchdog moves on land banking as investors fear losses', *Saturday Age*, 15 August 2015, pp 8–9.

3 Mr Muto was a councillor for Greater Shepparton City Council from November 2008 until May 2014, when he was disqualified for seven years due to gross misconduct. At different times during his tenure Mr Muto was suspended from carrying out his duties while facing criminal charges as well as complaints of gross misconduct, and in May 2014 he was sentenced to eight months imprisonment after being found guilty of attempting to pervert the course of justice —these legal proceedings were unrelated to Mr Muto's presentation at the 21st Century Property Direct seminar. County Court of Victoria at Melbourne, Criminal Jurisdiction, CR 13-01208, Director of Public Prosecutions v Milvan Muto [https://www.countycourt.vic.gov.au/sites/default/files/recent-decisions/MUTO%20Milvan%20\(22%20May%202014\).pdf](https://www.countycourt.vic.gov.au/sites/default/files/recent-decisions/MUTO%20Milvan%20(22%20May%202014).pdf) (accessed 5 January 2016).

4 Ms Grazyna Monka, *Submission 148*, around 8 to 25 minutes into DVD no. 3.

5 Ms Grazyna Monka, *Submission 148*, around 22 minutes into DVD no. 3.

So the area we are doing the development in is guess where? South! Alright, it is in the preferred growth corridor.

So the government, local government, has designated [that] this is the only area we are going to grow and this [Moira Park Green City] is where they want it to grow. So what do you think the chances are of getting development approval in that area? Like, that's where they want it, that is where they have said they want it.

Many people had the question, 'well, you know is it swamp land?' or 'will it be approved?' so that is why we want the council to tell people 'this is the corridor'. We have given them [the council] a master plan, they understand it, they are actually very happy with it, so it just has to go through a process, and that process will actually take years to do.⁶

4.8 In March 2015, however, the *Shepparton News* reported that Greater Shepparton City Council had received 49 inquiries from investors who were concerned about their investment in the Moira Park Green City development.⁷ The article mentioned that Mr Muto had been listed as a speaker at the 21st Century Property Direct seminars but that the Greater Shepparton City Council was refuting allegations that it had endorsed the development. The newspaper quoted Mr Johann Rajaratnam, the council's sustainable development director, who said:

Council has made it clear to anyone who contacts us about this proposal that council is not involved in this development in any way, nor is the council promoting or endorsing the proposal as part of its longterm development strategy.⁸

4.9 A letter, dated 10 March 2015, from the Greater Shepparton City Council to the Shepparton Newspaper outlined the council's current position in relation to the land which was the subject of the proposed 'Moira Park Green City' development. In its letter, the Council noted that it had not received an application for a planning permit to subdivide any of the land and 'it did not necessarily follow that the Council will approve such an application at any time in the future'. It stated further:

The land is currently not zoned to allow small lot residential subdivisions and is in fact subject to significant flooding which will prohibit development in some areas.⁹

6 Ms Grazyna Monka, *Submission 148*, around 23 minutes into DVD no. 3.

7 Darren Linton, 'Muto Angst', *Shepparton News*, 11 March 2015, p. 1.

8 Darren Linton, 'Muto Angst', *Shepparton News*, 11 March 2015, p. 1.

9 Shepparton News, 'Proposed Moira Park' Green City development', 11 March 2015, <http://www.mmg.com.au/local-news/shepparton/proposed-moira-park-green-city-development-1.89501> (accessed 4 January 2016). One area had been designated an "'Investigation Area"—15+ years' and another an 'Investigation area'.

4.10 Ms Monka told the committee that she had paid \$60,000 for two options in the Moira Park Green City development because of what she perceived to be an endorsement from the Greater Shepparton City Council:

What really sold me to the Shepparton scheme was an endorsement from Greater Shepparton City Council and the respected names of the businesses involved in the project. The attendees were frequently reminded of them. It was like an insurance policy—very much as the other project in 2009—so I paid for a club membership and set up a self-managed super fund—

...

...the most important [consideration] for me—it was like an insurance policy—was that the city council was there and was saying: 'It's real. It will happen.'¹⁰

4.11 As noted previously, the value of options in land banking schemes is inherently tied to the likelihood that the land will be rezoned and receive development approval. As such, any suggestion that the local council (or another government body with planning responsibilities) endorses a development can influence a potential investor's decision to sign up to the scheme. This is especially the case when an individual associated with a local council is used, however subtly, to endorse the development.

Moira Park Green City development: SMEC Urban

4.12 The involvement of SMEC Urban, which has since been renamed as SMEC, in the development of Moira Park Green City was repeatedly mentioned in promotional materials and during 21st Century Group's investment seminars. SMEC provides integrated urban development consultancy services throughout Australia, with the origins of the company dating back to the construction of the Snowy Mountains Scheme.

4.13 Mr Ofer Fridberg, described as a senior urban planner from SMEC Urban, gave a presentation to 21st Century Property Direct's seminar on the strategic background and the planning process for Moira Park Green City, including how the development would fit in with the Greater Shepparton Housing Strategy.¹¹ A slide taken from the 21st Century Property Direct seminar referred to SMEC Urban as industry specialists in master-planned developments that:

...are engaged to construct your property and are selected for their high level of public credibility and industry respect.¹²

4.14 21st Century Property Direct's spruiker introduced SMEC Urban as the 'project manager' for the development.¹³ However, a brochure for the Moira Park

10 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, pp. 7, 10.

11 Ms Grazyna Monka, *Submission 148*, around 31 and 41 minutes into DVD no. 3.

12 Ms Grazyna Monka, *Submission 148*, around 25 minutes into DVD no. 4.

Green City development and SMEC Urban's own presentation at the 21st Century Property Direct seminar (see Figure 3) described SMEC Urban's role as 'project consultants'.¹⁴

Figure 3: Slide from 21st Century Group's presentation on the Moira Park Green City development¹⁵



4.15 According to SMEC, it had been contracted to provide some services, such as conceptual urban design information, to the Moira Park Green City development but that the relationship had been terminated because of a number of concerns with the process:

Our review of our files relating to the project in question indicate that SMEC terminated the relationship with the client due to unauthorised use of

13 Ms Grazyna Monka, *Submission 148*, around 29 minutes into DVD no. 3.

14 Author unknown, *Moira Park Green City: Shepparton's neighbourhood of the future*, p. [8], http://21stcenturyfileserver1.com/pdf/pd/moira/moira_park_brochure.pdf (accessed 5 November 2015).

15 Ms Grazyna Monka, *Submission 148*, around 32 minutes into DVD no. 3.

SMEC's brand and marketing materials as well as use of information and materials supplied by SMEC beyond their intended use.¹⁶

4.16 SMEC also provided a letter, dated 5 October 2011, that was sent to Mr Nejat Mackali, the Shepparton property developer who was involved with the Moira Park Green City development, terminating the business relationship:

In withdrawing our services from the project, we reinforce the purpose of our work undertaken to date, together with concerns raised previously;

- Drawings we prepared were concepts only and not intended for any other purpose and should not be used to support any business case for Zsa Zsa properties and certainly not for use as marketing material to attract investment. They were also prepared on your instruction to test densities;
- On a number of occasions we have advised that Council were unlikely to accept density proposed in our concepts and those of Chris Smith & Associates and that the concepts were an exercise in assessing yield/density;
- On a number of occasions we have advised that much of the land is subject to flooding and that the relevant studies should be undertaken before proceeding with the development.¹⁷

4.17 The promoters of the schemes used the good name and reputation of this organisation beyond the services it was contracted to provide to enhance its own standing.

Market First's Foscari and Veneziane projects: Slater and Gordon Lawyers

4.18 Some investors in Market First's land banking schemes, the Foscari and Veneziane projects on the outskirts of Melbourne, were influenced by the reputed involvement of well-known law firm Slater and Gordon. The committee heard evidence that Market First's representatives, including Mr Rowan Burn, CEO of Market First, heavily promoted Slater and Gordon's involvement during their seminars.¹⁸ Statements made to potential investors suggested that Slater and Gordon were involved in the projects to represent and protect the interests of individual investors, including by lodging a 'master caveat' over the lots to ensure that the rights of the investors were maintained. While there appears to be no such thing as a 'master caveat', it is apparent, as explained further below, that some investors believed the instrument existed and provided an effective guarantee that their investment in a project would be secure if the project did not proceed.

16 SMEC Urban to Mr Nejat Mackali, 5 October 2011 attached with correspondence to the committee, 26 November 2015.

17 Correspondence, SMEC Urban to the committee, 26 November 2015.

18 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 36; Mr Trevor Haynes, *Committee Hansard*, 30 September 2015, pp. 38-39; Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 41.

4.19 While some investors were clients of Slater and Gordon, others, however, were under the misapprehension that they were clients when clearly they were not. This misunderstanding became apparent when Slater and Gordon received file transfer forms for investors who were not their clients.¹⁹ Mr Guy, for example, thought he was represented by Slater and Gordon and provided the committee with a Slater and Gordon disclosure statement and costs agreement signed by his wife and himself.²⁰ This document, however, was not signed by Slater and Gordon and Slater and Gordon later confirmed that Mr Guy was not a client of the firm.²¹ Another investor, whose name is withheld, also provided the committee with a similar document from Slater and Gordon not signed by anyone from the firm.²² This investor also received documents from Summit Law and the file transfer form from Slater and Gordon to SK Lawyers.²³

4.20 Mr Adam Zuchowski, who was then employed as a Senior Associate in the Footscray office of Slater and Gordon, was the lawyer representing some investors in the Foscari and Veneziane projects.²⁴ He took on his first clients for Market First's projects in May 2013.²⁵ According to Slater and Gordon, Mr Zuchowski advised 197 clients on the Veneziane or Foscari projects, 41 of which were options clients and the remaining 156 had invested through off-the-plan contracts of sale.²⁶ Ms Sharon Taylor, General Manager of Professional Standards and Risk at Slater and Gordon, started reviewing her firm's involvement when the matter was referred to her group on 23 September 2013. Mr Zuchowski stopped working for Slater and Gordon on 2 December 2013.²⁷

4.21 Ms Taylor's group investigated both Mr Zuchowski's advice as well as Market First's developments and, as noted earlier, raised concerns about the projects. They included: uncertainty around who was behind the developers; representations made to investors, in particular, that they were purchasing at wholesale prices; payments for exclusive membership; and 'a disconnect between the lifestyle amenity promised to investors and the likelihood of delivery'.²⁸

19 Slater and Gordon Lawyers, answer to written question on notice, 2 December 2015, p. 3.

20 Mr & Mrs Jim and Alison Guy, *Submission 150*, p. [2].

21 Slater and Gordon, *Submission 147*, p. 2.

22 Name withheld, *Submission 149*, p. [12].

23 Name withheld, *Submission 149*, pp. [15-21].

24 Slater and Gordon Lawyers, *Submission 147*, p. 2.

25 Slater and Gordon Lawyers, *Answers to Question on Notice*, 2 December 2015, p. 1.

26 *Committee Hansard*, 30 September 2015, p. 48.

27 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 44.

28 *Committee Hansard*, 30 September 2015, pp. 43, 46 and 48.

4.22 As discussed in the next chapter, Slater and Gordon also became concerned that Mr Zuchowski may have had a potential conflict of interest in providing advice on matters relating to Market First schemes. This potential conflict of interest appears to have derived in part from the fact that Mr Zuchowski is the brother-in-law of Mr Darren Eliaou, the Principal Lawyer at Evans Ellis Lawyers, which has been at the centre of a number of land banking schemes.²⁹

4.23 Mr Guy, who invested in Market First's Foscari project, told the committee that his investment decision was influenced by Slater and Gordon's apparent association with the project. Mr Guy told the committee that Mr Burn spoke about this involvement at the seminar:

...Rowan Burn made a comment in his statement during our program that Slater and Gordon would hold the master caveat over the entire site, protecting investors in the event the project development failed, or a sale of the whole site was imminent. That was what was influencing them. It was a guarantee that our money would not be lost because the money would be held in the lawyer's trust funds. It would only be released on completion of our property.³⁰

4.24 In addition, according to Mr Guy, he spoke to a lawyer named 'Adam' from Slater and Gordon who discussed the master caveat Slater and Gordon would lodge over the block of land.

4.25 Mr Hayne and Ms Baxter, who also invested in Market First's projects, had similar recollections about references to the master caveat. Mr Hayne indicated that Mr Burn, in his investment seminar presentation, told the audience that Slater and Gordon was providing the master caveat 'so I could not lose my money'.³¹ Ms Baxter informed the committee that 'They were the two things that made me buy into the scheme—the existence of the master caveat and representation by a reputable law firm'.³²

4.26 Ms Taylor explained that Slater and Gordon was not involved in lodging a master caveat. She referred to this 'curious notion' of a master caveat that 'had apparently been suggested by representatives of Market First':

The first I heard of the 'master caveat' was after our 10 February 2014 letter had been sent out to clients. One client contacted me and discussed the issue of the master caveat. That was the first time that I had heard of the master caveat. It was a little perplexing, really, because Slater and Gordon clearly did not provide a master caveat. What I was able to glean was it appeared that it was something said in the promotional seminars by Rowan

29 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 46.

30 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 36.

31 Mr Trevor Haynes, *Committee Hansard*, 30 September 2015, pp. 38–39.

32 Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 41.

Burn, as a way of assuring people about their investment. But it is not something that Slater and Gordon can or would provide. In fact, I am a little perplexed by what a master caveat would even be for a land development of that kind.³³

4.27 To summarise Ms Taylor's evidence, Slater and Gordon did not provide master caveats over the Market First projects and the provision of a master caveat would have, according to Ms Taylor, been 'implausible' as no such instrument exists.³⁴ Ms Taylor also provided the committee with a file note from a phone conversation with Ms Baxter on 13 February 2014; the file note records Ms Baxter asking about the master caveat which Mr Burn had mentioned at every seminar Ms Baxter attended.³⁵ It appears that Ms Baxter was the client who had contacted Ms Taylor and discussed with her the issue of the master caveat.

4.28 Mr Zuchowski, the Slater and Gordon lawyer who provided advice on the Market First schemes, submitted that he did not provide any advice or representations about lodging a master caveat, an instrument he also thought did not exist:

My advice did not include any representations, comments or discussion whatsoever in respect of a 'master caveat', the existence of a 'master caveat' or indeed that a 'master caveat' would be lodged and is directly contrary to the evidence given by Ms Baxter to the Committee.

...

I further advise:

1. I am unaware of and do not believe that such an instrument known as a 'master caveat' in fact exists as a matter of property law;
2. Accordingly I did not and would not provide any advice in respect of a 'master caveat' and again, as such an instrument does not exist I could not provide any advice in respect of it...³⁶

4.29 Further, Mr Zuchowski maintained that Slater and Gordon's clients were provided with documents (for an off-the-plan contract of sale) which expressly stated that the purchaser was not permitted to lodge a caveat to protect their interest.³⁷

4.30 In summary, all three investors in Market First projects who gave evidence to the committee had a strong recollection of Mr Burn making representations about

33 Slater and Gordon Lawyers, *Submission 147*, p. 1 and Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 48.

34 Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 41.

35 Slater and Gordon Lawyers, *Submission 147*, Attachment 2, p. [1].

36 Mr Adam Zuchowski, *Submission 145*, p. [4].

37 Mr Adam Zuchowski, *Submission 145*, pp. [4–5]. It should be noted that only an excerpt of the off-the-plan contract of sale was provided and it is not possible for the committee to confirm the authenticity of this document.

Slater and Gordon providing a master caveat over the Foscari and Veneziane projects during his presentations at investment seminars. These recollections seem consistent with Market First's practice to encourage attendees at its seminars to view its land banking schemes as a legitimate, rewarding property investment opportunity. The committee considers that it is unlikely that three investors, who do not have legal backgrounds, would concoct consistent and detailed stories about a non-existent type of caveat. It is more likely that Market First did make representations about Slater and Gordon lodging a master caveat to protect the interests of investors. It is clear that the representations about the master caveat, and Slater and Gordon's purported role in lodging the master caveat, played a substantial role in giving a sense of legitimacy to Market First's projects and convincing investors that their interests in the developments would be protected.

4.31 On the evidence, Mr Zuchowski's role in facilitating and encouraging clients to think that a master caveat would be lodged to protect their interests is unclear. Mr Zuchowski did not mention or provide any evidence about the documents provided in relation to options agreements; he asserted that the vast majority of matters on which he provided advice related to off-the-plan contracts of sale.³⁸ According to the documents Mr Zuchowski provided to the committee, investors in off-the-plan contracts of sale could not lodge any type of caveat to protect their interests.³⁹

4.32 The committee believes that Market First repeatedly promoted the involvement of Slater and Gordon and referred investors to Mr Zuchowski because the law firm's reputation provided the developments with an aura of legitimacy. Investors felt their interests would be protected because of the involvement of Slater and Gordon. Following this matter, Slater and Gordon has instituted an absolute prohibition on accepting work from wealth creation seminars, as the firm considers 'that wealth creation seminars represent an undesirable segment of the real estate promotion market'.⁴⁰

4.33 The committee considers that firms need to be cautious about providing advice on schemes that are promoted by spruikers, which includes ensuring that internal risk management processes are robust enough to identify promptly employees who may be engaged with developers or promoters of schemes that the firm would not endorse.

Market First's Foscari and Veneziane projects: Peddle Thorp architects

4.34 In their marketing brochures and during presentations at investment seminars, Market First promised that the Foscari and Veneziane luxury housing estates to be constructed outside of Melbourne were designed by Peddle Thorp architects. Market First's marketing brochure stated:

38 Mr Adam Zuchowski, *Submission 145*, p. [3].

39 Mr Adam Zuchowski, *Submission 145*, attachment 1, p. [1].

40 Slater and Gordon Lawyers, answer to Question on Notice, 2 December 2015, p. 2.

You can invest in a project designed by World Class Architects Elevli Plus Peddle Thorp

Peddle Thorp have designed many world famous projects including The Grand Hyatt in Collins Street Melbourne, Doha Aquarium in Dubai, The Rod Laver Arena, ANZ Headquarters in Melbourne and the recent global rebranding of Tiffany & Co.⁴¹

4.35 The brochure also described Peddle Thorp as a 'project partner' for Market First's developments.⁴² Mr Burn spent several minutes showing the attendees at one investment seminar photographs of Peddle Thorp's projects, emphasising that Market First's housing developments would be similarly luxurious and well-designed.⁴³ Peddle Thorp's involvement appears to have added significant attractiveness to Market First's developments, providing evidence to justify the promises of high returns for a 'branded' development built on farmland outside Melbourne.

4.36 Peddle Thorp Architects (PTA) informed the committee of its involvement with Market First's projects. It noted that, around August to November 2011, Michael Grochowski, Project Management (Aust) Pty Ltd engaged both PTA and its interior design company PTID for masterplanning and graphic design services for the Acacia Banks, Truganina and Reeds Edge near Melton. According to PTA, they had no knowledge of Market First's involvement in the project or of the project timeline—it did not know that these projects were Market First developments or that any sales or options were offered for sale. PTA noted that they were engaged 'to prepare a concept masterplan for Mr Grochowski (Project Management (Aust) Pty Ltd) for which PTA and PTID have not been fully paid'.⁴⁴ PTA explained:

...our Contract was with Michael Grochowski, Project Management (Aust) Pty Ltd, who was introduced to us by Hakan Elevli of Elevli Plus. The relationship ended as our invoices remained unpaid.⁴⁵

4.37 As noted in chapter 2, ASIC has serious concerns that Foscari is not close to completion and appears unable to be completed due to the financial position of the development company which operated the scheme and is the owner of the land.⁴⁶ It was also prompted to take legal proceedings against Foscari because it formed the view that investors may have invested in the scheme on the basis of misleading representations by the promoters of the project.

41 Mr & Mrs Jim and Alison Guy, *Submission 150*, [p. 53]. Architect Mr Hakan Elevli, Principal of Elevli Plus, has publicly stated that he has sold his copyright on the Foscari drawings, and he has no ongoing involvement in the project. Royce Miller, Simon Johanson and Ben Schnieders, 'Kaye continues to conjure', *Sydney Morning Herald*, 8 March 2015.

42 Mr & Mrs Jim and Alison Guy, *Submission 150*, p. [57].

43 Mr & Mrs Jim and Alison Guy, *Submission 150*, around 58 minutes into DVD no. 2.

44 Peddle Thorp Architects, answer to written question on notice.

45 Peddle Thorp Architects, answer to written question on notice.

46 ASIC, 'Heritage Bendigo and Foscari', frequently asked questions.

Office of Living Victoria—government grant to Foscari

4.38 The Foscari development promoted by Market First in Melbourne's outer west received a \$651,679 stormwater grant from the Victorian Government's former water agency, the Office of Living Victoria. An investor update on Market First's website cited this grant as evidence of the project's development.⁴⁷ The grant was also mentioned in Market First's marketing brochure:

Quality of content, outcomes and presentation

One of the major outcomes from the design [of Foscari] has been awarding of an Office of Living Victoria fund commitment for the projects ability to showcase how sustainability is a catalyst for connecting community, water and the environment.⁴⁸

4.39 A recent independent review of the grants program by former Victorian and Western Australian Auditor-General, Mr Des Pearson AO, found that 80 per cent of the grant had been released to the holding company behind Foscari, Foscari Holdings Pty Ltd. It also had concerns about the viability of the scheme, stating that the purpose of the grant was:

...to implement storm water management infrastructure in a green field development yet no infrastructure has been delivered. Milestone payments were triggered on signing of the Funding Agreement (25%), completion of detailed design work (45%) and awarding of contracts to builders (10%). No further milestones have been met and it is not clear whether the project will be completed.⁴⁹

4.40 Following the release of the independent review of the grants program, it was reported that the Victorian government would attempt to recover the grant money from Foscari Holdings.⁵⁰ Victorian Water Minister, the Hon Lisa Neville MLA, said the government would seek to recover the money as there were 'no tangible outcomes at all' with the Foscari project.⁵¹

Conclusion

4.41 The ability of the operators and promoters of land banking schemes to convince some well-known members of the property development sector and

47 Market First, *Unique benefits*, <http://www.marketfirstgroup.com.au/latest-news-1/foscari-development-council-approved> (accessed 18 September 2015).

48 Name withheld, *Submission 149*, p. [27].

49 Pearson, Des, *Office of Living Victoria: Independent Review*, September 2015, p. 27, http://delwp.vic.gov.au/_data/assets/pdf_file/0010/311779/OLV-Des-Pearson-Review-REPORT-FINAL-SEPTEMBER-2015.pdf (accessed 18 September 2015).

50 Royce Millar and Ben Schneiders, 'Dan Andrews wants water money back from Henry Kaye-linked project', the *Age*, 3 September 2015.

51 Royce Millar and Ben Schneiders, 'Dan Andrews wants water money back from Henry Kaye-linked project', the *Age*, 3 September 2015.

government agencies that the land would be developed as promised highlights the importance of all relevant authorities carrying out proper probity checks.

4.42 It appears that many of the companies that were promoted as having a significant involvement in bringing the developments to life were only involved at the early stages of the projects, and later withdrew their services. The involvement of these third parties provided a sense of legitimacy to the projects and encouraged investors to believe that the schemes were well supported by others in the property sector. However, potential investors were not aware of the exact nature of the companies' engagement or that they were no longer involved with the schemes.

4.43 In other cases, as with the Greater Shepparton City Council and Slater and Gordon (excluding the endeavours of Mr Muto and Mr Zuchowski, respectively), it appears that the brand name of the third party was used during investment seminars often without the explicit knowledge or consent of these organisations.

4.44 More broadly, these case studies raise questions about how consumers—who are often unaware of standard practices in the property development industry—can tell the difference between reputable developments and high-risk developments when some of those inside the industry (and in government) seem to have some difficulty in discerning the difference. They also highlight the reputational damage legitimate businesses can suffer by being associated with less reputable schemes, regardless of whether or not they have been directly involved in operating or providing advice on land banking schemes. Finally, the case studies demonstrate the capacity of the promoters of such schemes to overstate the involvement of respectable companies for blatant promotional purposes. They are likely to seize any opportunity to associate their venture with recognised, reputable entities in the expectation that it will lend credibility to their project.

Chapter 5

Referrals and independent advice

5.1 Consumer protection advocates urge potential investors to seek independent advice as a wise precaution before committing to a property investment venture, especially a complex scheme. In this chapter, the committee looks at the importance of independent advice and how this can be compromised. The committee considers the payment of commissions and advice given by lawyers and accountants who often had pre-existing relationships with Market First and 21st Century Group and benefitted from referrals.

Commissions

5.2 Mr McIntyre informed the committee that he received between 17 and 20 per cent commission for selling options.¹ The committee has received evidence that Mr McIntyre may have received commissions much higher, but he insisted that 21st Century received approximately 20 per cent.² Mr Kingsley, Property Investment Professionals of Australia, was curious to learn about the levels of commission that were being paid. He explained:

It is something that is debated heavily within the property investment industry around what is an appropriate level of commission that needs to be paid. I would suspect 17 to 20 per cent is excessive in the upper end of the scale with regard to what would be an appropriate level of remuneration for professional advice in our field.³

5.3 In his view, between two and five per cent would be a reasonable commission. He knew of practitioners offering more than five per cent—between five and 10 per cent but even these were 'very, very big numbers'. He observed:

If I was to buy a \$500,000 investment property and I was good enough to convince you it was a great investment, I could potentially take a \$50,000 commission.⁴

5.4 In this regard, it should be noted that as the principal marketer for Midland, Mr McIntyre suggested that 21st Century would have received commissions of between \$2 and \$3 million.⁵

1 *Committee Hansard*, 30 September 2015, p. 19.

2 Mr Nejat Mackali, correspondence to the committee, 22 October 2015 and Mr Jamie McIntyre, correspondence to the committee, 25 November 2015.

3 *Committee Hansard*, 30 September 2015, p. 57.

4 *Committee Hansard*, 30 September 2015, p. 57.

5 *Committee Hansard*, 30 September 2015, pp. 23 and 25.

5.5 In its current inquiry into forestry managed investment schemes (FMIS), the committee has identified two areas of concern associated with high fees and commissions—the incentive for an adviser to recommend a product for personal reasons (better remuneration irrespective of the merits of a product); and the siphoning of funds away from the investment. With regard to commissions exercising a perverse influence, the committee has noted that the payment of commissions has a tendency to compromise that advice.

5.6 Evidence from the FMIS inquiry indicates that the Future of Financial Advice (FOFA) reforms, by removing conflicted remuneration, may well have remedied one of the most pernicious incentives underpinning poor financial advice. However, without prejudging the findings of the FMIS inquiry, the committee makes the preliminary observations that commissions have the potential to corrupt advice and it is important to ensure there are no loop holes in legislation that would allow any form of incentive payments to creep back into the financial advice industry. This same observation about the propensity for commissions to compromise advice applies with equal force to investment in property.

Committee view

5.7 As long as commissions remain an important source of remuneration for the promoters of land banking schemes, particularly the payment of high commissions and other inducements to sell the product which override the interests of the investor, the potential for poor investment advice in this industry will persist.

One stop shop: 'independent' legal and financial advice

5.8 In many cases, it appears that Market First and 21st Century Group referred investors to service providers for advice on financial and legal matters who had an arrangement with the operators and promoters of the land banking schemes. ASIC informed the committee that it had identified 'many instances' where the operator or promoter of a scheme had referred investors to other professional service agents associated with those marketing or operating the scheme. It cited the case of Midland Hwy where the administrators have raised concerns as to a conflict of interest by a lawyer who acted for both the operators of the scheme and the investors.⁶

5.9 By failing to disclose this relationship, the service providers allowed investors to assume they were getting independent advice.

Slater and Gordon Lawyers

5.10 As discussed earlier, many investors in Market First's projects were referred to Mr Zuchowski, who was then employed as a lawyer at Slater and Gordon Lawyers and advised 197 clients on the Veneziane or Foscari projects.⁷ Alerted by the volume

6 ASIC, answer to written question on notice No. 15.

7 *Committee Hansard*, 30 September 2015, p. 48.

of Market First referrals, Slater and Gordon became concerned about the quality of Mr Zuchowski's advice and that he may have had a conflict of interest.⁸

5.11 In his legal advice to clients, Mr Zuchowski addressed the risks and complexities around the investments 'to some extent' and advised clients that the option fee was non-refundable; and, once paid, became the property of the grantor to do with as it saw fit.⁹ Nonetheless, Slater and Gordon reported that Mr Zuchowski did not follow Slater and Gordon's established risk management processes: Mr Zuchowski did not log his work with the Professional Standards and Risk team or consult his peers in relation to the substantive advice he provided to clients.¹⁰ Slater and Gordon told the committee that the adequacy of Mr Zuchowski's advice should be judged by others, not the firm.¹¹

5.12 Mr Zuchowski's potential conflict of interest appears, in part, to derive from a personal relationship. As part of its investigations, Slater and Gordon discovered that Mr Zuchowski is the brother-in-law of Mr Darren Eliau, Principal Lawyer at Evans Ellis Lawyers. Evans Ellis Lawyers have been at the centre of a number of land banking schemes, including, in this case, acting for the vendors.¹²

5.13 On a number of occasions in late 2013 and early 2014, Slater and Gordon wrote to clients, who were involved in Market First's projects, outlining several concerns about the Market First developments and advising them to seek independent legal advice on those matters.¹³ Market First contacted many investors directly, telling them that Slater and Gordon could not handle the volume of referrals they were receiving and suggesting that investors transfer their files to SK Lawyers.¹⁴ For instance, Mr Guy was told by Market First that 'Slater and Gordon was not capable of dealing with the amount of enquiries and paperwork that was associated with Market First generating the sale'.¹⁵ Also, Mr Hayne reported receiving phone calls from Market First, informing him that Slater and Gordon 'were not doing us any good anymore and we have to change to SK Lawyers'.¹⁶

8 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 48.

9 Slater and Gordon Lawyers, answer to question on notice, 2 December 2015, p. 2.

10 Slater and Gordon Lawyers, answer to question on notice, 2 December 2015, p. 2.

11 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 45.

12 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 46.

13 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 43; Slater and Gordon Lawyers, *Submission 147*, Attachment 1.

14 Slater and Gordon Lawyers, answer to question on notice, 2 December 2015, pp. 2-3.

15 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 37.

16 Mr Trevor Haynes, *Committee Hansard*, 30 September 2015, p. 39.

5.14 Despite urgings from Slater and Gordon to seek independent advice, most clients continued to follow Market First's referrals. Of the requests for Slater and Gordon to transfer files, 18 clients sought independent advice from Holding Redlich (who were nominated to provide legal advice by the Law Institute of Victoria) and 91 sought legal advice from firms recommended by Market First (namely SK Lawyers, Network Legal & Associate and Summit Law).¹⁷

5.15 The committee received evidence revealing how promoters encouraged potential investors to seek legal advice from a recommended law firm. At one of its investment seminars, a 21st Century Property Direct spruiker told potential investors that a 'bulk price' had been struck with Bazzani Scully Brand lawyers, so that it would cost 21st Century Group members only \$600 per options agreement for legal advice.¹⁸ While potential investors were told they could choose to receive legal services from another law firm, the 21st Century Property Direct spruiker repeatedly stated that it would likely cost potential investors a significant amount of money—\$2,000 to \$5,000 per options contract—if they went to another law firm.¹⁹

5.16 Further, the spruiker indicated that most solicitors would not understand options agreements, and even solicitors willing to take on the work would charge substantially higher fees because they would need to read and get across all of the details in the potential investor's contract.²⁰ With the emphasis on the efficiency and cost benefits of relying on the recommended law firm, it is not surprising that many investors would have considered using the services recommended by the promoters of the schemes. The committee makes no judgment as to the quality of the advice provided by Bazzani Scully Brand lawyers, but this example illustrates the method used by spruikers to direct investors to preferred service providers.

5.17 Many of the investors in Market First and 21st Century Group's land banking schemes used external accountants recommended by the promoters of the schemes. ASIC informed the committee that approximately 60 per cent of investors in land banking schemes invested through SMSFs. Importantly, ASIC noted:

The promoters or scheme operators refer investors to particular companies to establish the SMSFs.²¹

5.18 For example, in promotional material, Market First noted:

Many Market First Members choose to invest in property through their Self-Managed Super Fund.

17 Slater and Gordon Lawyers, answer to question on notice, 2 December 2015, p. 3.

18 Ms Grazyna Monka, *Submission 148*, around 60 minutes into DVD no. 3.

19 Ms Grazyna Monka, *Submission 148*, around 60 minutes into DVD no. 3.

20 Ms Grazyna Monka, *Submission 148*, around 60 minutes into DVD no. 3.

21 ASIC, answer to question on notice, 30 November 2015, p. 11.

As a member you can be introduced to a qualified advisor to help you do this. Your advisor can also help you set up a Self-Managed Super Fund, for very little cost, if you decide you want one.²²

5.19 Typically, the investors had little actual contact with lawyers and accountants other than to sign a standard document. Ms Monka, for example, told the committee that she only received legal advice about her investment in the Moira Park Green City development after the investment was finalised and the money had already been transferred.²³

Committee's view

5.20 Referrals by a company promoting a scheme to other service providers for expert advice may be a genuine attempt by the promoter to assist their client in finding such expertise. But in some cases, it appears that, because of links or relationships with the developer or promoter of the scheme, the independence of such advice may be called into question. The committee is particularly concerned about the advice given by several lawyers and law firms to investors in the schemes, as well as the role played by some law firms in the operation of land banking schemes (described at various points throughout this report). Most of those lawyers appear to be based in Victoria.

5.21 A common thread running through the land banking schemes investigated by the committee was that the promoters of the schemes referred investors to lawyers, accountants and lenders with whom they had a potential conflict of interest because of their pre-existing (and often intertwined) business relationships. In some cases, the professionals did not appear to alert their clients to risks associated with the projects and seemed more to facilitate a transaction in the interests of the promoter or developer and not their client. Their advice could not be seen as independent.

Recommendation

5.22 The committee recommends that the Victorian Legal Services Commissioner and Legal Services Board (and, where appropriate, other state and territory legal professional bodies) investigate thoroughly the conduct of lawyers involved in providing advice to investors in the land banking schemes considered in this report, as well as those lawyers who provided advice, and controlled trust accounts, for the operators of the schemes.

Recommendation

5.23 The committee recommends that Consumer Affairs Victoria investigate whether Market First and/or other parties, including lawyers, breached the

22 Market First, *'Secure Your Wealth' Property Investment System*, attachment to *Submission 150*, p. 41.

23 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 8.

requirements in the *Sale of Land Act 1962 (Vic)* in regards to off-the-plan contracts of sale for the Foscari and Veneziane developments.

Conclusion

5.24 All investment strategies have risks, and it is important to understand the risks to determine whether they are acceptable when considered as a part of an investment strategy. The committee strongly suggests that potential investors seek advice from professionals who are independent and not recommended by spruikers: licensed financial advisers (who are listed on ASIC's financial advisers register); lawyers who are recommended by state and territory legal profession bodies; qualified accountants; and brokers who disclose their ownership and commission structures. During discussions with these professionals, potential investors should specifically ask for the risks associated with the product or schemes to be clearly outlined.

Chapter 6

Recourse

6.1 Investors who have become concerned about the lack of progress with their development have reported significant difficulty seeking redress for perceived unsound advice. In this chapter, the committee considers the avenues open to investors to report complaints and to seek redress for conduct that, in their view, has caused them loss.

When land banking schemes do not deliver as promised

6.2 The operators and promoters of the land banking schemes under the committee's consideration presented themselves as educators or mentors and not financial advisers. Many spruikers insist that they are not providing financial advice so few hold an Australian Financial Services (AFS) licence, and most appear to hold no formal qualifications in relevant fields such as financial advice, property investment or real estate transactions. Instead, many claim to have learnt the 'secrets of success' from wealthy people or through their own self-education. When asked by the committee about his qualifications, Mr McIntyre spoke of his informal approach to learning which centred on a 'real-life education':

As an educator—well, you can be a lecturer at university through academic qualifications, but most people who come to seminars are looking for real-life education, so people to produce results—

...

What I did—I do not think you would get it in a certain job, but I did work for wealthy individuals to learn about investing in the property market.

...

...I learned and served my apprenticeship by learning off successful property investors, successful entrepreneurs—things that were not taught at school. I wrote a book: *What I didn't learn at school but wish I had*, which became a best seller, highlighting things about practical education that should be taught at school.¹

6.3 Mr Burn describes himself as having extensive training in human behaviour which has given him 'a unique ability to assist clients to understand how to develop wealth'. According to Mr Burn, he was 'professionally trained, for over 10 years, by Dr John Demartini; a world leading expert on human behaviour and potential'.²

1 *Committee Hansard*, 30 September 2015, p. 15.

2 Rowan Burn, *Universal Laws of Wealth*, 2012, <http://mypropertyinvestor.com.au/wp-content/uploads/2013/03/TheWealthReport.pdf> (accessed 18 January 2016).

6.4 Spruikers generally see no requirement to be licensed or to be members of external dispute resolution schemes (as AFS licensees are required to do). As a result, investors typically do not have access to any external dispute resolution scheme such as the Financial Ombudsman Service should things go wrong. Investors must instead rely on internal company mechanisms for recovering their investment, but these companies generally do not have adequate internal complaint-handling processes. Dissatisfied investors had to negotiate with the promoters for the return of their investment monies or other forms of redress. The committee is aware of an investor in the Moira Park Green City development who succeeded in receiving a refund. Ms Baxter described how she persuaded Market First to return her \$39,500 investment:

I just really harassed them several times a day for about two weeks, and then I said to them, 'Right, I'm going to the ACCC,' and they freaked out at that and they told me that I was unreasonable. Finally, they agreed when I said to them that I was going to the newspaper and the ACCC and I said, 'I've got nothing to lose now; you've got everything to lose.' They actually came good with it and they actually promised my money back.³

6.5 Understandably, many investors would not have the determination, knowledge or resourcefulness that Ms Baxter displayed in successfully getting her investment returned. In addition, investors no longer have leverage over Market First or 21st Century Group by threatening to report the behaviour of these companies to the regulators given ASIC's action in this space.⁴

6.6 The frequent changes in the spruikers' contact details has meant it is often difficult for investors to get in touch with the promoters to make a complaint. Mr Guy explained the difficulties he had experienced in 2015 when attempting to contact Market First's CEO, Mr Burn:

...the phone number that I had for the Melbourne office has been disconnected. His mobile phone number does not ring him anymore. I have not had any contact with him at all.

...

I have never spoken to anyone at Market First since then, because I do not have any contact numbers anymore and cannot even find them on the internet anywhere.⁵

6.7 In some cases, investors have reported being told to go through 'developers' to get their money back, but it is unclear who the developers of the schemes are. Mr Guy, for example, has managed to track down the location of his investment

3 Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 42.

4 Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 42.

5 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 36.

money: the money is in a trust account held by Evans Ellis Lawyers.⁶ Evans Ellis Lawyers has stated that they would seek instructions from their client as to whether the money can be returned to Mr Guy, but, as was noted earlier in the report, Evans Ellis Lawyers have refused to reveal the name of the developers for Market First's Foscari project.⁷

6.8 Another option open to investors is to take legal action against the developers and the spruikers of the scheme. For most investors, taking legal action to recover the cost of their investment and the compulsory membership fees is unlikely to be viable given the amounts involved and the risks and costs associated with legal action. Recovering investment monies is therefore likely to be extremely difficult for individual investors to achieve.

6.9 It is also unclear where the tens, if not hundreds, of millions of dollars invested in land banking schemes have gone. It is doubtful that investors will be able to have their investment monies returned or see the developments rezoned and constructed as promised because there are no funds available. All of the approximately \$25 million invested in the Hermitage Bendigo development run by Midland Hwy has been spent, with only \$1.7 million going toward planning permit and development purposes.⁸ In relation to the five schemes promoted by 21st Century Group involved in court proceedings, ASIC has indicated its concern that:

- investor funds have been removed from the development companies' bank accounts; and
- the option fees paid by investors have been transferred to related companies within the 21st Century Group.⁹

6.10 The ACCC informed the committee that it does have power to apply to the Court to seek orders to redress loss or damage suffered by persons in certain circumstances.¹⁰ It appears, however, that very few investors in the land banking schemes have reported their concerns to the relevant regulators.

6 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

7 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 36.

8 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed) CAN 153 096 069*, 14 October 2015, p. 2.

9 ASIC, '21st Century Group land banking proceedings: Frequently asked questions', <http://asic.gov.au/about-asic/media-centre/key-matters/21st-century-group-land-banking-proceedings/> (accessed 24 September 2015).

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

Making a complaint

6.11 Another avenue for redress is to lodge complaints and reports of suspected wrongdoing with a regulator. ASIC is Australia's corporate, markets and financial services regulator, while state consumer protection agencies, such as Consumer Affairs Victoria, administer and enforce the Australian Consumer Law (ACL), as well as state-based property legislation. The ACCC is responsible for promoting competition and fair trading and providing consumer protection. Its role is to enforce compliance with the *Competition and Consumer Act 2010* (CCA), which contains specific prohibitions on certain practices but generally prohibits false or misleading representations and or unconscionable conduct and applies across the economy.

6.12 Both ASIC and Consumer Affairs Victoria reported receiving few complaints about land banking schemes. Over a number of years, however, ASIC has received numerous complaints of misrepresentations, unlicensed financial product advice and high commissions that relate to different investment products.¹¹ When asked by the committee about any figures Consumer Affairs Victoria had in relation to the number of investors in land banking schemes, Mr Cohen explained:

The only figure I have is from what we have reviewed of our own records. We have received in the past two years, as best we could identify, eight complaints about land banking. So it had not been a matter that we had received significant complaints about.¹²

6.13 The ACCC informed the committee that it receives 'many contacts and complaints on an ongoing basis across all sectors of the economy, including a number in relation to various property investment schemes'.¹³ Noting that complaints do not always make reference to particular concepts such as land banking, the ACCC explained that it was difficult for the commission to identify exactly when it first became aware of concerns about land banking schemes and to give a precise number of complaints that could relate to this type of scheme. Nonetheless, the ACCC indicated that:

Key word searches from complaints suggest that over a five year period from 1 January 2011 to 31 December 2015, we have received at least 10 complaints or contacts that refer to land banking, 135 that otherwise refer to property spruiking and 170 that refer to investment seminars.¹⁴

6.14 Similarly, the committee notes that only a small number of investors provided evidence to this inquiry, either through the hearing or written submissions. The

11 ASIC, answer to question on notice, 30 November 2015, p. 8.

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

13 ACCC, answer to written question on notice Nos. 1–6, 12–15, 21, p. 5.

14 ACCC, answer to written question on notice Nos. 1–6, 12–15, 21, p. 5.

committee suspects that many people have not come forward to reveal their experiences of investing in land banking schemes because:

- the sophisticated and complex nature of the schemes, as well as the regular email updates on the 'progress' of the developments sent by the promoters of the schemes, have led some investors to assume that the developments may (eventually) be rezoned and built into residential housing as promised;¹⁵ or
- investors have realised that the developments are unlikely to proceed and, as such, are discouraged from reporting the misconduct.

6.15 The complexity of the schemes, and the method by which they were marketed to mostly unsophisticated retail investors through investment seminars, appears to have limited the number of investors who have realised that their investments may not be maturing as expected. Because of the medium- to long-term nature of land banking schemes, it appears that many investors are not yet in a position to determine whether they will receive a return on their investment as promised. As such, it may be the case that many investors have not realised that their investment may be in jeopardy or that what they thought they were buying is not what is to be delivered.

6.16 The investors who gave evidence to the committee appeared to be hopeful that their concerns would be addressed through channels such as media attention or the committee's inquiry. Mr Guy remarked that he had not yet lodged a complaint with ASIC as 'We have been hoping it is all going to work itself out', though he had also spoken to Fairfax reporters to draw media attention to the issue.¹⁶ When asked if he had tried to get his money back from Market First, Mr Hayne stated:

No. I have not really tried because I just thought it was pointless at the moment. I thought I would rather go through a process where everyone could get their money back at the same time—that sort of thing.¹⁷

6.17 The committee received (limited) evidence that some industry professionals were concerned about the way the land banking schemes were operated and may have sought to make reports of possible wrongdoing to ASIC. Ms Taylor from Slater and Gordon told the committee that a Market First employee came forward to provide information about Market First's operations when Slater and Gordon was conducting due diligence on the projects.¹⁸ Ms Taylor told the committee that the Market First employee was referred to the regulator, which was presumably ASIC.¹⁹ Similarly, ASIC submitted that it had received reports about misconduct:

15 Mr & Mrs Jim and Alison Guy, *Submission 150*, p. [5].

16 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 38.

17 Mr Trevor Haynes, *Committee Hansard*, 30 September 2015, p. 42.

18 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 52.

19 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 52.

ASIC has received a number of reports of misconduct in relation to the schemes operated by 21st Century and Market First. ASIC has responded to each of the reporters and has, where appropriate followed up with some reporters on a number of occasions.²⁰

6.18 The committee formed the view that the lack of complaints lodged with regulators about land banking schemes means that it is important for regulators to be proactive in relation to monitoring products spruiked at investment seminars and to encourage the reporting of suspected unscrupulous practices. By supplementing their complaints mechanism with a focused, proactive surveillance program, the committee hopes that ASIC, the ACCC and state and territory regulators could more quickly identify and take action against breaches of the law by spruikers.

A money-back guarantee

6.19 Mr McIntyre insisted that 21st Century Group's land banking schemes had solved one of the main risks of land banking by offering a 100 per cent money-back guarantee for options if the project was not approved within 20 years.²¹

6.20 Given that few investors appear to have been aware that the timeframe for options was a long-term timeframe, the usefulness of this money-back guarantee appears to be limited. It also does not appear to compensate the investor fully—for example \$20,000 invested in 2013 is not equivalent to \$20,000 returned in 2033.

6.21 As 21st Century Group has only been promoting land banking schemes for four or five years, the money-back guarantee has not yet been tested and will not be able to be accessed by investors for another 15 or 16 years. While it is impossible to predict whether the 21st Century Group will be able to honour their money-back guarantee in the distant future, the committee considers it to be very unlikely given the legal action currently affecting a number of land banking schemes operated or promoted by 21st Century Group.

Financial loss for investors

6.22 The committee received evidence from investors about the financial loss which could result from their investment in land banking schemes. Ms Monka told the committee that she had invested 90 per cent of her savings (through a SMSF) in the Moira Park Green City development in 2011.²² Not having access to this money has had a negative effect on Ms Monka's life. Ms Monka told the committee that she could have used this money to pay medical bills, as she has recently been out of work

20 ASIC, answer to question on notice, 15 November 2015, p. 1.

21 Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 13. The exception is the Tarneit project, where the money-back guarantee commences if the project is not approved after 10 years: Mr Jamie McIntyre, CEO, 21st Century Group, *Committee Hansard*, 30 September 2015, p. 21.

22 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 9.

following surgery, or she could have used the money to pay her mortgage.²³ Ms Monka stated that she would have to rely on the age pension to fund her retirement, instead of funding her own retirement as she had planned.²⁴

6.23 As mentioned earlier, it is possible that investors who paid deposits for an off-the-plan contract of sale may be able to receive their deposit back, as off-the-plan developments have a greater degree of consumer protection under the law. It should be noted that some of the protections under the Victorian Sale of Land Act, such as the requirement for any moneys paid by a buyer to be held in trust, may be available to land banking investors in Market First's schemes who invested through off-the-plan contracts of sale. Mr Cohen explained some of the safeguards in Victoria:

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.²⁵

6.24 Ms Taylor noted that the vast majority of the clients for whom Slater and Gordon acted entered into off-the-plan contracts of sale and similarly noted that their deposits were held in a solicitor's trust account, as required under the Sale of Land Act.²⁶ However, investors, who purchased options have no such protections. Mr Cohen suggested:

Where a scheme provides only for the payment of an option fee, these protective laws, to hold in trust all money paid towards the sale of land before the registration of the plan of subdivision, should also apply.²⁷

6.25 Mr Mullaly, ASIC, agreed with the view that a potential protection is for moneys paid in respect of these transactions to be held on trust because they are land transactions.²⁸

Recommendation

6.26 The committee recommends that state and territory governments consider requiring that moneys paid to purchase an option in a land banking scheme be held in trust consistent with the requirements for off-the-plan agreements.

6.27 Mr McIntyre provided copies of correspondence allegedly from investors in 21st Century Group's projects in which the investors voice significant concerns about

23 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 9.

24 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 10.

25 *Committee Hansard*, 30 September 2015, p. 1.

26 *Committee Hansard*, 30 September 2015, p. 52.

27 *Committee Hansard*, 30 September 2015, p. 2.

28 *Committee Hansard*, 30 September 2015, p. 63.

losing their investment moneys because of ASIC's court proceedings against 21st Century Group.²⁹ This correspondence provides additional insights into the financial effect on investors of investing in land banking schemes should they fail, with examples of statements made by different investors including:

- 'I invested the majority of my superannuation held in a SMSF in this option and if ASIC push for liquidation of these products that will all be lost';³⁰
- '...I am worried I will lose the money I have invested completely. This is most [of] my superannuation. It has taken me about 25 years to save this superannuation';³¹
- 'I am a single mother and do not want to lose the money I have invested';³²
- 'I don't want liquidators appointed to Jamie McIntyre's land banking projects (which are perfectly legal) as this action will cause my loss of money invested from my SMSF';³³ and
- 'I hold grave concerns that my hard-earned superannuation and savings will be lost as a result of the actions you [ASIC] are seeking in this case'.³⁴

6.28 Of course, the investor statements provided by Mr McIntyre suggest the risk to their investment comes from ASIC's intervention, rather than the questionable value of the underlying land banking schemes. Nonetheless, the statements are suggestive of the high stakes involved for many investors, both financially and emotionally. Sadly, there is strong likelihood that the harm to investors will grow, particularly with court proceedings and the reports of liquidators and administrators indicating it is unlikely investors will see a return on their investment or the return of their option fee or deposit money.

Loss of trust in the financial system and property development sector

6.29 The evidence provided by the few investors who spoke to the committee only hints at the possible extent of the problem. There are more than 2,000 other investors in land banking schemes across Australia who are exposed to significant loss should the early signs of trouble in these schemes signal their ultimate collapse.

Property spruikers continuing to operate

6.30 Despite the action ASIC has taken against Mr McIntyre and 21st Century Group, 21st Century Group has continued to be an active property spruiker.

29 Mr Jamie McIntyre, *Submission 146*, pp. 55–75.

30 Mr Jamie McIntyre, *Submission 146*, p. 71.

31 Mr Jamie McIntyre, *Submission 146*, p. 62.

32 Mr Jamie McIntyre, *Submission 146*, p. 61.

33 Mr Jamie McIntyre, *Submission 146*, p. 57.

34 Mr Jamie McIntyre, *Submission 146*, p. 55.

In September 2015, ASIC obtained an urgent injunction in the Federal Court of Australia against a number of companies, including related companies to Mr McIntyre's 21st Century Group, which prohibit the companies from promoting and marketing a property investment in the Pilbara, Western Australia.³⁵

6.31 An investment seminar that was planned for 10 September 2015 was among the actions prohibited by the injunction. ASIC alleges that the Pilbara development was being marketed using the tagline 'Do you know how to buy Australian property, no money down?'³⁶ The grounds on which ASIC sought the injunction included that:

- the investment documents were misleading and deceptive;
- the investment proposal is a financial product; and
- the companies were procuring investors to contravene their director's duties under the *Corporations Act 2001* (the Corporations Act)—under the proposed investment, the investors were to be paid a director's fee but agreed that one of the companies would be the sole-decision maker for the investment trust.³⁷

6.32 The hearing for the matter has been set down for 23 to 24 March 2016, where ASIC would ask the Federal Court to make declarations that these companies contravened the Corporations Act and for the injunctions to be made permanent.³⁸

6.33 The committee is struck by the audacity of 21st Century Group in continuing to spruik property schemes after ASIC had already commenced court proceedings against the companies in relation to five land banking schemes.

Conclusion

6.34 While the fate of a number of land banking schemes remains uncertain, the committee's main concern is the way in which such schemes were marketed to retail

35 ASIC, 'ASIC restrains Macro Realty Developments Pty Ltd and Jamie McIntyre's 21st Century Property and 21st Century Education from promoting Pilbara property investment', Media release 15-250MR, 14 September 2015.

36 ASIC, 'ASIC restrains Macro Realty Developments Pty Ltd and Jamie McIntyre's 21st Century Property and 21st Century Education from promoting Pilbara property investment', Media release 15-250MR, 14 September 2015.

37 ASIC, 'ASIC restrains Macro Realty Developments Pty Ltd and Jamie McIntyre's 21st Century Property and 21st Century Education from promoting Pilbara property investment', Media release 15-250MR, 14 September 2015.

38 ASIC, answer to question on notice, 30 November 2015, p. 8; ASIC, media release 15-250MR, 'ASIC restrains Macro Realty Developments Pty Ltd and Jamie McIntyre's 21st Century Property and 21st Century Education from promoting Pilbara property investment', 14 September 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-250mr-asic-restrains-macro-realty-developments-pty-ltd-and-jamie-mcintyres-21st-century-property-and-21st-century-education-from-promoting-pilbara-property-investment/> (accessed 14 January 2016).

investors who did not understand the arrangements they were entering and the lack of consumer protection which left them exposed to unscrupulous practices.

Chapter 7

Managed investment schemes and self-managed superannuation funds

7.1 The land banking schemes investigated in this inquiry featured both direct and indirect property investment—21st Century Group investors and some Market First investors invested through options agreements (indirect property investment), while some Market First investors invested through off-the-plan contracts of sale (direct property investment). Direct property investment is exempted from the Corporations Act but it is unclear whether options agreements in land banking, as an indirect property investment, could be regulated under the Corporations Act.

7.2 In this chapter, the committee looks at ASIC's current attempts to establish the status of options agreements in land banking schemes, as a form of indirect property investment, and whether they can be captured under the Corporations Act. The committee also examines the use of self-managed superannuation funds as a vehicle for property investment.

Managed investment schemes

7.3 ASIC first became aware of potential problems with land banking schemes offering options to purchase in mid-2014. It commenced investigations into these schemes, which are (in part) aimed at determining whether the options agreements central to some land banking schemes fall under the Corporations Act. On 3 June 2015, the Senate Economics Legislation Committee questioned ASIC about complaints raised in media reports relating to land banking schemes. ASIC indicated that, while land banking schemes did not fit neatly into ASIC's jurisdiction, it was conducting active inquiries in relation to this issue.¹

7.4 Two months later, on 7 August 2015, ASIC announced that it had initiated court proceedings in the Federal Court of Australia against companies associated with Mr McIntyre and the 21st Century Group. They related to their promotion and sale of interests to investors in five land banking schemes in Victoria and Queensland. As noted in chapter 2, the five projects are Botanica; Secret Valley Estate; Oak Valley Lakes Estate & Resort; Bendigo Vineyard Estate & Resort; and Melbourne Grove Estate.² ASIC's media release outlined the case:

1 Mr Tim Mullaly, Senior Executive Leader-Financial Services, ASIC, *Proof Estimates Hansard*, 3 June 2015, pp. 21 and 22.

2 ASIC, 'ASIC acts against 21st Century Group and Jamie McIntyre land banking schemes', 15-214MR, 7 August 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-214mr-asic-acts-against-21st-century-group-and-jamie-mcintyre-land-banking-schemes/> (accessed 4 January 2016).

ASIC understands that there are over 100 investors in the schemes, which have been promoted to investors, including through seminars, by entities associated with Mr McIntyre's 21st Century Group. Companies associated with Mr McIntyre and the 21st Century Group are also the developers of the schemes (development companies).³

7.5 These proceedings are a litmus test for whether ASIC has the regulatory powers required to regulate certain land banking schemes and protect affected investors under the Corporations Act. ASIC argued that the land banking schemes in question fall within the Corporations Act as the investments are actually either:

- unregistered managed investment schemes; or
- a type of financial product (that is, options to purchase property).

7.6 If the Federal Court accepts ASIC's arguments about the legal nature of the land banking schemes, the 21st Century Group would be required to have Australian financial services (AFS) licences to market the schemes. Financial advisers who give advice on financial products must satisfy many obligations under the Corporations Act, including the Future of Financial Advice (FOFA) requirements in Part 7.7A of the Corporations Act, because they are providing a 'financial service'. The key elements of the FOFA reforms include:

- amendments to the conduct obligations for financial advisers, including an obligation to act in the client's best interests and to prioritise the client's interest when giving personal financial product advice (previously advisers were required to have a reasonable basis for advice);
- a prospective ban on conflicted remuneration, including commissions and volume-based payments;
- a requirement to send an annual fee disclosure statement to clients with ongoing fee arrangements;
- a requirement that advisers obtain their client's consent every two years to continue the ongoing fee arrangements (the 'opt-in' requirement); and
- enhanced licensing and banning powers for ASIC.⁴

7.7 In this case, ASIC would have the power to ensure that these investments fulfil the obligations on financial services providers in the Corporations Act, such as having dispute resolution systems in place and fulfilling disclosure requirements with investment documents. ASIC made the point that there are additional obligations that managed investment schemes are required to meet:

If the land banking scheme is a managed investment scheme, there are strict legal requirements that must be met, including giving investors a product

3 ASIC, 'ASIC acts against 21st Century Group and Jamie McIntyre land banking schemes', Media release 15-214MR, 7 August 2015.

4 ASIC, answer to question on notice, 30 November 2015, p. 10.

disclosure statement (PDS). A PDS must include information about the scheme's key features, fees, commissions, benefits, risks and complaints handling procedure.⁵

7.8 Should the land banking schemes be recognised as a managed investment scheme, strict regulations would apply to the scheme. For example, the scheme could not operate without a responsibility entity (RE), which must be a public company that holds an Australian financial services licence (ASFL) authorising it to operate a managed investment scheme.⁶ One of the duties of an RE is to hold scheme property on trust for scheme members.⁷ In exercising its powers and carrying out its duties, the RE of a registered scheme must act honestly and exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position. An RE must also, among other obligations, act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests.⁸ An officer of the RE of a registered scheme is under similar statutory obligations.⁹

7.9 As the case has proceeded through the Federal Court, the 21st Century Group consented to ASIC's interlocutory application and Deloitte were appointed provisional liquidators of the development companies. Deloitte were scheduled to provide a report as to the affairs of the companies by 15 December 2015. On 3 December 2015, the Federal Court adjourned and re-listed the directions hearing for 5 February 2016.¹⁰ On that day, the Federal Court re-listed the matter for a further hearing on 10 March 2016.¹¹

7.10 Even if the Federal Court accepts ASIC's arguments, it does not follow that all land banking schemes, which have come to the attention of the committee (or any future schemes), would also be defined as financial products. Whether a scheme is captured by the Corporations Act will depend on the particular details of the scheme. As ASIC submitted:

5 ASIC, answer to question on notice, 30 November 2015, p. 6.

6 *Corporations Act 2001*, s 601FA.

7 *Corporations Act 2001*, s 601FC(2).

8 *Corporations Act 2001*, s 601FC.

9 *Corporations Act 2001*, s 601FD.

10 ASIC, 'Jamie McIntyre and 21st Century land banking companies agree to the appointment of provisional liquidators and other interim orders', Media release 15-289MR (including updates), 7 October 2015.

11 ASIC, 'ASIC acts against 21st Century Group and Jamie McIntyre land banking schemes', 15-214MR, 7 August 2015, Editor's note 9, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-214mr-asic-acts-against-21st-century-group-and-jamie-mcintyre-land-banking-schemes/> (accessed 19 February 2016). The Federal Court also accepted an extension of the undertakings from Messrs Jamie and Dennis McIntyre that until 4pm on 10 March 2016, they would give notice to ASIC of any travel outside of Australia and deliver their passports to their solicitors.

While ASIC does not regulate direct property investment, ASIC considers that land banking schemes, **depending on the particular scheme**, may be a managed investment scheme and/or a financial product and that the promoters of these schemes should therefore hold an Australian financial services licence and register these schemes with ASIC.¹²

7.11 There are likely to be additional opportunities to test the application of the Corporations Act to land banking schemes in the near future. ASIC told the committee that investigations are continuing into schemes promoted by Market First, in addition to the current proceedings against 21st Century Group and Mr McIntyre.¹³

7.12 Should the Federal Court not accept ASIC's arguments and decide as part of the final orders that the land banking schemes are not a financial product under the Corporations Act, the comprehensive licensing, conduct and disclosure regime covering financial services in chapter 7 of the Corporations Act will not apply to those schemes.

Self-managed superannuation funds (SMSF)

7.13 ASIC informed the committee that approximately 60 per cent of investors who invested in land banking schemes did so through self-managed superannuation funds (SMSFs).¹⁴ As many investors in land banking schemes used a SMSF, the committee is particularly interested in the regulatory regime for such funds.

7.14 While SMSFs are primarily regulated by the Australian Taxation Office, ASIC's role in relation to SMSFs is to regulate the 'gatekeepers' who provide advice on SMSFs including financial advisers, accountants, SMSF auditors and providers of products and services to SMSFs.¹⁵ These services are regulated under the Corporations Act and the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

Investing through an SMSF

7.15 In order to establish an SMSF, a trust must be created specifying the appointment of trustees, consideration of assets, identifiable beneficiaries and the intention to create a trust. Once an SMSF is established but before an SMSF can make an investment, the SMSF must have in place an investment strategy (the trust deed of a particular SMSF may dictate in which assets a fund can invest).¹⁶ The investment strategy sets out the fund's investment objectives and specifies the type of investments

12 ASIC, answer to question on notice, 15 November 2015, pp. 2-3 (emphasis added).

13 Mr Tim Mullaly, Senior Executive Leader, ASIC, *Committee Hansard*, 30 September 2015, p. 64.

14 ASIC, answer to question on notice, 30 November 2015, p. 11.

15 ASIC, answer to question on notice, 30 November 2015, p. 8.

16 ASIC, answer to question on notice, 30 November 2015, pp. 9, 12.

the fund can make; the SMSF must make investments within the framework of the fund's investment strategy.¹⁷

7.16 Although there is no legislative requirement for a person to seek advice from a professional before deciding to establish an SMSF, ASIC noted that people will usually seek assistance at some point in the process:

There is no requirement that a person seek advice before deciding to establish an SMSF. However, the engagement of professionals at some point is generally necessary in order to either establish the SMSF, seek advice on the type of investments to make or prepare annual financial statements. An SMSF auditor must be engaged to conduct an audit on the SMSF's financial statements and compliance with the superannuation laws each year.¹⁸

7.17 As a general rule, an SMSF may make any type of investment provided it is made on a commercial 'arm's length' basis and accords with the SMSF's investment strategy. While there are some restrictions in relation to lending money to relatives and borrowing to invest (with the exception of limited recourse borrowing arrangements), there are no restrictions on a person using their SMSF to invest in products or schemes promoted at investment seminars. Similarly, there are no regulatory legal impediments to stop a person investing in options in a land banking scheme through an SMSF.¹⁹

Investing in property or options in land banking schemes and SMSFs

7.18 Unlike advice on property investment, advice intended to influence a person to acquire, vary or dispose of a superannuation interest within the meaning of the SIS Act is financial product advice under the Corporations Act. Thus an adviser giving such advice must have an AFS licence.²⁰ For example, a spruiker who recommends to seminar attendees investing in property through establishing an SMSF may be providing financial product advice and should hold an AFS licence.

7.19 Through the work of a taskforce established in 2012, ASIC has been targeting property spruikers who break the law by providing unlicensed financial advice about SMSFs.²¹ ASIC launched legal proceedings in November 2014 against Park Trent Properties Group Pty Ltd (Park Trent) that, by the time of the trial in June 2015, had

17 ASIC, answer to question on notice, 30 November 2015, p. 9.

18 ASIC, answer to question on notice, 30 November 2015, p. 9.

19 ASIC, answer to question on notice, 30 November 2015, p. 11.

20 Corporations Act, subsection 911A(1).

21 ASIC, 'Property spruiker found to have provided unlawful advice', Media release 15-300MR, 20 October 2015.

advised over 860 people to establish and switch funds into an SMSF to purchase investment property.²²

7.20 In November 2014, when proceedings against Park Trent commenced in the Supreme Court of NSW, ASIC Commissioner Mr Greg Tanzer commented:

Collectively, Australians hold over \$1.85 trillion worth of assets in superannuation funds, with \$557 billion held in SMSFs. It is important when making decisions regarding superannuation to consider obtaining appropriate advice from an authorised financial adviser.

Dealing with an authorised adviser affords specific protections under the law, such as acting in the best interests of clients, a duty to avoid conflicts of interest and providing access to dispute resolution schemes.²³

7.21 Park Trent had been promoting the use of SMSFs for property investment to attendees at seminars and to people who were visited on 'home visits' by Park Trent employees. Park Trent's business model was dependent on:

...persuading relatively unsophisticated investors of the virtues of using their superannuation accounts to purchase investment properties and to establish SMSFs (at considerable expense) to enable the purchase to proceed.²⁴

7.22 In an affidavit sworn during the hearing, one of Park Trent's employees stated that the Property Investment Analysis was developed by a company called Somersoft.²⁵ The program, which could be purchased by anyone for a fee, was designed to analyse the capital growth, cash flows and rates of return on investment properties, taking tax implications into account. Park Trent showed the Property Investment Analysis to clients who expressed interest in investing in a property through an SMSF, describing it as an aid 'to influence the individual in coming to a decision to adopt the strategy that's being put forward in the document'.²⁶

7.23 The Supreme Court of NSW handed down final orders in ASIC's action against Park Trent on 27 November 2015.²⁷ The court found that Park Trent had

22 ASIC, 'ASIC obtains final orders against Park Trent', Media release 15-358MR, 30 November 2015.

23 ASIC, 'ASIC seeks court order to stop property promoter from providing unlicensed financial product advice on SMSFs', Media release 14-299MR, 11 November 2014.

24 *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at paragraph 499 (Sackville AJA).

25 *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at paragraph 131 (Sackville AJA).

26 *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at paragraph 137 (Sackville AJA).

27 *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 4)* [2015] NSWSC 1767.

unlawfully carried on an unlicensed financial services business for over five years by providing advice to clients to purchase investment properties through an SMSF. It made the following orders against Park Trent:

- a permanent injunction restraining Park Trent from providing unlicensed financial product advice to clients regarding SMSFs; and
- a requirement that Park Trent post a notice on its website outlining the orders made against it.²⁸

7.24 There are similarities between the business models of Park Trent and the land banking schemes promoted by 21st Century Group and Market First. Many investors in land banking schemes invested through an SMSF.

7.25 There are two possible breaches which may have occurred in the case of land banking schemes: firstly, depending on the advice given at the investment seminars, the spruikers may have provided financial product advice in recommending that attendees invest through an SMSF and, as such, should have held an AFS licence. Given the spruikers did not hold an AFS licence on the assumption that they were only providing 'education', not financial advice, this would have been a breach of the Corporations Act. It is difficult for the committee, on the evidence received, to have a view on whether such a breach occurred.

7.26 The second possible breach would have occurred after attendees were referred to accountants and financial advisers in order to establish their SMSF and invest in the land banking scheme. Financial advisers providing advice on the establishment of, and the disbursement of funds from, an SMSF would definitely be providing financial product advice. Even before the FOFA reforms commenced, the Corporations Act required financial product advice to be appropriate and consider the client's best interests. It is highly unlikely that advice to establish an SMSF and invest almost all of a retail client's funds into one highly risky product, such as a land banking scheme, would meet the appropriateness requirements for financial product advice, particularly when the SMSF would have a low balance.

7.27 In this regard, the committee refers back to the evidence produced by some investors cited in Mr McIntyre's submission especially references to people investing 'the majority' or 'most' of their superannuation in land banking options.²⁹ The committee also notes that Ms Monika invested 90 per cent of her savings (around \$60,000) through an SMSF in the Moira Park Green City development in 2011.³⁰ She did so after her own accountant advised that he was not in a position to advise her or establish an SMSF.³¹

28 ASIC, 'ASIC obtains final orders against Park Trent', Media release 15-358MR, 30 November 2015.

29 See paragraph 6.27.

30 Ms Grazyna Monika, *Committee Hansard*, 30 September 2015, p. 9.

31 Ms Grazyna Monika, *Committee Hansard*, 30 September 2015, p. 8.

7.28 Although her SMSF now has very limited funds, Ms Monka is forced to pay sizeable fees annually to comply with the requirements under superannuation laws for financial statements.³² As such, Ms Monka is paying a substantial portion of her remaining funds in fees every year.³³ Such a commitment to one asset class is contrary to sound financial advice, which advocates diversification as a means of reducing risk.

7.29 In July 2015, ASIC released guidance to advisers who provide personal advice to retail clients about SMSFs, which stated:

In many cases, a recommendation for a retail client to set up an SMSF with a starting balance of \$200,000 or below is unlikely to be in the client's best interests. The costs of establishing and operating an SMSF with a balance of \$200,000 or below are unlikely to be competitive, compared to a fund regulated by the Australian Prudential Regulation Authority (APRA). Therefore, the client may not be in a better position when compared to using an APRA-regulated superannuation fund.

...

Where advice is provided to establish an SMSF with a low balance, we would expect the advice to clearly set out:

- the circumstances that influence the adviser to believe the client is likely to end up in a better position, despite the SMSF having a low starting balance
- consideration of whether the SMSF's intended investment strategy is appropriate and viable
- the reasons why setting up and operating an SMSF is in the best interests of the client.

Compliance tip: We are likely to look more closely at advice to establish an SMSF, to consider whether the advice complies with the best interests duty and related obligations, if the starting balance of the SMSF is below \$200,000.³⁴

7.30 It should be noted that, based on her own experience, Ms Monka recommended that SMSFs should be banned for unsophisticated investors with less than \$500,000 in funds and that establishing an SMSF should only take place after advice and sign-off from a licensed financial adviser.³⁵

32 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 10.

33 ASIC, *Advice on self-managed superannuation funds: Disclosure of costs*, Information sheet 206, July 2015.

34 ASIC, *Advice on self-managed superannuation funds: Disclosure of costs*, Information sheet 206, July 2015.

35 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 8.

Removal of the 'accountant's exemption'

7.31 The regulatory regime for accountants providing advice on establishing an SMSF is currently more complicated than that for financial advisers. A person who carries on a business of providing financial product advice about an SMSF must hold an AFS licence and meet the obligations of providing financial product advice under the Corporations Act (described earlier). However, a number of licensing exemptions do apply, including for a 'recognised accountant' providing advice to establish or windup an SMSF.³⁶

7.32 This exemption is colloquially known as the 'accountant's exemption', and allows accountants to establish an SMSF without satisfying the key elements of the FOFA reforms, such as the obligation to act in the client's best interests and the ban on conflicted remuneration. However, from 1 July 2016, accountants providing advice on SMSFs must be licensed under the Corporations Act. The removal of the accountant's exemption will have a positive effect on consumer protection in the SMSF sector, as ASIC emphasised:

The effect of this change will mean that all advice to establish or windup an SMSF will fall within the AFS licensing framework and will also be subject to other obligations such as the best interest's duty and the requirement to provide a Statement of Advice.³⁷

7.33 The rationale behind the accountant's exemption was that accountants, as an established profession, were required to meet high standards to obtain their qualifications and should not be required to meet the obligations financial advisers were required to satisfy under the Corporations Act. The involvement of accountants in the promotion of a number of schemes investigated by this committee, including in relation to land banking schemes and in the separate inquiry into forestry managed investment schemes, is evidence that accountants should be required to meet the same regulatory standards when providing financial product advice on SMSFs. As such, the committee considers that the removal of the accountant's exemption for SMSF advice is long overdue.

Committee view

7.34 Armed with the evidence in this report, investors in land banking schemes may decide that it is prudent to seek advice from a licensed financial adviser (who is listed on ASIC's financial advisers register) as to whether their SMSF continues to be suitable for their circumstances.

36 *Corporations Regulations 2001*, regulation 7.1.29A.

37 ASIC, answer to question on notice, 30 November 2015, p. 11.

Conclusion

7.35 The courts are yet to decide whether some of the land banking schemes offering options are managed investment schemes or financial products. Should the courts find that they are, the investor protection regime, which has been significantly strengthened in recent years, will apply. If not the schemes remain outside this regime and investors will rely on the Australian consumer law and state and territory laws to safeguard their interests.

7.36 Investors who received advice to invest in land banking schemes through a self-managed superannuation fund have some protections under the Corporations Act. ASIC is aware of such activity and has taken action in the Trent Park case.

7.37 The committee is concerned about the use of SMSFs to invest in land banking schemes, especially where a substantial proportion of the funds are invested in such schemes. The committee contends that much greater publicity should be given to the injudicious use of self-managed superannuation funds and that all gate-keepers in the financial industry—financial planners, accountants, lawyers, media commentators and regulators—should make a concerted effort to educate investors on the pitfalls of doing so.

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,¹ 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.² 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 21st Century Group's land banking schemes offering options, arguing that the schemes are unregistered managed investment schemes and the 21st 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

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.³

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.⁴ 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

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.

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

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.⁶ 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.⁷

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.⁸ 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.⁹

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

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.¹⁰

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.¹¹

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

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.

investment advice as defined in the Corporations Act.¹² 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.¹³

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.¹⁴

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

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).¹⁵

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.¹⁶

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.¹⁷ 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.¹⁸

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 \$15,000.¹⁹

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'.²⁰ Mr Kaye also claimed that he would turn 1,000 ordinary Australians into property millionaires within 12 months.²¹ 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.²²

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.²³

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'.²⁴

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'.²⁵ 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.²⁶

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.²⁷

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

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.²⁸

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'.²⁹ 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.³⁰

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).³¹

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.³²

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.³³

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.³⁴ Accordingly, it made a number of recommendations including that the Victorian Government should propose to the MCCA at its 2008 meeting, that:

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.³⁵

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.³⁶

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.³⁷

8.41 Mr Kingsley was adamant that regulation was required for a 'sustainable, professional' property investment advice industry.³⁸ 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*.³⁹ 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.⁴⁰

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.⁴¹ This would occur if real property was classified as a financial product under the Corporations Act.⁴² 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;

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].

-
- 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.⁴³

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.⁴⁴

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.⁴⁵

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.

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.⁴⁶

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.⁴⁷

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.⁴⁸ 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

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.

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.⁴⁹

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.⁵⁰

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.⁵¹ 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 2017.⁵²

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.

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.⁵³ 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.⁵⁴

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.⁵⁵ 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

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

Ltd in May 2012 and Patricia and Bryan Susilo in February 2014 as noted above.⁵⁶

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

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'.⁵⁸ The directive for this project came from the Consumer Affairs Forum.⁵⁹ 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.⁶⁰

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'.⁶¹ 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.⁶²

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.⁶³

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.⁶⁴

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.⁶⁵

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

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.⁶⁶ 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.⁶⁷ 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.'⁶⁸ The NSW government issued a similar media release.⁶⁹

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

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.⁷⁰ 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 2017.⁷¹ 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;**

70 See Victorian Parliament Law Reform Committee, *Inquiry into Property Investment Advisers and Marketeers*, 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'.⁷² 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:

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

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.⁷⁸

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.⁷⁹

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.⁸⁰ 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:

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.

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.⁸¹

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.⁸²

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.⁸³ 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.⁸⁴

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.

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.⁸⁵ 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.⁸⁶

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:

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.⁸⁷

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'.⁸⁸

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 2015.⁸⁹ 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.⁹⁰

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.⁹¹ 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 21st Century Group's and

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.⁹²

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.⁹³

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 2014.⁹⁴

8.100 Consumer Affairs Victoria has a warning on their website about land banking schemes with 'tips to protect yourself'.⁹⁵ 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).⁹⁶ 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.⁹⁷

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.

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.

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

Appendix 1

Submissions received

- 1 Mr James Fairley
- 2 Name Withheld
- 3 Mr Anthony Burke
- 4 Name Withheld
- 5 Ms Katy Kircher
- 6 Bank Reform Now
- 7 Australian Timeshare & Holiday Ownership Council
- 8 Mr Peter Mazzucato
- 9 Name Withheld
- 10 Confidential
- 11 Name Withheld
- 12 Ms Lynne Kreutzer
- 13 Ms Susan Field
- 14 Financial Ombudsman Service
- 15 Financial Services Council
- 16 Name Withheld
- 17 Mr Wayne Ditchburn
- 18 Mr Silvio Crisafi
- 19 Name Withheld
- 20 Mr and Mrs Ray and Christine Blackman
- 21 Credit Ombudsman Service
- 22 Stockbrokers Association of Australia
- 23 Mr Ashley Pattinson
- 24 Ms Ann Marie Delamere
- 25 Name Withheld
- 26 Mr Kerry Budworth
- 27 Mr David Morgan
- 28 Ms Sheerie Wales
- 29 Ms Sandra Phillips
- 30 Mr Ray Catford
- 31 Confidential
- 32 Confidential
- 33 AMP Limited
- 34 Name Withheld
- 35 Name Withheld
- 36 Mr Lee Woldt
- 37 Ms Fiona Ireland
- 38 Mr Kevin Low
- 39 Mr Shane Pearce
- 40 Macquarie Group Limited
- 41 Association of Financial Advisers
- 42 Australian Institute of Superannuation Trustees
- 43 CPA Australia
- 44 Financial Planning Association of Australia Limited
- 45 Mr Errol Opie
- 46 Mr Robert Hicks
- 47 Name Withheld
- 48 Mr David Abraham
- 49 Ms Rose Mathews

50 Mr Noel McNally
51 Ms Linda Klein
52 Name Withheld
53 Ms Liz Thorby
54 Ms Andigone Aguilar
55 Westpac Group
56 Confidential
57 Dr Barry Landa
58 Name Withheld
59 Mr Domenic Olimpico
60 Ms Allison Pitt
61 Mr Adrian Allen
62 Ms Denise Allen
63 Mr Philip Brown
64 Mr Peter Bates
65 Mr Ken Winton
66 Mr Peter Maxwell
67 Name Withheld
68 Name Withheld
69 Name Withheld
70 Name Withheld
71 Name Withheld
72 Name Withheld
73 Name Withheld
74 Name Withheld
75 Australian Bankers' Association
76 Ms Alana Smith
77 Confidential
78 Commonwealth Bank
79 JMA Action Group
80 Ms Maha Nasser
81 CHOICE
82 Mr Andrew Davey
83 Ms Patricia White
84 Mr Wayne Styles
85 Menico Tuck Parrish Financial Services Pty Ltd
86 Centrepoint Alliance Limited
87 Maurice Blackburn Lawyers
88 Australian Securities and Investments Commission
89 Industry Super Australia
90 ANZ
91 Ms Claire Priestley
92 Ms Danielle McDonald and Mr Dennis O'Brien
93 Confidential
94 Mr Peter Spelta

- 95 Mr and Mrs Peter and Anne Harwood
- 96 Mr and Mrs Gilbert and Sylvia de Michiel
- 97 Mr Paul Topping
- 98 Mr Gregory Wignall
- 99 Confidential
- 100 Confidential
- 101 Confidential
- 102 Confidential
- 103 Confidential
- 104 Confidential
- 105 Mr and Mrs David and Janet Chapman
- 106 Confidential
- 107 Mr Wim Bannink
- 108 Confidential
- 109 Mr Greig Allan
- 110 Mr Len McKelvey
- 111 Ms Lyn Hume
- 112 Name Withheld
- 113 Banking & Finance Consumers Support Association
- 114 Mrs Marilyn Swan
- 115 Name Withheld
- 116 Ms Gloria Bondfield
- 117 Mr Frazer McLennan
- 118 Mr Quylas Meyer
- 119 Mr David Bentley
- 120 Mr and Mrs David and Tina Chapman
- 121 Mr Richard Talbot
- 122 Confidential
- 123 Confidential
- 124 Confidential
- 125 Consumer Action Law Centre and 6 consumer protection and advocacy groups
- 126 Credit and Investments Ombudsman Limited
- 127 Confidential
- 128 HNAB Action Group
- 129 Mr Michael Uebergang
- 130 Mr Matthew Walker
- 131 Mr Nicholas Smith
- 132 Mr John Elliott
- 133 Confidential
- 134 Dispute Assist
- 135 Confidential
- 136 Mr Jeffrey Morris
- 137 Ms Jane Comollatti
- 138 Mr Rob Simpson
- 139 Confidential
- 140 Name Withheld
- 141 Mr Domenic Olimpio
- 142 Confidential
- 143 Industry Super Australia
- 144 Property Investment Professionals of Australia

116

- 145 Mr Adam Zuchowski
- 146 Mr Jamie McIntyre
- 147 Confidential
- 148 Ms Grazyna Monka
- 149 Name Withheld
- 150 Mr & Mrs Jim and Alison Guy
- 151 Mr Phillip Harris

Please note that submissions 144 to 150 relate specifically to land banking schemes.

Appendix 2

Additional Information

Answers to questions on notice

1. Answers to questions on notice from a public hearing held in Canberra on 21 April 2015, received from ANZ on 8 May 2015.
2. Answers to questions on notice from a public hearing held in Canberra on 21 April 2015, received from Macquarie Group on 8 May 2015.
3. Answers to questions on notice from a public hearing held in Canberra on 21 April 2015, received from the Commonwealth Bank of Australia on 8 May 2015.
4. Answers to questions on notice from a public hearing held in Sydney on 3 August 2015, received from IOOF on 3 September 2015.
5. Answers to questions on notice from a public hearing held in Canberra on 10 August 2015, received from Westpac on 7 September 2015.
6. Answers to questions on notice from a public hearing held in Melbourne on 28 October 2015, received from ASIC on 15 November 2015.
7. Answers to questions on notice received from ASIC on 30 November 2015.
8. Answers to questions on notice received from Slater and Gordon on 2 December 2015.
9. Answers to questions on notice received from Peddle Thorp on 25 January 2016.

Correspondence

1. Correspondence received from Slater and Gordon on 15 December 2015.
2. Correspondence received from SMEC on 26 November 2015.

Appendix 3

Public hearings and witnesses

Melbourne, 6 March 2015

COULSTON, Ms Veronica, Private capacity

HAGGER, Mr Andrew, Chief Executive Officer, MLC, and Group Executive, NAB Wealth, National Australia Bank

MILLER, Mr Gregory, Executive General Manager, Wealth Advice, National Australia Bank.

MORATH, Mr Richard, Chairman, Advice and Licences Board, MLC, GWM Adviser Services Board, Godfrey Pembroke Advice and Licensee Board, and Apogee Board, National Australia Bank

MORRIS, Mr Jeff, Private capacity

Canberra, 21 April 2015

COULSTON, Ms Veronica, Private capacity

HAGGER, Mr Andrew Paul, Group Executive, NAB Wealth, National Australia Bank; and, Chief Executive Officer, MLC

HALPERN, Ms Naomi, Private capacity

HODGES, Mr Graham, Deputy Chief Executive Officer, ANZ Bank

MOORE, Mr Nicholas, Managing Director and Chief Executive Officer, Macquarie Group Ltd

MORRIS, Mr Jeff, Private capacity

NAREV, Mr Ian, Chief Executive Officer, Commonwealth Bank of Australia

PHILLIPS, Ms Joyce, Chief Executive Officer, Global Wealth Group, ANZ Bank

SPRING, Ms Annabel, Group Executive, Wealth Management, Commonwealth Bank of Australia

SWAN, Ms Merylyn, Private capacity

THORBURN, Mr Andrew, Group Chief Executive Officer, National Australia Bank

WARD, Mr Greg, Deputy Managing Director and Head of Banking and Financial Services Group, Macquarie Group Ltd

WILKIE, Ms Danielle, Private capacity

Sydney, 7 July 2015

KELAHER, Mr Christopher Francis, Managing Director, IOOF Holdings Limited

TANZER, Mr Greg, Commissioner, Australian Securities and Investments Commission

YANCO, Mr Greg, Senior Executive Leader, Market and Participant Supervision, Australian Securities and Investments Commission

Sydney, 3 August 2015

CORCORAN, Ms Danielle, Company Secretary and General Manager, Human Resources, IOOF

LEWIS, Mr Kevin Alan, Chief Compliance Officer, ASX Limited

SEXTON, Dr Roger, AM, Chairman, IOOF

SHACKELL, Mr Malcolm, Partner, PricewaterhouseCoopers

URWIN, Mr Rob, Head of Investigations, IOOF

Melbourne, 4 August 2015

BRODY, Mr Gerard Gavan, Chief Executive Officer, Consumer Action Law Centre

CROWHURST, Mr Nicolas, Company Secretary, Financial Ombudsman Service Australia

FIELD, Mr Philip, Lead Ombudsman, Banking and Finance, Financial Ombudsman Service Australia

GUTHRIE, Ms Fiona, Executive Director, Financial Counselling Australia

MUNCHENBERG, Mr Steven, Chief Executive Officer, Australian Bankers' Association

TREGILLIS, Mr Shane, Chief Ombudsman, Financial Ombudsman Service Australia

TURNER, Ms Erin, Campaigns Manager, Choice

Canberra, 10 August 2015

COOPER, Mr Bradley John, Chief Executive, BT Financial Group, Westpac Group

HARTZER, Mr Brian, Chief Executive Officer and Managing Director, Westpac Group

MELLER, Mr Craig Duncan, Chief Executive Officer and Managing Director, AMP Limited

MELLER, Mr Craig Duncan, Chief Executive Officer and Managing Director, AMP Limited

Melbourne, 30 September 2015*

BAXTER, Ms Liesl, Private capacity

COHEN, Mr Simon Justin, Deputy Secretary, and Director, Consumer Affairs Victoria, Department of Justice and Regulation, Victoria

FARRANT, Miss Marnie, Senior Lawyer, Australian Securities & Investments Commission

GUY, Mr James, Private capacity

HAYNES, Mr Trevor, Private capacity

KINGSLEY, Mr Benjamin James, Chair, Property Investment Professionals of Australia

LANYON, Dr Elizabeth, Director, Regulation and Policy Division, Consumer Affairs Victoria,
Department of Justice and Regulation, Victoria

McINTYRE, Mr Jamie, Chief Executive Officer, 21st Century Education and Media Group

MONKA, Ms Grazyna Elzbieta, Private capacity

MULLALY, Mr Tim, Senior Executive Leader, Australian Securities & Investments Commission

TAYLOR, Ms Sharon, General Manager, Professional Standards and Risk, Slater and Gordon
Lawyers

Melbourne, 28 October 2015

MORRIS, Mr Jeff, Private capacity

PHILLIPS, Mr Russell Stanley, Private capacity

*The hearing held in Melbourne on 30 September 2015 was exclusively relating to land banking schemes.

