

# 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.<sup>1</sup>

1.8 By early 2015, reports about land banking schemes marketed by two particular companies, 21<sup>st</sup> 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.<sup>2</sup> Around the same time, committee members became aware of disquiet over land banking schemes. The land on offer was primarily in Victoria but

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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.

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

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.<sup>4</sup> 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 21<sup>st</sup> Century scheme.<sup>5</sup> 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 21<sup>st</sup> 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.<sup>6</sup> On 7 October 2015, the Federal Court made interim orders appointing provisional liquidators to companies associated with those land banking schemes.<sup>7</sup> 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.<sup>8</sup> As such, while this report is

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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 21<sup>st</sup> 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

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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.<sup>9</sup> 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'.<sup>10</sup> 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);<sup>11</sup>
- 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.<sup>12</sup>

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.

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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.