

18th February 2005

The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Suite SG.64
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into Regulation of Property Investment Advice

Enclosed is our submission to the inquiry into regulation of property investment advice.

Wakelin Property Advisory, the Melbourne-based company of which I am co-founder, has been specialising in advising investors and home owners on the full spectrum of residential real estate matters since the mid-90s. Since the inception of the company, we have been providing prospective investors with unbiased advice and information by means of our well-respected public education program. I co-present this program with directors, Richard Wakelin and Paul Nugent.

I would very much appreciate the opportunity to give evidence at the public hearings following consideration of the submissions by the Committee.

My qualifications and credentials include:

- a Bachelor of Education degree from Victoria College Rusden
- Affiliate Membership of the Real Estate Institute of Victoria
- Membership of the Public Relations Institute of Australia, and
- Membership of the Australian Institute of Company Directors.

I am also a Board Member (Non-Executive Director) of the Australian Scholarships Group Friendly Society Ltd.

Over the years Wakelin Property Advisory has built strong links with major national and local media and I am regularly asked for impartial comment on a range of property-related issues by *The Age*, *The Australian*, *The Australian Financial Review*, *The Bulletin*, *The Herald Sun*, *Money Magazine*, *A Current Affair*, *ABC News*, and the *7:30 Report*. I am also the Victorian correspondent for *Australian Property Investor* magazine, and co-host the property segment on Melbourne's 774 ABC Saturday morning finance talkback program. I am frequently invited to speak on property and business-related topics. Richard Wakelin and I are co-authors of the best-selling book, *Streets Ahead: How to Make Money from Residential Property*, which was published in 2002.

If you have any queries in relation to our submission please contact Sue Montague, Communications Manager at Wakelin Property Advisory, on (03) 9859 9595.

Yours faithfully
WAKELIN PROPERTY ADVISORY

Monique Wakelin
Co-Founder

WAKELIN PROPERTY ADVISORY

**SUBMISSION TO THE
PARLIAMENTARY JOINT COMMITTEE ON
CORPORATIONS AND FINANCIAL SERVICES**

**INQUIRY INTO THE REGULATION OF
PROPERTY INVESTMENT ADVICE**

By Monique Wakelin
Co-Founder
Wakelin Property Advisory

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SUMMARY

At present advisers are not required to disclose their financial and other interests when they recommend a direct investment in property. The advice given by non-independent advisers may be biased because they receive remuneration and incentives from sources other than their client. **The goal of any new regulatory intervention in the property investment advice industry should be to create transparency.**

A client should have a right to know whether their adviser is independent or non-independent. New regulation should clearly differentiate between bona fide advisers who are providing advice and those selling products and services under the guise of giving advice.

Sufficient law to protect the consumer from misleading or deceptive advice already exists. While the introduction of a regulatory regime that mandates a process which all property investment advisers must follow is important, it may have no appreciable effect on the quality of advice. Moreover, the added cost of compliance would certainly add to the cost of independent advice.

The introduction of a regime that has high compliance costs may deny consumers access to independent advisers, who in turn would have to recover the total cost of compliance from the consumer. It would be a bizarre result if heavy-handed regulation destroyed the independent segment of the industry and left only those who have conflicts of interest and receive secret commissions.

It is our view that any new regulations should apply to any individual, trustee, partnership or corporation that provides purchase recommendation advice to a property investor. It should not apply to people buying a home for their own occupation.

We make the following submissions:

1. Existing legislation adequately protects consumers of property investment advice; but
2. Property investment advisers must be required to disclose any interest they have in the subject matter of the advice including details of any remuneration or incentives they receive from sources other than the client, how they get paid, and the quantum of those payments;
3. Under no circumstances should investment property be included as a “financial product” in Chapter 7 of the *Corporations Act*; and
4. Any new regulation should be designed to avoid high compliance costs.

(a) HOW EFFECTIVE IS THE CURRENT REGULATION?

The property investment advice industry comprises two distinct groups:

- independent property advisers; and
- non-independent property advisers.

Independent property advisers give advice on property investment and their only source of income comes directly from the consumer who uses their advice. This includes:

- independent property consultants who charge on a fee-for-service basis;
- buyers advocates;
- valuers; and
- accountants and solicitors, provided they are not recommending properties from which they may derive any kind of remuneration.

Non-independent property advisers are generally people who purport to give advice on property investment but who derive some or all of their income from sources other than the consumer. This includes:

- real estate agents;
- property entrepreneurs;
- developers;
- mortgage brokers;
- mortgage originators;
- financiers;
- financial planners; and
- some solicitors and accountants;
- builders;
- architects; and
- wealth creation “trainers” or “educators”.

Non-independent property advisers pose the greatest danger to the consumer because the nature of their investment advice is often driven by their source(s) of income rather than the needs of the consumer/investor.

Consumer Regulation

Section 52 of the *Trade Practices Act 1974*, which has been adopted in the various state and territory fair trading legislation, has been drafted broadly to give consumers protection against advisers who engage in “misleading or deceptive conduct” or conduct, which is “likely to mislead or deceive.”

However the legislation suffers from three main weaknesses:

- first, the consumer may not always recognise that they have been misled until they incur losses as a result of a poor investment decision;
- second, the consumer may not have the financial resources to take action against the adviser, especially where they have parted with significant funds; and
- third, 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.

To help overcome these weaknesses it is necessary to empower the consumer with knowledge of their adviser’s interests. This can be done by imposing a mandatory duty on the property adviser to disclose any conflicts of interest including principal and agent relationships, together with the source and quantum of any commissions, fees or income derived from sources other than the client.

Secret Commissions

Under present law there is no duty on “property investment advisers” who are not licensed real estate agents to disclose secret commissions. The result is that the consumer may base his or her investment decision on information that is biased or in the adviser’s best financial interests.

We submit that all advisers should, before providing any advice to the consumer or investor, have a duty to disclose any interest, commission or benefit that they will receive as a result of the consumer acting on that advice.

The *Secret Commissions Act 1905* is a piece of special purpose legislation that does not apply to these circumstances. It does however define secret gifts to include:

“valuable consideration of any kind, and particularly includes discounts, commission and rebates, bonuses, deductions and percentages, and also employment”.

We would encourage the Committee to adopt this definition in the implementation of any new disclosure regulations.

Financial Services Laws

The Commonwealth Government essentially regulates advisers under two forms of regulation:

- Part 2, Division 2 of *Australian Securities and Investments Commission Act 2001*; and
- Chapter 5C (Managed Investment Finance Schemes) and Chapter 7 (Financial Services and Markets) of the *Corporations Act 2001*.

Currently, financial services laws have only limited application to property investment advice and property-related wealth creation training activities. This is because the definitions of “financial product” and “making a financial investment” under section 763A and 763B of the *Corporations Act*, do not include making a direct investment in real property. The rationale for this omission was possibly that the Commonwealth Government viewed real property as the domain of the state governments. It may also have considered that real property is shelter, and as such a basic commodity rather than a financial product. However, property investment advisers will be caught by the legislation where they advise or deal in a “managed investment scheme”, or where they advise or deal in “financial products” as part of their education seminars or other activities.

If Chapter 7 of the *Corporations Act* were to be modified, we would advocate excluding independent property advisers (that is, those whose sole income is from their clients) from its application.

It would be overwhelmingly beneficial to individual consumers if they could have access to independent advice on property investment. This would have a flow-on benefit for the economy.

(b) ALLEGATIONS OF PROPERTY INVESTMENT ADVISERS ENGAGING IN BEHAVIOUR INCLUDING:

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

Education seminars and workshops can play a useful role in empowering consumers to make better investment decisions, but only where the advice given is factual, accurate and impartial.

Transparency can be improved through compulsory disclosure of the fact that financial products and/or properties may be promoted to attendees before, during or after the seminar or workshop.

The consumer should also have access to advisers who are well-qualified to give investment advice. The introduction of compulsory training units for the property investment advice industry as part of the existing real estate agent’s licence course would be a useful means of developing property investment advice skills and ethical standards within the industry.

(ii) habitual use of high pressure techniques in order to induce investment decisions;

It is our observation that the habitual use of high pressure sales techniques is generally limited to non-independent advisers, developers and marketeers whose income is derived from a source or sources other than the consumer whom they are advising.

Consumers would be best protected if non-independent advisers were compelled to disclose all third party interests. If a consumer then decides to follow the advice of a non-independent adviser, at least they are more likely to be aware of the risk that the advice may be skewed to optimise the benefit to the adviser.

Investments that seem too good to be true generally are. While some investors have been misled by unscrupulous marketeers masquerading as advisers, it can also be observed that there are a number of investors who, having made bad investments, cast around for someone else to blame. No legislation, however comprehensive, can prevent an individual acting from naivety or greed.

(iii) failure to disclose interests they may have in properties they are selling; and

(iv) failure to disclose commissions and fees associated with their services

All property advisers should have a mandatory duty to disclose and provide the consumer with the following information before they are appointed by the consumer:

- any conflicts of interest;
- the source and quantum of commissions, discounts, rebates or income derived from sources other than the client;
- any related or associated bodies involved in the transaction; and
- the nature of any arrangement with other service providers recommended by the adviser.

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

The focus of any new regulation should be on empowering consumers to make informed decisions.

However, there are some significant problems and unintended consequences that could result from a requirement to disclose downside risk.

- **Masking.** Advisers may tend to create long lists of all the possible risks. Many of these risks could have small consequences or could be unlikely to occur. A few could be really important. However, the important risks could be hidden among the many. The sheer volume of identified risks may mask the important ones;
- **Standardisation.** It will not take long before an industry-standard list of risks is established. Once this occurs, all advisers will disclose a standard list of risks. As a result, consumers/investors may not be able to make comparisons between competing property investment decisions on the basis of the disclosed risks; and
- **Generalisation.** Standardised and generic risk statements may fail to alert the consumer to the specific risks associated with the particular transaction that they are contemplating.

(c) **WHETHER IT IS APPROPRIATE FOR PROPERTY INVESTMENT ADVISERS TO SIMULTANEOUSLY SELL AN INTEREST IN PROPERTY AND FINANCIAL PRODUCTS ENABLING SUCH PURCHASES**

Anyone who sells an interest in property is not an adviser. They are a marketeer, vendor or real estate agent. Anyone who sells a financial product is already regulated by the *Corporations Act 2001*.

The phenomenon of the “one stop shop” concept often cleverly masks a total lack of independence by purporting to exclusively promote convenience for the consumer. The consumer generally has no idea that substantial payments are often made to affiliated valuers, solicitors, accountants, financiers and other third parties to conduct their business and provide information in a manner which is consistent with, or which enhances, the developer’s/marketeer’s profit margins. The activities carried out by these third parties are specialist, professional functions and should remain totally independent.

The danger is that the consumer may believe that the package deal on offer has been pre-selected and optimised for them when in fact it has been selected to optimise income for the so-called “adviser”.

We believe that all parties involved in providing these “one stop shops” should, at the very least, disclose the nature and quantum of payments and benefits they receive as a result of the package. These operators are neither independent, nor should the term “adviser” be applied to them.

However, provided they make full disclosure of their interests to consumers, we believe it would be acceptable for real estate agents or financial advisers to also give property investment advice.

Financial Planners

It is our observation that financial planners generally receive little or no education in direct property investment. As a result, consumers are in danger of receiving ill-informed and often biased advice.

We believe that direct property ownership should form a significant part of the education and qualification process for qualification as a financial planner, if in fact financial planners wish to offer property investment advice.

(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;**

Many property investors invest across state borders. Similarly, many property investment advisers, real estate agents, developers and financiers operate across state borders. It would clearly be helpful if any new regulatory framework had national coverage.

There is currently no national body that represents the interests of independent property advisers. Non-independent advisers are typically represented by various state-based and national bodies depending on the industry they feel most affiliated with. Examples include state-based Real Estate Institutes, the Australian Bankers Association, the Australian Property Institute and the National Credit Union Association. The industry is fragmented.

We therefore submit that implementation of a self-regulatory regime could face some difficulty.

We submit that to be effective regulation needs to be implemented by the Commonwealth.

(e) WHETHER LEGAL PROCESSES PROVIDE EFFECTIVE AND EASILY ACCESSIBLE REMEDIES TO CONSUMERS IN DISPUTE WITH PROPERTY ADVISERS

We make no submission on this issue.

APPENDIX 1

WAKELIN PROPERTY ADVISORY AND MONIQUE WAKELIN

About Wakelin Property Advisory

Wakelin Property Advisory is a Melbourne-based independent residential property advisory service specialising in the following practice areas:

- investor acquisition;
- homebuyer acquisition;
- investment portfolio review;
- rental search and lease negotiation;
- advice on property disposal;
- supervision and overseeing of rental management; and
- public education.

Monique Wakelin

Monique Wakelin, Co-Founder of Wakelin Property Advisory, holds a Bachelor of Education degree from Victoria College Rusden. She is an Affiliate Member of the Real Estate Institute of Victoria, and a Member of the Public Relations Institute of Australia and the Australian Institute of Company Directors. She also serves on the Board of Directors (Non-Executive Director) of the Australian Scholarships Group Friendly Society Ltd.

Monique contributes regularly to *The Age*, *The Australian*, *The Australian Financial Review*, *The Bulletin*, *The Herald Sun*, *Money Magazine*, *A Current Affair*, *ABC News*, and the *7:30 Report*. She is the Victorian correspondent for *Australian Property Investor* magazine, co-hosts the property segment of Melbourne's 774 ABC Saturday morning finance talkback, and is a sought-after public speaker on property and business-related topics.

Monique is co-author of the best-selling book, *Streets Ahead: How to Make Money from Residential Property*. This all-encompassing publication provides authentic, independent advice about property investment in Australia, dispels common property myths, and takes readers through every phase of property investment – from asset selection and bidding at auction, to rental management and taxation.