



**Australian  
Competition &  
Consumer  
Commission**

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

*Inquiry into the regulation of property investment advice*

**February 2005**

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# 1. INTRODUCTION

On 8 December 2004, the Parliamentary Joint Committee on Corporations and Financial Services resolved to inquire into the regulation of property investment advice by the Commonwealth, with reference to:

- (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.

The Committee will report on the inquiry by 23 June 2005.

The Australian Competition and Consumer Commission's (ACCC's) submission addresses Terms of Reference (a) and (e).

## 2. Overview and Recommendations

### *The TPA*

The *Trade Practices Act 1974* ('TPA') has been in operation for over 30 years. Consumer protection is a key focus of this national law, and as part of this, the TPA prohibits misleading and deceptive conduct. Unfair practices that adversely affect consumers may be found in any sector of the economy and, increasingly, by way of international cross-border activities. Without active and effective regulation, these practices can impact on the welfare of Australians.

The property investment sector, and property investment advisors in particular, are subject to the generic operation of the TPA. Where the activities of such advisors and their associates fall within the provisions of the TPA, the ACCC has used, and will continue to use, the provisions of the TPA to the fullest extent possible against them.

Past examples of this include the *Oceana*<sup>1</sup> case, and more recently, the ACCC's targeting of misleading and deceptive conduct by real estate property 'operators', including:

- two-tier marketing;
- unconscionable conduct by financial institutions;
- advice given by financial consultants, solicitors and valuers; and
- real estate investment seminars.

The latter two categories include property investment advice conduct the subject of the Joint Committee's current inquiry.<sup>2</sup>

Of particular concern to the ACCC were practices in which unsophisticated investors were being enticed (by 'spruikers') to join property investment programs (often delivered via 'seminars') promising rapid acquisition of significant personal wealth but which were only likely to provide them with large debts and advice they had little hope of utilising.

The ACCC has taken a number of enforcement actions and initiated a number of investigations and cooperative compliance actions under this campaign (see Section 4 and **Attachment 1** for more details of the campaign).

During the course of the campaign, the ACCC worked closely with the Australian Securities and Investments Commission (ASIC) on property related matters. This work was part of a project which has led to a new Memorandum of Understanding and associated arrangements for

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<sup>1</sup> 'Oceana Commercial Pty Ltd & Ors', *ACCC Journal*, ACCC Website, see link at: <http://www.accc.gov.au/content/index.phtml/itemId/538101>

<sup>2</sup> 'ACCC targets property "Scammers"', ACCC Media Release, MR No. 185/03, 2nd September 2003 at <http://www.accc.gov.au/content/index.phtml/itemId/360680/fromItemId/378016>.

improving and speeding up cooperation and joint action between the two agencies. (More details are under Section 3.3 below)

In the ACCC's view, the outcome of this compliance project was positive. The ACCC's complaint numbers significantly decreased over the period of increased activity, and it shows that, at least as far as the provisions of the TPA are concerned, a properly focussed combination of enforcement and compliance activity, in conjunction with other regulators, can have a beneficial impact on compliance in the property investment industry and to better protection for consumers.

**Recommendation 1:**

That the current provisions of the TPA dealing with misleading and deceptive conduct (sections 52, 53 and related provisions) can be used effectively to regulate aspects of the property investment advice industry dealing with representations made to consumers, including about future matters.

However, the ACCC campaign has also highlighted several issues, which have been of ongoing concern to the ACCC's ability to effectively enforce the provisions of the TPA.

*The TPA and 'financial services'*

The first issue stems from the current regulatory framework, in which the regulation of misleading and deceptive conduct in relation to financial services rests with ASIC<sup>3</sup>. It is the ACCC's view that conduct in the property investment advising industry in possible contravention of either the TPA or the mirror provisions in the ASIC Act, (as with other industries of a similar nature), is not always easily defined as falling within the technical legislative definitions that apply to financial services, financial advice and financial products.

Presently this uncertainty is addressed in practical terms by the operation of a newly revised Memorandum of Understanding and close co-operation between ACCC and ASIC, supported by cross-delegations between the ACCC and ASIC, to determine who should take action in respect of particular matters.

Broadly stated, the ACCC continues to pursue misleading and deceptive conduct in advertising and seminar content related primarily to property, while ASIC will take action in relation to misleading and deceptive advertising and content which is related to financial services, and to the offering of financial advice from a person not licensed to do so.

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<sup>3</sup> Although the TPA has provisions to deal with misleading and deceptive conduct (and unconscionable conduct) in trade and commerce, a review of Australia's financial services sector in 1997 saw a carve-out of the ACCC's role in financial services and the creation of ASIC to deal with consumer protection in financial services.

The ACCC considers, however, that a more effective regulatory approach would be to allow either regulator to operate with a full range of concurrent legislative powers. This would require legislative amendments to reverse the 1998 carve out of the role of the ACCC in financial services from the TPA.

This is because the reality is that conduct may involve a combination of factors which may contravene both TPA and ASIC provisions<sup>4</sup>. Hence, it is not always clear, to the regulators or even the regulated, as to who is to deal with such conduct. Further, separating elements of what is in fact a single course of conduct into different jurisdictions can potentially weaken regulators' abilities to investigate or act if, when considered as a whole, the course of conduct constitutes misleading or deceptive conduct, false representations or other breaches of the consumer protection provisions of the TPA or ASIC Act. This issue is addressed further in Section 4. (It should however be noted that the 'grey area' around financial services is not just confined to property investment activities, and extends to other areas of activity including debt collection.)

The priority should be to ensure consumers are protected by overlapping jurisdictional reaches of both regulators, thereby allowing the regulator who is best placed to take the action to operate promptly and without the need to settle the administrative requirements of a delegation or to face procedural uncertainty in the Courts.

The aim is not to reverse the fundamental regulatory divide on consumer protection between the ACCC and ASIC, but rather to ensure flexibility of action and to maintain the regulators' investigative and enforcement abilities when matters within the core work of either the ACCC or ASIC also involve elements that may take it outside those core areas. Matters involving conduct that falls within both jurisdictions should be able to be considered in the same comprehensive manner as matters that are completely, or predominantly, within one jurisdiction.

Concurrent regulatory arrangements in consumer protection are already a feature of Australia's federal system with ACCC and ASIC operating at the national level and the States and Territories operating with their own fair trading legislation and various licensing arrangements (for example, State licensing and regulation of real estate agents).

**Recommendation 2:**

Amend the Trade Practices Act (TPA) and the ASIC Act to enable the ACCC to also pursue conduct in relation to financial services where that conduct is related to, and part of, conduct primarily in contravention of Parts IVA, V and VC of the TPA, such that either the ACCC or ASIC can operate in their own right in protecting consumers – i.e. concurrent roles for both regulators

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<sup>4</sup> Often 'property seminars' or 'investment seminars' offer information about both non-financial services (such as real property) and financial services (such as mortgages).

## *The TPA and remedies*

The ACCC's second concern relates to the Parliamentary Joint Committee's call for an assessment of whether the current legal processes provide effective and easily accessible remedies for consumers.

In the ACCC's view, the provisions of the TPA relating to remedies do not sufficiently enable consumers (or the ACCC) to obtain redress from contravening conduct, or provide a sufficient deterrent to those engaging in such conduct. In relation to the property investment industry, the losses involved can amount to significant sums of money, and for many consumers, it can be their life savings.

The first suggested area of reform would be to address the limitation in the TPA which restricts remedies to those consumers that have given *prior* written consent to a claim of their behalf.<sup>5</sup> The effect of this is that while the ACCC (and ASIC) can prove a contravention of the law involving misleading and deceptive conduct, the restitution obtainable under the TPA is limited to those consumers who have opted-in to the action.

This can result in the offender effectively retaining the proceeds of their actions and being faced with, at best, court orders for injunctions, declarations, payments of court costs and corrective advertising. Even this scenario may take many months and lead to very little financial reimbursement for consumers.<sup>6</sup>

The fact that a person who contravenes the TPA is able to retain substantial amounts of money that have been unfairly obtained needs to be addressed. Disgorgement is a complementary remedy to restitution and it is recognised in Australian law. The ACCC would like to see express statutory recognition of this remedy as an order that may be granted by a court to deprive wrongdoers of their unfair gains. The funds that are recovered could then be used for specific or general consumer redress.

In parallel with more effective or accessible remedies for consumers, more effective and accessible penalties should also be available for regulatory agencies when dealing with those who cause the damage and loss to consumers. Currently, to obtain fines or monetary penalties under the TPA, the ACCC must pursue a criminal prosecution, which is considerably more resource-intensive than civil litigation.<sup>7</sup>

In the ACCC's view, more effective remedies and deterrents are required.

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<sup>5</sup> Minh Lam, 'Call to boost class action', *The West Australian*, 18 January 2005.

<sup>6</sup> In contrast, in some overseas jurisdictions a court may decide to issue an order specifying a group of consumers (including non-parties) who should be given refunds or damages.

<sup>7</sup> Civil pecuniary penalties currently only apply to Part IV (restrictive trade practices) and some GST-related matters.

**Recommendation 3:**

Amend the TPA to enhance the remedies available and to provide more effective deterrents to contravening conduct. In particular, to allow for:

- (i) orders for restitution to all consumers adversely affected, not just those who have formally signed as parties to any litigation proceedings;
- (ii) statutory recognition of disgorgement as a complementary remedy that a court may order to deprive those who contravene the TPA of unfairly obtained benefits; and
- (iii) civil pecuniary penalties for breaches of the provisions of Part V of the TPA (other than section 52).



### 3. The current regulatory environment

#### 3.1 *Australian Competition and Consumer Commission* – *role, responsibility and powers*

##### *The TPA*

The objective of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection<sup>8</sup>. The TPA draws its constitutional validity from several heads of power in the Commonwealth Constitution. Primarily, the TPA relies on the corporations power<sup>9</sup>, the trade and commerce power<sup>10</sup> and the territories power. Section 6(3) of the TPA extends the TPA to individuals to the extent that that it involves reliance on the post and telegraph power<sup>11</sup>.

The TPA applies to Australian businesses and regulates the conduct of Australian businesses by proscribing unacceptable conduct. Part V of the TPA contains a number of important consumer protection provisions, designed to protect consumers from unfair practices. The main focus of Part V is on misleading and deceptive conduct and misrepresentations. Other parts of the TPA also provide protection for consumers, for example Part IVA (unconscionable conduct).

##### *The ACCC*

The ACCC is an independent statutory authority with responsibility for ensuring compliance with, and enforcement of, the TPA. The ACCC was established in November 1995 by the merger of the former Trade Practices Commission and the Prices Surveillance Authority. The ACCC has offices in all capital cities and in Townsville.

The ACCC has a significant role in the administration of competition and consumer protection policy in Australia. The Commission is the only national agency dealing generally with competition matters and the only agency responsible for enforcing the TPA and associated State and Territory legislation.

In fair trading and consumer protection the Commission's role complements the primary consumer protection role of state and territory consumer affairs agencies, which administer largely mirror legislation (Fair Trading legislation) in their jurisdictions<sup>12</sup>.

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<sup>8</sup> TPA, Section 2.

<sup>9</sup> *Commonwealth of Australia Constitution Act 1901*: section 51(xx).

<sup>10</sup> *ibid*: section 51(i).

<sup>11</sup> *ibid*: section 51(v).

<sup>12</sup> Several States and Territories have amended their Fair Trading legislation in recent years to significantly enhance the enforcement powers of their respective fair trading and consumer affairs offices. These powers include (not all jurisdictions have made all amendments): substantiation of claims; prison terms; powers after legal entry effected (e.g. search and seizure powers); 'name and shame' powers (for Commissioners and Ministers); and the ability to issue "show cause" notices, 'cease trading' orders and infringement notices.

The ACCC's objectives include:

- securing compliance with the TPA by responding to complaints and inquiries and by observing market conduct and initiating action when appropriate;
- fostering competition, fair trading and protection of consumers by taking initiatives to overcome market problems; and
- informing the community at large about the TPA and its specific implications for business and consumers.

The functions conferred on the ACCC under section 28 of the TPA include examining and reporting on Australia's consumer protection laws. The ACCC also has the function to conduct research in relation to matters affecting the interests of consumers and to make known, for the guidance of consumers, the rights and obligations of persons under Australian consumer protection laws.

A key role of the ACCC under the TPA is as an enforcement agency.

In this role, the ACCC may bring proceedings for alleged contraventions of the TPA, such as civil proceedings in relation to a number of provisions in Part V. In doing so, the ACCC can seek remedial orders such as injunctions, corrective advertising and community service. The ACCC may also bring actions in the Federal Court for breaches of the provisions relating to safety standards, information standards and bans, and may seek injunctions and other orders. Matters for criminal proceedings under Part VC are referred to the Director of Public Prosecutions. It should be noted that criminal litigation can be very resource-intensive as there are higher evidential requirements than for civil litigation. Relatively fewer criminal cases are undertaken than civil.

The ACCC may also bring representative actions (under section 87(1B)) for contraventions of the provisions of Parts IVA, IVB, V and VC of the TPA, seeking compensation for persons identified as having suffered damage as a result of the breach and who would otherwise have had to bring action on their own behalf. Consumers generally may take their own private action under the TPA to obtain remedies or, in an appropriate case, the ACCC may seek leave of the court to intervene in a private action.<sup>13</sup>

### **3.2 Consumer protection in financial services**

#### *The 1997 Financial System Inquiry*

The final report of the *Financial System Inquiry* (March 1997 – the “Wallis Report”) included recommendations that addressed a perceived potential for regulatory duplication in the financial system with the operation of the TPA and the separate regulatory provisions under the then *Corporations Law*. The specific regulator for the financial services industry became

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<sup>13</sup> See Part VI – Enforcement and remedies of the TPA e.g. sections 80 and 87. However, the ACCC may not bring actions, representative or otherwise, for consumers in contract disputes involving implied conditions and warranties (Divisions 2 and 2A of Part V). Proceedings in reliance on these provisions must be brought by the consumers themselves.

ASIC. Consumer protection in the context of financial services was seen as being a matter for an industry specific regulator such as ASIC rather than the ACCC. The resulting package of legislation, known as the Financial Sector Reform Acts, carved out from the TPA its coverage of *financial services* and inserted equivalent provisions in the ASIC Act.

The TPA retained its Part V consumer protection provisions and its Part IVA (unconscionable conduct) provisions to deal with matters other than defined financial services. A legislative scheme was also established for reciprocal delegations between the two regulators to deal with those cases which contained both financial services as well as the provision of other services or goods.

### *2003 Review of the outcomes of the Financial System Inquiry*

In August 2004, the Treasurer released the Financial Sector Advisory Council's report, *Review of the Outcomes of the Financial System Inquiry 1997*<sup>14</sup>. The report noted that there are some industry views '...that the division of responsibilities between the ACCC and ASIC was not clear in respect of consumer protection issues'.<sup>15</sup> The Council expressed the view that the specific role of the ACCC in the financial sector was perhaps not sufficiently examined by the Financial System Inquiry in 1997.<sup>16</sup>

The Council flagged the overlapping consumer protection roles as an emerging issue. The Council expressed the view that the issue required further clarification.<sup>17</sup>

### *Current jurisdiction*

Table 1 following provides an outline of the equivalent provisions for consumer protection currently contained in the TPA, ASIC Act and the *Corporations Act 2001*. These legislative schemes also contain equivalent provisions (not listed in the table) on conditions and warranties, unconscionable conduct (TPA- Part IVA), enforcement, remedies and offences.

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<sup>14</sup> The Hon Peter Costello MP, Treasurer, 'Financial Sector Advisory Council Review of the Outcomes of the Financial System Inquiry', Press Release No. 062, 2 August 2004. The Council's usual role is to provide confidential advice to the Treasurer and the Government, however the Treasurer publicly released the review in August 2004.

<sup>15</sup> *Review of the Outcomes of the Financial System Inquiry 1997*, Financial Sector Advisory Council, August 2003; p. 14.

<sup>16</sup> *ibid*: p. 10.

<sup>17</sup> *ibid*: p.10.

**Table 1 – Equivalent provisions dealing with consumer protection<sup>18</sup>**

<i>Consumer protection provision</i>	<i>TPA</i>	<i>ASIC Act</i>	<i>Corporations Act</i>
Representations about future matters made without reasonable grounds	s. 51A	s. 12BB	s. 769C
Misleading or deceptive conduct	s. 52	s. 12DA	s. 1041H
False or misleading representations	s. 53	s. 12DB	–
False representations and other misleading or offensive conduct in relation to land	s. 53A	s. 12DC	–
Cash price to be stated in certain circumstances	s. 53C	s. 12DD	–
Offering gifts and prizes	s. 54	s. 12DE	–
Certain misleading conduct in relation to services	s. 55A	s. 12DF	–
Bait advertising	s. 56	s. 12DG	–
Referral selling	s. 57	s. 12DH	–
Accepting payment without intending or being able to supply as ordered	s. 58	s. 12DI	–
Harassment and coercion	s. 60	s. 12DJ	–
Pyramid selling	s. 65AAA to s. 65AAE	s. 12DK	–
Unsolicited credit and debit cards	s. 63A	s. 12DL	–
Assertion of right to payment for unsolicited goods or services	s. 64	s. 12DM	–
Application of provisions to prescribed information providers	s. 65A	s. 12DN	–

ASIC's primary responsibility for consumer protection in *financial services* does not mean that the ACCC is precluded from general consumer protection in relation to conduct (such as advertising) that accompanies schemes for property investment.

Broadly stated, ASIC's jurisdiction in this area is based in legislative definitions that are used to define financial services, financial product advice and financial products.<sup>19</sup> The ASIC web site provides some guidance on these matters including a simplified explanation that differentiates between advice about real estate (which is not itself a financial product under the legislation administered by ASIC) and advice about a financial product which may satisfy the technical requirements of the legislation. Complexities arise because property investment may combine advice or representations about property and financial advice. This could happen, for example, when consumers are lured by advertisements emphasising property to the door of a seminar (or a real estate agency) and once inside they are given advice about comparing the merits of investing in securities and investing in real estate or are encouraged to take out particular financial instruments, such as specific types of loans, to fund the property purchase.<sup>20</sup>

<sup>18</sup> A useful summary of consumer protection in the context of financial services is found at Appendix D of the Productivity Commission's research report *Australian and New Zealand Competition and Consumer Protection Regimes* (16 December 2004). Table 2, above, draws on information contained in that report.

<sup>19</sup> See *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*.

<sup>20</sup> See, 'I am a real estate agent that sells investment properties. How will the Corporations Act affect me?' which is displayed under Frequently Asked Questions, QFS 50, Australian Securities and Investment Commission web site.

An examination of the nature of the actual investment is also required to determine jurisdiction. For example, the contribution by a consumer to funds used by a developer in connection with a property development as top-up finance may be regarded as a 'mezzanine' finance product. By contrast, a consumer who simply invests in a real estate property to secure title to the property may not be involved in obtaining a financial product, in the technical sense.

These issues are further complicated if an investment fails and the consumer is pressed for debt collection. Depending on the circumstances, payment of a debt may be viewed as a separate matter to the provision of an initial financial service, particularly if the debt is assigned, but in other cases the payment can be regarded as associated with a service which may be the subject of a complaint to the ACCC or ASIC. As identified in Table 1 above, both the TPA and the ASIC Act contain prohibitions on harassment and coercion.

Administratively, the ACCC and ASIC can in part address the issue by the use of reciprocal delegations or joint actions (see further below).

### **3.3 Cooperation between ACCC & ASIC**

The implementation of the financial sector reforms also involved formalising a cooperation agreement between ACCC and ASIC on 17 July 1998 to enable the two regulators to refer complaints to the most appropriate agency, exchange information (subject to relevant legal restrictions) and, if required, the undertaking of joint responses to problems in the market. The cooperation agreement was made publicly available.<sup>21</sup>

A revised cooperation agreement, in the form of a Memorandum of Understanding (MOU) was concluded between the two regulators on 15 December 2004 and it was issued publicly on 21 December 2004.<sup>22</sup> The MOU is available on the ACCC web site.<sup>23</sup>

The MOU sets out a framework for cooperation between the regulators but the MOU does not create legally binding obligations. Matters covered include:

- regular liaison meetings to foster the timely exchange of information;
- subject to any legal restrictions, the exchange of information on request and also on an unsolicited basis;
- referral of relevant consumer complaints to each other (as the appropriate receiving agency);
- reciprocal delegations;
- the establishment of a joint task force when appropriate;
- the protection of confidential information; and
- review of the operation of the MOU.

<sup>21</sup> 'ACCC/ASIC cooperation agreement', News Release MR 134/98, Australian Competition and Consumer Commission, 17 July 1998.

<sup>22</sup> 'ASIC and ACCC sign new MOU', News Release MR 295/04, Australian Competition and Consumer Commission, 21 December 2004.

<sup>23</sup> The link is at: <http://www.accc.gov.au/content/index.phtml/itemId/557202/fromItemId/2332>.

The MOU also contains a non-exhaustive list of the types of matters that are of interest to each regulator.

In addition to the MOU, both regulators have concluded more detailed written administrative arrangements in relation to areas of possible jurisdictional overlap, including where necessary the use of delegations. These procedural arrangements include arrangements for dealing with 'seminar' matters. One practical example of close cooperation on jurisdictional issues has been debt collection (see box below).

*Debt collection - a case study of agency cooperation*

Following the original amendments to the TPA and the ASIC Act in 1998 and more particularly since amendments in 2002 to the ASIC Act to include credit facilities in the definition of financial services, various issues in relation to the division of the jurisdiction relating to debt collection between the ACCC and ASIC have arisen. Consumer representatives, in particular, have expressed confusion.

The Acts administered by the ACCC and ASIC include provisions to protect consumers from inappropriate behaviour by a debt collector. These include prohibitions on the use of physical force or undue harassment or coercion in connection with payment for goods and services, including financial services. They also include prohibitions of misleading and deceptive conduct and unconscionable conduct in trade or commerce that apply to the debt collection context.

As noted in Section 3.3 above, the ACCC and ASIC have addressed areas of potential overlap or uncertainty administratively through the MOU entered into on 4 December 2004 and associated administrative arrangements. The ACCC and ASIC have also entered into a joint compliance project relating to debt collection. In the first phase of this project the agencies released a joint brochure - Complaints about debt collection activity - the responsibilities of Commonwealth agencies (November 2004). The brochure outlines the responsibilities of the two agencies in relation to debt collection (as reflected in the administrative arrangements). The text of the brochure appears in Annexure A.

The second phase of the project involves the joint review and updating of the ACCC's guideline Debt Collection and the Trade Practices Act released in 1999. A revised joint version of the guideline that will incorporate information regarding the responsibilities of the two agencies and other developments has now been released for public consultation.

## 4. The ACCC and real property matters

In September 2003, the ACCC noted a significant increase in property wealth creation schemes being marketed to the public. In response to this, the ACCC increased its compliance activity in this sector and the real property sector more generally.

The ACCC publicly announced a campaign to target misleading and deceptive conduct by real estate property 'operators', including:

- two-tier marketing;
- unconscionable conduct by financial institutions;
- advice given by financial consultants, solicitors and valuers; and
- real estate investment seminars.<sup>24</sup>

The latter two categories include the property investment advice conduct the subject of the Joint Committee's current inquiry.

### 4.1 The ACCC activities

The ACCC identified real property-related matters for potential further investigation, then investigated these complaints, and instituted a number of court actions.

Table 2 below summarises the ACCC's enforcement actions since about September 2003:

**Table 2 – The ACCC's enforcement actions**

Action	Matter/Respondent	Outcome/Current Status
Litigation	Henry Kaye/ National Investment Institute	Court made declarations of misleading and deceptive conduct; permanent injunctions granted ( <i>pending appeal</i> )
Litigation	Giann & Giann Pty Ltd (Break Free Events)	Court-ordered mediation held in January 2005; directions hearing set for February 2005.
Injunctions	National Training Centre	Corrective notices and corrective oral statements at seminar venues
Injunctions	Robert G Allen	Corrective notices and corrective oral statements at seminar venues
Information-seeking powers	Seven Network Limited	Powers confirmed by Full Federal Court

<sup>24</sup> 'ACCC targets property "Scammers"', ACCC Media Release, MR No. 185/03, 2nd September 2003 at <http://www.accc.gov.au/content/index.phtml/itemId/360680/fromItemId/378016>.

Litigation	Gary Peer and Associates Ltd	Awaiting court hearing for alleged underquoting of likely property prices
Litigation	Set Sale Realty Pty Ltd	Admitted false claims of 'ACCC approval'; injunctions; corrective advertising
Litigation	Morgan Pacific Pty Ltd	Court hearings proceeding for alleged misrepresentations in property seminar advertisements

Another notable case in recent times was the *Oceana* case. This case involved alleged representations made between 1997 and 1998, via seminars and individual presentations throughout Australia, that residential units at the Gold Coast would increase in value over a ten year period by approximately eight per cent per annum. The allegations involved a range of allegations including alleged representations as to future events without reasonable grounds, unconscionable conduct and misleading representations. In that matter, the ACCC was not successful.

The ACCC considered over 150 serious complaints about the real property industry since 1 September 2003. In addition to the eight matters set out above, in the same period the ACCC has investigated over 75 complaints and is currently pursuing more than a dozen separate active investigations into alleged breaches of the TPA within the real property industry.

As well as this enforcement activity, the ACCC conducted a major compliance project with the Real Estate Institute of Australia (REIA), based on its concerns about a range of alleged misleading and deceptive practices observed in the real estate industry nationally. Between December 2003 to June 2004, the ACCC assisted the REIA in developing compliance guidelines for REIA members. The guidelines included the ACCC's views covering misleading and deceptive conduct generally, conduct at auctions, property descriptions, price ranges, price offerings, advertising rebates, photographic representations, and two-tier marketing.

The ACCC also regularly liaised with ASIC in relation to each agency's investigations, sharing information, and to the extent possible, co-ordinated complaint handling and investigation management. These discussions developed during 2004 via an ACCC/ASIC liaison program (at Commissioner, senior officer and operational levels). Links were strengthened further when a Property Working Group was established in July 2004 as a sub-program of the wider ACCC/ASIC liaison process.

The ACCC also held discussions on property matters with State and Territory consumer protection agency officials.

The ACCC also publicised its message through speaking engagements and the media. The ACCC issued at least 16 media releases during the relevant period, and included references to its activities in the property sector in speeches given by the Chairman, Deputy Chair, Commissioners and senior staff, to a wide range of audiences including real estate industry groups.



For more detailed information on the ACCC's activities during this period, refer to **Attachment 1**.

#### **4.2 The ACCC's assessment of its real property activities**

One measure of the effectiveness of compliance activity is whether it results in or facilitates a substantial reduction in non-compliant conduct by the industry concerned. While it is difficult to show causal links to the ACCC's activities, or that of ASIC and the State and Territory regulators, it appears that the numbers of property related complaints and inquiries (to the ACCC at least) have dropped significantly from the higher levels seen early in mid to late 2003, when the ACCC's Infocentre reported an average of 8-10 complaints and inquiries nationally per day. In late November and early December 2003, the ACCC was receiving up to ten calls a day on Henry Kaye and the National Investment Institute alone. Complaint and inquiry rates reduced substantially during 2004, and the rate has now fallen to an average of around 2 property related complaints and inquiries nationally per day. It also appears that the level of misleading property seminar advertising has dropped in the mainstream press, and the positive promotion of property investment schemes in the electronic media also appears to have reduced substantially. Based on anecdotal evidence, the Commission believes that promoters have also modified the type of claims made in advertisements.

Again, the point should be made that complaints to the ACCC are usually related to issues potentially only dealing with the TPA. The ACCC has no comment about other behaviours in the property investment industry, and the any impact of those behaviours by the ACCC or others.

## **5. ACCC observations on law reform**

### ***5.1 Jurisdiction in relation to property investment advisers***

As set out above in Section 3.2, the Government's response to the 1997 Financial System Inquiry (the 'Wallis Report') included consumer protection provisions for financial services under the ASIC Act, separate from the TPA. The ACCC retained its consumer protection powers under Parts V and IVA of the TPA – for matters other than defined financial services. The ACCC and ASIC have developed a comprehensive cooperative arrangement, which operates in tandem with the legislative scheme established for reciprocal delegations between the two regulators, where necessary.

The ACCC and ASIC cooperative arrangement for the division of roles in regulating property investment advice is working effectively but, as with any arrangement, it can be enhanced. The administrative arrangements – which require co-operation on a case-by-case basis so cases with an overlap can be coordinated by the most appropriate regulator – do work but are potentially cumbersome.

If it is necessary for either agency to provide a delegation to the other in order to support jurisdiction, this adds to the administrative burden. In the broad sense, legal challenges to the validity of delegations are potential features of the law and it is worthwhile considering whether the current arrangements in this area could be simplified by legislative amendments that would confer concurrent operation of both regulatory schemes.

While the outcome of the ACCC's activities in the real property sector appeared to have a positive impact on compliance with the TPA (see Section 4 above), the campaign also highlighted several issues of ongoing concern to the ACCC's ability to effectively enforce the provisions of the TPA in relation to property investment advice.

The 'carve out' of financial services from the TPA under the current regulatory framework has created some uncertainty for consumers and regulators. It is not always easy to determine whether particular conduct falls within the technical legislative definitions of financial services, financial advice and financial products. Further, in some cases aspects of the conduct may fall into ASIC's jurisdiction while other aspects fall into the ACCC's jurisdiction.

This means that:

- consumers have difficulties knowing who to complain to;
- there is potential regulatory uncertainty as to who can deal with a matter;
- regulatory resources can be diverted to jurisdiction issues;
- there can be difficulties taking cases about 'part' of a conduct without looking at the entire conduct as a whole; and
- there is a danger that issues may 'fall through the cracks'.

A primary illustration can occur at non-*bona fide* property investment seminars. The operators may make a number of misleading deceptive or false representations during the course of the seminar, but representations made at one stage (e.g. from minute five to minute fourteen of the seminar) may relate to matters that are not financial services, financial advice or financial products as defined by the ASIC Act and the TPA. Thus, those representations may fall under the TPA and therefore within the jurisdiction of the ACCC. Later representations (e.g. from minute twenty-one of the seminar until minute thirty) may relate to financial services, etc and so fall under the ASIC Act and within ASIC's jurisdiction.

Despite such representations being made at the one presentation, and the need to consider all such representations in that context, there is a *prima facie* difficulty in either regulator seeking to take steps to deal with the total conduct. Clearly, this makes for regulatory uncertainty if – from a presentation that absolutely must be considered as a whole – regulators have to extract individual statements out of context to match their jurisdiction. The uncertainty is compounded if the presentation is structured (deliberately or otherwise) so that it must be considered in its entirety to accurately assess whether there has been conduct that would otherwise be considered misleading, deceptive or otherwise in breach of the TPA or the ASIC Act.

While ACCC/ASIC cooperation and the new MOU (supported by possible cross-delegations) go some way in addressing these uncertainties in practical terms, the time required and administrative burden impose extra costs on the regulators that may potentially reduce the effectiveness of the overall regulatory regime.

The conclusions the ACCC draws are that:

- the regulatory priority should be to allow the regulator who is best placed to take action to operate promptly and without need to settle administrative requirements, or a delegation or to face procedural uncertainty in the Courts;
- a more effective regulatory approach would allow either regulator to operate with a full range of concurrent legislative powers; and
- this would require legislative amendments to reverse the 1998 carve out from the TPA of the role of the ACCC in financial services.

The aim is not to reverse the fundamental regulatory divide on consumer protection between the ACCC and ASIC, but rather to ensure flexibility of action and to maintain the regulators' investigative and enforcement abilities when matters within the core work of either the ACCC or ASIC also involve elements that may take it outside those core areas. Matters involving conduct that falls within both jurisdictions should be able to be considered in the same comprehensive manner as matters that are completely, or predominantly, within one jurisdiction.

#### *Other relevant reviews and inquiries*

In saying this, the ACCC also notes that a MCCA working party is looking at substantially related issues (see **Attachment 2**). The Working Party developed a Discussion Paper, which MCCA approved for public release and comment in August 2004. All State and Territory fair trading and consumer affairs agencies, except Tasmania, are represented on the Working Party, together with nominees from Commonwealth Treasury, the ACCC and ASIC.

In its trans-Tasman study, *Australian and New Zealand Competition and Consumer Protection Regimes*<sup>25</sup>, the Productivity Commission noted the similarity between Australian and New Zealand competition and consumer protection regimes.

Property investment schemes and illegal fund-raising in one country (or the same scheme operating in both countries) are sometimes the subject of common complaints to regulators in both countries. Consumers in both countries are also targeted by the same international cold calling scams that operate from a boiler room invariably located in a third country.

The Productivity Commission's research report provided a brief comparison of consumer protection in financial services in Australia and New Zealand. In New Zealand, various government agencies have responsibility for financial matters. The same situation applies in Australia. One variation, however, is that the New Zealand Commerce Commission – the equivalent of the ACCC – retains a role in consumer protection in financial services through its enforcement of the New Zealand *Fair Trading Act 1986* and (from 1 April 2005) the *Credit Contracts and Consumer Finance Act 2003*. In contrast, Australia's economy-wide consumer protection legislation (the TPA) excludes the ACCC from enforcement of consumer protection in financial services. As noted above, that role resides with ASIC in Australia.

## **5.2 Remedies for consumers**

One of the Parliamentary Joint Committee's terms of reference requires the Committee to have reference to:

*'whether current legal processes provide effective and easily accessible remedies to consumers in dispute with property investment advisers'*

The ACCC will briefly comment on the current situation *vis-à-vis* redress and penalties under the TPA, setting out where their effectiveness can be improved and how this can be achieved.

### *Damages*

The civil remedies for consumers under Part V (consumer protection) and Part IVA (unconscionable conduct) of the TPA are limited to injunctions and restitution (damages and associated orders, for example, declaring a contract void). The court may also make other non-punitive orders, including corrective advertising.

There is a further limitation in the availability of remedies in that restitution under the TPA can only be ordered for parties either named in the civil action or who have given prior written consent for a claim to be made on their behalf (*ACCC v 4WD Systems Pty Ltd*<sup>26</sup>). The limitation arises because of the wording in subsection 87(1B) of the TPA. The wording limits the remedy to persons who *'...have, before the application is made, consented, in writing to the making of the application'* by the ACCC. An equivalent provision is contained in the *Corporations Act 2001* (section 1325) and remedies are limited in an identical manner

<sup>25</sup> The Productivity Commission's final report on *Australian and New Zealand Competition and Consumer Protection Regimes* can be found at <http://www.pc.gov.au/study/trans-tasman/finalreport/index.html>

<sup>26</sup> *ACCC v 4WD Systems Pty Ltd* [2003] FCA 850

(*Medibank Private Limited v Cassidy*<sup>27</sup> and *ASIC v Aboriginal Community Benefit Fund Pty Ltd*<sup>28</sup>).

This limitation means that the ACCC is unable to obtain a court order for a group of consumers who have been adversely affected unless the ACCC can identify and confirm that each member of the group has given formal written consent to be part of the action. It is an opt-in arrangement.

The ACCC noted on 26 February 2004 the difficulties it has encountered in obtaining court-ordered refunds in some consumer protection matters<sup>29</sup>. In particular, in *ACCC v Danoz Direct Pty Ltd*<sup>30</sup>, the Federal Court held that it did not have the power to order Danoz Direct to provide consumer refunds, based on the earlier Full Federal Court decision re *Medibank*.

In contrast, in some overseas jurisdictions<sup>31</sup> a court may decide to issue an order specifying a group of consumers (including non-parties) who should be given refunds or damages. The tactical advantage in this approach is that the breach of the law has been proved and the offender is then immediately on notice that all consumers that have been adversely affected must be given the opportunity to make a claim for compensation.

In Australia, a form of class action can be achieved under Part IVA of the *Federal Court Act 1976* but, where a claim for damages is involved, the procedure involves a *preliminary* step where the court is satisfied that appropriate action has been taken to notify consumers affected, for example, by way of advertisements or direct contact. The court hearing then continues as to whether there has been a breach of the law. This procedure is useful but it can be cumbersome if the case involves large numbers of consumers.

The ACCC considers that consumers would be better served by prompt access to a range of court ordered remedies (including orders for non-parties who are reasonably assumed to be affected but who are yet to be formally identified), particularly in those cases where consumers have been duped into paying significant sums of money. Delays in these matters may see the dissipation or alienation of unfairly obtained money by the offender.

### *Disgorgement*

The ACCC also believes that orders for disgorgement should be included in the range of complementary remedies it may seek under the TPA.

<sup>27</sup> *Medibank Private Limited v Cassidy* (2002) 124 FCR 40.

<sup>28</sup> *ASIC v Aboriginal Community Benefit Fund Pty Ltd* [2004] FCA 863.

<sup>29</sup> ACCC News Release # MR 023/04: "Difficulties over refunds for consumers a 'concern': ACCC" – <http://www.accc.gov.au/content/index.phtml/itemId/486782/fromItemId/2332>

<sup>30</sup> *ACCC v Danoz Direct Pty Ltd* [2003] FCA 881

<sup>31</sup> For example, the United States and New Zealand have a remedy that produces a similar result. In New Zealand, the *Fair Trading Act 1986* contains a specific provision (subsection 43(1)) to enable an order to apply to a 'non-party': see also, *Commerce Commission v Alpha Club New Zealand & Others* (High Court of NZ, Auckland, case M404/2116/99 of 8-11 October 2002).

The power of a court to order the disgorgement of financial gains which have been unfairly obtained is recognised in Australia (see the significant disgorgement of \$28.5 million in *Edensor Nominees Pty Ltd v ASIC and Others*<sup>32</sup>).

Because of the technical limitations in securing comprehensive remedies for consumers, mentioned above, there are circumstances when the amount that is ordered to be repaid to identified complainants is significantly less than the unfairly obtained (and retained) gain. The difference can amount to tens of thousands of dollars and, in some cases, millions. In those cases, disgorgement would be an appropriate complementary remedy.

The US Federal Trade Commission (FTC) has utilised a disgorgement provision under US laws, and has more recently endorsed the continued use of disgorgement as a remedy<sup>33</sup>. The FTC said:

Disgorgement is an equitable monetary remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from future violations. Depriving the violator of any of the benefits of illegal conduct has long been accepted as an appropriate, indeed necessary, element of antitrust remedies. Restitution is also an equitable remedy, serving different but often complementary purposes. Restitution is intended to restore the victims of a violation to the position they would have been in without the violation, often by refunding overpayments made as a result of the violation.<sup>34</sup>

The experience of the ACCC in seeking court orders is that the existing statutory provisions in the TPA require clarification and, as far as possible, guidance for the court. It would assist the regulator, consumers and the court if the provisions were amended to provide express reference to the availability of complementary orders such as disgorgement.

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<sup>32</sup> *Edensor Nominees Pty Ltd v ASIC and Others* (2002) 190 ALR 516.

<sup>33</sup> *Policy Statement on Monetary Equitable Remedies in Competition Cases* (25 July 2003). In doing so, the FTC drew upon the decisions of US courts to provide a simple definition of 'disgorgement' and to state where the FTC saw disgorgement in its range of remedies i.e. Disgorgement is not the same as restitution to the 'victim' but it is a complementary remedy along with other conduct remedies and penalties.

<sup>34</sup> *Policy Statement on Monetary Equitable Remedies in Competition Cases*, US Federal Trade Commission, Washington DC, 25 July 2003. The court case citations used by the US FTC are cited in the text and references in the original policy statement but not repeated in the above quotation.

### ***How disgorgement would work: hypothetical example***

Consumers that are misled into buying goods or services that do not match the claims made about those goods or services (e.g. Attendance fees for wealth creation seminars related to property investment or for products related to wealth creation claims) have lost their money. The amount of money may be small or it may represent a significant outlay by the individual consumer. Where large numbers of consumers are involved, the cost or inconvenience of making an individual claim to recover the money may outweigh the individual amount that could be recovered. This means that the wrongdoer has benefited by retaining unclaimed amounts. That pool of money may have been used by the wrongdoer to generate more returns through an investment that they may not have otherwise been able to make had they not unfairly deprived consumers.

Disgorgement looks at the overall unfair benefit obtained by the wrongdoer and seeks to deprive the wrongdoer of that benefit. That amount may, in some cases, be more than the sum total of the amount lost by individual consumers. In contrast, restitution (damages) looks to the victim and seeks to return the amount of that individual's loss. Disgorgement may therefore provide a more effective deterrent in some cases where compensatory claims do not equal the amount of the gain achieved by the wrongdoer, and penalties may not be available.

Before a disgorgement order could be made, the court must find that there has been a contravention of the TPA.

An order for disgorgement is aimed at retrieving the unfair gain. Once retrieved, the funds are used for consumer redress. In the United States, it appears that the court may sanction the transfer by the regulator of the disgorgement amount to be used to satisfy civil claims for restitution (damages) in private class actions arising out of the same matter. 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 final default mechanism in such court orders is payment of any unclaimed moneys into the US Treasury.

Hypothetically, an equivalent Australian case involving a combination of seminars and investment might see a disgorgement order that seeks return of money paid for a worthless seminar *plus* any investment gain made by the wrongdoer in related property transactions, where the investment was made by the wrongdoer using the proceeds from the seminars. The disgorged amount would be then applied for specific or general consumer redress.

It would be necessary, in Australia, to also address the existing limitation in the TPA that excludes redress to consumers who have not formally consented to be party to the litigation. Otherwise, the distribution of the disgorgement amount would be cumbersome, if not limited in its reach.

*Civil pecuniary penalties for Part V of the TPA (other than section 52)*

Part VC (offences) of the TPA applies criminal monetary penalties to specified contraventions of the TPA. These provisions enable criminal penalties to be obtained in relation to most consumer protection matters including false or misleading representations. Criminal penalties do not however apply to conduct that falls only within s 52 of the TPA.

Criminal penalties are only sought in a relatively small number of cases. In deciding whether to take such action, the ACCC must weigh the circumstances of the alleged contravention with the cost and complexity of a criminal investigation, including the need to brief the Director for Public Prosecution (DPP).

The ACCC considers it is important to retain the possibility of criminal penalties to deal with a small number of cases that may warrant criminal sanctions. However, because the number of criminal matters taken will (by necessity) be small and the processes of a criminal investigation are slower than for a civil proceeding, this does not provide sufficient deterrence by itself.

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. However, a less complex civil action resulting in lesser penalties (for example injunctive relief and corrective advertising) may not provide a sufficient level of deterrence. 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. In those cases, other remedies such as the threat of injunctions or civil actions for damages may not outweigh the incentives for traders to breach the Act.

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.

The ACCC takes the view that section 52, which is a section of wide import, should remain a civil provision not remedied by fines or pecuniary penalties. The provision works well and is used well by regulators and others in the community. Should the rather harsher sanction of pecuniary penalties and fines be required, they should be limited to breaches of section 53 and the sections that follow in Part V.



## Attachment 1

### The ACCC's real property activities

The following summary provides a broad overview of some of the substantive enforcement and compliance actions taken by the ACCC during the relevant period. The comments are current as at the date of this submission.

#### *Property Investment Seminar Promoters*

On 30 September 2003 the ACCC instituted proceedings against Mr Henry Kaye and National Investment Institute Pty Ltd (NII) for their promotion of Mr Kaye's 'millionaires' property investment course via his 'Millionaire Challenge' free seminars in various capital cities. The objective was to stop further promotion of Mr Kaye's seminars as quickly as possible, and to provide the appropriate message to other property seminar operators and the broader community. The ACCC was largely successful in achieving those objectives.<sup>35</sup> Mr Kaye agreed on 8 October 2003 that he and NII would not engage in further seminar promotion pending the final outcome of the case.

The ACCC commenced investigations into other property investment seminar operators and promoters as their advertisements and promotions came to the ACCC's attention.

On 16 September 2004 the ACCC instituted proceedings against Gianni & Gianni Pty Ltd (Break Free Events) and its director Mr John Giannopoulos alleging misleading and deceptive statements were made in the promotion of 'Secrets of a Real Estate Millionaire' property investment seminars presented by Mr Peter Flanagan.<sup>36</sup>

On 26 October 2004 proceedings were instituted against Morgan Pacific Pty Ltd and its directors Mr Paul Hanna and Mr Danny Hanna Assabgy for alleged misleading and deceptive conduct in the promotion of their property investment seminars under the heading 'YOU! A Property Millionaire'.<sup>37</sup>

#### *Overseas property seminar operators*

The ACCC also took quick and effective action against misrepresentations by the property seminar industry even when presenters were from overseas and the invitations were mailed to Australian consumers from overseas. For example, the ACCC obtained consent court orders for corrective notices to be displayed at seminar venues and oral corrective statements to be made to attendees in the case of the US based National Training Centre promotion of 'Australia's Greatest Financial Superstars' which advertised property seminars in various

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<sup>35</sup> 'Federal court finds Henry Kaye misled over "millionaires" advertising', ACCC Media Release No. 232/04, 22 October 2004.

<sup>36</sup> 'ACCC institutes against Break Free Events over property investment promotion' ACCC Media Release No. 203/04 of 21 September 2004.

<sup>37</sup> 'ACCC institutes against investment seminar promoters', ACCC Media Release No. 234/04 of 28 October 2004.

Australian capital cities in July 2004 via direct mail from USA to Australian consumers.<sup>38</sup> A similar result was obtained in relation to the promotion of Mr Robert G Allen's 'Millionaire Matrix' seminars by Vision Pursuit Pty Ltd and Giann & Giann Pty Ltd by means of direct mail and via their respective Internet websites.<sup>39</sup>

#### *Media association with seminar promotion*

The ACCC also met with a number of media organisations to discuss their advertising or promoting of certain wealth creation activities, including property investment promotions, so that the ACCC could clarify the media's role and their obligations under the TPA.

#### *Real estate agents*

The ACCC has instituted legal proceedings against Victorian real estate agency Gary Peer & Associates Pty Ltd, with respect to alleged price range misrepresentations.<sup>40</sup> While that case has not yet been heard by the court, it is well known and appears to have had a significant effect on the perceptions of the real estate agency industry in Victoria and beyond as to the ACCC's willingness to pursue such matters.

Cases such as this, combined with ACCC concerns expressed to the REIA, the media and public (by way of media releases and speeches), have provided a 'multiplier effect' in gaining co-operation towards greater industry compliance with the TPA.

#### *Liaison with REIA*

In December 2003, the ACCC wrote to the Real Estate Institute of Australia (REIA) expressing concern about a range of alleged misleading and deceptive practices observed in the real estate industry nationally. Over the next six months the ACCC assisted the REIA in their development of guidelines for REI members throughout Australia. The guidelines included the ACCC's views covering misleading and deceptive conduct generally, conduct at auctions, property descriptions, price ranges, price offerings, advertising rebates, photographic representations, and two-tier marketing.

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<sup>38</sup> 'National Training Conference to correct misrepresentations made about investment seminars', ACCC Media Release 109/04 of 29 June 2004.

<sup>39</sup> 'USA property strategist not to make certain representations in Australia', ACCC Media Release 1333/04 of 21 July 2004.

<sup>40</sup> 'ACCC institutes against Gary Peers and Associates Pty Ltd over alleged real estate underquoting', ACCC Media Release 257/03 of 5 December 2003.

## Attachment 2

### **The MCCA Working Party on *Property Investment Advice*: Discussion Paper**

In August 2003, the Ministerial Council on Consumer Affairs (MCCA) set up a working party to consider property investment advice in Australia. MCCA is the national coordinating body of State, Territory and Federal Ministers with responsibility for fair trading and consumer affairs.

The Working Party's Terms of Reference are to:

- assess the extent and nature of the provision of property investment advice in Australia;
- assess the adequacy of current State/Territory and Commonwealth regulation;
- identify possible and/or actual consumer detriment resulting from the provision of property investment advice and assess what aspects of the provision of property investment advice cause consumer detriment;
- examine whether further regulation of the provision of property investment advice is required; and if so, what form such regulation should take; and
- examine the options for introducing a new national or state regulatory scheme and the costs and benefits associated with each option.

The Working Party developed a Discussion Paper, which MCCA approved for public release and comment in August 2004.<sup>41</sup>

In the coming months, the Working Party will develop a final report on the findings of this review, which will take into consideration the comments received from the consultation process and will develop a cost/benefit analysis of the options. A recommendation will be made to MCCA based on the option which provides the greatest net public benefit.

The Working Party is due to make its final report to MCCA in June 2005.

#### *What the Discussion Paper seeks*

The discussion paper developed by the MCCA Working Party on Property Investment Advice seeks the views of the broad community about the regulation of advice relating to investment in real estate. For the purposes of the discussion paper, the Working Party views 'advice' as including information, opinions and recommendations of advisers both where the adviser is

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<sup>41</sup> The MCCA working Party's discussion paper, *Property Investment Advice*, is found at: [http://www.consumer.qld.gov.au/oft/oftweb.nsf/AllDocs/F55C778592B79C3E4A256F01000A18BD/\\$File/PIDiscussionPaper%20August%202004.pdf](http://www.consumer.qld.gov.au/oft/oftweb.nsf/AllDocs/F55C778592B79C3E4A256F01000A18BD/$File/PIDiscussionPaper%20August%202004.pdf)

genuinely independent and where the adviser has a vested interest in promoting the investment or service recommended. The Working Party seeks responses to the general questions:

- Is the marketplace for property investment advice operating efficiently and in a way that adequately addresses the needs and interests of consumers and retail investors? [*'retail investors' are defined in the Paper*];
- Have property seminar operators and other property investment promoters had a detrimental impact? If so, to what extent? [*the Paper discusses property investment promoters and their conduct in detail*];
- Is the current regulatory framework effective and, if it is not operating as well as it should, is the answer:
  - better use of existing laws and other regulatory and consumer education mechanisms, or
  - enhanced regulation?
- the scope and intensity of any new regulatory scheme (in the event that it was decided to introduce such a scheme);
- whether primary responsibility for any new scheme should be a States'/Territories' responsibility or a Commonwealth responsibility; and
- the costs and benefits of different options for reform – including maintaining the status quo.

#### *What the Discussion Paper provides*

The Paper provides a comprehensive overview of:

- the current status of retail investors and the property market, including:
  - factors in the increase in retail investor participation in the rental property market in recent years;
  - retail investors' understanding of the risks associated with investment in residential property;
- what might constitute 'advice' in the context of property investment promotion;
- details of the operations of unlicensed property investment seminar operations and wealth creation promoters;
- the key problem areas for retail investors with the provision of property investment advice and wealth creation services;
- the current legal framework and action by regulators/enforcement agencies;
- the objectives of any government intervention in the current situation;
- the scope and coverage of any new regulatory scheme;
- options for reform and their costs and benefits (including whether any new scheme should be State/Territory or Commonwealth legislation or some form of code of conduct – mandatory or voluntary.)