

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.