



Response to Property Investment Advice Discussion paper

Ministerial Council on Consumer Affairs Working Party

Australian College Pty Ltd
ACN 104 401 827

:7/11 Ponderosa Pde,
Warriewood NSW 2102

PO Bos 1395
Mona vale, NSW 1660

Phone: 02 9999 6966
Fax 02 9999 0399
Email admin@australiancollege.com.au
Web www.australiancollege.com.au

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Question 2

Key Factors

a) The Question

What do you see as the key factors driving the growth in retail property investment in Australia in recent years?
[Section 3]

b) Response

It seems unlikely that this is the result of any single cause. Whilst changes in single factors (such as interest rates) could put a brake on it, the cause seems to be the result of the confluence of a number of factors. The analysis of these factors in section 3 seems to cover the scope of the causes. I think, however that the effect of the aggressive marketing of investment property seminars and the publications of authors such as Jan Somers etc have contributed significantly to it.

Question 3 **Appreciation of Risks**

a) The Question

Have retail investors generally had a sufficient appreciation of the down-side risks, associated with property investment? If you think a significant portion have not, can you suggest why this may be the case?
[Section 3]

b) Response

Retail property investors do not usually have an appreciation of the risks involved. This is particularly so when purchasing properties “off the plan”. Lulled by the concept of “It’s as safe as houses” many have failed to see the the essentially risky nature of engaging in a negatively geared investment under the guidance of less than scrupulous marketers.

Question 4 How the Investment Advice Market Operates Today

a) The Question

How does the market for investment advice about property operate in Australia today? How are advisory services being provided and by whom? [Section 4]

b) Response

The analysis in the paper seems accurate and comprehensive. It does however focus on a very real and present negative. There are, however, a number of practitioners in this area from most of the backgrounds described in the paper who would welcome a more professionally defined and regulated approach. The comments I have received from such people relate essentially to two things. The fear they share that the unethical practitioners are in fact going to damage a very real and beneficial market. Their wish to provide an ethical service that is congruent with their desire to behave with integrity and to cause their clients to become genuine beneficiaries rather than victims of the services they offer.

Question 5 Characterisation of Seminar Operators/Investment Promoters

a) The Question

Is our characterisation of the seminar operators/investment promoters fair and accurate? If not, in what respects is it inadequate? [Section 4]

b) Response

I feel the characterisation of the seminar providers is fair and accurate in so far as it relates to those providers who are clearly operating unethically. I feel it is inadequate in the sense that it runs the risk of stereotyping the offering of seminars as essentially unethical.

Seminars are one of many valid means of marketing and communication. Valid and ethical marketing and communication can only be of benefit to participants. I therefore have difficulty with the slippage in the media and in your paper into the use of the unqualified term “Seminar Provider” as meaning, “Unethical Seminar Provider”.

Understanding something of the power of such seminars, I believe there should be a standard of practice for seminar providers that relate particularly to the development and exercise of communication skills that do not abuse power or manipulate.

Question 6 Problems in the Property Investment Marketplace

a) The Question

In your view, are there significant problems associated with the property investment advice and training marketplace? If so, what are those problems and how extensive are they? What is the extent of consumer/investor detriment or loss? [Section 5]

b) Response

I feel the problems identified in section five are in general a fair and accurate representation of the practices of unethical practitioners in the investment property marketplace.

Question 7 Characterisation of the Problems

a) The Question

Is our characterisation of the problems associated with the property investment advice and training marketplace fair and accurate? Does it cover the main issues sufficiently? If not, in what respects is it inadequate? [Section 5]

b) Response

Following on from the answer to question five, I feel the characterisation of the problems identified in section five are fair, accurate and adequate.

Question 8 Property Advisory Activities of professional or Trade Groups

a) The Question

Leaving aside the unlicensed property investment promoters, are you aware of consumer problems associated with the property advisory activities of professional or trade groups? [Section 5]

b) Response

I have for some times been aware of problems relating to the investment advising activities of some real estate agents and accountants. I have seen some of these trade on their qualifications to imply to consumers that they were qualified to offer advice that in fact they were not qualified to offer. Many consumers are not aware of the specialised nature of many aspects of the investment and financial services industries. I suspect that many of these “advisers” actually believe they are competent when in fact they are not.

Question 9 Current Legal Framework

a) The Question

Do you have any comments on our outline of the current legal framework? Apart from those we have considered, are there other laws or regulatory mechanisms relevant to the regulation of property investment advice and training activities? [Section 6]

b) Response

The analysis in general matches my understanding.

It does not, however, in my view draw out sufficiently the power that already exists within the framework provided by the Corporations Act and ASIC Act. A good illustration of this relates to the view taken by ASIC in PS 122:27-29 where it speaks of negative and implied advice and uses the example of real estate advice. Whilst this PS is now superseded, the principles underlying it are not (cf PS 167). It seems therefore that the legal basis of a strong regulatory framework is at least in part already present.

This point has not been lost on many property investment advisers who have sought out our training. Commenting

on the comment in PS 122 that it would be hard to prove that the activities or real estate agents constituted implied or negative advice they said things like

“Heck (they actually said something stronger) in our case it would not be difficult to prove – giving investment advice is what we do – we are in the gun”.

Question 10 Objectives Of Government Intervention

a) The Question

Do you agree with the stated objectives of government intervention in the property investment advice market place? If not, what should government's objectives be? [Section 7]

b) The Response

I agree in general with the objectives of Government intervention within the current legal framework. I would however like to make a couple of observations.

The third bullet point under the expansion of the first objective is:

- advice is something more than disguised sales promotion or marketing

This seems to set up advice as something somehow opposed to sales and marketing and imply that sales promotion and marketing is essentially unethical. May I suggest that this is not the case and that such impressions must be carefully avoided.

May I also suggest that the government's objective should be to ensure that advice given within the context of sales and marketing is ethically and with integrity. This is what I see as being the main thrust of the second objective. Instead of conceptualising advice as essentially opposed to sales and marketing, see it as an essential part of these processes but a part which must be carefully managed. For instance, the advising skills listed in Appendix B of ASIC's PS 146 and enshrined as the elements of the NFITAB's ASIC Competencies are essentially the sales process as outlined many sales and marketing textbooks.

I feel that an outcome that recognises that ethical sales and marketing of investment properties is a valid and even

important activity enabling the availability of an important asset class to the investing public. I believe that such an approach would significantly contribute to the availability of the many social and economic benefits of an ethical and active investment property industry and hence contribute to the attainment of the third of the objectives.

Question 11 Meeting of Objectives

a) The Question

Are the objectives referred to in the previous question currently being met? [Section 7]

b) Response

I believe that in many cases the Government's objectives are being met. I personally have had the privilege of working with a number of investment property advisers for whom ethical behaviour is important. They see that as being something that is congruent with both the demands of their consciences and their commercial self interest. That is they see a better long term business outcome from a genuinely ethical approach.

I also believe that there are many who do not behave this way. I also concur with the views expressed expressed in section 7.2 of the discussion paper in that paper that

- practices at variance with community standards and expectations are quite widespread; and
- the standard of advice provided by property promoters frequently falls well short of what might be considered appropriate.

Question 12 Effectiveness of the Current Regulatory Framework

a) The Question

Can the objectives of government in relation to property investment advice be realised to an acceptable level within the current regulatory framework? [Section 7]

b) Response

I concur with the view that the government's objectives may not be able to be achieved within the current

regulatory framework. Whilst a regulatory framework does exist in the financial services area (the FSR) that is growing in its effectiveness to address investment property matters is severely restricted by limits set up by the nature of current legislation and jurisdictional boundaries.

Question 13 Scope of NewLaws

a) The Question

If a new regulatory scheme were to be introduced, what should its scope or coverage be? What activities should be covered, in respect of what types of property, and who should be protected? Do you agree that related advice about the financing of property investment should be covered? [Section 8]

b) Response

I would recommend that the regulatory scheme introduced would have to have the scope of covering all aspects of property related investment. I would argue that the regime established by the FSR has provided an effective framework for that addressing of this problem. This approach well covers the definition of who is protected by the regime as retail investors and how the activities regulated are defined through the definitions of financial product advice and service. I see the exclusion of investment property considerations from the scheme as an inconsistency that I hope this discussion paper is beginning to address.

I believe it is critically important for any new regulation to achieve the possibility of seamless integration with the FSR regime. This will allow for the development of a uniformity of practice, less potential loopholes and perhaps most significantly less confusion for consumers.

From an investor's point of view, investment property is no more than another asset class that should be equally selectable alongside other asset classes such as managed funds, managed investments shares, derivatives and securities etc. This is because when a property is being considered for investment purposes, the consideration and hence the advice being given relates to the investment characteristics of the property. Whilst these characteristics arise from the nature of any real estate asset in question, the consideration and evaluation of these assets for investment purposes is essentially the same as for other

asset classes. Within this framework, there should be no difference in the regulation of advice given for residential, commercial or other properties.

Question 14 Carve Out

a) The Question

If a new regulatory scheme were to be introduced, would a “carve-out” from the regulatory scheme be justified for any particular professional or trade groups, or in respect of any particular activities? If so, why? [Section 8]

b) Response

I see no need for “carve outs”. The advising activities in question here may be seen to be at odds with the essential nature of a real estate agent’s duties a vendor’s agent. Real estate agents who wanted to market properties via an advising process would need to get the vendor’s position to do so. This would particularly be the case for real estate agents who sought to provide personal advice. Carving out real estate agents would open the door for the continuation of conflicted practices by those who by law are essentially not permitted to be guided by purchaser interests. Their brief is to get the best price for the vendor.

I would also suggest that it would be invalid to provide real estate agents with a general advice exemption or carve out without adequate training. The reason for this is that advice related to the investment nature of any property requires a high level of investment related competence. I would argue that a real estate agent who is influencing a potential buyer to purchase a property by providing general advice about the investment characteristics of a real estate asset should be competent to make such comments. Whilst general advice does not take into account the personal needs and objectives of a purchaser, it does require considerable competence related to the nature of investing.

There is therefore no essential duality of regulation were a new regulatory scheme introduced at any level. What is happening is to distinguish between two separate but related processes. One is the advising process by which an investor is deciding whether or not to become a buyer. The other is the process by which an investor who has decided to become a buyer engages with the vendor of property through the vendor’s agent and begins the bidding process. The first of these is at present unregulated and often invalidly subsumed into the marketing activities of real estate agents. The second of these is the proper domain of the real estate agent and is regulated by the various state real estate acts.

Purchasers who are not investors simply start at the bidding process.

I have included a “Service guide” form an investment property company that is setting up to provide ethical advice. This service offering has been set up to be consistent with NSW law and carefully distinguishes between the role of the investment property adviser and the real estate agent.

Question 15 Role of Self Regulation

a) The Question

Is there a role for self-regulatory or co-regulatory mechanisms (for example a voluntary industry code or a mandatory code) in the regulation of property investment advice? [Section 9]

b) Response

In my view any degree of self-regulation requires the existence of experienced and competent Professional Associations¹. Such bodies, however, need a clear and strong regulatory framework in which to operate. The Association of Financial Advisers (AFA) is one such body and has recently adopted Investment Property Advising as one of its disciplines. I am not sure that self-regulation alone will work. It seems to me that for regulation to work effectively there needs to be a strong government regulatory regime working hand in hand with the associations. Such an arrangement is working well in the regular meetings between ASIC and the AFA.

I would therefore argue for a comprehensive disclosure and licensing regime supported by professional association liaisons such as are now operating in the FSR framework. This would have the further advantage of maintaining procedural consistency across all advising disciplines.

¹ A professional association must be carefully distinguished from other sorts of industry associations. In this view a professional association is one that if focussed on the activities and practices standards of practitioners. By contrast other industry associations may focus on the activities of product issuers etc. Some associations have tried to incorporate both and have resulted in significant internal conflicts of interest in which the interests of the product issuers are to see the rest of the association members become essentially compliant distribution channels for their products instead of being the autonomous responsible professionals they are representing themselves to be in the marketplace.

Question 16 Prescriptiveness of Regime

a) The Question

If a new regulatory scheme were to be introduced, how detailed and prescriptive should the scheme be? Are there particular regulatory requirements or mechanisms that should/should not be introduced? Should those involved in the provision of advice about property investment be required to be licensed? [Section 9]

b) Response

Given that the FSR is now well established, I would recommend that any new scheme is modelled on it. I see this scheme as being essentially well conceived and in a rapid process of development as it is being implemented. I would argue strongly for the benefits that would arise from ensuring consistency in approach. To illustrate this I have attached a copy of the AFA's professional standard for Investment Property Advising. This is modelled closely on the ASIC standards published by the National Finance Industry Training Advisory Body (NFITAB) as part of the FNB99 Financial Services Training Package and as part process by which they took over operation of the ASIC training registers. It illustrates how seamlessly investment property advising could be incorporated into the present regime.

Question 17 Preferred Option

a) The Question

What is your preferred Option among those outlined in section 9? Why? Are there other or variant Options that we should consider? [Section 9]

b) Response

Option 3 for reasons already discussed. I would like to see the FSR extended to cover all forms of advising. I do not see this as conflicting with the essential nature of real estate practice.

Question 18 Commonwealth or State

a) The Question

If a new regulatory scheme were to be introduced, should it be a Commonwealth or a State and Territory responsibility?
[Section 10]

b) Response

I would prefer Commonwealth to ensure national uniformity and simplicity. Investment property advising is already a national activity.

Question 19 Further Comments

a) The Question

Is there other information you wish to provide? Are there other issues you wish to raise? Do you have any further comments? [Section 11]

b) Response

We have successfully trialled the implementation of training related to the implementation of the AFA standard for Investment Property advising. This has been very well received and is gathering considerable interest.

In this regard we have developed:

- An Investment Property Services Guide modelled along the lines of an FSG as specified in ASIC's PS 175.
- A Statement of Advice template for personal advice giving based on ASIC's PS 175.
- An Investment Property Services Guide based along the lines of a PDS as specified by ASIC's PS 168.

I have attached a copy of each of these along with a training module designed as a supplement to stand alongside the FNB50802 Diploma of Financial Services (Financial Planning). Please note the training module is currently being updated. It does however illustrate how seamlessly FSR approach could cover Investment Property Advising.