23-3-05

The Secretary
Parliamentary Joint Committee on Corporations & Financial Services
Suite SG.64
Parliament House
CANBERRA ACT 2600
By post & email: corporations.joint@aph.gov.au

Dear Sir / Madam

RE: Inquiry into the Regulation of Property Investment Advice

I take this opportunity to provide the following commentary and thank the Joint Committee for considering the contents of this submission.

Issue 1
Know Your Client Rule & Reasonable Basis for Advice Sections 945 A & B – Half the problem solved.
Of concern, is that investment advisers are required to exercise the 'know your client rule'. However, there is no corresponding rule that holders of investment advisers licenses under the ASIC need to exercise a 'know the product rule'. Whilst a basis needs to be provided for the investment recommendation made under section 945A & B of the Corporations Act 2001, there is no requirement for the license holder to have an established product knowledge, experience or qualifications in the product area being recommended to a client. How is it possible for a licensed adviser with no property background, qualifications, experience or expertise in property to provide any type of property related investment advice to a client. How does an investment adviser comply with Sections 945A without knowledge of the investment vehicle.

Issue 2
NSW –v- Commonwealth Regulation the missing link.
Under current NSW legislation, the Property Stock & Business Agents Act 2002, Section 48, prohibits a selling agent from acting for a buyer and seller of the same property. This also includes obtaining any remuneration, fee or commission from both sides. Until similar legislation is incorporated into the Corporations Act 2001, legitimised corrupt activity will continue by default. It is insufficient for disclosure to justify that a fee or commission be obtained from developer and client. Until this matter is addressed, industry is being served before the consumer and the overview of property investment advice pays little more than lip service to the party's it is so called to assist. Until such a fundamental flaw is addressed in the Commonwealth regulatory regime, the Commonwealth has little hope in attempting to assist and convince the states on a national regulatory framework for property investment advice.

Issue 3 – Shifting the goal posts of regulation
Of particular concern for holders of an investment advisers license, who provide property investment advice, is the role of the property valuer. The property valuer provides a market value of a property in question having regard to its inherent and external features, the past, the present and future cash flow and the impact these factors have in arriving at the value of a property at the time of purchase.

Property valuers are not providers of property investment advice. The value arrived at is the Present Value of all future income from the property in perpetuity having regard to physical, economic (demand & supply) and social factors that may impact on the property. To conclude that property valuers are providing investment advice would constitute an attempt to subsume an existing profession under the umbrella and jurisdiction of the Financial Service Reform Agenda. It is pointless talking about carve outs in the discussion paper by bringing valuers under national legislation as valuers would constitute a carve out for the reason stated. Hopefully the MCCA committee will look at Accountants and superannuation in the last round of regulation and conclude the obvious, that one regime does not account for the specialized skills of every existing profession. It is encouraging to see the ACCC participating in the MCCA as they are pivotal in insuring that hurdles to practice as a valuer are not affected by the licensing provisions of the ASIC's agenda. This is particularly the case when appendix C 'Complaints Received in 2003' of the discussion paper has not shown any complaints against the valuation profession, or the real estate agents core activity.

Valuations are crucial but not always essential for investors of property in assessing the correct price to pay for a property investment. This is particularly the case when the investor is an experienced property investor. It is noted that few investment advisers recommending a property to an investor, recommend to that investor that an independent valuation be undertaken to establish the market value of the property. It is apparent that a dichotomy of interests exists where an investment adviser is obtaining a disclosed commission or fee from a developer for the sale of their property. An investment adviser can only serve one master. I believe that this particular issue will rectify itself through litigation, after the resale of a number of investment properties in which properties have been recommended by licensed but non property qualified investment advisers who have not protected themselves by recommending their client obtain independent valuation advice.

Issue 4 – Banks controlling mortgage valuers – a matter for the ACCC
Property valuers provide advice to a large cross section of the business and retail community for a variety of purposes, including the market value of property at the time of purchase. In the case of ACCC v Oceana Commercial Pty Ltd [2003] FCA 58, the ACCC addressed the disturbing concern that the respondent bank did not provide valuation advice of the property being purchased to the purchasers of the subject properties. This immediately should raise the concern of the ACCC that the constitution of bank panels of valuers is an anti competitive practice. The reasons for this proposition are as follows:

1) A valuation undertaken by a valuer engaged by a purchaser prior to purchasing a property is not accepted by a bank, if the valuer is not on the banks panel of valuers.
2) Investors of property are not inclined to pay for two valuations, one to inform them of the value of the property and a second valuation to inform the bank, which they are not privy to, despite having paid for the valuation.
3) The proposition that there is no valuation fee passed onto borrowers by lenders is questionable, as this cost may be recovered in the myriad of charges and expenses incurred in undertaking a loan.
4) Banks and lenders dictate to valuers the fee they will pay for valuation advice. There is no open tender process, where valuers are able to compete for a place on a banks panel of valuers, or for valuers to establish the cost of their service to the bank or lender.

This issue is fundamental to the property purchasing process, as the bank is engaging a valuer to confirm the purchase price of a property, which in many cases, has been purchased by a party without knowledge of the market value or reference to sales of other property. Valuation advice should be available to the purchaser if they so wish to obtain it. The bank is not responsible for providing purchase prices or values to investors, this fact was stated by the court in the above case. The Banks have the process in place to protect themselves via the use of valuations, why shouldn't the purchaser have the same opportunity if they choose.

Issue 5 – Property investment seminars

This area of the discussion paper is important for regulators for the following reasons:

1) Professionals including Valuers, agents, financial planners and developer's in house marketers are each skilled in their respective area of valuing, selling and advising. The requisite skills to provide any information in a meaningful, relevant and reliable format goes beyond putting together a power point presentation and some scenarios. Teachers and lecturers at recognized learning institutions including TAFE and Universities are trained and educated in the process of the facilitation of learning. The key to any learning rests with the learning outcomes and objectives of the session or lesson. A title or heading of a presentation does not constitute an outcome or objective. 'Property Investment' or 'Wealth Creation & Property', are not learning objectives or outcomes.
2) Property and other professionals do not conduct investment seminars as a core function of their business. Seminars are used as a conduit or means of promoting their services and products, namely investment property listed for sale. There are two key issues to be addressed in relation to this:
    a. A property investment seminar is not a property investment seminar if the objective is to promote a particular property during or at the end of a seminar. This is a property sales promotion.
    b. Property investment seminars need to be defined by the qualifications of the presenter(s), a disclosure of any affiliation with a particular developer or development and affiliation with any brokers or other service providers.
3) An unfortunate revelation of the property investment seminar issue, is in part assisting and protecting consumers from themselves. For some investors there is genuine merit for successful property investment. For some, however there is speculation and investment for the wrong or uninformed reasons. This will always be present to some degree regardless of the level of consumer protection adopted.
4) Property investment seminar operators need to clearly spell out that the seminar information is general investment information. All property investment seminars, should clearly provide a recommendation that attendees consult a financial planner or adviser, to first determine if property is the most suitable investment vehicle for them. **(Regarding issue 2 above, preference should be directed to planners / advisers who act and are soley remunerated by the client / consumer)**
5) Universities have a strict curriculum development process and procedure for the introduction and review of course material. A regulatory process needs to be developed for property investment seminar providers to have the content, objectives and learning outcomes of seminars scrutinized in a similar manner. A declaration needs to be signed and lodged with a qualified independent learning institution to validate these measures.

As part of the measures in combating the issue of property investment seminars, the public needs access to independent property investment sessions and information. In part this is available through some property investment books. This could be further achieved by Universities developing and conducting property investment seminars, that are funded soley by Government.

Property investment seminars need to be regulated and the qualifications, objectives and affiliations of presenters needs to be clearly defined and made available to the public in advance as part of the promotion of the seminar.

Summary

- The MCCA needs to consider the roles qualifications and experience of parties providing property investment advice. What skills, qualifications and experience does each stakeholder have that may impact on the quality of advice provided.
- The nature of the complaints in Schedule C of the discussion paper indicate that issues raised relate to the sale of new property undertaken by non-qualified property professionals, not property professionals regulated at the state level. Attempting to bring the regulation of property professionals under the umbrella of the ASIC for issues stated in the discussion paper are premised on the basis that current state regulation is insufficient to regulate property professionals, which has not been in any way demonstrated.
- Bank panels of valuers are anti competitive and clandestine. They do not assist the consumer who ultimately pays for the valuation.
- The promotion of valuation services by investment advisers forms part of section **945B Obligation to warn client if advice based on incomplete or inaccurate information,** if in fact the adviser does not recommend the investor seek this advice. Whilst a property may suite an investor, the investor should pay no more than its market value, or at least make an informed assessment about how much they may pay for a property, based on its value.
- One client only rule needs to be adopted at the Commonwealth regulatory level.
- Regulation of property investment seminars needs to be drafted for discussion.

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