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JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Reference: Regulation of property investment advice

FRIDAY, 15 APRIL 2005

SYDNEY

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JOINT COMMITTEE ON

CORPORATIONS AND FINANCIAL SERVICES

Friday, 15 April 2005

Members: Senator Chapman *(Chair)*, Ms Burke *(Deputy Chair)*, Senators Brandis, Lundy, Murray and Wong and Mr Bartlett, Mr Bowen, Miss Jackie Kelly and Mr McArthur

Members in attendance: Senators Chapman and Murray and Mr Bartlett and Ms Burke

Terms of reference for the inquiry:

To inquire into and report on:

(a) the effectiveness of current regulation (including the Trade Practices Act 1974, the ASIC Act and the Corporations Act 2001) of the property investment advice industry in protecting consumers;

(b) allegations that property investment advisers engage in behaviour including:

  i. characterisation of their activities (for instance, as 'education seminars') in order to avoid regulation;

  ii. habitual use of high-pressure selling techniques in order to induce investment decisions;

  iii. failure to disclose interests they may have in properties they are selling;

  iv. failure to disclose commissions and fees associated with their services; and

  v. failure to provide appropriate disclosure of downside risk associated with the property or financial products they recommend;

(c) whether it is appropriate for property investment advisers to simultaneously sell an interest in property and financial products enabling such purchases;

(d) advantages and disadvantages of possible models for reform of the property investment advice industry including:

  i. national coverage through uniform state and territory legislation;

  ii. Commonwealth legislation; and

  iii. a scheme of self-regulation of property investment advisers on a national basis; and

(e) whether current legal processes provide effective and easily accessible remedies to consumers in dispute with property investment advisers.

WITNESSES

Committee met at 9.08 a.m.

CLARK, Mr Doug, Policy Executive, Securities and Derivatives Industry Association

CHAIRMAN—Today the committee will hear evidence regarding its inquiry into the regulation of property investment advice and relevant and related matters. The committee expresses its gratitude to the contributors to this inquiry, including those who will be appearing before us as witnesses today.

Before we start taking evidence, may I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence provided. Parliamentary privilege refers to the special rights and immunities attached to the parliament or its members and others, as necessary for the discharge of parliamentary functions without obstruction or fear of prosecution. Any act by any person that operates to the disadvantage of a witness on account of evidence given by him or her before the parliament or any of its committees is treated as a breach of privilege. I also state that, unless the committee should decide otherwise, this is a public hearing and, as such, all members of the public are welcome to attend. Of course, if any witness wishes to give evidence in camera they may request that of the committee and the committee will consider such a request.

After this hearing concludes, the committee will immediately reconvene to conduct a hearing on its inquiry into the regulation of the timeshare accommodation industry. The committee has already held one hearing on this reference—which was on Wednesday on the Gold Coast—and will hold a further hearing on 29 April in Canberra.

I welcome Mr Doug Clark from the Securities and Derivatives Industry Association. I invite you to make your opening statement, at the conclusion of which I am sure we will have some questions.

Mr Clark—The SDIA represents the vast majority of the stockbroking industry in Australia. Our 69 member firms account for about 98 per cent of trading on the Stock Exchange as such, which represents about $2.5 billion of trading every day in our wonderfully liquid market. Our industry employs about 8,000 people. I would like to make five brief points. The committee will be relieved to hear that I do not intend to take up my full allotted time—I doubt whether I will. The five main points are in relation to the financial services reform process that my industry has just been through. Consumer protection is probably the main point I would emphasise today in relation to this inquiry and then some brief points on the proper regulatory structure of the property investment advisory industry, the possibility of a domestic carve-out and a brief point on the definition of 'retail investor' in this context.

Firstly, in relation to the financial services reform, or FSR process, I am sure the committee will be aware that the financial services industry—not just stockbroking, but everyone in that industry—has just been through an unprecedented period of reform in the lead-up to FSR, which commenced over a year ago. In that time, our members have reported that their compliance costs have more than doubled in preparation for the implementation of FSR reforms. As well as bearing the brunt of that reform, my industry has also been regulated on another level by the Australian Stock Exchange. The Australian Stock Exchange has very wide powers of investigation and enforcement of its rules, which ensure market integrity and also the protection

of clients. So both from the legal point of view and from the regulatory point of view of ASX there is a multi-faceted, multi-layered structure in place which is designed, amongst other things, to protect clients. This is a good thing.

We contrast that structure with the property investment advisory industry, where there does not seem to be that level of protection. For instance, a retail client who has a complaint against one of my members for bad advice can take that complaint to an industry-run complaint service at no cost to the consumer and can get an enforceable award from that service of up to $100,000, and that level is about to be lifted. So that is a very powerful protection measure for the consumer.

Going into more detail about our concerns about consumer protection, it appears that there are inherent conflicts of interest in the property investment advisory industry which have not been adequately dealt with by the industry. In the stockbroking world, if a stockbroker is advising a client to purchase a stock in which the stockbroker has a significant interest or in which the firm is underwriting a new issue or has a particular corporate relationship with the issuer of the security, that must be disclosed to the client at the time of giving advice. It would appear that in the property investment advisory industry the only interest that is taken into account is the interest of the developer, of the promoter of the investment. The effect of the relationship with the promoter and any influence that might have on the advice that they are giving to the consumer is not even taken into account. In other words, the suitability of the investment for the consumer is not even considered when an investment advisory property is being promoted to a consumer.

In my industry, suitability is a key factor in the advice that is given. If advice is not suitable for a client, having taken into account the client's circumstances, it is no less than a criminal offence. Under FSR it is now a criminal offence, which bears the same penalty as market manipulation, and people giving unsuitable advice can be put away for five years. We see a grave gap in the appropriate standards applying to the investment advisory industry in that situation.

As well as conflicts of interest and suitability, there are issues in relation to liquidity. In the stockbroking world, and with respect to other financial products, there is a liquid market either on markets through the Stock Exchange or through the redemption and buyback provisions of, for example, managed funds. An investor can easily and quickly exit an investment. In the property game that liquidity may not be there, and this is a consideration that should be pointed out to consumers and it does not appear to be happening. In our industry, if liquidity were so low, we would have to disclose that up-front. Indeed, there would have to be up-front disclosure in product disclosure documents and other prospectus documents.

The other consumer protection point bears on gearing. In the property investment scenario it is not uncommon for property to be geared substantially. Gearing is not uncommon in the stockbroking world either with margin-lending operations—operated by all the big banks and some other lenders—doing very well, especially in the bull market that we have just experienced and hopefully will for some time to come. But even lenders who lend money on stock will not generally lend more than 75 per cent of the value of that stock. A good adviser talking to retail clients will typically not recommend gearing above, say, 50 per cent. A conservative level of gearing is always preferable.

However, the client who has received that conservative advice—in one of our member's offices—appropriate for their needs, can walk down the street and into a development site and be offered a unit, or an apartment, which may be geared at 90 per cent or more. We understand that gearing levels of above 100 per cent are not uncommon in the property investment industry. This is a crucial consumer protection point and bears on suitability, because it does not take into account the catastrophic effect of rises in interest rates. The investment promoter does not have to take into account the investor's capacity to service all this debt. So the consumer protection issue is a grave one that we see in relation to the property investment advisory industry.

I have a couple of quick points. In the paper, the regulatory structure of a proposed investment advisory regulator or regulatory structure is discussed. We make the point in our submission that we would hope that we can leapfrog, if you like, the federal-state arrangement that our industry used to have, until 1991—the federal-state cooperative scheme, with the corporate affairs offices and the NCSC et cetera. In this industry we hope that we can leapfrog that and go to a federal scheme. I think the example of the cooperative scheme is a strong one for this committee to consider. It led to a duplication of state and federal additional costs for the consumer, and the effectiveness of regulation between the state and federal corporate affairs offices and the NCSC was often found wanting, so we would advocate a national structure, if that is what will happen in this industry.

Having said all that about consumer protection, we acknowledge that there is an appropriate place for real estate agents and property advisers in the domestic area. People advising on domestic properties should not be the subject of such a high level of regulation. People need places to live. People need to be able to buy and sell domestic property. We would see the higher level of regulation and consumer protection cutting in once you go from the retail to the investor level.

Finally, in the paper there is a discussion of the appropriate definition of retail investors in terms of the cut-off from retail to wholesale. This has been a big issue in the Corporations Act and the whole FSR process. There is a complex definition already in the Corporations Act of retail versus wholesale investor. I was very pleased to see that the Parliamentary Secretary to the Treasurer announced that there will be refinements to the FSR, including the definition of wholesale-retail. The point I would like to make to this committee is that we would advocate not reinventing the wheel and producing a new retail-wholesale definition. We would urge the government to piggyback off the retail-wholesale definition that is already in the Corporations Act and is about to be enhanced or improved significantly. That concludes my opening comments.

CHAIRMAN—Thank you very much. The submission that we have received from ASIC in part says:

> ... there is a strong functional similarity between the giving of financial advice about real estate and the giving of advice about securities and other investments ... real estate and securities are, and are perceived by investors to be, interchangeable investment alternatives.

That is in the context of ASIC supporting a comparable regulatory regime. I assume from what you have said that you would agree with that.

Mr Clark—Very much so. In fact, the degree to which people consider investment properties as the be-all and end-all is of concern. Speaking as an advocate for the stockbroking industry, we would hope that people have a balanced portfolio. The problem is that people have been putting most if not all of their investments into investment property, especially during the property boom of the last few years. So we would agree with ASIC in relation to that functional similarity.

CHAIRMAN—In contrast, the Commercial Law Association says:

Generally, we consider that the regulation of property investment advice would be best primarily placed with the States, but on a uniform State-by-State basis. Such regulation would be consistent with the existing Constitutional and Fiscal federal framework, and yet recognises that many property investment decisions are made and implemented across State borders—particularly in the 'holiday home/unit' sector.

On the other hand, the Law Council recommends that property investment advice be regulated similarly to financial product advice, including an approach that favours administration of property investment advice laws by ASIC. Wakelin Property Advisory in their submission says:

Under no circumstances should investment property be included as a 'financial product' in Chapter 7 of the *Corporations Act* ...

So there are three different positions there. Would you care to comment on each of those from your perspective?

Mr Clark—I think it is obvious from what I have already said that we would agree that property investment should be included in the definition of 'financial products' in chapter 7. As to the constitutional structure, obviously in our country we will always face these constitutional hurdles. We have given the example already of the previous corporations and securities regulatory structure in this country, which was an example of a cooperative uniform federal-state arrangement. That worked to some extent but was found wanting, especially in the 1980s when it was found to not properly cope with the crash of 1987 and all of the problems leading up to and post that crash. After negotiations with the states, which is unavoidable—and this is a constitutional issue that keeps rearing its head—the states ceded their power in corporations to the federal sphere so that we now have ASIC as a federal agency. We would advocate a similar structure—as I say, leapfrogging that ungainly, clumsy federal-state arrangement—in the property investment industry.

CHAIRMAN—Another submission we have received was from JBA Finance Solutions. It says:

Growth in property investment has ... been driven by people's lack of faith in the share market and superannuation funds ... the everyday Australian has been more affected by the failure of companies such as One Tel, HIH and the poor performance of their compulsory super funds. They see their hard earned money disappear whilst fund managers take their fees then blame everything else for the losses. People want to take more control and at least "touch" their investment hence the move to bricks and mortar.

What is your reaction to that claim?

Mr Clark—I think there are a few cheap shots in there. I do not represent fund managers, so I make no comment about the level of fees that fund managers charge. In terms of investors being able to take control of their own assets, especially in complex products which involve gearing, such as property and geared shares, I cannot see how investors are properly equipped to do that unless they get appropriate, suitable advice—suitable to their own circumstances. That is the main gap that we see in the property investment advisory industry—that is, taking into account the client's circumstances just is not a consideration.

CHAIRMAN—Would your proposed regulatory structure differentiate between real estate agents simply acting for vendors and those who are purporting to act for purchasers and actually giving advice on real estate as an investment, or would you see them all lumped into the one basket?

Mr Clark—I do not think our submission goes into that detail. Our main differentiation is between owner-occupied residential property and investment property.

Ms BURKE—You say you have to take into consideration a person's ability to service and the ability to grow, and generally people say, 'Diversify; don't put all your eggs in one basket.' If someone comes in to see a stockbroker, would the stockbroker recommend looking into property as well or, seeing as they are selling stock, would they stay within the stocks field?

Mr Clark—It depends on the services that the brokers offer. Some are very much confined to stockbroking only. Most will look at a range of listed and unlisted investments, including managed funds, off-market BT funds et cetera. Not having the expertise in the area, I think they would tend to be more familiar with listed property trusts on the exchange or unlisted property trusts off-market than advising in direct property investment.

Ms BURKE—Would a stockbroker also then find finance and offer finance, like some of these retail investors seem to do as well—that is, they opt for the advice and then go and find the finances to buy into these things?

Mr Clark—They may do but it would all be disclosed and it would normally be by way of margin finance. I hate to keep mentioning BT, but—

Ms BURKE—That is all right; I understand why.

Mr Clark—The stockbroker would put them in contact with BT or ANZ Margin Lending. They would then enter into a finance arrangement with the lender separately. It is not often that the financing arrangement is built into the product. But, having said that, there are a number of structured products like instalment warrants and certain derivatives where there is a financing component built it. That is all set out in the property disclosure statements and prospectuses.

Ms BURKE—Have you seen a tendency for people to pull their money out of stocks and put it into real estate, into investment properties? Has there been a trend like that?

Mr Clark—Not really.

Ms BURKE—The stock market has been doing okay in some respects.

Mr Clark—It has done incredibly well in the last two years.

Ms BURKE—And there are a whole lot of people wondering why their super funds are not doing the same thing.

Mr BARTLETT—Mr Clark, your submission recommends changing the definition of 'financial products'—apparently, that would resolve the issue. How would you change the definition to include property investment? It seems to me that there is at least one fundamental difference, and that is that property investment is an investment in a real asset rather than an investment in a marketable security—hopefully, backed by a real asset, in the case of financial services. How would you change the definition in order to meet the needs of protecting investors in property? Is there a proposed definition in mind?

Mr Clark—I do not have the wording off the top of my head but, if you look at the definition of 'financial product' in the act, on its face it would include property investment. As I understand it, it is only because property investment has been carved out of that definition that the property investment industry is separate to the financial product advisory industry.

Mr BARTLETT—If the definition were changed and it included property investment, presumably then in your thinking that would place the same obligations on providers of investment property advice. So the training requirements—all of those sorts of things—that financial planners and adviser need to do, property investment advisers would be required to undertake as well. Where do we draw the line then? It seems to me that that potentially creates some real problems for real estate agents, for instance. Senator Chapman alluded to this. I know that you acknowledge the distinction between owner-occupied, or residential, and investment property, but isn't the blurred area much broader than that? For the real estate agent who gives advice to a mum or dad investor who wants to buy one investment property in addition to their own residential premise, does your proposal then require the same obligations on that real estate agent, in terms of training to provide financial advice, as would be on a financial adviser or a marketer of financial products?

Mr Clark—We would argue that it should, especially when the extra investment property that that person is being advised to buy is their sole or major financial investment. Why should you put all or most of your eggs into the property investment sector when there are so many other appropriate investments? Diversity has been mentioned before. It is almost a given that there should be diversification. One of the main problems we see is that so much of a percentage of a person's investable funds are tied up in investment property, without these protections.

Mr BARTLETT—But isn't it a decision for the investor as to where they will put the money? Isn't the role of the estate agent—obviously, on the one hand it is to sell properties for their clients—to point a potential purchaser in the direction of available properties, rather than to be offering a whole range of professional advice regarding competing and diversified alternatives?

Mr Clark—Again, it comes back to suitability. We say that the adviser should always take into account the suitability of that investment for that client. It may well be that property investment would be a suitable investment, but what about the other asset classes?

Mr BARTLETT—How far do we go in the direction of almost deciding for the client what sort of investment they ought to be undertaking? If I walk into a real estate agent's office with a view to buying a home unit investment property, I have thought through, hopefully, the competing alternatives. I may have already discussed that with a financial planner. I may have discussed it with my accountant. Is the role of the real estate agent to provide advice as to alternatives, derivatives et cetera, rather than just pointing me in the direction of a property that I might like to look at?

Mr Clark—In stockbroking, not all stockbrokers give advice. If I log onto my e-trade account or my CommSec account, I may not require advice; I may want to buy some Coles Myer shares, and I do. So I would walk into their shop and buy those shares. Provided that it is clear that, in seeking property investment alternatives, the client is not seeking investment advice, that would be a useful carve-out. That is the same—

Mr BARTLETT—That is a very blurred distinction, though, isn't it?

Mr Clark—It is a blurred distinction.

Mr BARTLETT—If I go to the real estate agent and say, 'I want to buy an investment property; do you have any on the market here?' and then I ask, 'What's been the average level of appreciation over the past 12-24 months in this area?' and then I ask, 'Do you see those levels of appreciation continuing?' where do you get to the point where it is financial advice, as distinct from more generic advice about the local property market?

Mr Clark—In that scenario we would say that personal advice is being given, and that should trigger consumer protection training and the rest. That is the same issue that we have in financial products. Financial planners face it; stockbrokers plan it.

Mr BARTLETT—So it would add a whole lot of extra compliance requirements to the average real estate agent who is just there to assist clients buy and sell property?

Mr Clark—It may do, but it would also make them careful about where to draw the line in giving advice.

Mr BARTLETT—I am thinking aloud here: do you think it would be possible, as an alternative, to have a requirement that the client could show that he or she had sought broader independent advice regarding the suitability of property investment, rather than put the onus on the real estate agent to provide that investment advice? Is it possible that the client could somehow give evidence that he or she had sought advice from an accountant or from a financial planner that encompassed all alternatives, including investment advice in property investment, thus freeing the real estate agent from the obligation of needing to do that?

Mr Clark—It would be very handy for real estate agents to have that sort of carve-out, but I doubt whether financial planners or stockbrokers, for that matter, would like to rely on the fact that the real estate agents will not give advice. Do you see what I mean? The real estate agent is not in the planner's office—he is not in the stockbroker's office—so we would not know what the estate agent was saying to the client. If it were all signed and sealed and everyone knew where the lines were drawn and the estate agent knew what limited pieces of information they

could give without giving advice, maybe that sort of structure could work. I know my members would be very concerned because, whatever happens with a property, they would face the challenges and they would face the client complaints, not necessarily the real estate agent.

Mr BARTLETT—What level of training do your members have in providing property advice?

Mr Clark—If they offer the service, they will be well trained. Direct property is not a common product that my members will advise upon. As I mentioned before, they are more likely to advise on listed property trusts or unlisted property investments.

Mr BARTLETT—Are you suggesting, then, that your members are not fully advising their clients of the broad range of investments, including direct property investment?

Mr Clark—It may be the case, but it may also be that clients coming to stockbrokers understand that they are not going to get the full suite of financial product advice, and they will be told that, if they want tax advice, they should go to a tax adviser and that, if they want direct property advice, they should go to a direct property expert.

Mr BARTLETT—In the same way, is a client walking into a real estate agent aware that they will not get the full range of investment advice there—that they will not get advice as to securities, equities et cetera—but that they will only get advice on property investment?

Mr Clark—I do not know what they expect, but the facts seem to show that, despite what they expect or what they are considering, suddenly property investment becomes the only investment into which they are considering putting their funds.

Mr BARTLETT—In the same way that, in an interview with a stockbroker or financial adviser, direct property investment is probably not considered as a high priority.

Mr Clark—It would be included in one of the asset classes considered, but it is not the only class.

Ms BURKE—Do you see your members having concerns that this unregulated market in some respects will get worse and worse over time as more and more people get access to their super funds?

Mr Clark—The more money there is, the more money there will be to invest. We want to make sure that there is a level playing field in regulation and in the protection of consumers' interests.

CHAIRMAN—Mr Clark, thanks very much for your appearance before the committee and for your assistance with our inquiry.

[9.41 a.m.]

ANNING, Mr John Melville, Manager Policy and Government Relations, Financial Planning Association of Australia

GRAHAM, Mr Sean, Member, Financial Planning Association Regulations Committee, Financial Planning Association of Australia

ORSKI, Mr Gil, Analyst Policy and Government Relations, Financial Planning Association of Australia

ROAN, Mr Peter, Financial Planner; Chair, Western Division Chapter, Financial Planning Association of Australia

CHAIRMAN—As I indicated at the outset, this is a public hearing and therefore the committee prefers that all evidence be taken in public but, if at any stage of your evidence you wish to give evidence in camera, you may request that of the committee and we would consider such a request. I invite you to make an opening statement, at the conclusion of which I am sure committee members will have some questions.

Mr Anning—The Financial Planning Association of Australia appreciates this opportunity to provide evidence to the committee's current inquiry into Commonwealth regulation of property investment advice. The FPA is the peak professional association for the financial planning sector in Australia. With more than 12,000 members organised through a network of 31 chapters across Australia and an estate office located in each capital city except Darwin, the FPA represents qualified financial planning practitioners who manage the financial affairs of over five million Australians, with a collective investment value of more than $560 billion.

Appearing for the FPA today are Peter Roan, an FPA practitioner member who is chair of the FPA's western division chapter; Sean Graham, an active member of the FPA's regulations committee and executive manager of dealership compliance and advice coaching in the Commonwealth Bank's wealth management division; Gil Orski, financial analyst with the FPA; and me, the FPA's manager, policy and government relations. The FPA's CEO, Kerrie Kelly, sends her apologies that she is unable to attend today's hearing as she has an all-day board meeting.

With the committee's agreement, I would like to read out quickly the main points of the FPA submission. Peter Roan will then give a couple of practical examples of why the FPA believes that the current regulatory situation for property investment advice is inadequate, and we will then welcome questions from committee members. Mr Roan will be able to contribute from the perspective of a practising financial planner, while Mr Graham can address the regulatory and legal issues.

The lack of effective regulation for property investment advice has been a longstanding concern of FPA members as they see a lot of people who have been burnt by poor and misleading unregulated property investment advice. When investing in real property, Australians

hope to enjoy a capital return, a yield and any possible tax advantages available from the investment. In this regard, there is little difference between investing in real property and investing in what the Corporations Act considers a financial product. By their very nature, property investments are not small-scale financial commitments, being bigger than many financial investments, and often involve complex, long-term financing arrangements.

People making property investments should be entitled to the same protections that they receive when purchasing a financial product under the financial services regime in the Corporations Act. Disclosure is a major requirement for the effective operation of the real property market. Matters such as fees, commissions, interrelationships and other acts and representations are not currently effectively regulated. Some of these arrangements may also have excessive fees and commissions that are not appropriately disclosed. This situation represents a clear gap in consumer protection.

As applies to financial services, investors in real property should have all the information disclosed to them that is necessary in order to make an informed decision. To be of value, real property advice for investment purposes needs to be comprehensive and should include a needs analysis, goal setting and research before a potential investor considers any investment. Direct property can be a large component of an investment portfolio and, under the current regime, can be entered into after receiving unqualified advice or, potentially worse, being subjected to a marketing or sales campaign.

Other important protections should be available to property investors, including access to an external dispute resolution service, obligations on the adviser to have in place professional indemnity insurance, appropriate compliance structures that are adequately resourced and he should have met specific educational training requirements.

While consumers may envisage both real property and financial product investments being made for the same purposes of wealth creation and financial management, there are considerable differences in the protection offered to investors because of the patchwork of regulation currently governing property investment advice. The focus of any advice related regulation should be based on protecting the interests of consumers and creating an effective and efficient market for the provision of advice. The current regulatory framework does not provide a level playing field and puts those who are licensed to provide investment advice under the Corporations Act at a considerable competitive disadvantage as against those who are providing unregulated investment advice in the real property market.

The requirements of an Australian financial services licence attach extensive obligations to the provision of product related advice from a compliance perspective in the interests of consumers. Those obligations come at a cost that is not borne by those providing unregulated advice. The aim of any new regulatory regime should be to enable consumers to receive quality investment advice, irrespective of the sector in which they are considering investing. A consumer should be able to have confidence that their adviser, whether dealing in property or financial products, will be appropriately qualified, with appropriate obligations relating to full disclosure and conduct.

In proposing such a national regulatory regime for property investment advice, we would emphasise the more positive features of an FSR-like regime. These include: consumer protection, corporate governance, promotion of professional conduct, standard and consumer-

friendly disclosure obligations so that the consumer is in a better position to make an informed choice, a mandated paper trail for advice, uniform competency requirements and licensee supervisory requirements. We believe that the first and key priority is the establishment of an effective, nationally uniform regulatory regime for property investment advice, with the vehicle to achieve the first priority being the second consideration. However, the FPA considers that it would be more efficient if the national regime was achieved by Commonwealth legislation rather than by a coordinated uniform approach. As financial services are governed by national legislation it would be logical that the counterpart regime for property investment advice be similarly regulated, with ASIC as the regulatory authority.

Any new regulation would need to carefully consider and appropriately provide for the broad scale, scope and variety in the property sector and not disadvantage professionals in the industry or financial planners who may already be qualified and licensed pursuant to the Corporations Act to recommend financial products that have property as an underlying asset. This could include an exemption to the new legislation for real estate agents to the extent that they are simply dealing in real estate and also to the extent that they may already be regulated for the provision of property investment advice under the Corporations Act. This potential exemption would seek to avoid a double regulatory burden.

Property is a favoured investment vehicle for Australians and the sector has seen substantial growth in the volume of investment and the provision of related services. As with many investments, there is a degree of risk attached to an investment property. However, a more educated public that has protections in place against misleading activity and unqualified advice through appropriate regulation would be better able to provide for their future.

With the current slowdown in the property market, many of the schemes and promotions which were of concern appear to have faded away. With the inevitable upturn in the property cycle—whenever that may be—unless the opportunity is taken now to correct the shortcomings of the regulatory regime for property investment advice, investors will once again be vulnerable to unscrupulous operators. The FPA would urge that the momentum for reform be maintained.

CHAIRMAN—Thank you, Mr Anning. You represent about 12,000 members. Currently, what proportion of your members would give advice on direct property investment, if any, as distinct from other forms of investment?

Mr Anning—I do not know whether my colleagues can give precise figures, but my impression is that it is a relatively small number of members.

Mr Graham—It is a relatively small number. It is difficult to ascertain. Most licensees prohibit it, but certainly it is difficult to know where some smaller boutiques move away from listed property into direct property. Over the past couple of years we did see an upturn into direct property advice in some areas.

CHAIRMAN—This is a broader question, but I suppose it is peripherally related to the inquiry. Where can a person go to get what I would call broad financial planning or investment advice? With the limited exposure I have had to financial planners, it seems to me that most of them advise on managed funds and some, but not many, might advise on direct equity investment. If I wanted to get advice about direct investment in shares, managed funds,

residential real estate, commercial real estate, industrial real estate, maybe even farming property or investing in a small business, is there a group of people who provide that breadth of advice—or not at the moment? Is each fairly segmented?

Mr Roan—I think there are financial planners who will do the full spectrum, as you are suggesting, but it relates to what the licensee has authorised them to do. It probably relates to the more boutique type of planner or to the planner who is more independent of the institution. Most planners, through their training, are relatively qualified to look at analyses of investments. They may not be able to give actual advice as to whether you should buy X, Y or Z as opposed to another form of investment. But I believe most financial planners, through their training, can do an analysis of whether that investment in the first place will have reasonable growth and a reasonable income and possibly meet the expectations of the client. Whether they can deal with the placement of the investment is where the planner would direct the client to a real estate agent for a purchase, to a solicitor for a will or to an accountant to get tax advice.

CHAIRMAN—Would the small percentage who are involved in giving advice on direct property investment tend to specialise in that area, or would it just be a segment of their practice?

Mr Graham—The small number I knew who were doing it were moving into direct property a few years ago, when the market was not performing as well as it could have been. Were they doing that as part of a concerted effort? Yes, they probably were. They were tying it into their other activities. In some cases, those licensees had related companies—accounting practices or similar types of professional service firms.

Even though a minority of people are moving into direct property, most financial planners and financial advisers deal with property and provide broad financial planning but use listed vehicles—not just managed investment schemes but a broader range of financial products than just direct properties. The issue with direct property is competency: how many financial planners or other professionals out there are competent enough to provide appropriate and suitable advice in relation to direct property, and how do they justify the reasonableness of their advice?

CHAIRMAN—That was going to be my next question but, in a sense, you have pre-empted it. Would the more independent or boutique planners, rather than those perhaps employed by the major financial institutions—banks and the like—be giving direct property advice?

Mr Roan—That is where the consumer has to ask relevant questions about what type of services they want, because not every planner is going to be all things to all people. You must understand that the role of the financial planner is to help consumers achieve their financial objectives. That could be saving for a child's education, retiring early, making sure that they can retire on a reasonable income as opposed to the old age pension, retiring to go on a holiday or perhaps creating the opportunity to take on a business. Whatever it may be, at the end of the day the financial planner is there to create choices for clients in a systematic and informed way that benefits the goals and objectives of the consumer.

Mr Graham—Institutional licensees tend to prohibit recommending any direct property. That is a matter of course. It is just too hard to monitor and control.

CHAIRMAN—In your submission you suggest that real estate agents should be exempt from the proposed regulatory regime relating to property investment advice.

Mr Anning—To the extent that they are dealing in real estate, real estate agents are not providing investment advice.

CHAIRMAN—I understand that. Other submissions have suggested that a regulatory regime should cover everyone. In terms of establishing the boundary, how would you distinguish between real estate agents who are real estate agents and those who are offering investment advice in relation to properties?

Mr Roan—The role of the real estate agent is the placement—the buying and selling of the property. I suppose that is a distinction that the FPA is trying to make—that there is a need for that. Assuming that the family home is always exempt, the placement of those assets is one issue. The giving of advice as to whether that purchase, asset, investment, income stream and growth may be suitable in the whole scheme of things is the area in which we are advocating there needs to be a level playing field for all concerned.

Mr Anning—We have discussed the possibility of the exemption being cast around the purpose of the purchase. Similar tests are used in other legislation—whether it is for consumer credit or investment purposes. Similar tests could be constructed in this instance.

CHAIRMAN—Could you establish a clear demarcation line and not have a grey area?

Mr Graham—I think you would be able to do it in the regulations if you focused on the purpose of that financial product. In the case of an investment property you are recommending or advising on a financial product to deliver certain rates of return, yields or whatever else. That is different from performing a transactional value or even dealing in property as a principal place of residence. Effectively, I do not see how it would be all that difficult through regulation to give that carve-out to the principal place of residence or that transactional property as opposed to the investment property. I will not say it would be simple, because nothing is ever simple, but I think it would be fairly easy to achieve from that perspective.

Mr BARTLETT—Mr Graham, I was interested in your comment that the reason financial planners generally do not offer much advice in terms of property is the issue of competency in direct property. Isn't it fair to say that, on the other side, requiring property investors to give a broader range of advice, including financial products, is also requiring a degree of competency in a much broader area than you are requiring of yourself?

Mr Graham—Policy statement 146, for example, which is all about training financial product advisers, says that you have to be trained and competent to perform the functions which you are going to perform. So even if you are going to be limited to dealing in securities you have to have a generic knowledge of financial planning and all the asset classes so that you can point out to a client, 'I can advise you on equities but there may be a range of other financial products about which I cannot give you advice.' You have to be able to identify where the gaps in your knowledge are and point that out to a client. So all we are saying there is that the competency issue is one reason why most planners do not give direct property advice. The other part is the reasonableness of the recommendation, because how do they then turn around and say that

recommendation was reasonable? For any other financial product there is research, there is considerable training and there are considerable support mechanisms that an adviser can rely on to be able to say, hand on heart, 'This advice is appropriate and suitable.' With property it is very difficult because there is very little accurate research or support that would enable an adviser to say, 'I recommend this particular direct property for this reason.'

Mr BARTLETT—Using that same level of requirement for a property investment adviser and a real estate agent, isn't it then reasonable to say that the real estate agent ought to be able to say to his or her client: 'I can't give advice on any other alternative investments. I can't tell you whether property is a better investment for you than financial securities or alternatives that you might be able to find. All I can tell you is about this particular property and the local real estate market'? Isn't it reasonable to say that that ought to be the limit of the expertise of the real estate agent offering property investment advice?

Mr Graham—Personally, I think that is part of. They have to be able to point out the limitations of advice—no-one would argue that. The other thing is that they have to have a reasonable basis for recommending that product. In a lot of the property seminars and whatever, you look for the reasonableness of the recommendation they are making and there is nothing to support it.

Mr BARTLETT—Could you elaborate on what you would require of a real estate agent who would give advice to a client who wants to make an investment purchase? I think we would all acknowledge that there are issues with developers and promoters of larger scale investment schemes but, for a local real estate agent who sells an investment property to the mum or dad investor, what sorts of requirements and obligations would you propose there?

Mr Roan—I will demonstrate by using a couple of examples from a financial planning point of view. With the growth of property, and shares a couple of years ago being fairly low in returns, we were seeing real estate agents advertising: 'Go into an investment property; it's better than super'. As soon as you start to use that sort of terminology, you are indirectly crossing over in advice. I have come across a retiree who recently sold his farm and will come out of that quite well. He has been canvassed to buy a couple of investment properties to fund his retirement. That may be appropriate advice. However, when we do the calculations with regard to his principal place of residence being exempt and the concessions available under the assets and incomes test by some financial products, if this gentleman were to invest in property and receive his $30,000 or $35,000 a year income—most of which would be taxable—he would not get any age pension. If an analysis were done as to whether an age pension could be accessed by using, for example, other financial products, that gentleman may receive in excess of $40,000 per year, which may include the best part of an age pension.

Property is a very important part of anyone's financial portfolio but at the end of the day one needs to ask whether everything has been considered in the best interests of the client. Obviously the real estate agent has an obligation to both the buyer and the seller and—I suppose, cynically—he will win either way. But, as soon as the real estate crosses over into giving advice with regard to income streams, trying to complement super or doing something instead of super or giving advice on any other product that may be suitable, I do not believe that, under the current system, the real estate agent would be objective in that advice and be acting in the best

interests of the client. Property may still be an important part of the portfolio but the question is whether the agent in that instance acted in the best interests of the client.

Mr BARTLETT—How far would you propose that we go in ensuring that the agent has adequate knowledge of competing and alternative investments? No matter how far you go, how do you resolve the issue of objectivity?

Mr Roan—It gets back to our submission that the agent is well qualified in the transactional stages of property advice but I believe the agent crosses over into other areas when it comes to comparing other vehicles and recommending an effective stream of income.

Mr BARTLETT—So are you suggesting that they should never be allowed to cross over or that they need to have adequate training in order to enable them to effectively cross over?

Mr Anning—If the real estate agent is holding himself out as providing advice on real estate as compared to other investments, there should be a regulatory regime which draws on the best features of the financial services regime.

Mr BARTLETT—But often it is very informal, is it not? You do not often find a real estate agent with a banner at the front saying, 'Full range of financial advice,' or that sort of thing. It is usually fairly informal—that is, the customer comes in and the agent says, 'Here's a good investment; it will probably give you a better rate of return than what you might get elsewhere.' Again, it is a matter of where you draw the line, is it not?

Mr Roan—That is implied advice.

Mr BARTLETT—Yes. How are you suggesting that we adequately regulate that? Are you suggesting that there ought to be demonstrated competency across a broader range of financial planning or that the agent should be prevented from giving such advice?

Mr Roan—In the perfect world you would have planners who would gravitate more towards property advice, and I would imagine you would have agents who would gravitate their businesses across to full financial planning advice. There will always be planners who will specialise in managed funds, there will always be stockbrokers who will purely do shares and there will always be agents who will just do property. It is probably difficult for me to answer but if there were a common regulation for all concerned, each adviser, due to their own competency—the required education standards and what is required of legislation—would be accredited or licensed accordingly for the provision of the advice they wish to give.

Mr Graham—You could probably fit it within the current regulatory regime quite easily. You would have a specialist unit in direct property, which is consistent with what we have at the moment in relation to self-managed super or others and then a generic knowledge of financial planning and markets, which is an entry level requirement. That is so that the adviser, in whatever field they are giving advice, can point out the limitations to their advice. There is not necessarily a problem with providing the advice on direct property as long as you can point out the limitations to that.

Mr BARTLETT—You still do not overcome the problem of objectivity, do you, given that there is a return?

Mr Graham—There are some really admirable things about the Corporations Act that have been put in it from a consumer protection perspective, and one of those is the disclosure elements. Realistically, you can try to formalise some of those professional obligations which are already there in the statute and just apply those. It goes back to your earlier question: what would be the requirements? The financial services regime requires advisers to disclose—'Let's disclose what could be influencing my advice; let me disclose the basis of my advice, why I am recommending this property and how I can do that; and are there any relationships that have influenced this advice?' You cannot necessarily avoid the conflict at all times, but you can put the consumer in a position where they understand what the conflicts are and then they can make an informed decision. We do that in financial planning, and the conflicts of interest requirement in the Corporations Act as well as the general disclosure obligations address some of those issues you are concerned about.

Ms BURKE—Leaving aside real estate agents, we are talking about property investment advice and spruikers and the Henry Kayes of this world. They definitely need to be regulated because fundamentally they are doing the same thing as a financial adviser is doing just in investment property.

Mr Graham—Yes.

Mr Roan—Most definitely.

Ms BURKE—Even though Henry Kaye has now been dealt with in a legal sense, you are still competing as financial planners with get rich quick schemes being advertised and spruikers being out there saying, 'Make your buck this way,' and 'Make your super go further.'

Mr Roan—Yes. Several weeks would not go past where as a consumer I do not get cold-called for such a thing. Several weeks ago I invited one of those people to my office and went through the process of what they were trying to do. Halfway through the presentation I interrupted the person and said, 'You haven't even asked me what my income is; you haven't even asked me what my assets are and whether I need or have property.' He kept going through the spiel. He was advocating investment property in Queensland, and I said to him, 'Not being familiar with the area that you are trying to promote, I would like to know how you know it's the most suitable property for me.' He said, 'Our research says that.' I said, 'Could I have a copy of your research?' He said, 'I think I can find something for you.' Then I asked him questions that generally, as a financial planner, I am asked—that is, what are your qualifications, who is responsible for your advice? I asked him: 'Are you a real estate agent?' 'No.' 'Are you an accountant?' 'No.' 'Are you a financial planner?' 'No.' Yet here was this gentleman telling me the best places to buy and how to buy. He was telling me how I could save tax and how this investment was going to be better than shares. On the analysis that I did, I would not even get a gross three or four per cent income.

Then I did probably what every consumer should do: I actually rang a local real estate agent in the area concerned. I got the addresses of what he was trying to advocate and, lo and behold, guess what? I could buy similar properties in the same unit block for $30,000 or $40,000

cheaper. A lot of these schemes or promotions at seminars really target people and get their emotions going: 'Are you happy paying tax? You know Kerry Packer doesn't pay tax. Are you happy with your super? Super has bad returns.' We actually run super funds that have property and shares. Super is just another structure for holding investments. It is that type of education or terminology that needs to be understood by a real estate agent or a seminar promoter as well as it is understood by a financial planner.

Ms BURKE—In that example, I suppose he did not disclose his commission basis, who he was being paid by and whether he was involved with a developer?

Mr Roan—Correct. I asked all those questions and I could not get any of the answers, whereas under our legislation that is very wrong for us.

Ms BURKE—The other thing is that when people came in they were told not only 'Here's a lovely property' but also 'Hey, wow, here's the finance to go and buy it.'

Mr Roan—Yes, it was all there—all packaged.

Ms BURKE—I suppose that is where financial planners are really coming up against it: this thing is advertised, you will go home with a gift at the end of the seminar, you have made your fortune and you will live rich in retirement until the end of your days.

Mr Roan—I think good planners have good relationships with their clients. A lot of those clients would take the opportunity to see their financial planner or accountant at least and get a second opinion. That is really prudent as a consumer and what everyone should be doing, because at the end of the day it is their money. But some of these seminars are promoted on the basis that you do not need to do that: 'We can make you money; they can't.' There is a lot of emotion and, of course, hard sell involved.

Ms BURKE—We would like to think that all consumers are really capable and intelligent and that they are getting this advice, but, let us face it, a lot of people have been burnt by Henry Kaye who we would have assumed were fairly normally intelligent, thoughtful individuals—they thought that somehow with property it is okay; it will not go belly up. There is the notion that it is bricks and mortar. People were suckered in in some respects, with people buying into things like mezzanine finance. To this day, I would love someone to really explain mezzanine finance to me. I have seen an awful lot of people—for example, small business operators doing quite well—who have bought into these schemes without taking any secondary advice, assuming that somehow this industry is regulated when it is not.

Mr Graham—I was speaking with a financial planner recently who got dragged into that very scheme. He fell for it. He would have been the type of person you would have expected to get it. The picture is very persuasive and it is presented in such a way that normally quite intelligent and reasonable people get caught up in it. That is even without looking at all the studies that examine the financial literacy of most Australians. Most Australians are probably not capable or do not have the experience to be able to do that assessment, and they are not getting independent advice. A lot of this is not from a competition perspective; it is more a consumer protection issue. We need to recognise that superannuation, shares and managed funds have costs and benefits that need to be explained—that people should have the information to make an informed

decision. I guess our position is: why is investment property different? You would say that the same rules and guiding principles that underpin the financial services regulation would apply to the same situation.

Ms BURKE—I would see a plethora of these things happening insofar as more and more people are coming out with super and more and more people have money to invest. Many people have never invested before. They turn up to work; their employer contributes; they themselves may, if they are intelligent enough, contribute to their super; and suddenly, a couple of years before they retire, everybody is saying, 'Go and see a financial planner, work out what to do, structure your retirement so you're not old and poor.' Do you see that there is going to be a greater need for regulation in this industry and a greater need for people to know that they are getting sound advice? I suppose that was the backing of why we did FSR in the first place. No disrespect, but there are certain financial planners who also had a fairly poor reputation a while ago, and that is why we went down this path.

So we are going to be seeing a greater need in the future to say to people: 'Go and get many bits of advice. Maybe see an institution; maybe see a planner who is not tied in solely to one branded product. Get a bit of advice.' The theory is you will now be able to compare those bits of advice. I am not sure we have achieved that, but never mind. You will be able to compare and know which way to go with your money, what will be your return and those sorts of things. There is going to be an even greater need in the future.

Mr Roan—Most definitely. There is not a newspaper printed that does not tell us that we do not have enough taxes to pay for our retirement, we are living longer and so on. I think people today, either directly or indirectly, have accumulated assets. Given the floating of Telstra and the Commonwealth Bank, most consumers by default have become investors. There is so much more information available for people, whether via the internet, seminars or whatever. At the end of the day people need to be assured that in any decisions they are making about their retirement or about retiring early—whatever the case may be—they do get the appropriate advice, there is a basis for that advice, it is in writing, preferably, and understandable and, if something goes amiss in the giving of that advice, there is appropriate legislation and recourse available to the consumer.

Ms BURKE—If you are the financial adviser, you have the limitations of licensing, although most of you are telling people to diversify their funds and consider X, Y and Z. If you are spruiking on behalf of the Commonwealth Bank, you are spruiking for their products—we understand that. But if you are actually sitting down with somebody, you would often say: 'Here's a range, have a think. These are the things that you need to think about.'

Mr Graham—I do not necessarily agree that an institutional adviser is spruiking; I actually believe they are providing appropriate and suitable advice given the limits of their product list and their licence. Nevertheless, they do consider alternative strategies and they do point out the limitations of and qualifications on their advice. One of the great things that the FSR has achieved is this uniform regulation and a level playing field for all those people who were providing similar services. This is where it comes back to direct property for investment purposes. As consumer protection is also for maintaining a level of market efficiency, there are compelling reasons to say: 'This is a financial product. Let's make sure the consumers have the same protection that they're getting if they see a financial adviser or a stockbroker.'

Ms BURKE—Thank you.

CHAIRMAN—In their submission to us JBA Finance Solutions has said:

> Growth in property investment has ... been driven by people's lack of faith in the share market and superannuation funds ... The everyday Australian has been more affected by the failure of companies such as One Tel, HIH and the poor performance of their compulsory super funds. They see their hard earned money disappear whilst fund managers take their fees then blame everything else for the losses. People want to take more control and at least "touch" their investment hence the move to bricks and mortar.

What is your response to that?

Mr Graham—There are psychological reasons why people invest in direct property as opposed to anything else, but I just think back to a presentation I attended a couple of years ago where an actuary was saying that people should control all their own money and control their own super. At that time the tech boom was in full swing. People thought that they had the capacity and understanding to invest in those tech stocks because everyone was making money. It was a hot topic: everyone was making money and everyone was happy. But then the bubble burst. Property is the same. People are investing in property now because they see the returns they are likely to get compared to other assets, but there is no asset that consistently overperforms. There are cycles in any investment class and any asset class, and it is more an education issue to communicate to people that there are alternatives and that each of these asset classes needs to be looked at. Obviously there is self-interest from certain groups to say one particular asset class is better than the other, but the obligation on a professional who is aware of their fiduciary obligations is to give their client the full range of information they need to make that decision within their levels of competency.

CHAIRMAN—And the sort of regulatory regime that you envisage would ensure that, as with financial products, advice being given in relation to real estate would make certain that people are aware of the volatility of real estate as much as of other forms of investment?

Mr Graham—We have to communicate the volatility and the risks associated with any asset class. If you look at the submission we have put forward you will see that what we are suggesting is not onerous. In a lot of ways it is a very efficient way to complement what has been implemented in other areas of financial services.

Mr Roan—With the share market being down, a lot of the complaints against advisers was obviously to do with the market falling. I would concede that in two or three years time perhaps that level of complaints will change from shares to property, where perhaps people will have borrowed too much compared to the value of a property. There are some stories already starting to appear with regard to unit development where bonds have been put forward and then, on settlement, the value of the property is lower than the bonds. We are starting to see those sorts of stories. In talking about market cycles, perhaps in two or three years time that could be the topic.

CHAIRMAN—In their submission to us, Wakelin Property Advisory have cautioned that any new requirement to disclose downside risk on the part of advisers could lead to unintended consequences such as masking—that is, the most pertinent risks are not clearly brought to the attention of the consumer as they are lost in a long list of all possible risks and the most likely

ones might get drowned in that list—or standardisation, where the industry will develop a standard list of possible risks that all advisers would disclose, making it difficult for consumers to make meaningful distinctions between risks. What is your response to that?

Mr Graham—My response would be that, if you look at the current regulations, any piece of advice that a financial product adviser provides has to be appropriate and suitable and has to be clear, concise and effective. My view is that both those risks—masking or bolstering the disclosure to a point where it is lost—exist currently. They are dealt with by the process put in place by the licensees, the risk management structures and the regulator, who is able to act on behalf of those consumers and to ensure that clear, concise and effective disclosure is made.

CHAIRMAN—The CPA said in their submission:

If a regulatory scheme is proposed, the Accounting Bodies would seek delegation of accreditation and disciplinary functions to professional accounting bodies where advice on property investment was given in the normal course of an accountant's business ...

Would you see that as a reasonable carve-out for accountants?

Mr Graham—There have been a lot of carve-outs previously. When you look at FSR some of the carve- outs have actually made the regime more bureaucratic and more complicated than it necessarily needed to be. I would suggest that what we saw with PS146 when that was first brought in is that those people who could demonstrate their competency in the area did not necessarily need to go through the same formal education systems as everybody else. There are ways in which that competency can be recognised and regulated. We have just got to make sure that the people who are providing that advice and those services are in fact competent.

CHAIRMAN—Are you concerned that some of the questionable promotional techniques used in relation to property investment could be used to promote investment in other financial products?

Mr Graham—The thing about other financial products is that they are so heavily regulated at the moment. There are antihawking provisions and cooling-off aspects—we are highly regulated and highly aware of the risks of those activities. It would be very hard to find licensees engaging in those types of activities. There are the antihawking provisions as well as some of the more highly regulated aspects of providing workshops and seminars. I do not see it working the other way around. All we are in fact suggesting is that we do have a level playing field and that all financial service providers are held up to the same standard.

CHAIRMAN—The example I have here is of an advertisement headed: 'Who else wants to be a millionaire?' It is promoting a free workshop by a Mr George Mihos, who claims to be Australia's best-known business and wealth coach. He talks about multiple streams of income. So he is obviously not just a real estate spruiker.

Mr Graham—There could be multiple properties.

CHAIRMAN—Yes. At the bottom of the advertisement is an asterisk with the words: 'For educational purposes only'.

Mr Roan—I am sure the regulator, ASIC, would agree that if it sounds too good to be true it usually is!

CHAIRMAN—I think we would all agree with that. I do not know whether he is licensed or not and he does not indicate anywhere on the advertisement that he is a licensed person.

Mr Graham—I suspect that, if he were licensed, it would have to be there.

CHAIRMAN—One might assume that he is going beyond real estate, but he is getting around the regulations.

Mr Graham—There are gaps in the regime and there are grey areas which he can exploit, unfortunately. So there are people who can move outside the regime by saying, 'We're not providing advice; we're providing education,' or 'We're providing factual information.' That is not regulated. We are not suggesting that everything needs to be regulated. We can rely on ASIC to do the good job that they are doing and identify those people who are taking advantage of the grey areas to exploit and disadvantage consumers. That is not an issue. I just do not think we have similar things from licensees. I would be very surprised if there were many licensees who are promoting themselves or their services in that way.

CHAIRMAN—So you would suspect he is actually marketing product rather than training people.

Mr Graham—Marketing is probably a nice way to present it. I would suspect he is not providing advice and he is not providing any real financial product advice at all.

CHAIRMAN—Or training people how to invest.

Mr Roan—I think you would find that most of the money that he would make would be from that seminar or the book or the program.

CHAIRMAN—There being no further questions, I thank all of you for your appearance before our committee and your assistance with our inquiry.

[10.26 a.m.]

FUNSTON, Mr Michael David, Senior Policy and Education Officer, Consumer Protection, Australian Securities and Investments Commission

TANZER, Mr Greg, Executive Director, Consumer Protection, and Regional Commissioner, Queensland, Australian Securities and Investments Commission

CHAIRMAN—I welcome representatives from the Australian Securities and Investments Commission. The committee prefers all evidence to be given in public, but if at any stage of your evidence you wish to give evidence in camera you may request that of the committee and we will consider such a request. I invite you to make an opening statement, at the conclusion of which I am sure we will have some questions.

Mr Tanzer—I would like to open by conveying the apologies of my chairman, Jeffrey Lucy. He is detained elsewhere on some significant matters today but he apologises for his inability to appear personally.

CHAIRMAN—Perhaps it is to do with HIH!

Mr Tanzer—I will not be commenting on that. Personally, I welcome the opportunity to appear before the committee today on what I think is a most important issue. The importance stems from, as I think is well known, the significant increase in the level of investments by Australians in rental properties. The productivity discussion paper issued in December 2003 on first home ownership refers to some of the statistics about the level of significant investment. In fact, I will quote some of those figures. It refers to the fact that the proportion of households with an investment property has grown from eight per cent to 12 per cent over the last decade. In the same period, investment loans as a proportion of total housing loans outstanding have grown from 15 per cent to 33 per cent, with more than 40 per cent of lending approved since 2002 being for investment properties.

I should observe that, in some senses, property has not been a bad investment—median house prices have increased by something like 12 per cent annually, on average, since the mid-1990s—but rental yields are now relatively low. At the end of 2003, rental yields stood at something like 3.5 per cent according to the RBA and figures submitted to the Productivity Commission, compared to the cash rate of around 2.5 per cent then and compared to the yield of commercial properties at that time, which was something like eight to nine per cent. Growth in investment in rental property was continuing despite prices being at or close to historical highs, particularly in Sydney and Melbourne.

This inquiry is concerned in particular with property investment advice—that is, advice given about the investment characteristics and the prospects of real property, usually with the intention of motivating a customer to buy. The starting point is that within Australia the buyer and seller are clearly free to reach an agreement about the price to be paid. We do not have any form of price control and we do not have any mandatory valuation practices or anything of that nature. The buyer is clearly entitled to reach that agreement without being defrauded or materially

misled or lied to or coerced or overborne, and there is a range of criminal and civil consequences for breaching our general consumer protection laws to ensure this. In addition, we have added protections in the form of licensing and some conduct requirements—and we might talk about those a little later—in particular areas to ensure that consumers get a certain level of professional service in those areas. The previous submission referred to the sale of and advice on financial products through legislation administered by ASIC, particularly the FSR provisions. Similarly, there are licensing provisions in the state and territory real estate legislation dealing with the sale of real property, although not advice on real property. So the core issue for the committee, if I might be so bold as to suggest it, is whether there is evidence of a sufficient market failure that something should be done in the regulatory sphere to address that failure. ASIC's submission, which has been made available to you, is that we believe it is doubtful that the existing regime adequately protects consumers. We have consistently seen problems with nondisclosure of conflicts of interest, as you were just discussing. We have seen problems previously with the quality or appropriateness of advice that has been given. Frankly, we have seen problems with some dishonest operators. The regulatory regime that applies in those three particular areas is in stark contrast to the regulation of financial advisers at the Commonwealth level.

Moreover, we believe that it is not simply a matter of more vigorous enforcement particularly of the existing general consumer protection laws. To some degree the existing consumer protection laws, particularly those dealing with misleading and deceptive conduct, have dealt with the worst excesses in particular cases but they have not been able to deal with the fundamental issues involving the growth of this type of activity. They are inevitably reactive. It is not possible to deal with the conduct at its core. With those types of provisions, you can only ever deal with the conduct once it has occurred, subject to an ability to injunct in appropriate cases. That is largely my opening statement, Chairman. I wanted to reiterate the key points that, while it is at least arguable, we believe that the existing regulatory regime has not proven sufficient to deal with the worst excesses that we have seen and that it is not simply a matter of more vigorous enforcement. We believe that some changes are required.

CHAIRMAN—Thank you very much, Mr Tanzer. Mr Funston, do you have anything to add?

Mr Funston—No.

CHAIRMAN—Can you perhaps give some indication of the prevalence of so-called get-rich-quick schemes and advisory seminars? Before you came before the committee I raised the issue of this advertisement in relation to Mr Mihos, who seems to be going beyond property advice. I am not sure whether he started as a property adviser and has moved into other fields or what. In terms of the broad range of get-rich-quick advice schemes and seminars, to what extent are they prevalent and what percentage of them focus on property, as against other types of investment?

Mr Tanzer—It is difficult to give precise figures. It is certainly the case that these types of schemes have changed over time. Going back two or three years, we were seeing quite a significant spike in complaints about get-rich-quick type schemes and educational seminars largely directed at property investment advice. Some of that was driven by the Henry Kaye type phenomenon and, quite frankly, some of the spike in complaints to us was driven by a spike in complaints about Henry Kaye himself.

Since that time, as the property market has cooled a little and other markets have come along, we have seen similar types of activity in relation to share-trading software, in relation to some other types of exotic products and also in relation to the bare educational seminar—some of which I would describe as not much more than broad motivational seminars that offer nothing by way of practical investment advice and are much more about motivating people to believe that if they have a good idea they can do something with it and make money out of it themselves. But even at just that end of the spectrum you find that there are consumer protection issues—for example, where the seminar is promoted quite aggressively in terms of the returns that one might make out of taking on the advice of these types of motivational speakers and where there is a fairly high up-front cost. The short answer to your question is that we continue to see this phenomenon.

In terms of property investment advice specifically, it has dropped away over recent times, partly with some cooling in the property market, I would suggest, but also because perhaps more attention has been given to the likes of some of the people we have been speaking about. But nevertheless there are always get-rich-quick schemes and educational seminars out there that are promoting heavily and really pushing the psychological buttons that go to people wanting to increase their wealth.

CHAIRMAN—The education seminars seem to be examples that, as I understand it, then go on to charge. There are initial free workshops advertised but they are then used to market a seminar or a weekend course with would seem to be fairly exorbitant fees. Is there any protection for people who get involved in that sort of seminar and then find after the event that they have been substantially overcharged for the information that has been imparted to them?

Mr Tanzer—It depends on what they are doing. If in the seminar they are giving some investment advice or financial advice within the terms of the Corporations Act they would be committing an offence if they were not licensed. We have taken action against a large number of those types of schemes and those types of seminars, either to close them down entirely or to injunct them from giving any form of investment advice as part of the seminar.

If you are left with just purely an educational seminar for which a person has paid a substantial amount of money, then that falls back to basically the general consumer protection law. Essentially, in the absence of some sort of misrepresentation and the absence of some real dissatisfaction it gets down to the willingness of the vendor—the provider of the seminar—to provide a refund. In many of these types of courses they actually start off with a free workshop or seminar and some of them promote the fact that they will also give you a refund of your money if at a particular point you are not satisfied, which is quite encouraging for consumers.

But another pernicious aspect of these types of seminars is that quite often once you are there a pretty hard sell is put on you. A person asking questions about the veracity of what they are being told is put under some pressure. They may be told that they are a loser and belittled in front of a whole room, and there may be other people planted in the room to cheer when that type of activity happens. Sometimes when the person has then sought the refund they have found that it is very difficult to obtain. In circumstances where the refund has been offered and then it is not given the law does protect the consumer and action can be taken. But if you have gone into a seminar understanding that it is only an educational seminar and understanding that you have been prepared to pay a certain sum of money for that up front then in the absence of an

agreement by the provider to provide you with a refund if you want it there is no other protection.

Mr Funston—I will add there that sometimes the initial seminar will be used to promote direct investment opportunities as well as further expensive workshops. Both of those things happen.

CHAIRMAN—More specifically in relation to property investment advice, how would you see a regulatory structure distinguishing between real estate agents and those who are giving advice on property investment?

Mr Tanzer—I guess our starting point is to say that, when you compare the regulatory regime that applies to financial advice with the regulatory regime that applies to a person who wants to give investment advice about property, there are significant gaps. There are significant differences, and we refer to them in our submission. Specifically, if a person wants to give personally tailored investment advice about real property, there is a range of protections in Corporations Law that do not apply. To start with, licensing is aimed largely at ensuring that the person who is providing advice has the appropriate competencies and experience—and the previous witnesses referred to some of the requirements of policy statement 146. The legislation also contains some provisions relating to the fit and proper person test. But the key test that would deal with a number of the type of promotional activities that we are dealing with is the requirement to demonstrate experience and competencies in a particular area.

Leading on from that, though, when you decide to give personally tailored investment advice about a particular financial product, there is a range of other requirements that also apply. In particular, you have to make reasonable inquiries of the client's circumstances and you have to tailor your advice appropriately for the client's circumstances. These are not features that you see in a mass marketed seminar. It simply would not be possible for advisers to provide the sort of service that they are providing now and comply with the law in that respect.

Even in respect of just giving general advice—not giving advice that is personally tailored to your circumstances that takes into account your income, your other investments, your needs, your age, your family status and so on—there are requirements to disclose, appropriately, conflicts of interest that might apply. One of the other concerns that has been consistently expressed about this type of behaviour, particularly with respect to property investment advice, is the association between the person giving the advice—or the spruiking—and the people who are selling, in association with the developer. So there is a range of protections, in the Corporations Act context, that do not apply.

Within the real estate sphere, specifically for a licensed real estate agent, there is a licensing regime. The licensing regime, in our estimation, goes more towards ensuring that the real estate agent is competent to sell the property—to deal in real property. But the regime does not deal with or it does not address the issue of giving advice about property and it was not set up with that in mind. Generally speaking, we have not seen real estate agents very much involved in the investment property type spruiking activity to which you have referred. But they could be. If a financial adviser were in that situation, certain regulation would apply. If a real estate agent were in that situation then similar protections do not apply. If a real estate agent wanted to go into investment property type spruiking, we would not regard the existing licensing regime for real

estate agents as being sufficient to deal with that problem. I hasten to add and reiterate what I said at the start: we and indeed the Ministerial Council on Consumer Affairs have not seen real estate agents as being at the heart of this activity.

CHAIRMAN—I would think that the large majority of real estate agents would be unlikely to get involved in a mass marketed spruiking activity, but they may well get involved in advising individual people who come to talk to them about real estate—

Mr Tanzer—Yes.

CHAIRMAN—the investment aspects of real estate, even though it is not their principal role. Their principal role is acting on behalf of vendors to sell real estate. So I think it is probably a bit of a grey area. Where would you draw the line in terms of those who would have to come under the federal jurisdiction—as investment advisers and financial planners do in relation to financial products—and those who would simply be regarded as real estate agents?

Mr Tanzer—I should say, in prefacing my answer to that question, that I have not argued, and ASIC has not argued, that they should be under a federal regime. We have said that they should be under a comparable regime. We believe it is a matter for government and the parliament to decide how that is actually implemented at a detailed level, but we do believe that it should be under a broadly similar regime.

The way I see it operating is that, generally speaking, as I understand the ordinary conduct of a real estate agent, they would not be engaging in giving personally tailored advice. Much more often, they are reacting to a purchaser coming to them to seek advice on properties in the area, in respect of which they have got some competence to deal. Similar to the previous speaker, I can see an argument that there would be grounds for some improvement in the competency standards that apply under the licensing regime for real estate agents to bring them up to the standard of, say, a financial adviser who is giving general advice. Those standards are some general, educational and competence requirements that go to the understanding of financial markets more generally. Potentially, there are some educational requirements that go to the nature of the property, but not much beyond that.

If a real estate agent did want to get into personally tailored advice and wanted to go down the course of seeking to give a full suite of advice about why a particular property suits the particular needs of the investor in their financial circumstances then, consistent with the rest of ASIC's submission, we regard that they should be subject to the full range of requirements, similar to what a financial adviser would be subject to.

CHAIRMAN—Your 1999-2000 review of the regulation of financial advising activities and real estate agents listed safeguards found not to be available to consumers in the real estate market, including mandatory internal dispute resolution procedures or standards, competency requirements covering the giving of financial advice, warnings on the limitations of general advice, statutory liability of the licensee for the acts of its representatives and so on. You made a number of suggestions as to how comparability might be achieved. Has there been any progress in relation to those recommendations that you made?

Mr Tanzer—As I understand it, those suggestions were picked up by the Commonwealth government. The report was referred to the state and territory ministers—I think it was referred to the ministers for consumer affairs at the time because of the competence of the states and territories with respect to real estate agents. Bear in mind that that particular review was directed to the financial advising activities of real estate agents. I think similar considerations apply to people who are not real estate agents, but that particular review was related to real estate agents and arose out of a recommendation of the Wallis inquiry to specifically do that. That is why the Commonwealth government referred it back to the states. It has led to the Ministerial Council for Consumer Affairs process of producing a discussion paper on what should be the appropriate regulation of property investment advice that is ongoing. That currently is at the stage of a discussion paper that was released in October last year. The ministerial council is meeting, I think, next Friday to talk about that issue further.

Mr Funston—I have had a look at the real estate legislation of the states recently, and it is fair to say that those proposals have not been picked up except in a couple of small instances. I think the New South Wales and ACT real estate legislation now have some requirement about disclosing conflicts of interest but, generally speaking, the licensing of real estate agents continues not to go to the issue of advice at all.

CHAIRMAN—What is your reaction to this statement in the submission from the Real Estate Institute of Australia:

... the recent regulatory actions of the ACCC and ASIC in regards to property investment seminars have been too little, too late.

Mr Tanzer—Certainly from ASIC's point of view—I cannot pretend to speak for the ACCC—we have taken action where we believed action was warranted and the legislation had been contravened. The tenor of our whole submission is that the existing tools that are available, in particular through the general misleading and deceptive conduct provisions, are not suitable for completely dealing with this problem except in a reactive way. So I can understand why some people might regard it as being wholly reactive. As to it being too little too late, that suggests a criticism that the bodies did not act quickly enough to activate their powers and move forward, and I do not think that is warranted.

CHAIRMAN—The Financial Planning Association observed:

... the general community has little appreciation or knowledge of the downside risks of property as an investment and the associated financing arrangements. The lack of relevant consumer education and the potential for poor advice in relation to property investment may lead to confusion and the possibility of a herd mentality approach to these investments.

Given that ASIC publishes extensive consumer education material, particularly on the FIDO web site, what is your reaction to that comment by the FPA?

Mr Tanzer—I am not a complete expert in herd mentality or the reactions of large populations of people but there is anecdotal evidence to suggest that, when it comes to property, people—investors generally—have more confidence in the nature of the vehicle as an investment product and less appreciation of the risks than perhaps in some other asset classes. I quoted some figures in the opening statement that would suggest that. If you have a rental yield

of 3½ per cent on an investment rental property compared with a yield of eight to nine per cent in the commercial property sphere, you wonder why people would be favouring rental property over commercial property because clearly there is a significant income gap.

Part of that may be to do with their understanding that there might be a better capital gain in that area. It may be to do with the fact that many Australians are property owners in terms of their own house, so they have a better identification with that type of product. In terms of ASIC's education activities, we certainly advocate that people take a balanced approach to their investment portfolio. Property for many people is part of that. It is sensible to diversify one's risk. I have certainly seen, through these and other types of seminars, that people see the diversification of risk, as one of the previous speakers mentioned, as buying two or three properties, and maybe two or three properties in the one suburb—not even in different places—whereas we would advocate a more balanced approach than that.

CHAIRMAN—Apart from whatever regulatory initiative might be necessary in relation to real estate spruikers, is there a need for a greater level of broad education in the community in addition to what ASIC are already doing? Would ASIC see themselves as having a role in that?

Mr Tanzer—This is getting a little bit beyond the terms of reference of the inquiry, perhaps. In terms of general levels of consumer education and so on, it is all a question of where you want to apply your resources, obviously. We certainly take our consumer education responsibilities quite seriously and we put a lot of effort into the web site and some of the publications, as you mentioned, and making them available in the way that we think is most suitable, particularly for disadvantaged groups. I must say that within the consumer education field the difficulty is always getting to the groups that most need that message.

With the FIDO web site we are very happy with the quality of the information that is there and we are very happy with its usage, but sometimes one feels that the people who might be most likely to need that message are the people who are least likely to visit a web site, ours or anybody else's. So we constantly need to think about ways to improve that.

Mr Funston—A general issue with consumer education is that ASIC's messages of restraint and prudence have to compete with aspirational dreams of instant wealth, which is not easy.

Ms BURKE—The Nigerian letter scams have netted billions. You think that you would have to be smarter than to tell somebody over the internet what your bank account details are, yet people are willing to do it. It frightens me. My husband opened my email account for me recently and had to delete 300 of those emails received during the last three days—and you would think that our emails are pretty well filtered.

Mr Tanzer—I receive a large number. In fact I received one the other day from Greg Tanzer, executive director. That is a slightly different issue again, although I make the point that I have reasonably good faith—perhaps it is misguided—in the good sense of people to sort through some of this. I mentioned before that the number of complaints about this had dropped off. Obviously there was a problem with a lot of investment seminars, public awareness was raised about them and then people were more careful. We saw a similar phenomenon with cold calling about overseas shares a couple of years ago. The number of complaints in that area has dropped well away, although there still are people who get caught by that scam. I have a reasonable

degree of confidence in people to be somewhat sceptical. We would just like them to be a bit more sceptical than they are sometimes.

Ms BURKE—Some of the problem with Henry Kaye, though, and bringing him to account was the lack of a legislative avenue to stop his activities. The complaints about Henry Kaye were out there well and truly before any action could be taken against him.

Mr Funston—If Henry Kaye had had to have a financial services licence or something equivalent then it would have been easier to take proactive action. Greg made the point before that if you are limited to the general consumer protection laws then you have to wait for someone to do something in breach of the conduct requirements before you can do anything.

Mr Tanzer—Last year in our annual report we reported on closing down something like 60 illegal schemes. They were schemes that we prevented from proceeding because it was clear that they were investment schemes. Mr Kaye was not promoting an investment scheme within the terms of the Corporations Law. We ended up taking some action against Mr Kaye, particularly with respect to some mezzanine financing arrangements and some assertions that he made that his scheme was ASIC approved. But you are quite right that, as it currently stands, if a person is running an educational seminar purely advocating direct investment in property then there is nothing that prevents that person from doing that other than the general law which goes to misleading and deceptive conduct or unconscionable conduct. The difficulty there is that that tends to be a reactive remedy—that you would need to see the misleading representations made before you could take action.

In a number of the cases that we have brought, even where we believe that misleading representations are going to be made, that is probably not enough to stop the seminar. It might be enough, and has been enough, to get injunctions specifically going to that type of conduct. Then our officers go along to the seminar and find that the promoter steers carefully clear of making those sorts of representations—it ends up being the sort of seminar that I referred to before: a general motivational seminar that is not of very much worth.

Ms BURKE—From previous Senate estimates and your testimony now we have discovered that ASIC has sent people to these seminars in a covert way to observe. Is that the best way to do it or should ASIC officers have a right of entry to these property seminars so that you know somebody is sitting in the background paying attention?

Mr Tanzer—We normally do not have a problem getting access, so there is normally no difficulty there. I think the issue that we are really trying to come to in our submission is that, in the absence of something that says the person who is engaging in this type of activity needs some form of licence or authorisation to do it, you will always be left with that reactive remedy of having to go along and see whether the person is making misleading or deceptive comments. At least in relation to property—which is a significant investment class—we think that there are reasonable grounds for saying that the situation is unsatisfactory and that there should be improvement, specifically along the lines we have discussed. I can tell you that, as an enforcement agency, if you have the capacity to go to court and to say, ‘This looks like an investment seminar; the person is not licensed; it has to stop,’ then you very quickly get an injunction and it stops the seminar from proceeding, as we have done in a number of cases that I can mention.

Ms BURKE—For quite some time the RBA and, in particular, the Governor of the Reserve Bank, was indicating these schemes were actually overheating the property market—particularly in units and inner city apartments in Melbourne, where one of the prime developers and investors, Henry Kaye, was—and, for quite some time before action was taken, was pleading that legislation needed to be changed to cool down the property market because people cannot get in. Young investors are being locked out by virtue of the overheating of the market, particularly in the investment cycle. It did seem that there was a bit of passing of the buck. The federal government were saying, 'It is not our responsibility' and the states were saying, 'It should be a federal responsibility'. I was interested by your earlier comments that there was not a need to actually have a federal jurisdiction in this environment. I would argue strongly that there is a need for a federal jurisdiction. I would like any comments on the overheating, what has happened and where we should go with this inquiry.

Mr Tanzer—To take the last point first, I do not and ASIC does not advocate that it cannot be Commonwealth and it cannot be state. We believe that that is really a matter for government to determine, so I do not advocate one way or the other. I do advocate that there are gaps, and these are what the gaps are. In terms of overheating of the market, I do not agree that the property investment seminar caused the overheating of the market. I think it was probably more the other way, that the market was running along and therefore the investment characteristics, the possible capital gains and so on, became all the more attractive. I do not know that regulating this type of activity would necessarily change the cycles in the property market, in the equity market or in anything else. But it would go towards dealing with the most pernicious sort of activity that causes direct harm to consumers. In an overheated property market an investor could go to a real estate agent and say, 'I want to buy an inner city apartment,' buy an inner city apartment that they then find straight off the plan or whatever, and as soon as it is built it is worth less than what they paid for it because the developer has also built into the price some idea of the capital gain. That would not apparently be actionable but, certainly in a case where the investor has been induced and coerced and false promises have been made, I think that is the sort of area where we should be concerned about less than just regulating the cycle of markets.

Mr Funston—One additional point: if the share market is booming, then marginal/spruiker/dishonest elements cannot just move into giving advice about equities. There is a whole set of requirements that they have to meet, so there are some barriers to entry that it was government policy to put in place. If the property market is booming then people with no particular training qualifications, who are just spruiking, can set up shop quite easily. There are no effective barriers to entry.

Ms BURKE—Isn't that an argument for us to actually regulate under FSR people who are offering property advice as an investment tool?

Mr Funston—It would not need to be under FSR, but it is an argument for regulating comparably, which is our view.

Senator MURRAY—Mr Funston, just to continue that point: you said that the states had not adopted the report's recommendations as to advice. Do you have a sense of whether that is because they do not want to, as they do not believe it is necessary, or they think it is a federal responsibility that would be better off enshrined in national legislation?

Mr Tanzer—Perhaps I might answer that. There are a couple of strands to the question. Through the Ministerial Council on Consumer Affairs, the states have engaged in quite an extensive examination and consultation process with respect to property investment advice. Most of that has been directed less to real estate agents and much more to unlicensed operators. I do not pretend to speak for the states but, in reading their property investment advice discussion paper, you get the strong sense that they see the issue resting with the unlicensed part of the market and not with real estate agents, whom they regulate directly. The states strongly see the answer as coming through this discussion paper and, indeed, through a statement made, I think last April, by the state ministers for consumer affairs that they believe the Commonwealth should take on this field.

Senator MURRAY—That was my impression too.

Mr BARTLETT—Mr Tanzer, you mentioned in your submission that, in addition to taking action against promoters giving unlicensed advice about financial products, you are taking action against illegal fundraising activities for property development. Could you please elaborate on that?

Mr Tanzer—ASIC's jurisdiction covers a range of financial products, some of which involve property. In that part of the submission, I refer specifically to our having closed down a number of schemes involving fundraising broadly related to property if it fell within the category of a managed investment scheme. Often that would operate where there is some pooling of funds from the investor which involves the purchase of maybe a unit but more often where there is some sort of share of a larger piece of property or where it involves a particular unit in property with some management of the overall property to produce income for the investor. In circumstances where there is some type of pooling of the activity—where it is not just a direct investment in a particular piece of property or strata unit or something of that nature—the investment falls within the managed investment provisions. They then require a product disclosure statement and they then require a responsible entity, which would be authorised by ASIC. It is there that we have taken action to close down those types of schemes, and over time there have been quite a large number of them.

Mr BARTLETT—In your earlier comments, in terms of protection for consumers, you have said that there are gaps. Could you summarise where you see the gaps and what you see as the most effective means of protecting consumers against areas where there are gaps?

Mr Tanzer—I will not go through all the gaps, because they are probably covered reasonably in the submission. However, to take one of the most significant, I suspect from the information that has come to us that consumers are most concerned about nondisclosure of information with conflicts of interest and specifically where the promoter is associated with the developer or has some ownership stake in the investment property. Under the Corporations Act regime, conflicts of interest of that nature must be disclosed by the adviser. We believe that is a specific gap and that it should be covered.

A number of these seminars try to elicit and delve into information such as, 'Tell me of your particular circumstances; tell me your income; tell me about your family situation and how long you have to go until retirement,' and so on. In respect of personally tailored financial advice, there is a regime under the Corporations Act that requires the adviser to make reasonable

inquiries of the person's financial circumstances and to produce a recommendation that is suitable in those circumstances. At the moment that does not apply at general law, and we believe it should apply to personally tailored property investment advice.

The third aspect is the general idea of some of form of licensing for people who want to get into the business of providing property investment advice. The reason we think that is important is that it includes these general competency and educational type requirements that would weed out a lot of fly-by-night operators. The fly-by-night operators would not go to the trouble of getting a licence in those circumstances, together with all of the other compliance requirements that go with a properly functioning licensing regime, which is what I think we have for the financial adviser area.

Mr BARTLETT—Do you think we can adequately do that without unduly penalising real estate agents, for instance, who are basically selling for their vendors, with the conflict of interest issue presumably taken care of by virtue of the fact that a purchaser knows that there is a commission on the sale of the property? Do you think we can adequately protect consumers without creating an unnecessary burden on agents who are giving informal advice? The issue of personally tailored advice is a question of definition, I suppose. Where do we draw the line there?

Mr Tanzer—I think you are quite right. At the heart of it is how you would draw that line, and I think you would find that agents, like anybody else, would quickly adjust to that. There would be some who are interested in giving personally tailored advice and would go the extra step, but there would be a lot who would prefer not to and would prefer to stay in the realm of general advice. In terms of disclosure of conflict of interest, I think you are right that it is reasonably well understood that when a person approaches a real estate agent they understand that the real estate agent is normally being paid by the vendor through a commission arrangement. I do not think there is any great problem there. Sometimes, of course, they do act for a buyer, and there is in fact a positive disclosure arrangement if you are acting for both sides; you must disclose that.

I would want to look in more detail at exactly how each state's disclosure arrangements work. Some states have moved to say that there must be positive disclosure of the fact that you are acting for the vendor and the amount of that commission, from memory. I might be wrong about that, but I think they have taken that extra step when you are acting for both sides. It is not uniform but that might be a step. If an agent wants to move much more into the realm of giving general advice and inviting people to talk to them about their overall investment portfolio and moving forward, that might be an extra step that is reasonable.

I would like to see most of all for the adviser who is just giving general advice something that beefs up the existing competency requirements for an agent. At the moment, the competency requirements very much go to quite short course work that goes to making sure that you understand the legal requirements for how you actually sell land, maintain trust accounts and the like. If real estate agents want to get a lot more into the general investment advice business, I could see an argument that says you could add some of the general overview of financial markets and securities and how the investment market works as a whole—some of that type of training—into what they do, and possibly something that is more specialised with respect to the investment characteristics of real property itself and which tries to describe the swings and

roundabouts and the types of things you need to take into account when determining yields and long-term prospects. That would seem to be something that would give people who are dealing with real estate agents or anyone else a bit more confidence about their capacity to give advice more generally, rather than just, 'Come to me because I am a salesman, because I am here to sell your property'.

Mr BARTLETT—Anecdotally, do you have any indications that, within the financial planning services, advice with regard to direct property investment is too often overlooked?

Mr Tanzer—I suspect that some of that goes to the structure of the industry. We heard from the previous speakers that it is quite common in the financial advice industry, particularly for those who are retained by an institution, that the range of products they can offer advice on is confined typically to that institution's range of products. That means that they certainly cannot extol the virtues of direct property investment as an alternative, although most of them, you will find, will advocate the principles of balance and diversification that I was talking about before.

I think that if you went down the track of something that had a more holistic approach to investment, including property as an investment type product, you might find that that gets loosened up and there are a lot more advisers who would want to give that type of advice. You would probably find that there are some real estate agents who would be quite happy to get a degree of competence in financial advising or financial instrument advising just so that they know when the advice they are giving might be less appropriate for a particular person.

Mr BARTLETT—So it is not your view that the advice from the financial services side is in any way inadequate because of the limitations there?

Mr Tanzer—I think that the disclosure requirements that apply under the law make it quite clear what they can advise on and what they cannot. That is a function of the law and a function of the structure of the industry. If you were starting with a blank sheet of paper, you might do it a different way, but I think that, in terms of the understanding of the consumer receiving that advice, there are good safeguards in the legislation through the financial services guide and the statement of advice to make sure that people know what they are getting and what the limitations are.

Mr Funston—I will add something to the earlier point about real estate agents and not imposing an excessive burden on them. I think it is important that if there were to be any legislative reform it would not just in any crude way carve out licensed real estate agents. There is some activity on the part of licensed real estate agents in the property investment seminar area. So, if there were to be such a carve-out, you would have to do a carve-out that was functionally based rather than based in terms of a sort of licensed category. If you were to do that, then, perhaps with some enhancement of the real estate legislation to cover the general advice, you could adequately cover real estate agents without imposing an excessive burden on them.

CHAIRMAN—The submission from the Law Institute of Victoria, in relation to the real estate spruikers and the get-rich-quick promoters generally, says:

A conflict and crossover of jurisdiction exists between ASIC, ACCC and State-based consumer affairs departments. There is confusion over whether a Commonwealth or State level approach is warranted. This leads to each authority claiming it

is the responsibility of the other authorities and leads to no regulatory authority taking any action and no provision of consumer assistance.

The submission recommends that an authority:

... should be given specific powers and authority to regulate the property investment advice industry and to prosecute persons involved in unconscionable behaviour. Specific direction needs to be given to avoid the existing problem of regulatory authorities declining to act because of perceived demarcation issues.

What is your reaction to the issue of demarcation? I note that ASIC and ACCC have recently signed a memorandum of understanding designed to improve levels of cooperation between ASIC and ACCC in particular. Will that overcome this issue? Is there a need to perhaps extend that sort of MOU further?

Mr Tanzer—I will take the last part first. As part of the discussions underlying the MOU, specifically one of the areas we discussed was property investment, to make clear between our two agencies what aspects of property investment we would take responsibility for and what aspects of property investment the ACCC would take responsibility for. As part of the MOU process, we also talked about and have settled procedures for, where necessary, offering a delegation of power to the other agency and back to ours.

Regarding the demarcation between our responsibilities and the ACCC's, it comes down to people thinking about whether the glass is half-full or half-empty. There is a reasonably clear line. The legislation determines that, if the misleading or deceptive conduct relates to a financial product or service, that is ASIC's responsibility and, if it does not, it is the ACCC's responsibility. There are cases where something might or might not involve a financial product. That is where the potential overlap or potential issue arises.

With the state and territory agencies the issue is quite different. State and territory agencies have plenary power with respect to misleading and deceptive conduct in trade or commerce. If they wished, they could take an action under those provisions with respect to anything. That is quite a separate issue. Throughout the discussions that we have had with the ACCC in particular there has been no great desire to shuffle a matter from one to the other. It is much more an issue of what is the appropriate regulatory tool that we can use to deal with this activity. People, particularly people who want to skirt the law, get good advice and often they are quite intelligent and find ways to skirt their way around the law. I think that will apply regardless of what regulators you have in the field.

I believe that our relationship with the ACCC and our ongoing discussions with them at officer level and at more senior level are really helping to make sure that we coordinate things. On previous occasions we have offered direct delegations to the ACCC so that they could cover an entire field. For example, in the area of health insurance and prices surveillance in health insurance during the introduction of the GST a couple of years ago we did just that.

Certainly the MOU is a great assistance in that regard. You are quite right to identify it as a key step that we have taken to make sure that our arrangements with the ACCC are on the best footing that they possibly can be. I think that, regardless of how you draw up any legislative regime, there will always be things at the border that smart people are going to want to exploit.

The clearer you can make the accountability the better. It is certainly better to have one agency that has responsibility than two agencies with clearly overlapping responsibilities if you can avoid it.

Ms BURKE—One of the problems with Henry Kaye was that he skirted three fields—he went into some of APRA's territory as well. He not only spruiked the property, he tried to sell it to you and then he tried to sell you the finance to get into the property. So we are talking not only about investment advice but also about trying to get you to buy into a financing package as well. Even if we deal with the issue of investment advice, be it in real estate, unit trusts or whatever, don't we also need to look at some of the things that some of these spruikers are adding on—mezzanine finance, as you called it at the beginning?

Mr Tanzer—I think in terms of the sale of the financial product, the sale of the mezzanine finance, while there is a prudential application that APRA would need to consider, the consideration of the conduct in the sale of the financial product would much more clearly fall to ASIC—provided we are not dealing with credit, but that is a whole different issue.

Senator MURRAY—Any consideration of a licensing regime has to have professional standards and behaviour, a kind of certification process, attached to it. Much of the community concern and discussion is more about behaviour and morality than expertise. Many crooks have a great deal of expertise; they just do not have much morality. Some time back the Vice-Chancellor of the University of Notre Dame told me that one of their five core courses, which every student does, is ethics. Do you think competency standards and a general certification regime should always include an ethics component?

Mr Tanzer—It is a good question, and one that I would probably like to consider further. My immediate reaction comes back to the first part of your question: I do not know whether you can teach ethics and morality. You can certainly give people some training that helps them to confront some of these issues before they come across them in the workplace so that they are in a better position to have logically thought through what the issues are in considering these sorts of ethical conundrums. We probably should divorce the issue of whether ethics or morality is a good idea as part of a competency based regime from the suggested solution of trying to deal with unethical behaviour. Whether it is through a training and experience type regime or through direct legislation, I suspect you cannot legislate for good ethics.

Senator MURRAY—I have been watching the work that you, the ASX and others have been doing on corporate governance, for instance. Many of the codes and the constructs that have been put together are in fact an ethical determination: 'Thou shalt do this, and thou shalt not do the other.' I have felt that one of the shortcomings of the approach in this area is that it has concentrated on competency and expertise, whereas it is a much more behavioural problem than that.

Mr Tanzer—I think the point is well made. That would help you deal with the well-meaning person who gets into something of a mire and would try to stop that person getting into that position. Obviously it will not solve all the problems—and I do not think you are asserting it would—because you will always have people who want to flout the law.

CHAIRMAN—I have a final question. We talked earlier about the different groups: you have the real estate spruikers, other investment spruikers and you have the group we referred to with regard to this ad—people who are perhaps providing an overpriced educational facility rather than pushing direct particular investments. Does ASIC have a list of—or is it something you should consider having a list of—people who might provide educational advice, rather than specific advice, to the average investor if they are looking to educate themselves on investments? Therefore they would be able to assess what is good and what is bad, other than through the formal courses perhaps offered by the Securities Institute or a university or something like that. Do you have a list of people who are regarded as competent and reputable that provide that sort of service?

Mr Tanzer—Outside the ASX and the Securities Institute, as you mentioned, no, we do not have a list. We do not license people to do that. Obviously a licensee is licensed to do that, and we have that list. If a licensee were engaging in that sort of activity they would have to indicate that they are licensed to do so, but we do not have a separate category of licensee. I do not think we have been approached by the industry to come up with something that encourages people to go into the broader educational seminar area, other than through the ASX and the SIA.

CHAIRMAN—Would Robert Kiyosaki come into the category of being a reputable educator, or is he just another of that sort of person? Or is that something you would not want to comment on?

Mr Tanzer—It is hard to comment. I should say I do not know all the details in relation to the one you are talking about. It may well be that that person is not skirting the law—they may be in breach of the law; they may be completely within the law. I do not know the circumstances of that particular one, and you would need to look at it in more detail. I guess you have raised the point that it might be difficult for ASIC to give that sort of certification in any case. We certainly license people as competent to give financial advice. That would give them the competence to run an educational seminar and provide general advice in that context.

CHAIRMAN—Thank you, Mr Tanzer and Mr Funston, for your appearance before the committee and for your assistance with our deliberations. I am sorry we went over time, but I think your perspective on the issues is very important to what we might finally conclude and recommend. The Prime Minister did ask that we observe a minute's silence at an appropriate stage today in remembrance of the serving officers who lost their lives in the Sea King helicopter crash. It is now 11 o'clock in Adelaide, so this might be an appropriate time at which to do that.

[11.31 a.m.]

WOLTHUIZEN, Ms Catherine Nicole, Senior Policy Officer, Financial Services, Australian Consumers Association

CHAIRMAN—Welcome. As you are probably aware, this is a public hearing and the committee prefer that all evidence be given in public, but if at any stage of your evidence you wish to give evidence in camera you may request that of the committee and we will consider such a request. I invite you to make an opening statement, at the conclusion of which I am sure we will have some questions.

Ms Wolthuizen—I understand I am doing a back-to-back today: property investment first and time share second.

CHAIRMAN—There will be an adjournment then a reconstitution before the second round.

Ms Wolthuizen—I might start by taking a few minutes to make a brief opening statement, simply because I was not able to provide the committee with a submission prior to my appearance. Firstly, I would like to thank the committee for inviting ACA to speak here today and for conducting its inquiry into this issue. I am sure the committee is aware that the regulation of property investment seminars and advice is a high priority for many consumer representatives—both caseworkers and policy workers in this area—who see and who have seen a lot of problems related to property investment seminars and advice over the past few years.

It is a consistent view across the consumer sector that the lack of sufficient regulation in this area presents ongoing severe risks to consumers and exacerbates asymmetry in the operation of investment markets more generally because of the lack of consistent regulation across different classes of investment, to the detriment not only of those operating in the more well-regulated sectors of the industry but also to consumers, who, understandably, expect that regulation and protection will be consistent.

In our view it is clear that the current consumer protection framework around property investment advice is inadequate and that consumers are suffering as a consequence. The boom in property values has fuelled strong consumer interest in property investment and many are anxious to assure their financial security but spooked by downturns in the performance of other forms of investment and have flocked to wealth creation and property investment seminars as a consequence. Instead of the easy wealth or overnight millions that many are promised, those accessing property investment advice, often through the initial free seminars, meet with pressure sales tactics, exorbitant fees for further coaching or seminars and onerous terms and conditions which make it difficult for them to exit any finance arrangements they may have entered into. The investment strategies have, in some cases, been out-and-out scams, as was the case with the two-tier marketing of apartment developments, particularly in Queensland, through to the marketing and sale of linked property developments, with the relationship between developer and property investment adviser not disclosed to the consumer.

Unlike investments and investment advice regulated under the Corporations Law, consumers of property investment advice do not have the protection afforded by the disclosure, training, licensing and redress mechanisms required by the Financial Services Reform Act. Regulators have also reported difficulty and frustration in their attempts to rein in anticonsumer practices in this area. The ACCC struggled and ultimately failed to successfully prosecute the perpetrators of a particular two-tier marketing scam. And while ASIC has had some success, most notably against Henry Kaye, it has also acknowledged the difficulties entailed with bringing successful actions and the lengthy delays that are often incurred in trying to bring about such actions.

We know that property investment promoters are generally well aware of the limits of the law and structure their activities accordingly, ensuring consumers are left unprotected. Consumers themselves appear generally unaware of the lack of protection, with many expressing shock and surprise upon learning that they are without recourse if they have a complaint.

For ACA and other consumer representatives the issue is not whether this area should be regulated but how and how soon, and I would like to outline what we see as the essential items forming part of any effective regulation of this area. The first is that any regime must be nationally consistent. It is our preference that this be regulated at the Commonwealth level, though it appears there is not much appetite for that; therefore, we would at least aim for a uniform state regulation of property investment advice if a reference of power cannot be achieved. Not only should the legislation itself and the regulatory framework be consistent across the states but so too should enforcement, as property investment promoters tend to operate across jurisdictions and across the country.

Second, we would advocate regulatory consistency to ensure that the standards that are set in place are consistent with other forms of investment. This would mean, in our view, extending the FSR model to property investment advice, whether at the Commonwealth or state level. As I have said, the current asymmetrical regulatory environment is deeply undesirable, exacerbating the risks to consumers and penalising those who operate under more stringent regulation. But, from the perspective of consumers, they need to be confident that, whichever form of investment they choose, protection and regulation levels will be consistent. This is simply not the case at present. I would also like to say, though, that consumers themselves do not differentiate between jurisdictions and regulators in the way that it may sometimes be assumed. It is our experience, from the types of reports consumers present to us in this area, that the ACCC and ASIC are perceived as having responsibility for this area, even though their powers to regulate it are extremely limited at present.

The third item relates to the nature of the regulation. We think that at a minimum there need to be barriers to entry and minimum standards of advice incorporated into any new regulatory regime for property investment advice. In our view, FSR is a logical model to extend to this area, translating the licensing, training and qualification requirements, the disclosure of commissions and factors likely to influence advice, the management of conflicts of interest, and the requirement to have an internal dispute resolution scheme and belong to an external ASIC approved scheme.

Moreover—and I think it is possibly an issue that has not come up before in discussions around this area—in our view it is equally important that the principles attached to FSR are also extended, such as the obligation on licensees to act honestly, efficiently and fairly and the duty to

provide appropriate advice. That may address some of the ethical concerns as well, to introduce that ethical dimension into how conduct is engaged in in this area.

With regard to the alternatives, it is our view that co-regulation or self-regulation would be insufficient to protect consumers of property investment advice. Just looking at how the sector has operated, it has markedly failed to demonstrate it could self-regulate to an adequate standard of consumer protection. Consumers themselves are unable to exert sufficient pressure to improve standards of conduct, as many are simply unaware of the risks, conflicted relationships or dubious behaviour which goes on in this industry until they have experienced it and it is too late. In that respect, while education is always going to be a component of getting messages out to consumers about the kinds of activities they should avoid, steer clear of or watch out for, the nature of education and the educational messages in this area thus far have been very much strident warnings from a range of agencies, including ours, against promoters of particular seminars. So at the moment just trying to get an educational message out to people to warn people off is a bit of a struggle, let alone trying to provide some sort of proactive educational message as well.

In terms of issues around the application of the new regime beyond seminars, it is our view that the activity being targeted here is the conduct of property investment seminars, training courses and some of the ongoing coaching activities that are spruiked by promoters in this area. While we are aware that the real estate agent issue is certainly one that has generated some concern, we would argue that, just as proposals for reform are not aimed specifically at real estate agents, we would not want to see that issue hold up the process of ensuring that consumers more generally are protected if they attend property investment seminars.

Furthermore, there are other mechanisms beyond regulation that perhaps we need to explore. It may be a bit beyond the scope of this particular inquiry. We note that there is strong pressure on consumers generally to provide for themselves financially in order to secure their future financial wealth, and particularly on those people approaching retirement. That is a very strong driver for people to attend these sorts of seminars and seek out financial information and investment advice wherever they can find it.

The reality is that these seminars are one of the few free mechanisms by which consumers access financial advice, and therefore it is little wonder they are drawn to them, not only by the promises of easy wealth but also because it is free for them to attend, certainly in the initial stage. When we look at issues around financial literacy, maybe it is time that we also consider what we are now seeing as an advice gap for Australian consumers. For many people access to financial advice is beyond their means, but they do have the need to access it and maybe it is time to consider some of the kinds of initiatives that have been entered into overseas: looking at the provision of free advice through, say, the Citizens Advice Bureau in the UK, which is currently under pilot. I will leave that perhaps for another inquiry, but I will just highlight it today.

CHAIRMAN—Thank you, Ms Wolthuizen. Does your experience reflect what the Real Estate Institute of Victoria highlights in the work of the Commonwealth government's Consumer and Financial Literacy Taskforce, which noted last year:

... some population groups have particularly low consumer and financial literacy levels, making them vulnerable to scams, rorts and unmanageable levels of debt.

Also, the Law Institute said:

In our members' experience ... The target audience—

for aggressive property investment advisers—

is typically professional persons (medical industry, executives etc) who have a good income and good equity in their home.

From your experience, is the target audience one that would not ordinarily be identified as having low consumer and financial literacy levels or is it the group that the Commonwealth's Consumer and Financial Literacy Taskforce identified as having low financial literacy?

Ms Wolthuizen—I do not know how discerning the promoters of these investment seminars are about whom they draw in as audiences. They engage in mass marketing and mass advertising for their seminars and they are quite happy to get people along. From a casework perspective, a lot of people who were caught up in the Henry Kaye adverse experiences did not necessarily have a lot of wealth to invest, and for them that was part of the attraction, because they could go along to the initial free seminar and then access linked finance arrangements to attend further investment coaching. In fact, they ended up in financial counsellors' offices and casework offices because of the linked finance arrangements. They never even really got to the point of entering into substantial investments.

Certainly people on lower incomes have been caught up in this just as much as the marketing may have caught people who you might expect to have more investment experience. Again, we also need to be careful of assuming that people are knowledgeable and discerning about the investment advice which they are provided. I would refer the committee to the ASIC investigation into victims of the offshore boiler room cold-calling, which found that a lot of the victims were accountants or people who ran small businesses—people you might otherwise assume would have been able to spot the scam when they were cold-called.

CHAIRMAN—I raised with ASIC an issue addressed in the submission of the Law Institute of Victoria. They drew attention to what they saw as a conflict and a crossover of jurisdiction between ASIC and ACCC in state consumer affairs departments. To what extent do you see that as an issue with regard to this problem? And, leading on from that, would an appropriate regulatory regime be Commonwealth based or state based?

Ms Wolthuizen—There has clearly been a problem in trying to find effective and quick ways of dealing with these seminars and some of the consumer risks that they have presented. We have seen some initial confusion over who should take on these particular hot potatoes and how the cases themselves should proceed. To me, that is more about trying to manage what is effectively and fundamentally an undesirable situation, where there are not really enough regulatory hooks in place to take that action. Different agencies have looked at their own powers and how far they might stretch their own powers in order to take some effective action. In the case of ASIC, we have seen it stretching its powers over misleading and deceptive conduct. I

think we have been quite fortunate that Henry Kaye slipped up and made representations that ASIC was then able to successfully prosecute on. The ACCC has had mixed success, and I think the Oceania case in Queensland demonstrated that there were limits to how far it could take its own powers. In the case of that two-tier marketing scam, it was ultimately unsuccessful.

At the state level, again, I think that without that kind of up-front regulation of these activities you are sitting back waiting for some form of misleading and deceptive conduct or some other more general breach to react to. Ultimately, it seems to us that the only effective solution is to introduce a comprehensive regime that establishes entry barriers and standards of conduct that could be acted upon without waiting for people to be the victims of a scam, and to concentrate responsibility for enforcing that regime in one regulator. Our preference is that you would simply extend FSR in this respect and that ASIC would have that responsibility. We have consistently advocated that. If that cannot be achieved then, at least, similar responsibility and standards should be devolved to the states.

CHAIRMAN—If you were to deal with the issue by expanding FSR, where would you draw the line in terms of trying to ensure that real estate agents were not caught up in that regulatory regime?

Ms Wolthuizen—I can see the problem for real estate agents, but I think the nature of conduct that we are trying to control here is quite clear. In the same way that, in other areas of FSR, standards for conduct relating to particular financial products have been set out, it has been acknowledged that, when people who operate providing financial advice bump up against engaging in that kind of conduct or when they deal in those sorts of products, that is when the regulation kicks in. There is a big difference between someone walking into a real estate agent because there is a unit advertised on the front door, asking what the price is and effectively entering into just the conveyancing transaction or the lead-up to that, and a real estate agent who hangs out a shingle saying, 'Come to me and I will teach you all there is to know about investing in property for your future wealth.' Where that line is crossed is where it is appropriate for the regulation to reach.

CHAIRMAN—The University of Technology, Sydney, has suggested as a model provisions in the New South Wales Property, Stock and Business Agents Act 2002. Section 48, which prohibits a selling agent from acting for a buyer and a seller of the same property, including obtaining any remuneration, fee or commission from both sides, has been suggested as a good model for Commonwealth legislation to adopt through the Corporations Act. What is your response to that?

Ms Wolthuizen—It may well be worth investigating, but the conduct that is the focus of this committee inquiry and is the focus of the discussion of what the appropriate regulation is goes beyond the fact that there are conflicts of interest. That is just one element that you would expect the regulatory regime to address—that those conflicts would be disclosed—but there is a whole range of other conduct regarding disclosure of commissions, levels of qualification, tailoring advice to the particular needs and circumstances of the individual, explaining the risks of the advice and access to redress mechanisms. There is a whole raft of consumer protections that would be appropriate to this area.

CHAIRMAN—Do you believe that financial institutions, or others that are lending to property investors, should have a mandatory requirement to provide to the investor their valuation of the property?

Ms Wolthuizen—The two-tier marketing problems demonstrated that the lenders—particularly some of the biggest banks—had been very remiss in their duty to the consumers who were victims in those cases. It is unfortunate that the ACCC was not successful in more firmly establishing that duty late last year. Certainly, whether or not that is done by another case that can establish that duty more firmly, or by some other means, I think it is pretty much incumbent on banks to treat people better than they did in those circumstances. Also, the banks have suffered some damage to their reputations as a consequence and we have not seen that be such a problem since. Beyond that, though, a lot of problems in this area are not just the big banks; they are often much smaller lenders who are not covered by equivalent regulation to the large lenders and who do not have the same risk to their reputation by engaging in these activities. In many cases they are very closely linked with the promoters of these activities as well. They are the ones signing people up; they are often very small finance brokers, but it is a lucrative business for them.

CHAIRMAN—Wakelin Property Advisory have cautioned in their submission that any new requirement for the disclosure of downside risks may in effect have an unintended consequence of 'masking' or 'standardising' the consumer's awareness of specific risks. Do you see that as a problem?

Ms Wolthuizen—Not really. I think that disclosing to consumers, in the context of what are often very hyped-up presentations, that there are risks to property investment is at the very least a minimal requirement. Getting the message out to people that property does not always increase in value and that they do need to be cautious and take into account the particular features of whichever investment they are considering is something we should require as a minimum.

CHAIRMAN—You would also be of the view that some form of dispute resolution procedure should be in place for real estate investment?

Ms Wolthuizen—Yes. One of the great advantages of FSR has been streamlining and standardising access to dispute resolution by imposing both requirements that licensees have their own internal processes and belong to an ASIC approved scheme. I note too that, whether or not this is regulated at the Commonwealth or state level, there is still the capacity and a precedent for having membership of an ASIC approved scheme by the participants in this area. The credit ombudsman scheme essentially takes in mortgage brokers. It has obtained ASIC approval, and I think it certainly has been working better since that has taken place.

CHAIRMAN—Obviously there is a fairly broad problem in relation to get-rich-quick schemes or get-rich-quick seminars not just in real estate but across the board. How can we make consumers more aware that if it looks too good to be true it is too good to be true?

Ms Wolthuizen—It is tough. That is going to be one of the biggest challenges for the Consumer and Financial Literacy Foundation once it gets firmly up and running: how to get messages out to people that are pretty clear about what they need to take into account when they are starting to deal with their financial affairs. We put out all sorts of material—on our web site,

through our magazines and the public work that we do—trying to get across those messages, as do a range of other agencies, including ASIC of course. We put out warnings. We put out a warning last week against the promoter of a particular wealth creation seminar just because of the concerns we had. First of all, it is hard getting the message out generally to people so that the ones you want to hear it actually do hear it. It is even harder to get them to heed it when they are faced with so much hyped advertising and promises from the other side. I think a lot of the attention on Henry Kaye has maybe had a bit of a dampening effect but the reality is people are still flocking to wealth creation seminars and these sorts of seminars and they are still paying up to $9,000—sometimes even more—to go on three-day seminars. I think in many instances they are doing it partly driven out of a desire to make a lot of money—that is a pretty understandable thing for people to want to do—but it is also that many people do not know where else to go. They have been told they have to provide for their future financial security by investing and they do not know enough about it to be discerning.

CHAIRMAN—Has the ACA sent people along to particular seminars to gain some insight into them? Earlier we were discussing the advertisement about Mr Mihos that has recently appeared in the *Sunday Telegraph.*

Ms Wolthuizen—He is the one on which we put the warning out last week. I am happy to table all our material about him. He is certainly well and truly on our radar at the moment. We have sent people along to his seminars. We are obviously a bit constrained in terms of the number of people we have, but they go along and there are quite extraordinary things. There are a whole range of people who attend these for a whole range of reasons. There are people who are there because they really want to invest, there are people there out of curiosity and others are there because they had nothing better to do that night and they thought they might just go along. But the reality is that at the end of the evening people who probably had no intention of signing up to intensive three-day courses do so, and that is largely as a result of the very vigorous pressure tactics that are brought to bear on them during those presentations.

Senator MURRAY—You made a good point which I would summarise in this way: a lot of people who go to these seminars and are interested in this area are need driven not greed driven. In other words, they are very concerned about their future. I want to ask you about another related remark that you made. You indicated that there is a market gap for public education. Do you think it is a feasible or innovative idea for the government to consider conducting public education programs? As you know, the federal government and, to some extent, the state governments spend a great deal of money on advertising and information programs but they tend not to use the mass media—namely, television—where half-hour programs or that sort of thing can provide in-depth advice of this sort. Do you think it is appropriate for government or the regulators to think of that sort of avenue to address this area? One of the reasons that I put this question to you is that when people lose money they end up on the welfare system and costing taxpayers' money. So there is a kind of cost-benefit notionally attached to that idea.

Ms Wolthuizen—Absolutely. It is interesting to look at where the UK are on some of these issues. Having set up a few years ago or really embarked on their own financial literacy initiative and having devoted very substantial resources to examining ways of improving financial literacy and giving the regulator a lot of power to do that, they have evolved into recognising that it is about not just literacy but also capability—that you need to not only put out messages but also

try to somehow capture people's attention and give them more targeted messages about the financial decisions that they might make and what factors they need to take into account.

As I alluded to, that has now translated into the pilot between the Financial Services Authority there and the Citizens Advice Bureau, which is the network of free providers of financial counselling and other free advisory services, to give people financial health checks or provide a sort of one-stop place where they can see a publicly funded financial adviser who will give them some advice about their own circumstances. It will obviously be very resource intensive if they embark upon that and take up the results of that pilot but, again, it is recognising that it is not just enough to put messages out there; you have to put some substances behind them and give people some practical assistance when they are making these decisions.

The people for whom that information is most important are not people who are on very low incomes or income support. They are not people who have enough money to pay to see a financial planner; they are people for whom having some good financial advice at the right time would probably make all the difference. I think the real challenge here is about finding a way to reach them. Maybe it is through some public funding of mass media programs where people can also have trust in the advice that they are receiving and trust that it is not conflicted and that they can basically rely on it as an independent source of information.

Senator MURRAY—Shifting tack, are you familiar with the very determined and persistent campaigner on the mortgage broking scandal and property spruiking generally Mrs Denise Brailey?

Ms Wolthuizen—Yes.

Senator MURRAY—As you would be aware, in my home state of Western Australia, the mortgage broking scandal was a huge issue. A minister lost his seat in the election before last, and I believe it was a major contributor to the government changing hands at that election. Yet, despite that, the state government of WA have made only modest advances in approving regulation. My take on that is that they feel that state resources and state abilities in this area can never be structured or resourced to match the expertise and the corporate knowledge of an ASIC or an ACCC and they really do want the Commonwealth to take up the cudgels. I do not think that they are negative about reform; I think that they feel inadequate with respect to dealing with this issue. Do you agree with that view?

Ms Wolthuizen—Yes. I think that leaving to the states the regulation of these areas—and I include mortgage broking and property investment seminars—is asking an awful lot both of the capacity of the states to quickly agree on a uniform regime—they are not at that point yet and they have been working on it for some years—and then to be able to enforce it. In our view it has always been a second-best option to leave it up to the states to regulate this area because, firstly, we have already got a pretty comprehensive and what appears to be an efficient system of regulation that operates at the Commonwealth level for like products and like markets. So there is a good infrastructure already in place that could quite readily be extended to cover these particular products as well.

Senator MURRAY—Are you suggesting that is because there are economies of scale?

Ms Wolthuizen—It is just about not having to reinvent the wheel at the state level. Also, at the moment ASIC and the ACCC by default have been tasked with attempting to regulate this area through their existing powers. It is not as though there is not an expectation within the community that they are already responsible for the area or that they are not already expending resources on trying to deal with it. It is just that they do not have the powers that they need to deal with it more effectively such as they have for other forms of investment and other forms of similar activity.

Ms BURKE—At the beginning of your opening statement you said that you did not see a great appetite for regulating this at the Commonwealth level. What has led your organisation to come to that conclusion?

Ms Wolthuizen—About two years ago the Governor of the Reserve Bank made some comments to a House of Representatives committee hearing about the desirability of giving ASIC the power to regulate in this area. There was some speculation at the ministerial council meeting in August of that year that that might have been an outcome but it was very much not the outcome of that meeting. I think there was some disappointment among many who were observing that at the time, and there has been no indication that I have seen or heard of from the Commonwealth that they are interested in revisiting that. They are quite happy to participate in discussions that the states are having around formulating regulation but they are not angling to take it on.

Ms BURKE—The various premiers and state ministers said that it was the Commonwealth's responsibility, and the Treasurer said that, no, it was the states' responsibility—and I was at that hearing with the RBA governor. Do you see that this continuation of buck-passing will have us going around in circles and that the Henry Kayes will just keep slipping through the net and the other two-tiered systems you are talking about?

Ms Wolthuizen—I understand that progress is being made. But as we have seen in other areas of reform, particularly in mortgage broking, they take an awfully long time. The risk is that we will reach the end of the property boom and people's attention will swing entirely back to investing in shares and we will not have got in place the regulation that was needed. That is a very pessimistic view and I am sure that ultimately regulations will be put in place and there will be some level of improvement of consumer protection. But this could have been done so much more quickly a couple of years ago in advance of the real frenzy of activity we have seen in this area.

Ms BURKE—But, as the property market wanes, people are still going to be looking for somewhere to put their money and ways to ensure their future retirement income, so there are going to be people who are going to fill the gap. Don't we still need regulation for whatever investment you are selling for consumer protection?

Ms Wolthuizen—We view George Mihos and his seminars as an interesting test of how far FSR might reach to cover these sorts of seminars. This may be getting a bit off track, but we have gone through what he promises and found that he offers personal coaching sessions with a qualified wealth coach. He is making that offer without a financial services licence. It is hard to see, if you are paying $9,000 for ongoing personal coaching sessions with a qualified wealth coach, how that would not ultimately, in some way, touch on activity that is regulated currently.

We know that Consumer Affairs Victoria is looking at some of his activities and we would expect that that would fall within ASIC's scope as well.

Ms BURKE—We regulate, but, as we have discussed, we still have this gap in ensuring that people have appropriate advice. FIS officers at Centrelink provide that at one level for one group of clients—and I am continually amazed that people do not realise that Centrelink have these people. Do we need to advertise and advise people (a) that there are currently things available to certain people and (b) that they should do more in this area? I know that the people at my Citizens Advice Bureau are fantastic, but they are all about 80 years old and they are predominantly giving out food vouchers to people I send around there fairly regularly, tragically, because I am opposite the Centrelink office. Obviously we have people in this market already. Do we need to be advertising what is available now? I suppose I am reiterating what we have all said: that there is a need to do something about it in the future.

Ms Wolthuizen—Absolutely. If we could ensure that those resources were able to do the job, were able to meet future demand and were better known, that would be an important step towards trying to draw people away from these sorts of seminars and give them some advice that would be useful for them. At the moment, on the ground, resources are pretty stretched. The National Information Centre on Retirement Investments is not advertising its services at the moment because it cannot handle any additional demand. That gives an example of where there are government funded services in place that do a terrific job and would be absolutely appropriate to the needs of a lot of people going to these seminars, but it is not high within the public consciousness that they exist and they do not have the capacity to meet any additional demand at the moment.

Senator MURRAY—I would like to add to this. I am concerned that we are getting over-obsessed with seminars. It seems to me that modern marketing enables very targeted one-to-one marketing to occur, and I can see that if the seminar area is clamped down on they will simply switch, as they did with mass marketed investments. Mass marketed investments—on the tax effective side—mostly were not sold through mass meetings or seminars; they were sold on a direct basis, assisted by word of mouth. I think that this will go in the same direction. My view is that regulation is required even if the seminar area is tightened up and closed down. I have been concerned that the good activities of ASIC, ACCC, you and others in drawing attention to seminars do not address the fundamental issue, which is that people are persuading investors that they will get returns which are unrealistic from high-risk investments.

Ms Wolthuizen—I think it comes down to how you frame the legislation or regulation in this area. The way FSR operates now, it does not really matter whether you are operating on a one-to-one basis or speaking to a group if you stray into giving personal financial advice without being licensed and without meeting all the requirements that come with that. Perhaps that is a good way of approaching the concern you have that, whether it is by a seminar, a one-on-one meeting or a small group scenario, if you are selling people property as an investment that purports to meet their personal financial needs then you will be captured.

CHAIRMAN—Ms Wolthuizen, thank you very much for your appearance before the committee and for your assistance with our inquiry.

Committee adjourned at 12.09 p.m.