CHAPTER 3

A new regulatory regime

What is the objective?

3.1 The Committee's objective is the creation of a regulatory regime which takes reasonable steps to protect consumers from the operations of property spruikers and other get-rich-quick promoters.

3.2 Such a regime would also provide the basis for a recognised and respected property investment advisory industry, which provides high quality and appropriate advice to consumers.

Proposed new regulatory regime

3.3 Most submissions and witnesses supported the introduction of an FSR-like regulatory regime for property investment advice.[1] For example, the submission from the Real Estate Institute of Australia (REIA) suggested that an effective solution would be to include real property within the current FSR regulations:

> The basic premise of the REIA is that all those providing investment advice should be regulated by financial services legislation, which may need to be better defined to address all asset classes, and not just financial products.[2]

3.4 A strong argument was made that investment in property is similar to investment in other asset classes and that all investors should receive the same level of protection. The submission from the Financial Planning Association of Australia (FPA) made the following comment on this point:

> When investing in real property, Australians hope to enjoy a capital return, a yield and any possible tax advantages available from the investment … In this regard, there is little difference between investing in real property to investing in what the Corporations Act 2001 considers a financial product. People making property investments should be entitled to the same protections and comforts that they would receive when purchasing a

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1 See, for example, Australian College of Financial Services, *submission 2*; Australian Property Systems, *submission 3*; Securities and Derivatives Industry Association, *submission 7*; Law Council of Australia, *submission 12*; Centre for Credit and Consumer Law, Griffith University, *submission 13*; Financial Planning Association of Australia, *submission 18*; and Ms Wolthuizen of the Australian Consumers' Association, *transcript of evidence*, 15 April 2005.

2 REIA, *Submission 4*, p. 10.

> financial product under the financial services regime contained in the Corporations Act 2001. These important and compulsory protections include membership of an external dispute resolution service, professional indemnity insurance by the adviser, having compliance structures and appropriate resources in place, and specific educational training requirements.[3]

3.5 ASIC's submission recommended regulatory comparability because 'there is a strong functional similarity between the giving of financial advice about real estate and the giving of advice about securities and other investments'.[4] The submission from the National Institute of Accountants (NIA) made the same point:

> The NIA believes that investment in real estate is no different than investment in other financial products.[5]

3.6 Griffith University made a similar observation:

> We strongly advocate for property investment advice to be included in the financial services regulatory regime ("FSR regime") as it is, from the consumer's perspective and in a practical sense, investment advice.[6]

3.7 The National Credit Union Association (NCUA) suggested that the most efficient way to regulate property investment advice is to change the definition of 'financial product' under FSR to include investment in real property.[7]

3.8 The Committee received evidence that consumers are confused by the fact that investment in different asset classes is regulated differently, with the recommendation that there should be a uniform approach to the provision of all investment advice.[8] The submission from the Australian College of Financial Services said that any new regulation should 'integrate seamlessly with FSR to give uniformity of practice, fewer loopholes, and less confusion for consumers'.[9]

3.9 Another argument presented in favour of bringing property investment advice under an FSR-like regulatory regime was that, from a practitioner's point of view, all providers of investment advice should face the same regulatory regime.[10] Is it fair that advisers on investment in financial products are subjected to much more stringent regulation than their competitors promoting investment in property?

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3 FPAA, *Submission 18*, p. 2.

4 ASIC, *Submission 21*, p. 5.

5 NIA, *Submission 14*, p. 3.

6 Griffith University, *Submission 13*. p. 3.

7 Mr Tham, *Transcript of evidence*, 13 April 2005, p. 22.

8 For example, REIA, *submission 4*, p. 3; Griffith University, *submission 13*, p. 4.

9 ACFS, *Submission 2*, p. 9.

10 For example, REIA, *submission 4*, p. 3.

3.10 On the other hand, The Investors Club opposed further regulation. It argued that consumers would be adequately protected from property spruikers if (a) they were made to provide full details of their own wealth and how it was acquired, (b) if all fees and commissions and relationships had to be disclosed, and (c) if an independent valuation of each property had to be provided.[11]

3.11 Wakelin Property Advisory also opposed further regulation, but said that consumer protection would be enhanced if property investment advisers were made to disclose all fees, commissions and relationships, so that any advice given is fully transparent.[12]

3.12 The submission from Mirvac Real Estate warned that 'over-regulation may have a significant effect on our business operation as well as increasing compliance and purchase costs for the investor'. Mirvac suggested that an effective solution would be to add a list of warnings to the front page of all contracts for sale, such as: 'be sure you can really afford this property'; 'do your own due diligence on the developer'; 'seek independent tax and financial advice'; 'property is a long term investment – do not buy for speculation'.[13]

3.13 JBA Finance Solutions thought that the desired outcomes could be achieved by the creation of an "advice license", which would be an addendum to a normal real estate agents license. It would cover those agents who wanted to provide property investment advice to clients.[14]

3.14 The Property Investment Association of Australia (PIAA) advocated a regime with 'frameworks and rules similar to the requirements of the FSRA and PS146', based on an accreditation process administered by the industry itself.[15]

3.15 The joint submission from The Institute of Chartered Accountants of Australia and CPA Australia (the 'Accounting Bodies') recommended that no decision be made until (a) there is further research on the extent of the problem,[16] and (b) the effectiveness of FSR has been reviewed. In regards to the latter point, the Committee

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11 Mr Allen, *Transcript of evidence*, 13 April 2005, pp. 29 & 42. The Law Institute of Victoria also advocates the mandatory provision of an independent valuation to purchasers, *Submission 19*, p. 9.

12 WPA, *Submission 15*, pp. 5 - 8.

13 Mirvac Real Estate, *Submission 8*, p. 1.

14 JBA Finance Solutions, *Submission 1*, pp. 5 & 6.

15 PIAA, *Submission 5*, p. 15.

16 CPA/ICAA, *Submission 23*. The submission indicates that CPA Australia is currently undertaking research into the extent of this problem, with the results expected in late June 2005.

notes that the Commonwealth is currently looking at ways to enhance the operation of FSR.[17]

3.16 The Committee considers that a full regulatory regime is appropriate to an industry of such national economic importance, which provides the accommodation needs of more than one-in-five Australians, and which often involves the life's savings of investors.

3.17 The Committee does not consider that property investment advice warrants the establishment of a whole new process—the simplest and most effective approach would be to include real property as a new asset class under the existing FSR provisions in the Corporations Act. That would immediately result in a comprehensive licensing, conduct and disclosure regime.

3.18 ASIC's submission emphasises the importance of a proper licensing system:

> … in the absence of a licensing regime of some kind, it is very difficult to stop dishonest or incompetent operators from continuing to participate in the marketplace. Even where the general consumer protection powers can be used to stop or restrict particular activities, a rogue or marginal operator is not prevented from otherwise continuing with their business or 'resurfacing' under a different name or in another legal form. Dealing effectively with such operators arguably requires the structure of a licensing regime and the power to ban individuals from holding a license and undertaking regulated activities for an extended period of time.[18]

3.19 At the public hearing ASIC reinforced this point:

> … [a licence] includes these general competency and educational type requirements that would weed out a lot of fly-by-night operators. The fly-by-night operators would not go to the trouble of getting a licence in those circumstances, together with all of the other compliance requirements that go with a properly functioning licensing regime, which is what I think we have for the financial adviser area.[19]

3.20 The NCUA also advocates a full licensing regime to persons giving property investment advice:

> The licensing regime is essentially proving to ASIC that you have controls in place, that your staff are appropriately trained under PS146 and that you have responsible officers who have the appropriate expertise to run the business and who will take responsibility and provide support for the business … We believe that the full licensing regime should apply …[20]

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17 Press release by the Parliamentary Secretary to the Treasurer, 2 May 2005, announcing a package of 25 proposed refinements to improve the operation of the FSR framework.

18 ASIC, *Submission 21*, p. 7.

19 Mr Tanzer, *Transcript of evidence*, 15 April 2005, p. 32.

20 Mr Tham, *Transcript of evidence*, 13 April 2005, p. 21.

3.21 Based on the evidence presented, the Committee considers that property investment advisers should be subject to a licensing scheme similar to that which currently applies under FSR to advisers on investment in financial products and services.

3.22 The Committee considers that making property investment advice subject to a comprehensive regulatory regime has a number of benefits, including:

- Improve the quality of property investment advice available to consumers, both general and personal;
- Substantially reduce the number of consumers who fall prey to unscrupulous operators;
- Ensure that consumers receiving investment advice on any asset class have the same regulatory protection;
- Establish adequate entry and participation barriers for fly-by-night and incompetent operators;
- Encourage the professionalisation of the provision of good quality and appropriate advice by competent advisors;
- Close the regulatory gaps which enable property spruikers and marginal operators to function.

3.23 The Committee recognises that regulating property investment advice under FSR will introduce compliance costs for individuals and businesses providing property investment advisory services. There will also be costs to Government in administering and enforcing the legislation. However, the Committee considers that the expected benefits of such regulation, as outlined above, will far outweigh the additional costs involved.

3.24 Most submissions, including that from the Real Estate Institute of Australia (REIA), argued that any new regulatory regime should be designed to protect retail investors in real property. The REIA said :

> Any new regulatory regime should be limited to retail investors, given that this is the consumer group which has experienced harm and/or loss. All forms of real property, including residential, commercial, retail and industrial property, should be covered.[21]

3.25 The Committee agrees with this view. Recommendation 4, at para 3.56 below, outlines the coverage of the proposed regulatory scheme.

21 REIA, *Submission 4*, p. 8.

Definition of property investment advice

3.26 For the purpose of the proposed new regulatory regime, the Committee believes that "property investment advice" should be defined as including:

- advice in relation to the prospect of an investment return (capital growth or income) from a particular property, and over a defined timeframe;
- advice in relation to the prospect of an investment return from one among a portfolio of properties; and
- advice which suggests a strategy of investing in property on the basis of a proposed investment return (capital growth or income).

3.27 The key principles which underpin this definition are:

- The essence of property investment advice is that it relates to the *future*. Statements about the current value, rental yield or characteristics of a property, and statements about the past characteristics of a property, although relevant in evaluating the historical investment performance of a property, are not property investment advice; and
- Property investment advice involves making claims about investment returns—it is not necessary, for instance, that a specific return be forecast. General statements that property investment will reap a return are sufficient; and
- The presence or absence of advice about other asset classes is irrelevant (if advice about other asset classes is occurring, the adviser would be required to have an FSR licence anyway).

Features of the new regulatory regime

3.28 The Committee recommends that the foundations of the proposed regulatory regime should be:

- Any person giving property advice must hold an Australian Financial Services license under the proposed new "property investment advice" regulatory regime.
- The license must be held personally by the person giving the advice.
- A number of exemptions (carve-outs) should apply, including:
  - Accountants giving advice on taxation matters and subject to the CPA and ICAA disciplinary processes;
  - Lawyers giving advice on legal matters and subject to the disciplinary processes for solicitors;
  - Valuers, giving advice on current property valuations;

- Real estate agents who stick to providing present and past information (because this is not "property investment advice");
- Lecturers delivering a university course, or teachers delivering a course in a school environment;
- Educators delivering a course approved by Australian National Training Authority (ANTA, now part of the Department of Employment and Workplace Relations);
- Fair comment in the mass media.

3.29 The Committee considers that a comprehensive regulatory regime for property investment advice would include provisions for the following:

- A licensing regime (which requires minimum standards of conduct and minimum standards of the quality and appropriateness of advice; and includes specified training and educational qualifications);
- Disclosure obligations regarding conflicts of interest, relationships, fees, commissions, contents of educational courses, and charges;
- Cooling off periods;
- The requirement to advise clients of both upside and downside risks;
- An undertaking to act honestly, fairly and efficiently;
- Anti-hawking provisions;
- An internal dispute resolution process in place; and
- A recognised course of study delivered by a reputable institution.

Who should be regulated?

3.30 The MCCA discussion paper recommended that a functional rather than an occupational approach would be most appropriate.[22] This view was supported by most submissions, including from the NCUA:

> Approach to this area must be targeted to the activity rather than any specific occupation … We believe that a functional based approach to regulation, similar to the FSR provisions, would be most appropriate and effective, rather than an occupation based approach.[23]

3.31 The Committee agrees that a functional approach should be taken so that all those who engage in property investment advisory activities (including advice about financing arrangements), whatever the setting or form of the advice and whoever the provider of the advice may be, are covered.

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22 MCCA Discussion Paper, August 2004, p. 37.

23 NCUA, *Submission 9*, pp. 4 & 5.

3.32 However, the Committee considers that, consistent with the current approach to regulating other financial advice, certain activities should be excluded ('carved-out') from coverage of the new regulation. For example, accountants giving tax advice and lawyers giving legal advice in relation to property investment. These two professions have well-established codes of conduct which are rigorously enforced. The Accounting Bodies told the Committee that FSR currently provides a carve-out for accountants on the basis that they are strictly regulated:

> They have compulsory professional indemnity insurance … every five years they are required to submit to a quality control review. Any trust accounts … must be audited by an independent auditor … the accounting bodies have their own disciplinary proceedings in which they can effectively discipline an act of misconduct.[24]

3.33 The Committee received considerable evidence on the question whether or not real estate agents should be excluded from any new regulatory regime which covers property investment advice.

3.34 Some submissions argued that as real estate agents are already subject to State and Territory legislation they should be exempted from any new regulation. For example, the submission from the REIA recommended:

> Real estate practice is already highly regulated by the State and Territory governments, therefore any change to regulations should not unduly affect the 'high street' real estate agent…[25]

3.35 On the other hand, other submissions made a strong case for including real estate agents on the basis that, in everyday life, they provide the bulk of property investment advice to consumers. For example, the submission from The Investors Club noted that 99 per cent of property investment advice comes from real estate agents, who represent only one side of the transaction – the vendors.[26]

3.36 The NCUA noted that comments by real estate agents and mortgage brokers can mislead prospective buyers and that any regulation of property investment advice should cover such professionals. It said:

> Comments [by real estate agents and mortgage brokers] on the growth and rental potential of property may often be misleading and overstated to induce potential buyers.[27]

3.37 The PIAA recommended that, because training courses for real estate agents normally do not cover investment issues, 'no carve-out be available to real estate agents where they seek to provide overall property investment advice."[28]

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24 Mr Bobb, *Transcript of evidence*, 29 April 2005, p. 24.

25 REIA, *Submission 4*, p. 1.

26 The Investors Club, *Submission 10*, pp. 1 & 3.

27 NCUA, *Submission 9*, p. 3.

3.38 The Securities and Derivatives Industry Association (SDIA) suggested that the point of difference could be if a real estate agent is dealing with a purchaser who will be an owner-occupier or a purchaser who is buying the property for investment.[29]

3.39 On 14 February 2000 ASIC reported to Government on its review of the financial advising activities of real estate agents. ASIC found that:

> Many real estate agents give, and see it as part of their function to give, general financial advice to potential buyers of investment property. Typically, this advice takes the form of advice about the likely capital appreciation or rental incomes from the property - basically, its investment return potential. Sometimes this advice will include some general taxation advice, such as about the benefits of negative gearing.[30]

3.40 On the basis of their research ASIC concluded that general financial advice provided by real estate agents as an incidental part of selling real estate should include warnings that (a) the advice is only general advice, and (b) that purchasers should assess the suitability of any property investments in the light of their individual circumstances. The real estate agent giving general advice should also make full disclosure of any conflicts of interest, relationships and fees and commissions.

3.41 Furthermore, ASIC recommended that where individual advice is provided, the real estate agent should be subject to 'similar regulatory requirements as investment advisers who give personal securities recommendations'.[31]

3.42 ASIC's recommendations were referred by the Commonwealth to the States and Territories. They eventually led to the MCCA working party being formed, and the discussion paper on property investment advice issued by MCCA in August 2004.

3.43 Only NSW and the ACT made minor changes to legislation as a result of ASIC's February 2000 report on real estate agents:

> … it is fair to say that those proposals have not been picked up except in a couple of small instances … the New South Wales and ACT real estate legislation now have some requirement about disclosing conflicts of interest but, generally speaking, the licensing of real estate agents continues not to go to the issue of advice at all.[32]

3.44 After careful consideration, the Committee reached the conclusion that there should not be a general 'carve-out' for real estate agents, as they are such a vital part of

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28 PIAA, *Submission 5*, p. 20.

29 Mr Clark, *Transcript of evidence*, 15 April 2005, pp. 3 & 5.

30 *'ASIC Completes Review of Real Estate Agents'*, ASIC Media Release, 14 February 2000, page 2 of Summary.

31 *'ASIC Completes Review of Real Estate Agents'*, ASIC Media Release, 14 February 2000, pages 1 & 2. See also ASIC, *Submission 21*, p. 4.

32 Mr Tanzer, *Transcript of evidence*, 15 April 2005, p. 27.

the property industry. Rather, there can be a specific carve-out for real estate agents doing their normal work of selling and managing property. However, real estate agents will need to be very conscious that when they go beyond the provision of factual information to prospective property investors, it becomes advice.

3.45 For example, if real estate agents provide historical information on a property (e.g. current outgoings, recent rent levels achieved, past capital appreciation) — the Committee considers that to be factual information. But, if they provide comments on possible future costs or future rents or future capital appreciation or the use of deposit bonds or negative gearing, that becomes advice.

3.46 This distinction is especially important in view of the growth of 'off-the-plan' sales in recent years.[33] Any commentary regarding possible rents or values in 2 or 3 years time is obviously speculative and should be seen as property investment advice. The submission from the Australian College of Financial Services makes the point that investors buying off-the-plan often do not appreciate the downside risks.[34]

3.47 While real estate agents would need to be more careful in their comments to prospective investors, the Committee agrees with ASIC's view that they would quickly adjust to the new requirements.[35] Those real estate agents who wanted to deal in investment property would take the necessary steps to obtain an Australian Financial Services Licence to enable them to provide property investment advice.

3.48 ASIC suggests that it would improve the general competence and standing of the average real estate agent if a segment on how investment markets work is included in their training courses.[36]

3.49 The Committee notes that a functional approach, as recommended, would capture the activities of an important sector of the property industry which, till now, appears to have escaped even minimal regulation. These are the sales agents (either direct employees or contractors) used by developers to sell their own property developments.

3.50 Such sales agents have been able to operate without a real estate licence or certificate. Thus they have not been subjected to the codes of conduct or educational requirements which apply to normal real estate agents. The Accounting Bodies identified unlicensed 'marketing consultants' selling property for developers as an important issue:

> … [marketing consultants] are somehow outside the scope of the regulated scheme, where states are involved in ensuring that registered real estate

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33 For example, The Investors Club commented that in recent times off-the-plan sales had increased to about 50% of total sales. Mr Allen, *Transcript of evidence*, 13 April 2005, p. 33.

34 ACFS, *Submission 2*, p. 3.

35 Mr Tanzer, *Transcript of evidence*, 15 April 2005, p. 32.

36 Mr Tanzer, *Transcript of evidence*, 15 April 2005, pp. 32 - 33.

> agents toe the line, maintain trust accounts and are licensed and that their sales staff have the appropriate certification … 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?[37]

3.51 The submission from the REIA advocates that anyone selling and/or managing real property should operate under a real estate agents license. One of the recommendations made by the REIA is that:

> Property developers selling their own properties must be licensed [real estate agents]. All employees of developers who are engaged in real estate transactions should be registered to conduct those transactions.[38]

3.52 Spruikers have been able to utilise this loop-hole to sell properties on behalf of developers (or themselves if they own the properties), often at inflated prices (so called 'two-tier or multi-tier marketing'). They often offer a package to a client which includes the provision of expensive or inappropriate financing to pay for the investment property.

3.53 The Committee considers that this is a major deficiency in the current system. It agrees with the REIA that sales staff of developers should operate, as a minimum, under a real estate agent's license. If those sales staff also provide property investment advice, as defined in this report, then they should operate under an AFS license as well.

Recommendation 2

3.54 **The Committee recommends that Chapter 7 of the Corporations Act 2001 be amended to include real property as a separate asset class.**

Recommendation 3

3.55 **The Committee recommends that a definition of property investment advice should be inserted into the Corporations Act 2001. This definition should make it clear that property investment advice encompasses representations about the future value of, or income from, a property. It does not include statements about the past or present income from the property.**

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37 Mr Bobb, Transcript of evidence, 29 April 2005, p. 23.

38 REIA, *Submission 4*, p. 6.

Recommendation 4

3.56 **The Committee recommends that anyone providing property investment advice should have an Australian Financial Services Licence unless:**

- **They give advice during a university course or similar approved training course; or**
- **They are an accountant, solicitor or valuer giving information in the course of their professional activities; or**
- **They are making fair comment in the mass media, where the comment is not made in the course of soliciting customers for any good or service.**

Enforcement

3.57 If the Committee's recommendation for a new regulatory regime to cover property investment advice under FSR is accepted, ASIC will have prime responsibility for its enforcement.

3.58 However, the Trade Practices Act (TPA) will still be an important regulatory tool, particularly in relation to other get-rich-quick wealth creation promoters.

3.59 The ACCC alerted the Committee to their view that, notwithstanding much closer cooperation between them and ASIC, a more effective regulatory approach would be to allow both the ACCC and ASIC to operate with a full range of concurrent powers. That would enable quick and decisive action to be taken against unscrupulous promoters.

3.60 The Committee notes that the ACCC and ASIC signed a Memorandum of Understanding (MOU) in December 2004 to facilitate consultation and procedures in situations where it is not clear which agency should take responsibility for a particular activity which requires investigation.

3.61 As the MOU was only signed a few months ago the Committee would prefer to see how it operates in practice before commenting on the need for concurrent legislative powers for the ACCC and ASIC. Furthermore, the Committee would like to first evaluate the Government's reactions to this report and also the outcomes of the review of property investment advice being undertaken by the Ministerial Council on Consumer Affairs.

3.62 The NIA recommended that even if the decision is made to regulate property investment advice through the introduction of uniform State and Territory legislation, the actual powers to enforce that legislation should be ceded to ASIC:

> The NIA does not believe that the state governments have shown sufficient resolve in relation to protecting the interest of consumers and their reliance on property taxes creates a conflict of interest. As such, the enforcement and prosecution of breaches of the new regime should be ceded to ASIC, as the regulator of other forms of investment advice.[39]

3.63 However, as the Committee is recommending that property investment should come under the Corporations Act, which is Commonwealth legislation, ASIC would automatically be responsible for its enforcement.

Remedies

3.64 The submission from the Law Institute of Victoria (LIV) recommended the establishment of a more accessible system of obtaining remedies.

3.65 The LIV noted that the current procedures to claim civil remedies pursuant to the *Trade Practices Act 1974* and State fair trading Acts are expensive, complex and time-consuming which are all negatives to purchasers seeking redress.

3.66 The LIV suggested that tribunals (such as the Victorian Civil and Administrative Tribunal) should be used instead of courts and that procedures could be changed to give a purchaser more scope for remedy. For example, it recommended changing the onus of proof where it is established that the purchaser was introduced to the property by a spruiker who did not make the proper disclosures; and recommended changing the rules of evidence to allow investors to rely upon representations made by a spruiker, notwithstanding that they do not form part of a written contract.[40]

3.67 The ACCC's submission also recommended a number of changes to improve the remedies available to victims of spruikers who are successfully prosecuted, as discussed below.[41]

Remedies for all victims

3.68 At present the TPA restricts remedies to consumers who give prior written consent to a claim. The ACCC believes that this is too restrictive, and that restitution should be available for all victims where a contravention of the TPA is proven.

3.69 The Committee notes that there is some precedent for this, in s.80B(b) of the TPA, which allows the court to order refunds to named consumers in the event of a breach of section 75AU (price exploitation in relation to the new tax system). The

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39 NIA, *Submission 14*, p. 4.

40 LIV, *Submission 19*, pp. 8 & 9.

41 See also the discussion on remedies in the public hearing, *transcript of evidence*, 29 April 2005, pp. 9 – 11.

Committee considers that, for property spruiking offences under the TPA, the courts should be able to make a similar order, compelling the spruiker to issue refunds to consumers either identified individually or as a class.

Recommendation 5

3.70 **The Committee recommends that, where property spruikers contravene the Trade Practices Act, the courts should be able to make an order compelling the spruiker to issue refunds to consumers either identified individually or as a class.**

3.71 Such an order would be limited to refunds, not to damages in the event that damage is suffered. However, a successful action by the ACCC on behalf of some consumers does give rise to the potential for other victims to take action in accordance with section 83 of the TPA, which allows findings of fact in the original case to be regarded as *prima facie* evidence in any subsequent case. Use of this section allows subsequent litigants to take advantage of the previous proceedings, thus improving the likelihood of them obtaining suitable damages.

Civil pecuniary penalties

3.72 The ACCC also calls for civil pecuniary penalties for breaches of the provisions of Part V of the TPA (other than section 52). Currently to obtain fines or monetary penalties under the TPA for Part V offences, the ACCC must pursue a criminal prosecution which is considerably more resource-intensive (and costly) than civil litigation. The submission explained it this way:

> In many consumer protection matters, including property investment matters, it is important to take swift action in order to stop ongoing conduct and minimise damage to consumers. A slower, more complex criminal investigation is not appropriate in those circumstances … In short, the current framework results in a situation where penalties are not sought in cases which warrant such measures, because the procedure involved is too unwieldy to produce a successful outcome for consumers …
>
> For this reason, the ACCC believes that it is necessary to introduce a civil pecuniary penalty regime in relation to consumer protection matters (other than section 52) to more effectively deter activity by property investment advisers and others likely to breach the Act.[42]

3.73 Civil pecuniary penalties are currently available under section 76 of the TPA for breaches of a restricted range of provisions under the TPA (Part IV, s.75AU, s.75AYA). However, where the court imposes both a penalty, and compensation to victims, the compensation must be paid first (s.79B).

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42 ACCC, *Submission 16*, p. 24

3.74 Extending the provisions of s.76 to cover all of Part V (other than s.52) would be a dramatic step with far-reaching consequences for consumer affairs in Australia. While there is no doubt an argument for this extension to occur, such a recommendation would be well outside the terms of reference for this inquiry, and would probably require an inquiry in its own right (along with extensive negotiation with State and Territory governments). The Committee simply has not undertaken the work required to make such a recommendation.

3.75 However, for Part V offences relating to property spruiking, the Committee would support the extension of civil pecuniary penalties, to be imposed subject to s.79B.

Disgorgement

3.76 The ACCC argues in favour of statutory recognition of disgorgement as a complementary remedy that a court may order to deprive those who contravene the TPA or their ill-gotten goods or benefits.[43] The Committee is sympathetic to this view. However, the Committee considers that if the court has the power to order refunds to victims, and has the power to impose civil pecuniary penalties, then a disgorgement remedy is unnecessary.

3.77 Disgorgement, which may operate in a similar manner to an account-of-profits in contract law, would be a complex remedy to implement. It may, for instance, involve forensic accounting in order to determine what were the actual proceeds of the breach.

3.78 The Committee is not prepared to support disgorgement at this stage.

Cease and desist powers

3.79 During its consideration of the powers required by the ACCC in order to deal appropriately with property spruiking, the Committee turned its attention to a possible tool which was not raised in evidence. In particular, the Committee was concerned to provide the ACCC with an enforcement tool which could be used before spruiking seminars take place, to prevent potential victims from sustaining losses. In other inquiries, more focussed on the TPA, the ACCC has called for "cease and desist" powers, which would enable the ACCC to issue enforceable orders preventing conduct which it considers contrary to the TPA:

> Cease and desist orders provide interim administrative orders restraining corporations from engaging in specified anti-competitive conduct. A decision to issue an order would be based on the Commission's reasonable satisfaction of prima facie anticompetitive use of market power, if urgent

43 ACCC, *Submission 16*, pages 7 & 21-23.

> action was required in the public interest. Judicially imposed penalties and injunctions would be available for breach of a cease and desist order.[44]

3.80 The Dawson Review of the Competition Provisions of the Trade Practices Act, and the subsequent Senate Economics References Committee report on the effectiveness of the *Trade Practices Act 1974* in protecting small business both recommended against granting the ACCC cease and desist powers, because there were already appropriate means for the ACCC to act to prevent anticompetitive conduct.

3.81 The same arguments do not apply in the case of property spruikers. In this case the harm prevented is not activity in a relatively well-formed and functioning market, but sporadic preying by spruikers with little forewarning other than the spruikers' advertising. The Committee has not tested evidence on this question and is therefore not in a position to make a strong recommendation in relation to cease and desist powers. However any review of the ACCC's powers which follows this report should seriously consider the use of a tightly restricted cease and desist power which the ACCC can use to prevent spruikers from conducting their business in cases where speed is required.

Recommendation 6

3.82 **The Committee recommends that the Treasurer should examine the utility of providing the ACCC with cease and desist powers to prevent spruiking activity which, if conducted, would contravene any provision of the *Trade Practices Act 1974*.**

Professional education & training

3.83 The fledgling PIAA advised the Committee that Deakin University, through its commercial education division DeakinPrime, will introduce a new Diploma in Property Investment in the second half of 2005. Following discussions with the Financial Services Education Advisory Authority, the PIAA is confident that this Diploma will meet standards equivalent to those in ASIC's Policy Statement 146 on Training of Financial Product Advisers.

3.84 The PIAA hopes that this diploma will become the recognised educational qualification for property investment advisers in Australia.[45] Mr J Hopkins, Inaugural President of the PIAA told the Committee:

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44 ACCC, *Submission 56 to the Review of the Competition Provisions of the Trade Practices Act* (the "Dawson Review"), p. 95.

45 PIAA, *Submission 5*, p. 10.

> A hugely important part of the career and the training of any property investment adviser must be learning about property in a far deeper way than they might be taught at the moment … They must be able to kick the bricks, they must be able to know value, they must be able to assess supply and demand and they must be able to have a philosophy about what the future will be for that particular category of property.[46]

3.85 The Investors Club also advised the Committee that it had developed the concept of a basic educational qualification for property investment advisers through an appropriate TAFE course.[47]

3.86 The Committee is strongly in favour of the initiatives to introduce an appropriate educational qualification for property investment advisers. This will help to give credibility to the participants, and such a qualification would represent an important step towards making property investment advice a recognised profession. The diploma course developed jointly by the PIAA and Deakin University is a laudable scheme and seems well-designed and timely.

3.87 The Committee also considers that it will be important for an appropriate program of continuing professional development to be introduced to underpin this evolving profession.

The issue of 'educational seminars'

3.88 The Committee received evidence that the so-called 'educational seminar' approach is used not only by property spruikers but also by other get-rich-quick promoters, such as for share market software programs and horse racing betting systems.

3.89 The spruikers and promoters use the seminar or workshop approach in an endeavour to avoid the regulators – they claim that they are only providing educational and/or training courses, and not advice.

3.90 The FPA described it this way:

> There are gaps in the regime and there are grey areas … people who can move outside the regime by saying, 'We're not providing advice; we're providing education,' or 'We're providing factual information.' That is not regulated.[48]

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46 Mr Hopkins, *Transcript of evidence*, 13 April 2005, p. 6.

47 The Investors Club, *Submission 10*, p. 1.

48 Mr Graham, *Transcript of evidence*, 15 April 2005, p. 21.

3.91 ASIC told the Committee:

> … as the property market has cooled a little and other markets have come along, we have seen similar types of activity in relation to share-trading software, in relation to some other types of exotic products and also in relation to the bare educational seminar—some of which I would describe as not much more than broad motivational seminars that offer nothing by way of practical investment advice and are much more about motivating people to believe that if they have a good idea they can do something with it and make money out of it themselves … there are always get-rich-quick schemes and educational seminars out there that are promoting heavily and really pushing the psychological buttons that go to people wanting to increase their wealth.[49]

3.92 ASIC continued:

> If Henry Kaye had had to have a financial services licence or something equivalent then it would have been easier to take proactive action … if you are limited to the general consumer protection laws then you have to wait for someone to do something in breach of the conduct requirements before you can do anything.
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> … as it currently stands, if a person is running an educational seminar purely advocating direct investment in property then there is nothing that prevents that person from doing that other than the general law which goes to misleading and deceptive conduct or unconscionable conduct. The difficulty there is that that tends to be a reactive remedy—that you would need to see the misleading representations made before you could take action.
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> In the absence of something that says the person who is engaging in this type of activity needs some form of licence or authorisation to do it, you will always be left with that reactive remedy of having to go along and see whether the person is making misleading or deceptive comments. At least in relation to property—which is a significant investment class—we think that there are reasonable grounds for saying that the situation is unsatisfactory and that there should be improvement … I can tell you that, as an enforcement agency, if you have the capacity to go to court and to say, 'This looks like an investment seminar; the person is not licensed; it has to stop,' then you very quickly get an injunction and it stops the seminar from proceeding …[50]

3.93 The Committee wants a practical solution to be found which provides consumers with adequate protection not just from bogus educational or training seminars but also from other marketing strategies used to promote similar get-rich-quick messages. The issue is illustrated in the following exchange which took place during the public hearing with the Australian Consumers Association (ACA):

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49 Mr Tanzer, *Transcript of evidence*, 15 April 2005, p. 24.

50 Messrs Funston and Tanzer, *Transcript of evidence*, 15 April 2005, p. 29.

> **Senator MURRAY**—I would like to add to this. I am concerned that we are getting over-obsessed with seminars. It seems to me that modern marketing enables very targeted one-to-one marketing to occur, and I can see that if the seminar area is clamped down on they will simply switch, as they did with mass marketed investments. Mass marketed investments—on the tax effective side—mostly were not sold through mass meetings or seminars; they were sold on a direct basis, assisted by word of mouth. I think that this will go in the same direction. My view is that regulation is required even if the seminar area is tightened up and closed down. I have been concerned that the good activities of ASIC, ACCC, you and others in drawing attention to seminars do not address the fundamental issue, which is that people are persuading investors that they will get returns which are unrealistic from high-risk investments.
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> **Ms Wolthuizen**—I think it comes down to how you frame the legislation or regulation in this area. The way FSR operates now, it does not really matter whether you are operating on a one-to-one basis or speaking to a group if you stray into giving personal financial advice without being licensed and without meeting all the requirements that come with that. Perhaps that is a good way of approaching the concern you have that, whether it is by a seminar, a one-on-one meeting or a small group scenario, if you are selling people property as an investment that purports to meet their personal financial needs then you will be captured. [51]

3.94 The Committee would like to see this loop-hole closed. The suggested definition of property investment advice should make it very difficult for spruikers to run any seminars based on real property if they do not have an AFS licence in place. The only carve-out would be in relation to "Educators delivering a course approved by ANTA (now DEWR)".

3.95 However, that also raises the wider issue of financial literacy, and the need for some sort of advisory service for ordinary Australians. The ACA commented:

> When we look at issues around financial literacy, maybe it is time that we also consider what we are now seeing as an advice gap for Australian consumers. For many people access to financial advice is beyond their means, but they do have the need to access it and maybe it is time to consider some of the kinds of initiatives that have been entered into overseas: looking at the provision of free advice through, say, the Citizens Advice Bureau in the UK, which is currently under pilot.[52]

3.96 The LIV recommends a consumer education campaign coupled with a central bureau providing information and advice to potential investors.[53]

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51 Ms Wolthuizen, *Transcript of evidence*, 15 April 2005, p. 46.

52 Ms Wolthuizen, *Transcript of evidence*, 15 April 2005, p. 39.

53 LIV, *Submission 19*, p. 3.

3.97 The Committee does not want to restrict the use of seminars or workshops as a legitimate marketing and communication tool. That would be unfair to honest property investment advisers and may indeed constrain the development of the legitimate property investment advice industry.

3.98 Furthermore, if the use of seminars is specifically restricted by regulation, property spruikers could just move on to use other means of contacting consumers (e.g. internet, direct mail, telemarketing, etc).

3.99 A better solution would be to make it difficult for spruikers to commence operating in the first place, and to continue operating, by giving regulatory agencies the ability to act quickly and proactively. The Committee considers that including real property under FSR will mean that spruikers promoting property will need an AFS license and be subject to all the related codes of conduct and probity. While no absolute guarantee against unscrupulous behaviour, it will be much more difficult for spruikers to operate.