COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Reference: Regulation of property investment advice

FRIDAY, 29 APRIL 2005

CANBERRA

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JOINT STATUTORY COMMITTEE ON

CORPORATIONS AND FINANCIAL SERVICES

Friday, 29 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 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 8.32 a.m.

ANTICH, Mr Robert, General Manager, Policy and Liaison Branch, Australian Competition and Consumer Commission

BAILEY, Mr Brendan, Government Liaison Section, Australian Competition and Consumer Commission

CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission

SAMUEL, Mr Graeme Julian, Chairman, Australian Competition and Consumer Commission

CHAIRMAN—I call the committee to order. 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 the witnesses appearing for 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 necessary for the discharge of parliamentary functions without obstruction and fear of prosecution. Any act by any person that operates to the disadvantage of a witness on account of evidence given before the parliament or to any of the parliament's committees by him or her is treated as a breach of privilege. Also, unless the committee should decide otherwise, this is a public hearing and, as such, all members of the public are welcome to attend. However, if at any stage witnesses wish to give evidence in camera they may request that of the committee and the committee will consider such a request. I now welcome representatives from the Australian Competition and Consumer Commission. I invite you to make an opening statement at the conclusion of which I am sure we will have some questions.

Mr Samuel—In September 2003 the ACCC launched a deliberate public campaign in respect of the property industry. Our focus was on two sections: those that I will call the 'property spruikers', the property seminar promoters, and on what I will call the 'real estate agency section of the industry' and some of the practices involved in that sector of the industry that we considered had the potential to be misleading and deceptive within the context of the Trade Practices Act.

The campaign pursued that two-pronged approach dealing with the property spruikers and the real estate agent sector of the industry through a process of engagement with media—working extensively with the media in promoting the fact that practices were being engaged in that were in our view breaches of the Trade Practices Act and subject to potential litigation under the act—and engagement with those whom we considered were potentially in breach of the act both as property spruikers and as real estate agents and then taking the appropriate course of litigation where we felt it necessary to do so.

The media engagement was deliberate and extensive. It was intended to both inform those that were engaged in the two sectors of the industry that I talked about that they faced potential

substantial litigation from the ACCC under particularly section 52 of the Trade Practices Act if they continued to pursue the conduct that we regarded as being misleading and deceptive. It seemed to have its impact in particular in respect of both property spruikers and real estate agents. There were some—and there were many exceptions in the case of property spruikers—who ultimately took the view that it was better to comply with the law than to attempt to run the gauntlet of ACCC action, and I will come back to the ACCC action in a few moments.

With respect to dealing with the parties, institutions and organisations concerned, we met with initial resistance but ultimately extensive cooperation from the real estate agent sector of the industry in the development of new codes of conduct that focused on how they might rid the industry of practices that they had previously regarded as being acceptable but that they now appreciated were in breach, or potentially in breach, of the Trade Practices Act. That culminated in the release by the Real Estate Institute of Australia of a code of conduct that reflected upon the concerns of the ACCC and then reflected upon the new codes of behaviour that needed to be adopted by the industry to comply with the Trade Practices Act.

Property spruikers were another matter. We engaged with a number of those and although they were not widely publicised I am pleased to be able to indicate that our engagement with the threat of litigation and the attendant publicity associated with it brought to a halt a number of potential property spruikers before they even got to the point of opening the seminar doors. We became alerted to their activities as a result of our publicity media campaign and the moment we received complaints our officers throughout Australia contacted the spruikers concerned—I call them 'spruikers' as a generic description—and in many cases they simply ceased their activities. They withdrew their internet sites, they cancelled any potential seminars and they never took a cent out the public's hands. To that extent it was a very successful process.

As always in any industry there were the recalcitrants. They had to be dealt with by two processes that ran in parallel. The first was the threat of litigation and in some cases litigation ensued. In other cases the mere threat of litigation led to the signing of court enforceable undertakings which reflected upon the changes in their behaviour and in the way that they needed to modify their practices and their promotions to avoid breaches of the Trade Practices Act. Litigation did ensue in a number of cases. Perhaps the most noteworthy was the litigation against Mr Henry Kaye and his corporate vehicle. That litigation resulted in a very satisfactory outcome for the ACCC and for the community at large in two respects. The first is that court orders were ultimately made which vindicated the ACCC's view that the advertisements that Mr Kaye and his institute had promulgated were misleading and deceptive under the Trade Practices Act. The second result was that, as a result of our actions and the actions of the Australian Securities and Investment Commission, Mr Kaye's primary company went into financial administration and ultimately disappeared off the corporate records. I think that it is fair to say that these actions brought to a halt Mr Kaye's activities in this industry in Australia.

We had several other actions. The Henry Kaye one took the usual course but several other actions occurred in respect of other property spruikers. There was the well-known one of Robert G. Allen and associates, the American property promoter who came out to Australia attempting to promote some of his schemes to the Australian public. We took interlocutory proceedings there in a matter of hours, if not one or two days, to obtain court orders to prevent those seminars proceeding without corrective advertisements appearing at the seminar door to indicate that the matters that were to be promoted by the promoters concerned related not to Australian property

or Australian financial instruments but to United States property and instruments. Again, a warning sign was provided there and it was an attempt to correct any misleading and deceptive conduct.

Our submission notes the various court actions taken in that area and I think that the speed with which they were taken has demonstrated that the section of the act, section 52, can be used effectively and with appropriate speed in terms of court processes to prevent damage being done to consumers before it actually occurs. The moment that something is brought to our attention our enforcement team is able and is capable of taking speedy court action to prevent these promoters attacking consumers and causing them the financial damage that so often occurs.

Having said that, I think that the fundamental message that has come out of the experience that we have had over the past year and a half has been that the combined use of publicity to inform consumers of their rights and to inform stakeholders in the industry—the property spruikers and the real estate agents and the like—of their responsibilities is effective. Having used the court processes both as a threat and as a reality I think we have been able to demonstrate that in particular section 52 of the act and the appropriate provisions of section 53 can work very effectively to stop the property spruikers and those engaging in misleading and deceptive conduct from continuing the activity in a way that will disadvantage consumers. But there are some areas where we believe the processes and the resources and remedies available to us can be improved. Let me just detail those in quick summary form. The responsibility for this area lies both separately and, in a sense, conjointly with ASIC and the ACCC. The separation occurs as a result of the financial services carve-out that occurred in March 2003, I think, or thereabouts—

Mr Bailey—It initially commenced in 1998 but there were subsequent amendments—

Mr Samuel—Yes, which culminated in the ultimate carve-out. The carve-out means that there are separate and discrete jurisdictions for ASIC and the ACCC. In so far as the activities of spruikers relate to financial services, that is a matter for ASIC and the ACCC cannot be involved in it. In so far as it relates to any area outside financial services, then that is a matter for the ACCC to deal with and it is not a matter that ASIC can deal with. ASIC and ACCC have entered into a memorandum of understanding and that will be, in a sense, an evolutionary and iterative document. It is not intended to be prescriptive in any sense but to set out the basis upon which the two regulatory agencies will cooperate with each other to avoid any regulatory gaps occurring and likewise, obviously, to avoid any regulatory overlaps. I think that it is appropriate to indicate that while we have a memorandum of understanding—and I think that it is working extraordinarily well now and the level of cooperation occurs at the highest levels of ASIC and the ACCC, I mean on a chairman-to-chairman level, and all the way through the organisation—the speed with which it is necessary sometimes to act in relation to these matters can mean that the cross-fertilisation of delegations and of referral of responsibilities in determining who has got responsibility for a particular course of action undertaken by property spruikers can be difficult. It can be difficult to interrelate that cross-referral and/or delegation that we need to undertake between us and ASIC with the speed necessary to deal with some of the property spruiker activities.

For example, when Robert G Allen and associates come to Australia, their advertisements and promotional material are brought to our attention and we realise that we have a weekend and two

days in which to get court orders to bring about at least some rectification of misleading and deceptive conduct that we allege has occurred in relation to that matter. The last thing that either ASIC or the ACCC really needs to be doing is spending time between themselves trying to work out what it is that Robert G Allen will be saying at his seminar. Is it going to be about financial services or is it going to relate to non-financial service matters? Is it a matter that ACCC should best deal with, because our memorandum of understanding indicates that where it is predominantly non-financial services we will deal with it and where it is predominantly financial services they will deal with it? Indeed, as I think happened in the Robert G Allen case, or it might have been one of the others, as a result of our intervention the course and the content of the seminar itself were changed. An attempt was made to limit the ability of one or other of the regulators to intervene by pulling out the material that might fall within one jurisdiction and allowing the material to continue that might fall under the other regulator's jurisdiction.

Of course, as is so often the case, there will be a bit of mixing around of that material so that a seminar might contain a mixture of financial services material and non-financial services material. It is unfortunate if we have to try to determine who has the primary regulatory role in that matter after the event. To make it easier for the memorandum of understanding to operate more effectively—and I have to say that it is operating as effectively as we can make it at the moment; there is a high degree of cooperation between the two regulatory bodies and that develops as we get more used to the modus operandi of each of the regulatory agencies—we have suggested that it might be useful to consider some form of legislative amendment that enables both regulatory bodies to intervene in circumstances where there might be a potential crossover of jurisdiction. That is one of the recommendations that we have made.

The other recommendations relate primarily to the consequences of Federal Court determinations as to the extent of the power of the ACCC to obtain restitution for consumers who have suffered damage as a result of misleading and deceptive conduct or misrepresentations that are otherwise in breach of part V of the Trade Practices Act. As a result of the Medibank Private case, it is now quite clear that the ACCC cannot with any degree of ease obtain restitution for consumers who have suffered financial damage in relation to misleading and deceptive conduct without going through a process that requires each and every consumer to name themselves and to sign up to or be a party to, in a sense, the action undertaken by the ACCC to gain restitution. In the case of Medibank Private, we ultimately had a situation where Medibank Private had in our view engaged in misleading and deceptive conduct. There were some 250,000 consumers that we allege had been potentially disadvantaged and it was not possible to get restitution for them in any reasonable means.

I note that in a very recent case involving Gary Peer and Associates, a real estate agent in Victoria, in which we took action in respect of underquoting on an auction and we obtained a court order that the agent had engaged in misleading and deceptive conduct but nothing else, the question most often asked of us by the media was: 'Why did you go light on Gary Peer? Why didn't you seek penalties?' We had to point out, torturously, to every representative of the media that it is not possible to obtain penalties—the most we can do is obtain a court order declaring misleading and deceptive conduct and, in some cases, get some corrective advertising and have compliance strategies or processes be put in place in the organisation concerned.

So there are those two issues: obtaining restitution for consumers, and the related issue of obtaining disgorgement of any financial gain that might have been obtained by property

spruikers in respect of their activities. Then there is the other matter that I mentioned, which is the obtaining of financial penalties in the event of a breach of part V occurring. They are the three items that we have suggested might be addressed by parliament in improving the processes and resources available to us under the Trade Practices Act. I will finish there.

CHAIRMAN—In your submission—and you have reinforced it in your opening remarks—you claim that the current provisions of the act are adequate in dealing with issues of misleading and deceptive conduct. Some of the submissions that we have received have asserted that actions against unscrupulous operators have been taken too late and some say that the action has been too little as well. Certainly in terms of the assertions about it being too late, given your comments in relation to the misleading and deceptive conduct provisions, what is your response to those claims?

Mr Samuel—I think that it is fair to say that if we could have determined a little earlier the jurisdictional issues and the level of cooperation that we could establish between ASIC and the ACCC then it may be that the accusation about being too late would be less appropriate. I think the jurisdictional issues led to a regulatory gap occurring that ultimately we needed to address with serious effort. Ultimately that did get addressed in September 2003. I think that it is fair to say that, in every area of regulation and enforcement of law, by the very nature of our enforcement activity we will tend to address matters after the event initially. Matters need to be drawn to our attention and it is not until a potential problem is drawn to our attention that the regulators then become involved.

I think that it became a serious problem through 2003 and we started to address the problem in a serious way in September 2003. There will always be a debate as to whether that was too late—I doubt that anyone would debate that it has been too little. The matter was then being addressed from our end from September 2003. There was a very serious effort made and I think some quite significant results were achieved. In terms of the period prior to that, it is certainly our perception that a large part of what was being promoted in the spruiker market—if I can call it that—was financial services and therefore not a matter that the ACCC could become deeply involved in.

Mr Cassidy—Perhaps one angle on the ‘too little’ comment: we are aware that there is a fair degree of disappointment amongst some of the people who have attended some of the investment seminars where we have taken action in that we were not able to get their money back. We are disappointed about that as well. That goes to the issue of refunds, which the chairman referred to a bit earlier.

CHAIRMAN—If the provisions are adequate with regard to misleading and deceptive conduct, how is it that there are still instances of ‘get rich quick’ or ‘how to become a millionaire’ seminars taking place, if not in the property side then certainly in other areas of activity, by these promoters? Are the provisions too easy to get around by just, for example, describing these seminars as ‘educational’ events or something of that nature?

Mr Samuel—No, I think that it would be fair to observe that the vast bulk, if not all, of property related seminars have been driven out of the system. I do not want to state that in absolute terms because there are still those appearing. I have likened this area—and it occurs in many other areas of fraud of consumers or misrepresentation—to those amusement park

machines where you knock one on the head and another one pops up and then you have to keep knocking them. There will always be those who will attempt to breach of law but, as far as the property spruikers are concerned, where the ACCC has had the matter drawn to their attention and where we have been able to get to it, as we have in several cases, by very quick court action then we have either managed to stop them dead in their tracks or at the very least have large corrective promotional material placed outside the seminar doors that says to consumers: 'Beware, this is not all that it is represented to be.'

I would have to say to you that I think section 52 is the most litigated section of the Trade Practices Act since 1974. I might stand corrected here but I do not think that law has ever been amended, certainly not in any significant way. The law could not be broader in its words or in its import: thou shalt not engage in misleading and deceptive conduct in trade or commerce. You could not want it any wider.

CHAIRMAN—Wakelin Property Advisory in their submission have said:

> ... the ACCC does not have the resources to regularly monitor and take action against property investment advisers who mislead and deceive their clients. Take for example Henry Kaye and the National Investment Institute, who continued their operations largely uninterrupted for several years although some observers had little difficulty identifying their misleading and deceptive conduct.

Do you agree with that claim regarding your resources?

Mr Samuel—As I have said on many occasions with a somewhat wry smile, it would be an errant chairman of the commission that ever admitted that it had absolutely adequate resources to deal with anything, because the Treasurer would take note of that and then reject any budget submissions on our part. It is fair to say that we do have the resources to deal with these matters but, ultimately, they need to be drawn to our attention. They are drawn to our attention through the 65,000 complaints and inquiries that we receive into our info centre each year. We do not act on each individual separate complaint but where we see a systemic problem arising, a series of complaints that are pointing to a particular course of action that might be taking place in an industry or a particular business or institution that is causing a problem, we elevate it quickly and take action.

The process of enforcement of the law at the commission has been undergoing some change over recent times with a view to increasing the speed and effectiveness of the way we deal with these matters. I think that was best reflected in the two or three matters that I referred to earlier—for example, the Robert G Allen, which is the best noted one. As soon as the matter was drawn to our attention, within about three days we got to court and obtained interlocutory orders that provided for corrective material being placed at the seminar door.

In respect of Henry Kaye, which is the well publicised one, as I think I indicated before, there was a period of time when this was a matter that we believed—and I think ASIC believed—needed to be dealt with by ASIC because it involved financial services. This is the complexity of dealing with financial services on the one hand and non-financial services on the other hand. What we got Henry Kaye on, I have to say to you, was nothing at all to do with what occurred within his seminar door. It was the advertisement for the seminar that promised to make property millionaires out of those attending his seminars. We did not focus on what occurred within the

seminar door because, as you got within the door, as I have said on previous occasions, it probably fell outside the jurisdiction of the ACCC and into the jurisdiction of ASIC. This is where the cooperation is so essential but, equally, the ability to have some form of concurrency of jurisdiction might assist both regulatory agencies in pursuing their respective responsibilities and roles.

CHAIRMAN—The ASIC submission states:

> ... it is doubtful, in our view, whether the current regulation of property investment advice does adequately protect consumers.
>
> … … …
>
> it is doubtful whether a general consumer protection law regime alone can force advisers and promoters of property as a direct investment to address issues going to the quality and appropriateness of the advice they give.

ASIC seem to be suggesting there needs to be additional regulation, whereas, as I interpret what you said, you are looking only for legislation to enable cooperation with ASIC plus the issue of restitution. They seem to be wanting to go a bit further than you in the end. Is that a fair assessment?

Mr Samuel—Yes, and it is not appropriate for me to comment upon issues of licensing other than to observe that the distinction between the propositions put by ASIC and us is that we see ourselves focusing on consumers being prevented from being misled and deceived. Our focus and the focus of our law since 1974 has been on ensuring that business does not engage in misleading and deceptive conduct and then otherwise leaving it to consumers to use their ability to discern whether information being provided to them is of high quality, low quality or is of value to them or otherwise.

I think the focus of your summation of ASIC's submission was on the quality of advice being provided, and that is outside the ACCC's remit under the Trade Practices Act. ASIC focuses on the quality of those providing advice through licensing systems relating to financial advisers, securities industry dealers and the like. That is not something the ACCC has ever dealt with in the context of its law, which has never focused upon the quality of advice but rather on its accuracy or the lack of misrepresentation or misleading and deceptive conduct in relation to that advice.

CHAIRMAN—Are you able to comment on whether you agree that a licensing regime is needed in this area?

Mr Samuel—It is outside our jurisdiction, and frankly it is outside the whole nature of the way the ACCC operates. We are not into—and never have been into—the context of qualitative analyses of those who are providing goods or services, other than under some of the warranty provisions of the Trade Practices Act. That is a matter of policy for the parliament.

CHAIRMAN—I note that between December 2003 and June 2004 you assisted the Real Estate Institute of Australia to develop compliance guidelines for members, including on

misleading and deceptive conduct, auctions, property descriptions, price ranges, advertising rebates and the like. Did that initiative result in a reduction in consumer complaints?

Mr Samuel—It is very hard to detect this because consumer complaints are often the result of raising the profile of issues. Of course, in September 2003, and for at least three or four months following that, in cooperation and conjunction with the media we raised the profile of some of these issues. And, of course, the profile has been raised in several states through individual state legislation. I think it is fair to say that there was a combination of things: the media activity we undertook; the activity we undertook in terms of enforcement issues—particularly some of the litigation that we threatened but ultimately did not have to take because we managed to resolve matters before they got to court; the Gary Peer and Associates court action; and the work we undertook with the Real Estate Institute of Australia, which, I would have to say as a retrospective observation, was probably the most valuable contribution that could have been made to this area. We were able to have the Real Estate Institute understand our concerns and how they ought to be addressed—that what might previously have been regarded as acceptable conduct was frankly a breach of the law—and the new codes of conduct that developed from that. And then of course there were the efforts made by several state governments and consumer affairs bodies in terms of the activity they undertook with specific laws relating to the activities of real estate agents. All those things contributed towards a lessening of the problems. I think it would be a brave if not foolhardy person who would indicate that all the problems had disappeared—I certainly would not want to indicate that—but I certainly think the behaviour of agents has changed for the better. They understand that their own institute has indicated in its code of conduct that certain conduct is not acceptable. It is not acceptable in the law and it is not acceptable under the code of conduct of the real estate industry. There are laws in several states now that say you will be penalised—if the ACCC does not get you in the first place.

CHAIRMAN—Some of the submissions we have received have argued that real estate agents should be exempted from any new regulatory regime because they are already regulated under state and territory legislation. Other submissions have argued that real estate agents must be included because, in reality, they provide the bulk of property investment advice. From your experience on this issue, and from dealing with real estate agents and the institute, what is your view on that?

Mr Samuel—As I think I have indicated, other than the amendments to the Trade Practices Act we have suggested in our submission, we have not focused on other forms of regulatory regime—whether at a state or federal level—or licensing systems or the like, so I cannot really comment on that. I doubt that any of the submissions is suggesting that real estate agents should be exempt from the Trade Practices Act, and that would be our primary concern.

CHAIRMAN—I am just harking back to the continuation of some of the seminars. A recent advertisement has been provided to me. I am not sure if you are aware of this one. It indicates: 'Who else wants to be a millionaire?' It then goes on to talk about a presentation by Mr George Mihos, who is from the Today Not Tomorrow Institute. He describes himself as a business wealth coach. This is in an advertisement in the *Sunday Telegraph* on 3 April 2005. Have you had any complaints about this particular seminar or this promoter?

Mr Cassidy—Let me try and answer that in an indirect way, if I can, by saying that we have a practice of not commenting on investigations—

CHAIRMAN—Operational matters?

Mr Cassidy—that we currently have under way.

Mr Samuel—Or may not have under way.

CHAIRMAN—I have one final question before I hand over to my colleagues, again in relation to some of these seminars. In the promotional phase, some of them make promises that, if you are not satisfied part-way through the seminar that you are getting useful advice or whatever, you are guaranteed a refund, but I understand that some people have great difficulty in getting their refunds. Are you able to comment on that issue and what action you have been able to take with regard to that?

Mr Samuel—That would be misleading and deceptive conduct. It would be important to understand the nature of the seminar. If the seminar related to financial services—and I do not have the context of that advertisement, for example—we cannot intervene. That would be a matter for ASIC to deal with. But if a promise was made in a seminar advertisement relating to non-financial services, or predominantly relating to non-financial services, that refunds would be available at a point in time if there was dissatisfaction and they were then not available, then in our view that would be misleading and deceptive conduct and we would take appropriate action.

Mr Cassidy—However, we could stop the representation being made. But, as we said earlier, unfortunately, as the law currently stands, we probably could not get anything done about having the refunds that were promised actually being made.

Ms BURKE—That is certainly the case with a lot of the people post Henry Kaye who are very upset that they cannot get their money back from the educational seminars as well as the money they have invested in mezzanine financing. Is any action being taken on their behalf, besides several of them ringing me constantly? Is there a way to redress and find some of that money for these individuals? In some cases, they are rather large sums of money.

Mr Antich—They could bring a personal action. It depends on what their claim is. If it came under the Trade Practices Act, they would have a right in damages. They would probably be all right in contract, depending on the terms that they were given. Their private rights are there. For us, I guess it depends on what sort of representation it was: financial services or otherwise. It would really come down to the circumstances, what they were promised and whether it related to financial services. I do not know if that will stop you getting phone calls, though.

Ms BURKE—No, it will not, but that is all right.

Mr Cassidy—I could add to that point. We have the basic problem that, having taken action against Henry Kaye, there is a limit to what we can do to actually get people's money back—indeed, even to get money that Henry Kaye has obtained through a process which the court has found to be in breach of our law.

Ms BURKE—And, given that that one has gone into liquidation and it has all now caught up with creditors, it is going to be a never-ending story for those people anyway. Your submission

discussed what you can do if you actually take action against these people. Through that case, you have discovered that there does need to be some redress for these individuals in the future.

Mr Antich—It is an issue that has been around for us for a while, certainly post the Medibank case, and even the Danoz Direct case highlighted what the limitations of that act currently are in relation to damages. The issue goes in two ways: one relates to getting the money back in redress, and the second relates to sending a powerful signal to the community in terms of a deterrent effect. Pecuniary penalties are a specific deterrent. Obviously, they are not about redress; they are about deterring people from engaging in future conduct, but so is the damages element. So, if people know that they will be forced to disgorge their funds, whether or not it is under an action that avoids being a class action, they may be less likely to make those claims and less likely to engage in that conduct. It has a dual effect.

Ms BURKE—At the moment, you cannot get those funds back from those individuals, can you? There is no action you can take to get that money back.

Mr Antich—In the absence of a class action, that is right.

Ms BURKE—Some of the submissions have gone to widening the definition of financial services under the Corporations Act. In your view, would that complicate the issue for you? As you say, it then becomes a case of whose jurisdiction is it? Most people said Henry Kaye was up and running for a good two years—probably even longer—before anybody did something. It was a football between the states and the Commonwealth. The Commonwealth was saying that it should be in the states' jurisdiction and the states were saying, 'No. He's operating across all boundaries, so it should be federal.' If they went down the path of saying, 'Let's just add to the corporations a financial services tag,' would that make it more complex for you to pursue some of these issues?

Mr Cassidy—I do not know whether we would necessarily say it would make it more complex. Pointing to the need for a joint jurisdiction arrangement, we are basically saying that where you have a border, and on one side is ASIC and the other side is us, there is potentially a problem and widening the definition of financial services is, if you like, moving that border. But it does not, in any sense, address the problem of things that fall either side of that border. So I do not think it makes it any better or any worse, as far as we are concerned; it just leaves the problem and moves the demarcation, if I can put it that way.

Mr Samuel—By way of illustration, I point out this advertisement that has just been handed to us. From this advertisement, I do not think it would be possible for ASIC or the ACCC to identify which organisation has jurisdiction. It talks about being a millionaire, how to get into the hot seat and stay there and it says that they dreamt of having a million dollars in cash et cetera. I have read the whole advertisement and I have no idea who has jurisdiction. I am not sure whether it is financial services or non-financial services. They might well be putting money into a Tattslotto scheme.

Ms BURKE—So, in that instance, what happens then?

CHAIRMAN—Does nothing happen or do both of you go along and investigate?

Mr Cassidy—Potentially, picking up from my earlier answer—

Ms BURKE—Hypothetically speaking, of course.

Mr Cassidy—You can understand that I am choosing my words fairly carefully. Potentially, what happens is that we both start investigating. At some point, we obviously need to discuss with ASIC what we each make of it. Then perhaps—and this is where we start to lose time—we seek advice of senior counsel, which we have done on more than one occasion, on exactly where the jurisdiction is likely to fall and on what aspects. We then would reach some arrangement with ASIC as to how the matter would be pursued.

Mr Samuel—I note that the advertisement appeared on 3 April with a seminar occurring on 7 April. I suspect that, by the time we went through that process, the seminar had well and truly been conducted.

CHAIRMAN—I understand he is conducting these on an ongoing basis.

Ms BURKE—Do ASIC and the ACCC take joint action on some of these things to get around some of these jurisdictional issues?

Mr Cassidy—Let me say that joint actions are messy. There is a process where both we and ASIC can delegate to one another our powers in a particular matter. We have done that and indeed that is what we did for the refunds issue—you will notice from the submission that it has my name on it. It was a health insurance issue involving Medibank Private. We did that under delegations from ASIC. Since then, the law has been changed to make it clear that health insurance is not a financial service. So we do have a delegation power but, before you get to delegating power to one another, you need to be reasonably clear on what it is that you are delegating power in respect of because the delegation power is case specific. You cannot have a general delegation. So there is that power but, as I say, it does not avoid the steps we still have to go through.

Mr Antich—The other issue with a delegation is that the agency that gets the delegation will not necessarily always be dealing with that area of law, so there will always be concerns about whether you are dealing with it appropriately or running the appropriate case. While we are on our best endeavours to make sure we cover off against the gaps, it is still less than ideal. As I said, our position is quite clear: we would rather look at it and go forward with that certainty. Again, the issue is not so much that we want to go into what would predominantly be an ASIC area; it is just that, where there is a gap—a 50-minute spiel of which 10 minutes might be a financial services issue—we would like to cover off on the whole thing. If it is predominantly us, naturally we would rather just deal with it that way. For us it is more about certainty and the ability to move faster.

Mr Cassidy—The other complication with delegations is that some technical issues are raised in relation to our investigatory powers, because under, say, the Trade Practices Act we cannot use our compulsory information acquisition powers for something which is not a breach of our act, and ASIC is in a similar position. Delegations do have their complexities when it comes to the investigation process associated with a delegated power.

Ms BURKE—Going back to what the chairman asked at the outset, can people get around the law by falling between the cracks and hiding themselves somewhere?

Mr Cassidy—To be honest, if someone carefully crafts something so it looks like a genuine mixture of investment advice on the one hand and real property advice on the other, that does then cost ASIC and us some process and time in sorting it out. So there is at least a potential to delay action by us and ASIC if someone structures their property investment seminar in a particular way.

Ms BURKE—One of the difficulties is with the real estate agencies determining what is investment advice. So if someone walks into a real estate agency wanting to buy an investment property and they are told, 'This is what houses have been selling for and this is the rate of return and your outgoings and ingoings,' is that investment advice? If they are then told, 'In three years time you are still going to be getting this return,' is this investment advice? Have you looked at what you would define as property investment advice? It is something we have been going around in circles on.

Mr Cassidy—That is why I referred earlier to the fact that getting advice from senior counsel is not something you can do all that quickly. Counsel needs to spend some time looking at some of these things, exactly for that sort of reason. That is why our approach is perhaps not one of recommending that the best way of solving this problem is to sharpen up the definitions. We are taking an approach of saying that, rather than trying to sharpen up the definitions which defined a border between us and ASIC, if we could remove that border that is a much more certain way of solving the problem. Unfortunately, with the best will in the world and the best legal draftsman, sharpening up definitions is still going to leave scope for delay and for some property spruikers to structure their seminars in particular ways.

Mr Samuel—I would just like to emphasise that there is no lack of willingness or effort on the part of either ASIC or the ACCC to cooperate. It is working very effectively and we do that to the best of our ability. But inevitably when you are facing a prospect of going to court and having your jurisdiction challenged by the respondent to the matter, that is where I think both agencies can get themselves into some difficulty. They need to have some certainty as to their jurisdictional base.

Senator MURRAY—It is a thoughtful submission and set of statements from your organisation, as usual, Mr Samuel. The issue that I want to pick up on, with respect to your proposal to enable the ACCC to also pursue conduct in relation to financial services, is super choice. In a few years time, there will be about $1 trillion in super, and as you know super choice is coming in from 1 July. That honey pot is so large that it is already attracting a great deal of attention. There was a report in the papers this week, for instance, that Mr Branson's organisation proposes to spend, I think, $34 million trying to gain entry to that market and so on. So you will have a lot of legitimate, high-powered and very capable people trying to get a slice of the action. But, at the other end, you are going to have, without doubt, some scammers and so on. I do not see your request just within the perspective of property advice; I see it within the perspective of all financial services, of which super is perhaps the major portion. Do you think, with respect to your proposal, any safeguards need to be written into the legislation, such as automatic consultation with a senior duty officer of ASIC when the decision is being made, so there is no chance of competition? Your two chairs and your two organisations might be working

very effectively now, but a future set of chairs might not. I am looking for a means to not only achieve the flexibility and the real-time sort of response that you are after but also prevent future agency tension over this sort of approach.

Mr Cassidy—In one sense, we are wary of setting up what you might call hurdles or prerequirements, simply because when you go to court they themselves can become a source of debate.

Senator MURRAY—Yes, a threshold issue.

Mr Cassidy—I think the real safeguard is to, if you like, have a double-jeopardy provision which basically says that, even though both ASIC's legislation and our legislation might apply to a particular situation, someone can only be prosecuted for a particular offence under one piece of legislation or the other. Not only does that protect the individual from potentially being pursued for the same offence by both regulators but also it puts a considerable onus on the two regulators to make sure that we are consulting with one another and that only one of us is pursuing a particular alleged breach. So the safeguard that we would encourage would be what is a fairly common double-jeopardy type safeguard, rather than requirements about consultation, which, as I said, can lend themselves to some debate when you get to court.

Mr Samuel—I should emphasise that the purpose of our submission is not to seek to have the ACCC suddenly become involved extensively in financial services enforcement. That is not the objective. Equally, I am aware from discussions we have had with ASIC that they do not have any great desire to suddenly become involved in misleading and deceptive conduct in relation to non-financial services. What it does is enable both bodies to more effectively implement their MOU of cooperation so that there are no regulatory gaps or enforcement delays occurring as a result of jurisdictional doubts and the like. I will just refer you to one paragraph alone of the MOU we have before us. This covers the sorts of issues that you have just been raising. It says:

> The agencies recognise that once a complaint is received or an initial investigation has been conducted by an agency, it may become apparent that the matter more appropriately falls within the jurisdiction of the other agency ... For example, ASIC may refer a matter to the ACCC where the matter being investigated primarily involves the application of the TPA—

the Trade Practices Act. It goes on:

> Similarly, the ACCC may refer a matter to ASIC which primarily involves breaches of the ASIC Act or the Corporations Act or other laws administered by ASIC.

So that in a sense is the nub of the cooperation and the spirit of cooperation that we have between the two agencies. The difficulty that arises is the time that it takes to determine whether the complaint that has been received, or the initial investigation, reveals that it is a matter that more appropriately falls within the jurisdiction of one agency or the other. While we are busy trying to determine that and then, in a very cooperative fashion, referring matters to each other, as the case may be—and potentially, as a result of the investigatory processes, we have gleaned information which we are inhibited from providing to the other agency—the misleading and deceptive conduct can continue to be perpetrated.

Senator MURRAY—I must say at the outset that I am sympathetic to two of your objectives. One is providing the ability to close regulatory gaps and the second is shifting to proactive or prevention oriented strategies rather than reactive activity, which costs both you and the consumers, in particular, a lot more. Did any of you see Denise Brailey's opinion piece this week in the *Australian*, I think it was, on the issue of property advice?

Mr Samuel—No, I cannot recall seeing it.

Senator MURRAY—I forget the exact title of her organisation. It is the Real Estate Consumer Association or something of that sort.

Mr Samuel—I think I did see that, yes.

Senator MURRAY—She is a very well-informed and vigorous activist in this area. But really she was expressing a great deal of frustration—particularly at ASIC, I might say—about action on these fronts and implying that yesterday is already too late. In other words, she was talking about the need for a rapid change in the ability of the regulators to respond. My feeling is that that therefore means legislative change, because the powers and authorities of the two bodies are constrained in a number of effects. That is really the nub of my question. Do you think there is a need for real urgency on behalf of the government in introducing these changes, particularly the one we are discussing at the moment, and particularly given the massive freeing up of the market for super from 1 July—in other words, are you looking for a very early amendment of the act?

Mr Samuel—I do not think it is appropriate for us to comment upon the priority of these matters relative to other matters that are before government and that need to be dealt with. As things currently stand, we have been able to be relatively effective, we believe, in conjunction with the other agencies at both state and federal level that have operated in this area over the past year and a half or two years that we have been focusing on the matter, particularly since September 2003. So, to a large part, but not as a complete solution, I think we have managed to be able to deal with some of the more obvious and some of the more reprehensible conduct that is occurring. I think the propositions we are putting to you and the recommendations that we have made are in an effort to enable ASIC and the ACCC to more effectively and more speedily deal with the difficulties that are arising still and have the potential to arise in the future—in other words, not to give those who are out there in the marketplace engaging in misleading and deceptive conduct a leg up as a result of constraints that might be imposed upon the two regulatory agencies in the manner in which they can enforce the law. As to the priority that ought to be given, I think that is a matter that obviously has to be determined by government.

Senator MURRAY—Have you previously advised the government that these are objectives you would like realised, or is this the first time, now that it has come to the committee?

Mr Samuel—In Senate estimates and other forums we have indicated that there are some difficulties here. We are working very well with ASIC in terms of the memorandum of understanding and in terms of the level of cooperation, but the best will in the world and the best level of cooperation in the world will not avoid the simple fact that, in any area, where you have a specific legislative jurisdictional fence that is established, working out who is on what side of the fence and how they are going to climb over the fence without doing a lot of damage can often be a bit of a problem.

Senator MURRAY—Do I take that answer to mean that the specific recommendations in this submission of yours have not yet been put to the government?

Mr Cassidy—We have raised them with government.

Senator MURRAY—I asked deliberately because we have our report coming up. Typically, if this were the first time, you might be looking at 1½ to two years before the response to the report, the consultation and the legislation resulted. That is why I want to know what your sense of urgency is about this.

Mr Antich—Certainly pecuniary penalties have been the subject of considerable discussion. They are also the subject of a working party under SCOCA and the Ministerial Council on Consumer Affairs. There is a working party that is dealing specifically with pecuniary penalties, so it is a matter of quite active consideration as well.

CHAIRMAN—I am conscious of Mr Samuel's time. Do you have a couple of minutes to answer a couple of questions on time share?

Mr Samuel—Sure.

Senator MURRAY—I have one last question, if I could put it.

CHAIRMAN—I just wanted to get in a couple of questions on time share.

Mr Samuel—My colleagues are very capable of answering all these questions.

CHAIRMAN—As you are aware, we are doing the timeshare inquiry as well. I understand that you are willing to answer some questions on it, although it is not the subject of this particular hearing. In examining this issue some of us on the committee have come to the conclusion that, when you really look at time share, although it has elements of a financial product—and ASIC put that to us yesterday—in many respects it is not a financial product; it is more of a long-term consumer durable or lifestyle product. In that context, I think some of us are coming to the view—although it is not finalised yet—that it is more appropriately regulated under the Trade Practices Act and the ACCC rather than as a financial services matter under the Corporations Law. I am wondering what ACCC's view is on that.

Mr Samuel—The number of inquiries and complaints that we receive in the area of time share is not large. I think that is probably as a result of ASIC having publicly announced that they considered that time share was a matter that they were involved in regulating. Our external web site offers consumers a link to the timeshare industry's association for further information, but it is not a matter that we have been primarily involved with. I think the question of whether it is a financial service is interesting.

Mr Cassidy—At the moment I think it is deemed under legislation to be a managed investment. I do not know whether you would like me to express a strong view as to whether it is or is not a financial service. I suppose my only comment would be that, if there were going to be a change, it would probably be better for the change to be through changing the status of timeshare arrangements, making it clear that it is not a financial service—it would then quite

clearly fall within our jurisdiction—rather than relying on the process we have just been talking about of a joint jurisdiction between us and ASIC, because that might put timeshare arrangements on that borderline and be another issue which we and ASIC would need to resolve between us. I do not feel we have any particular basis for doing so, and so, without discussing a particular view as to whether they are or are not a financial service, I would say that, if there were going to be a change, the best change would be one of clearly defining them as being something other than a financial service or managed investment scheme so that the jurisdiction was quite clear.

CHAIRMAN—In their submission, ASIC say that the greatest risk to the consumer relates to the way in which timeshare interests are sold. That seems to be the basis of most of the complaints that we are aware of: the high-pressure selling that is used. Are the marketing practices in relation to time share an issue that has come to your attention? What concerns do you have about that?

Mr Cassidy—A number of the complaints we get relate to the way in which these things are sold—misleading claims being made and overbearing conduct in the sale process—rather than the financial aspects of the arrangements. They are complaints which, in a sense, we get about other arrangements as well, so they are complaints which are not unfamiliar to us. But, as the chairman said, we do not get an enormous number of complaints—about 40 a year, which, on our scale, is not all that high. That may be because some people realise it is an ASIC jurisdiction and the complaints go to that body, but the complaints we get largely revolve around the way these things are promoted and marketed.

CHAIRMAN—We had better let Mr Samuel go or he will miss his plane.

Mr Samuel—Yes, I had better go.

CHAIRMAN—I just have one more question on time share, which I am sure Mr Cassidy will be able to handle. My question is in relation to the exchange process, where people can exchange their particular timeshare rights for accommodation in other facilities, both in Australia and overseas. It appears that, in terms of exchange, the timeshare market is dominated by two very powerful exchange organisations: Interval and RCI. Putting that together with the industry sales methods, it seems to me that the consumer has very little opportunity to make a proper and appropriate comparison of the products that are available. Is this a cause for concern and is this an area in which the ACCC would be involved—even if it is a financial product—or, under the current regulatory arrangements, does all this have to remain under the ASIC bailiwick?

Mr Cassidy—The exchange arrangements are not something we have been involved in or that we have had many complaints about, so that is not something that we have obtained hard legal advice on. My off-the-cuff reaction would be to say that, the way things stand at the moment, they would still probably be financial services and therefore something which would fall within ASIC jurisdiction.

Ms BURKE—One option floated for regulating the timeshare industry, in a targeted fashion, is a mandated, enforceable industry code under part IVB of the Trade Practices Act, which would then fall into your jurisdiction. What would be your view of going down that route?

Mr Cassidy—The question of whether to have a mandatory code or not is really one for the government. Our plea, as it always is with mandatory codes, is that if there is going to be one it should be drafted as clearly and concisely as possible, because one of the issues with making codes of conduct mandatory is that under part IVB they then become quasi law, which we are required to enforce. Our greatest worry in turning codes into mandatory codes under the act is that we end up with a code which, because of the way it is drafted, we find very difficult to do anything about enforcing.

Ms BURKE—Besides the franchise code are there any others that are actually up and running and working?

Mr Cassidy—No, not at the moment. The government has signalled that the horticultural code—it was raised during election campaign—will be a mandatory code and they are going through the processes of consultation and preparation of a regulatory impact statement and so forth, which precede the making of a mandatory code. The franchise code is the only mandatory code we currently have.

Ms BURKE—I suppose it is the same with the property-spruiking issue. You had this jurisdictional argument between ASIC and ACCC because most of the complaints were about the marketing of it, as opposed to the actual product you get at the end of the day. Has there been any of that sort of overlap or not?

Mr Antich—My understanding is that there has not been, because most of the complaints come through our call centre and their practice is generally to refer them on to ASIC. So it is (a) consistent with the way the MOU operates and (b) consistent with our understanding of the way it is regulated. Obviously that also impacts on the code point, because clearly you have something that ASIC is fundamentally dealing with, and to transplant it into our act would involve a fair bit of work. I totally support my CEO's comments about the way it needs to be drafted if that were ever to happen.

Ms BURKE—They have experience, by the sound of things.

Senator MURRAY—I have one last question on property investment advice. It relates to retrospectivity, Mr Cassidy, and your proposal to get orders for restitution to all consumers adversely affected and to get a statutory recognition of disgorgement. If the government were of a mind to go in that direction and if, for instance, it took them a fair time to arrive at that law, all the people affected by actions before they came to a statutory passage would miss out. It would be very unfair.

There is a practice in tax law, as you know, in which the Treasurer issues a press release saying, 'As from this date, the supply is,' regardless of the law. Putting that into practice may occur as much as a year or more later. Nevertheless, the law is dated to that day. The purpose is to prevent people from rearranging their affairs. Within that confined view of retrospectivity, do you think that with respect to these issues, which would in fact give a great deal of real comfort to consumers affected, the government should consider that method of announcing its support for these issues, rather than waiting until the statute comes into force?

Mr Cassidy—Again, I think it is something which the government would obviously have to weigh up, because even with that sort of announcement the legislation would need to be retrospective.

Senator MURRAY—That is right.

Mr Cassidy—And, as you well appreciate, there are a number of issues which retrospective legislation can raise. A comment I would make is that, if thought were being given to retrospective legislation, certainly signalling early on that that was the intention would remove some of the arguments you get about retrospective legislation and about people not realising the consequences of their actions because, at the time they took them, the law was what it was.

Senator MURRAY—Let us use your earlier example and assume for argument's sake that your two recommendations came into law tomorrow. The 250,000 consumers you mentioned could not get restitution.

Mr Cassidy—Indeed.

Senator MURRAY—They would be pretty aggrieved, wouldn't they? It seems to me that there would be very large numbers of people affected very adversely in these circumstances.

Mr Antich—A further issue is obviously that, if the law were changed, while we may well want to push the issue, it would be up to the court in its discretion to agree to make orders to reimburse people.

Senator MURRAY—Which I would not propose to take away.

Mr Antich—No, that is right. I am just saying it is always going to be a matter of a court's discretion as to whether they would view the respective standing of the parties to be able to be changed so fundamentally after the event. I am raising that as an obvious issue that we would have to deal with.

Senator MURRAY—Yes, it is always an issue in contractual circumstances.

Mr Cassidy—Another issue I would have to flag is that, if the refund issue were to be addressed, we would hope that it is addressed on a general basis in relation to our consumer protection provisions and not just property investment, because it is an issue that arises in relation to any misleading, deceptive or false conduct under the Trade Practices Act. There would then be an issue of whether that early signalling was purely in relation to property investment or a more general early signalling that the government was intending to change the law so that we could obtain refunds disgorgement for any conduct that was in breach of the consumer protection provisions of the act.

Senator MURRAY—As you know, ASIC reports to this committee. My impression is that ASIC has, reasonably regularly, secured orders allowing for restitution to be made to large numbers of affected parties. I cannot see why the same principle should not apply to the ACCC.

Mr Cassidy—Up until the Medibank Private case, which went all the way to the High Court, that was our belief—indeed a widely held belief—of the way our law worked. It was when the Medibank Private case was finally decided by the High Court that, in a sense, we were told by the courts that that is not the way our law works, given the way it is worded. But, as you say, it is something that exists in other pieces of legislation. It is just that because of the way our particular law is drafted the courts have held that we do not have the power to seek refunds.

Mr Bailey—For the record, I would like to make a correction to one sentence in the written submission on page 23. Would you like me to read it out?

CHAIRMAN—Yes, please.

Mr Bailey—Halfway down page 23 of the written submission there is a paragraph that starts 'An order for disgorgement'. There is a sentence in the middle of that paragraph about the practice in America by the Federal Trade Commission in terms of consumer redress, that is, disgorgement funds. It says:

> Residual amounts not claimed may also be used for general consumer redress, which could be consumer awareness programs or for initiating consumer actions in other cases.

The words 'or for initiating consumer actions in other cases' should be deleted. The reason is that the Federal Trade Commission is prevented by law from augmenting its resources to initiate unrelated action.

CHAIRMAN—Thank you for that correction. Thank you, Mr Cassidy, Mr Bailey and, in his absence, Mr Samuel for your attendance at this hearing. As you can see, we have gone somewhat over time, which indicates the value that we have placed on the time you have spent with us. It has certainly been very useful to both inquiries.

[9.48 a.m.]

BOBB, Mr Richard, Chair, Legislation Review Board, Australian Accounting Research Foundation

CHAIRMAN—The committee prefers 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. We have before us your submission which we have numbered 23. Are there any alterations or additions that you want to make to the written submission?

Mr Bobb—Not at this stage.

CHAIRMAN—I invite you to make your opening statement, at the conclusion of which we will have some questions.

Mr Bobb—At the outset I would like to thank the committee for the opportunity to appear before it on this very important topic of property investment advice. I should point out that the Legislation Review Board is administered by the Australian Accounting Research Foundation, otherwise known as the AARF. The AARF is an initiative of both the Institute of Chartered Accountants in Australia and CPA Australia, otherwise known as the accounting bodies or sometimes referred to as the joint accounting bodies.

The role of the LRB is to review and comment upon proposed legislation which is directly relevant to the accounting profession, other than tax or superannuation. So this particular topic is within the purview of the LRB. In preparing the submission, one of our constituent bodies, CPA Australia, brought to our attention that they are conducting their own research into this particular area. They have suggested that, as a consequence, our submission should be tailored to reflect the fact that at this stage their research is not yet complete. They do expect that their research will be completed by the end of next month. When the results of their findings and the conclusions that they might reach through their own independent research become available, no doubt that will also be provided to the PJC. I will say a little bit more about that in my concluding comments.

It is important, I believe, to consider the concept of what is property investment advice. I suspect that most of the focus of the committee's attention will be pretty much on what are called 'get rich quick' schemes. In any event, it is probably worthy to note that there is a whole gamut of property investment advice at both the small end and the top end. The best way of describing that would be to provide an example. Let us just say that you have a young married couple who are looking at a property investment. They approach a sales person, who might be marketing an apartment in a high rise. That person might not necessarily be identified as an employee or an independent contractor for the property developer, which raises the issue of representation. Who are they representing? Are they representing the developer? Are they representing themselves? Are they in fact licensed? Are they required to be licensed to market properties? Should they inform the couple that they should obtain independent advice? Are they

required to do so? These sorts of questions and issues are probably quite important, particularly at that end of the market.

At the other end of the market you have now got the prospect of being able to acquire property investment not just in Australia. You can acquire property investment in the United States in shopping centres and you can acquire industrial property in New Zealand. Most recently we have seen a plethora of real estate investment trusts offering property in Japan through listed vehicles. The Babcock and Brown listed vehicle that recently came onto the market through an IPO is a pretty good example of that type of investment that is now available. In addition, we have heard a lot about infrastructure and in particular infrastructure trusts, but it is probably fair to say that infrastructure trusts are really another form of property. Therefore, we are looking at the issue of property investment advice.

Not only is there the important issue of identifying the great range that would apply, through the examples that I have just given, as to who receives that type of advice and the types of obligations that are imposed upon persons who provide the advice but there is also the important distinction to make with regard to property as a class of investment. Unlike other types of investments—for example, equities, bonds or hybrids like convertible notes and preference shares—property tends to have its own unique characteristics. In terms of the improvements on property, they tend to depreciate over time and they tend to depreciate for a number of reasons, not just simply those associated with physical obsolescence. The investment tends to be illiquid. By that I am specifically referring to direct property as opposed to indirect property.

There also tend to be, as a special class, environmental factors associated with that class of investment. An example could be a change in zoning having an adverse impact upon the value of the investment. As you can see, they are just three simple examples that illustrate the fact that, as a class of investment, property tends to have its own unique characters, and these adversities sometimes do not necessarily play on the minds of those who perhaps might consider it as part of an investment strategy.

With regard to investment advice, it is probably fair to say that accountants and the accounting profession focus very much on the tax law implications of investing in property. But that is not to say that others who are also engaged in the provision of advice are not also stakeholders in respect of this very important area. By way of example, there are people who provide financial advice and property law advice. Just in respect of property law advice, I could perhaps mention three areas of property law advice that could impact upon consumers: property law relating to leases, property law relating to mortgages and property law relating to guarantees. These are three areas where either solicitors or conveyancers might have some direct involvement in respect of the provision of advice with regard to the investment in property.

The gist of our submission, as you can probably tell, was reasonably brief. As I said earlier, it was very much predicated on the basis that CPA Australia wanted to delay providing any definitive recommendations or advice in respect of the terms of reference. The Institute of Chartered Accountants deferred to the request of CPA Australia, and it is on that basis that, whilst our submission appears to be somewhat brief, it is clearly based on the fact that there is some work still to be done by CPA Australia. We believe it will be not only important work for the accounting bodies but also important work that will no doubt become available to the

committee. We would submit that the committee ought to take on board any of the findings and conclusions that CPA Australia obtain through their own independent research.

There is one final point to make, and that is the fact that in our submission we made the important point that at this stage the results from the introduction of the Financial Services Reform Act regime are not widely known. I do no believe there is any available analysis of how that particular piece of legislation has impacted upon the consumers of financial products. No doubt over a period of time—who knows exactly how long, but perhaps in the near future—the results of that particular form of legislation will become known to members of parliament and to this committee and you will be able to take that into account in framing any recommendations in respect of property investment advice.

CHAIRMAN—Thank you very much, Mr Bobb. Would it be possible for you to provide the results of the research that your organisation is undertaking to the committee as a supplementary submission?

Mr Bobb—I will endeavour to do that. The gentleman from CPA Australia who is directly responsible and who is an observer on our board is Mr John Purcell. I will communicate to him immediately after this hearing to provide the information directly to the committee as soon as the results become available. I think that was likely to have been the case in any event.

CHAIRMAN—As a practising accountant yourself, does your practice have any significant direct practical experience of the property investment industry?

Mr Bobb—Yes. That is a very pertinent question, Mr Chairman. Some of our clients are in fact property developers tending to specialise in city strata subdivision. They are likely to acquire a city building block for the purposes of strata subdivision. That usually will entail a process of going through council to obtain approval for the strata subdivision and the preparation of what is called the linen plan and then the later marketing of the office strata units for sale to property investors.

We have several clients who are quite prolific in that field and we tend to provide tax advice to clients that are involved in that activity. They tend to obtain their legal advice from their lawyers. We and the lawyers involved tend to be the principal advisors to those particular clients. At the smaller end, we have clients who acquire residential property for investment. It is fair to say, though, that they do not tend to approach us for investment advice; they tend to go and off their own bat, acquire the property, and we as a firm tend to learn of their acquisition after the event. Whether they have taken into account the tax implications or any other implications in their investment is very hard to tell, because we are not usually involved and are not requested to become involved. As I say, it is usually at the time when we prepare their tax returns or prepare financial statements that we will become aware of that type of property acquisition. So our practice has clients at both ends of the spectrum. We get involved with the larger ones but we do not get involved with the smaller ones.

CHAIRMAN—Have any of your clients been involved in property purchases as a result of the so-called property spruikers' seminars and, if so, what have been the consequences?

Mr Bobb—Thankfully not. I am pleased to say that is not the case. It could possibly be the case, though, that if they have they were maybe too embarrassed to reveal the fact that they were involved in acquiring such property. But, to the best of my knowledge, I am not aware of any of our clients having acquired property through an investment seminar or a get rich quick scheme.

CHAIRMAN—The avenues of advice for investment in the stock market, direct investment, equity investment and investment in managed funds and the like through stockbrokers and financial planners seem fairly well developed. Property is a fairly significant asset class and yet the advisory services on the investment side of property do not seem to be as well developed.

Mr Bobb—That is a very good point.

CHAIRMAN—In your experience, is there any reason for that?

Mr Bobb—It is perhaps just the development of history. There is clearly regulation of property agents in terms of obtaining commission for the type of work that they perform. Whether that is facilitating the sale of a property or managing property and charging a fee for managing the collection of rent, that type of activity appears to be fairly well regulated. I was pleased to note Mr Samuel's comment earlier—and it was very widely known in any event—about the ACCC proceeding against a registered property agent in Victoria where that agent had misrepresented the value of a particular property that was being offered on behalf of a client in that state. Clearly, the ACCC saw it as being within its right to pursue a registered property agent and did not leave it necessarily to the equivalent state bodies that regulate registered property agents to pursue what they saw as misleading and deceptive conduct. That was pleasing to note.

But the point is, I suppose, that you really do have a gap in this particular area, and that is the gap of people who hold themselves out as being marketing consultants. They are probably achieving the same end result, which is facilitating a sale, and they are somehow outside the scope of the regulated scheme, where states are involved in ensuring that registered real estate agents toe the line, maintain trust accounts and are licensed and that their sales staff have the appropriate certification. That is an area that probably does need to be investigated. No doubt this committee will take those issues into account when it deliberates further.

The point that I was making in my opening remarks dealing with the concept of a marketing consultant for a high rise is a good point to make in this context because you approach such a person and do not know who they are representing. They are in effect facilitating a sale, or at least that is the intention. Otherwise, why would they be there? They probably have that effect. But the question is: are they registered and are they licensed and does the property developer who engages these persons take an active role—undertake due diligence—in ensuring that these 'marketing consultants' are properly registered and licensed with the relevant state bodies to ensure that the developers are doing the right thing?

CHAIRMAN—If a regulatory scheme were established for the property investment advice industry, you say in your submission:

> … 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, with the overall scheme regulator setting benchmarks for and monitoring the performance of those professional bodies.

Could you expand on that and in doing so also respond to the assertion by the Real Estate Institute that industry self-regulation is not appropriate for property investment advice?

Mr Bobb—As I said earlier, there ought to be a differentiation between property investment advice given at the top end and property investment advice given at the bottom end. I think it is fair to say that, if there is to be regulation at all—and again I would like to defer any real comment on that until CPA Australia has come forward with its findings and conclusions—the view which I believe would be shared by most of the parties that have made submissions to the committee is that regulation should be targeted at the lower end, where the mums and dads, if I can use those terms, and other vulnerable types are exposed. As to whether that regulation should be imposed through a government or quasi-government authority or through self-regulation, it probably requires, I would suggest, further deliberation. At the end of the day there are arguments for and against self-regulation.

Given the nature of—I will use the term—scams that have emerged with the likes of Henry Kaye and others, it is probably fair to say that the regulation ought to be at a government or quasi-government level on the basis that it is unlikely that any form of self-regulation will have the desired effect. That is unfortunately the case, I suspect. I am not trying to disparage any professional in that industry. I am sure there are many good property professionals, but it is unfortunate that at that unregulated level—and property investment advice, we all know, is unregulated—it is going to lead to a situation where ultimately the best form of regulation will be one that is imposed, not self-regulation.

CHAIRMAN—But in that context you are proposing a carve-out for accountants. If so, would that carve-out be similar to what currently exists for the financial services industry?

Mr Bobb—That is precisely the point. Currently the financial services reform regime provides for a carve-out for accountants and that is principally because accountants from the two accounting bodies, the institute and CPA Australia, have very heavy regulation imposed upon them. They have compulsory professional indemnity insurance—that is not something they can do away with; they are compelled to take that out. They have quality control practices and procedures imposed upon them by their respective bodies, where every five years they are required to submit to a quality control review. Any trust accounts that are maintained by a member of either accounting body must be audited by an independent auditor; if there are any problems with or deficiencies in the audit, the auditor is required to make an immediate report to the relevant body. And there are disciplinary proceedings that are imposed upon members of both bodies, to the effect that if there is any form of misconduct the accounting bodies have their own disciplinary proceedings in which they can effectively discipline an act of misconduct.

I would suspect that the form of the carve-out would be pretty much limited to areas of tax, because predominantly that is the area most accountants are involved in when it comes to the provision of property investment advice. I do not see accountants providing advice outside of that—perhaps with one exception: the big four accounting firms, which, as we all know, are not really accounting firms at all but professional services firms. They tend to have property valuation teams and due diligence teams that are involved in property acquisitions. So when I refer to members of the accounting profession I am really excluding the big four from that because they are for all intents and purposes professional services firms and not accounting firms.

Senator MURRAY—Listening to the ACCC's evidence, did you have any commentary on their proposed law changes and processes?

Mr Bobb—I listened to what was said by the panel that was before you earlier, and I suppose the important thing is to await the type of regulation that comes out in due course. From the ACCC's point of view there was not much they could say, and I did not discern anything that was entirely new or innovative in any of the comments that were made before the committee.

Can I just make one point which I think probably bears mentioning because it is quite relevant and recent—that is, the issues of criminal sanctions. Recently we have seen the government take the view that criminal sanctions should be imposed for collusive behaviour involving cartels. That seems to have been a change in the government's mindset. We have also seen some prominent individuals compelled to serve terms of imprisonment for criminal behaviour. That is, no doubt, due to ASIC's vigorous enforcement of the Corporations Act. I suspect that the mindset within the business community is starting to change rather rapidly because of those two developments—that is, the government looking at criminal sanctions involving trade practices legislation, and regulators like ASIC becoming more vigorous in the way in which they enforce the law.

That someone like Henry Kaye could find themselves becoming criminally liable for the type of activity that they have been involved with in the past, I suspect, is a good prospect of some form of legislation heading in that direction. I do not propose to promote one form of legislation over another but, as I said earlier, it seems to me that there is a change in the mindset both at the government level and at the regulator level. This may very well play some role in how, ultimately, the regulation of the property advice sector goes, particularly if there are further examples of vulnerable people losing savings—and, in some cases, life savings.

Senator MURRAY—Yes, there has been a change in recent years whereby white-collar crime, which causes considerable economic harm and consumer grievance, is starting to get penalties parallel to individual, more notorious crimes, which had fewer economic consequences and far fewer effects on society at large because they were individual crimes.

Mr Bobb—Can I make the point that the experience in the United States is also relevant to the changed mindset. We have clear examples of white-collar individuals being shackled and taken away for events that 10 years or so ago might not have received the same type of punishment and might have, in fact, been considered exemplary behaviour. I believe the changed mindset is like a pendulum that has swung the other way, and it is probably a good thing. If the laws are changed, the likes of Henry Kaye may find themselves committing some form of criminal offence with criminal sanctions attached. I am not speaking as a representative of the accounting profession, but I believe that is likely to happen as we go forward.

Senator MURRAY—I have questions about not self-regulation but industry regulation which has statutory backing. You have already mentioned the way in which accountants operate under that system, as indeed the legal profession operates. I want to draw an analogy between real estate agents and auditors. As you know, there has long been a disciplinary body established under law, which is staffed principally by members of the profession—I forget the acronym for it but you know the one I refer to. Recently, Corporations Law was changed not just to oblige

auditors to exercise more care and more responsibility in their functions but also with respect to that body, with better resourcing and changes to the way in which it is represented and operated.

I have noted an exponential increase, relatively speaking, in the number of auditors that have been disciplined. But effectively they have been disciplined with respect to old statute not new statute. In other words, they have failed to do their duties with respect to their signing off on accounts or in the audit process itself. It just signals to me greater enforcement of what are now accepted community and regulatory standards. Do you think a relatively easy route to follow to lift the game is to give the real estate agents disciplinary bodies the sorts of obligations and authorities and requirements that auditors are now put under? In other words, the law has always existed requiring good and honest conduct in property advice matters; it is a standard tenet of both administrative and civil law. Do you think that is an easy way to go? You are then effectively using bodies and organisations and structures which already exist; you are just putting a greater obligation on them.

Mr Bobb—Let me start off by explaining that the accounting profession is actually regulated concurrently in several ways. An auditor, for example, could be reprimanded or admonished by the Companies Auditors and Liquidators Disciplinary Board—

Senator MURRAY—The CALDB—that was the acronym that I was looking for.

Mr Bobb—Yes. An auditor could also be admonished by his own professional body. If he is a member, for example, of the Institute of Chartered Accountants he could find himself, or she could find herself, effectively disciplined twice in respect of the same conduct. Clearly, the CALDB has the powers to either suspend or take away the registration of the auditor and that to some extent takes away the livelihood of the auditor. Whereas, if a person were suspended or removed from the membership of the professional body, that does not prevent him or her from continuing to practise as an auditor. That is an important issue.

That same body, incidentally, looks after conduct issues of liquidators, and in addition to that we have got a Tax Agents Board which looks after the issue of whether or not tax agents are fit and proper persons to continue to practise as registered tax agents. There is always the chance that if a chartered accountant or a CPA does the wrong thing that is likely to result in that person not being considered fit and proper and therefore his right to practise as a tax agent will be taken away from him. A very useful example is the recent sentencing of three accountants in WA for criminal behaviour. The behaviour that I am referring to was a conspiracy to defraud the revenue. It was well reported. In fact, it was probably reported again very recently when the three convicted persons sought to appeal both their convictions and their sentences. The Court of Appeal felt in the circumstances that the original sentence and conviction were in order and there was no change made on the appeal.

Senator MURRAY—I am familiar with that. My impression is that the real estate agents disciplinary bodies, or whatever they are called, have the same abilities. They can withdraw the licence to operate, they can suspend a person's licence to operate and they can withdraw professional association recognition. In other words, there are a number of actions they can take which would materially affect the ability of a person to conduct a real estate business or activity. My impression is that those powers are not exercised enough, in the same way that they were not exercised enough for accountants and auditors five or 10 years ago.

Mr Bobb—That is my observation as well. I think it ultimately comes down to the mindset of the regulator. If the regulator is vigorous then it will regulate and enforce the laws to the extent that they are required to be enforced. If someone is asleep on the job—and that is a pretty unfortunate phrase to mention in a parliamentary committee hearing, which will form part of the *Hansard*—then I think appropriate questions need to be asked. It was probably the case, as you said, Senator, that perhaps 10 years ago ASIC was not seen as the vigorous enforcer of the law that it is today. No doubt that has come about because the persons at the top of ASIC have a different view on how the laws need to be enforced. It could also be that the government is now providing the regulator with more resources. Whether it is a combination of both the mindset and the funding and resources that are becoming available to the regulator, I think that if a head of a regulatory agency believes funding is essential for the proper, vigorous and rigorous enforcement of the law then the regulator needs to make all the appropriate noises to government to ensure that the funding is provided. There is nothing worse than effectively having a regulator who does not regulate.

Senator MURRAY—In contrast to accountants and auditors, who fall under national laws—Corporations Law and the laws governing ASIC—real estate agents bodies are state bodies. The argument is whether regulations should be national or state. I think there may be a halfway house. It might be simply that the disciplinary side of things, the requirement that they act in accord with the law, is made national. They can continue to operate otherwise in a state sense. What I am almost thinking of is the creation of a national equivalent to the CALDB on real estate, appropriately resourced with the proper people representing it. The state would agree through their legislative practices that disciplinary matters were automatically referred to it and it would have the power to suspend and withdraw licences et cetera. That is really a disciplinary mechanism. The most powerful tool you can have is to take someone's livelihood away from them.

Mr Bobb—Indeed. I am sure we all remember the recent example where the estate of the Gonzales family was being marketed for sale by a property agent and it was considered that the conduct of that property agent was below par, if I can use a euphemism. I think it was the industry that ultimately came to bear upon the property agent. It certainly was not the regulator. I think that is a good example of the regulator perhaps not enforcing available laws. At the end of the day, at least in New South Wales, the Office of Fair Trading has the powers to ensure that the equivalent of section 52 of the Trade Practices Act—which in New South Wales is section 42 of the Fair Trading Act, and it mirrors the provisions of section 52 dealing with misleading and deceptive conduct—is enforced. There is no issue with whether or not the power is there; the power is there.

In fact, the state act has much greater coverage than the federal act, simply because it is not constrained to corporations as the federal act is. For example, if the agency were carrying on a business and the offence of misleading and deceptive behaviour took place through a partnership of individuals, section 42 would cover the offensive behaviour and the Office of Fair Trading would be able to bring the partners to task, whereas the corporations power circumscribes only corporations in trade and commerce. Therefore, if Mr Samuel's organisation wished to take deliberate action against a partnership, it would not be able to do so because it would not have the constitutional power to do that under the Trade Practices Act.

ACTING CHAIR (Ms Burke)—I am curious as to why the CPA has undertaken this research. Was there something that happened—complaints from clients?

Mr Bobb—I am equally curious about that. I am from the institute side. The role of chair of the LRB alternates between CPA Australia and the institute. The institute currently has the chair. On the last occasion that this matter was discussed before we put in our submission, John Purcell indicated that CPA Australia had conducted research. Certainly the members of the LRB from the institute side were not aware of that. It may also be the case that the LRB members from CPA Australia were not aware of it. CPA Australia has centres of excellence. This could be something that is covered within one of those centres, where they conduct their review of particular areas and produce the results of the research. I cannot provide any further information to respond to your curiosity.

ACTING CHAIR—I suppose your experience would probably mirror that of medium sized firms in that you are probably not offering clients advice on going into property. So I am wondering why they have done it. Anyway, I suppose we will be able to see that once we get the report.

Mr Bobb—I can only surmise that the reason is to review the conduct of the likes of Henry Kaye. That is the only conclusion I can come to, but it is based on speculation.

ACTING CHAIR—That is fine. As you said, you are probably not offering financial advice to many of your client base, but would many accountants be called upon by clients who are speculating about where to put money and how to do it? If they have a relationship with the accountant anyway, that is the person they would go to in the first instance.

Mr Bobb—Financial planners have taken a much more important role in that area. Unless the accountant also happens to be a financial planner—and that is not always the case—then it is more likely than not that they will approach a financial planner for that type of advice. Where I do see accountants becoming involved with property acquisition is where lenders say to the borrower: 'If you are going to borrow a sum of money then it is a term of our loan agreement that you obtain independent financial advice and that you procure from a chartered accountant or a member of CPA Australia a certificate of independent financial advice.' More often than not, that is associated with the provision of a guarantee by a third person to ensure that the third person is familiar with the obligation of giving the guarantee on behalf of the borrower. More often than not, the lending institution will also require an independent legal advice certificate from a lawyer who is not acting for the borrower, to ensure that the guarantor has been given appropriate advice and understands the ramifications of what might happen if the borrower were to default and the lender were to make a demand on the guarantor to pay up under the mortgage that has been guaranteed.

Whether that type of activity becomes more prevalent in terms of property investment advice—in terms of your committee's deliberations and whether you think that is an area that ought to be explored—is yet to be seen. I think we are 23 on the list of submissions and I think 25 submissions have been made to the committee but no doubt buried in some of those submissions there will be some suggestion or recommendation that the form of regulation might need to look at the issuing of those independent certificates in order to ensure—not so much from a lender's point of view but perhaps from the investor's point of view—that people are

obtaining appropriate independent advice with regard to the investment that they are undertaking.

An option would be to have some sort of de minimus rule for example, where investments under a certain sum of money do not require that type of independent advice. Or maybe it should be the other way. You may look at it and say, 'The more vulnerable in society are those who are purchasing the smaller dollar valued property investments and maybe the de minimus rule ought to work in reverse. No doubt that will be a matter that the committee will ponder in its deliberations and in the report that it produces at the end of the day.

ACTING CHAIR—It is certainly one of the big gaps because you have a real estate agent who is acting on the vendor's behalf and a spruiker who is trying to sell a piece of a pie in a development as well as the finance to go with it. And there seems to be a lack of advice for the actual investor—credible advice that is not predicated on somebody else's gain.

Mr Bobb—What I found quite unbelievable, to be quite frank with the committee, is the fact that quite apart from spruikers and consultants—and no-one really knows whether they are engaged by the developer as an employee or an independent contractor—is the fact that when a person approaches the property agent, usually that property agent is being renumerated by the vendor on the basis that they are have signed a sales agency agreement. The agreement will specify the commission that is paid by the vendor to the purchaser for delivering the product—that is, facilitating the sale of the property. But very often the sales agent will spend more time with prospective purchasers then he or she will spend with the client who is paying the fee. In order to ensure that the transaction is consummated the agent will need to make all sorts of representations. The issue is: are those representations misleading and deceptive? That is a moot point. Whose interest does the agent have at the end of the day—on the basis that usually there is a form of confidence between the purchaser and the property agent? That is to say the property agent will become the confidant of the property purchaser because the purchaser will commence confiding in the agent and asking the agent certain questions. Very often the purchaser might almost believe that the property agent is the purchaser's agent, not the vendor's agent.

I believe that that raises the perennial problem, which I do not think has ever been properly addressed or resolved, and that is: whose agent is the agent who has been engaged? Is he the agent of the vendor who is paying the fee or is he in some respects also the agent for the purchaser, because he takes the purchaser around and he introduces the purchaser to a range of properties? No doubt he is focusing more or less on the properties for which he has been retained as the agent. And obviously he could be acting for more than one vendor—and that in itself raises an issue, because the agent, by preferring one vendor over another vendor, exposes himself or herself to the issue of a conflict of interest.

There is also a conflict at a more fundamental level, and that is in taking the purchaser around and representing to the purchaser that there are all these properties on the market available for the purchaser's consideration. That person is almost an agent for the purchaser. So you have, at various levels, different forms of conflict and how an agent addresses those—and whether the agent even knows or believes that agent faces a conflict at the various levels I have just described—is a moot point. Whether the real estate institutes at state and national levels have some forms of education to train agents to understand the risks that they expose themselves to, in the way that they conduct their practices, is something that I am not familiar with.

I can tell you about the system in Hong Kong, with which I am familiar. I mention it because our firm has a representative office there. The system there comes down to this: the vendor will retain an agent and will pay an agent a commission which is usually one per cent. It is a standard one per cent and everyone knows that it is one per cent. If any agent introduces a purchaser to a property, that agent will be retained by the purchaser and the purchaser will pay the agent one per cent. If it turns out to be the same agent then that agent will make a full disclosure through a disclosure document and that agent will actually receive two per cent—one per cent from the vendor and one per cent from the purchaser.

To me that sounds very transparent and at least lets both the purchaser and the vendor know precisely who is paying the fee and what they expect to get for that fee, and I believe it also avoids the issue of conflict. It may not necessarily avoid it completely where one agent is involved in acting for both parties, but I think it is still far better than the situation we have at the moment, where you find that the fee is paid by the vendor yet the agent spends more time with the purchaser or a range of purchasers and effectively has to compete against a range of principals for which the agent has been retained.

Ultimately, real estate institutes at the state and national levels will have to address this issue to the extent that it has not already been addressed. I am conscious of the fact that it might be outside the committee's terms of reference, but in the scope of giving property investment advice it may become a relevant issue that the committee may wish to consider when it produces its final report.

ACTING CHAIR—I suppose it gets down to one of the other nubs of the issue: what is property investment advice. We heard evidence from the Real Estate Institute yesterday suggesting that, if you present a set of known facts—such as, 'These properties have recently sold for this amount; these are your ingoings and outgoings and this is current rental return—they would not see that as investment advice but rather as fact. But other witnesses have said they would then sell on the basis of projected return: if you buy this investment property, it will give you this; you are looking at capital gains of such and such. Has your foundation looked at that sort of issue?

Mr Bobb—It is quite a relevant point, and thank you for taking the time to make the point. Usually, an agent who is retained by a vendor will immediately go to the accountant and ask the accountant to produce a statement of outgoings on the basis that the agent will tell the vendor that that information is relevant for the purposes of assisting the sales process because a purchaser will want to know that information, especially with an investment property, and the outgoings become part and parcel of the equation of the return on the investment. That information will need to be procured. Inevitably, the vendor might go back to the accountant and say: 'You prepare my financial statements. You're in a better position than I am to provide that information.' An accountant will then assume some responsibility for providing that information.

What I have noticed, though, is that in the provision of any form of information, whether it comes from an accountant or a property agent, usually where the information is not provided directly to the client but to a third party, that accountant or property agent will usually use a form of disclaimer to limit the exposure that they might be open to on the basis that the information might not necessarily be completely accurate.

At the end of the day, it is an important point. Accountants do have a role to play in the provision of that information. There are also times, I suppose, where a client might have that information within his own grasp and is able to pass it on without much else. Very often, the best way of providing the information is to provide supporting documentation. Since outgoings are usually water rates, council fees, land tax and, if the property is under strata, strata plan levies, it would make good practice to support the supply of that information by simply taking a copy of the relevant statements from the various authorities in order to support the calculation of the outgoings.

In my view, in that way the accountant would probably discharge his obligation in providing useful information, because at the end of the day it is then not really a question of what the accountant represents as being the outgoings. Yes, there is the statement representing what the outgoings are, but that is fully supported by documented copies of actual invoices that have been applied by these authorities. At the end of the day, it all comes down to a mindset that is based on risk management. If an accountant appreciates that he is going to be exposed, yes, he might produce a disclaimer to limit his liability, but if he adopts good management practice he might then go to his client and say, 'I think there is a better way of doing it: why don't we supply the information in the form of a summary together with copies of the last statements in order to support the statement that I am producing at your request to the third party.'

If that form of good practice becomes common practice, you will then find that property agents who ask for the information will probably start going the extra yard, asking the clients to support the statement of outgoings with copies of relevant information. We all know that with technology nowadays it is quite easy to scan these documents, attach them to an email and, before you can say, 'A, B, C,' the information has already been supplied and delivered.

ACTING CHAIR—A lot of the submissions have suggestions on that point, such as that a widening of the definition of financial services under the Corporations Act would resolve some of the issues we are having here and going to the FSR—which I take from accountants from outside, but you understand fully. Would the association have a view on that?

Mr Bobb—I suppose, if you are looking at the marketing of financial products, you see that they are usually associated with all forms. I must say that they are now becoming so exotic that it is very hard to keep up to date with the type of financial products that are being marketed. In the field of property, you will usually find that they are still very much limited to people acquiring units in property trusts. As I mentioned in my opening remarks, there are now all sorts of exotic property trusts that are marketing property overseas, in Japan, the United States and New Zealand—outside the normal home territory of the investor. But it still comes down to a property trust, so you can use the American terminology and call it an REIT and maybe even sell condominiums, again, using American terminology, but it always comes back to the same thing: they are still units in a property trust; they are still taxed the same way. It does not matter whether the income comes from overseas or the income comes from within Australia, the income is still taxable in the same way.

As to whether there ought to be an equivalent FSR regime for property investment, I would probably suggest not because, to the extent that we are looking at indirect property through property trusts, they are probably already covered through FSR anyway. To the extent that we are looking at direct property, I suspect that is probably the area that the committee is really

looking at—that is, direct property and not indirect property and whether it is appropriate to regulate property investment advice with an FSR type regime. Once the committee has conducted its complete review of the issue and obtained all of the information that has yet to come your way, including the CPA's research paper, which will hopefully be with you well before you draft your final report, I believe you will be in a much better position to properly answer the question you have posed. I do not think I can answer it for you at this stage.

ACTING CHAIR—We are having trouble finding someone to answer it for us. Thank you very much for your time today and your submission. We appreciate it.

Committee adjourned at 10.43 a.m.