

LAW REFORM COMMITTEE

INQUIRY INTO PROPERTY INVESTMENT ADVISERS AND MARKETEERS

FINAL REPORT APRIL 2008



PARLIAMENT



OF VICTORIA



**Inquiry into property investment
advisers and marketeers**

**Final report of the
Victorian Parliament
Law Reform Committee**

April 2008

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and marketeers

Law Reform Committee

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Functions of the Law Reform Committee

The functions of the Law Reform Committee are set out in section 12 of the *Parliamentary Committees Act 2003* (Vic). That section states:

- (1) The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with—
 - (a) legal, constitutional or parliamentary reform
 - (b) the administration of justice
 - (c) law reform.

Terms of reference

The following reference was made by the Legislative Assembly on 1st March 2007:

To the Law Reform Committee — for inquiry, consideration and report no later than 31 March 2008 on property investment and property marketeers with particular regard to:

- a) reviewing the regulatory framework for the provision of property investment advice, with the objective of establishing how best to control the exploitation of Victorians in the context of keeping the burden on business as low as possible
- b) the Commonwealth's role in regulating financial advice, and the ongoing work of the Ministerial Council on Consumer Affairs in considering regulation of this area.

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The Victorian Government, in conjunction with the Commonwealth Government, the Australian Bureau of Statistics and relevant private sector organisations, should develop a strategy to ensure the regular collection and publication of information about the characteristics of property investors in Australia.

Recommendation 2: Research into the property investment advice and marketeering 'industry'..... 29

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that it commission research into the number, characteristics and operations of property investment advisers and marketeers.

Recommendation 3: Research into consumer detriment..... 56

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that it commission research into consumer detriment in the property investment advice and marketing industry. This research should:

- identify the total detriment experienced by consumers
- identify the extent to which consumers of these services have experienced lower returns compared with property investors generally
- estimate the current levels of risk facing consumers and the extent to which consumers understand that risk.

Objectives of regulation

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The Victorian Government should:

- (a) identify a set of clear objectives to inform its policy in relation to the regulation of property investment advisers and marketeers
- (b) include the following objectives:
 - the promotion of informed decision-making by consumers about direct property investment, including the risks involved in investing
 - the protection of consumers against unfair conduct and practices by property investment advisers and marketeers
 - the promotion of high quality, professional property investment advice and marketing services
 - the promotion of an efficient and competitive market for investment advice and marketing generally
 - ensuring accessible and timely redress for consumers who have experienced detriment
 - the promotion of appropriate enforcement of regulation
- (c) propose to other governments at the 2008 meeting of the Ministerial Council on Consumer Affairs that they adopt the same objectives.

National regulation (preferred) – Commonwealth regulation

Recommendation 5: Commonwealth responsibility for property investment advice 97

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting:

- (a) that the Commonwealth Government regulate property investment advisers
- (b) that real estate or property transactions should continue to be regulated by the states and territories.

Recommendation 6: Legal advice on constitutional issues 98

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that legal advice be obtained on the Commonwealth's constitutional power to regulate property investment advisers.

Recommendation 7: Resolution of constitutional issues 98

If the Commonwealth does not have sufficient constitutional power to regulate property investment advisers, the Victorian Government should:

- (a) refer its power to regulate property investment advisers to the Commonwealth under section 51(xxxvii) of the Australian Constitution
- (b) propose that other states and territories refer their powers to the Commonwealth.

Recommendation 8: Regulation of property investment advisers 102

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth Government amend the *Australian Securities and Investments Commission Act 2001* (Cth) and chapter 7 of the *Corporations Act 2001* (Cth) so that advice about direct property investment is included in the financial services regime.

Recommendation 9: Reform of the financial services regime 103

The Victorian Government should, through the Ministerial Council on Consumer Affairs, request the Commonwealth Government to continue to monitor the capacity of the disclosure requirements contained in the financial services regime to effectively manage conflicts of interest.

Recommendation 10: The scope of the regulation 103

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth regulation of property investment advisers should:

- (a) include advice about investment in all types of direct property in the Commonwealth regulation of property investment advisers
- (b) define the purchase of direct property as an investment where the property was purchased for the predominant purpose of obtaining a financial benefit.

Recommendation 11: Exemption for real estate agents 108

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth regulation of property investment advisers exempt licensed estate agents provided that they confine their advice to:

- (a) past or current property returns
- (b) future returns, provided that the advice is general advice and that it relates to a particular property or properties.

Recommendation 12: Related amendments to real estate agent regulation.. 108

The Victorian Government should:

- (a) amend the *Estate Agents Act 1980* (Vic) to require licensed estate agents who provide investment advice that is exempt from the Commonwealth regulation of property investment advisers to provide the advice and warnings required by regulation 10 of the *Property, Stock and Business Agents Regulations 2003* (NSW) and regulation 14 of the *Agents Regulation 2003* (ACT)
- (b) encourage other states and territories at the 2008 meeting of the Ministerial Council on Consumer Affairs to implement similar amendments.

Recommendation 13: Exemption for education providers 109

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth regulation of property investment advisers exempt schools, universities and other accredited educational providers who provide advice in the course of providing accredited courses or training.

Recommendation 14: Exemptions for other professions 110

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth regulation of property investment advisers exempt advice provided by accountants and valuers, but only when that advice is given in the course of the ordinary practice of their professions.

Recommendation 15: Regulatory priorities 111

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth Government should set priorities for the regulator responsible for the financial services regime including:

- the need to proactively monitor the activities of property investment advisers
- the need to monitor advertisements by property investment advisers and to take early action to deal with any false, misleading or deceptive representations.

Recommendation 16: Product disclosure by marketers and sellers 113

The Victorian Government should introduce legislation to require all property investment marketers and sellers to provide prospective property investors with a prescribed 'product disclosure form'.

Recommendation 17: Consultation about product disclosure 113

The Victorian Government should:

- (a) develop the prescribed 'product disclosure form' in consultation with the property investment advice and marketing industry and relevant consumer organisations
- (b) encourage the states and territories to adopt consistent product disclosure requirements around Australia
- (c) consult with the Commonwealth Government to ensure that the new legislation complements the proposed Commonwealth regulation of property investment advisers.

Recommendation 18: The Ministerial Council on Consumer Affairs 115

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that it provide regular public reports on the status of the property investment advice project, including in each future Ministerial Council communiqué and on the Ministerial Council's website.

National regulation (alternative) – complementary state and territory regulation

Recommendation 19: Alternative national scheme 117

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that, if there is no agreement on Commonwealth regulation of property investment advisers, the states and territories develop complementary legislation to establish a licensing, conduct and disclosure regime.

Victorian regulation (alternative)

Recommendation 20: Alternative Victorian scheme..... 117

If there is no agreement on national regulation of property investment advisers by the Ministerial Council on Consumer Affairs at its 2008 meeting, the Victorian Government should introduce its own regulation as set out in recommendations 21-24.

Recommendation 21: Stronger Victorian consumer protection law 117

The Victorian Government should amend the *Fair Trading Act 1999* (Vic) to remove any provisions that limit the Act's application to property investment advisers including amendments to:

- clarify that 'goods' includes real property
- clarify that 'personal, domestic or household use' includes property investment by retail investors
- ensure that the off-business-premises sales provisions, and their cooling-off periods, apply to the techniques and operations used by property investment advisers and marketeers.

Recommendation 22: Victorian code of conduct..... 117

The Victorian Government should:

- (a) introduce a statutory code of conduct for property investment advisers and marketeers, including a requirement that advisers warn investors when their advice does not take account of the investor's individual circumstances
- (b) develop the code in consultation with the advisory committee outlined in recommendation 25.

Recommendation 23: Victorian disclosure laws..... 117

The Victorian Government should introduce legislation to require all property investment advisers to:

- disclose all conflicts of interest including whether they act for the vendor of the property, whether they will obtain any benefit from the sale of investment property and their relationship with anyone to whom they refer the investor for professional services
- disclose significant risks involved in recommended strategies or investments.

Recommendation 24: Enforcement of Victorian law..... 118

The Victorian Government should:

- (a) implement a communication strategy to inform consumers and business about the new Victorian regulation of property investment advisers

- (b) monitor and enforce compliance by property investment advisers with the new Victorian regulation, including monitoring advertisements for false, misleading or deceptive representations.

Role of industry associations

Recommendation 25: Industry consultation 118

The Victorian Government should establish or, if there is agreement to national regulation, propose the establishment of an advisory committee to help develop and implement regulation of property investment advisers. The advisory committee should include relevant industry associations.

Recommendation 26: Review of industry standards and codes of conduct.. 118

The Victorian Government should urge industry associations whose members have been identified as providing property investment advice to review their codes of conduct to ensure that they address property investment advising activities.

Other changes

Recommendation 27: Awareness-raising campaign for related professions..120

The Victorian Government should urge the industry associations representing solicitors, conveyancers, valuers, finance brokers, credit providers, property managers, accountants, financial planners and financial advisers to alert their members to the problems caused by some property investment advisers and marketeers and the potential implications for their clients.

Recommendation 28: Disclosure requirements for related professions 120

The Victorian Government should review the statutory and industry requirements for solicitors, conveyancers, valuers, finance brokers, credit providers, property managers, accountants, financial planners and financial advisers to ensure that they include provisions for the adequate disclosure of conflicts of interest.

Recommendation 29: Regulatory action for related professions..... 120

The Victorian Government should urge the regulatory and disciplinary authorities responsible for solicitors, conveyancers, valuers, finance brokers, credit providers, property managers, accountants, financial planners and financial advisers to monitor compliance with conflict of interest requirements.

Recommendation 30: Cooling-off periods..... 122

The Victorian Government should:

- (a) if there is agreement on national regulation of property investment advisers by the Ministerial Council on Consumer Affairs at its 2008 meeting, propose that the national regulation introduce a cooling-off period for goods (other than real property) and services sold or arranged by property investment advisers
- (b) if there is no agreement on national regulation, introduce a cooling-off period for goods (other than real property) and services sold or arranged by property investment advisers under the *Fair Trading Act 1999* (Vic)
- (c) introduce a cooling-off period for goods (other than real property) and services sold or arranged by property investment marketeers under the *Fair Trading Act 1999* (Vic).

Recommendation 31: Fees for property investment seminars..... 123

The Victorian Government should urge industry associations whose members have been identified as providing property investment advice or marketing property to amend their codes of conduct to discourage members from charging consumers for attendance at property investment marketing seminars.

Evaluation of regulation

Recommendation 32: Review of regulation 124

- (a) The Victorian Government should:
- if there is national regulation of property investment advisers in the form of Commonwealth regulation, propose that the Commonwealth Government conduct an independent evaluation and review of the regulation not more than five years following its commencement
 - if there is national regulation of property investment advisers in the form of complementary state and territory regulation, propose that the Ministerial Council on Consumer Affairs conduct this evaluation
 - if there is Victorian regulation of property investment advisers, conduct this evaluation.
- (b) The evaluation and review should examine in particular:
- whether the regulation is meeting its objectives
 - whether consumers are adequately protected by the regulation
 - the burden on business and whether there are ways this could be minimised
 - whether any further legislative amendments are required
 - the development of industry associations and whether they could take on a greater regulatory role
 - the effectiveness of disclosure provisions in dealing with conflicts of interest.

Non-regulatory strategies

Recommendation 33: Evaluation of consumer warnings..... 127

The Victorian Government should support the Productivity Commission's draft recommendation for an evaluation of the effectiveness of consumer information and education measures, and should actively participate in the evaluation.

Recommendation 34: Timely publication of consumer warnings 127

The Victorian Government should develop a strategy to ensure that consumer alerts and warnings regarding rogue traders in the property investment industry are published as soon as the Government becomes aware of the activities of rogue traders.

Recommendation 35: Strategic consumer awareness measures 127

The Victorian Government should:

- (a) develop and implement a consumer awareness strategy that takes account of the demographic characteristics of property investors, their preferred sources of advice and information and the advertising and marketing vehicles used by property investment advisers and marketeers
- (b) propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that Commonwealth, state and territory regulators adopt a coordinated consumer awareness strategy.

Recommendation 36: Coordination of investment literacy programs 129

The Victorian Government should establish a working group of consumer organisations, industry associations and education providers to develop property investment literacy resources.

Recommendation 37: Property investment information booklet..... 130

The Victorian Government should:

- (a) publish a free information booklet on property investment in a range of community languages. The booklet should address, amongst other things:
 - factors to consider when choosing between investment classes
 - basic information about the property market, including the fact that the market can fall and that different segments of the market can perform differently
 - the need to consider both risks and returns from property investment
 - the role of estate agents, developers, property investment advisers and other professions
 - common problems with property investment advisers and marketeers
 - the importance of seeking independent advice
 - the avenues available to consumers if they are dissatisfied with goods and services.
- (b) distribute the booklet widely through estate agents, financial advisers and planners, accountants, consumer organisations and other services used by property investors.

Recommendation 38: Investment literacy in schools..... 130

The Victorian Government should review its ‘Consumer Stuff’ program and any other consumer and financial literacy programs for schools to examine the potential for addressing investment literacy.

Recommendation 39: Publication of sales data..... 132

The Victorian Government should:

- (a) publish information about property sales in Victoria, including sale prices for individual properties, not later than three months after the end of each financial quarter
- (b) consult the Office of the Victorian Privacy Commissioner about ways to minimise the impact on the privacy of individual buyers and sellers
- (c) publicise the availability of this information, and the existence of commercial information providers, in its property investment booklet.

Recommendation 40: Publication of recommended maximum rate of commission 132

The Victorian Government should, after consultation with the Real Estate Institute of Australia, publicise a recommended maximum rate of commission for the sale or purchase of real property in its property investment booklet.

Recommendation 41: Disclosure of valuation amounts by lenders 134

The Victorian Government should urge lenders to alert borrowers when the amount of their own valuation is 10% or more below the contracted sale price of a property.

Recommendation 42: Voluntary industry training 135

If there is no agreement on national regulation of property investment advisers at the 2008 meeting of the Ministerial Council on Consumer Affairs, the Victorian Government should urge industry associations whose members are engaged in providing property investment advice to include property investment knowledge and skills in their professional development programs.

Recommendation 43: Compulsory industry training..... 135

If there is no agreement on national regulation of property investment advisers at the 2008 meeting of the Ministerial Council on Consumer Affairs, the Victorian Government should propose compulsory training for estate agents about property investment when those training requirements are next reviewed at a national level.

Recommendation 44: Raising the profile of consumer regulators..... 137

The Victorian Government should:

- (a) actively promote Consumer Affairs Victoria's dispute resolution services as part of the consumer awareness strategy outlined in recommendation 35
- (b) publicise the services provided by Consumer Affairs Victoria in its property investment booklet.

Recommendation 45: Alternative dispute resolution 138

If there is no agreement on national regulation of property investment advisers at the 2008 meeting of the Ministerial Council on Consumer Affairs, the Victorian Government should work with industry associations to establish an industry-based alternative dispute resolution scheme to assist consumers who use property investment services.

Glossary

| | |
|---|--|
| Australian Competition and Consumer Commission | The Australian Competition and Consumer Commission is a Commonwealth Government authority. Its role is to enforce Acts which relate to consumer protection, fair trading and competition. |
| Australian Securities and Investments Commission | The Australian Securities and Investments Commission is a Commonwealth Government agency and is Australia's main corporate, markets and financial services regulator. |
| buyers' agents | Buyers' agents are real estate agents that act on behalf of property purchasers rather than property vendors. |
| commercial property | Commercial property refers to property other than a residential property where people live. It can include retail property, industrial property and other property such as resort accommodation. |
| co-regulation | Co-regulation refers to regulatory arrangements that involve a partnership between industry and government. Most commonly, the industry will develop and administer regulatory arrangements (for example, a code of conduct) with legislative backing from the government. |
| Consumer Affairs Victoria | Consumer Affairs Victoria is part of the Victorian Department of Justice and is Victoria's main consumer affairs agency. |
| consumer detriment | Consumer detriment refers to the harm (which can be financial, emotional, or both) experienced by consumers when goods and services they purchase fail to meet their expectations. |
| direct property investment | Direct property investment refers to situations where a consumer purchases and holds real property in their own right with the aim of producing income and/or capital growth. |
| experience goods | Experience goods refer to goods (or services) whose quality cannot be judged effectively by consumers until after the purchase has been made. |

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| financial services regime | The financial services regime is the term sometimes used to refer to the provisions in the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) and the <i>Corporations Act 2001</i> (Cth) that regulate Australia's financial services industry. |
| income unit | Income unit is a term used by the Australian Bureau of Statistics in its publication <i>Household Investors in Rental Dwellings</i> , Cat No.8711.0, June 1998. It refers to a person, or group of related persons, within a household whose command over income is assumed to be shared. |
| indirect property investment | Indirect property investment refers to situations where a consumer purchases an interest in a trust, company or other structure, which in turn invests in real property. The consumer does not hold any real property in their own right. |
| information asymmetry | Information asymmetry refers to a situation where one party in a transaction or market has access to more information than the other party. |
| loan to value ratio (LVR) | Loan to value ratio is calculated by dividing the amount of money being borrowed by the total value of the property. For example, if a consumer borrows \$80,000 to purchase a \$100,000 property, the loan to value ratio is 80%. Banks often require consumers to purchase mortgage insurance if their loan to value ratio is higher than 90%. |
| Ministerial Council on Consumer Affairs | The Ministerial Council on Consumer Affairs is made up of all Australian and New Zealand Ministers responsible for consumer protection, fair trading and credit laws. Its role is to consider issues relating to consumer affairs and fair trading, and agree to a consistent policy for dealing with them if possible. |
| National Reform Agenda | The National Reform Agenda is an initiative that was agreed by the Council of Australian Governments on 10 February 2006. It aims to continue collaborative reform by the Commonwealth, state and territory governments to promote Australia's future prosperity. It has three streams – human capital, competition and regulatory reform. |

| | |
|------------------------------------|--|
| negative licensing | Negative licensing schemes ban certain types of people (for example, people with a particular type of criminal record) from operating in an industry. |
| positive licensing | Positive licensing schemes require all people who wish to operate in a particular industry to obtain a licence or approval before they can operate in that industry. |
| reference person | Reference person is a term used by the Australian Bureau of Statistics in its publication <i>Household Investors in Rental Dwellings</i> , Cat No.8711.0, June 1998. It refers to the male partner in a couple income unit, the parent in a one-parent income unit and the person in a one-person income unit. |
| regulation impact statement | Regulation impact statements are documents prepared by governments when they develop new regulation that has an impact on business. Their precise requirements differ, but they commonly set out the options for addressing an identified problem, their costs and benefits and the government's preferred option. |
| residential property | A residential property is any property (for example, a house, apartment or unit) designed for people to live in. |
| retail investors | Retail investors are individual investors, rather than institutional investors such as funds or companies. |
| self-regulation | Self-regulation is a regulatory arrangement under which an industry takes steps to develop and enforce its own regulation. It most commonly involves voluntary codes of conduct or standards. |
| two-tier marketing | Two-tier marketing refers to a type of scheme in which property is sold to non-local buyers, who are unfamiliar with local market conditions, for amounts above local market value. |
| vendor terms | Vendor terms contracts are schemes in which a purchaser buys real estate by paying the vendor instalments, together with interest, so that the vendor in effect finances the purchase. The purchaser does not become the registered owner of the property until all of the agreed instalments have been paid. |

Chair's foreword

More Australians are investing in property than ever before. At a time when the property market is rising and more Australians need to save for their own financial futures, property has become a popular way to build wealth.

There is no shortage of businesses willing to help Australians invest in the property market. As part of this inquiry, I attended the Property Expo held in Melbourne in October 2007. The number of different investment options and strategies on offer was surprising as were the claims that large amounts of money can be made relatively easily and safely through property investment.

Throughout this inquiry the Committee heard evidence of a number of issues associated with the property investment industry and significant losses suffered by individual investors. We were told about a motor mechanic who purchased a property for \$206 000 only to later discover that it was really worth \$175 000. We heard of a suburban couple who lost their own home which they had used as security against an over-priced investment property. We were told about a young woman, struggling with debt, who was sold an expensive investment property education package that was promised to 'help her out of debt'. Several stakeholders expressed the view that many Australians have been encouraged to invest in strategies and properties that are high risk.

This report advocates a multifaceted approach to these problems, with action at both the state and national level and a range of regulatory and non-regulatory mechanisms. The property investment industry operates as a national industry across Australia. The Committee's recommendations recognise this and support Commonwealth Government regulation of property investment advisers in line with the current regulation of financial service advisers. I am optimistic that, following a change of government at the Commonwealth level, a national solution to this issue can be achieved. However, it may not be possible for a national approach to be implemented in the short term and therefore this report also sets out a 'fall back' position by which Victoria can act to ensure that Victorian property investors are adequately protected pending the implementation of a national approach.

The Committee received valuable contributions to this inquiry from a range of individuals and organisations including consumers, consumer groups, industry bodies, property investment advisers and regulators. In an area where there is limited research and documented evidence, this input has been invaluable to the Committee. I would particularly like to acknowledge the individual consumers who have agreed to allow the Committee to use their stories in this report to highlight the need for action.

I would like to thank my fellow Committee members for their time, energy and insights throughout this inquiry. The Committee is indebted to the Law Reform Committee secretariat for their splendid work in producing this report. I would like to acknowledge the leadership provided by the Law Reform Committee's Executive Officer, Ms Kerry Riseley. Ms Riseley's knowledge of the legal and policy context at both the national and state level has been critical to the success of the inquiry.

Ms Susan Brent was the principal researcher for this inquiry and I would like to give special recognition to the high quality of the work she has done. Her research skills, her attention to detail and her grasp of the legal and policy dimensions of the many issues that are dealt with in the report are exceptional.

I would also like to thank Mr Christian Farinaccio, a law student who completed a one month placement, mapping the property investment advice and marketeering industries.

The evidence presented in this report clearly demonstrates the need for action to regulate property investment advisers and marketeers. The model for reform presented by the Committee offers Victorian – and potentially all Australian – consumers greater protection, while at the same time supporting and strengthening legitimate businesses.

Johan Scheffer MLC
Chair

Executive summary

This report examines the regulatory framework for property marketeering and the provision of property investment advice in Victoria. The terms of reference required the Committee to consider how to protect Victorian consumers while minimising the burden on business. They also required the Committee to consider the role of the Commonwealth Government in regulating financial advice, and the current work of the Ministerial Council on Consumer Affairs in this area.

In this report the Committee focuses on ‘direct property investment’, that is, where investors buy and hold real estate in their own right. It looks at those who provide property investment education or advice (advisers) and those who market or promote property (marketeers).

There have been two previous inquiries about property investment advice at a national level. The first inquiry, conducted by a working group of the Ministerial Council on Consumer Affairs, began in 2003 but has not yet been completed. The second inquiry, conducted by a Commonwealth parliamentary committee, recommended that the Commonwealth Government assume responsibility for the regulation of property investment advice under the Commonwealth’s financial services laws.

In the course of this inquiry it became clear to the Committee that many stakeholders, both from the industry and consumer groups, supported national regulation of property investment advice and were frustrated by the lack of action at the national level. The Committee is confident that the issues identified and recommendations made in this report can assist Victoria to play a key role in achieving reform at a national level.

The issues

The property investment advice and marketeering industry was described by one witness as ‘unordered’ and ‘chaotic’. The Committee’s research found there are many different players in the industry from a broad spectrum of occupations, ranging from real estate agents to accountants and from developers to lawyers. It is an industry that operates at a national level, with businesses advising investors from around the country and marketing properties nationwide.

This report identifies a number of issues with property marketeers and providers of property investment advice. These problems include:

- unscrupulous businesses who disguise their selling activities as ‘independent’ education or advice
- undisclosed conflicts of interest
- overpricing
- exaggerated or unsubstantiated claims of returns
- failure to disclose risks

- ‘one size fits all’ advice which fails to take into account the specific circumstances of individual investors
- poorly trained and unqualified advisers
- a lack of ‘holistic’ advice that covers different types of investments.

The Committee also heard evidence of many property investment myths which are often promoted at ‘education’ seminars, such as ‘all property doubles in value every ten years’.

The Committee experienced considerable difficulty estimating the extent of detriment suffered by consumers as a result of these practices. The experiences of several consumers who have suffered loss are set out in this report. However, the Committee heard that the true extent of consumer detriment is likely to be hidden by the ‘booming’ property market and the fact that consumers often do not report their losses. This report recommends further research on these issues.

The current regulatory regime

The regulatory regime that currently applies in relation to property investment advisers and marketeers in Victoria is made up of both national and state general consumer protection legislation, a range of state-based industry-specific legislation (for example, real estate agent regulation) and self-regulation by industry associations. Some states have introduced specific laws dealing with businesses that provide property investment advice.

Some stakeholders criticised the existing consumer protection regime as it applies in Victoria for a number of reasons including that it is reactive, there is limited enforcement and it fails to address problems such as conflicts of interest.

In particular, many stakeholders criticised the fact that financial advisers and property investment advisers are regulated differently and that consumers receive different levels of protection when they use those services. Financial advisers are regulated by the Commonwealth Government’s financial services laws which have operated since 2002 and include licensing, conduct and competency requirements as well as disclosure of conflicts of interest and mandatory dispute resolution schemes.

The Committee’s recommended model

Given the number and nature of problems with property investment advisers and marketeers raised during the inquiry, the Committee believes that a multifaceted and coordinated approach involving government and industry, and regulatory and non-regulatory initiatives, is required. Chapters six and seven of this report set out in detail the regulatory and non-regulatory strategies recommended by the Committee.

National regulation

The Committee’s preferred position is that the Commonwealth Government regulates property investment advisers under its financial services laws in the same way as financial advisers. This approach has a range of benefits including creating a level

playing field between financial advisers and property investment advisers and affording consumers equal protection, regardless of whether they invest in property or a financial product. In the interests of reducing the regulatory burden on business, the Committee also proposes a limited exemption for some professions which are already regulated by industry-specific regulation. In the absence of Commonwealth Government regulation of this area, the Committee recommends that Victoria should actively pursue a nationally consistent state and territory licensing, conduct and disclosure regime through the Ministerial Council on Consumer Affairs.

State regulation

While the Committee is hopeful that the Commonwealth Government will act on the concerns highlighted in this report, the terms of reference required the Committee to identify strategies that would best protect Victorians from exploitation. To this end the report identifies strategies that the Victorian Government could pursue independently. These reforms include strengthening the state's consumer protection laws, introducing a statutory code of conduct for property investment advisers and marketeers, legislative requirements for property investment advisers to disclose conflicts of interest and significant risks and more proactive law enforcement. The Victoria-only strategy recommended by the Committee differs from the proposed national model because the Committee believes that a full licensing regime will be of limited effect unless it is implemented at a national level.

The Committee did not receive sufficient evidence to justify a separate licensing, conduct and disclosure regime for property investment marketeers. However, the Committee does believe that marketeers and other sellers should be required to provide specified information to investors so they can judge the quality of investment properties for themselves. The Committee believes this should be implemented at a state level, in line with the current regulation of real estate agents, but it encourages national consultation and consistency.

Other strategies

The Committee recognises that industry associations have a critical role to play and recommends that they be actively involved in any reforms, either at the state or national level. In particular, the Committee recommends the creation of an advisory committee which includes relevant industry associations to assist government to develop and implement new regulation.

The comprehensive approach recommended in this report also includes a range of non-regulatory strategies to empower consumers and raise industry standards. These are focused around the four themes of increasing consumer education, providing access to market information, improving industry training and increasing access to consumer redress mechanisms.

The Committee believes that the mix of regulatory and non-regulatory measures recommended in this report provide a practical and workable model for addressing the many issues raised throughout this inquiry. The Committee is confident that the proposed model will protect Victorian consumers better and equip them to make better-informed investment decisions. It also believes that they strike an appropriate balance between the interests of consumers and legitimate businesses.

In the view of the Committee, progress towards national regulation in this area has been stalled for too long. The model presented by the Committee in this report provides an opportunity for Victoria to take the lead on this issue at both a national and state level. Victoria should seize that opportunity.

Chapter one: Introduction

I'll make 5 'ordinary' Australians into 'Property Millionaires' in just 6 months ... using no money down, no debt and no equity ... All I'll ask of those I'll teach, is that they follow the exact steps, just as thousands of my enlightened clients have before.

*Newspaper advertisement for one of Henry Kaye's property investment seminars*¹

On 1 March 2007 the Victorian Parliament's Legislative Assembly gave terms of reference to the Law Reform Committee to conduct an inquiry into property investment and property marketeers.

The Committee came across a number of reasons why this area deserved attention during its inquiry, but the example used most often to illustrate the need for action was that of Henry Kaye.

At the beginning of this decade Mr Kaye and his company, the National Investment Institute, established a business that offered to teach people how to build wealth through property investment. Media reports suggest that Mr Kaye was a compelling speaker. People reportedly paid fees from \$4000 to \$55 000 to attend his different training programs. Some people took out loans to pay the course fees. Others bought property from another one of Mr Kaye's companies. Mr Kaye claimed that 100 000 people had attended his free seminars and 13 000 had paid to attend his courses.²

Mr Kaye was also a controversial figure. In 2002 Consumer Affairs Victoria, the Victorian Government's main consumer affairs regulator, obtained orders from the Magistrates' Court to require him to substantiate testimonials that turned out to have been made by his employees.³ In 2003 the Australian Securities and Investments Commission, the Commonwealth Government's corporate affairs regulator, took action over allegedly false, misleading and deceptive representations that it had approved some of the courses.⁴

In September 2003 Mr Kaye's company launched a promotion which, it was claimed, would silence his critics 'once and for all'. It advertised a series of seminars around the country at which Mr Kaye promised to choose five people to turn into property millionaires in only six months using no money down, no debt and no equity.

¹ Newspaper advertisement quoted in *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 at [15].

² James Button, 'Inside Henry Kaye's club of "millionaires"', *The Age* (Melbourne), 11 August 2003, 1,6; James Button, 'House of cards', *The Age* (Melbourne), 20 November 2003, 4-5; Karin Derkley, 'Spruikers on the loose', *Personal Investor*, May 2004, 38; Nick Papps, Mathew Charles and Kate James, 'Disgraced spruiker vows to do it again', *Herald Sun* (Melbourne), 3 December 2003, 9.

³ Dr David Cousins, Director, Consumer Affairs Victoria, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 4; Consumer Affairs Victoria, 'Consumer Affairs responds on Henry Kaye' (Press release, 4 December 2003).

⁴ Australian Securities and Investments Commission, 'ASIC obtains undertakings from Henry Kaye and others' (Press release, 31 July 2003).

By the end of 2003, however, the National Investment Institute had been placed into voluntary administration, with initial reports suggesting that it had debts of over \$17 million.⁵ The company went into liquidation the following February. Some former clients complained that they were owed money, while others claimed that their investment properties were worth less than they had paid for them.⁶ In October 2004, the Federal Court found that the advertisements for the September 2003 promotion involved misleading and deceptive conduct.⁷

The case of Henry Kaye is a dramatic example of a ‘get rich quick’ scheme gone wrong. However, it did cast a spotlight on the activities of property investment advisers and marketeers more generally and in particular the fact that they were, and still are, largely unregulated compared with other financial advisers.

These issues have formed the subject of the Committee’s inquiry.

1.1 The context for the inquiry

The Committee’s inquiry took place against a background of two significant developments. The first is the failure of efforts to date to introduce regulation of property investment advisers at a national level. The second is a stricter approach to using government regulation to deal with such issues generally.

1.1.1 Earlier national inquiries into property investment advisers

There have been two inquiries into the regulation of property investment advisers at a national level since 2003, but to date neither has resulted in reform.

The Ministerial Council on Consumer Affairs

In 2003, the Ministerial Council on Consumer Affairs established a working party to develop a regulatory framework for advice about property investment. The Council comprises Commonwealth, state and territory consumer affairs ministers. Its role is to consider fair trading and consumer issues of national significance and, where possible, to develop a consistent approach.

The working party, chaired by the Queensland Office of Fair Trading, issued a discussion paper on property investment advice for public comment in August 2004. The paper described the activities of property investment advisers and promoters, problems of concern and the existing regulatory framework. It set out three possible options for addressing these issues:

- no change to the existing regulatory framework, but a possible greater emphasis on its use

⁵ Papps, Charles and James, above n 2.

⁶ Button, ‘Inside Henry Kaye’s club of “millionaires”’, above n 2; James Button and Murray Mottram, ‘Question mark on Kaye land values’, *The Age* (Melbourne), 16 August 2003, 3; Derkley, above n 2, 38.

⁷ *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363.

- a new ‘medium intensity’ regulatory scheme with additional disclosure and conduct requirements for advisers
- a ‘high intensity’ licensing regime for advisers with mandatory training and competency requirements as well as disclosure and conduct requirements.⁸

According to records from the Ministerial Council’s meetings, the Council considered the results of the consultation process in April 2005 and agreed that the working party would finalise a regulation impact statement and a preferred option for change.⁹ In May 2006 it noted that the states and territories supported a Commonwealth regulatory regime like that applying to financial advisers, but that the previous Commonwealth Government wanted to continue to investigate all options. The Ministerial Council agreed that the working party would finalise the regulation impact statement as a matter of urgency and that, if agreement could not be reached on a model, the Council would consider whether a national approach remained feasible.¹⁰

There has been no mention of the project in the Council’s communiqués since that time.

The Chair of the Committee wrote to the Chair of the Ministerial Council in September 2007 seeking information about the status of the project. The Chair of the Ministerial Council informed the Committee in February 2008 that the Australian jurisdictions had been unable to reach agreement on the level of intervention to address problems in the market and there is no timeframe for a conclusion.

The Director of Consumer Affairs Victoria, Dr David Cousins, gave the Committee his views on the difficulties experienced by the working party. Dr Cousins confirmed that the states and territories’ preferred option was a Commonwealth licensing regime, like that applying to financial advisers, but that the previous Commonwealth Government had not been prepared to accept this position. He said that the previous Commonwealth Government had initially supported additional disclosure requirements but that it had shifted its support to a new co-regulatory option.¹¹

Dr Cousins informed the Committee that the working party had prepared a regulation impact statement which had been submitted to the Commonwealth Government’s Office of Best Practice Regulation in accordance with the usual procedures for proposed national regulation. He said that the Office of Best Practice Regulation had sought further information and raised some concerns but that progress had stalled.¹²

Dr Cousins told the Committee that ‘in the end Queensland has largely thrown up its hands about the whole process and has indicated that it wishes to remove the item ... altogether from the Ministerial Council agenda’.¹³

⁸ Ministerial Council on Consumer Affairs Working Party, *Property Investment Advice Discussion Paper* (2004).

⁹ Ministerial Council on Consumer Affairs, ‘Joint Communiqué’, 22 April 2005, <http://www.consumer.gov.au/html/jointcommuniqué_April2005.htm> at 10 December 2007.

¹⁰ Quoted in Centre for Credit and Consumer Law, *Submission No. 12*, 2-3.

¹¹ Dr David Cousins, *Transcript of evidence*, above n 3, 5-7.

¹² *Ibid* 6.

¹³ *Ibid* 2.

There has been a change of government at the Commonwealth level since Dr Cousins gave his evidence to the Committee, however the Ministerial Council on Consumer Affairs had not met again at the time this report was written.

The Joint Committee on Corporations and Financial Services

In December 2004 the Commonwealth Parliament's Joint Committee on Corporations and Financial Services was given terms of reference to conduct its own inquiry into the regulation of property investment advice.

The Joint Committee received 26 submissions and held four days of public hearings. It tabled its report, *Property Investment Advice – Safe as Houses?*, in June 2005.

The Joint Committee made 11 separate recommendations, including that:

- Regulation of property investment advice should be a Commonwealth responsibility.
- Chapter 7 of the *Corporations Act 2001* (Cth), which contains the Commonwealth's financial services regime that regulates financial advisers, should be amended to include real property.
- Anyone providing property investment advice should have a license under that regime (with some exceptions).
- The Commonwealth Government should continue and expand programs to enhance financial literacy amongst consumers.
- The Australian Securities and Investments Commission, which administers the financial services regime, should conduct targeted advertising and education campaigns to alert consumers to the risks associated with property investment in general and with 'get-rich-quick' spruikers in particular.¹⁴

At the time this report was finalised, the Commonwealth Government had not responded publicly to the Joint Committee's recommendations.

1.1.2 Developments in regulatory policy

The Commonwealth and Victorian Governments have both adopted initiatives in recent years designed to reduce the amount of 'red tape' in Australia and its impact on business. Their initiatives include:

- the Commonwealth Government's Taskforce on Reducing Regulatory Burdens on Business, which reported in January 2006 and made a number of recommendations about regulatory processes and systems¹⁵

¹⁴ Joint Committee on Corporations and Financial Services, Parliament of Australia, *Property Investment Advice – Safe as Houses?* (2005) 23, 35-36.

¹⁵ Australian Government Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation* (2006).

- the Council of Australian Governments' February 2006 agreement to a range of measures to ensure 'best practice' regulation making and review as part of the National Reform Agenda¹⁶
- the Victorian Government's \$42 million *Reducing the Regulatory Burden* initiative, under which the Government has committed itself to cutting the existing administrative burden of regulation by 25% over five years and to undertaking reviews to identify action necessary to reduce compliance burdens.¹⁷

The economic and social rationale for consumer protection regulation is well-established.

In economic terms, consumer protection regulation has a role to play where markets fail to function effectively because consumers lack access to information or are unable to use it effectively (a situation that economists refer to as 'information asymmetry').¹⁸ Consumer policy can also help to promote competitive and efficient markets. To quote the Secretary of the Commonwealth Treasury, Dr Ken Henry AC, it facilitates markets by 'empowering consumers to exercise their preferences, to make informed choices, and to signal to suppliers what it is that they, the consumers want'.¹⁹

In social terms, consumer protection regulation aims to protect vulnerable and disadvantaged members of the community from scams and unfair conduct by businesses and to promote certain basic rights for consumers such as the right of choice.²⁰

However, consumer regulation is not immune from changes in regulatory policy. In 2006 the Commonwealth Government asked the Productivity Commission to undertake an inquiry into Australia's consumer policy framework and to report on a number of issues including:

- barriers to, and ways to improve, the harmonisation and coordination of consumer policy and its development and administration across Australia
- any areas of consumer regulation which are unlikely to provide net benefits to Australia and which could be revised or repealed
- the scope for avoiding regulatory duplication and inconsistency through reducing reliance on industry-specific consumer regulation and making greater use of general consumer regulation

¹⁶ Council of Australian Governments, *Communiqué*, 10 February 2006, <<http://www.coag.gov.au/meetings/100206/index.htm>> at 8 January 2008.

¹⁷ Victorian Government, *Reducing the Regulatory Burden: The Victorian Government's Plan to Reduce Red Tape* (2006).

¹⁸ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Draft Report (2007) 29-33.

¹⁹ Ken Henry, 'Connecting Consumers and the Economy: The Big Picture' (Speech delivered at the National Consumer Congress, Melbourne, 15 March 2007) 4. See also Productivity Commission, above n 18, 2-4, 28.

²⁰ Productivity Commission, above n 18, 34-37; Centre for Credit and Consumer Law, *Submission No. 12*, 13-16.

- the extent to which more effective use could be made of self-regulatory, co-regulatory, consumer education and consumer information approaches and principles-based regulation in addressing consumer issues.

Although the Productivity Commission is not due to finalise its inquiry until after the Committee tables this report, it did release a draft report for public comment in December 2007. The Committee has made a number of references to the Productivity Commission's draft recommendations throughout this report.

The Committee's terms of reference for this inquiry also reflect these trends in regulatory policy. They require the Committee to review the regulatory framework for property investment advice, with the aim of controlling the exploitation of Victorians while keeping the burden on business as low as possible.

Although the Committee is not bound by government regulatory policy and processes, it has had regard to the previous Commonwealth Government's and the Victorian Government's guidelines for regulatory design to assist it with this task. Their guidelines are not identical but it is possible to distil some basic principles for good regulatory design:

- identification of a case for action
- identification of the desired objectives of that regulation
- consideration of all feasible options and an assessment of their costs and benefits, and their impact on competition
- selection of an option that produces the greatest net benefit for the community
- effective communication and consultation with all affected parties
- steps to ensure that the regulation remains relevant and effective.²¹

The Committee has used these principles to guide its inquiry and the preparation of this report.

1.2 The scope of the inquiry

1.2.1 The Committee's terms of reference

The Committee's terms of reference for this inquiry are set out at the beginning of this report and require the Committee to inquire into, consider and report on property investment and property marketeers. As noted above, they require the Committee to have particular regard to reviewing the regulatory framework for the provision of property investment advice. They also require the Committee to have regard to the Commonwealth's role in regulating financial advice and the ongoing work of the Ministerial Council on Consumer Affairs.

²¹ Australian Government, *Best Practice Regulation Handbook* (2007) 2-3; Victorian Government, *Victorian Guide to Regulation* (2nd edition, 2007) Chapter 3.

The terms of reference do not define ‘property investment’, ‘property marketer’ or ‘property investment advice’. The Committee developed its own working definitions of these terms to help guide its inquiry.

1.2.2 The Committee’s definition of ‘property investment’

At the start of its inquiry the Committee decided to focus on ‘direct property investment’, or those situations where investors buy and hold real estate in their own right with the aim of producing income and/or capital growth. This can be distinguished from ‘indirect property investment’ such as property trusts and managed investment funds, where investors buy an interest in a company, trust or partnership which in turn buys and holds real estate.

The Committee was conscious that indirect property investment, and advice about those forms of investment, is already regulated under the Commonwealth’s financial services laws. Although the collapses of the Westpoint, Fincorp, Australian Capital Reserve and Bridgecorp property investment schemes have raised questions about these laws,²² the Committee considered that these events fell outside its terms of reference. The Australian Securities and Investments Commission announced initiatives aimed at improving regulation of these types of schemes in the course of the Committee’s inquiry.²³

The Committee did not attempt to limit its definition of ‘property investment’ any further for the purposes of the inquiry. The evidence to the Committee did focus almost exclusively on ‘retail’, or non-institutional, investors and also dealt more with investment in residential property than commercial property. The Committee examines which investors, and which investments, should be covered by regulation in chapter six of this report.

1.2.3 ‘Property marketers’ and the Committee’s definition of ‘property investment advice’

The term ‘property marketer’ is often used to refer to operators like Henry Kaye, along with terms like ‘property spruiker’, ‘property promoter’ or ‘wealth creation promoter’. While the *Macquarie Concise Dictionary* defines ‘marketeer’ as ‘one active in or advocating a market’, the term ‘property marketer’ has become a term of art in this area. The previous inquiries have described some of the common operations of property marketers, but the Committee found that it was not always easy to distinguish between these operators and reputable businesses using some of their criteria. These issues are discussed further in chapter three of this report.

The Committee decided to examine the activities of property investment advisers more generally. It adopted a working definition of ‘property investment advice’ at the start of the inquiry based on the definition adopted by the Joint Committee on

²² Marc Pallisco, ‘When big players fold, small players suffer’, *The Sunday Age* (Melbourne), 26 August 2007, Domain 4; John Collett, ‘In search of justice’, *The Age* (Melbourne), 19 July 2006, 4-5; John McCarthy, ‘The Westpoint wait’, *Herald-Sun* (Melbourne), 26 December 2006, 7.

²³ Australian Securities and Investments Commission, ‘ASIC’s next steps towards better disclosure for unlisted and unrated debentures’ (Press release, 31 October 2007); Australian Securities and Investments Commission, ‘Better disclosure for unlisted and unrated debentures: ASIC releases its advertising guide’ (Press release, 19 December 2007).

Corporations and Financial Services in its report. The Committee's adopted definition was:

Advertising, marketing, representations or advice in relation to:

- the risk and prospect of an investment return (capital growth or income) from a particular property or a portfolio of properties;
- a strategy of investing in property on the basis of a proposed investment return (capital growth or income).

The Committee considered that the references to advertising, marketing and representations in this definition covered businesses that promote property investment products, as well as businesses that provide advice in its purer sense.

During the inquiry some stakeholders encouraged the Committee to draw a clearer distinction between businesses that promote or sell products and businesses that provide advice. The Committee found that it was not always easy to distinguish between these businesses in this industry. However, in light of these concerns, the Committee has decided to refer separately to property investment advisers (businesses that provide advice in its purer sense) and property investment marketeers (businesses that promote property sales) in this report. These issues, and the way they should be addressed in regulation in the future, are discussed further in chapters three and six of this report.

1.3 The conduct of the inquiry

The Committee called for public submissions to the inquiry on 25 June 2007. The call for submissions was advertised in *The Age*, the *Herald-Sun*, the *Australian Financial Review* and *The Weekly Times* and via a media release from the former Chair of the Committee, Mr Brian Tee, MLC. The former Chair also wrote directly to around 40 relevant organisations, including government regulators, industry associations, consumer groups and universities, alerting them to the inquiry and inviting them to contribute.

The Committee received a total of 16 written submissions in the course of the inquiry and a list of the people and organisations who made those submissions is set out in appendix A.

Although the Committee was impressed by the overall quality of these submissions, it was concerned that the low number of submissions limited the Committee's ability to address its terms of reference thoroughly. In particular, the Committee was concerned by the lack of evidence from government regulators, consumers and businesses providing property investment advice.

The Committee took a number of steps to gather further evidence in these areas. It sought information from a number of government agencies including:

- the three Victorian and Commonwealth regulators in the area – Consumer Affairs Victoria, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission

- consumer affairs agencies in Queensland, New South Wales and the Australian Capital Territory, which have their own specific regulation on property investment advisers
- the Ministerial Council on Consumer Affairs.

On 26 September 2007, the Chair of the Committee and Committee staff attended Consumer Affairs Victoria's regular forum with community organisations, the *Working Together Forum*, to seek a consumer perspective on the issues raised by the inquiry. Organisations represented at the forum included the Australian Consumers Association, the Country Women's Association and the Council on the Ageing.

The Committee held two public hearings on 15 October 2007 and 12 November 2007 and invited a number of stakeholders who had not made written submissions to speak to the Committee. A list of the people and organisations who participated in those hearings is set out in appendix B of this report.

The Committee also conducted its own research into the property investment advice and marketing 'industry'. The Committee conducted a survey of property investment-related businesses, based on advertising and directories, with the assistance of an intern recruited through the Victoria Law Foundation. Committee representatives also attended property investment-related events and seminars in October and November 2007. The results of this research are set out in chapter three.

The Committee considers that it has sufficient evidence to make broad recommendations about the regulation of property investment advisers and marketeers. However, it remains apparent at the conclusion of the inquiry that there are some significant gaps in the available evidence about property investment in Australia, the number and characteristics of property investment advisers and marketeers and their impact on consumers. The Committee believes that these gaps will continue to limit the ability of policy makers and regulators to adopt a considered, evidence-based approach to regulation in this area. The Committee has made a number of recommendations in this report that aim to remedy this situation.

1.4 Outline of this report

This report is divided into two parts.

The first part sets out the evidence gathered by the Committee during its inquiry:

- Chapter two discusses the extent of property investment in Australia and the likely reasons behind its growth, the characteristics of property investors and why property investment matters from an individual and community perspective.
- Chapter three describes the property investment advice and marketeering 'industry' and outlines the problems with the industry raised during the inquiry.
- Chapter four examines the impact of these problems on consumers and others in the community.

The second part of the report focuses on the regulatory framework for property investment advisers and marketeers:

- Chapter five describes the existing regulatory framework and examines whether it provides adequate protection for Victorians.
- Chapter six looks at the costs and benefits of options for future regulation and at whether there should be a national or state-based approach to these issues.
- Chapter seven examines steps that governments and the property investment industry could take in addition to regulation to improve industry standards and consumer protection.

Chapter two: Property investment in Australia

Australia has a love affair with property.

Mr Kerry Sharp, State Director, Association of Financial Advisers²⁴

The Committee found evidence that a growing number of people are looking to real estate, not just for shelter but also as a way to build future wealth. This chapter looks at why property investment deserves the attention of policy makers and regulators in Australia. It examines the number of Australians with property investments, the reasons for their growth, the types of people investing in property and the significance of property investment for individuals and the community.

2.1 How many people invest in property?

2.1.1 The number of property investors in Australia

Governments in Australia do not regularly collect and publish information about the number of people with an interest in investment property. The Australian Bureau of Statistics' last major report on residential property investors was published in 1998. There is more recent data available from other sources, but it varies considerably.

The taxation system is one source of recent information about property investment in Australia. According to Australian Taxation Office statistics, 1 510 921 personal taxpayers reported receiving net rental income in 2004-05, the latest year for which statistics are available.²⁵ This amounts to 13.4% of personal taxpayers in 2004-05 or, assuming a national population of 20 399 800 at the end of 2004-05,²⁶ 7.4% of all Australians.

Recent research based on household surveys reports a higher percentage of people with investment property, although the results also vary widely:

- The Australian Bureau of Statistics reported that nearly 20% of households in 2005-06 owned a property other than the dwelling in which they lived, although this figure includes properties such as holiday homes as well as properties for rent.²⁷
- The 2002 Household Income and Labour Dynamics in Australia (HILDA) survey, a longitudinal survey funded by the Commonwealth Government, reportedly found that 10.3% of households owned investment properties. The Reserve Bank's analysis of this data suggests that this figure is likely to underestimate the true number of property investors, because a further 6.5%

²⁴ Mr Kerry Sharp, State Director, Association of Financial Advisers, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

²⁵ Australian Taxation Office, *Taxation Statistics 2004-05* (2007) 13.

²⁶ Australian Bureau of Statistics, *Australian Demographic Statistics*, Cat No. 3101.0, ABS, Canberra, June 2007, 10.

²⁷ Australian Bureau of Statistics, *Household Wealth and Wealth Distribution*, Cat No. 6554.0, ABS, Canberra, November 2007, 4.

reported owning a residential property that was not their primary residence but not receiving rental income, and a further 3% reported receiving rental income but not owning a second property.²⁸

- Other surveys conducted in 2005 and 2007 found that 19% and 18% of respondents respectively reported owning an investment property.²⁹

The Committee considers that the household survey results are likely to be a more accurate reflection of the level of property investment in Australia than data from the taxation system, which only collects information about investment properties that produce rental income in a given year. There are a number of reasons why an investment property may not be producing income, such as the property may be vacant or investors only seek capital growth, for example if they have purchased the property for a relative to live in rent-free. The household surveys would capture those properties as well.

The Australian Securities and Investments Commission told the Committee it had commissioned its own investor research in 2007 that would include information about people who have investment property.³⁰ The research results had not been released at the time of writing this report, but may throw further light on these issues.

Based on the available data, it appears that Victorians are slightly less likely than other Australians to invest in property. In 2005-06, only 12.5% or 350 170 Victorian personal taxpayers reported receiving net rental income, compared with 13.4% of personal taxpayers nationwide. The percentage of Victorian taxpayers living outside Melbourne who reported net rental income was lower again at 10.4%.³¹ These results are consistent with the last major Australian Bureau of Statistics survey of residential property investors in 1997, which found that the percentage of Victorian 'income units' with a residential rental property was 0.5% lower than the national figure.³²

Property investment does appear to be more common, even in Victoria, than in comparable nations. In 2003 the Productivity Commission reported evidence that around 6.5% of people in Canada and the United States owned a rental property, while the figure in the United Kingdom was 2%.³³

There is less recent information available to show the extent to which Australians are investing in property. The 1997 Australian Bureau of Statistics survey found that 76.4% of residential property investor 'income units' owned one residential rental

²⁸ Natalie Parlett and Anthony Rossiter, 'Residential Property Investors in Australia', *Reserve Bank of Australia Bulletin*, May 2004, 52, 52-53.

²⁹ ANZ and AC Nielsen, *ANZ Survey of Adult Financial Literacy in Australia* (2005) 65; Financial Literacy Foundation, *Financial literacy: Australians understanding money* (2007) viii.

³⁰ Letter from the Acting Executive Director, Regulation, Australian Securities and Investments Commission to the Chair, Law Reform Committee, 5 November 2007.

³¹ Australian Taxation Office, above n 25, Table 2C.

³² Australian Bureau of Statistics, *Household Investors in Rental Dwellings*, Cat No. 8711.0, ABS, Canberra, June 1998, Table 1 and Table 5. The term 'income unit' is defined on page 37 of this publication as a person, or group of related persons within a household whose command over income is assumed to be shared.

³³ Productivity Commission, *First Home Ownership*, Report No 28 (2004) 22.

property, 16.1% owned two properties and 7.5% owned three or more properties.³⁴ The Committee notes these figures are now over 10 years old and may no longer be current.

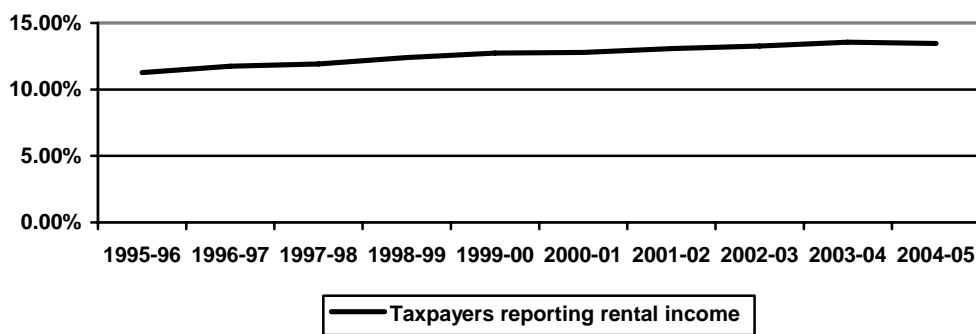
2.1.2 Growth in the levels of property investment

The Committee did find evidence of slow but steady growth in the levels of property investment in Australia since the mid-1990s.

The Australian Taxation Office's statistics show consistent growth in the proportion of personal taxpayers reporting net rental income since 1995-96. These statistics are set out in figure 1 of this report.

The proportion of housing finance that is attributable to investment compared with owner-occupied housing also suggests property investment has become more common since 1996. Figure 2 shows that proportion of housing finance attributable to investors since 1996 based on data from the Australian Bureau of Statistics.

Figure 1 – Percentage of personal taxpayers reporting net rental income 1995-96 to 2004-05³⁵



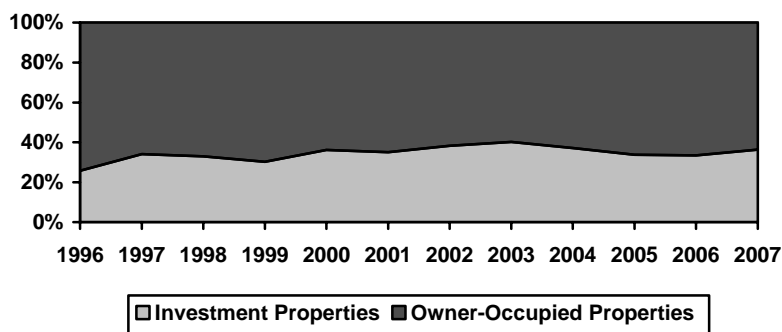
The popularity of property investment will clearly vary depending on the state of the property market and a range of other factors, and the Committee is not in a position to predict whether or not growth will continue. The most recent Wizard Home Loans *Tomorrow's property investor* survey, an online survey which asks people about their intentions to invest in residential property, recorded a drop in the number of Australians planning to buy a residential property investment in the third quarter of 2007. However, it still found there were 716 000 potential residential property investors nationally.³⁶

³⁴ Australian Bureau of Statistics, *Household Investors in Rental Dwellings*, above n 32, Table 1. See also Tim Seelig, Terry Burke and Alan Morris, *Motivations of investors in the private rental market*, Australian Housing and Urban Research Institute Positioning Paper No 87 (2006) 25-26.

³⁵ Australian Taxation Office, above n 25, Table 7.

³⁶ Ed Logue, 'Property investment turnaround', *The Daily Telegraph* (Sydney), 30 November 2007.

Figure 2 – Housing finance commitments for owner-occupied and investment housing³⁷



2.2 Why do people invest in property?

The Australian Bureau of Statistics' 1997 survey of residential property investors was the last major survey to ask investors about their motivations. Not all respondents had made a conscious decision to acquire an investment property. Just over a quarter (25.6%) were renting out a property that had previously been their own home, and 3.8% had inherited the property. The most common reason given for investing in or renting out property was that it was a long term investment (66%), followed by negative gearing benefits (15.7%), rental income (15.1%), the potential for the investment to become a future home (14.6%), capital gain (8.8%), an inability to sell the property (6.8%) and 'family reasons' (5%).³⁸

The two previous national inquiries into property investment advisers attributed the popularity of property investment in recent years to a range of factors including:

- expectations about rises in the property market and a desire for capital gain
- cheaper and easier access to finance due to relatively low interest rates and new loan products
- beneficial taxation treatment
- economic growth and the willingness of households to take on more debt
- the downturn in the sharemarket between 2000 and 2003 and the collapse of major public companies such as HIH
- retirement planning by the 'baby boomer' generation
- promotion of property investment by advisers and marketeers.³⁹

³⁷ Australian Bureau of Statistics, *Housing Finance*, Cat No. 5609.0, ABS, Canberra, 2007, 'Table 11. Housing Finance Commitments (Owner Occupation and Investment Housing), By Purpose: Australia (\$000)', time series spreadsheet.

³⁸ Australian Bureau of Statistics, *Household Investors in Rental Dwellings*, above n 32, Table 6 and Table 7. 7.6% of respondents gave their reason as 'other'.

³⁹ Joint Committee on Corporations and Financial Services, Parliament of Australia, *Property Investment Advice – Safe as Houses?* (2005) 6; Ministerial Council on Consumer Affairs Working

The Property Investment Association of Australia referred to similar reasons in its written submission.⁴⁰

Other stakeholders noted that there might be less tangible reasons why Australians are so attracted to real estate as a place to invest their money. Property Planning Australia, a Melbourne-based property advice business, explained in its written submission that property 'is an asset that people relate to and believe they understand. Everyone has lived in a home; many have bought, sold or rented one. By its very nature, property creates a sense of security – real or imagined – that other asset classes do not.'⁴¹ The submission from the Centre for Credit and Consumer Law also referred to the emotional element in property investment:

The tangible nature of property and the familiarity that all Australians have with real property means that property is an investment that the 'average' person believes that they understand to some degree and that they will be able to exercise some control over the investment ... [M]any people perceive real estate as a 'bricks and mortar investment' and therefore 'safe'.⁴²

The perception that property investment is a 'safe' investment, and its potential consequences for investors, is discussed further in chapter four of this report.

The Australian Housing and Urban Research Institute has been conducting a research project on the motivations, expectations and experiences of rental property investors, which has the potential to provide further information on these issues.⁴³

2.3 What types of people invest in property?

The Committee had difficulty locating recent comprehensive and published data about the types of Australians who invest in property. Some of the property investment businesses that participated in the inquiry referred to 'mum and dad investors' in their evidence.⁴⁴ The data that is publicly available suggests that although property investors come from all backgrounds they tend to be concentrated in particular parts of the community.

2.3.1 Age

The data about property investors that is publicly available consistently shows higher levels of property investment amongst people aged between 35 and 64 years than in other age groups.

Party, *Property Investment Advice Discussion Paper* (2004) 9-11. The Committee notes that taxation benefits associated with property investment include negative gearing and depreciation.

⁴⁰ Property Investment Association of Australia, *Submission No. 3*, 10.

⁴¹ Property Planning Australia, *Submission No. 2*, 1.

⁴² Centre for Credit and Consumer Law, *Submission No. 12*, 12. See also Mr Rob Pepicelli, Victorian Division, Australian Property Institute, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3; Andrew Beer, 'Housing Investment and the Private Rental Sector in Australia', *Urban Studies*, volume 36, issue 2, 1999, 255, 260.

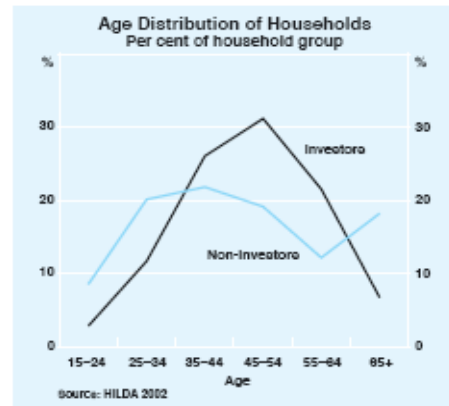
⁴³ See Seelig, Burke and Morris, above n 34.

⁴⁴ Mr Mark Armstrong, Director, Property Planning Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 4; Mr Troy Gunasekara, Branch Manager, The Investors Club, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 7.

This is evident from the Reserve Bank’s analysis of the 2002 HILDA survey, which is set out in figure 3.

Figure 3 – Property investors by age⁴⁵

The higher levels of property investment amongst people in their middle years is also evident from a 2005 survey conducted for the ANZ Bank,⁴⁶ and the 1997 Australian Bureau of Statistics’ survey of investors in residential property. The latter found that the proportion of ‘income units’ with residential rental property was over three times higher for income units with a reference person aged between 45 to 54 years than for income units with a reference person aged under 34 or over 65 years.⁴⁷



2.3.2 Labour status, income and wealth

The 2002 HILDA survey and the 2005 ANZ Bank survey both reported that households with property investments are more likely to be working households, and in particular are more likely to be self-employed.⁴⁸

The HILDA and ANZ Bank surveys also show a relationship between property investment, income level and wealth.⁴⁹ Figure 4 shows the Reserve Bank’s analysis of the HILDA survey. It demonstrates that property investment rises substantially with income and net wealth.

Figure 4 – Property investors by income and net worth quintiles⁵⁰



Data taken from the taxation system confirms the relationship between income and investment levels. The percentage of personal taxpayers reporting net rental income in the \$6001-\$10 000 taxable income bracket in 2004-05 was 8.8%, compared with 33.5% of personal taxpayers with taxable income exceeding \$1 million.⁵¹

⁴⁵ Parlett and Rossiter, above n 28, 53.

⁴⁶ ANZ and AC Nielsen, above n 29, 80.

⁴⁷ Australian Bureau of Statistics, *Household Investors in Rental Dwellings*, above n 32, Table 1. The term ‘reference person’ is defined on page 39 of this publication as the male partner in a couple income unit, the parent in a one-parent income unit and the person in a one-person income unit.

⁴⁸ Parlett and Anthony, above n 28, 53; ANZ and AC Nielsen, above n 29, 80.

⁴⁹ Parlett and Rossiter, above n 28, 53; ANZ and AC Nielsen, above n 29, 80.

⁵⁰ Parlett and Rossiter, above n 28, 54.

⁵¹ Australian Taxation Office, above n 25, Table 5.

2.3.3 Household composition

The publicly available data also shows a relationship between household composition and levels of property investment. The 2005 ANZ Bank survey found that couples with children at home were amongst the people most likely to have an investment property (24%). The categories least likely to have an investment property included single people living alone (13%), single people in shared households (11%) and single parents (12%).⁵²

These results are consistent with the 1997 Australian Bureau of Statistics survey of investors in residential property, which found higher levels of property investment amongst ‘income units’ comprising couples, with or without dependent children, than one person income units.⁵³

2.3.4 Home ownership

The available data also suggests that most property investors purchase their own homes before purchasing an investment property. Eighty-five percent of the respondents who owned investment property in the 2002 HILDA survey also owned their own homes. The 2005 ANZ Bank survey included people who owned their home outright amongst its profile of people most likely to have an investment property.⁵⁴

The Reserve Bank’s analysis of the HILDA survey suggests that people who own an investment property, but not their own home, tend to be younger than other investors, with a median age of 39 compared with 49 years for owner-occupier investors.⁵⁵

2.3.5 Other information and the need for further research

The 2005 ANZ Bank survey report includes other information about property investors. It puts women in the category ‘least likely’ to own an investment property and people with degrees in the ‘most likely’ category.⁵⁶ The Australian Bureau of Statistics’ very first survey of residential property investors, conducted in 1993, also included information on the gender and birthplace of investors.⁵⁷

However, the Committee found that recent data on significant demographic factors such as gender, cultural and linguistic background and education levels is difficult to locate from the sources that are currently available.

The Committee notes that this type of information can help policy makers and regulators target their efforts to protect consumers more effectively. The detailed data that is currently collected through the HILDA and ANZ Bank surveys is not published in full, although it should be noted that the focus of the ANZ Bank survey is financial literacy, not property investment. The Australian Bureau of Statistics

⁵² ANZ and AC Nielsen, above n 29, 80.

⁵³ Australian Bureau of Statistics, *Household Investors in Rental Dwellings*, above n 32, Table 4.

⁵⁴ Parlett and Rossiter, above n 28, 53; ANZ and AC Nielsen, above n 29, 80.

⁵⁵ Parlett and Rossiter, above n 28, 53.

⁵⁶ ANZ and AC Nielsen, above n 29, 80.

⁵⁷ Australian Bureau of Statistics, *Investors in Rental Dwellings Australia*, Cat No. 8711.0, ABS, Canberra, July 1993.

conducted its last detailed survey of residential property investors more than 10 years ago.

The Committee considers that governments should encourage the regular collection and publication of data about property investors, either by government itself or in collaboration with the non-government sector.

Recommendation 1: Research into property investors

The Victorian Government, in conjunction with the Commonwealth Government, the Australian Bureau of Statistics and relevant private sector organisations, should develop a strategy to ensure the regular collection and publication of information about the characteristics of property investors in Australia.

2.4 Why does property investment matter?

The Committee considers that there are a number of reasons why policy makers should pay attention to property investment, both in terms of its impact on individual investors and on the wider community.

2.4.1 The significance of property investment for individuals

With the median house price in metropolitan Melbourne reaching \$485 000 in the December 2007 quarter, and a median apartment/unit price of \$390 000,⁵⁸ buying an investment property in Victoria is a substantial financial undertaking.

Property investment accounts for a substantial proportion of household wealth in Australia. While fewer Australians invest in direct property than in asset classes such as shares or managed funds,⁵⁹ investment properties account for a much higher proportion of household assets. According to the most recent Australian Bureau of Statistics data on household wealth, property other than the family home accounted for 13.8% of the mean value of household assets, the second highest source of household assets after people's own homes.⁶⁰ The Australian Property Institute's submission estimated that directly owned investment property in Australia was worth \$200 billion in equity.⁶¹

Property investment also accounts for a significant proportion of household liabilities. The Australian Bureau of Statistics data shows that the principal outstanding on loans for 'other property' accounted for 31.6% of the mean value of household liabilities in 2005-06, the second highest type of liability behind the principal on loans for owner-occupied homes.⁶²

At an individual level, the majority of property investors in Australia appear to owe debt on their investment or investments. The Reserve Bank's analysis of the 2002 HILDA survey shows that 55% of investor households owed debt on their

⁵⁸ 'REIV December Quarter 2007 Median Prices', <<http://www.realestateview.com.au/median/>> at 30 January 2008.

⁵⁹ ANZ and AC Nielsen, above n 29, 65.

⁶⁰ Australian Bureau of Statistics, *Household Wealth and Wealth Distribution*, above n 27, 16.

⁶¹ Australian Property Institute, *Submission No. 14*, 4.

⁶² Australian Bureau of Statistics, *Household Wealth and Wealth Distribution*, above n 27, 16.

investment property.⁶³ Property investors also appear to have significant levels of debt overall. The 2005 ANZ Bank survey found that 57% of investment property owners had a total mortgage debt of over \$250 000, and 52% had non-mortgage debt of \$100 000 or more.⁶⁴

The importance of the wealth and the debt carried by property investors has become more significant in the context of social and policy changes making ordinary Australians more responsible for their own financial security. Changes to superannuation policy in the 1980s signalled a shift towards Australians taking greater responsibility for their own retirements, a shift given added impetus by the concerns about the ageing of the population.⁶⁵ Research on current levels of superannuation, however, suggests that it is unlikely to provide a comfortable living standard in retirement for most Australians on its own.⁶⁶

As noted earlier in this chapter, one of the main reasons why people invest in property is to build wealth for retirement. Investors who rely on property to secure their retirements will live with the consequences of investment decisions, good and bad, well into their futures.

2.4.2 The significance of property investment for the community

Although the focus of the Committee's inquiry is on ways to minimise harm to individual Victorians, it is also worth briefly noting some of the implications of property investment for the broader community.

Although the Committee did not receive data on the contribution of property investment to economic activity, the Property Investment Association of Australia drew the attention of the Committee to the 'economic driver of property investment'. The Chairman of the Association, Mr John Hopkins, noted that '[i]f we just think of one thing – that is, purchasing property off the plan – [we realise] how much activity in construction, in different consulting practices, in finance, in a whole range of ways, is created because of that activity'.⁶⁷

The growth in levels of property investment has also been linked to the recent increases in the property market and the difficulties faced by first home buyers. The Reserve Bank's submission to the 2003 Productivity Commission inquiry into first home ownership stated that '[t]he demand by investors for rental properties has added to the general upward pressure on house prices, and thus made it more difficult for first-time buyers to get a foothold in the market'.⁶⁸ The Productivity

⁶³ Parlett and Rossiter, above n 28, 54. See also Australian Bureau of Statistics, *Household Investors in Rental Dwellings*, above n 32, Table 11, which shows that 67.5% of respondents to the 1997 survey owed some mortgage debt.

⁶⁴ ANZ and AC Nielsen, above n 29, 80.

⁶⁵ See, for example, Consumer and Financial Literacy Taskforce, *Australian Consumers and Money – A Discussion Paper by the Consumer and Financial Literacy Taskforce* (2004) 5; Commonwealth of Australia, *Intergenerational report 2007* (2007).

⁶⁶ Association of Superannuation Funds of Australia, *Are retirement savings on track?* (2007).

⁶⁷ Mr John Hopkins, Chairman, Property Investment Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 2.

⁶⁸ Reserve Bank of Australia, 'Submission to Productivity Commission inquiry into First Home Ownership' (2003) 35.

Commission's final report also cited the increase in investment in rental housing as one of the factors behind the recent upswing in house prices.⁶⁹

Property investors also have a significant impact on non-investors through their contribution to the stock of rental housing in Australia. According to the Australian Bureau of Statistics, 22% of all households in 2005-06 were renter households with a private landlord. Lower net worth households were even more dependent on accommodation provided by private landlords, with 65.9% of households in the lowest net worth quintile and 36.5% in the second lowest net worth quintile renting accommodation provided by private landlords.⁷⁰ Although estimates vary, it appears that most of this private rental stock is provided by individuals or families rather than institutional or professional investors.⁷¹

For these and other reasons, the Committee believes that property investment needs to be taken seriously by policy makers and regulators in Australia.

The next chapter begins examining the particular issues raised by the Committee's terms of reference, namely the activities of those people promoting property investment and the problems facing consumers of their services.

⁶⁹ Productivity Commission, *First Home Ownership*, above n 33, 21. See also Tim Colebatch, 'Investors' housing splurge' *The Age* (Melbourne), 18 February 2008, 1.

⁷⁰ Australian Bureau of Statistics, *Household Wealth and Wealth Distribution*, above n 27, 17.

⁷¹ Beer, above n 42, 266; Mike Berry, 'Investment in Rental Housing in Australia: Small Landlords and Institutional Investors' *Housing Studies*, volume 15, number 5, 2000, 661; Seelig, Burke and Morris, above n 34, 24-27.

Chapter three: Property investment advisers and marketeers

[D]ubious operators are creating an environment where ethical and experienced advisers are being brought into disrepute.

*Property Investment Association of Australia*⁷²

Professional property investment services have the potential to help investors make better informed, higher quality investment decisions, but the Committee heard that this is not always the case in the current market. This chapter looks at the role of advisers and marketeers in the property investment market, the number and type of businesses that provide these services at the moment and the problems raised by stakeholders in the course of the Committee's inquiry.

3.1 The role of property investment advisers and marketeers

Direct property investment, like all investment, requires investors to make some significant decisions.

Investors need to decide at the outset whether property is the best place to invest their funds, or whether they would be better off investing in other assets such as shares or indirect forms of property investment like property trusts. The Commonwealth Government's Understanding Money website lists a range of issues that investors should consider when choosing between investments. These include how long they intend to invest for, the level of risk they are willing to bear, the importance of a diversified investment portfolio and the investment's costs and tax implications.⁷³ Given the high cost of real estate, investors also need to make sure they have enough funds to enter this market.

Once an investor decides to buy property they then face the task of choosing a good investment from the hundreds available on the market. The Committee heard evidence that this was more complex than some investors think. Property Planning Australia, a property and home loan advisory business, told the Committee in its written submission that underlying economic factors such as land-building ratios and long term supply and demand issues mean that different properties in different locations generate different investment returns.⁷⁴ Mr Mark Armstrong, one of the business's directors, told the Committee that 'the property market is as complex as – and I would say in some cases more complex than – the share market'.⁷⁵

⁷² Property Investment Association of Australia, *Submission No. 3*, 3.

⁷³ Commonwealth of Australia, *Understanding Money Pays Off - Investing* <<http://www.understandingmoney.gov.au/content/consumer/financialliteracy/investing/>> at 20 December 2007.

⁷⁴ Property Planning Australia, *Submission No. 2*, 3-4.

⁷⁵ Mr Mark Armstrong, Director, Property Planning Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 6.

Professional property investment advisers and sellers have the potential to help inexperienced or time-poor investors with these issues. Economists usually refer to businesses that act as a conduit between suppliers and consumers in complex markets as ‘intermediaries’. They can potentially save consumers the time and effort of researching difficult and complex products by providing expert information or helping them to locate suitable products.

There is limited information available about the extent to which property investors use these services at the moment. The Chair of the Financial Planning Association of Australia, Ms Corinna Dieters, told the Committee that ‘the people who invest in property are not necessarily those people who think about seeking advice’.⁷⁶ Some of the recent surveys show that investors use a range of sources of advice, and some prefer to use family and friends and newspapers and magazines to help them with investing as much as professional advisers or seminars.⁷⁷ However, there are now a number of property investment advice and other services in Australia offering to help consumers with their decisions.

3.2 Who are property investment advisers and marketeers?

The Committee tried to develop a picture of the property investment advice and marketeering ‘industry’ to inform its inquiry, but this proved a more difficult task than it anticipated. The Committee found that available data about these businesses was limited and often based on assumption rather than concrete evidence. It did become clear, however, that the ‘industry’ is diverse and fragmented, and that the boundaries between advising and promotion and selling are often unclear.

3.2.1 Available information about property investment advisers and marketeers

Most of the existing information about businesses in this area, and the evidence provided to the Committee, focused on advisers.

The two earlier national inquiries listed the types of professions they believed were involved in giving property investment advice. These lists included people from well-established professions such as real estate agents, buyers’ agents (estate agents who act for buyers rather than vendors), property developers, financial planners, accountants, finance brokers, lenders and lawyers. They also included businesses, sometimes referred to as ‘property spruikers’ or ‘property investment promoters’, who did not fall within any traditional occupational category.⁷⁸

Consumer Affairs Victoria, the main state regulator in the area, listed similar professions, but not lawyers or lenders, in its submission to the Committee.⁷⁹ The

⁷⁶ Ms Corinna Dieters, Chair, Financial Planning Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 7.

⁷⁷ ANZ and AC Nielsen, *ANZ Survey of Adult Financial Literacy in Australia* (2005) 235-244; Financial Literacy Foundation, *Financial literacy: Australians understanding money* (2007) 26-32.

⁷⁸ Ministerial Council on Consumer Affairs Working Party, *Property Investment Advice Discussion Paper* (2004) 15-16; Joint Committee on Corporations and Financial Services, Parliament of Australia, *Property Investment Advice – Safe as Houses?* (2005) 4.

⁷⁹ Consumer Affairs Victoria, *Submission No. 16*, 7-8.

Property Investment Association of Australia included some additional professions, including property valuers and body corporate managers, in its submission.⁸⁰

The Committee received differing evidence about the number of advisers in Australia and the extent to which different professions are involved in this area.

The Committee asked the Victorian and Commonwealth Government regulators in this area – Consumer Affairs Victoria, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission – if they had conducted specific research into the number and characteristics of property investment advisers and marketeers. The Australian Competition and Consumer Commission and the Australian Securities and Investments Commission advised the Committee that they had not conducted or were not able to provide such research.⁸¹ Consumer Affairs Victoria’s written submission to the Committee included information compiled by the Ministerial Council on Consumer Affairs working party in 2006-07 on the number and types of businesses potentially engaged in property investment advice, and this is reproduced in figure 5.

Figure 5 – Ministerial Council on Consumer Affairs estimates of numbers and types of businesses potentially engaged in property investment advice⁸²

| Industry sector | Businesses in Australia | Businesses giving property investment advice |
|---|-------------------------|--|
| Property investment promoters e.g. seminar providers | 80 | 80 (100%) |
| Real estate agents (including buyers’ agents) | 13 300 | 665 (5%) |
| Property valuers | 8000 | 160 (2%) |
| Property developers | 2500 | 1250 (50%) |
| Finance brokers | 10 000 | 300 (3%) |
| Accountants | 10 000 | 1000 (10%) |
| Financial planners | 4400 | 45 (1%) |
| Total businesses in Australia potentially providing property investment advice = 3500 | | |

According to the submission from Consumer Affairs Victoria, the information is based on estimates provided by state and territory consumer affairs agencies.

These figures are consistent with some, but not all, of the Committee’s other evidence.

The Financial Planning Association of Australia and Association of Financial Advisers, both of whom appeared at the Committee’s public hearings, agreed that few of their members were giving advice about direct property investment.⁸³

⁸⁰ Property Investment Association of Australia, *Submission No. 3*, 4.

⁸¹ Letter from the Acting Executive Director, Regulation, Australian Securities and Investments Commission to the Chair, Law Reform Committee, 5 November 2007; Letter from Chief Executive Officer, Australian Competition and Consumer Commission to the Chair, Law Reform Committee, 19 December 2007.

⁸² Consumer Affairs Victoria, *Submission No. 16*, 8.

⁸³ Ms Corinna Dieters, *Transcript of evidence*, above n 76, 3; Mr Kerry Sharp, State Director, Association of Financial Advisers, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 4.

Evidence provided by the Law Institute of Victoria, the peak body representing solicitors in Victoria, supported the exclusion of lawyers from the Ministerial Council's list. Mr Michael Hayes and Ms Karen Cheng told the Committee that it was common for lawyers to give legal advice about property investments, but that 'insofar as buying into a particular suburb over another suburb, or whether one particular purchase is more appropriate or a "better investment" than another, then we would not technically be providing that advice'.⁸⁴

Other evidence suggests that the proportion of real estate agents and buyers' agents giving property investment advice is likely to be higher than the 5% estimated by the Ministerial Council. The Chief Executive Officer of the Real Estate Institute of Australia, Mr Bryan Stevens, told the Committee that a number of its members conducted property investment seminars.⁸⁵ A review of the financial advising activities of real estate agents conducted by the Australian Securities and Investments Commission in 2000 also noted that many real estate agents give general advice to potential buyers of investment property, usually about a property's likely capital appreciation or rental.⁸⁶ The Vice-President of the Real Estate Buyers' Agents Association of Australia, Mr Hugh Jones, also told the Committee that buyers' agents were 'not talking about guaranteeing returns or anything like that, but we are giving a degree of advice on what makes a good or a bad investment property'.⁸⁷

The Committee received no specific evidence about the numbers and types of people engaged in property investment marketeering as opposed to advising.

3.2.2 The Committee's survey

Prior to receiving the Ministerial Council working party's figures from Consumer Affairs Victoria, the Committee had undertaken its own survey of property investment advisers and marketeers to try to address some of the gaps in its evidence.

The survey involved:

- attendance at a range of property investment-related events, including seminars, held in Melbourne in October 2007 (some of these events are set out as case studies in this chapter)
- a survey of advertising by property investment advisers and marketeers in major publications and on the internet during October and November 2007. The sources examined by the Committee are listed in appendix C, while appendix D shows where the advertisements actually appeared. Publications included major metropolitan newspapers, local suburban and regional newspapers and specialist investment magazines

⁸⁴ Mr Michael Hayes, Commercial Law Section, and Ms Karen Cheng, Property and Environmental Law Section, Law Institute of Victoria, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 4-5.

⁸⁵ Mr Bryan Stevens, Chief Executive Officer, Real Estate Institute of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 4.

⁸⁶ Australian Securities and Investments Commission, *ASIC review of financial advising activities of real estate agents* (2000).

⁸⁷ Mr Hugh Jones, Vice President, Real Estate Buyers' Agents Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 5.

- consideration of the evidence provided by the stakeholders that participated in the Committee's inquiry.

The Committee acknowledges that this survey is also unlikely to have produced a comprehensive picture of businesses in this area. The Committee heard that some businesses only advertise at particular times, such as when newspapers offer discounted advertising rates.⁸⁸ Other businesses may not advertise at all. Some professions like real estate agents and accountants have pre-existing clientele, while some businesses use other marketing strategies such as telemarketing or referrals. The Investors Club, for example, told the Committee that '[p]retty much most of our business today is by word of mouth'.⁸⁹

However, the Committee believes that the results of the survey do shed light on the numbers and types of businesses actively seeking customers in this area.

Property investment advisers

The Committee identified 71 businesses that advertised themselves primarily as property investment advisers during the survey period. It was not possible to determine the professional background of all of these advisers, but they fell broadly into the following categories:

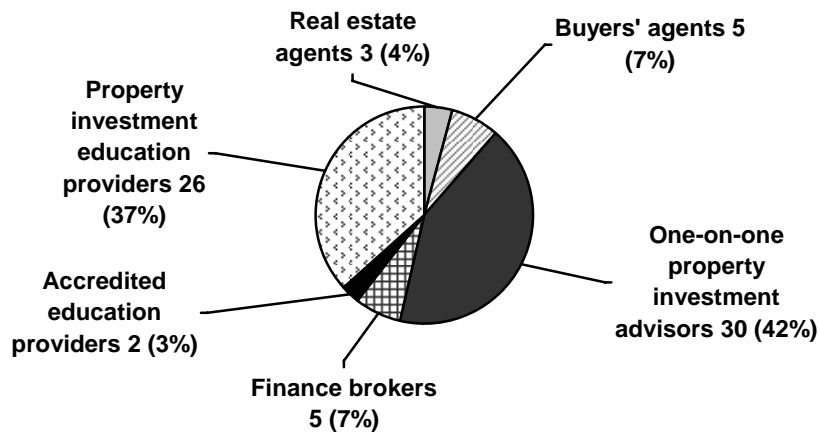
- real estate agents. These agents offered property investment advice or seminars in addition to standard real estate services
- buyers' agents. The agents offered property investment advice, mentoring and investment seminars in addition to standard buyers' agents services
- finance brokers. Not surprisingly, these businesses focused on investment financing issues, including portfolio structuring and taxation. Some advertised investment seminars and one advertised an investment mentoring program
- accredited education providers. These institutions offered property investment courses for fees ranging from \$400 for individual subjects to \$500 for a one day workshop and \$2695 for a five module course
- other 'educators'. These businesses offered a variety of products and services such as books, DVDs, seminars and workshops that offered to teach people how to invest in property. Some of the services were free but others required payment, including one home study program costing up to \$5772. Many of the individuals in this category advertised themselves as people who had 'made it themselves' and were sharing their 'secrets' with others. Some also offered additional services such as property sourcing and mentoring
- businesses offering specialist 'one-on-one' property investment advice. The qualifications and experience of many of these advisers was also unclear.

⁸⁸ Mr Neil Jenman, consumer advocate, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

⁸⁹ Mr Troy Gunasekara, Branch Manager, The Investors Club, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

Figure 6 shows the number of advertised businesses that fell into each of these categories.

Figure 6 – Professional background of surveyed property investment advisers



Property investment marketeers

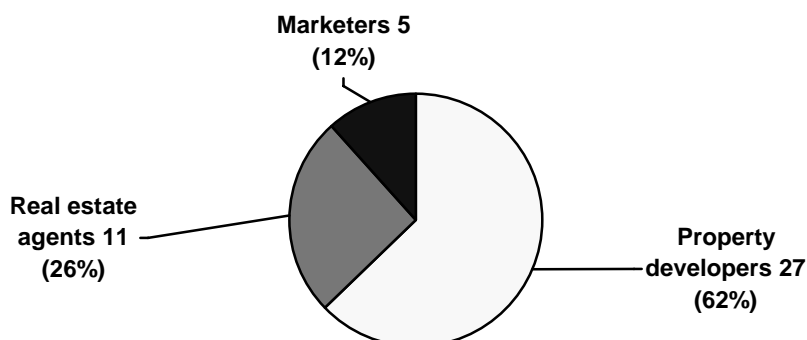
The Committee identified 43 businesses that advertised or promoted particular investment properties for sale.

These businesses identified themselves as:

- property developers. Many of the developers were based in Queensland and over half of the advertised properties were located in that state. The properties were predominantly apartments and houses located in new developments
- real estate agents
- other marketeers selling investment properties on behalf of developers. These businesses offered a range of investment properties for sale, including a large number that were part of larger commercial, residential or tourism developments.

Figure 7 shows the proportion of marketeers from each of these categories. Five of these businesses claimed to be able to provide investors with general advice about property investment and several offered additional services such as property management or referrals to property managers and financiers.

Figure 7 – Professional background of surveyed property investment marketeers



3.2.3 How do property investment advisers and marketeers operate?

The previous national inquiries in this area described the typical operations of property investment advisers but, not surprisingly given concern about operators like Henry Kaye, focused largely on ‘property investment promoters’. The Ministerial Council’s 2004 discussion paper listed a number of common practices employed by spruikers including free seminars or workshops, overstated and manipulative claims about property investment, promotion of their services as ‘educational’ and suggestions that they can ‘source’ property at better prices than the general market.⁹⁰

The Committee’s own survey identified some businesses that matched this description, or parts of it. However, it was not always easy to distinguish between reputable and disreputable businesses based on these practices. A large number of advisers, for example, offered ‘educational’ products and services such as investment seminars. The Property Investment Association of Australia stressed in its submission that ‘[m]arketing practices such as seminars, workshops and public presentations are universally recognised as legitimate means of communication, and can be and are conducted by professional, experienced and ethical operators’.⁹¹

Some witnesses who participated in the inquiry described the industry, and its problematic elements, in more functional terms. Ms Monique Wakelin from Wakelin Property Advisory, for example, told the Committee that ‘we need to create a very clear distinction between individuals and companies selling product and those not selling product but offering genuinely impartial independent advice’.⁹²

The Committee identified some businesses during its inquiry that were just providing advice and assistance. Ms Wakelin put her own company in this category. She told the Committee that:

The client comes to us, they pay us a straight-up fee for service, they ask us what works, what does not work, we explain that in a very simple and straightforward way ... and then we simply go into the marketplace in a completely unrestricted way ... We are not in league with any third party during the transactional selection or advisory process. We simply select a property using feet-on-the-ground exertion, sweat from the brow, literally, or scouring the marketplace, finding the right asset within the client’s approved financial range and purchasing that asset on behalf of the client. This is effectively what we do, and that is all we do.⁹³

However, the Committee identified many cases in its survey where the distinction between advising and selling was unclear. One business advertised education seminars and ‘one-on-one’ advice, as well as properties for sale in new apartment complexes. Some of the marketing businesses also purported to give at least general advice about the likely returns from their advertised properties, with many making claims about the capital growth potential of the areas in which their properties were located.

⁹⁰ Ministerial Council on Consumer Affairs Working Party, above n 78, 16-19. See also Joint Committee on Corporations and Financial Services, above n 78, 9-10.

⁹¹ Property Investment Association of Australia, *Submission No. 3*, 3.

⁹² Ms Monique Wakelin, co-founder, Wakelin Property Advisory, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 2. See also Property Planning Australia, *Submission No. 2*, 15.

⁹³ Ms Monique Wakelin, *Transcript of evidence*, above n 92, 2.

Case study 1: The Property Expo

Representatives of the Committee attended the Property Expo held at the Melbourne Exhibition & Convention Centre from Friday 12 October to Sunday 14 October 2007. The Expo's website promoted the Expo as 'Melbourne's largest property expo'. It was held in conjunction with the Franchising & Business Opportunities Expo and the Investment Expo. There were over 80 exhibitors, representing a range of industries including developers, financiers, buyers' advocates, investment advisers, education providers and seminar promoters.

A range of free seminars were run as part of the Expo, with topics including:

- How to grow a multi-million dollar portfolio – in your spare time
- How to safely invest in residential real estate
- How to avoid the biggest mistakes made by property investors.

However, despite several of the Expo's free seminars dealing with risk and/or safe investing, none of the exhibitors the Committee's representatives spoke to mentioned the risks potentially associated with investing in property. Only one speaker during the Committee representatives' attendance spoke about having an 'exit strategy.'

Committee representatives were also handed a wide range of promotional material by exhibitors. Representations made in this promotional material included:

- '[We] help make property millionaires every week of the year! Will you be one of them?'
- '7% returns on average over 3 year rental guarantee, returns in excess of 10% anticipated after 3 years' [for a development in Queensland].
- 'You can buy and sell multi-million dollar properties with little or NO MONEY.'

Many exhibitors offered multiple services, such as free property investment seminars, mortgages, mortgage broking, conveyancing, property management and property sourcing. There were many different strategies and products promoted at the Expo.

While data on attendees at the 2007 Expo is not yet available, The Melbourne 2006 Show Report,⁹⁴ available from the Property Expo website, provides data on the 2006 Expo. According to the report, 9378 people attended the 2006 Expo over three days. Of those attending the 2006 Expo:

- 69% reported that they had more than \$250 000 to invest
- 70% reported that they were ready to invest within 12 months, with 24% reporting that they were ready to invest immediately
- 46% reported that they did not currently own an investment property, 16% reported owning one investment property and 29% reported owning between 2 and 5 investment properties
- 34% of attendees reported earning under \$50 000, 47% reported earning between \$50 000-\$100 000 and 19% reported earning over \$100 000
- 18% of attendees were aged under 30 years, 25% were aged 31-40 years, 25% were aged 41-50 years and 32% were aged over 50 years.

⁹⁴ Diversified Exhibitions Australia Property Expo, *Melbourne 2006 show report*, <http://www.investmentexpo.com.au/page/melbourne_exhibitor_home.html> at 17 January 2008.

Another part of the market identified by the Committee were ‘one stop shop’ property investment businesses. These businesses offered not only advice and properties for sale, but also provided or arranged related services such as finance, financial advice, insurance, legal services and conveyancing and ongoing property management.

The Investors Club, one of the businesses that participated in the inquiry, falls within this category. It provides free newsletters and introductory seminars about property investment and ongoing support and information for members, as well as advertising properties for sale. The Club’s representatives told the Committee that its network also included accountants, solicitors and finance brokers and that it provided ongoing property management as well.⁹⁵ The representatives did not describe The Investors Club as an advice or marketeering business in its evidence, telling the Committee that ‘[w]e are simply there to facilitate and assist [our members]’.⁹⁶

3.2.4 The need for further research

The evidence available to the Committee suggests that the property investment advice and marketeering ‘industry’ is a fragmented one without clear boundaries. Some businesses come from established professions and appear to have ‘branched out’ into this area, while others have no discernible professional qualifications. The type of advice and range of services provided by these businesses also varies considerably. The Property Investment Association described the industry in its submission as ‘unordered, if not chaotic at times’.⁹⁷

This creates some challenges for policy makers and regulators, who need a proper understanding of the size and nature of industries in order to respond to them appropriately. The Committee’s own experience was that information about this industry is limited and sometimes inconsistent.

The Committee believes that further dedicated research into the number, types and operations of property investment advisers and marketeers would help policy makers and regulators adopt a more evidence-based approach. As was noted in chapter one, there is currently some debate about whether the Commonwealth Government or state and territory governments should take responsibility for this area. The Committee notes that the Ministerial Council on Consumer Affairs is the body charged with resolving these issues. Given its current project on property investment advisers, the Committee believes this Council should organise and oversee this research.

Recommendation 2: Research into the property investment advice and marketeering ‘industry’

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that it commission research into the number, characteristics and operations of property investment advisers and marketeers.

⁹⁵ ‘The Investors Club: What we do’ <<http://www.tic.com.au/what+we+do.aspx>> at 20 January 2008.

⁹⁶ Mr Troy Gunasekara, *Transcript of evidence*, above n 89, 3.

⁹⁷ Property Investment Association of Australia, *Submission No. 3*, 13. See also Joint Committee on Corporations and Financial Services, above n 78, 6.

3.3 Problems with property investment advisers and marketeers

The earlier national inquiries into property investment advisers described a litany of unfair practices on the part of ‘spruikers’ operating in the property investment market. These included targeting of financially vulnerable and unsophisticated consumers, high pressure selling techniques and undisclosed conflicts of interest.⁹⁸

The Committee also heard a range of concerns about property investment advisers and marketeers in this inquiry, not just from regulators and consumer advocates but also from businesses within the industry as well. Some of these complaints concerned the activities of Henry Kaye-like ‘rogue traders’, but others concerned broader systemic problems with the industry as a whole.

3.3.1 Rogue traders

Businesses that act illegally or unethically in particular industries are sometimes referred to as ‘rogue traders’. In 2006, the Director of Consumer Affairs Victoria, Dr David Cousins, said that:

The experience of consumer agencies is that the great majority of businesses comply with the laws that protect consumers, or would do so if they were aware of their obligations. There is a small percentage of businesses, however, that deliberately breach the law. These rogue traders intentionally engage in ongoing activities that exploit consumers, especially taking advantage of the vulnerable and disadvantaged.⁹⁹

Stakeholders described a range of practices by some property investment advisers and marketeers that appear to place them within this category.

Conflicts of interest – marketing disguised as advice or education

As was noted earlier in this chapter, a number of businesses that provide property investment advice or education also sell products, either in the form of property or other products such as courses or books.

Some stakeholders pointed out that this constituted a conflict of interest. Property Planning Australia told the Committee that the common element among promoters and marketers is that:

they purport to provide “advice” when in fact they are selling something – either directly (e.g. seminars, books, CDs, properties, loans) or via referral to third parties (for which they receive commissions or other forms of remuneration). In this scenario, the investor is the least significant player, when in fact, they should be at the very top of the food chain.¹⁰⁰

⁹⁸ Joint Committee on Corporations and Financial Services, above n 78, 3-4; Ministerial Council on Consumer Affairs Working Party, above n 78, 21-25.

⁹⁹ Consumer Affairs Victoria, *Stopping Rogue Traders*, Research Paper No. 11 (2006) i.

¹⁰⁰ Property Planning Australia, *Submission No. 2*, 7. See also Ministerial Council on Consumer Affairs Working Party, above n 78, 23; Dr David Cousins, Director, Consumer Affairs Victoria, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

The Committee heard that not only do some property investment advisers and marketeers fail to disclose these vested interests to their clients, but some also actively misrepresent the true nature of their activities. To use a term employed by the Australian Property Institute in its submission to the Committee, these businesses can ‘hoodwink’ the public into using their services without disclosing their true motives.¹⁰¹

Mr Neil Jenman, a consumer advocate in the real estate industry, showed the Committee an example of one advertisement that he believed illustrated this problem:

They have an advertisement which is headed, say, “Important financial notice”. They make out they are giving financial or retirement or that sort of advice. They say nowhere in this advertisement that they are actually selling overpriced property.¹⁰²

Mr Peter Dunn from the Financial Planning Association of Australia also told the Committee that some advertisements ‘are set really to deceive, to give the impression that we are here to give you advice around your self-managed super fund or investment or whatever it is, but in the fine print down the bottom we are selling property’.¹⁰³

Conflicts of interest – undisclosed relationships

Witnesses also expressed concern about the failure of some businesses, particularly ‘one stop shops’, to disclose conflicts of interest when they refer clients to financial advisers, lawyers, finance brokers and other service providers.

The Committee heard that some businesses have financial arrangements with these service providers but fail to disclose this to their clients. Henry Kaye’s company, for example, referred clients who needed a loan to pay their course fees to a particular finance company. Clients were not told, however, that the financing company had an arrangement with Mr Kaye’s company to keep part of the loan amount as a ‘holdback fee’, a practice that was later found to breach the Uniform Credit Code.¹⁰⁴

Another concern, particularly in the case of referrals to lawyers, accountants and other professional advisers, is that consumers may incorrectly believe they are getting independent advice. The Committee found evidence that some rogue traders use their own lawyers and other associates to snare unwitting consumers. Mr Neil Jenman told the Committee that the way property spruikers ‘sign them up is through a series of crooked mates and pals, from crooked accountants to what is really probably the most serious and the thing that makes me the most upset of all – the crooked lawyers they send them to’.¹⁰⁵

¹⁰¹ Australian Property Institute, *Submission No. 14*, 2.

¹⁰² Mr Neil Jenman, *Transcript of evidence*, above n 88, 2.

¹⁰³ Mr Peter Dunn, Certified Financial Planner, Financial Planning Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 2.

¹⁰⁴ *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* [2007] HCA 57.

¹⁰⁵ Mr Neil Jenman, *Transcript of evidence*, above n 88, 3. See also the property investment scheme described in *Australian Competition and Consumer Commission v Oceana Commercial Pty Ltd* [2004] FCAFC 174.

Case study 2: 'How do I build REAL wealth?'

This wealth building seminar was widely advertised in Melbourne including through radio and newspapers. It was held at a city venue and cost \$30 for one person or \$40 for two people, but many people appeared to have free entry coupons. All attendees received a free copy of the presenter's book on wealth creation in '7 steps'.

Around 400 people, mostly aged between 20 and 40, attended the seminar. It opened with a video containing testimonials from former clients and highlighting the presenter's charity work.

The presenter was confident, charismatic and interacted with the audience. He told the audience that he came from a poor background but had become a millionaire by the age of 23. He said he purchased 38 investment properties in 2006 and planned to purchase 'another 20 or so' in 2007. He told the audience he had 2000 clients, with a combined equity of \$300 million in property.

The presenter told the audience that building wealth through property was not for everyone. He said that wealth builders are 'positive, responsible and proactive' people, rather than negative people who focused on risks such as not having tenants. This was the only time he mentioned risks during the seminar, although dealing with risks is covered in the free book given to attendees.

The presenter talked about a strategy of compound growth, or 'growth on growth'. This involved using equity in one property to buy another property, using the equity in that property to buy a third and so on. He told the audience that investors using this strategy could have six investment properties and net assets of \$2 million in 10 years and an income of \$44 500 per annum based on 'only' 8% capital growth.

He stated that most banks will only lend customers 80-90% of the loan to value ratio (LVR, calculated by dividing the loan amount sought by the total value of property), but growth-oriented investors should borrow 95% LVR, as this enables investors to buy a second investment property sooner. He also said that most banks will lend only 33% debt service ratio, which is what lenders use to determine an investor's ability to repay the loan, but said that prudent investors will request 40%, demanding that the future rental income from the property be taken into account in this calculation.

The presenter recommended that investors have 30% equity in their own home or \$50 000 in cash. He suggested those people who did not meet these criteria should team up with someone else.

At the end of the seminar, people were invited to stay for a further 30 minute session and a one-on-one consultation. Many attendees stayed. They were given a folder containing information about the company's services and products including other educational materials and 'approved' properties available for sale, as well as information about a sister company specialising in investment loans.

Five days after the seminar, the Committee's representative received a phone call asking whether she was interested in attending a one-on-one consultation or a smaller seminar which would cover issues such as goal setting and properties available for sale through the company.

Other stakeholders also referred to conflicts of interest or a general lack of transparency in the industry as a cause for concern.¹⁰⁶

Overpricing

The Committee also heard evidence that some businesses were selling investment properties to consumers at inflated prices.

One of the more well-known schemes used by rogue traders is ‘two-tier marketing’. In these schemes businesses sell property for amounts well above local market value, usually to interstate buyers who are unfamiliar with local market conditions. This practice became common in the 1990s in Queensland where it is claimed that, at one stage, nearly 45% of all new home units, strata buildings and house and land packages were sold in this way.¹⁰⁷ The Committee is not aware that these schemes have been widespread in Victoria, although Dr David Cousins referred the Committee to one case in which a developer sold a home in country Victoria to a homebuyer for double the locally advertised price.¹⁰⁸

Stakeholders told the Committee about other schemes which have the potential to result in consumers paying inflated prices for property investments in Victoria. Mr Hugh Jones, the Vice President of the Real Estate Buyers’ Agents Association of Australia, described one scheme for the Committee:

[Y]ou might have a builder who might either be building a large block of apartments or who might be selling refurbished apartments ... To underpin their finance they will try to gain contracts before they commence construction. One of the ways that they do this is that they will have a number of groups around town – financial advisers they are called ... – who will take an option fee on the property. For example, if the value of the property is \$100 000 per unit, they will pay an option fee to buy them at \$110 000 – a non-refundable option fee which might be \$10 000. That group will then place the units through their seminar arm and might sell them at \$120 000 or \$130 000 and then substitute contracts at settlement ... The properties generally that are sold by this route, if they were sold on the open market, would sell, obviously, for much lower rates.¹⁰⁹

The high cost of some investment seminars and other services was another problem raised by stakeholders. An individual who made a confidential submission to the Committee complained that he had attended a free investment seminar only to be offered a further conference for \$9650.¹¹⁰ Mr Hugh Jones told the Committee that the commissions charged by some ‘wealth creators’ were also excessive. He told the Committee that ‘a normal selling rate of commission in the real estate industry might be between 2 per cent and 3 per cent of the sale price. In this area of the industry it might be anything from 5 per cent up to 12 per cent, sometimes 15 per cent.’¹¹¹

¹⁰⁶ Property Investors Association of Australia, *Submission No. 6*, 7. See also Mr Bryan Stevens, *Transcript of evidence*, above n 85, 3; Real Estate Institute of Australia, *Submission No. 4*, 3.

¹⁰⁷ Iain Herriott, ‘It’s time for honourable valuers to be counted’, *Australian Property Journal*, volume 36, 2001, 683, 684.

¹⁰⁸ Dr David Cousins, *Transcript of evidence*, above n 100, 9.

¹⁰⁹ Mr Hugh Jones, *Transcript of evidence*, above n 87, 3. See also Property Planning Australia, *Submission No. 2*, 5.

¹¹⁰ Confidential, *Submission No. 5*, 2.

¹¹¹ Mr Hugh Jones, *Transcript of evidence*, above n 87, 2.

Exaggerated returns

Although the Committee identified few statements during the inquiry as dramatic as Henry Kaye's claim that he could turn people into millionaires in six months with no money down and no debt, stakeholders told the Committee that some advisers and marketeers were still making unsubstantiated or exaggerated claims.¹¹²

Mr Neil Jenman took issue with the common use of claims that the value of property increases at a particular rate over time, claims that were certainly made at some of the investment seminars the Committee attended. He told the Committee that:

They actually say that since the *Domesday Book* was written in 1066, real estate has increased by an average of 10 per cent per annum throughout history. Yet, funnily enough, nobody has ever got out a simple calculator and worked out that if real estate in England started at a farthing in 1066 and increased by 10 per cent per annum what the average block of land would be worth today. The answer is that there would not be enough money on the planet to buy the average block of land. If real estate in Melbourne or Sydney had increased at the rates that the property advisers generally claim ... then the average Melbourne home today would be worth about \$39 million.¹¹³

Another stakeholder referred to the high returns promised by some businesses. Mr Rob Pepicelli from the Australian Property Institute told the Committee that a lot of investment products associated with direct property are 'juiced up, for want of a better term' by 'various financial engineering methods' and do not reflect the likely return from the property itself.¹¹⁴

The Committee's own survey of property investment advisers and marketeers found that a number of businesses claim to have 'secret' strategies for successful property investment. One internet site encouraged consumers to 'Click here NOW for your FREE 27 Page Report (Before the Authorities ban it)'.

Failure to disclose risks

Stakeholders told the Committee that some businesses also fail to disclose the risks involved with their strategies or products.

Ms Monique Wakelin stressed that all investments, including property investment, involve risks. She told the Committee that 'there is inherent risk in any kind of investment strategy. You can put your money under the mattress and there is risk associated with that.'¹¹⁵ Stakeholders outlined a number of particular risks with property investment including:

- a lack of diversification sometimes associated with property investment, which often require people to put a large proportion or all of their funds into a single asset or asset class

¹¹² See, for example, Property Investors Association of Australia, *Submission No. 6, 7*; Dr David Cousins, *Transcript of evidence*, above n 100, 3.

¹¹³ Mr Neil Jenman, *Transcript of evidence*, above n 88, 3.

¹¹⁴ Mr Rob Pepicelli, Victorian Division, Australian Property Institute, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

¹¹⁵ Ms Monique Wakelin, *Transcript of evidence*, above n 92, 5.

- the additional risk created by the use of gearing or debt to fund property investment
- the illiquid nature of property compared with investments such as shares, given the high costs and time involved in buying and selling
- downturns in the property market.¹¹⁶

Property Planning Australia told the Committee that some advisers promoted investment strategies that encouraged speculative investing. In its written submission it noted that:

many seminar promoters espouse the strategy of buying units off-the-plan to save on stamp duty, then selling before settlement to make a profit. This kind of strategy relies heavily on picking market cycles – buying low and selling high – to be successful, yet the reality is that unless they have the proverbial crystal ball, no-one (not even a seasoned investor) can identify market peaks and troughs until they have been and gone.¹¹⁷

The Committee identified a number of businesses in its own survey that emphasised the ease or low cost of investing in property. One property developer described their properties as a ‘worry free’ or ‘set and forget’ investment, while another Melbourne-based developer claimed that their investment properties cost ‘from as little as \$9 a day’.

The Property Investment Association of Australia’s submission to the Committee said that some property promoters deliberately avoid telling customers about possible downsides with investment because ‘[a]ny negatives brought into the selling scenario would be perceived by those people as being counter-productive to their interests’.¹¹⁸

‘One size fits all’ advice

The Ministerial Council’s 2004 discussion paper expressed concern that some property investment spruikers were promoting strategies that were not practical for most people. One example given in the discussion paper was the strategy of buying, renovating and selling properties in a short period at a high profit, a scheme that involves high transaction costs.¹¹⁹

The Committee had similar concerns about some of the seminars attended by its representatives, where presenters suggested that people who did not have enough money or equity in their own homes to buy investment property could draw on the resources of relatives and friends.

¹¹⁶ Property Planning Australia, *Submission No. 2*, 5; Mark Armstrong and David Johnston, ‘Out in the cold: why property investors need real protection’, *Australian Property Investor*, September 2006, 28, 31; Ms Corinna Dieters, *Transcript of evidence*, above n 76, 7; Mr Kerry Sharp, *Transcript of evidence*, above n 83, 3.

¹¹⁷ Property Planning Australia, *Submission No. 2*, 8.

¹¹⁸ Property Investment Association of Australia, *Submission No. 3*, 11.

¹¹⁹ Ministerial Council on Consumer Affairs Working Party, above n 78, 22-23.

Case study 3: Not all property is good property

This seminar was run by an established firm of property advisers and buyers' agents in the meeting room of a hotel in inner-suburban Melbourne.

The seminar cost \$65 per person, which included a copy of the firm's book on how to make money from residential property. About 30 people attended the seminar and most appeared to be in their 30s or 40s.

Two speakers from the firm spoke about why property was a good investment and where investors should buy. A third speaker from a finance broking company gave a presentation about ways to finance property investment.

The investment strategy outlined at the seminar was the same as the strategy promoted in case study 2 – take advantage of compound growth by investing in one property, wait for its value to increase, use the equity in the first property to invest in a second and so on.

The seminar's style was markedly different to case study 2. The speakers described property investment as a 'long term, conservative' process that was 'not about getting rich quickly'. They stressed that they were 'completely independent' and did not sell property or have ties to developers or agents.

The speakers warned that some investors had lost large sums of money and valuable time by investing badly. They stressed that while good property investments should grow at 6-8% above inflation, speculative investments could have poor or even negative growth. They recommended buying certain types of apartments or houses in certain suburbs in inner Melbourne.

To illustrate their point, the speakers showed slides of properties that had been bought for similar prices but had performed differently over time. One slide showed an apartment in a complex in Carlton that had been bought new for \$232 000 in 1993, sold for only \$168 000 in 1996 and was worth \$360 000 now. The speakers said that if the \$232 000 had been invested in a good property in 1993, that property would be worth over \$900 000 now.

The speakers then gave an example of one of their clients, 'David', who had started investing in 1984 and now had six properties worth over \$3 million.

Participants were told that they needed a minimum of \$300 000 to \$320 000 if they wanted to invest in the current market and should look to hold investment property for a minimum of 7-10 years.

At the end of the seminar the speakers outlined their services, including a further one day course. Participants were asked to fill out a feedback form and to note whether they wanted to be contacted by the firm or the finance broker.

Property Planning Australia told the Committee that some businesses failed to take account of the circumstances, goals or risk-tolerance of individual investors when promoting property investment. In its written submission, it noted that some property investment promoters:

say that if a particular formula worked for them, it can work for everyone. This fails to recognise that each investor has different circumstances, financial position, risk profile and goals. While market performance obviously plays a large role, the success of any property investment strategy depends to a large extent on whether it is suited to the *individual investor* – not on how well it worked for others.¹²⁰

Other problems

The Committee also heard evidence about other problems with rogue traders including:

- the use of high pressure selling techniques, particularly at investment seminars, to encourage people to invest.¹²¹ These types of techniques were evident at one of the seminars attended by Committee staff, where the presenter described people who worried about investment risks as ‘negative’
- the failure of companies to provide promised refunds to unhappy consumers¹²²
- the use of unqualified staff to promote investment strategies, including former ‘students’ of the businesses concerned.¹²³

3.3.2 Are rogue traders still a problem?

The Committee was interested in whether rogue traders were still a major problem in the property investment area given the limited public response to its call for submissions. Many of the submissions it did receive referred largely to problems that had occurred in the past.

Although a number of stakeholders told the Committee that problems in this area had decreased in recent years, the common response of consumer and business groups was that there are still problems with a number of businesses involved in property investment advice and sales.

The Centre for Credit and Consumer Law at Griffith University told the Committee that:

In the last couple of years, the heat appears to have gone out of the property market somewhat, at least in some parts of Australia, and the returns from property have

¹²⁰ Property Planning Australia, *Submission No. 2*, 7.

¹²¹ Mr Bryan Stevens, *Transcript of evidence*, above n 85, 3; Real Estate Institute of Australia, *Submission No. 4*, 3; Consumer Action Law Centre, *Submission No. 7*, 2; Dr David Cousins, *Transcript of evidence*, above n 100, 3.

¹²² Mr Bryan Stevens, *Transcript of evidence*, above n 85, 3; Real Estate Institute of Australia, *Submission No. 4*, 3; Consumer Action Law Centre, *Submission No. 7*, 2; Dr David Cousins, *Transcript of evidence*, above n 100, 3.

¹²³ Property Planning Australia, *Submission No.2*, 8.

deceased in relation to their previous highs. The activities of property investment marketeers of the likes of Henry Kaye are therefore not as prominent as they were a number of years ago. However, it is reasonable to suspect that there will be times in the future when investors move back into the property market in high numbers.¹²⁴

Dr David Cousins told the Committee that ‘these things are still happening ... some of the cases [Consumer Affairs Victoria is] investigating now raise very serious issues of concern in terms of the behaviour of some operators and the way they have taken advantage of vulnerable people’.¹²⁵

Mr Hugh Jones from the Real Estate Buyers’ Agents Association was one of the stakeholders from the business community who agreed with these assessments. He told the Committee that the ‘whole wealth creation seminar industry, which slowed down a little bit after all the trouble with Henry Kaye, is still going. It has just gone a bit further underground.’¹²⁶

The Committee heard evidence that some advisers and marketeers have found new markets for their services. Mr Peter Dunn from the Financial Planning Association of Australia told the Committee ‘there is a new target for some of these property sellers these days, and that is the self-managed super fund market ... [T]hese are growing at the rate of 2000, 3000 a month and there are now approaching 350 000 of these self-managed funds in Australia.’¹²⁷ Recent media reports have stated that some businesses are targeting Western Australians who have profited from that state’s resources boom with highly priced apartments in the Melbourne CBD, Southbank and the Docklands.¹²⁸

The Committee received limited evidence about the actual number of rogue traders currently operating in the industry. Mr Neil Jenman told the Committee he is writing a book on the issue which currently has 137 ‘characters’.¹²⁹ Information provided by Consumer Affairs Victoria about complaints made by consumers show that a relatively small number of businesses attract the majority of complaints.¹³⁰ These numbers are a small fraction of the total estimated number of businesses operating in the area. However, the impact on the reputation of property investment advisers as a whole is likely to be much broader, with some stakeholders complaining that reputable businesses have also been ‘tarnished’.¹³¹

¹²⁴ Centre for Credit and Consumer Law, *Submission No. 12*, 4.

¹²⁵ Dr David Cousins, *Transcript of evidence*, above n 100, 9.

¹²⁶ Mr Hugh Jones, *Transcript of evidence*, above n 87, 3. See also Ms Monique Wakelin, *Transcript of evidence*, above n 92, 2.

¹²⁷ Mr Peter Dunn, *Transcript of evidence*, above n 103, 7.

¹²⁸ Anthony Klan, ‘Property spruikers chase boom’, *The Daily Telegraph* (Sydney), 2 October 2007; ‘Property sharks are circling again’, *Herald-Sun* (Melbourne), 10 November 2007.

¹²⁹ Mr Neil Jenman, *Transcript of evidence*, above n 88, 2, 5.

¹³⁰ Consumer Affairs Victoria, *Submission No. 16*, 10.

¹³¹ Real Estate Institute of Australia, *Submission No. 4*, 11. See also Property Investment Association of Australia, *Submission No. 3*, 3.

3.3.3 Systemic problems

While rogue traders have attracted the most concern in the past, at least one witness urged the Committee to look beyond those examples to what they saw as more systemic problems with property investment advisers and marketeers in Australia.¹³²

Lack of boundaries between advising, promoting and selling

As noted earlier in this chapter, the boundaries between advising, promoting and selling are often unclear in the area of property investment. Some witnesses noted that businesses providing advice and selling products face conflicts of interest in the same way as rogue traders who market products under the guise of providing advice.

The profession which attracted most concern during the Committee's inquiry was real estate. Although real estate agents often give general advice to purchasers about the investment potential of properties in the course of their work, they act on behalf of the people selling those properties. Some witnesses were concerned that consumers did not properly appreciate that this gives real estate agents a vested interest in their own advice. Mr Mark Armstrong from Property Planning Australia told the Committee that:

[t]here is a perception in the marketplace that agents are there to help the purchaser buy. An agent's job is to help a vendor sell ... People who are purchasing need to be aware clearly that the advice they are receiving from the person who is selling the product is in the interest of the vendor, not in their interest.¹³³

The Australian Property Institute also expressed concern that consumers fail to appreciate the true role of estate agents. However, it suggested that even buyers' agents and other commission-based services that act for purchasers have a conflict of interest, because they only get paid if the investor goes ahead with a transaction. In its submission, it told the Committee that:

The broader community is confused about who is properly qualified and experienced to provide independent property investment advice. Some members of the public perceive professionals such as real estate agents and other "commission based" services as the only available property advisors. It is difficult to argue real estate agents are independent in their advice (either on the buy-side or the sell-side) because their commission is usually linked to a transaction.¹³⁴

The Committee notes that concerns about the use of commission-based remuneration by advisers extends to financial advisers and is not confined to property investment. These issues are discussed in greater detail in chapter six of this report.

'One stop shops'

The Consumer Action Law Centre, a consumer casework and policy organisation based in Melbourne, also suggested that 'one stop shop' businesses that offer a full range of property services, or provide referrals to other professions, create a number of problems from a consumer perspective.

¹³² See, for example, Property Planning Australia, *Submission No. 2*, 12, 29.

¹³³ Mr Mark Armstrong, *Transcript of evidence*, above n 75, 4.

¹³⁴ Australian Property Institute, *Submission No. 14*, 5.

Case Study 4: The key to your financial independence

This free session was held in the function room of a city hotel by a business that regularly holds sessions in metropolitan and regional areas throughout Australia. The seminar was attended by 12 people, several of whom indicated that they had already purchased investment properties through the business. Attendees were predominantly male and appeared to be aged between 30 and 50 years.

The presenter started the session by telling attendees that most Australians do not have enough superannuation and savings to fund a comfortable retirement. He suggested that property investment is a good way to ensure financial security. He said that property investment only needed a small amount of money to get started, property has high leverage and investing in property is low risk.

The presenter stated that the business did not provide financial advice, but it did give people access to the 'accumulated experience' of many investors. He showed a video of the business's founder who said that his aim is 'to help battlers become millionaires. I hope I can make you a millionaire.' The presenter told the audience that he had been able to quit his job to spend time with his young family.

The presenter talked about investing for capital growth in a way similar to case studies 2 and 3. He talked about purchasing multiple properties and legally minimising tax. He stated that people could buy five properties in ten years using the business' strategies, and that multiple properties could be held fairly cheaply. He gave an example of a \$400 000 property that cost an investor only \$25 per week. He gave an example of another investor who owned 38 properties on an income of \$50 000 per year.

The presenter said that property usually doubles in value every 7-10 years and that it was a low risk investment because property increases in value at a faster rate than the debt increases. He talked about the risks of interest rate rises and suggested that investors who were worried about this get fixed rate loans.

The presenter outlined the business's services. He said that it lists properties for sale and gets its remuneration through commissions from vendors (3-4% of the purchase price). He said that the week before the seminar, 81 properties worth \$131 million had been bought through the business. He also described other services offered by the business including property research, maintenance and inspections.

The speaker said that since 1995, over 10 000 properties had been sold through the business without a single mortgage default. He said 30% of those who purchased property through the business owned multiple properties.

A representative of the business's preferred finance broker also gave a presentation. He stated that the firm specialises in products suited to investors. He also disclosed that commissions were paid to the business for clients it referred.

At the end of the seminar, all attendees were encouraged to submit a borrowing capacity form so that an obligation free, one-on-one consultation could be arranged.

In its written submission, the Centre stated that '[s]uch complex arrangements add additional consumer detriment, particularly where there are fees and charges passing between the different parties. Inappropriate management of conflicts of interest can lead to poor advice from advisors.'¹³⁵ It also noted that 'consumers who attend a seminar are often referred to other parties directly, without the chance to shop around. There are often high fees paid to all involved.'¹³⁶

Poor education and training

Some stakeholders told the Committee that unqualified, inexpert advisers were not limited to the 'property spruiker' segment of the market.

Some of the criticisms made by witnesses were targeted at real estate agents who provide advice to prospective investors but who do not have any specialist training in property investment. In its written submission, Property Planning Australia told the Committee that 'the overwhelming bias of formal qualifications specifically relating to direct property is towards sales and marketing on behalf of vendors, not providing advice to purchasers'.¹³⁷ Mr Hugh Jones from the Real Estate Buyers' Agents Association was also critical of training for estate agents:

You have got people out there who are giving advice who have had 10 days training effectively. The sums of money that they are earning are very high. You have got people with one year's experience who are making \$100 000, \$200 000 a year and sometimes more. The amounts of money they are advising on are high as well. The system is crazy.¹³⁸

The Chief Executive Officer of the Real Estate Institute of Australia, Mr Bryan Stevens, told the Committee that 'real estate agents do [have experience in giving advice] because that is what they do for a living'.¹³⁹ He also told the Committee that training programs for estate agents had just been reviewed nationally.

Some of the other professions that give property investment advice also attracted criticism during the Committee's inquiry. The Chairman of the Property Investment Association of Australia, Mr John Hopkins, told the Committee that 'I might change the percentages, but I just want it to be heard – that 98 per cent of financial planners, estate agents and accountants, in my firm view, do not understand property investment as it relates to retail property investors'.¹⁴⁰ Mr Hugh Jones expressed concern about:

people like solicitors who go and bid at auctions, accountants who give comments on the state of the market, financial planners who often do not understand the fundamentals or the grassroots of the real estate market but are giving advice on rates of return or things like that or areas of growth, where they are reading out of the newspaper and probably are no better informed than their clients.'¹⁴¹

¹³⁵ Consumer Action Law Centre, *Submission No. 7*, 3.

¹³⁶ *Ibid.*

¹³⁷ Property Planning Australia, *Submission No. 2*, 10.

¹³⁸ Mr Hugh Jones, *Transcript of evidence*, above n 87, 4.

¹³⁹ Mr Bryan Stevens, *Transcript of evidence*, above n 85, 5.

¹⁴⁰ Mr John Hopkins, Chairman, Property Investment Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 3. See also Australian Property Institute, *Submission No. 14*, 5.

¹⁴¹ Mr Hugh Jones, *Transcript of evidence*, above n 87, 2.

Mr Kerry Sharp from the Association of Financial Advisers told the Committee that there was some training on direct property investment available to financial advisers because, even though few financial advisers deal in direct property investment, in the course of their work they ‘come across clients who have direct property’.¹⁴²

Lack of ‘holistic’ advice

The Consumer Action Law Centre also expressed concern that investors face difficulty getting holistic or comprehensive information from advisers about where to invest their funds.

As was noted earlier in this chapter, few financial planners and financial advisers deal with direct property investment. Property investment advisers and marketeers cannot provide advice about other financial investments such as shares unless they are licensed under the Commonwealth Government’s financial services laws.

Mr Gerard Brody from the Consumer Action Law Centre told the Committee that this situation presented a problem from a consumer perspective:

consumers who get property investment advice from an adviser that does not have a financial services licence will only be getting half the story. What if it is in their financial interests for them to invest in shares or superannuation? They possibly will not get that advice – they will not. If the consumer seeks advice from a financial services adviser, will they get advice about alternatives like property investment? For consumers this framework significantly limits competition and choice.¹⁴³

Mr Kerry Sharp from the Association of Financial Advisers told the Committee that the problem was partly a regulatory one but that the existence of rogue traders in the property investment industry was also a factor.¹⁴⁴ The Association’s written submission quoted one adviser who said he had referred clients to property investment businesses in the past, but ‘these referrals failed to live up to expectation, and cost me the trust of the referred clients. I now no longer recommend property investment.’¹⁴⁵

‘Choice overload’

One final issue that was not raised in detail by stakeholders, but became evident when the Committee’s representatives attended property investment seminars and events, was the amount of conflicting advice and information facing consumers.

The Committee staff who attended the Property Expo in October 2007 were encouraged by one buyers’ agent to consider investing in Frankston in outer metropolitan Melbourne. The presenters at a seminar held in the same month warned investors against investing in property outside inner suburban Melbourne. The third

¹⁴² Mr Kerry Sharp, *Transcript of evidence*, above n 83, 4.

¹⁴³ Mr Gerard Brody, Director – Policy and Campaigns, Consumer Action Law Centre, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 2. See also Ms Pina Sciarrone, Association of Financial Advisers, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3; Joint Committee on Corporations and Financial Services, above n 78, 9.

¹⁴⁴ Mr Kerry Sharp, *Transcript of evidence*, above n 83, 2-4.

¹⁴⁵ Association of Financial Advisers, *Submission No. 13*, 3.

investment seminar attended by Committee representatives that month recommended that investors consider buying property interstate.

While this demonstrates a healthy level of choice and competition from one perspective, some economists working in the emerging field of 'behavioural economics' have noted that too much choice can actually create problems for consumers. Their research suggests that consumers may avoid making decisions if they are too many alternatives on offer and they are too complicated to evaluate.¹⁴⁶

The evidence from one property investment business suggested to the Committee that this is a problem for some consumers in this industry. Mr Mark Armstrong from Property Planning Australia told the Committee that '[t]here is so much conflicting information out there. There is an amazing amount of confusion in the marketplace, and that confusion causes frustration and that frustration means they just act and in many situations make mistakes.'¹⁴⁷ Mr Armstrong told the Committee that, when his business asks clients why they bought a particular property, 'the common answer we get without a doubt is, "I was sick and tired of looking"'.¹⁴⁸

The next chapter addresses the impact on consumers of this problem and other concerns raised during the inquiry.

¹⁴⁶ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Draft Report (2007) 33.

¹⁴⁷ Mr Mark Armstrong, *Transcript of evidence*, above n 75, 6.

¹⁴⁸ *Ibid.*

Chapter four: The impact on consumers

I thought I was doing the right thing 3 years ago by getting this property for \$206 000 ... I just don't understand how it can be only worth \$195 000.

*Email from property investor to Mr Neil Jenman*¹⁴⁹

Property investment involves a substantial financial commitment in today's market and the consequences for people who invest unwisely are potentially significant. This chapter looks at the impact of the reported problems with property investment advisers and marketeers from a consumer perspective. It examines why consumers appear to be so susceptible to rogue traders in this area and considers the evidence of harm to consumers and other members of the community to date.

4.1 Why are people susceptible to rogue traders?

At first glance, property investors appear to be the type of people in our community who should be able to protect themselves against the practices described in the previous chapter. As was noted in chapter two, property investors are mostly, although not exclusively, older, wealthier, better educated and more experienced in buying property, at least in the form of their own homes, than the community as a whole.

The Committee was told that some rogue traders deliberately target more vulnerable members of the community. Mr Gerard Brody from the Consumer Action Law Centre said that the people his organisation had assisted in the past were usually 'young people, often naïve, who are struggling with their finances already'. He told the Committee that these businesses often advertised in 'the free weekly magazines and the local papers that are targeted at those sorts of consumers'.¹⁵⁰

However, other witnesses told the Committee that even relatively well-educated consumers had been caught by rogue traders. The Director of Consumer Affairs Victoria, Dr David Cousins, told the Committee that, '[w]hat we have experienced is that the most educated of people, who in a sense should know better, are still lured into these arrangements'.¹⁵¹

Recent work in the area of consumer policy suggests that all consumers, regardless of education or financial status, can be 'vulnerable' and require extra protection in

¹⁴⁹ Email from property investor (name confidential) to Mr Neil Jenman dated 29 January 2006, provided at Law Reform Committee public hearing, Melbourne, 12 November 2007.

¹⁵⁰ Mr Gerard Brody, Director – Policy and Campaigns, Consumer Action Law Centre, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 5.

¹⁵¹ Dr David Cousins, Director, Consumer Affairs Victoria, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 7.

some markets and situations.¹⁵² The Committee came across a number of reasons during its inquiry why the property investment market is a case in point.

4.1.1 The complexity of the property investment market

Consumer policy makers have noted that consumers tend to be more vulnerable in markets where:

- there is information asymmetry because businesses and consumers have unequal access to information about goods or services. This can occur where consumers are unable to access information, or where they are unable to use that information effectively. An example of the latter situation is ‘experience goods’, where consumers are unable to judge the quality of goods or services until some time after they have been purchased
- there is market power
- there are businesses that aim to exploit consumers
- the goods or services in question are particularly complex.¹⁵³

The property investment market has many of these characteristics for the reasons described in chapter three. The Centre for Credit and Consumer Law in its submission described information asymmetry as a particular problem for property investors. The Centre noted that it makes it difficult for consumers to verify suppliers’ claims. It also argued that property investment advice should be classified as an ‘experience good’, which cannot be tested or tried prior to purchase.¹⁵⁴

These characteristics mean that consumers in this market are likely to face particular challenges protecting themselves against rogue traders and poor services.

4.1.2 Financial and investment literacy

The Committee also found evidence that some consumers lack the financial and investment knowledge and skills that would help them differentiate between good and bad advisers and investments.

The Real Estate Institute of Australia noted in its written submission that ‘property investors are more likely to belong to population groups with reasonable consumer and financial literacy skills’.¹⁵⁵ Recent research into the financial literacy skills of Australians supports this view, showing that the segments of the community more

¹⁵² Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Draft Report (2007) 12, 233-236. See also Consumer Affairs Victoria, *What do we mean by ‘vulnerable’ and ‘disadvantaged’ consumers?*, Discussion Paper (2004).

¹⁵³ Consumer Affairs Victoria, *What do we mean by ‘vulnerable’ and ‘disadvantaged’ consumers?*, above n 152, 14; Productivity Commission, above n 152, 29-33.

¹⁵⁴ Centre for Credit and Consumer Law, *Submission No. 12*, 15.

¹⁵⁵ Real Estate Institute of Australia, *Submission No. 4*, 5.

likely to invest in property are similar to those segments of the community which record higher levels of financial literacy.¹⁵⁶

However, this research also suggests that, when it comes to investment skills, some Australians struggle.

In a recent survey conducted for the Commonwealth Government's Financial Literacy Foundation, 69% of respondents said they were confident about their ability to invest and 88% of respondents said they had the ability and understanding to recognise a scam or an investment scheme that seems too good to be true. However, when asked questions that tested their actual understanding of investment concepts, only 34% said they would consider both risk *and* returns when making an investment decision, only 6% said they would consider background information such as the reputation of the company and only 5% said they would consider the need for diversification.¹⁵⁷

The results of the financial literacy survey conducted for the ANZ Bank in 2005 suggest that, even where people do understand investment concepts, they can have trouble applying them in practice. In that survey, 89% of respondents correctly recognised that an investment with a high return was likely to carry greater risks. However, when the respondents were asked what they would recommend for an investment advertised as having a return well above market rates and no risks, only 49% said that they would consider the investment 'too good to be true' and not invest.¹⁵⁸

A 2004 survey conducted for the Commonwealth Bank reported that less than 20% of respondents understood what was important to investment decisions.¹⁵⁹

These results suggest that many consumers lack the specialist investment skills they need to protect themselves in this area.

4.1.3 Property investment 'myths'

Some behavioural studies of investors argue that they can be influenced as much by 'market sentiment' or 'investor sentiment' – intangible views about markets based on 'personal feel', the views of commentators or trend forecasts – as much as hard facts. This can be particularly so in markets such as the property market where publicly available market data is limited.¹⁶⁰

The Committee found evidence that, in Australia, the recent property boom has generated some 'myths' about the property market amongst investors which are not only influencing their decisions but may also be making them less guarded.

¹⁵⁶ ANZ and AC Nielsen, *ANZ Survey of Adult Financial Literacy in Australia* (2005) 30. See also Commonwealth Bank Foundation, *Improving financial literacy in Australia: benefits for the individual and the nation – Research Report* (2004).

¹⁵⁷ Financial Literacy Foundation, *Financial literacy: Australians understanding money* (2007) 10-11, 24.

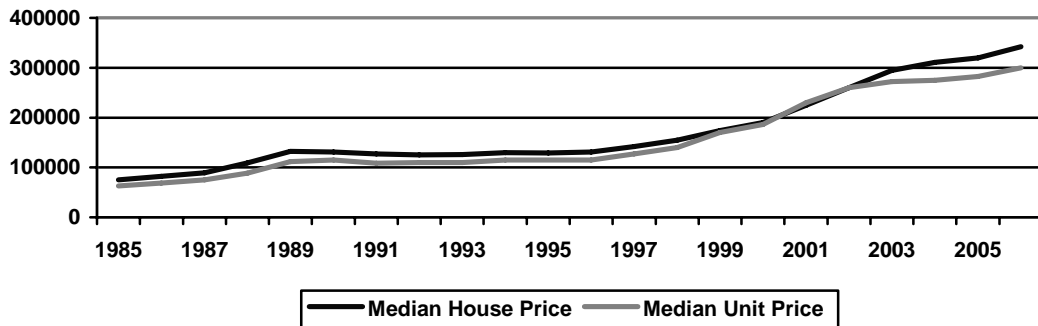
¹⁵⁸ ANZ and AC Nielsen, above n 156, 97, 99-102.

¹⁵⁹ Commonwealth Bank Foundation, above n 156, 6.

¹⁶⁰ Paul Gallimore and Adelaide Gray, 'The role of investor sentiment in property investment decisions', *Journal of Property Research*, volume 19, issue 2, 2002, 111; Tim Seelig, Terry Burke and Alan Morris, *Motivations of investors in the private rental market*, Australian Housing and Urban Research Institute Positioning Paper No 87 (2006) 36-39.

As was noted in chapter two, one of the reasons why people invest in property is the perception that it is a ‘safe’ investment. In terms of capital growth, the property market has performed strongly in recent years, but this has not always been the case. Figure 8 shows the median house and unit price in Melbourne between 1985 and 2006 based on information published by the Victorian Government’s Department of Sustainability and Environment. It shows that, along with periods of high growth, there have also been long periods of stagnation and even short periods of decline across the property market.

Figure 8 – Residential property house and unit median prices in Melbourne 1985-2006¹⁶¹



In 2003, the Reserve Bank of Australia expressed concern that investors may have forgotten this fact. It said that:

Over recent decades, property has been a sound investment, with prices rising in most years. On those rare occasions when prices have declined, the falls have been modest, and even people who bought at the peak of the late 1980s boom have recorded healthy returns on their investments. As a result, many people believe that property prices will not fall over any reasonable investment horizon. This is notwithstanding the fact that prices have fallen noticeably in some other developed countries and, in Australia, they have fallen in real terms on a number of occasions.¹⁶²

Stakeholders made similar comments during the Committee’s inquiry. The State Director of the Association of Financial Advisers, Mr Kerry Sharp, told the Committee that ‘it is perceived that property cannot go down in value; it most certainly can and most certainly does particularly if somebody has paid too much for it in the first place. Even a well-purchased property can go down in value.’¹⁶³

The ANZ Bank’s first financial literacy survey, which was published in 2003, supports this view. It found that 59% of respondents were able to identify a potential

¹⁶¹ Department of Sustainability and Environment, Victoria, *A Guide to Property Values* (2007) 17.

¹⁶² Reserve Bank of Australia, ‘Submission to Productivity Commission inquiry into First Home Ownership’ (2003) 36.

¹⁶³ Mr Kerry Sharp, State Director, Association of Financial Advisers, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3. See also Mr Neil Jenman, consumer advocate, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 4.

increase in property values as one of the advantages of property investment, but only 12% recognised a potential decrease in property values as one of its disadvantages.¹⁶⁴

Property Planning Australia's submission referred to another common misconception that the property market is a homogenous one and that all property will perform in the same way. One of its directors, Mr Mark Armstrong, told the Committee that there was a 'perception in the marketplace that all property works in the same way: just get your foot in the door and you will be right'.¹⁶⁵

Although the property market has performed strongly overall in recent years, the information published by the Department of Sustainability and Environment demonstrates that different parts of the market have produced very different returns. Between 1996 and 2006, for example, the median house price in Kensington increased by 232%, the median house price in Ballarat increased by 172% and the median house price in Frankston increased by 158%. Different types of property have also performed differently over the same period, even within the one suburb. Between 1996 and 2006, for example, the median house price in Carlton North increased by 171% while the median unit/apartment price increased by only 78%.¹⁶⁶

The Committee is aware of reports of price falls in some segments of the market, such as high rise developments in Melbourne and parts of western Sydney, even in the midst of the current boom.¹⁶⁷

Consumers who are not conscious of these risks are even more vulnerable to unscrupulous advisers and marketeers.

4.2 Evidence of consumer detriment

Consumer policy makers sometimes refer to the harm – financial and emotional – that consumers experience when goods and services fail to meet expectations as 'consumer detriment'.¹⁶⁸

During its inquiry, the Committee found a number of individual instances in which consumers had suffered significant detriment as a result of poor property investment advice or marketing. However, research on the overall level of detriment experienced by consumers in this area appears to be limited.

4.2.1 Reports of consumer detriment

During its inquiry, the Committee received direct evidence about four consumers who had experienced detriment.

¹⁶⁴ Roy Morgan Research, *ANZ Survey of Adult Financial Literacy in Australia: Final Report* (2003) 40.

¹⁶⁵ Mr Mark Armstrong, Director, Property Planning Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 6. See also Property Planning Australia, *Submission No. 2*, 3-4, 28.

¹⁶⁶ Department of Sustainability and Environment, above n 161, 33-54.

¹⁶⁷ Lawrence Money, 'High rise, low return', *The Sunday Age* (Melbourne), 30 December 2007, 18; Matt Wade, 'How the housing bust went west', *Sydney Morning Herald*, 4 October 2006.

¹⁶⁸ See Consumer Affairs Victoria, *Consumer detriment in Victoria: a survey of its nature, costs and implications*, Research Paper No 10 (2006).

Three of these cases were brought to the Committee's attention by consumer advocates and two of them are described in the case studies set out in this chapter (see case studies five and six). Their experiences illustrate the very real financial and emotional impact that rogue traders can have on people.

The experience of the fourth consumer was brought to the Committee's attention by a relative who gave confidential evidence to the Committee. He told the Committee that a real estate agent had provided advice about selling a valuable commercial property owned by his relative. He told the Committee that the agent recommended selling the property to an existing tenant, without putting the property on the market, for \$4.5 million less than its purchase price.¹⁶⁹

The Committee was surprised by the low number of complaints it received from individual consumers given the high profile of these issues following the collapse of Henry Kaye's companies. The Ministerial Council on Consumer Affairs working party reported that agencies around Australia received 762 complaints about property investment advisers in 2003.¹⁷⁰ The Australian Competition and Consumer Commission told the Joint Committee on Corporations and Financial Services that, at one point in 2003, it was receiving eight to ten property-related complaints and inquiries per day.¹⁷¹

Consumer organisations and regulators told the Committee they had also experienced a drop in consumer complaints about property investment advisers since that time.

Mr Gerard Brody from the Consumer Action Law Centre told the Committee that the Centre had received fewer complaints in the past 18 months than previously.¹⁷²

The three main consumer regulators in Victoria – Consumer Affairs Victoria, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission – provided figures from their complaints databases. These figures, which are set out in figure 9, show a decline in the number of complaints across all regulators.

Consumer Affairs Victoria and the Australian Competition and Consumer Commission provided additional information about the nature of their complaints. Most of the written complaints to Consumer Affairs Victoria involved allegations of false or misleading representations or potentially misleading advertising.¹⁷³ The three most common types of complaints to the Australian Competition and Consumer Commission involved allegations of misleading representations about the rate of return on property investment (27%), property financing and property seminars (25%) and two-tier marketing practices (17%).¹⁷⁴

¹⁶⁹ Confidential, *Submission No. 5*, 2.

¹⁷⁰ Ministerial Council on Consumer Affairs Working Party, *Property Investment Advice Discussion Paper* (2004) 68.

¹⁷¹ Joint Committee on Corporations and Financial Services, Parliament of Australia, *Property Investment Advice – Safe as Houses?* (2005) 16.

¹⁷² Mr Gerard Brody, *Transcript of evidence*, above n 150, 2.

¹⁷³ Consumer Affairs Victoria, *Submission No. 16*, 10-11.

¹⁷⁴ Letter from Chief Executive Officer, Australian Competition and Consumer Commission to the Chair, Law Reform Committee, 19 December 2007.

Figure 9 – Complaints to Victorian and Commonwealth regulators 2004-2007¹⁷⁵

| Regulator | 2004 | 2005 | 2006 | 2007 |
|-----------|------|------|------|------|
| CAV | 110 | 23 | 8 | 19 |
| ACCC | 89 | 14 | 15 | 14 |
| ASIC | 37 | 48 | 60 | 27 |
| Total | 236 | 85 | 83 | 60 |

4.2.2 Under-reporting of consumer detriment

While the evidence from regulators and the Committee's experience suggests that consumer detriment has declined in recent years, the Committee is conscious that the available figures are unlikely to be a true reflection of problems in this area.

Dr David Cousins warned the Committee that complaints to regulators and others are 'just the tip of the iceberg' in terms of the overall level of consumer problems in the community.¹⁷⁶ A survey of consumers conducted for Consumer Affairs Victoria in 2005-06 found that only 4% of revealed consumer detriment had been reported to Consumer Affairs Victoria. The survey found that 53% of people complained directly to the business that provided the goods or services, while 26% of people had not complained to anyone.¹⁷⁷

Mr Neil Jenman, a consumer advocate in the real estate area, told the Committee that he estimated that just under 33 000 people a year were 'ripped off' by 'property spruikers' nationally. This estimate was calculated by taking the number of property spruikers he had identified for a forthcoming book, and multiplying this by the likely number of their clients.¹⁷⁸

Mr Jenman told the Committee there were a number of reasons why people do not come forward when they experience detriment:

They are ashamed, a lot of them; they are made to feel stupid in our society, whereas they are not – they are victims of fraud ... The other thing is that they do not know that you exist. The third thing is that they do not know how to complain.¹⁷⁹

¹⁷⁵ Consumer Affairs Victoria, *Submission No. 16*, 8-9; Letter from Acting Executive Director, Regulation, Australian Securities and Investments Commission to the Chair, Law Reform Committee, 5 November 2007; Letter from Chief Executive Officer, Australian Competition and Consumer Commission, above n 174. The figures from Consumer Affairs Victoria reflect complaints from Victoria about wealth creation seminars received up to October 2007. The figures from the ACCC reflect complaints nationwide about property investment received up to June 2007. The figures from ASIC refer to complaints nationwide about property and investment seminars up to October 2007.

¹⁷⁶ Dr David Cousins, *Transcript of evidence*, above n 151, 9.

¹⁷⁷ Consumer Affairs Victoria, *Consumer detriment in Victoria*, above n 168, 9.

¹⁷⁸ Mr Neil Jenman, *Transcript of evidence*, above n 163, 2, 5.

¹⁷⁹ *Ibid* 6.

Case study 5: Dimitra's story

Dimitra and John* are aged in their 40s and have two teenage children. The couple owned their own home in a Melbourne suburb, with a mortgage of \$194 000. In late 2004 Dimitra received a call from a telemarketer who offered to show her ways to reduce tax and pay off her mortgage faster. Dimitra made an appointment with a representative of the company to discuss the couple's financial situation. Dimitra and John were told that they could afford an investment property and that the company would 'hold their hands the whole way'. Soon after this, representatives of the company took Dimitra to view potential investment properties: John did not attend as he was working interstate at the time. After viewing several properties, Dimitra was driven back to the company's offices to sign the paperwork, including loan documents. A lawyer was provided 'to act for' Dimitra.

The purchase price of the investment property was \$266 000. On top of this there were set up fees and costs of around \$40 000. The contract and mortgage documents were faxed to John for signing. On the company's advice, Dimitra also refinanced her home loan, and was unaware that, in doing so, the investment property loan was linked to the mortgage on the family home. Dimitra and John ended up with a \$300 000 mortgage on the investment property and a \$200 000 mortgage on the family home. The interest-only loan repayments were approximately \$1500 per month.

Dimitra and John separated shortly before settlement. Dimitra contacted the company at this stage and attempted to cancel the settlement. The company told her to hold the property for 12 months and 'you won't lose anything'.

Shortly afterward, John told Dimitra he wanted nothing to do with the investment property. Dimitra struggled to pay the mortgage on her own. At this stage Dimitra tried to contact the company but they refused to return her calls. In addition, major structural problems were found with the investment property and the tenants 'did a runner'.

As a result of her financial difficulty, Dimitra was forced to sell the family home. The home sold for \$330 000, considerably less than Dimitra's expectations. Dimitra tried to sell the investment property but was unable to find a buyer. The bank repossessed the property and sold it for \$200 000 – \$66 000 less than Dimitra had paid for it.

Even after the sale of both the family home and the investment property, Dimitra and John still owe \$20 000. Dimitra estimates that they lost about \$170 000 in equity that they had built up in their family home.

* Not their real names

Dr David Cousins from Consumer Affairs Victoria acknowledged in his evidence that not all consumers may be aware of Consumer Affairs Victoria and its role.¹⁸⁰ The preliminary results from the Australian Securities and Investments Commission's recent investor research reportedly shows that only 29% of investors were able to name the Commission as Australia's 'corporate watchdog'.¹⁸¹

Other witnesses told the Committee that consumers may not yet have felt the impact of poor advice. The Vice President of the Real Estate Buyers' Agents Association of Australia, Mr Hugh Jones, told the Committee that the strong performance of the property market in recent years had cushioned the impact of problems in the industry:

[P]urchasers have been very lucky that the market has gone up. If that market had not been rising as quickly as it has been, I think this would be on the front page of the paper. At the moment it is something which is hidden under the surface, but it is a real issue.¹⁸²

Mr Rob Pepicelli from the Australian Property Institute also told the Committee that 'the bull market of the last 15 years has hidden a lot of ... sins ... [P]otentially there could be a lot more blood on the streets if the investment cycle does turn against some of these products.'¹⁸³

Mr Mark Armstrong from Property Planning Australia told the Committee that, because property was a long term investment, it often took some years before consumers could judge the success or failure of their investment:

[I]t takes us such a long time to determine that we have actually made a mistake within [the property market] compared to the share market. The share market is reactive. You can look at the paper each morning and see exactly what a share price is doing and know within 24 hours whether you have made a mistake or not. Property is a dinosaur compared to that. It may well take 5, 10, 15 or 20 years to really understand that you have made a mistake in the market, and by that time the person who advised you to do that is well and truly gone.¹⁸⁴

The Property Investment Association of Australia told the Committee in its written submission that it did not possess full information to quantify the extent of consumer loss and 'in fact, nobody does'.¹⁸⁵

4.2.3 Consumer detriment surveys

Some regulators have begun to take a more proactive approach to finding out about the experiences of consumers.

¹⁸⁰ Dr David Cousins, *Transcript of evidence*, above n 151, 9.

¹⁸¹ Australian Securities and Investments Commission, *Unlisted, unrated debentures – improving disclosure for retail investors*, Consultation Paper No 89 (2007) 79.

¹⁸² Mr Hugh Jones, Vice President, Real Estate Buyers' Agents Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 4.

¹⁸³ Mr Rob Pepicelli, Victorian Division, Australian Property Institute, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 4.

¹⁸⁴ Mr Mark Armstrong, *Transcript of evidence*, above n 165, 8.

¹⁸⁵ Property Investment Association of Australia, *Submission No. 3*, 17.

Case study 6: Miss M.'s story¹⁸⁶

'Miss M. saw a full-page advertisement in the daily *mX* newspaper asking her whether she wanted to get rich quickly. She was interested and particularly wanted to get rid of a \$6000 credit card debt she had. She attended an information night where it was organised that she would have a phone consultation with a wealth coach. She spoke with the wealth coach later for about an hour. She explained her financial situation, her employment status and her credit card debt and the fact that she was struggling to make ends meet. The wealth coach told her success stories about people who had gone to their seminars, and tried to sign her up. Miss M. found him pushy and said she wanted to check the company with Consumer Affairs Victoria first. At that stage CAV had had no complaints so she actually signed up.

Miss M. then attended a three-day seminar put on by the ... Today Not Tomorrow Institute ... She was told that she could leave at any stage during the three days except after lunch on the third day. During that time a number of wealth coaches spoke to her. At the middle of the third day she expressed concern that she could not afford the 'Astute' package that was being proposed with a value of almost \$6000. She was told that they could arrange for her to pay for instalments over 24 months. After putting much time and energy into the three days Miss M. agreed to sign up to a direct debit agreement. She later received a statement saying the amount payable was over \$10 000 over 24 months. She soon found it difficult to make payments, at which time George Mihos persuaded her to work for him at information nights to pay off her debt. By this time she was very stressed, in further financial trouble and sought assistance from a financial counsellor. She was later referred to our service [Consumer Action Law Centre] where we negotiated an outcome favourable to her. Miss M.'s story is typical of perhaps many young, perhaps naive, people who are drawn in by the desire to have their financial problems solved, only to find themselves in worse financial trouble.'

¹⁸⁶ Described by Mr Gerard Brody, *Transcript of evidence*, above n 150, 2-3.

In 2006, for example, Consumer Affairs Victoria undertook what is thought to be the first major survey of consumer detriment in Australia. It surveyed 1000 consumers around Victoria about problems they had experienced across a range of sectors and attempted to quantify not only the financial cost of repairing and replacing items, but also the costs of following up and resolving problems and the personal time involved.

Consumer Affairs Victoria told the Committee that property investment advice and marketing problems were likely to have been recorded against four categories in the survey:

- banking, finance, credit, debt, savings and insurance, the total detriment cost of which was \$308.7 million
- buying, selling or letting a home, the total detriment cost of which was \$147.9 million
- other professional or personal services, the total detriment cost of which was \$73.1 million
- scams and ‘get rich quick’ schemes, the total detriment cost of which was \$129.9 million.¹⁸⁷

However, the survey did not ask about property investment advice and marketing specifically and cannot be used to calculate the level of detriment in this area accurately.

4.2.4 The need for further research

Although there is evidence that individual consumers have experienced actual losses as a result of the activities of property investment advisers and marketeers, the Committee is concerned by the lack of information about the extent and cost of these problems. In an environment where governments require clear evidence about the existence and cost of problems before they will regulate, this lack of information makes it difficult for policy makers and regulators to respond appropriately.

The Committee was impressed by the recent approach of some regulators and believes that specific research into consumer detriment in the property investment market is required to support an evidence-based approach to policy and enforcement.

The Committee believes that this research should also address two issues specific to investment products and services. The first, which was not raised in detail during the Committee’s inquiry but warrants further attention, is the extent to which consumers affected by rogue traders have achieved lower returns, even though they may not have suffered losses. One of the seminars attended by Committee representatives, which is set out as a case study in chapter three, gave several examples of different investors who had invested similar amounts at similar times but had achieved significantly different returns.

¹⁸⁷ Consumer Affairs Victoria, *Submission No. 16*, 16-17; Consumer Affairs Victoria, *Consumer detriment in Victoria*, above n 168, 3-4.

The second issue is the level of risk facing consumers and their understanding of that risk. The Committee was concerned by the evidence it received that consumers may face significant problems if there is a downturn in the property market in the future.

The Committee notes that some investors may be happy to accept a high level of risk in return for the promise of higher returns. Dr David Cousins told the Committee that ‘in many cases we are not just dealing with innocent victims; there are issues of greed and other things that come into play here’.¹⁸⁸

The Committee is concerned, however, that many consumers do not appreciate the level of risk involved in their investments. As was noted in the previous chapter, some property investment advisers and marketeers do not disclose, or adequately explain, the risks involved in their strategies and products to consumers.

Mr Mark Armstrong from Property Planning Australia told the Committee that ‘the community is just not aware of the risks they place themselves in’.¹⁸⁹ He stated that:

We have clients who come to us who carry property portfolios worth \$1 million, and on that property portfolio they carry debt of \$950 000. When we say to them, “That is a very risky position”, their faces go blank. They think, “What do you mean? I have a \$1 million portfolio”. We say, “No, you do not. You have \$50 000 worth of equity. You have a \$950 000 debt”.¹⁹⁰

Based on the evidence currently available, it is not possible to determine how many people who have invested in property in recent years are in a similar position.

The Committee again believes that the Ministerial Council on Consumer Affairs is the most appropriate body to arrange and oversee research into consumer detriment in the property investment advice and marketing industry.

Recommendation 3: Research into consumer detriment

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that it commission research into consumer detriment in the property investment advice and marketing industry. This research should:

- identify the total detriment experienced by consumers
- identify the extent to which consumers of these services have experienced lower returns compared with property investors generally
- estimate the current levels of risk facing consumers and the extent to which consumers understand that risk.

4.3 The impact on other members of the community

Although the evidence to the Committee focused on the impact of advisers and marketeers on investors, the two consumer organisations that participated in the inquiry noted that some advisers promoted strategies that had the potential to harm other members of the community as well.

¹⁸⁸ Dr David Cousins, *Transcript of evidence*, above n 151, 7.

¹⁸⁹ Mr Mark Armstrong, *Transcript of evidence*, above n 165, 4.

¹⁹⁰ *Ibid.*

These organisations referred to the promotion of vendor terms and ‘wrap’ schemes by some property investment advisers. Under these schemes, an investor buys a property and then enters into an agreement to ‘sell’ it to a homebuyer. The homebuyer may agree to pay the investor in instalments, with ownership not changing hands until all payments have been made. Alternatively, the homebuyer may take out a mortgage to buy the property from the same lender who arranged the investor’s original purchase.¹⁹¹

The Consumer Action Law Centre told the Committee that these schemes caused considerable problems for homebuyers. These included problems where investors fail to maintain their own mortgage payments, along with high costs for homebuyers and complex legal arrangements. The Centre also noted that such schemes often involved low quality housing which involved significant maintenance costs.¹⁹² The Centre for Credit and Consumer Law also raised the issue and noted that advertising of these schemes had increased in Queensland in recent times.¹⁹³

The Committee understands that the Ministerial Council on Consumer Affairs is considering amendments to the Uniform Credit Code that will bring these types of arrangements within that regulatory scheme.¹⁹⁴ The Committee supports initiatives to protect homebuyers using these arrangements.

¹⁹¹ See Consumer Action Law Centre, *Vendor terms: Rhetoric & reality* (2007).

¹⁹² Consumer Action Law Centre, *Submission No. 7*, 3. See also Mr Gerard Brody, *Transcript of evidence*, above n 150, 3.

¹⁹³ Centre for Credit and Consumer Law, *Submission No. 12*, 4.

¹⁹⁴ See ‘The Consumer Credit Code Website: What’s New’, <<http://www.creditcode.gov.au/display.asp?file=/content/whatsnew.htm>> at 30 January 2008.

Chapter five: The current regulatory framework

Property investors are in no-man's land, with limited protection under some laws and none whatsoever under others.

*Mr Mark Armstrong and Mr David Johnston, Property Planning Australia*¹⁹⁵

Since the 1970s, governments have introduced a range of laws that aim to protect consumers against rogue traders and other problems. This chapter reviews the laws that currently apply to property investment advisers and marketeers in Victoria, and compares them with the laws that apply in other states and to other property and investment-related occupations. It considers whether the current laws and regulators are doing enough to protect consumers, as well as the impact of moves towards greater industry self-regulation in this area.

5.1 Regulation of property investment advisers and marketeers

5.1.1 General consumer protection law

Although there are some established common law doctrines that can be used by consumers,¹⁹⁶ the main laws regulating property investment advisers and marketeers in Victoria are the Commonwealth and state general consumer protection laws.

The Commonwealth laws are set out in the *Trade Practices Act 1974* (Cth) and are administered by the Australian Competition and Consumer Commission, while the state laws are set out in the *Fair Trading Act 1999* (Vic) and are administered by Consumer Affairs Victoria.

The Commonwealth and state laws both prohibit certain types of unfair conduct by businesses across the economy, including:

- misleading or deceptive conduct¹⁹⁷
- false or misleading representations.¹⁹⁸ Representations about future matters, such as the future capital growth of an investment property, are deemed to be misleading if the corporation or person does not have reasonable grounds for making the representation¹⁹⁹
- 'unconscionable' conduct. This generally refers to a situation where a business has taken unacceptable advantage or exploited a vulnerability of a person in a

¹⁹⁵ Mark Armstrong and David Johnston, 'Out in the cold: why property investors need real protection', *Australian Property Investor*, September 2006, 28, 29.

¹⁹⁶ Ms Lang Thai, *Submission No. 10*, 3-4.

¹⁹⁷ *Trade Practices Act 1974* (Cth) s 52; *Fair Trading Act 1999* (Vic) ss 9-11.

¹⁹⁸ *Trade Practices Act 1974* (Cth) ss 53-53A; *Fair Trading Act 1999* (Vic) s 12.

¹⁹⁹ *Trade Practices Act 1974* (Cth) s 51A; *Fair Trading Act 1999* (Vic) s 4.

position of relative weakness to them, taking into account all the circumstances of the case.²⁰⁰

The laws also contain provisions dealing with particular practices such as bait advertising, referral selling, harassment and pyramid selling²⁰¹ and provide for implied warranties in some contracts, for example that services will be rendered with due care and skill.²⁰²

Although the Commonwealth and state laws are broadly similar, there are some differences. For constitutional reasons, the Commonwealth laws only apply to conduct by corporations engaged in trade or commerce, involving postal, telegraphic or broadcasting services, crossing state boundaries or within Australia's territories.²⁰³ The state laws apply more generally, including to individual traders and other businesses that are not corporations.

Both the Australian Competition and Consumer Commission and Consumer Affairs Victoria share a range of regulatory powers that can be used to monitor and enforce their laws, including entry, search and seizure powers and powers to enter into undertakings with businesses. They can also bring court proceedings where there is a suspected breach of the laws.

The courts have the power to make a number of civil orders including declarations, injunctions, awards of damages, adverse publicity orders and other orders such as refunds. Breaches of some provisions, such as those prohibiting false and misleading representations, also give rise to fines.

Individual consumers can also take their own legal action under the laws. Consumers can apply to the Federal Court, Federal Magistrates Court or state courts for orders under the Commonwealth laws. Most consumer disputes under the state laws can be heard by the Victorian Civil and Administrative Tribunal.

Victoria has introduced some additional consumer protections. In 1999, for example, Victoria introduced 'cooling-off' periods for some off-business-premises sales, such as telemarketing and door-to-door sales.²⁰⁴ In 2003, Victoria introduced laws that can be used to void 'unfair terms' in consumer contracts,²⁰⁵ as well as giving the Director of Consumer Affairs Victoria the power to issue notices requiring businesses to substantiate claims they have made, or to 'show cause' why they should be allowed to continue trading.²⁰⁶

5.1.2 Industry-specific laws

Some of the occupational groups that were listed in chapter three as giving property investment advice are subject to their own industry-specific regulation. However,

²⁰⁰ *Trade Practices Act 1974* (Cth) ss 51AA-51AB; *Fair Trading Act 1999* (Vic) ss 7-8.

²⁰¹ See *Trade Practices Act 1974* (Cth) Part V Div 1; *Fair Trading Act 1999* (Vic) Part 2.

²⁰² *Trade Practices Act 1974* (Cth) Part V Div 2; *Fair Trading Act 1999* (Vic) Part 2A.

²⁰³ *Trade Practices Act 1974* (Cth) s 6.

²⁰⁴ *Fair Trading Act 1999* (Vic) Part 4.

²⁰⁵ *Fair Trading Act 1999* (Vic) Part 2B. 'Unfair terms' are terms that are contrary to the requirements of good faith and, in all the circumstances, cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

²⁰⁶ *Fair Trading Act 1999* (Vic) ss 106A, 106B.

these laws usually cover only the standard professional activities of those groups, and have limited relevance to their conduct as property investment advisers.

Real estate agents and buyers' agents

Real estate agents and buyers' agents in Victoria are regulated by the state *Estate Agents Act 1980* (Vic) and its associated regulations. Under these laws, agents must be licensed and both agents and their employees have to meet competency and character requirements. Agents also have to abide by certain rules of conduct and there are complaints and compensation mechanisms for aggrieved consumers.

The Act and regulations do apply to the property marketing activities of real estate agents. However, they are primarily concerned with the rights of *sellers* rather than investors and other buyers. There are some rules governing the conduct of agents towards buyers but they tend to be limited. For example, an agent must not publish any false or misleading statement or representation concerning a property for sale in an advertisement,²⁰⁷ must provide certain information if they make any promise about obtaining finance to cover the purchase price of the property,²⁰⁸ and must not 'underquote' the selling price for a property to a buyer.²⁰⁹

In addition, the Act and regulations also contain some rules for buyers' agents engaged by purchasers. For example, a buyers' agent cannot act for or accept a commission from a seller if they have been engaged by a buyer.²¹⁰

Real estate and buyers' agents are also subject to ethical rules which state, amongst other things, that they must not knowingly mislead or deceive any party involved in negotiations or a transaction, must act fairly and honestly, must exercise care, skill and diligence and must not engage in exaggeration or concealment in the conduct of their profession.²¹¹

The Act and its regulations are primarily concerned with the buying and selling activities of agents, however, and do little to regulate any property investment advice they give to investors.

Finance brokers

Finance brokers in Victoria are currently regulated by the state *Consumer Credit (Victoria) Act 1995* (Vic). This Act establishes a 'negative licensing' scheme that stops people acting as finance brokers if they fail certain character and competency tests. The Act also requires finance brokers to disclose to their clients any commissions they receive from third parties, such as lenders, and prohibits certain misleading and deceptive conduct.²¹²

²⁰⁷ *Estate Agents Act 1980* (Vic) s 42.

²⁰⁸ *Estate Agents Act 1980* (Vic) s 51.

²⁰⁹ *Estate Agents Act 1980* (Vic) s 47C.

²¹⁰ *Estate Agents (Professional Conduct) Regulations 1997* (Vic) reg 13.

²¹¹ See *Estate Agents (Professional Conduct) Regulations 1997* (Vic).

²¹² Consumer Affairs Victoria, 'Mortgage and Finance Broking: Financial Services Factsheet' (2005).

The Act does not have any application to brokers' property investment advice and marketing activities. Brokers who deal in business and investment finance rather than consumer finance are exempted from the requirements of the legislation.²¹³

The Ministerial Council on Consumer Affairs is proposing new national regulation of finance brokers and has recently released an exposure draft for comment.²¹⁴ The proposed new regime would establish a more comprehensive positive licensing and disclosure scheme for finance brokers and, unlike the current Victorian laws, it would cover property investment finance in the same way as consumer credit.

A number of stakeholders raised concerns about the impact of finance brokers on property investors during the Committee's inquiry and the Committee commends the moves towards national regulation of this area. However, the proposed national regulation also focuses on the traditional business of finance brokers and does not regulate any additional property investment advising or marketing activities.

Credit providers

The Consumer Credit Code, a uniform national state and territory-based regime, regulates the provision of credit in Victoria. Credit providers in Victoria must be registered and must disclose certain types of information to borrowers. The Code may be used against some parties involved with property advisers or marketeers in some circumstances. Consumer Affairs Victoria, for example, took successful action against one of the finance companies that lent funds to people to attend Henry Kaye's seminars under the laws.²¹⁵

However, the Code's application to property investment is limited. It only applies to credit that is provided wholly or predominantly for personal, domestic and household purpose, not credit for investment purposes.²¹⁶ Nor does it attempt to regulate investment advising or marketing activities by credit providers.

5.2 Regulation of other property and investment-related professions

The regulation of property investment advisers and marketeers stands in stark contrast to other professions involved in the property or investment industries, many of which are subject to detailed industry-specific regulation including licensing.

The table in figure 10 compares the current regulation of property investment advisers and marketeers with these and other professions.

5.2.1 Regulation of other professions in the property industry

The Committee has already described the regulatory regimes that apply to real estate and buyers' agents, finance brokers and credit providers earlier in this chapter.

²¹³ See *Consumer Credit (Victoria) Act 1995 (Vic)* ss 5, 37A; Consumer Credit Code s 6.

²¹⁴ Office of Fair Trading, New South Wales, *National Finance Broking Scheme Consultation Package* (2007).

²¹⁵ See *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* [2007] HCA 57.

²¹⁶ *Consumer Credit (Victoria) Act 1995 (Vic)* s 5; Consumer Credit Code s 6.

Lawyers in Victoria also have to hold a licence or ‘practising certificate’ under the *Legal Profession Act 2004* (Vic) before they can engage in legal practice, and conveyancers in Victoria will become subject to a new licensing, conduct and disclosure regime when the *Conveyancers Act 2006* (Vic) commences in 2008.

Not all of the other professions involved in the property industry are subject to additional regulation, however. Property developers in Victoria do not need to be licensed or registered and valuers were ‘de-regulated’ in Victoria in the 1990s. The accounting profession is only subject to government licensing in relation to some of its activities, such as taxation services, although it does have well-established self-regulatory arrangements.

5.2.2 Regulation of financial investment advisers and dealers

The most striking ‘regulatory gap’ in this area is the difference between regulation of advisers and marketeers dealing with direct property investment, and advisers and dealers working with other financial investments.

In 2001, the previous Commonwealth Government introduced a new legislative regime, known as the financial services regime, to regulate people who provide financial services, including people who provide financial product advice and people who deal in financial products. The legislative regime is administered by the Australian Securities and Investments Commission and has two main components:

- general consumer protection laws that apply to financial services. These laws are contained in the *Australian Securities and Investments Commission Act 2001*
- a comprehensive licensing, conduct and disclosure regime covering financial services. These laws are set out in chapter 7 of the *Corporations Act 2001*.

The general consumer protection laws in the *Australian Securities and Investments Commission Act 2001* largely mirror those in the *Trade Practices Act 1974* (Cth) that prohibit misleading and deceptive conduct, false and misleading representations and unconscionable conduct.²¹⁷ In this sense, the regulation of financial advisers and dealers is not significantly different to the regulation of property investment advisers and marketeers.

However, chapter 7 of the *Corporations Act 2001* imposes significant additional regulation on financial services providers. It requires these providers to be licensed and imposes detailed conduct requirements including:

- ethical requirements – financial services providers must ensure that financial services are provided efficiently, honestly and fairly²¹⁸
- competency requirements – financial services providers must maintain their competence to provide financial services and ensure that their representatives are adequately trained and competent²¹⁹

²¹⁷ See *Australian Securities and Investments Commission Act 2001* (Cth) Part 2 Div 2.

²¹⁸ *Corporations Act 2001* (Cth) s 912A.

²¹⁹ *Corporations Act 2001* (Cth) s 912A.

Figure 10 – Government regulation of selected investment and property-related professions

| | Property advisers | Financial advisers ^a | Accountants ^b | Finance brokers ^c | Credit providers ^d | Solicitors ^e | Real estate & buyers' agents ^f | Property developers | Valuers | Conveyancers ^g |
|-------------------------------------|-------------------|---------------------------------|--------------------------|------------------------------|-------------------------------|-------------------------|---|---------------------|---------|---------------------------|
| Consumer protection laws | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Industry-specific regulation | ✗ | ✓ | ✗ | ✓ | ✓ | ✓ | ✓ | ✗ | ✗ | ✓ |
| Licensing or registration | ✗ | ✓ | ✗ | ✓ | ✓ | ✓ | ✓ | ✗ | ✗ | ✓ |
| Disclosure of conflicts of interest | ✗ | ✓ | ✗ | ✓ | ✓ | ✓ | some | ✗ | ✗ | ✓ |
| Product disclosure | ✗ | ✓ | ✗ | N/A | ✓ | N/A | ✗ | ✗ | N/A | N/A |
| Conduct standards | ✗ | ✓ | ✗ | ✗ | ✗ | ✓ | ✓ | ✗ | ✗ | ✓ |
| Training standards | ✗ | ✓ | ✗ | ✗ | ✗ | ✓ | ✓ | ✗ | ✗ | ✓ |
| Industry ADR or complaints scheme | ✗ | ✓ | ✗ | ✗ | ✗ | ✓ | ✓ | ✗ | ✗ | ✗ |

^a Financial advisers are regulated by the *Australian Securities and Investments Commission Act 2001 (Cth)* and the *Corporations Act 2001 (Cth)*.

^b Accountants are regulated in relation to some of their activities, for example, as tax agents.

^c Financial brokers are currently regulated by Part 4A of the *Consumer Credit (Victoria) Act 1995 (Vic)*, and are subject to a 'negative licensing' regime. They are required to disclose certain commissions, but not all conflicts of interest. The Ministerial Council on Consumer Affairs is currently examining a possible national scheme.

^d Credit providers are regulated by the *Consumer Credit (Victoria) Act 1995 (Vic)*. They are required to disclose certain commissions, but not all conflicts of interest. The Consumer Credit (Victoria) and Other Acts Amendment Bill 2007, would require credit providers to participate in an external dispute resolution scheme.

^e Solicitors are regulated by the *Legal Profession Act 2004 (Vic)* and associated regulations and professional rules.

^f Real estate and buyers' agents are regulated by the *Estate Agents Act 1980 (Vic)* and associated regulations.

^g Conveyancers will be regulated by the *Conveyancers Act 2006 (Vic)* from 1 July 2008, if the Act is not proclaimed earlier.

- ‘know your client’ rule – advisers who provide personal advice²²⁰ must make reasonable inquiries about the client's relevant personal circumstances and ensure that their advice is appropriate to the client. Advisers must also have a reasonable basis for their advice²²¹
- conflicts of interest – financial services providers must have arrangements in place for managing conflicts of interest²²²
- compensation arrangements – financial services providers must have approved arrangements for compensating clients for loss or damage²²³
- dispute resolution – financial services providers must have internal dispute resolution systems that meet specified standards and be members of an independent external dispute resolution scheme when they provide services to retail clients.²²⁴

Financial services providers are subject to extensive disclosure requirements when they deal with retail clients:

- Financial services providers must provide a financial services guide which describes the type of services they provide, as well as information about their remuneration, commissions and other benefits and any associations or relationships that could influence their services.²²⁵
- Advisers must provide a statement of advice which sets out their advice and its basis when they provide personal advice to a client. If an adviser provides general advice, they must warn the client that the advice does not take account of their objectives, situation or needs and that the client should consider its appropriateness to their situation.²²⁶
- Financial services providers must provide a product disclosure statement if they recommend or offer to arrange or sell a particular financial product. Amongst other things, the product disclosure statement must explain the significant benefits and the significant risks associated with the product.²²⁷

The laws also provide for cooling-off periods for some products and ‘anti-hawking’ provisions that regulate unsolicited offers of financial products.²²⁸ Financial services

²²⁰ This is defined as advice given where the adviser has considered the person's financial objectives, financial situation or financial needs, or where a reasonable person might have expected the adviser to consider these things: *Corporations Act 2001* (Cth) s 766B.

²²¹ *Corporations Act 2001* (Cth) ss 945A-945B.

²²² *Corporations Act 2001* (Cth) s 912A.

²²³ *Corporations Act 2001* (Cth) s 912B.

²²⁴ *Corporations Act 2001* (Cth) s 912A.

²²⁵ *Corporations Act 2001* (Cth) Part 7.7 Division 2.

²²⁶ *Corporations Act 2001* (Cth) Part 7.7 Division 3.

²²⁷ *Corporations Act 2001* (Cth) Part 7.9 Division 2.

²²⁸ *Corporations Act 2001* (Cth) Part 7.9 Division 5, ss 992A-992B.

providers can only use words such as ‘independent’ and ‘impartial’, for example, if they do not receive any commissions, gifts or other benefits.²²⁹

Financial services providers can have their licences cancelled or suspended, or be banned from providing services, if they breach these obligations.

Direct property investment is specifically excluded from the scope of this regime. ‘Financial product’ is defined by the Acts to include a facility through which a person ‘makes a financial investment’.²³⁰ The term ‘makes a financial investment’ is then itself defined by reference to three main elements:

- the investor contributes money or money’s worth
- generation or intended generation of a financial return or benefit
- the investor has no day to day control over the use of the money to generate the return.²³¹

The last of these elements excludes direct property investment because people who buy property directly do not provide their money to another person in order to generate a return. A note in the Acts makes this clear by stating that they do not include a person purchasing real property.

There may be circumstances in which property investment advisers and marketeers provide advice on financial products in the course of their activities and are subject to this regime. For example, an adviser might compare returns from direct property investment against returns from financial products, or might promote financial products in addition to direct property investment. In those circumstances, the statements about financial products will be subject to the financial services laws but the statements about property investment will not.

5.3 Regulation in other states and territories

In the absence of a national approach to property investment advisers and marketeers, some other states and territories in Australia have acted to fill the current regulatory gaps by imposing additional regulations on at least some property investment advisers and marketeers.

5.3.1 New South Wales and the Australian Capital Territory

New South Wales and the Australian Capital Territory have introduced laws to regulate estate agents who provide financial or investment advice. These laws apply to agents who provide advice which is intended to influence the recipient in relation to a particular financial or investment decision in connection with the sale of purchase of land, or could reasonably be regarded as intended to have such an influence. They require these agents to:

²²⁹ *Corporations Act 2001* (Cth) s 923A.

²³⁰ *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA(1); *Corporations Act 2001* (Cth) s 763A.

²³¹ *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA(4); *Corporations Act 2001* (Cth) s 763B.

- warn the recipient that the advice is general advice and that its preparation has not taken into account the individual circumstances of the person
- if the advice is provided in connection with the purchase of land, warn the recipient that he or she should assess the suitability of the investment in light of their own needs and circumstances, which they can do themselves or by consulting an appropriately licensed financial adviser
- provide information that discloses the existence and nature of any conflict of interest the agent may have in connection with the provision of the advice, such as a commission or a referral fee.²³²

These laws appear to have been introduced in response to the recommendations of a 2000 Australian Securities and Investments Commission report on the financial advising activities of real estate agents. That report, which was published prior to the introduction of the Commonwealth's financial services regime, expressed concern that regulation of real estate agents did not adequately cover their financial advising activities and recommended the introduction of such measures.²³³

New South Wales and the ACT also requires estate agents and buyers' agents to disclose information to their clients about any relationships they have with anyone to whom they refer clients for professional services.²³⁴

The Committee contacted the New South Wales and ACT regulators of these laws but was not able to obtain information about the extent to which these laws were applied or enforced in practice.

5.3.2 Queensland

In 2000 and 2001, Queensland introduced more extensive regulation of businesses that provide property investment advice or market property investment, not just estate agents. This regulation was introduced in response to concerns about 'two-tier' marketing practices in Queensland.²³⁵ The laws:

- prohibit misleading conduct, unconscionable conduct and false and misleading representation and harassment by 'property marketeers'.²³⁶ Although these provisions largely mirror general consumer protection laws, they allow the courts to consider additional, property-specific factors and entitle a person who suffers

²³² *Property, Stock and Business Agents Act 2002* (NSW) s 46; *Property, Stock and Business Agents Regulations 2003* (NSW) reg 10; *Agents Act 2003* (ACT) s 83; *Agents Regulation 2003* (ACT) reg 14.

²³³ Australian Securities and Investments Commission, *ASIC review of financial advising activities of real estate agents* (2000)

²³⁴ *Property, Stock and Business Agents Act 2002* (NSW) s 47; *Agents Act 2003* (ACT) ss 81, 84, 85.

²³⁵ Letter from Queensland Attorney General and Minister for Justice to the Chair, Law Reform Committee, 10 December 2007. See also Centre for Credit and Consumer Law, *Submission No. 12*, 5-8; Sharon Christensen and Bill Dixon, 'Marketeers beware!', *Australian Property Law Bulletin*, volume 16, issue 3, 2001, 25.

²³⁶ *Property Agents and Motor Dealers Act 2000* (Qld) ss 573A-573E. 'Property marketeer' is defined broadly in schedule 2 of the Act to include any person who is directly or indirectly involved in the sale, promotion of the sale or provision of a service in connection with the sale of residential property, including a person who provides advisory, management, legal, accounting or administrative or other services.

financial loss to make a claim against a compensation fund.²³⁷ Breaches also attract monetary penalties and can lead to the marketeer being banned from involvement in the business of selling property, promoting sales or providing services in connection with sales

- require contracts for the sale of property to contain recommendations that buyers get independent legal and valuation advice²³⁸
- require property developers as well as estate agents to be licensed, and provide for a prescribed code of conduct for property developers²³⁹
- require estate agents and property developers to give prospective buyers information about any relationships they have with anyone to whom the agent refers the buyer for professional services²⁴⁰
- give buyers a right to a copy of a property valuation for which the buyer has paid under a contract for the sale of residential property²⁴¹
- require lawyers engaged by prospective buyers to provide a certificate stating, amongst other things, whether the lawyer is independent of the seller and anyone involved in the sale, promotion of the sale or provision of a service in connection with the sale²⁴²
- prohibit a person from making an ‘unsolicited invitation’ to attend a ‘property information session’ unless the person is a property developer or estate agent, or is acting for a property developer or agent.²⁴³

The Centre for Credit and Consumer Law at Griffith University in Queensland described a number of the cases that have been brought under these laws in its written submission.²⁴⁴ The Queensland Government advised the Committee that consumer complaints have fallen considerably since the introduction of the laws, although it acknowledged that this might also be due to a flattening of the property market and the fact that a number of marketeers had relocated interstate.²⁴⁵ As was noted in chapter four, there has been a general decline in the number of complaints nationwide.

5.3.3 Other states and territories

Amendments to the legislation regulating real estate agents in South Australia, which have not yet commenced, provide that:

²³⁷ Centre for Credit and Consumer Law, *Submission No. 12*, 6-8.

²³⁸ *Property Agents and Motor Dealers Act 2000* (Qld) Chapter 11 Part 2.

²³⁹ *Property Agents and Motor Dealers Act 2000* (Qld) ss 20, 269; *Property Agents and Motor Dealers (Property Developer Practice Code of Conduct) Regulation 2001* (Qld).

²⁴⁰ *Property Agents and Motor Dealers Act 2000* (Qld) ss 138, 268.

²⁴¹ *Property Agents and Motor Dealers Act 2000* (Qld) s 365A.

²⁴² *Property Agents and Motor Dealers Act 2000* (Qld) s 365B.

²⁴³ *Property Agents and Motor Dealers Act 2000* (Qld) s 584. ‘Unsolicited invitation’ and ‘property information session’ are defined in section 18 and schedule 2 respectively.

²⁴⁴ Centre for Credit and Consumer Law, *Submission No. 12*, 8-10.

²⁴⁵ Letter from Queensland Attorney General and Minister for Justice, above n 235.

- Agents must disclose to the vendor any benefit the agent receives or expects to receive in connection with a sale of property.²⁴⁶ This is intended to include a requirement to disclose any commissions from a person to whom the agent has referred a client for service, including a financial adviser, mortgage broker or financier, valuer or legal practitioner.²⁴⁷
- Regulations may require agents to provide specified information or warnings to any person to whom they may provide investment or financial advice.²⁴⁸

These amendments were introduced following a review commissioned by the South Australian Minister for Consumer Affairs into the regulation of the real estate industry.²⁴⁹ Like the laws in New South Wales and the ACT discussed above, these amendments are also a response to recommendations contained in an Australian Securities and Investments Commission report on the financial advising activities of real estate agents in 2000.²⁵⁰

The Committee also notes that Western Australia does not require property developers to hold a licence, but it does require them to register their principal place of business and keep records of their real estate transactions.²⁵¹

5.4 Does the current regulatory framework protect consumers?

The Committee's terms of reference specifically require it to review the existing regulatory framework for the provision of property investment advice. The previous inquiries into property investment advisers concluded that the current regulatory framework may not be able to achieve policy objectives in this area, or was not providing adequate protection for consumers.²⁵² The Committee heard similar views from a number of stakeholders during its inquiry but was interested in whether the fault was with the laws, or with the way they are being enforced.

5.4.1 Is current regulation adequate?

Many witnesses who participated in the inquiry suggested that the inadequacies in the current regulatory framework are inherent in the laws, and that the regulatory gap between property investment and financial investment is adding to problems in the area.

²⁴⁶ *Statutes Amendment (Real Estate Industry Reform) Act 2007 (SA)* s 43, inserting s 24C into the *Land Agents Act 1994 (SA)*.

²⁴⁷ South Australia, Second Reading Speech, *Statutes Amendment (Real Estate Industry Reform) Bill*, Parliamentary Debates, House of Assembly, 26 October 2006, (J.M. Rankine, Minister for Consumer Affairs) 1147.

²⁴⁸ *Statutes Amendment (Real Estate Industry Reform) Act 2007 (SA)* s 43, inserting s 24B into the *Land Agents Act 1994 (SA)*.

²⁴⁹ South Australia, Second Reading Speech, *Statutes Amendment (Real Estate Industry Reform) Bill*, above n 247, 1146.

²⁵⁰ *Ibid* 1148.

²⁵¹ *Real Estate and Business Agents Act 1978 (WA)* ss 57-59.

²⁵² Ministerial Council on Consumer Affairs Working Party, *Property Investment Advice Discussion Paper* (2004) 34; Joint Committee on Corporations and Financial Services, Parliament of Australia, *Property Investment Advice – Safe as Houses?* (2005) 17.

Limits of current regulatory framework

The Committee heard evidence that general consumer protection laws are not capable of addressing problems with property investment advisers and marketeers for a number of reasons:

- They are ‘corrective’ in nature because they deal with misconduct after it has already taken place and consumers have already suffered significant detriment²⁵³
- Enforcement of the laws relies heavily on regulators, who tend to ‘prosecute only the most egregious wrongful conduct’²⁵⁴
- They do not provide any barrier against people who should be excluded from conducting business based on their lack of qualifications or character. In her submission, Ms Lang Thai from Deakin University’s School of Law noted that ‘[a]nybody can walk into the market and become “a property investment adviser” without the need to have any formal qualification, training or a reference check’.²⁵⁵
- They deal only with unfair conduct. They do not address the quality and appropriateness of property investment advice or encourage disclosure of conflicts of interest²⁵⁶
- Businesses who breach the law may continue to operate. ASIC told the Joint Committee on Corporations and Financial Services, for example, that

Even where the general consumer protection powers can be used to stop or restrict particular activities, a rogue or marginal operator is not prevented from otherwise continuing with their business or ‘resurfacing’ under a different name or in another legal form.²⁵⁷

- It can be difficult to prove breaches of the laws in this area, where cases often turn on future events such as growth in property values. Ms Lang Thai noted in her submission that this ‘involves opinions, predictions and some calculated guesswork’.²⁵⁸

Mr Paul Latimer and Mr Mark Bender from the Department of Business Law and Taxation at Monash University took a more sanguine view of the application of general consumer protection laws than other witnesses. They noted that the *Trade Practices Act 1974* (Cth) provides for interlocutory injunctions that can be used to prevent future misconduct by businesses and that the unconscionable conduct provisions may be applied to high pressure selling techniques. They also described

²⁵³ Consumer Action Law Centre, *Submission No. 7*, 4; Ms Lang Thai, *Submission No. 10*, 9.

²⁵⁴ Consumer Action Law Centre, *Submission No. 7*, 4.

²⁵⁵ Ms Lang Thai, *Submission No. 10*, 9, also 3. See also Centre for Credit and Consumer Law, *Submission No. 12*, 5.

²⁵⁶ Centre for Credit and Consumer Law, *Submission No. 12*, 5; Consumer Action Law Centre, *Submission No. 7*, 4; Ms Lang Thai, *Submission No. 10*, 9; Australian Property Institute, *Submission No. 14*, 3.

²⁵⁷ Australian Securities and Investments Commission, ‘Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the regulation of property investment advice - Submission of the Australian Securities and Investments Commission’ (2005) 7.

²⁵⁸ Ms Lang Thai, *Submission No. 10*, 8. See also Ministerial Council on Consumer Affairs Working Party, above n 252, 35.

one successful case dealing with underquoting by an estate agent to prospective buyers.²⁵⁹

The majority of stakeholders who addressed the issue, however, argued that the current general consumer laws were flawed. Some also criticised or noted the limited scope of industry-specific laws, particularly real estate laws and their focus on vendors rather than investors and selling rather than advising.²⁶⁰

Impact of the regulatory gap between property investment and financial products

The gap between the regulation of direct property investment and other investments was a source of particular concern for stakeholders.

Some stakeholders argued that there was no logic in the exclusion of direct property investment from the Commonwealth's financial services laws. The Centre for Credit and Consumer Law noted in its submission that, from a consumer perspective, 'property investment advice forms a similar role to investment advice. There is no logical reason for operating a different regulatory regime.'²⁶¹ Mr Mark Armstrong from Property Planning Australia also told the Committee that:

Members of the general public perceive property as a financial product: they use it as a financial product, they use it to invest, and they use it to fund their retirement. The only group that does not see property as a financial product is the government.²⁶²

Property Planning Australia also noted that the fact that someone retains direct control of an investment does not make them more likely to make sound decisions.²⁶³

In its 2004 discussion paper, the Ministerial Council working party noted that the regulatory gap between property and other investment advice had the potential to cause additional problems for consumers and business.²⁶⁴

Firstly, there is a risk that consumers may incorrectly assume they have the same level of legal protection when they are dealing with property investment advisers and marketeers. The Centre for Credit and Consumer Law told the Committee that the regulatory gap 'may cause confusion amongst investors. One of the risks with such confusion may be that consumers erroneously form the view that property investment advice is regulated by the financial services scheme and that they are protected by it.'²⁶⁵ The Chair of the Financial Planning Association, Ms Corinna Dieters, also noted that '[f]rom a consumer point of view the difficulty is that they cannot tell who

²⁵⁹ Mr Paul Latimer and Mr Mark Bender, *Submission No. 9*, 6.

²⁶⁰ Property Planning Australia, *Submission No. 2*, 14; Property Investors Association of Australia, *Submission No. 6*, 7; Dr David Cousins, Director, Consumer Affairs Victoria, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

²⁶¹ Centre for Credit and Consumer Law, *Submission No. 12*, 5.

²⁶² Mr Mark Armstrong, Director, Property Planning Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 2. See also Ms Lang Thai, *Submission No. 10*, 10.

²⁶³ Property Planning Australia, *Submission No. 2*, 30.

²⁶⁴ Ministerial Council on Consumer Affairs Working Party, above n 252, 44-45.

²⁶⁵ Centre for Credit and Consumer Law, *Submission No. 12*, 19.

is regulated and who is not regulated, where do they have protection, where do they not have protection'.²⁶⁶

Secondly, the Committee heard evidence that the different regulatory regimes actually discourage advisers from providing holistic investment advice to consumers and limit competition. Mr Gerard Brody from the Consumer Action Law Centre told the Committee that '[w]e believe that the current regulatory regime prevents that'.²⁶⁷ Mr Kerry Sharp, the State Director of the Association of Financial Advisers, told the Committee that one of the reasons few financial advisers dealt with direct property was that it was not on the approved product lists required under the financial services regime, and not covered by their professional indemnity insurance.²⁶⁸

Thirdly, it is possible that some unscrupulous businesses have been taking advantage of the fact that property investment is less regulated than other financial investments. The Property Investment Association raised concerns in its written submission about 'dishonest and unethical operators who rely on the fact that there is a vacuum between regulation and correct commercial behaviour'.²⁶⁹

Some stakeholders from the business community also complained that the different regulatory regimes applying to different professions were inhibiting competition. Ms Corinna Dieters pointed out that the members of her organisation:

have a whole range of regulations and legislation that they have to deal with when they are giving advice, whereas if you look at property and other types of advisers, they do not have the same sort of regulation. It is not a level playing field.²⁷⁰

The Real Estate Institute of Australia also raised this issue in its written submission, and noted that differences between the regulation of estate agents and other property marketers were having a similar impact:

Those with a [financial services] license suffer competitive disadvantage compared with unregulated property investment marketers. This competitive disadvantage extends to licensed real estate agents. It is the REIA's view that investment regulation should focus on all asset classes and not only financial products. Likewise real estate regulation should focus on all those who provide real property services, not just real estate agents.²⁷¹

5.4.2 Is the existing regulation enforced adequately?

Although individual consumers can take legal action under the Commonwealth and Victorian general consumer protection laws, in practice enforcement depends largely on regulators. The Committee found some evidence that lack of action by regulators had contributed to the ineffectiveness of the current regulatory framework.

²⁶⁶ Ms Corinna Dieters, Chair, Financial Planning Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 2. See also Catherine Wolthuizen, 'Mortgage Mania', *Consuming Interest*, Summer 2004, 9, 11.

²⁶⁷ Mr Gerard Brody, Director – Policy and Campaigns, Consumer Action Law Centre, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 2.

²⁶⁸ Mr Kerry Sharp, State Director, Association of Financial Advisers, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

²⁶⁹ Property Investment Association of Australia, *Submission No. 3*, 21. See also Property Planning Australia, *Submission No. 2*, 5.

²⁷⁰ Ms Corinna Dieters, *Transcript of evidence*, above n 266, 2.

²⁷¹ Real Estate Institute of Australia, *Submission No. 4*, 4.

Action by regulators

The Committee wrote to Consumer Affairs Victoria, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission to seek information about action they had taken to enforce laws against property investment advisers and marketeers.

They informed the Committee of a number of court actions they had taken against property investment advisers and marketeers, including:

- Consumer Affairs Victoria's 2002 Magistrates' Court action which led to orders requiring substantiation of testimonials published by Henry Kaye and one of his companies
- the Australian Competition and Consumer Commission's successful Federal Court action against Henry Kaye and the National Investment Institute for misleading and deceptive conduct in relation to his September 2003 promotional campaign
- Consumer Affairs Victoria's action against Australian Finance Direct Ltd, one of the financiers linked to Henry Kaye's companies, for breaches of the Consumer Credit Code
- the Australian Competition and Consumer Commission's action against Channel Seven, Dymphna Bolt, Sandra Forster and Universal Prosperity in relation to claims made on the *Today Tonight* television program in October 2003 about the 'Wildly Wealthy Women Millionaire Mentoring Program'
- the Australian Competition and Consumer Commission's Federal Court action against property investment seminar provider Morgan Pacific Pty Ltd and its directors Paul Hanna and Danny Hanna Assabgy for misleading and deceptive conduct in relation to 2003 advertisements for their seminars.²⁷²

The regulators also informed the Committee that they had taken steps to warn consumers about the activities of property investment advisers and marketeers on a number of occasions. The Australian Securities and Investments Commission noted that it had published extensive material on its consumer website, <<http://www.fido.gov.au>>, including about the risks associated with get-rich-quick schemes and seminars.²⁷³ Consumer Affairs Victoria told the Committee it had issued media releases and fact sheets warning consumers about problems in the area and had conducted its own home-buying seminars in metropolitan and country

²⁷² Dr David Cousins, *Transcript of evidence*, above n 260, 4; Consumer Affairs Victoria, *Submission No. 16*, 18-24; Letter from Acting Executive Director, Regulation, Australian Securities and Investments Commission to the Chair, Law Reform Committee, 5 November 2007; Letter from Chief Executive Officer, Australian Competition and Consumer Commission to the Chair, Law Reform Committee, 19 December 2007. See also Ministerial Council on Consumer Affairs Working Party, above n 252, 55-63.

²⁷³ Letter from Acting Executive Director, Regulation, Australian Securities and Investments Commission, above n 272, 5-6.

Victoria. It also told the Committee that its inspectors had attended wealth creation seminars and handed out information about consumer rights.²⁷⁴

Could regulators be using their powers more effectively?

The Committee heard mixed views from stakeholders about whether regulators were doing enough to enforce existing laws in this area.

Some witnesses were critical of what they saw as the slow response of regulators. Mr Hugh Jones from the Real Estate Buyers' Agents Association told the Committee that businesses reported to regulators 'need to be pursued more vigorously. I know when I was chair at the Real Estate Institute we would nominate people who we thought were doing the wrong thing or who might be unlicensed, and it was not pursued vigorously at all.'²⁷⁵ Mr Gerard Brody from the Consumer Action Law Centre also told the Committee that:

Often there is a significant lag time before consumer agencies take any action. They wait to get numerous instances of complaint before taking enforcement action. We are increasingly concerned about consumer agencies, when they are able to conciliate matters to the benefit of consumers, not taking any enforcement action.²⁷⁶

The Real Estate Institute of Australia also described recent actions by the Australian Competition and Consumer Commission and Australian Securities and Investments Commission as 'too little, too late' in its written submission,²⁷⁷ although its Chief Executive Officer, Mr Bryan Stevens, told the Committee that the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission were working more closely and had become more proactive in the area.²⁷⁸

Some witnesses told the Committee that regulators had become better at handling these issues. Mr Michael Hayes from the Law Institute of Victoria told the Committee that regulators had dealt with most cases effectively.²⁷⁹ Mr Gerard Brody also told the Committee that '[i]n the last couple of years Consumer Affairs has actually been quite good ... [I]t is just a matter of making sure they have the resources and capacity to do so.'²⁸⁰

The Committee notes that Consumer Affairs Victoria is responsible for protecting consumers across a range of industries, of which property investment is only one. Its current compliance and enforcement policy does not list property investment amongst the agency's enforcement priorities.²⁸¹ However, the Director of Consumer Affairs Victoria, Dr David Cousins, told the Committee that 'we have been one of

²⁷⁴ Consumer Affairs Victoria, *Submission No. 16*, 11-15. See also Dr David Cousins, *Transcript of evidence*, above n 260, 3.

²⁷⁵ Mr Hugh Jones, Vice President, Real Estate Buyers' Agents Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 4.

²⁷⁶ Mr Gerard Brody, *Transcript of evidence*, above n 267, 4.

²⁷⁷ Real Estate Institute of Australia, *Submission No. 4*, 3.

²⁷⁸ Mr Bryan Stevens, Chief Executive Officer, Real Estate Institute of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 4.

²⁷⁹ Mr Michael Hayes, Commercial Law Section, Law Institute of Victoria, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 2.

²⁸⁰ Mr Gerard Brody, *Transcript of evidence*, above n 267, 8-9.

²⁸¹ Consumer Affairs Victoria, *Compliance and Enforcement Policy* (2004).

the more active consumer regulators in property investment advice and marketing'.²⁸²

The impact of Commonwealth-state arrangements

The presence of multiple Commonwealth and state regulators with overlapping responsibility for property investment advisers and marketeers has been a particular source of concern.

Regulators themselves have expressed concern about the problems caused by their overlapping jurisdiction in the past. The Australian Competition and Consumer Commission told the Joint Committee on Corporations and Financial Services that there had been a question about whether it or the Australian Securities and Investments Commission had jurisdiction in relation to Henry Kaye.²⁸³ The Commission told the Joint Committee that neither agency was unwilling to cooperate but that:

inevitably when you are facing a prospect of going to court and having your jurisdiction challenged by the respondent to the matter, that is where I think both agencies can get themselves into difficulty. They need to have some certainty as to their jurisdictional base.²⁸⁴

The Committee asked the regulators about the steps they had taken to ensure a cooperative and coordinated response in this area. The Australian Securities and Investments Commission told the Committee that it had memoranda of understanding with other consumer agencies to deal with issues such as exchanges of information, referral of matters and joint actions. Consumer Affairs Victoria informed the Committee that agencies used Auzshare, an electronic network, to share information about scams and consumer complaints and that it had conducted a successful joint investigation with the Australian Competition and Consumer Commission. The Australian Securities and Investments Commission and Consumer Affairs Victoria noted that they were represented on the Ministerial Council on Consumer Affairs and participated in the equivalent body of public officials.²⁸⁵

However, some witnesses suggested that problems caused by the responsibilities of different regulators had not been resolved completely.

Ms Lang Thai from the School of Law at Deakin University was particularly critical of the crossover between the different regulators. She noted that the memorandum of understanding between the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission has no legal effect and suggested that multiple regulators produced a lack of responsiveness:

The likely occurrence is that one agency may be claiming that the matter is the responsibility of the other agency and so on and so forth and this could lead to no agency wanting to accept responsibility.²⁸⁶

²⁸² Dr David Cousins, *Transcript of evidence*, above n 260, 4.

²⁸³ Joint Committee on Corporations and Financial Services, above n 252, 15.

²⁸⁴ *Ibid* 16.

²⁸⁵ Letter from Acting Executive Director, Regulation, Australian Securities and Investments Commission, above n 272; Consumer Affairs Victoria, *Submission No. 16*, 25-26.

²⁸⁶ Ms Lang Thai, *Submission No. 10*, 5-6.

The Director of Consumer Affairs Victoria, Dr David Cousins, also told the Committee that the division of responsibilities between federal, state and territory governments meant that ‘there are areas where consumers can be quite confused about whose role and responsibility it is in these areas’.²⁸⁷

The Productivity Commission has noted the benefits of a single national regulator in its draft report on Australia’s consumer policy framework and has recommended that governments explore the possibility of a single national regulator.²⁸⁸

5.5 Industry self-regulation

Government regulation is not the only source of regulation for property investment advisers and marketeers. There are a number of industry associations in this area that impose additional conduct and ethical requirements on their members. However, the Committee found that the effectiveness of these initiatives is also limited at present.

5.5.1 Profession-specific industry associations

The traditional professions that were identified in chapter three as having some involvement in property investment advice all have their own industry associations that have developed codes of conduct and other standards for members.²⁸⁹

The Australian Property Institute’s Code of Ethics and Rules of Conduct is one example. It requires members of the Institute to:

- identify conflicts of interest and to not act unless all interested parties have consented
- observe high standards of competence, honesty, loyalty, integrity and fairness
- not provide any advice or make any statement without reasonable foundation unless it is appropriately qualified or limited
- not include exaggerated or false claims in any advertisement.²⁹⁰

The Committee supports efforts by industry associations to encourage legal and ethical conduct by their members.

However, the fragmented nature of the property investment advice and marketing industry means that, in this area, there are a large number of industry associations

²⁸⁷ Dr David Cousins, *Transcript of evidence*, above n 260, 5.

²⁸⁸ Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Draft Report (2007) 60-61, 72.

²⁸⁹ See, for example, Australian Property Institute, ‘Code of Ethics’ (2001); Australian Property Institute, ‘Rules of Conduct’ (2006); Accounting Ethical and Professional Standards Board, ‘Statement of Financial Advisory Service Standards’ (2005); Association of Financial Advisers, ‘Code of Ethics’; Financial Planning Association of Australia, ‘Code of Ethics and Rules of Professional Conduct’; Real Estate Buyers’ Agents Association of Australia, ‘Code of Ethics’ and ‘Standards of Practice’; Real Estate Institute of Australia, ‘Fundamental Principles of Conduct for REI Members’ (2006).

²⁹⁰ Australian Property Institute, ‘Code of Ethics’ and ‘Rules of Conduct’, above n 289, cls 1.1, 1.4, 4.2.

representing different segments of the industry. Advisers and marketeers are subject to different standards depending on which association they choose to join.

The Committee also found that not all existing industry associations attempted to regulate the property investment advising activities of their members. The Real Estate Institute's code of conduct, for example, deals only with the selling and buying activities of estate agents. The Accounting Professional and Ethical Standards Board has adopted guidance for accountants involved in giving financial advice, but it is not clear whether this includes or excludes property investment.

The Committee obtained only limited evidence during the inquiry about the extent to which industry associations were able to enforce their own self-regulation. A number of associations told the Committee they had systems in place for dealing with complaints against members,²⁹¹ but most were unable to provide detailed statistics on complaints or their outcomes.

5.5.2 Specialist property investment associations

There have been attempts in recent years to establish specialist property investment industry associations that can represent all property investment advisers and marketeers, regardless of their professional background. Two of these associations participated in the Committee's inquiry.

The Property Investors Association of Australia told the Committee it was formed in 2002 to 'enable investors to make prudent property investment decisions'.²⁹² The President of the Association, Mr John Moore, made a written submission and appeared at the Committee's first public hearing. He described a number of the Association's current and proposed initiatives including:

- a code of conduct which, amongst other things, requires disclosure of conflicts of interest, such as where a business providing 'education' to investors is in fact promoting a particular development
- a proposed accreditation scheme for members who meet certain conditions, such as indemnity insurance
- a rating scheme which rates the level and quality of due diligence material from developers (although not the quality of the investment).²⁹³

The Property Investment Association of Australia was formed in 2004 'with the purpose of representing and benefiting all the diverse industries and professions involved with property investment for the advantage of its members, consumers and regulators'.²⁹⁴ The Association also made a submission and attended the

²⁹¹ Mr Rob Pepicelli, Victorian Division, Australian Property Institute, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 5-6; Ms Corinna Dieters, *Transcript of evidence*, above n 266, 8-9; Mr Hugh Jones, *Transcript of evidence*, above n 275, 6.

²⁹² Property Investors Association of Australia, *Submission No. 6*, 6, 20.

²⁹³ Mr John Moore, President, Property Investors Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 2-3; Property Investors Association of Australia, *Submission No. 6*, 13-23.

²⁹⁴ Property Investment Association of Australia, *Submission No. 3*, 2.

Committee's public hearings. It has a code of ethics for members which includes requirements that members:

- conduct their professional activities with due skill, care, diligence and competence
- disclose and fairly manage all conflicts of interest
- act objectively and recommend solutions that fit the client's situation.²⁹⁵

The Property Investment Association told the Committee that it had also been working with DeakinPrime, the commercial education division of Deakin University, to establish an accredited property investment training course.²⁹⁶ It provided the Committee with a copy of its training materials which cover a range of topics including ethical guidelines and regulatory requirements.

Both Associations are still developing their membership. Mr John Moore told the Committee that his Association had over 1000 subscribers who are investors and about 25 to 30 associate members from the industry.²⁹⁷ The General Manager of the Property Investment Association, Mr Noel Browne, told the Committee that his Association had over 70 members across all states and acknowledged that '[w]e are obviously only just touching the industry, but we are constantly out there looking for new membership'.²⁹⁸

The Committee regards the establishment of specialist associations as a positive step but, given their current membership levels, notes that the impact of their initiatives is likely to be limited at this stage.

²⁹⁵ Property Investment Association of Australia, <<http://piaa.thetranscribers.com/ethics.html>> at 4 September 2007.

²⁹⁶ Property Investment Association of Australia, *Submission No. 3, 5*; Mr Phil Emery, Program Director – DeakinPrime, Property Investment Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 4-5.

²⁹⁷ Mr John Moore, *Transcript of evidence*, above n 293, 4.

²⁹⁸ Mr Noel Browne, General Manager, Property Investment Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 6.

Chapter six: The need for regulatory reform

[T]here is no single strategy that can combat rogue traders, ... a combination of strategies is necessary.

*Consumer Affairs Victoria*²⁹⁹

Throughout the Committee's inquiry, witnesses suggested that a new type of regulatory regime would address the current problems with property investment advisers and marketeers more successfully. This chapter looks at the objectives for future regulation in this area, whether that regulation should be national or Victorian and the various regulatory options witnesses raised during the inquiry. It sets out the Committee's own views and recommendations about how the current framework should be changed to protect consumers and improve standards in this industry.

6.1 Objectives of regulation

The Committee notes that good regulation requires clear objectives.

The Ministerial Council working party proposed a number of objectives of government intervention in the property investment advice market in its 2004 discussion paper. They included transparency, high standard services, informed investor decision-making and, ultimately, enhanced returns for investors.³⁰⁰

The Productivity Commission's draft report on Australia's consumer policy framework has proposed a common objective for all consumer policy, which is 'to promote the confident and informed participation of consumers in competitive markets in which both consumers and suppliers trade fairly and in good faith'.³⁰¹ The Commission has proposed six further operational objectives, including to:

- ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition
- ensure that goods and services are safe and fit for the purposes for which they were sold
- prevent practices that are unfair or contrary to good faith
- meet the needs of those who, as consumers, are most vulnerable or at greatest disadvantage

²⁹⁹ Consumer Affairs Victoria, *Stopping Rogue Traders*, Research Paper No. 11 (2006) 33.

³⁰⁰ Ministerial Council on Consumer Affairs Working Party, *Property Investment Advice Discussion Paper* (2004) 33.

³⁰¹ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Draft Report (2007) 42.

- provide accessible and timely redress where consumer detriment has occurred
- promote proportionate, risk-based enforcement.

The Committee considers that these objectives form a good template for consumer regulation but they need to be modified to address specific concerns about property investment advisers and marketeers and specific features of this market.

The Committee found that problems in this area can be classified into four basic categories – inadequate information, unfair practices, poor quality services and competition problems caused by regulatory gaps. The objectives of regulation of property investment advisers and marketeers should address these issues.

The Committee also notes that investment products and services are unlike many other consumer goods and services because they involve an inherent element of risk. As the Australian Securities and Investments Commission explained in its submission to the Productivity Commission’s review:

Investment products are unusual compared to other goods and services in that they have a risk-return balance. Unlike other goods and services, they cannot be designed or declared to be ‘safe’. Many consumers mistakenly expect that, like other goods, investment products would not be permitted to be on the market if they were unsafe.³⁰²

Some of the witnesses who participated in this inquiry noted that regulation could not eliminate risks for consumers. Mr Michael Hayes from the Law Institute told the Committee that ‘[t]o the extent that you can adequately protect people 100 per cent of the time from making decisions in the property market or investment decisions, I do not think that is realistic’.³⁰³ Mr Rob Pepicelli from the Australian Property Institute also told the Committee, ‘[i]t is about educated risks’.³⁰⁴

The Committee does not believe that regulation should aim to stop consumers taking risks when investing. As the Committee has noted, some consumers are willing to take on a high level of risk in return for the possibility of high returns. However, the Committee does believe regulation should aim to ensure that consumers are fully informed of these risks and that the advice and services they receive from property investment advisers and marketeers are of a high quality.

³⁰² Australian Securities and Investments Commission, ‘Productivity Commission Review of Australia’s Consumer Policy Framework: Submission by the Australian Securities and Investments Commission’ (2007) 10. See also Gail Pearson, ‘Risk and the Consumer in Australian Financial Services Reform’, *Sydney Law Review*, volume 28, 2006, 99.

³⁰³ Mr Michael Hayes, Commercial Law Section, Law Institute of Victoria, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 2.

³⁰⁴ Mr Rob Pepicelli, Victorian Division, Australian Property Institute, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 8.

Recommendation 4: Objectives of regulation of property investment advisers and marketeers

The Victorian Government should:

- (a) identify a set of clear objectives to inform its policy in relation to the regulation of property investment advisers and marketeers
- (b) include the following objectives:
 - the promotion of informed decision-making by consumers about direct property investment, including the risks involved in investing
 - the protection of consumers against unfair conduct and practices by property investment advisers and marketeers
 - the promotion of high quality, professional property investment advice and marketing services
 - the promotion of an efficient and competitive market for investment advice and marketing generally
 - ensuring accessible and timely redress for consumers who have experienced detriment
 - the promotion of appropriate enforcement of regulation.
- (c) propose to other governments at the 2008 meeting of the Ministerial Council on Consumer Affairs that they adopt the same objectives.

6.2 Options for future regulation

The Committee identified six basic options for regulating property investment advisers and marketeers based on those considered by the earlier national inquiries and those raised by witnesses in this inquiry. Figure 11 provides an overview of the different options and their costs and benefits.

This section describes each of the options in more detail, their likely costs and benefits, the views expressed by the earlier national inquiries and the views expressed by stakeholders in this inquiry. The Committee has not been able to quantify the likely costs and benefits of each option. It received little firm data on the options' likely costs for government or business and, as the Committee has already noted, there is no clear data on the detriment faced by consumers in this area.

6.2.1 Option 1: Status quo

Under this option, there would be no changes to the current regulatory framework for property investment advisers and marketeers. All advisers and marketeers would continue to be subject to general consumer protection laws and a limited number would be subject to profession-specific regulation.

The market itself would be left to resolve any problems that could not be addressed under these laws, or governments could consider non-regulatory initiatives such as consumer education (the Committee discusses non-regulatory initiatives further in chapter seven).

Figure 11 – Options for regulation of property investment advisers and marketeers

| | OPTION 1: STATUS QUO | OPTION 2: STRONGER GENERAL CONSUMER LAW | OPTION 3: SELF-REGULATION | OPTION 4: CO-REGULATION | OPTION 5: ADDITIONAL OBLIGATIONS | OPTION 6: LICENSING, CONDUCT AND DISCLOSURE |
|-------------|---|---|---|---|---|--|
| DESCRIPTION | There would be no changes to the current regulatory framework. | Government/s would strengthen general consumer protection laws. Options include: <ul style="list-style-type: none"> • closing 'loopholes' • prohibiting a wider range of unfair conduct • additional enforcement powers • more enforcement action | The industry would develop and administer industry-specific rules. Options include: <ul style="list-style-type: none"> • a code of conduct • an accreditation scheme • a disciplinary or complaints scheme | Government/s and industry would work together to regulate for industry-specific obligations. Options include legislative support for: <ul style="list-style-type: none"> • an industry code of conduct • an industry accreditation scheme | Government/s would regulate for additional industry-specific obligations. Options include: <ul style="list-style-type: none"> • disclosure requirements eg. conflicts of interest, risks • conduct requirements eg. mandatory code of conduct, dispute resolution schemes | Government/s would restrict who can operate in the industry through a licensing regime in addition to conduct and disclosure requirements. The regime could be: <ul style="list-style-type: none"> • negative ie. ban certain types of people from operating in the industry • positive ie. require people to get a licence before they can operate in the industry. |
| BENEFITS | <ul style="list-style-type: none"> • low compliance costs for business • lower administration costs for government • low administration costs for industry | <ul style="list-style-type: none"> • low compliance costs for business • low administration costs for industry | <ul style="list-style-type: none"> • lower compliance costs for business • low administration costs for government | <ul style="list-style-type: none"> • lower consumer detriment • lower costs to business through increased consumer confidence • low administration costs for industry | <ul style="list-style-type: none"> • lower consumer detriment • lower costs to business through increased consumer confidence • low administration costs for industry | <ul style="list-style-type: none"> • lower consumer detriment • lower costs to business through increased consumer confidence • low administration costs for industry |
| COSTS | <ul style="list-style-type: none"> • higher consumer detriment • costs for business due to low consumer confidence | <ul style="list-style-type: none"> • higher consumer detriment • higher administration costs for government • costs for business due to low consumer confidence | <ul style="list-style-type: none"> • higher consumer detriment • high administration costs for industry • costs for business due to low consumer confidence | <ul style="list-style-type: none"> • higher compliance costs for business • high administration costs for industry • higher administration costs for government | <ul style="list-style-type: none"> • higher compliance costs for business • high administration costs for government | <ul style="list-style-type: none"> • high compliance costs for business • high administration costs for government |
| COMPETITION | <ul style="list-style-type: none"> • does not restrict competition within property industry • restricts competition between property and financial advisers | <ul style="list-style-type: none"> • does not restrict competition within property industry • restricts competition between property and financial advisers | <ul style="list-style-type: none"> • does not restrict competition within property industry • restricts competition between property and financial advisers | <ul style="list-style-type: none"> • may restrict competition within property industry • restricts competition between property and financial advisers, although to lesser extent | <ul style="list-style-type: none"> • does not restrict competition within property industry • restricts competition between property and financial advisers, although to lesser extent | <ul style="list-style-type: none"> • restricts competition within property industry • does not restrict competition between property and financial advisers |

Benefits and costs

Included in the benefits of this option are that it does not restrict competition by creating barriers to participation in the property investment industry and it involves low compliance costs for businesses.

The costs of this option are those costs incurred by government regulators charged with taking action against unscrupulous operators. The Director of Consumer Affairs Victoria, Dr David Cousins, told the Committee that ‘there are costs associated with that, there is no doubt about that’.³⁰⁵ Consumers may also experience costs under this option given the evidence that the current regulatory framework does not provide adequate levels of consumer protection. These may take the form of actual financial losses or lower investment returns. Reputable businesses may also face some costs under this option due to the impact of rogue traders on consumer confidence in the industry, and the impact of the regulatory gap between property investment and financial products on competition.

The views of the earlier national inquiries

The Ministerial Council working party included the status quo as an option in its 2004 discussion paper. However, it noted that, amongst other things, the option did not adequately address consumer protection issues, the costs and negative outcomes for consumers would appear to be considerable and that reputable businesses would continue to suffer damage to their reputations.³⁰⁶

Although the Ministerial Council did not provide the Committee with a copy of its draft regulation impact statement, Consumer Affairs Victoria described its contents in its submission. According to that submission, the statement includes the status quo as an option but lists its various disadvantages, including the limited capacity of general consumer protection laws to prevent problems in this area and the likelihood that rogue elements will continue to act unfairly.³⁰⁷

The Joint Committee on Corporations and Financial Services concluded in its report that the current regulatory framework ‘is not able to provide an adequate level of protection for consumers, and should be strengthened’.³⁰⁸

The views of stakeholders

As the discussion in chapter five of this report demonstrates, the majority of witnesses concluded that the current regulatory framework is inadequate.

Mr Rodney Van de Hoef, an individual who made a submission to the Committee, was the only witness who appeared to support an option based on existing laws and market forces. In his written submission he questioned whether the government should regulate in this area and stated that ‘[m]y view is government should not ...

³⁰⁵ Dr David Cousins, Director, Consumer Affairs Victoria, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 8.

³⁰⁶ Ministerial Council on Consumer Affairs Working Party, above n 300, 43-46, 48.

³⁰⁷ Consumer Affairs Victoria, *Submission No. 16*, 29.

³⁰⁸ Joint Committee on Corporations and Financial Services, Parliament of Australia, *Property Investment Advice – Safe as Houses?* (2005) 17.

There is no need to create further laws to deal with an issue that is akin to natural selection ... [Y]ou win or lose, that is part of life – that is also part of investment.³⁰⁹

The Centre for Credit and Consumer Law took a different view. It told the Committee that it was ‘unlikely that any market based solution will emerge in a reasonably timely and effective form despite a competitive market’.³¹⁰ It noted that the consequences facing consumers are ‘potentially catastrophic’.³¹¹

6.2.2 Option 2: Stronger general consumer protection laws

Under this option, governments would not introduce any industry-specific regulation in this area, but would take action to strengthen their general consumer protection laws. This could be achieved by:

- closing any ‘loopholes’ that limit the application of the current laws to property investment advice and marketing
- prohibiting a wider range of unfair conduct by business
- giving regulators additional enforcement powers.

This option could also involve more action on the part of regulators to enforce consumer protection laws in the property investment industry.

Benefits and costs

The benefits of this option are similar to those for option 1 – it does not restrict competition by creating barriers to participation in the property investment industry and it involves relatively low compliance costs for reputable businesses.

However, given the inherent limits of general consumer protection laws, it is likely that consumers would continue to experience some detriment. This option would also involve additional administrative costs for the government, which would need to fund a communication campaign about changes to its existing laws and additional enforcement action. Business would also continue to face problems with competition as a result of the regulatory gap between property investment and financial products. The continued existence of rogue traders in the industry could also erode consumer confidence in the industry as a whole, reducing business for reputable traders.

The Committee also notes that any changes to the general consumer protection laws would affect all industry sectors, and not just property investment advisers and marketeers.

The views of the earlier national inquiries

The earlier national inquiries did not specifically address ways to strengthen the general consumer protection laws.

³⁰⁹ Mr Rodney Van de Hoef, *Submission No. 1*, 1.

³¹⁰ Centre for Credit and Consumer Law, *Submission No. 12*, 19.

³¹¹ *Ibid.*

The Productivity Commission has considered some possible changes to general consumer protection arrangements in its draft report on Australia's consumer policy framework. Its draft report does not support the introduction of laws prohibiting a broader range of unfair business practices, like those in Europe and the United States, at this stage.³¹² It does recommend national, generic consumer protection laws that would be administered by Commonwealth regulators, which would have a number of enforcement powers.³¹³

The views of stakeholders

Consumer Affairs Victoria was the only witness to raise amendments to the general consumer protection laws as a possible option during the inquiry.

The Victorian Government currently aims to rely more on general consumer protection laws than industry-specific regulation. The Director of Consumer Affairs Victoria, Dr David Cousins, told the Committee that:

we would see the general law as generally having less impact on business and being a preferable way to go rather than keeping developing these industry-specific laws ... I think there has always been a tendency in the past when a problem has arisen to think we need a new law to deal with that problem. Actually what we often needed was creative use of the existing law from an enforcement point of view to see whether we could have dealt with the problems.³¹⁴

Dr Cousins noted that general consumer protection laws in Australia only address certain types of conduct, such as misleading representations and unconscionable conduct, and that unfair conduct could be broader than those. He drew the Committee's attention to the laws in Europe and the United States that prohibit a broader range of unfair conduct. He also drew the Committee's attention to 'gaps' in the *Fair Trading Act 1999* (Vic) in relation to property investment.³¹⁵ He noted that:

- the definition of 'goods' does not expressly refer to land, although the definition of 'services' does refer to rights in real property. Dr Cousins told the Committee that '[i]n practice this has not been a major limitation'.
- some provisions only apply to goods and services for personal, domestic or household use, and do not necessarily apply to investment
- the cooling-off rights for off-business-premises sales (for example, door-to-door selling) do not apply to sales in hotels or similar venues where property investment advisers and marketeers usually hold their seminars.³¹⁶

The Committee did not receive any evidence regarding the Commonwealth's consumer protection laws, although Mr Paul Latimer and Mr Mark Bender from Monash University noted one court decision in their submission which suggests that

³¹² Productivity Commission, above n 301,110-111.

³¹³ Ibid 177-197.

³¹⁴ Dr David Cousins, *Transcript of evidence*, above n 305, 8.

³¹⁵ Ibid 4-5.

³¹⁶ Ibid. See also Consumer Affairs Victoria, *Submission No.16*, 39.

the Commonwealth's laws can be difficult to enforce effectively in the area of real estate.³¹⁷

Other witnesses agreed that there could be better enforcement of the laws by regulators. The Chairman of the Property Investment Association of Australia, Mr John Hopkins, told the Committee that '[w]here these silly advertisements and claims are made, the Acts are there ... we just need activity and teeth'.³¹⁸ Mr Gerard Brody from the Consumer Action Law Centre also told the Committee that 'regulators should be better able to enforce the legislation when they see instances of misleading conduct in the provision of education seminars and promises that people will get rich quickly'.³¹⁹

6.2.3 Option 3: Self-regulation

Under this option, the property investment advice and marketing industry would develop, administer and enforce its own industry-specific rules. Self-regulation can take a variety of forms but commonly involves:

- a code of conduct that sets ethical and professional standards for businesses
- an accreditation scheme, which requires businesses to meet training and other criteria before they are accredited by the industry
- a disciplinary or complaints scheme for businesses that breach these standards.

Benefits and costs

The benefits of self-regulation are that it does not restrict competition because compliance is voluntary, it usually involves lower compliance costs for business than government regulation and it involves no administration costs for government. Although business would incur compliance costs because of the need to meet new regulatory requirements, these may be lower than for other options.

Self-regulation would involve some costs. The industry as a whole would have to fund the development and administration of the scheme. The Real Estate Institute of Australia identified a number of possible costs in its submission including an industry reference committee, reporting requirements, consumer communication requirements, training requirements for the industry and a code administration body.³²⁰ Consumer Affairs Victoria told the Committee that the Ministerial Council's draft regulation impact statement also identified a number of costs, but there is no reliable model available for estimating their quantum.³²¹

³¹⁷ Mr Paul Latimer and Mr Mark Bender, *Submission No. 9*, 6. See also Sharon Christensen, 'Marketeers, market value and misleading conduct – can the ACCC protect consumers?', *Australian Property Law Bulletin*, volume 19, issue 3, 2004, 25.

³¹⁸ Mr John Hopkins, Chairman, Property Investment Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 7.

³¹⁹ Mr Gerard Brody, Director – Policy & Campaigns, Consumer Action Law Centre, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 4.

³²⁰ Real Estate Institute of Australia, *Submission No. 4*, 10.

³²¹ Consumer Affairs Victoria, *Submission No. 16*, 32-33.

Self-regulation would not address the regulatory gap between property investment and financial services, and would not improve competition between those industries.

The views of the earlier national inquiries

The Ministerial Council working party's discussion paper concluded that self-regulation was not a viable option. It noted that there was no industry association representing the range of businesses in the market and that there were a number of businesses in the industry with no concern for reputation.³²²

According to Consumer Affairs Victoria, the draft regulation impact statement does include self-regulation in the form of an industry code of conduct as an option, but also noted some flaws and significant costs for the industry.³²³

In its report, the Joint Committee on Corporations and Financial Services concluded that self-regulation might be a viable proposition at some point in the future, but that it would be 'premature at this time'.³²⁴

The views of stakeholders

The Committee did not hear from any stakeholders who supported self-regulation during its inquiry.

Most stakeholders thought that self-regulation would be ineffective in this area. Mr Gerard Brody from the Consumer Action Law Centre told the Committee that:

We would not support such an approach. The market for property investment is characterised by a large number of participants and low barriers to entry. There is often little repeat custom and therefore little concern for reputation. In these circumstances we think self-regulation would just not work. While the good players would comply, many in the industry would simply ignore the regulation in place and suffer no consequences.³²⁵

Witnesses from the industry expressed similar views. Ms Monique Wakelin from Wakelin Property Advisory told the Committee that 'self-regulation has not worked and would not work'.³²⁶ Property Planning Australia said in its submission that:

industry should be fully consulted in the development of any new regulatory regime. However, we do not believe there is a role for industry in terms of co-regulation or self-regulation. History has proven the property industry to be a poor self-regulator, while the number and range of interested parties in the property investment advice industry would make any kind of consensus and co-regulation very difficult.³²⁷

³²² Ministerial Council on Consumer Affairs Working Party, above n 300, 42.

³²³ Consumer Affairs Victoria, *Submission No. 16*, 29-30.

³²⁴ Joint Committee on Corporations and Financial Services, above n 308, 21.

³²⁵ Mr Gerard Brody, *Transcript of evidence*, above n 319, 3. See also Consumer Action Law Centre, *Submission No. 7*, 4; Centre for Credit and Consumer Law, *Submission No. 12*, 18.

³²⁶ Ms Monique Wakelin, co-founder, Wakelin Property Advisory, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

³²⁷ Property Planning Australia, *Submission No. 2*, 24. See also Mr Kerry Sharp, State Director, Association of Financial Advisers, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 5.

The Real Estate Institute of Australia supported a role for industry associations, but noted that there is no guarantee that rogue traders would comply with self-regulation and that there would be ‘significant cost, time and administration implications’ for the industry.³²⁸

6.2.4 Option 4: Co-regulation

Under this option, government and industry would take joint responsibility for developing and administering industry-specific regulation in this area. Co-regulatory schemes can involve a variety of initiatives but they commonly involve industry codes of conduct and accreditation schemes that have legislative backing.

Benefits and costs

The benefits of co-regulation are that, if successful, it can reduce consumer detriment and benefit businesses by increasing consumer confidence.

Co-regulation would involve some of the same costs as option 3 – businesses would incur some compliance costs because of the need to meet new requirements under the scheme, and the industry as a whole would have to fund its development and administration. These costs may be passed on to consumers in the form of higher fees and charges. This option would also involve more administration costs for government than self-regulation because it would have input into the scheme and would play a role in enforcing legislative arrangements.

This option has the potential to reduce the regulatory gap between property investment and financial investment but would not eliminate it completely. It could also restrict competition in the property investment industry if the scheme sought to exclude certain businesses from the industry.

The views of the earlier national inquiries

The Ministerial Council working party did not examine co-regulation as an option in its 2004 discussion paper on the grounds that, like self-regulation, it was not viable in this industry for a range of reasons, including the fact that there was no industry association representing the range of participants in the market.³²⁹

According to Consumer Affairs Victoria, the working party’s draft regulation impact statement does include a co-regulatory option. This option would prevent businesses from providing property investment advice under legislation unless they were members of an association with a government-approved code of conduct and subscribed to a government-approved dispute resolution scheme.³³⁰

The Joint Committee on Corporations and Financial Services did not expressly consider co-regulation as an option.

³²⁸ Real Estate Institute of Australia, *Submission No. 4*, 9-10.

³²⁹ Ministerial Council on Consumer Affairs Working Party, above n 300, 42.

³³⁰ Consumer Affairs Victoria, *Submission No. 16*, 30.

The views of stakeholders

A small number of witnesses from the business community proposed schemes that resembled co-regulation.

In its submission the Australian Property Institute noted that, as an alternative to the government licensing, governments could help the Institute regulate the industry by requiring property investment advisers to be associate members of the Institute. It told the Committee it was important that the government back a professional organisation to give it ‘the legitimacy that is required by the public’.³³¹

The Property Investment Association stated that it had shifted its support from self-regulation to licensing but it preferred a lighter licensing regime involving membership of a professional association.³³²

In its submission the Property Investors Association of Australia recommended a scheme involving an industry code of conduct, due diligence requirements and accreditation, supported by appropriate legislation.³³³

Co-regulation was only addressed by a small number of other witnesses. The Centre for Credit and Consumer Law described it as inappropriate given the diverse nature of the property investment industry.³³⁴ The Real Estate Institute of Australia noted that, like self-regulation, it had significant cost, time and administrative implications for the industry.³³⁵

6.2.5 Option 5: Additional conduct and disclosure obligations

Under this option, the government would introduce a number of industry-specific statutory obligations for property investment advisers and/or marketeers. The additional obligations could take the form of:

- disclosure requirements. These might include a requirement to disclose conflicts of interest to consumers, as well as a requirement to disclose the risks involved in recommended investment strategies or products
- conduct requirements. These might involve a mandatory code of conduct, mandatory professional indemnity insurance or a requirement that businesses establish dispute resolution procedures.

Benefits and costs

The benefits of this option are that, depending on its effectiveness, it could reduce consumer detriment by improving standards in the industry. Improved standards could also assist the industry as a whole by improving consumer confidence. This

³³¹ Australian Property Institute, *Submission No. 14*, 6; Mr Rob Pepicelli, *Transcript of evidence*, above n 304, 7.

³³² Mr John Hopkins, Chairman, and Mr Phil Emery, Program Director – DeakinPrime, Property Investment Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 4, 10.

³³³ Property Investors Association of Australia, *Submission No. 6*, 4, 10-12.

³³⁴ Centre for Credit and Consumer Law, *Submission No. 12*, 19.

³³⁵ Real Estate Institute of Australia, *Submission No. 4*, 10.

option would not limit competition in the industry because it would not restrict who could provide property investment advice or promote investment property for sale.

This option would involve costs, although these would vary depending on the extent of the regulation. Businesses would face compliance costs because of the need to meet new requirements, and may pass those on to consumers. These might include the costs of developing systems to ensure compliance with the new laws and training staff. Consumer Affairs Victoria gave the Committee a table setting out the estimated costs of the financial services regime’s disclosure obligations for businesses and these are set out in figure 12.

Consumer Affairs Victoria stressed that compliance costs would be likely to be lower for property investment businesses, because financial services businesses deal with a broad range of products.³³⁶ Consumer Affairs Victoria suggested that a business with assets of up to \$75 million that provided general and personal property investment advice may incur up to \$17 000 in implementation costs and up to \$15 000 per year in compliance costs.³³⁷ Consumer Affairs Victoria did not provide figures on the likely impact on the profitability of such a business, although the costs do not appear significant against an asset base of that size.

The government would also incur higher administrative costs under this option than the previous options. According to Consumer Affairs Victoria, a national compliance program may cost up to \$2.4 million per year nationally.³³⁸

Figure 12 – Estimated costs of financial services regime’s disclosure requirements³³⁹

| Business size | General advice only business | | General and personal advice business | |
|--|------------------------------|--|--------------------------------------|--|
| | Average implementation costs | Average ongoing compliance costs (per annum) | Average implementation costs | Average ongoing compliance costs (per annum) |
| Sole trader | \$2700 | Up to 3.4 per cent of gross income | \$7300 | Up to 17.5 per cent of gross income |
| Small (assets less than \$75 million) | \$19 000 | \$8700 | \$50 000 | \$44 000 |
| Medium (assets of \$75 million to \$500 million) | \$54 000 | \$23 000 | \$144 000 | \$118 000 |
| Medium/large (minimum assets of \$500 million) | \$152 000 | \$67 000 | \$405 000 | \$339 000 |
| Large | \$576 000 | \$176 000 | \$1 536 000 | \$897 000 |

³³⁶ Consumer Affairs Victoria, *Submission No. 16*, 35-36.

³³⁷ *Ibid* 36.

³³⁸ *Ibid*.

³³⁹ *Ibid* 35.

The views of the earlier national inquiries

The Ministerial Council working party included ‘additional requirements short of a full licensing regime’ as one of the options in its 2004 discussion paper. It noted that this option would reduce the costs to consumers and reputable businesses caused by existing problems in the industry, although it might not target quality and competency problems effectively.³⁴⁰

Consumer Affairs Victoria told the Committee in its submission that an option involving conduct and disclosure requirements, including a requirement that advisers have internal dispute resolution procedures, had been included in the working party’s draft regulation impact statement. According to Consumer Affairs Victoria, the statement notes that this option would help consumers by improving their access to information, but would not necessarily prevent rogue traders entering the industry.³⁴¹

The Joint Committee on Corporations and Financial Services did not consider this type of option in detail.

The views of stakeholders

This type of option attracted support from a small number of stakeholders.

Mr Neil Jenman, a consumer advocate in the real estate industry, told the Committee that one of the ways to solve problems in this area would be to require advisers to disclose the true nature of their business to consumers. He also supported enforcement of existing consumer protection laws in relation to advisers’ claims and a requirement that investors get independent legal advice and an independent valuation.³⁴²

The Investors Club also supported disclosure in the industry. It told the Committee that it supported disclosure of bank property valuations, all sales within a one kilometre radius of the investment property in the past 12 months, three written rental appraisals for the property, client lists and all commissions made by parties involved in the sale.³⁴³ This report discusses disclosure of bank valuations and sales data in greater detail in chapter seven.

Some stakeholders were sceptical about whether additional obligations for advisers and marketeers would be effective in the absence of a licensing regime. The Centre for Credit and Consumer Law stated in its submission that disclosure laws alone were unlikely to give sufficient protection to consumers because such information is difficult for them to verify.³⁴⁴

Other evidence raised doubts about whether regulators would be able to enforce these obligations without a licensing or registration scheme to help them identify businesses in the industry. Mr Gerard Brody from the Consumer Action Law Centre

³⁴⁰ Ministerial Council on Consumer Affairs Working Party, above n 300, 46, 49.

³⁴¹ Consumer Affairs Victoria, *Submission No. 16*, 30-31.

³⁴² Mr Neil Jenman, consumer advocate, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 2-3.

³⁴³ Mr Neil Higgins, National Finance Manager, The Investors Club, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

³⁴⁴ Centre for Credit and Consumer Law, *Submission No. 12*, 14-15.

questioned the effectiveness of Queensland's property marketeering laws, which impose additional obligations on property marketeers but do not require them to be licensed or registered. He told the Committee that although he was not close to Queensland's experience, 'there are still many small players in the market, little shopfronts offering property investment advice, the regulator still does not know who is out there in the market and how to enforce it'.³⁴⁵

6.2.6 Option 6: Licensing, conduct and disclosure regime

Under this option, property investment advisers and marketeers would need to be licensed by the government before they could provide services to consumers. This would most likely be combined with conduct and disclosure requirements like those discussed under option 5.

Licensing regimes can be 'positive' or 'negative'. Negative licensing regimes prohibit certain people from operating in an industry, often on the basis of poor character such as a criminal history. Positive licensing regimes require businesses to actively seek government approval before they can operate. Licence applicants usually have to meet competency as well as good character requirements.

Benefits and costs

A licensing, conduct and disclosure regime would have a number of benefits. It offers a higher level of consumer protection than the other options and would be more likely to reduce consumer detriment. It may also improve consumer confidence in the industry by providing an assurance of minimum service quality. This option would also help to remove the regulatory gap that currently applies to property investment and financial investment businesses, thereby improving competition between those groups.

A licensing scheme would restrict competition within the property investment industry by creating barriers to the industry, and it would also involve significant costs for industry. Businesses would incur costs obtaining and renewing their licences and complying with the new requirements, and these could be passed on to consumers in the form of higher fees and charges. Consumer Affairs Victoria provided a table of the estimated costs of the financial services regime's licensing, conduct and disclosure requirements, which is reproduced here as Figure 13.

Consumer Affairs Victoria again stressed that compliance costs are likely to be lower for property investment businesses than financial services businesses.³⁴⁶ It suggested that a business with assets of up to \$75 million providing general and personal property investment advice may incur up to \$31 000 in implementation costs and up to \$17 000 per year in ongoing compliance costs.³⁴⁷ As with option 5, Consumer Affairs Victoria did not provide figures on the likely impact on the profitability of such a business. However, again, the costs do not appear significant against an asset base of that size.

³⁴⁵ Mr Gerard Brody, *Transcript of evidence*, above n 319, 7.

³⁴⁶ Consumer Affairs Victoria, *Submission No.16*, 36, 38.

³⁴⁷ *Ibid* 38.

Figure 13 – Estimated cost of financial services regime’s licensing, conduct and disclosure requirements³⁴⁸

| Business size | General advice only business | | General and personal advice business | |
|--|------------------------------|--|--------------------------------------|--|
| | Average implementation costs | Average ongoing compliance costs (per annum) | Average implementation costs | Average ongoing compliance costs (per annum) |
| Sole trader | \$8900 | Up to 5.9 per cent of gross income | \$13 500 | Up to 20 per cent of gross income |
| Small (assets less than \$75 million) | \$61 000 | \$15 000 | \$92 000 | \$51 000 |
| Medium (assets of \$75 million to \$500 million) | \$176 000 | \$40 000 | \$266 000 | \$135 000 |
| Medium/large (minimum assets of \$500 million) | \$493 000 | \$115 000 | \$746 000 | \$387 000 |
| Large | \$1 872 000 | \$304 000 | \$2 832 000 | \$1 025 000 |

Government would also face higher administration costs under this option. Consumer Affairs Victoria estimated in its submission that a Commonwealth financial services style scheme may cost the Commonwealth Government \$12.7 million per year, assuming that some costs could be recovered through licence fees.³⁴⁹ It estimated that a state and territory-administered licensing scheme would be cheaper at \$4.2 million per year, because state and territory licensing schemes usually involve less onerous requirements. This would be less convenient for businesses that operate in more than one state or territory, however, because they would need to obtain multiple licences.³⁵⁰

The views of the earlier national inquiries

The Ministerial Council working party included a licensing, conduct and disclosure regime as an option in its 2004 discussion paper. It concluded that it was more likely to reduce consumer detriment than the other options, but noted that it involved ‘significant additional compliance costs’.³⁵¹

The Committee understands that the working party’s draft regulation impact statement also notes that this option can significantly discourage, although not eliminate, rogue behaviour but that it has costs for government and business.³⁵²

The Joint Committee on Corporations and Financial Services supported this option for property investment advisers and recommended that the Commonwealth’s

³⁴⁸ Consumer Affairs Victoria, *Submission No. 16*, 37.

³⁴⁹ *Ibid* 37.

³⁵⁰ *Ibid* 37-38.

³⁵¹ Ministerial Council on Consumer Affairs Working Party, above n 300, 46-47, 49-50.

³⁵² Consumer Affairs Victoria, *Submission No. 16*, 31-32.

financial services regime should be extended to those advisers. It concluded that the expected benefits would ‘far outweigh’ the additional costs involved.³⁵³

The views of stakeholders

This option attracted support from stakeholders across all sectors during the Committee’s inquiry, at least in relation to property investment advisers.

The two consumer organisations that participated in the inquiry both supported licensing, as did the individual who made a confidential submission. Mr Gerard Brody from the Consumer Action Law Centre told the Committee that regulating property in a similar way to financial services ‘would be the simplest and most sensible approach’.³⁵⁴

A number of businesses who participated in the inquiry also supported this type of option. The Property Investment Association of Australia said in its submission that it would accept ‘a federally regulated licensing regime with mandatory accreditation including an emphasis on due diligence requirements’.³⁵⁵ The Australian Property Institute told the Committee that a national approach similar to the financial services regime was preferable.³⁵⁶ Property Planning Australia’s submission also supported a licensing regime with disclosure requirements.³⁵⁷

The regulators in this area did not express a preference for any particular option during the inquiry. However, the Committee understands that the Australian Securities and Investments Commission’s submission to the Productivity Commission stated that ‘there is a case for [direct property] investment being regulated in a similar way to other forms of financial investment’.³⁵⁸

Ms Lang Thai from Deakin University also supported a regime which included entry requirements, disclosure requirements and some conduct rules.³⁵⁹

Not all witnesses supported licensing for property investment advisers. Mr Neil Jenman told the Committee that if property spruikers were licensed, ‘my goodness, you will be giving bandits badges, that is what will happen’.³⁶⁰

Only two witnesses discussed a licensing option for businesses that market or sell investment property, including developers. The Real Estate Institute of Australia argued that developers selling their own properties should be licensed.³⁶¹ The Australian Property Institute suggested that licensing of developers or vendors is unnecessary although it supported additional disclosure requirements.³⁶²

³⁵³ Joint Committee on Corporations and Financial Services, above n 308, 29, 35-36.

³⁵⁴ Mr Gerard Brody, *Transcript of evidence*, above n 319, 3. See also Centre for Credit and Consumer Law, *Submission No. 12*, 19-20.

³⁵⁵ Property Investment Association of Australia, *Submission No. 3*, 5.

³⁵⁶ Australian Property Institute, *Submission No. 14*, 4.

³⁵⁷ Property Planning Australia, *Submission No. 2*, 25-26, 32.

³⁵⁸ Australian Securities and Investments Commission, ‘Productivity Commission Review of Australia’s Consumer Policy Framework’, above n 302, 31.

³⁵⁹ Ms Lang Thai, *Submission No. 10*, 10-11.

³⁶⁰ Mr Neil Jenman, *Transcript of evidence*, above n 342, 6.

³⁶¹ Real Estate Institute of Australia, *Submission No. 4*, 6.

³⁶² Australian Property Institute, *Submission No. 14*, 5.

6.3 A Commonwealth or state responsibility?

The Committee was also presented with different options for regulation of property investment advisers and marketeers in terms of whether there should be a national or state scheme.

6.3.1 Advantages of a national approach

The Committee found the overwhelming preference of stakeholders was for a national approach to property investment advisers and marketeers.

Stakeholders from both consumer and business groups told the Committee that the property investment market was a national one that had little regard for state and territory boundaries. The Centre for Credit and Consumer Law's submission stated that:

Many property investment advisers operate across State and Territory boundaries. Particular schemes in operation in recent years have in fact focused on encouraging consumers on NSW and Victoria to buy property in Queensland. Consistent regulation between jurisdictions facilitates certainty and reduced costs for multi-state providers, and a consistent level of protection for consumers.³⁶³

Mr John Hopkins from the Property Investment Association of Australia agreed, noting that '[t]here is so much cross-border activity there needs to be some federal licensing or accreditation'.³⁶⁴ Mr Rob Pepicelli from the Australian Property Institute told the Committee that '[p]roperty is a borderless asset class now'.³⁶⁵ The Property Investors Association told the Committee that it even received inquiries from investors overseas.³⁶⁶

The Committee's own survey of property investment businesses also showed the extent to which advisers and marketeers operate across state and territory borders. Most of the properties advertised by developers were in Queensland. Exhibitors at the Property Expo in Melbourne in October 2007 were marketing developments in Queensland, Tasmania, Broome and New Zealand as well as Victoria.

The Committee did not receive any recent data about the levels of interstate investment, although it notes that the Australian Bureau of Statistics 1997 survey of residential property investors found that 11.5% owned properties in another state or territory.³⁶⁷

Stakeholders also told the Committee that consumers in Australia should receive the same protections and the same level of service regardless of where they lived. In its

³⁶³ Centre for Credit and Consumer Law, *Submission No. 12*, 5. See also Ms Corinna Dieters, Chair, Financial Planning Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 2-3; Mr Paul Latimer and Mr Mark Bender, *Submission No. 9*, 1.

³⁶⁴ Mr John Hopkins, *Transcript of evidence*, above n 318, 3. See also Property Investment Association of Australia, *Submission No. 3*, 3.

³⁶⁵ Mr Rob Pepicelli, *Transcript of evidence*, above n 304, 7.

³⁶⁶ Email from Mr John Moore, President, Property Investors Association of Australia to Research Officer, Law Reform Committee dated 26 October 2007.

³⁶⁷ Australian Bureau of Statistics 1998, *Household Investors in Rental Dwellings*, Cat No. 8711.0, ABS, Canberra, June 1998, Table 13.

submission, the Real Estate Institute of Australia said that '[c]onsumers must be afforded the same protection wherever they reside in Australia'.³⁶⁸ Mr Peter Dunn from the Financial Planning Association told the Committee that if consumers 'see somebody recommending property to them in Cairns, they need to know that they have had the same sort of training as somebody in Perth, Port Augusta or Mildura'.³⁶⁹

The Committee also notes that a national approach is likely to minimise the costs for businesses and regulators. Consumer Affairs Victoria has previously identified a number of benefits of consistent regulation:

- it makes consumer protection easier by eliminating confusion amongst businesses and customers about standards in different jurisdictions
- it minimises duplication and reduces the costs of administering licensing schemes and conducting education programs
- it increases the potential for competition amongst operators in different states and territories
- it reduces costs for businesses that operate across different states or territories, or which move interstate.³⁷⁰

The Productivity Commission's draft report on Australia's consumer policy framework also raised concerns about inconsistent regulation and recommended a review.³⁷¹

6.3.2 Options for a national approach

The Committee heard that there are two ways that a national approach could be achieved:

- regulation by the Commonwealth Government
- national, uniform regulation by Australia's state and territory governments.

Not all witnesses who participated in the inquiry expressed a preference for one or the other of these options and, of those that did, views were divided. Mr Paul Latimer and Mr Mark Bender from Monash University and Ms Lang Thai from Deakin University expressed a preference for Commonwealth regulation.³⁷² Property Planning Australia supported regulation at both Commonwealth and state and territory levels, with Commonwealth recognition of direct property investment as a financial asset but state administration of the scheme and stronger state real estate

³⁶⁸ Real Estate Institute of Australia, *Submission No. 4*, 11.

³⁶⁹ Mr Peter Dunn, Certified Financial Planner, Financial Planning Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

³⁷⁰ Consumer Affairs Victoria, *Using licensing to protect consumers' interests*, Research Paper No. 9 (2006) 25.

³⁷¹ Productivity Commission, above n 301, 79, 84-87.

³⁷² Mr Paul Latimer and Mr Mark Bender, *Submission No. 9*, 7; Ms Lang Thai, *Submission No. 10*, 7.

and consumer protection laws.³⁷³ The Real Estate Institute also argued that there needed to be extension and enhancement of both Commonwealth and state laws.³⁷⁴

The consumer organisations that participated in the inquiry questioned whether uniform state and territory regulation would be effective. Mr Gerard Brody from the Consumer Action Law Centre and the Centre for Credit and Consumer Law both pointed to problems with the Uniform Credit Code, which is based on national uniform state and territory legislation. Mr Brody told the Committee that:

There have long been ... gaps or loopholes in that regulation that everyone agrees are there, but the ability to get seven jurisdictions to agree is difficult and time consuming and for that reason consumers continue to experience detriment for a long period of time.³⁷⁵

The Centre for Credit and Consumer Law told the Committee that loopholes in the Code were identified as far back as 2000 but amendments had not been implemented yet.³⁷⁶

Other inquiries in this area have also expressed different views. The Joint Committee on Corporations and Financial Services recommended that regulation of property investment advice, but not real property or real estate transactions generally, should be a Commonwealth responsibility.³⁷⁷ The Productivity Commission's draft report on Australia's consumer policy framework states that it does not propose to make specific recommendations about the issue. However, it suggests that consideration of the issue should be deferred pending a review of regulation and a decision on which level of government should be responsible for real estate regulation.³⁷⁸

The Committee notes that property investment does not fall neatly within the responsibilities of either level of government under Australia's federal system. The states and territories are responsible for property transactions and real estate agents, but their laws regulate property sales, not investment advice. Investment advice is a Commonwealth responsibility under its financial services laws.

On balance, the Committee favours Commonwealth regulation of property investment advisers, and state regulation of property investment sales and marketeers. It does not believe that the issue should be deferred pending a decision on regulation of real estate agents, as the Productivity Commission has suggested.

Recommendation 5: Commonwealth responsibility for property investment advice

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting:

- (a) that the Commonwealth Government regulate property investment advisers
- (b) that real estate or property transactions should continue to be regulated by the states and territories.

³⁷³ Property Planning Australia, *Submission No. 2*, 22.

³⁷⁴ Real Estate Institute of Australia, *Submission No. 4*, 6.

³⁷⁵ Mr Gerard Brody, *Transcript of evidence*, above n 319, 8.

³⁷⁶ Centre for Credit and Consumer Law, *Submission No. 12*, 5.

³⁷⁷ Joint Committee on Corporations and Financial Services, above n 308, 21-23.

³⁷⁸ Productivity Commission, above n 301, 94-95.

That process may take some years and the problems that have arisen with property investment advisers and marketeers require more urgent attention.

6.3.3 Constitutional issues

The legal academics who participated in the Committee's inquiry raised the need to ensure that Commonwealth regulation in this area would be constitutionally valid.

Ms Lang Thai noted in her submission that the Australian Constitution only gives the Commonwealth Parliament the power to legislate in relation to particular issues. She noted that some of the Commonwealth Parliament's powers, such as the interstate trade and commerce power, could be used in this area but that the Commonwealth Parliament cannot legislate in relation to real property or property investment generally. Ms Thai suggested that the problem could be overcome by the states and territories referring their own constitutional power in this area to the Commonwealth, as they did in relation to the *Corporations Act 2001* (Cth).³⁷⁹

Mr Paul Latimer and Mr Mark Bender referred to a recent High Court of Australia decision in their submission which suggests that the Commonwealth Parliament's power to legislate in relation to corporations confers broad powers. They stated that:

Only the most determined "states' righters" would not accept that in modern Australia the Commonwealth Parliament should have the power to prevent lack of uniformity in the area of property regulation across Australia, and sufficient macro-economic powers to manage investments in the national economy.³⁸⁰

The Committee was interested in whether the Commonwealth and Victorian Governments had sought any legal advice on these issues. Their regulators told the Committee they had not undertaken or could not provide any specific work on constitutional issues in this area.³⁸¹ The Committee considers that, if governments have not sought advice on these issues, they should do so in the course of developing new regulation.

Recommendation 6: Legal advice on constitutional issues

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that legal advice be obtained on the Commonwealth's constitutional power to regulate property investment advisers.

Recommendation 7: Resolution of constitutional issues

If the Commonwealth does not have sufficient constitutional power to regulate property investment advisers, the Victorian Government should:

- (a) refer its power to regulate property investment advisers to the Commonwealth under section 51(xxxvii) of the Australian Constitution
- (b) propose that other states and territories refer their powers to the Commonwealth.

³⁷⁹ Ms Lang Thai, *Submission No. 10*, 12-13.

³⁸⁰ Mr Paul Latimer and Mr Mark Bender, *Submission No. 9*, 5.

³⁸¹ Consumer Affairs Victoria, *Submission No. 16*, 27; Letter from Acting Executive Director, Regulation, Australian Securities and Investments Commission to the Chair, Law Reform Committee, 5 November 2007, 5; Letter from Chief Executive Officer, Australian Competition and Consumer Commission to the Chair, Law Reform Committee, 19 December 2007.

6.4 The Committee's preferred framework for property investment advisers and marketeers

Given the number and nature of the problems with property investment advisers raised during the inquiry, the Committee considers it is unlikely that any single policy can solve all of these issues effectively.

The Committee believes that a multifaceted and coordinated approach involving government and industry, and regulatory and non-regulatory initiatives, is required. The remainder of this chapter sets out the Committee's views on regulatory changes. The following chapter examines a number of non-regulatory strategies.

6.5 Regulation of property investment advisers

The Committee's preferred approach for the regulation of property investment advisers involves:

- general consumer protection laws for property investment advisers
- an additional industry-specific licensing, conduct and disclosure regime.

The Committee believes that this approach has several advantages over the other options available.

Firstly, by introducing industry-specific regulation it deals with the problems in this industry that general consumer protection laws cannot address, including information asymmetry, poor quality services and the regulatory gap between property and other investment advisers. Although there has been a decline in the number of complaints about this industry in recent years, the Committee is concerned by the evidence it received suggesting problems are likely to re-emerge in the future if the property market moves into a new phase. Although no regulatory regime can protect consumers against detriment in all cases, the Committee believes that industry-specific regulation offers the best protection for consumers in this area.

Secondly, at this stage a licensing, conduct and disclosure regime is the only viable option for industry-specific regulation. The Committee believes that the industry is currently too fragmented and disparate to support self-regulation or co-regulation. Each of the existing profession-specific industry associations represents only a segment of the current market, while the new specialist property investment associations have limited membership at this stage. The Committee is also concerned that, given the lack of reliable information about the size and nature of the industry, regulators will not be able to enforce regulation effectively without the help of a licensing or registration scheme.

Thirdly, the Committee believes that this is the only option that addresses the regulatory gap between the regulation of property investment advisers and financial advisers and the additional problems it has caused for consumers and for business.

The Committee is conscious that its terms of reference require it to consider how best to control the exploitation of Victorians while keeping the burden on business as low as possible. The Committee's preferred approach does involve significant costs for business, which may result in higher fees for consumers. As the Chair of the

Financial Planning Association noted, ‘there will always be some costs that get passed on to a client’.³⁸²

Some witnesses who participated in the inquiry were concerned about the prospect of onerous regulation. The National Finance Manager for The Investors Club, Mr Neil Higgins, told the Committee that:

The requirements that are across small, medium and large business are very onerous in today’s society. I refer to such things, and this is what our general manager cops on a regular basis, as ATO audit, Office of Fair Trading, ASIC, payroll audit through the office of state revenue, GST, income tax, capital gains tax, employment compliance and the WorkChoices legislation.³⁸³

Mr Michael Hayes from the Law Institute also told the Committee that:

we need to tread a little carefully with any proposed regulation ... [w]e would like to see it achieved with some sort of surgical precision, moreover to ensure the target we are aiming at is managed and that we do not inadvertently stifle market dynamics.³⁸⁴

Other witnesses from the business community did not think that the costs of additional regulation would be prohibitive, and suggested that they would be outweighed by potential gains. Mr Mark Armstrong from Property Planning Australia told the Committee ‘we have to accept a short-term cost for a long-term gain’,³⁸⁵ and that:

I do not think it is going to be an enormous cost to industry ... If we look at some of the money that has been made in this marketplace – I do not think anyone is really crying poor out there. So for people to go out and educate themselves – courses are offered in these things for anywhere from \$1000 to \$5000 – it is not a cost that is over the top.³⁸⁶

Ms Corinna Dieters from the Financial Planning Association of Australia also told the Committee that ‘I do not think we are looking at exorbitant cost increases to those businesses. I would think that most people who are running good businesses in this area are already doing those things in some form or another.’³⁸⁷

6.5.1 A new property investment regime or a broader financial services regime?

There are two options for implementing the Committee’s preferred approach to regulation of property investment advisers:

- extending the existing financial services regime to property investment advisers
- introducing a specific licensing, conduct and disclosure regime for property investment advisers.

³⁸² Ms Corinna Dieters, *Transcript of evidence*, above n 363, 8.

³⁸³ Mr Neil Higgins, *Transcript of evidence*, above n 343, 6.

³⁸⁴ Mr Michael Hayes, *Transcript of evidence*, above n 303, 2.

³⁸⁵ Mr Mark Armstrong, Director, Property Planning Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 9.

³⁸⁶ *Ibid* 10.

³⁸⁷ Ms Corinna Dieters, *Transcript of evidence*, above n 363, 8.

Stakeholders were divided on this issue. Some supported the extension of the financial services regime. Mr Kerry Sharp, the State Director of the Association of Financial Advisers, told the Committee that ‘property investment advisers should be regulated within the existing financial services regulation’, although he acknowledged that it had some flaws.³⁸⁸ Mr Mark Armstrong from Property Planning Australia told the Committee that ‘[p]roperty needs to be considered a financial product’.³⁸⁹

Other witnesses preferred a specific regime. The Chair of the Financial Planning Association of Australia, Ms Corinna Dieters, told the Committee that ‘I do not think you should steer down the path of mirroring [the financial services regime] in all its detail but simply take some of the key components that would be appropriate’.³⁹⁰ Ms Monique Wakelin told the Committee that ‘there would need to be consistency across the two sets of legislation’ but that property should not be classed as a financial product because ‘property is shelter and therefore in our view it is a commodity’.³⁹¹

Ms Lang Thai from Deakin University raised some technical concerns about extending the financial services regime to property. Amongst other things, she noted that the *Corporations Act 2001* was designed to regulate corporations, not protect consumers, and that it is already lengthy and hard for practitioners to manage. She suggested that ‘[i]t would be simpler to use [the financial services regime] model and draft a whole new Act to regulate property investment advice and property investment advisers’.³⁹²

The Committee is aware of criticism of the financial services regime.³⁹³ One of the issues raised during the Committee’s inquiry was the regime’s heavy reliance on disclosure to deal with conflicts of interests. Some witnesses supported disclosure. Mr Mark Armstrong from Property Planning Australia told the Committee that:

Industries that have a great reputation are the ones that have complete transparency, and we feel that whether it is the finance industry, the mortgage broking industry or the property advice industry, the only way to bring these to the forefront and make them professional bodies that have the reputation that they deserve is to have complete and utter transparency.³⁹⁴

Consumer groups have been critical of the regime’s reliance on disclosure to address these issues. The Consumer Action Law Centre cited research by behavioural economists in the United States in its submission which suggests that ‘when conflicts of interest are disclosed, consumers are actually more trusting of an adviser, rather than less’. According to its submission, this research found that:

³⁸⁸ Mr Kerry Sharp, *Transcript of evidence*, above n 327, 2.

³⁸⁹ Mr Mark Armstrong, *Transcript of evidence*, above n 385, 2.

³⁹⁰ Ms Corinna Dieters, *Transcript of evidence*, above n 363, 6.

³⁹¹ Ms Monique Wakelin, *Transcript of evidence*, above n 326, 2, 4.

³⁹² Ms Lang Thai, *Submission No. 10*, 13-14.

³⁹³ See, for example, Australian Government Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation* (2006) 101-103.

³⁹⁴ Mr Mark Armstrong, *Transcript of evidence*, above n 485, 9. See also Mr John Hopkins, *Transcript of evidence*, above n 318, 3; Property Investors Association of Australia, *Submission No. 6*, 23; Ms Monique Wakelin, *Transcript of evidence*, above n 326, 2.

“people generally do not discount advice from biased advisors as much as they should, even when advisors’ conflicts of interest are disclosed [and] disclosure can increase the bias in advice because it leads advisors to feel morally licensed and strategically encouraged to exaggerate their advice even further.”³⁹⁵

An article published in the Australian Consumers Association’s journal argued that, as a result, ‘an unethical and anti-competitive behaviour becomes more entrenched and systematic and, unfortunately, broadly acceptable’.³⁹⁶

Some consumer advocates support stricter approaches to conflicts of interest, including bans on particular practices or conflicts. Mr Gerard Brody from the Consumer Action Law Centre told the Committee that ‘it is better to eliminate conflicts rather than manage them’.³⁹⁷ Ms Lang Thai also argued that property promoters should be prohibited from arranging finance or acting as a finance broker, although she supported disclosure in other cases.³⁹⁸ Debate amongst witnesses was particularly strong in relation to whether advisers should have to charge fees for service rather than commissions.³⁹⁹

Although the financial services regime provokes criticism and debate, on balance the Committee believes it would be preferable to extend the regime to property investment advisers. It incorporates all of the licensing, conduct and disclosure requirements the Committee believes are needed to address the problems that have arisen in this area, and it would eliminate completely the regulatory gap between direct property investment advice and financial product advice.

The Committee would prefer to see the issues raised by witnesses about conflicts of interest and disclosure resolved by the Commonwealth Government and the Australian Securities and Investments Commission for the financial services regime as a whole, for the benefit of all investors. The new Commonwealth Government has established a Financial Services Working Group to look at issues associated with financial services advice and disclosure. According to the Minister for Superannuation and Corporate Law and the Minister for Finance and Deregulation, the Working Group will focus initially on shortening product disclosure documents in superannuation but further product examination will be added to the work schedule throughout 2008.⁴⁰⁰

Recommendation 8: Regulation of property investment advisers

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth Government amend the *Australian Securities and Investments Commission Act 2001* (Cth) and chapter 7 of the *Corporations Act 2001* (Cth) so that advice about direct property investment is included in the financial services regime.

³⁹⁵ Consumer Action Law Centre, *Submission No. 7*, 5.

³⁹⁶ Nick Coates, ‘Disclosure overexposure’, *Consuming Interest*, Summer 2006, 16, 17. See also Mr Gerard Brody, *Transcript of evidence*, above n 319, 4.

³⁹⁷ Mr Gerard Brody, *Transcript of evidence*, above n 319, 4. See also Nick Coates, ‘Cutting remarks’, *Consuming Interest*, Summer 2006, 6, 7.

³⁹⁸ Ms Lang Thai, *Submission No. 10*, 11.

³⁹⁹ See Mr John Hopkins, *Transcript of evidence*, above n 318, 7-8; Ms Corinna Dieters, *Transcript of evidence*, above n 363, 5; Mr Gerard Brody, *Transcript of evidence*, above n 319, 6.

⁴⁰⁰ Minister for Superannuation and Corporate Law and Minister for Finance and Deregulation, Commonwealth, ‘Complexity to be Tackled in Financial Services: Working Group to Start Immediately’ (Press release, 5 February 2008).

Recommendation 9: Reform of the financial services regime

The Victorian Government should, through the Ministerial Council on Consumer Affairs, request the Commonwealth Government to continue to monitor the capacity of the disclosure requirements contained in the financial services regime to effectively manage conflicts of interest.

6.5.2 The scope of the regulation – how should property investment be defined?

The Committee considers that the new regulatory regime should apply to advice about all types of property, not just residential property. Although most of the evidence to the Committee focused on residential property investment, consumers face the same problems regardless of whether they invest in residential, commercial or industrial property. This position is supported by the Ministerial Council's 2004 discussion paper and some stakeholders.⁴⁰¹

Although it was not raised by stakeholders during the inquiry, the Committee notes that there may be cases where it is not clear whether a person has purchased a property for investment purposes or some other purpose. A person may, for example, purchase a residential property with the short term aim of providing housing for a relative but with the long term intention of selling it for capital gain. A person could also purchase a holiday home which they use for part of the year and rent out at other times.

For the purposes of the regulation, the Committee considers the purchase of real estate should be taken to be an investment if the predominant purpose of the investor is to obtain a financial benefit in the form of capital growth or income.

The Committee is conscious that this regulatory framework will result in different levels of protections for property investors and other purchasers, including homebuyers. Some of the cases mentioned by Consumer Affairs Victoria in its evidence suggested that unscrupulous property advisers and marketeers target homebuyers as well as investors. One such case involved a single mother who was the victim of two-tier marketing.⁴⁰² The impact of advisers and marketeers on homebuyers falls outside the Committee's terms of reference for this inquiry, but the Committee would encourage governments to examine these issues further.

Recommendation 10: The scope of the regulation

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth regulation of property investment advisers should:

- (a) include advice about investment in all types of direct property in the Commonwealth regulation of property investment advisers
- (b) define the purchase of direct property as an investment where the property was purchased for the predominant purpose of obtaining a financial benefit.

⁴⁰¹ Ministerial Council on Consumer Affairs Working Party, above n 300, 38. See also Centre for Credit and Consumer Law, *Submission No. 12*, 18; Real Estate Institute of Australia, *Submission No. 4, 9*.

⁴⁰² Consumer Affairs Victoria, *Submission No. 16*, 19-24.

6.5.3 The scope of the regulation – which investors should be protected?

As was noted in chapter one, most of the evidence the Committee received during the inquiry concerned retail (that is, individual) investors.

The protections in the financial services regime are limited to retail investors, although there are some exceptions for ‘sophisticated’ retail investors and professional investors who might be expected to be in a position to protect themselves.⁴⁰³

A number of witnesses argued that property investment regulation should be limited to retail investors because they are most at risk.⁴⁰⁴ The Committee heard that some marketeers have been targeting self-managed superannuation funds,⁴⁰⁵ but it did not receive evidence to show that they require additional regulatory protection.

Accordingly, the Committee does not propose to recommend any changes to the financial service regime’s focus on protection for retail investors.

6.5.4 The scope of the regulation – how should advice be defined?

As was noted in chapter one, property investment advice was defined broadly for the purposes of the Committee’s inquiry as:

Advertising, marketing, representations or advice in relation to:

- the risk and prospect of an investment return (capital growth or income) from a particular property or a portfolio of properties;
- a strategy of investing in property on the basis of a proposed investment return (capital growth or income).

Some witnesses suggested their own definitions,⁴⁰⁶ or argued that this definition was too broad because it extended into marketing. Mr Rob Pepicelli from the Australian Property Institute told the Committee that ‘[w]e actually think the first three – advertising, marketing and representations – do not constitute property investment advice’.⁴⁰⁷ The Australian Property Institute argued that it was important ‘to distinguish between property advice and “spruiking” or “marketeing”’, a view shared by some other witnesses.⁴⁰⁸

⁴⁰³ *Corporations Act 2001* (Cth) ss 761G-761GA.

⁴⁰⁴ Centre for Credit and Consumer Law, *Submission No. 12*, 17; Real Estate Institute of Australia, *Submission No. 4*, 9.

⁴⁰⁵ Mr Peter Dunn, *Transcript of evidence*, above n 369, 7.

⁴⁰⁶ Property Investors Association of Australia, *Submission No. 6*, 6.

⁴⁰⁷ Mr Rob Pepicelli, *Transcript of evidence*, above n 304, 2.

⁴⁰⁸ Australian Property Institute, *Submission No. 14*, 2. See also Ms Monique Wakelin, *Transcript of evidence*, above n 326, 2; Property Planning Australia, *Submission No. 2*, 15.

The financial services regime defines financial product advice even more broadly as:

a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as intended to have such an influence.⁴⁰⁹

Given the Committee's view that the financial services regime should be extended to property investment, it would be preferable to use that regime's definition of advice.

The Committee notes that this definition could also encompass some representations made by marketeers and sellers. The Australian Securities and Investments Commission's regulatory guide on this issue states that financial advice generally involves 'a qualitative judgement about, or an evaluation, assessment or comparison of' the features of a financial product or products, but that it is important to consider the overall impression and circumstances.⁴¹⁰

While the Committee appreciates that some witnesses would like there to be a clearer distinction between advisers and sellers in this industry, the Committee believes that consumers require the same level of protection regardless of whether the person giving them recommendations or opinions is an adviser or a seller.

The Committee also supports the financial services law's distinction between general and personal advice.⁴¹¹ Advisers who give only general advice have to warn investors that their advice does not take account of the client's objectives, financial situation or needs. Advisers who do take account of those factors and give personal advice must, amongst other things, have a reasonable basis for that advice and provide a written statement of advice to their clients.

Property Planning Australia argued that the new regime should only cover personal advice.⁴¹² However, the Committee believes that all advising activities should be regulated under the one regime.

6.5.5 The scope of the regulation – which advisers should be covered?

The Ministerial Council working party and the Joint Committee on Corporations and Financial Services supported a 'functionally-based' approach to regulation in this area.⁴¹³ This means that the regulation applies to anyone who purports to provide advice, regardless of their background or profession. Most witnesses who addressed this issue during the Committee's inquiry agreed. The Centre for Credit and Consumer Law, for example, argued that 'a functionally based approach to

⁴⁰⁹ *Corporations Act 2001* (Cth) s 766B.

⁴¹⁰ Australian Securities and Investments Commission, *Regulatory Guide 36: Licensing: Financial product advice and dealing* (2007) 7-8.

⁴¹¹ *Corporations Act 2001* (Cth) s 766B; Centre for Credit and Consumer Law, *Submission No. 12*, 17.

⁴¹² Property Planning Australia, *Submission No. 2*, 31.

⁴¹³ Ministerial Council on Consumer Affairs Working Party, above n 300, 37; Joint Committee on Corporations and Financial Services, above n 308, 31.

regulation is appropriate in this area due to the fragmented and sometimes transient nature of the providers of property investment services'.⁴¹⁴

However, as was noted in chapter five, many of the businesses involved in giving property investment advice come from established professions which already have their own occupation-specific licensing regimes. This raises the prospect that those businesses will be subject to dual licensing regimes.

This problem is not easily resolved. On the one hand, professions which are already regulated should not have to suffer the additional burden of obtaining multiple licences to conduct their businesses. On the other hand, if these professions are exempted from property investment advice regulation completely, consumers of their advice will be left with little protection.

Real estate agents

Most of the discussion about these issues during the Committee's inquiry focused on real estate agents. As was noted in chapter five of this report, real estate agents are already subject to a state licensing regime, as well as rules of conduct and complaints and compensation mechanisms. However, this regime focuses primarily on their buying and selling activities, and does little to regulate any investment advising activities.

The Real Estate Institute of Australia told the Committee that real estate agents are regulated by the financial services regime when they provide advice that compares the potential returns from property with financial products like shares, but are not regulated when they provide advice about direct property investment.⁴¹⁵

The Institute told the Committee that:

real estate practice is already highly regulated by the State and Territory governments, therefore any change to regulation should not unduly affect the 'high street' real estate agent in accordance with the current application and spirit of the intention of the [financial services laws].⁴¹⁶

The Institute's Chief Executive Officer, Mr Bryan Stevens, told the Committee that:

[w]e cannot see any cause that would lead a state or territory government to introduce a second licence for real estate agents to conduct their business in the way that they have been doing in the past, letting aside property seminars ... I do not see the point of that.⁴¹⁷

Some witnesses opposed a general exemption for estate agents. As was noted in chapter three, some witnesses claimed that real estate agents were not trained or competent to provide investment advice. Mr Neil Jenman noted that some property spruikers were licensed real estate agents. He told the Committee that 'of course the

⁴¹⁴ Centre for Credit and Consumer Law, *Submission No. 12*, 17. See also Property Planning Australia, *Submission No. 2*, 21, 31; Property Investment Association of Australia, *Submission No. 3*, 26.

⁴¹⁵ Real Estate Institute of Australia, *Submission No. 4*, 5-6.

⁴¹⁶ Real Estate Institute of Australia, *Submission No. 4*, 1. See also Mr Bryan Stevens, Chief Executive Officer, Real Estate Institute of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 3.

⁴¹⁷ Mr Bryan Stevens, *Transcript of evidence*, above n 416, 4-5.

real estate institutes will say, “It has nothing to do with us; they are not real estate agents”, but in many cases they are licensed real estate agents’.⁴¹⁸ Mr Gerard Brody also told the Committee that:

Our experience shows that real estate agents have been unable to provide investors with accurate or useful information. I am thinking particularly about the inability to estimate auction prices within a reasonable range. For these reasons we believe real estate agents should be subject to the same regulatory regime and oversight as any other professional seeking to provide property investment advice.⁴¹⁹

Other witnesses supported a partial or conditional exemption. The Centre for Credit and Consumer Law argued that there could be a specific exemption for estate agents for any advice given in the ordinary course of their activities as a real estate agent that is reasonably regarded as a necessary part of those activities.⁴²⁰ The Association of Financial Advisers suggested that estate agents should offer the full suite of advice under the financial services regime or not provide advice at all. The Association suggested that, unless estate agents had a licence to do the former, they should provide a standard document about particular properties that investors can take to a licensed adviser.⁴²¹

The Joint Committee on Corporations and Financial Services stated that real estate agents doing their normal work of selling and managing property should not be captured, but it did not support a general exemption for estate agents.⁴²²

The Committee agrees that estate agents should not have to obtain a second licence to conduct the traditional and normal business of their profession. Estate agents, by reason of their training and experience, are appropriately qualified to provide general advice about the past and current performance of properties, and the property market generally. The broad definition of ‘advice’ in the financial services regime means that some of these traditional activities are likely to be captured if the regime is extended to direct property, and some exemption for estate agents will be required.

The Committee does not support a blanket exemption for estate agents, however. The evidence to the Committee shows that some estate agents have moved beyond their traditional selling activities and are providing investment advice to individual clients or through investment seminars. The current statutory training requirements for estate agents in Victoria do not require them to undertake any specialist investment training to equip them for these activities.⁴²³ The Committee considers that estate agents who elect to undertake these specialist activities should be subject to the additional requirements of the proposed new regulation.

The exemption for estate agents needs to draw clear and workable boundaries between these traditional and specialist activities. After considering the available evidence, the Committee proposes that estate agents be exempted when:

- they provide a recommendation or a statement of opinion based on factual information about past and current property investment returns

⁴¹⁸ Mr Neil Jenman, *Transcript of evidence*, above n 342, 5.

⁴¹⁹ Mr Gerard Brody, *Transcript of evidence*, above n 319, 4.

⁴²⁰ Centre for Credit and Consumer Law, *Submission No. 12*, 18.

⁴²¹ Association of Financial Advisers, *Submission No. 13*, 6.

⁴²² Joint Committee on Corporations and Financial Services, above n 308, 33-35.

⁴²³ *Estate Agent (Education) Regulations 2004* (Vic).

- they provide a recommendation or a statement of opinion about future returns, provided that the advice is general advice within the meaning of the financial services laws (that is, it does not purport to take into account the individual objectives, financial situation or needs of the investor) and it relates to returns from a particular property or properties (that is, it does not deal with general property investment strategies).

There is still a need to ensure that consumers who receive this type of advice from real estate agents receive adequate protection. As noted, current estate agent laws in Victoria do little to address the advising activities of agents. The Committee believes that the Victorian Government should amend these laws to require estate agents to disclose any conflicts of interest and to warn consumers that their advice is general advice and they need to assess the suitability of the property in light of their own needs and circumstances. As was noted in chapter five, New South Wales and the ACT have already introduced these requirements for estate agents in the *Property, Stock and Business Agents Regulations 2003* (NSW) and the *Agents Regulation 2003* (ACT), and South Australia will introduce them shortly. Victoria should also encourage other states and territories to adopt such laws to ensure national consistency.

Recommendation 11: Exemption for real estate agents

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth regulation of property investment advisers exempt licensed estate agents provided that they confine their advice to:

- (a) past or current property returns
- (b) future returns, provided that the advice is general advice and that it relates to a particular property or properties.

Recommendation 12: Related amendments to real estate agent regulation

The Victorian Government should:

- (a) amend the *Estate Agents Act 1980* (Vic) to require licensed estate agents who provide investment advice that is exempt from the Commonwealth regulation of property investment advisers to provide the advice and warnings required by regulation 10 of the *Property, Stock and Business Agents Regulations 2003* (NSW) and regulation 14 of the *Agents Regulation 2003* (ACT)
- (b) encourage other states and territories at the 2008 meeting of the Ministerial Council on Consumer Affairs to implement similar amendments.

Education and information providers

The Committee heard evidence that some property investment advisers and marketeers have attempted to avoid regulation in the past by representing themselves as educators rather than advisers. Mr Gerard Brody from the Consumer Action Law Centre told the Committee that ‘education, in lots of circumstances, is actually advice, and I think it is a way that these spruikers evade the regulation, by couching their seminars as education when in fact it is advice’.⁴²⁴

⁴²⁴ Mr Gerard Brody, *Transcript of evidence*, above n 319, 4.

The Joint Committee on Corporations and Financial Services confined its exemption or ‘carve out’ for educators to people who give advice during a university course or similar approved training course.⁴²⁵

The Committee notes that the definition of general advice under the financial services regime appears broad enough to cover recommendations and opinions given at ‘educational’ seminars. Like the Joint Committee, the Committee considers that there should be an exemption for genuine educators and information providers, but that this should be limited to recognised and accredited educational institutions.

Recommendation 13: Exemption for education providers

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth regulation of property investment advisers exempt schools, universities and other accredited educational providers who provide advice in the course of providing accredited courses or training.

Finance brokers

The Committee also heard some evidence about whether the proposed new Commonwealth regime should cover advice about financing of property investment.

The Ministerial Council working party’s 2004 discussion paper argued that it should be included under any new regime.⁴²⁶ The Centre for Credit and Consumer Law agreed in its submission and noted that this type of advice ‘poses one of the most significant risks to consumers in the retail investment sphere’.⁴²⁷

The investment seminars attended by Committee representatives involved information and advice about financing methods, including statements that investing in property would only cost a certain amount per week. The Committee considers that, if the financial services regime is extended to direct property investment, some of the statements made by finance brokers at these seminars will become subject to this regulation. The Committee does not believe further amendments are necessary in this regard.

As was noted in chapter five, the Ministerial Council on Consumer Affairs is examining national regulation of finance brokers that may deal with some other concerns raised by stakeholders about finance brokers generally.

Other professions

The Committee received little evidence about the need for exemptions for other professions.

The Joint Committee recommended exemptions for accountants, solicitors or valuers giving information in the course of their professional activities, as well as an

⁴²⁵ Joint Committee on Corporations and Financial Services, above n 308, 36.

⁴²⁶ Ministerial Council on Consumer Affairs Working Party, above n 300, 37.

⁴²⁷ Centre for Credit and Consumer Law, *Submission No. 12*, 17. See also Property Planning Australia, *Submission No. 2*, 21, 31.

exemption for fair comment in the mass media where the comment is not made in the course of soliciting customers.⁴²⁸

The Committee considers that these exemptions are appropriate. The Committee understands that the financial services laws already contain exemptions for certain advice given in the media, by lawyers about legal matters or in the course of their professional activities, and for tax agents.⁴²⁹ The Committee notes that the laws would need to be amended to include the additional proposed exemptions for accountants and valuers.

Recommendation 14: Exemptions for other professions

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth regulation of property investment advisers exempt advice provided by accountants and valuers, but only when that advice is given in the course of the ordinary practice of their professions.

6.5.6 Regulatory arrangements

The financial services regime is currently regulated solely by the Australian Securities and Investments Commission and, if that regime is extended to property investments advice, the Commission will become the sole regulator in this area as well. This is likely to solve some of the concerns described in chapter five about the existence of multiple regulators in this area.

The Productivity Commission has been considering regulation of the financial services regime as part of its review of Australia's consumer policy framework. Its draft recommendations propose that the Australian Securities and Investments Commission should remain the primary regulator in relation to financial services, but the Australian Competition and Consumer Commission should also have jurisdiction.⁴³⁰ These issues go well beyond the scope of the Committee's inquiry and it does not propose to comment.

The Committee does believe that the future regulator/s in this area, whoever they may be, should give greater priority to two issues raised by evidence in this inquiry.

Firstly, given the evidence to the Committee about the under-reporting of complaints by consumers, the Committee considers that the regulator/s should continue to take active steps to monitor activity in the industry for the presence of rogue traders.

Secondly, given the particular concerns raised during the inquiry about the types of claims that property investment advisers make in their advertising, the Committee believes that the regulator/s should monitor advertisements in particular.

⁴²⁸ Joint Committee on Corporations and Financial Services, above n 308, 30-36.

⁴²⁹ See *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAB, 12DN; *Corporations Act 2001* (Cth) s 766B; *Corporations Regulations 2001* (Cth) reg 7.6.01B.

⁴³⁰ Productivity Commission, above n 301, 69, 71.

Recommendation 15: Regulatory priorities

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that the Commonwealth Government should set priorities for the regulator responsible for the financial services regime including:

- the need to proactively monitor the activities of property investment advisers
- the need to monitor advertisements by property investment advisers and to take early action to deal with any false, misleading or deceptive representations.

6.6 Regulation of property investment marketeers

Most of the evidence the Committee received concerned property investment businesses that were providing advice, rather than businesses who were just marketing or selling property.

As was noted earlier in this chapter, the states and territories rather than the Commonwealth have been traditionally responsible for regulating real estate agents and the sale of real property.

Real estate agents, who form a large proportion of the marketing segment of the industry, are already subject to state-based licensing regimes in Victoria and in the other states and territories.

The Committee's own survey of property investment businesses, which was discussed in chapter three, showed that property developers and other marketers also promote the sale of investment properties. In Victoria, these businesses are not currently subject to a licensing or regulatory scheme.

The Real Estate Institute of Australia argued in its submission to the Committee that anyone who sells property as their business, including property developers selling their own property, should be licensed.⁴³¹ The Joint Committee on Corporations and Financial Services also suggested that sales staff for property developers should operate, at a minimum, under a real estate licence.⁴³² As noted earlier in this chapter, the Australian Property Institute did not support licensing for developers or vendors.

One option would be to move to a national licensing regime for all direct property marketers and sellers. Ideally, such a scheme would ensure that consumers receive the same protection regardless of whether they are buying direct property investment or other financial investments, regardless of whether they are buying from an estate agent or developer, and regardless of the state or territory in which they live. It would also remove the regulatory gap between marketers and sellers dealing with direct property investments and marketers and sellers dealing with other financial investments.

However, the Committee understands that this raises substantial legal and policy questions that go beyond the Committee's terms of reference for this inquiry. These include whether property developers and other vendors should be licensed and whether the Commonwealth should assume responsibility for real estate agents and sales generally, including those involving homebuyers and other purchasers. Only

⁴³¹ Real Estate Institute of Australia, *Submission No. 4*, 6.

⁴³² Joint Committee on Corporations and Financial Services, above n 308, 35.

two stakeholders addressed the issue during the Committee's inquiry, and this does not provide sufficient evidence on which to base considered and workable recommendations on these issues.

The Committee notes that the Productivity Commission's draft report on Australia's consumer policy framework recommends a review and reform program for industry-specific consumer regulation, including whether policy and enforcement responsibilities should be transferred to the Commonwealth.⁴³³ The Committee notes that the Victorian Government is likely to be closely involved in any such review of real estate regulation.

The Committee did receive some evidence suggesting that consumers would be assisted if marketers and sellers were required to provide standard 'product disclosure' information about properties to potential investors. A number of witnesses expressed their support for product disclosure. Mr Michael Hayes from the Law Institute of Victoria, for example, told the Committee that 'we would be encouraging any requirement that compelled sellers to provide full disclosure on the product'.⁴³⁴

Consumer and business witnesses were critical of the product disclosure requirements for financial products under the Commonwealth's financial services regime. Mr Gerard Brody told the Committee that the Consumer Action Law Centre was:

concerned that many consumers become overwhelmed with information and perhaps do not consider it all rationally or, worse, do not read it. To be effective information provided to consumers must be clear and easy to understand. Currently this is not often the case.⁴³⁵

Witnesses who deal with clients themselves reported this was their experience as well. Mr Kerry Sharp, the State Director of the Association of Financial Advisers, told the Committee that:

The truth is that the clients do not read the plans. I can produce a financial plan that is very succinct ... – no padding – and I can say to a client, "Here, read this", and they will say to me, "No, no, no, I believe that is good. Where do you want me to sign?" Okay, I have been dealing with them for a while and they trust me, but the point I am making is that once trust is established, whether it is deserved or not, the clients do not actually read the plans.⁴³⁶

Some stakeholders suggested that these problems could be remedied if product disclosure was shorter and better targeted. Mr Gerard Brody told the Committee that 'I know ASIC is currently doing a lot of work ... I think it is trying to get to a four-page maximum, and I think that is a good start'.⁴³⁷ Mr Rob Pepicelli from the Australian Property Institute suggested that a 'health warning' system 'a bit like the

⁴³³ Productivity Commission, above n 301, 83-87.

⁴³⁴ Mr Michael Hayes, *Transcript of evidence*, above n 303, 7. See also Property Investment Association of Australia, *Submission No. 3*, 3; Property Investors Association of Australia, *Submission No.6*, 10-11.

⁴³⁵ Mr Gerard Brody, *Transcript of evidence*, above n 319, 3.

⁴³⁶ Mr Kerry Sharp, *Transcript of evidence*, above n 327, 6.

⁴³⁷ Mr Gerard Brody, *Transcript of evidence*, above n 319, 7.

health hazards on the packets of cigarettes' might be more effective.⁴³⁸ Ms Lang Thai argued that disclosure statements need to be in different languages as well.⁴³⁹

The Association of Financial Advisers gave the Committee an example of what it believed was a useful product disclosure document for real property. It attached a one page sample property report from a commercial provider to its written submission to the Committee and suggested that, if estate agents provided that type of information to investors, investors could use it to seek professional advice.⁴⁴⁰

The Committee considers that a standardised form of product disclosure would be useful for consumers in this area, and may avoid some of the length and complexity associated with product disclosure under the financial services regime.

The Committee believes there is a range of useful information that can be included on the standardised form including the demographic profile of the area surrounding the property, proximity of the property to local services, median rents and property prices for the area and the current value and rental for the property (if applicable). The Committee believes the prescribed disclosure form should be developed in consultation with industry and consumer organisations to ensure that it contains the information that investors need to make an informed decision. To ensure compliance, the Government will need to introduce appropriate penalties for marketers and sellers who provide false or misleading information on the statements.

The Committee believes that these requirements should be implemented at a state and territory level pending the review proposed by the Productivity Commission. There should be close consultation between the states and territories to ensure consistent requirements, and with the Commonwealth Government to ensure that these laws complement the Committee's proposed Commonwealth regulation of property investment advisers.

Recommendation 16: Product disclosure by marketers and sellers

The Victorian Government should introduce legislation to require all property investment marketers and sellers to provide prospective property investors with a prescribed 'product disclosure form'.

Recommendation 17: Consultation about product disclosure

The Victorian Government should:

- (a) develop the prescribed 'product disclosure form' in consultation with the property investment advice and marketing industry and relevant consumer organisations
- (b) encourage the states and territories to adopt consistent product disclosure requirements around Australia
- (c) consult with the Commonwealth Government to ensure that the new legislation complements the proposed Commonwealth regulation of property investment advisers.

⁴³⁸ Mr Rob Pepicelli, *Transcript of evidence*, above n 304, 7.

⁴³⁹ Ms Lang Thai, *Submission No. 10*, 12.

⁴⁴⁰ Association of Financial Advisers, *Submission No. 13*; Mr Kerry Sharp, *Transcript of Evidence*, above n 327, 2-3.

6.7 The Ministerial Council on Consumer Affairs

The Committee's terms of reference require it to have regard to the ongoing work of the Ministerial Council on Consumer Affairs in relation to the regulation of property investment advisers. The Committee's recommendations for future regulation of property investment advisers and marketeers propose that the Victorian Government continue to work through the Ministerial Council to encourage a national approach.

A number of witnesses expressed their concern about the delay with the Ministerial Council's project and the development of a national approach. One stakeholder noted that '[g]iven the growing number of failed property investment schemes and marketeers, along with the considerable consumer fallout and widespread media coverage, this is extremely disappointing'.⁴⁴¹

In its submission, the Consumer Action Law Centre encouraged the Committee to 'consider recommendations to improve the operation of [the Ministerial Council], so that items for consideration are not repeatedly delayed, exacerbating consumer detriment'.⁴⁴² The Centre for Credit and Consumer Law noted the Productivity Commission's current inquiry into Australia's consumer policy framework but also suggested that '[r]ecommendations from the Law Reform Committee on this issue could also assist in a move towards a more effective consumer protection framework for property investment advice'.⁴⁴³

The Productivity Commission's draft report on Australia's consumer policy framework suggests the problems raised by witnesses are not confined to the Ministerial Council's property investment advice project. It states that nearly half the issues raised in Ministerial Council meetings over the last decade remain unresolved.⁴⁴⁴ The Commission's only specific recommendation regarding the Ministerial Council relates to its voting arrangements, but its proposal that the Commonwealth Government take on greater responsibility for consumer affairs would reduce the Ministerial Council's oversight and coordinating roles.⁴⁴⁵

These issues extend well beyond the Committee's terms of reference and the Committee does not propose to make recommendations on them.

The Committee would encourage the members of the Ministerial Council working party to adopt a cooperative approach to the regulation of property investment advisers. The Committee appreciates that the working party has faced substantial and complex issues and that the future of the project is currently a matter of some sensitivity. However, the Committee is also mindful that consumers in this area have remained at risk while the Council has been considering the issue, and will continue to do so while the project remains uncompleted.

The Committee believes the Ministerial Council should, at a minimum, provide regular public reports on the status of the project. As was noted in chapter one, the

⁴⁴¹ Email from Communications Manager, Property Planning Australia to Law Reform Committee, 9 July 2007. See also Real Estate Institute of Australia, *Submission No. 4*, 2; Mr Bryan Stevens, *Transcript of evidence*, above n 416, 3.

⁴⁴² Consumer Action Law Centre, *Submission No. 7*, 5.

⁴⁴³ Centre for Credit and Consumer Law, *Submission No. 12*, 4.

⁴⁴⁴ Productivity Commission, above n 301, 53-54.

⁴⁴⁵ *Ibid* 107-108.

project has not been mentioned in the Ministerial Council's communiqués since May 2006. The Committee obtained most of the information about the project contained in this report from other stakeholders in its inquiry. Given the importance of these issues and the time and effort expended by stakeholders on the project, the Committee believes that a more open approach is required.

Recommendation 18: The Ministerial Council on Consumer Affairs

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that it provide regular public reports on the status of the property investment advice project, including in each future Ministerial Council communiqué and on the Ministerial Council's website.

6.8 Victoria's 'fall back' position

Although the Committee supports a national approach to the problems with property investment advisers and marketeers, the Committee is aware that the Ministerial Council working party has experienced difficulties reaching an agreement on a national approach in the past. The current Commonwealth Government, when in opposition, indicated in 2004 that it would introduce national regulation of property investment advisers administered by the Australian Securities and Investments Commission.⁴⁴⁶ However, the issue was not specifically addressed in the 2007 election campaign.

The Committee asked some witnesses what Victoria should do if a national solution was not forthcoming in the near future.

Some witnesses urged the Committee not to make any such recommendations. Mr Bryan Stevens from the Real Estate Institute of Australia said that the Institute:

would ask the Committee not to introduce specific legislation or recommend [its] introduction in Victoria pending the resolution of this very important issue at the Ministerial Council on Consumer Affairs and the possible implementation of a nationally consistent regulation regime.⁴⁴⁷

He told the Committee that 'introducing your own state government legislation makes it much more difficult in due course to harmonise that legislation across Australia'.⁴⁴⁸

Other witnesses noted that introducing legislation in Victoria would simply shift the problem to other states. Mr Gerard Brody told the Committee that:

I think what would happen is that many of the property investment advisers would move interstate. We have seen that recently with consumer credit legislation. In New South Wales and the ACT they introduced an interest-rate cap of 48 per cent ... which really put a limit on what we see as fringe lenders or payday lenders in the community. What that has led to is them moving to Queensland and Victoria.⁴⁴⁹

⁴⁴⁶ Minister for Consumer Affairs, Victoria, 'Federal Labor take on property investment spruikers' (Press release, 12 March 2004).

⁴⁴⁷ Mr Bryan Stevens, *Transcript of evidence*, above n 416, 3.

⁴⁴⁸ *Ibid* 7.

⁴⁴⁹ Mr Gerard Brody, *Transcript of evidence*, above n 319, 8.

Ms Monique Wakelin also told the Committee that unscrupulous advisers could possibly move to ‘states that were more sympathetic to the way they want to run their businesses’.⁴⁵⁰

If the Commonwealth Government does not introduce regulation in the near future, Victoria could work with the other states and territories to develop a state and territory licensing, conduct and disclosure regime.

However, the Committee believes that the Victorian Government should consider interim strategies to protect consumers in Victoria while these issues are resolved. Dr David Cousins, the Director of Consumer Affairs Victoria, acknowledged this problem, telling the Committee that ‘[o]ur strong preference – and it has always been the case – is for a national solution’.⁴⁵¹ However, he noted that if the impasse affecting the Ministerial Council project was not overcome following the 2007 federal election, ‘then it is clear that Victoria will need to consider whether or not it goes its own way on this’.⁴⁵² The Committee believes that the Victorian Government should take such steps if there is no agreement on a national approach by the Ministerial Council at its 2008 meeting.

The Committee received little evidence about the form that Victorian regulation should take. Mr Gerard Brody agreed that a state licensing scheme would ‘be a start’.⁴⁵³ Ms Monique Wakelin also told the Committee that if regulation ‘did not happen nationally then I think Victoria could very happily be a trailblazer in this regard and might set the tone for everybody else to come on stream’.⁴⁵⁴ Mr John Moore, the President of the Property Investors Association, suggested that Victoria could support his Association’s proposed accreditation process at a state level, as well as funding investor education, access to sales information and legal action by consumers (these options are discussed further in chapter seven).⁴⁵⁵

Although the Committee’s preferred option involves a licensing, conduct and disclosure regime, it has doubts about whether it would be practical to introduce such a scheme in Victoria alone. The relatively high costs of this option may encourage Victorian-based businesses, including reputable businesses, to move interstate.

The Committee therefore supports a different approach at a state level. This would involve:

- the product disclosure laws discussed in recommendations 16 and 17
- strengthening Victoria’s general consumer protection laws, which the Director of Consumer Affairs Victoria acknowledged may have some gaps in relation to property investment advice
- a statutory code of conduct for property investment advisers that sets appropriate professional and ethical standards. This should include a requirement for

⁴⁵⁰ Ms Monique Wakelin, *Transcript of evidence*, above n 326, 4.

⁴⁵¹ Dr David Cousins, *Transcript of evidence*, above n 305, 9-10.

⁴⁵² *Ibid.*

⁴⁵³ Mr Gerard Brody, *Transcript of evidence*, above n 319, 8.

⁴⁵⁴ Ms Monique Wakelin, *Transcript of evidence*, above n 326, 6.

⁴⁵⁵ Email from Mr John Moore, President, Property Investors Association of Australia to Research Officer, Law Reform Committee dated 26 October 2007.

advisers to warn investors when advice does not take into account their individual circumstances

- statutory disclosure obligations for real estate agents and other advisers and marketeers
- stronger enforcement of these requirements by regulators.

The Committee believes the Victorian Government should supplement this regulation with a range of non-regulatory measures. These are discussed in chapter seven.

Recommendation 19: Alternative national scheme

The Victorian Government should propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that, if there is no agreement on Commonwealth regulation of property investment advisers, the states and territories develop complementary legislation to establish a licensing, conduct and disclosure regime.

Recommendation 20: Alternative Victorian scheme

If there is no agreement on national regulation of property investment advisers by the Ministerial Council on Consumer Affairs at its 2008 meeting, the Victorian Government should introduce its own regulation as set out in recommendations 21-24.

Recommendation 21: Stronger Victorian consumer protection law

The Victorian Government should amend the *Fair Trading Act 1999* (Vic) to remove any provisions that limit the Act's application to property investment advisers including amendments to:

- clarify that 'goods' includes real property
- clarify that 'personal, domestic or household use' includes property investment by retail investors
- ensure that the off-business-premises sales provisions, and their cooling-off periods, apply to the techniques and operations used by property investment advisers and marketeers.

Recommendation 22: Victorian code of conduct

The Victorian Government should:

- (a) introduce a statutory code of conduct for property investment advisers and marketeers, including a requirement that advisers warn investors when their advice does not take account of the investor's individual circumstances
- (b) develop the code in consultation with the advisory committee outlined in recommendation 25.

Recommendation 23: Victorian disclosure laws

The Victorian Government should introduce legislation to require all property investment advisers to:

- disclose all conflicts of interest including whether they act for the vendor of the property, whether they will obtain any benefit from the sale of investment property and their relationship with anyone to whom they refer the investor for professional services
- disclose significant risks involved in recommended strategies or investments.

Recommendation 24: Enforcement of Victorian law

The Victorian Government should:

- (a) implement a communication strategy to inform consumers and business about the new Victorian regulation of property investment advisers
- (b) monitor and enforce compliance by property investment advisers with the new Victorian regulation, including monitoring advertisements for false, misleading or deceptive representations.

6.9 The role of industry associations

Although the Committee's preferred approach involves government regulation rather than self-regulation or co-regulation, the Committee considers that industry associations have a critical role to play by ensuring that legislation is workable, by assisting their members to comply and by developing additional ethical frameworks.

One of the challenges in this area is the fragmented nature of the industry. As was noted in chapter five, not all of the established industry associations seek to regulate the property investment advising activities of their members, while the specific property investment associations currently lack a broad membership base. The Committee believes that involving industry associations in the regulatory framework will create an additional incentive for the property investment advice industry as a whole to become better organised and coordinated.

The Committee believes the Commonwealth Government should form an advisory group that includes the relevant industry associations to help it develop the new regulatory framework recommended by the Committee and arrangements for its implementation. If a national approach is not achieved, the Victorian Government should do the same in the development of its regulation.

The Committee also considers that existing profession-specific industry associations should examine their internal requirements, in particular their codes of conduct and disciplinary procedures, to ensure that they provide guidance to any of their members who give property investment advice. The Institute of Chartered Accountants advised the Committee that it was about to commence a review of its financial advising standard⁴⁵⁶ and the Committee recommends that other industry associations whose members are involved in this area should do the same.

Recommendation 25: Industry consultation

The Victorian Government should establish or, if there is agreement to national regulation, propose the establishment of an advisory committee to help develop and implement regulation of property investment advisers. The advisory committee should include relevant industry associations.

Recommendation 26: Review of industry standards and codes of conduct

The Victorian Government should urge industry associations whose members have been identified as providing property investment advice to review their codes of conduct to ensure that they address property investment advising activities.

⁴⁵⁶ Email from Financial Planning and Superannuation Manager, Institute of Chartered Accountants to Executive Officer, Law Reform Committee dated 21 December 2007.

6.10 Additional regulatory changes

As was noted earlier in this chapter, the Committee believes that a multifaceted approach is needed to tackle the problems that have arisen with property investment advisers and marketeers. During the Committee's inquiry, it became aware of a number of other possible statutory changes, apart from simply regulating advisers and marketeers, that could help to address some of the problems reported in this area.

6.10.1 Regulation of related service providers

There are number of professions that provide ancillary services to property investors. These professions include lawyers, conveyancers, valuers, finance brokers and lenders, property managers, accountants and financial planners and advisers.

The Committee considers that these professions need to be alert to the potential problems faced by clients who are investing in property so they can provide independent advice and assistance where needed. The Chief Executive Officer of the Law Institute of Victoria raised the problems caused by property investment promoters in a recent edition of the Law Institute's journal, and other industry associations could take similar steps.⁴⁵⁷

The Committee also received evidence that some members of these professions participate in property investment schemes themselves through 'one stop shops' or other schemes with advisers and marketeers. One of the case studies set out in chapter four of this report shows the damage that can be caused by this conduct. The Committee is concerned that these professionals are not providing independent advice or acting in the best interests of their clients.

The Committee received limited evidence about the legal and ethical obligations of these professions when they act in concert with property investment advisers or marketeers. At least some of the professions in question are required to disclose these types of conflicts of interest. The professional conduct rules for solicitors in Victoria, for example, provide that solicitors must not:

- act for both the vendor and the purchaser in connection with the sale or transfer of land, unless the practitioner obtains written agreement from each party after fully informing them in writing of the potential disadvantages
- accept an engagement to provide legal services to a person who has been introduced or referred by a third party, where the practitioner is providing a fee, benefit or reward for that referral, unless this is disclosed to the client
- act for a client in any dealing with a third party from whom the practitioner may receive a fee, benefit or reward, unless the practitioner can provide advice free from constraint or influence by the third party, the advice is fair and free from bias, and the nature and value of the fee, benefit or reward is disclosed in writing to the client.⁴⁵⁸

⁴⁵⁷ Michael Brett Young, 'Risky business', *Law Institute Journal*, November 2007, 8.

⁴⁵⁸ *Professional Conduct and Practice Rules 2005* (Vic) rr 8.5, 33.1, 33.2.

However, not all professions are subject to such requirements. Valuers are no longer regulated in Victoria although, as was noted in chapter five, the Australian Property Institute does require its members to disclose conflicts of interest.

The Committee believes the Victorian Government should review the legal and ethical obligations of each of these related professions to ensure they are subject to effective statutory or industry requirements to disclose conflicts of interest when they act in league with advisers and marketeers.

The Committee also believes that the relevant disciplinary authorities for these associations need to take a more proactive approach to monitoring and enforcing these requirements. Mr Michael Hayes from the Law Institute of Victoria told the Committee that while lawyers are meant to withdraw or get consent in these circumstances, 'it is quite often subjective and it is up to the practitioner to call it'.⁴⁵⁹

Recommendation 27: Awareness-raising campaign for related professions

The Victorian Government should urge the industry associations representing solicitors, conveyancers, valuers, finance brokers, credit providers, property managers, accountants, financial planners and financial advisers to alert their members to the problems caused by some property investment advisers and marketeers and the potential implications for their clients.

Recommendation 28: Disclosure requirements for related professions

The Victorian Government should review the statutory and industry requirements for solicitors, conveyancers, valuers, finance brokers, credit providers, property managers, accountants, financial planners and financial advisers to ensure that they include provisions for the adequate disclosure of conflicts of interest.

Recommendation 29: Regulatory action for related professions

The Victorian Government should urge the regulatory and disciplinary authorities responsible for solicitors, conveyancers, valuers, finance brokers, credit providers, property managers, accountants, financial planners and financial advisers to monitor compliance with conflict of interest requirements.

6.10.2 Other regulatory changes

There were a number of other regulatory changes that were raised in the course of the Committee's inquiry that might help protect consumers.

Consumer warnings on contract for sale of property

Contracts for the sale of land in Victoria are already required to include a 'conspicuous notice' about cooling-off rights for the sale of residential property.⁴⁶⁰ However, as was noted in chapter five, Queensland has introduced additional requirements that contracts for the sale of property contain statements urging buyers to get independent legal advice and valuations.⁴⁶¹

⁴⁵⁹ Mr Michael Hayes, *Transcript of evidence*, above n 303, 5.

⁴⁶⁰ *Sale of Land Act 1962* (Vic) s 31; *Estate Agents (Contracts) Regulations 1997* (Vic).

⁴⁶¹ *Property Agents and Motor Dealers Act 2000* (Qld) Chapter 11 Part 2.

Some stakeholders supported further requirements in Victoria as well. Mr Hugh Jones from the Real Estate Buyers' Agents Association suggested that there should be a section on the contract cover page outlining who is paying the property investment adviser.⁴⁶² The Real Estate Institute of Australia supported the introduction of mandatory warnings about independent legal advice and valuations.⁴⁶³

The 'section 32 statement' that vendors are required to give to purchasers of residential property in Victoria could be an alternative vehicle for such warnings.⁴⁶⁴

The Committee did not receive any evidence about how effective the Queensland or Victorian provisions have been in alerting consumers to their rights and interests.

The Committee notes that sale contracts and section 32 statements are technical documents and believes there are likely to be more effective ways to alert consumers to problems in this area and their rights. Chapter seven of this report discusses consumer education in greater detail.

Cooling-off periods

A small number of stakeholders also suggested the introduction of additional 'cooling-off rights' for property investors. These rights would give investors a set period of time in which to reconsider and withdraw from any commitments they have made.

In Victoria, purchasers of residential property through private sales have access to a three day cooling-off period in some circumstances.⁴⁶⁵ Consumers who purchase goods and services through some off-business-premises sales, such as door-to-door sales, have access to longer cooling-off periods under the *Fair Trading Act 1999* (Vic).⁴⁶⁶ The Commonwealth's financial services regime provides for 14 day cooling-off periods for some products such as managed investments.⁴⁶⁷

Two stakeholders supported the extension of cooling-off rights for property investors. The Centre for Credit and Consumer Law proposed a cooling-off period for contracts entered into at investment seminars for the provision of further advice, products or services.⁴⁶⁸ The Real Estate Institute of Australia stated in its written submission that cooling-off periods should be required for goods and services provided as part of property investment advice, including agreements that require financial commitments.⁴⁶⁹

⁴⁶² Mr Hugh Jones, Vice President, Real Estate Buyers' Agents Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 3.

⁴⁶³ Real Estate Institute of Australia, *Submission No. 4*, 6.

⁴⁶⁴ *Sale of Land Act 1962* (Vic) s 32.

⁴⁶⁵ *Sale of Land Act 1962* (Vic) s 31.

⁴⁶⁶ *Fair Trading Act 1999* (Vic) ss 63, 67H, 71.

⁴⁶⁷ *Corporations Act 2001* (Cth) Part 7.9 Div 5.

⁴⁶⁸ Centre for Credit and Consumer Law, *Submission No. 12*, 16.

⁴⁶⁹ Real Estate Institute of Australia, *Submission No. 4*, 7.

The Committee notes that the Joint Committee on Corporations and Financial Services recommended any loans for investment in property which are secured by home equity should be subject to a waivable 14 day cooling-off period.⁴⁷⁰

Mr Gerard Brody from the Consumer Action Law Centre warned the Committee that cooling-off periods do not always help consumers in practice:

We see many people having made a bad purchasing decision not taking advantage of cooling-off periods. Perhaps they do not know about them, but more often they are making out as if the decision was a good one ... Marketing professionals call this the endowment effect. In a sense our ego steps in and to some degree does not let us convince ourselves we made a bad decision ... This is not to say that cooling-off periods are a bad thing, but the lawmakers and regulators cannot assume that just because a cooling-off period exists consumers will be adequately protected.⁴⁷¹

The Committee agrees that additional cooling-off periods on their own do not provide consumers with sufficient protection against problems in this area. However, given the evidence that some advisers and marketeers use high pressure sales techniques, they could provide a useful supplementary protection for consumers.

The Committee considers that the cooling-off period should be the same as that applying under the financial services regime. It should not apply to the purchase of real estate, which is already subject to a cooling-off period in Victoria, but should apply to other financial commitments that a consumer enters into with a property investment adviser or marketeer including loans and additional seminars or courses.

Recommendation 30: Cooling-off periods

The Victorian Government should:

- (a) if there is agreement on national regulation of property investment advisers by the Ministerial Council on Consumer Affairs at its 2008 meeting, propose that the national regulation introduce a cooling-off period for goods (other than real property) and services sold or arranged by property investment advisers
- (b) if there is no agreement on national regulation, introduce a cooling-off period for goods (other than real property) and services sold or arranged by property investment advisers under the *Fair Trading Act 1999* (Vic)
- (c) introduce a cooling-off period for goods (other than real property) and services sold or arranged by property investment marketeers under the *Fair Trading Act 1999* (Vic).

Regulation of commissions and fees

In the course of the Committee's inquiry, two witnesses suggested that the high fees and commissions charged by advisers needed to be addressed.

Mr Hugh Jones from the Real Estate Buyers' Agents Association told the Committee that, while the deregulation of estate agents fees in Victoria had resulted in fees going down in most of the market, they had risen in parts of the property investment market. He told the Committee that this 'would not have been able to happen if a

⁴⁷⁰ Joint Committee on Corporations and Financial Services, above n 308, 49.

⁴⁷¹ Mr Gerard Brody, *Transcript of evidence*, above n 319, 4.

maximum fee was still regulated. I think that deregulating the fees actually created a real problem in the industry that had not been there in the past.’⁴⁷²

The Australian Property Institute also suggested to the Committee that ‘developers should not be able to charge interested parties to attend marketing events/functions whose purpose is to sell property’.⁴⁷³

The Committee would prefer to see the high commissions charged by some advisers and marketeers dealt with through stronger disclosure, market competition and consumer education rather than regulation. Consumer education and information is addressed in chapter seven of this report.

The Committee shares the Australian Property Institute’s concerns regarding fees for investment seminars. The seminars the Committee staff paid to attend did contain some useful information for investors but, to varying degrees, they were also used to market the services of the advisers who conducted them. The Committee believes it would be preferable for businesses not to charge consumers for such seminars. This is an issue that should be addressed by industry associations in any changes to their codes of conduct.

Recommendation 31: Fees for property investment seminars

The Victorian Government should urge industry associations whose members have been identified as providing property investment advice or marketing property to amend their codes of conduct to discourage members from charging consumers for attendance at property investment marketing seminars.

6.11 Review and evaluation

The Committee considers that, in accordance with good regulatory practice, there should be a thorough evaluation and review of any new regulatory framework to ensure that it is meeting its objectives. This should provide an opportunity to reconsider some of the particular issues raised by this inquiry, including whether the provisions requiring disclosure of conflicts of interest are working effectively or whether bans are needed, and to review the development of industry associations and their role.

The government or organisation that should be responsible for conducting the evaluation and review will depend on whether there is national regulation, either through Commonwealth regulation or complementary state and territory regulation, or Victorian regulation.

⁴⁷² Mr Hugh Jones, *Transcript of evidence*, above n 462, 3.

⁴⁷³ Australian Property Institute, *Submission No. 14*, 5; Mr Rob Pepicelli, *Transcript of evidence*, above n 304, 3.

Recommendation 32: Review of regulation

- (a) The Victorian Government should:
- if there is national regulation of property investment advisers in the form of Commonwealth regulation, propose that the Commonwealth Government conduct an independent evaluation and review of the regulation not more than five years following its commencement
 - if there is national regulation of property investment advisers in the form of complementary state and territory regulation, propose that the Ministerial Council on Consumer Affairs conduct this evaluation
 - if there is Victorian regulation of property investment advisers, conduct this evaluation.
- (b) The evaluation and review should examine in particular:
- whether the regulation is meeting its objectives
 - whether consumers are adequately protected by the regulation
 - the burden on business and whether there are ways this could be minimised
 - whether any further legislative amendments are required
 - the development of industry associations and whether they could take on a greater regulatory role
 - the effectiveness of disclosure provisions in dealing with conflicts of interest.

Chapter seven: Non-regulatory strategies

Confident and empowered consumers secure better outcomes for themselves and society as a whole.

*Productivity Commission*⁴⁷⁴

Regulation is not the only way to promote professional standards or protect consumers. This chapter looks at a number of non-regulatory initiatives that governments and the industry could explore to make consumers better informed and less susceptible to rogue traders, ensure that advisers provide high quality services and empower consumers to seek redress when services fail.

7.1 Consumer education

The Committee notes that even the most well-designed and enforced regulatory regime cannot stop unscrupulous businesses or poor advice in every case, and action also needs to be taken to help consumers protect themselves.

As Consumer Affairs Victoria stated recently, consumer information plays a key role in strategies to combat rogue traders:

The more aware the community is about consumer rights the more discerning consumers will be. They will be better at detecting rogue traders and responding quickly if they inadvertently engage businesses that are not delivering the goods or services they expected, reducing the damage rogues can cause. Informed consumers are more likely to lodge inquiries or complaints with consumer agencies.⁴⁷⁵

As was noted in chapter four of this report, poor financial and investment literacy and the existence of certain ‘myths’ about property investment are contributing to the susceptibility of consumers in the property investment market.

This section examines two types of initiatives that have the potential to assist consumers in this way.

7.1.1 Consumer warnings

The Committee found a considerable number of existing warnings from regulators and other organisations about unscrupulous property investment advisers and marketeers and how to avoid them. The following are examples of some of the warnings available:

- Consumer Affairs Victoria has issued a fact sheet on ‘Investment seminars and get rich quick schemes’, including information on what to look out for and

⁴⁷⁴ Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Draft Report (2007) 202.

⁴⁷⁵ Consumer Affairs Victoria, *Stopping Rogue Traders*, Research Paper No. 11 (2006) 19-20.

sources of further assistance. It also issued a number of media releases and has issued consumer alerts about two investment schemes.⁴⁷⁶

- The Australian Competition and Consumer Commission has published *The Little Black Book of Scams* for consumers, which includes a section on property scams.
- The Australian Competition and Consumer Commission's Scamwatch website, <<http://www.scamwatch.gov.au>>, also contains information about investment seminar and real estate scams and how to identify and guard against them.
- The Australian Consumer Association's website, <<http://www.choice.com.au>>, contains warnings for consumers about property investment advice and seminars and wealth creation seminars.
- The Australian Securities and Investments Commission's consumer website, <<http://www.fido.gov.au>>, contains information about get rich quick schemes, investment seminars and ways that consumers can protect themselves against high pressure sales techniques.

These warnings ensure that consumers who actively seek information about the property investment market have access to good advice. However, there have been questions about whether this type of information actually reaches consumers and whether it changes their behaviour. Mr Neil Jenman told the Committee:

ASIC and the CAV do advertising and they do marketing and things. But as you well know, the people who get ripped off watch *Today Tonight* and *A Current Affair*. They watch me getting punched on *A Current Affair*, which does more to stop the property spruikers than can ever get done at this stage.⁴⁷⁷

Regulators themselves have acknowledged concerns about government information strategies. In its submission to the Productivity Commission, Consumer Affairs Victoria described a number of problems with government information campaigns, including the fact that the public rarely seeks out information from government before making purchasing decisions and that many government initiatives are 'drowned out' by business advertising.⁴⁷⁸ The Productivity Commission's draft report on Australia's consumer policy framework also lists a number of challenges for campaign design and recommends a cross-jurisdictional evaluation of the effectiveness of consumer information and education measures.⁴⁷⁹

The Committee agrees that there should be an evaluation of the effectiveness of campaigns in this area, although it notes this is likely to take some time. In the meantime, the Committee believes governments should continue to issue warnings to alert consumers to the identity of rogue traders as soon as possible.

Regulators should also examine the scope for strategic placement of consumer warnings. Consumer Affairs Victoria told the Committee that its compliance staff had attended property investment seminars and had handed out consumer

⁴⁷⁶ Consumer Affairs Victoria, *Submission No. 16*, 12-16.

⁴⁷⁷ Mr Neil Jenman, consumer advocate, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 7.

⁴⁷⁸ Victorian Government, 'Submission to the Productivity Commission's Review of Australia's Consumer Policy Framework' (2007) 50-52.

⁴⁷⁹ Productivity Commission, above n 474, 213-217.

information to attendees.⁴⁸⁰ The Committee notes that these targeted strategies help to ensure that messages reach consumers and are not ‘drowned out’ by other advertising. Chapters two and three of this report refers to data on the characteristics of property investors, their preferred sources of advice and information and the advertising vehicles used by advisers and marketeers. The Committee believes that Consumer Affairs Victoria and other regulators should use this type of information to develop strategic ways to reach consumers in this area. In particular, regulators should examine the scope for including consumer warnings and information in investment magazines and at seminars and events like the annual Property Expo held in Melbourne.

Recommendation 33: Evaluation of consumer warnings

The Victorian Government should support the Productivity Commission’s draft recommendation for an evaluation of the effectiveness of consumer information and education measures, and should actively participate in the evaluation.

Recommendation 34: Timely publication of consumer warnings

The Victorian Government should develop a strategy to ensure that consumer alerts and warnings regarding rogue traders in the property investment industry are published as soon as the Government becomes aware of the activities of rogue traders.

Recommendation 35: Strategic consumer awareness measures

The Victorian Government should:

- (a) develop and implement a consumer awareness strategy that takes account of the demographic characteristics of property investors, their preferred sources of advice and information and the advertising and marketing vehicles used by property investment advisers and marketeers
- (b) propose to the Ministerial Council on Consumer Affairs at its 2008 meeting that Commonwealth, state and territory regulators adopt a coordinated consumer awareness strategy.

7.1.2 Investment literacy

Another way that governments and industry organisations can help consumers protect themselves is by ensuring that consumers develop positive investment literacy and skills. The Property Investment Association’s submission stated that ‘there has too often been a failure to develop property investment literacy in the first instance’.⁴⁸¹

There have been a number of government and private sector initiatives in recent years that aim to improve general financial and consumer literacy skills. These include:

- the creation of the Australian Government’s Financial Literacy Foundation in 2005. The Foundation’s 2006 ‘Understanding Money’ campaign aimed to raise community awareness about financial literacy and its website,

⁴⁸⁰ Consumer Affairs Victoria, *Submission No. 16*, 11-12.

⁴⁸¹ Property Investment Association of Australia, *Submission No. 3*, 11.

<<http://www.understandingmoney.gov.au>>, contains a range of information about investing and how to obtain good information and advice

- Consumer Affairs Victoria's 'Consumer Stuff' consumer education programs for schools, which includes resources dealing with money management⁴⁸²
- the Australian Securities and Investments Commission's consumer website, <<http://www.fido.gov.au>>, which contains advice about investing, including investing in real estate
- the Financial Planning Association's consumer publications which address issues such as investment risk and how to choose a good adviser.⁴⁸³

The Real Estate Institute of Australia's written submission to the Committee stated that programs needed to include a stronger focus on property investment, which currently receives less coverage than other asset classes.⁴⁸⁴ In its 2005 report, the Joint Committee on Corporations and Financial Services also recommended that the Commonwealth Government ensure that there was a stronger focus on property investment.⁴⁸⁵

The Committee found no shortage of magazines, newspapers and books that provide advice about property investment. However, there is still a relative lack of authoritative government and industry information about direct property investment compared with banking products and assets such as shares.

The Committee heard some evidence that this vacuum is being exploited by rogue traders. Mr Gerard Brody from the Consumer Action Law Centre told the Committee that '[t]hese seminars are targeted at people who are trying to improve their financial literacy'.⁴⁸⁶ Mr John Moore, the President of the Property Investors Association of Australia, told the Committee that 'the problem area is the lack of education that is provided to investors that is freely available, and hence spruikers market on the basis of secret information or information that is not commonly available for investors'.⁴⁸⁷

The Committee considers that governments and the property investment and real estate industries should work together to address this gap and ensure that consumers have an alternative to the 'education' offered by rogue traders.

Mr Neil Jenman suggested that one helpful initiative for investors would be a booklet warning people about the property investment myths perpetrated by rogue traders.⁴⁸⁸ Consumer Affairs Victoria already publishes a booklet on buying and selling real

⁴⁸² Victorian Government, 'A preliminary submission to the Productivity Commission's Review of Australia's Consumer Policy Framework' (2007) 43-45.

⁴⁸³ Financial Planning Association of Australia, 'Consumers', <http://www.fpa.asn.au/FPA_Content.aspx?Doc_id=1036> at 10 January 2008.

⁴⁸⁴ Real Estate Institute of Australia, *Submission No. 4*, 9.

⁴⁸⁵ Joint Committee on Corporations and Financial Services, Parliament of Australia, *Property Investment Advice – Safe as Houses?* (2005) 45-46.

⁴⁸⁶ Mr Gerard Brody, Director – Policy & Campaigns, Consumer Action Law Centre, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 3.

⁴⁸⁷ Mr John Moore, President, Property Investors Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 3.

⁴⁸⁸ Mr Neil Jenman, *Transcript of evidence*, above n 477, 7.

estate but it is aimed at homebuyers rather than investors.⁴⁸⁹ The Queensland Office of Fair Trading publishes a specific guide to *Buying an investment property?*, which contains more specific investment-related advice and information, such as the role played by estate agents, developers and marketers and the importance of independent advice.⁴⁹⁰

The Committee believes that regulators in Victoria should develop and publish a similar booklet for property investors. Although the Committee has recommended that the Commonwealth Government assume responsibility for property investment advice, the Committee considers that the Victorian Government should prepare an interim publication while this issue is resolved.

The Committee was also told that financial literacy programs needed to start early. In his evidence to the Committee, Mr Gerard Brody said that '[f]inancial literacy should really start in schools to ensure that people are adequately cautious about what is being advertised or targeted at them'.⁴⁹¹ Ms Corinna Dieters from the Financial Planning Association also told the Committee that '[i]t really has to start before they get to the stage of having money to invest. That is why the FPA is very strong on literacy starting at an early age within the schools.'⁴⁹²

The Committee has already noted Consumer Affairs Victoria's 'Consumer Stuff' program for schools. It considers the program should be reviewed to examine the potential for including investment literacy components.

The Committee would prefer these initiatives to be developed with industry and consumer groups and educational providers in a coordinated way. There are already a large number of competing financial literacy programs and resources in Australia. The Australian Government's former Consumer and Financial Literacy Taskforce surveyed consumer information programs in 2004 and found over 700 initiatives from public, private and community sector organisations. It stated that 'there is no shortage of good consumer information available to assist Australians. However, a good proportion of that material is either not known, not properly targeted or not used by Australian consumers.'⁴⁹³

The Committee would not like to see a similar situation develop in relation to property investment programs and would encourage governments, regulators, consumer organisations, industry associations and education providers to work together to develop common resources.

Recommendation 36: Coordination of investment literacy programs

The Victorian Government should establish a working group of consumer organisations, industry associations and education providers to develop property investment literacy resources.

⁴⁸⁹ Consumer Affairs Victoria, *Real estate – A guide for buyers and sellers* (2006).

⁴⁹⁰ Office of Fair Trading, Queensland, *Buying an investment property?*, <[http://oft.eos-solutions.com.au/OFT/OFTWeb.nsf/AllDocs/8B08D54C1908F0224A256B440030524D/\\$File/Buying_Investment_Property_1107+FSH-SO.pdf](http://oft.eos-solutions.com.au/OFT/OFTWeb.nsf/AllDocs/8B08D54C1908F0224A256B440030524D/$File/Buying_Investment_Property_1107+FSH-SO.pdf)> at 10 January 2008.

⁴⁹¹ Mr Gerard Brody, *Transcript of evidence*, above n 486, 5.

⁴⁹² Ms Corinna Dieters, Chair, Financial Planning Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 7.

⁴⁹³ Consumer and Financial Literacy Taskforce, *Australian Consumers and Money – A Discussion Paper by the Consumer and Financial Literacy Taskforce* (2004) xiv.

Recommendation 37: Property investment information booklet

The Victorian Government should:

- (a) publish a free information booklet on property investment in a range of community languages. The booklet should address, amongst other things:
- factors to consider when choosing between investment classes
 - basic information about the property market, including the fact that the market can fall and that different segments of the market can perform differently
 - the need to consider both risks and returns from property investment
 - the role of estate agents, developers, property investment advisers and other professions
 - common problems with property investment advisers and marketeers
 - the importance of seeking independent advice
 - the avenues available to consumers if they are dissatisfied with goods and services.
- (b) distribute the booklet widely through estate agents, financial advisers and planners, accountants, consumer organisations and other services used by property investors.

Recommendation 38: Investment literacy in schools

The Victorian Government should review its 'Consumer Stuff' program and any other consumer and financial literacy programs for schools to examine the potential for addressing investment literacy.

7.2 Access to market information

Governments and industry could also address the information problems experienced by consumers in the property investment market by ensuring that they have ready access to information that helps them judge the quality of different property investment advice and products.

Other industries have taken steps to empower consumers in this way. One example is the use of rating schemes in the finance industry to help consumers compare mortgage and other finance products.⁴⁹⁴ Another is the recent introduction of Standard Information Statements for private health insurance policies that allow consumers to compare different products easily.⁴⁹⁵

The Committee's recommendation that estate agents, marketers and sellers be required to provide standard product disclosure statements to prospective investors has the potential to help consumers compare different investment properties.

The Committee believes there is also scope to address the overpricing of properties and services by some property investment advisers and marketeers by providing consumers with better access to information. This section examines a number of possible initiatives.

⁴⁹⁴ See, for example, the Cannex rating service, <<http://www.cannex.com.au>> at 10 January 2008.

⁴⁹⁵ See the Commonwealth Government's [privatehealth.gov.au](http://www.privatehealth.gov.au) website, <<http://www.privatehealth.gov.au>> at 10 January 2008.

7.2.1 Public information about the property investment market

Property sale prices

A number of witnesses told the Committee that access to historical sale prices would help consumers determine when they are being overcharged for properties. Mr John Moore from the Property Investors Association argued that such data would ‘enable [consumers] to do an assessment of a reasonable price’.⁴⁹⁶ Mr Gerard Brody from the Consumer Action Law Centre told the Committee that it was ‘important and should be mandatory. If you are going to have a competitive and efficient market you must have all the information available on that market.’⁴⁹⁷

The Chief Executive Officer of the Real Estate Institute of Australia, Mr Bryan Stevens, pointed out in his evidence that there is already data available in the marketplace.⁴⁹⁸ The Committee conducted its own investigation and found at least 11 businesses offering a range of property market information from \$20 to \$275, including lists of recent sales in particular suburbs. Mr Stevens noted that the state real estate institutes also publish sales prices in newspapers such as *The Age* in Melbourne.⁴⁹⁹

Other witnesses told the Committee that these arrangements were not always ideal. Mr Mark Armstrong from Property Planning Australia told the Committee that there was no requirement for estate agents to report sales and not all prices were reported. He told the Committee that they were ‘seeing a large number of property sales not being disclosed, even to us who are licensed agents. We look on our databases and there are holes within the sales results.’⁵⁰⁰ The Committee’s own investigations suggest that up to 13% of sale prices in Victoria are not disclosed, with even higher rates of non-disclosure at the higher end of the market.

The Committee notes that there are Victorian government agencies that collect information about property sales that could potentially provide that information to the public. Buyers and sellers of land in Victoria are required by law to report sale information including prices to municipal councils, and buyers must also provide this information to the Registrar of Titles.⁵⁰¹

The Department of Sustainability and Environment in Victoria already publishes some information, although it is limited to median prices and, as the information is published quarterly, it is often some months out of date. The December 2007 edition of the Department’s quarterly property sales report, for example, only contains data up to the June 2007 quarter.⁵⁰²

⁴⁹⁶ Mr John Moore, *Transcript of evidence*, above n 487, 7.

⁴⁹⁷ Mr Gerard Brody, *Transcript of evidence*, above n 486, 7. See also Property Planning Australia, *Submission No. 2*, 16.

⁴⁹⁸ Mr Bryan Stevens, Chief Executive Officer, Real Estate Institute of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 7.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ Mr Mark Armstrong, Director, Property Planning Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 15 October 2007, 11.

⁵⁰¹ *Local Government Act 1989* (Vic) ss 230-231; *Local Government (General) Regulations 2004* (Vic) regs 14-15; *Land Tax Act 2005* (Vic) s 103; *Land Tax Regulations 2005* (Vic) reg 5.

⁵⁰² Department of Sustainability and Environment Victoria, *Victorian Property Sales Report: Median House Prices December 2007* (2007).

The Committee considers that public access to individual sale prices would promote greater transparency in the property market, and that publication of this information by the Victorian Government would overcome some of the deficiencies with existing sources that rely on reporting by estate agents. The Committee does still support an ongoing role for commercial providers. As Mr John Moore noted, there are likely to be delays in producing government information and commercial providers will still be able to offer more current information to investors.⁵⁰³

The Real Estate Institute of Australia noted that publication of property sales data would raise privacy issues.⁵⁰⁴ The Committee notes that some witnesses believed that the public interest in market transparency should outweigh the privacy of property sellers and buyers, particularly if properties are sold at public auction.⁵⁰⁵ However, the Committee considers that the Victorian Government should consult the Office of the Victorian Privacy Commissioner about how to minimise the impact of this initiative on the privacy of individual buyers and sellers. The Committee believes that, at a minimum, buyers and sellers should be informed that this information is likely to be published and should be given the option of keeping the information confidential.

Recommendation 39: Publication of sales data

The Victorian Government should:

- (a) publish information about property sales in Victoria, including sale prices for individual properties, not later than three months after the end of each financial quarter
- (b) consult the Office of the Victorian Privacy Commissioner about ways to minimise the impact on the privacy of individual buyers and sellers
- (c) publicise the availability of this information, and the existence of commercial information providers, in its property investment booklet.

Fees and commissions

As was noted in chapter six, the Committee is reluctant to recommend regulation of fees and commissions to deal with the high prices charged by some advisers and marketeers. The Real Estate Institute of Tasmania publishes a recommended scale of fees and commissions that agents and consumers can use to determine fair market fees. The Committee considers that the Victorian Government should work with the Real Estate Institute of Australia to determine a recommended maximum rate of commission, and that the Government should publicise this rate in its property investment advice booklet.

Recommendation 40: Publication of recommended maximum rate of commission

The Victorian Government should, after consultation with the Real Estate Institute of Australia, publicise a recommended maximum rate of commission for the sale or purchase of real property in its property investment booklet.

⁵⁰³ Mr John Moore, *Transcript of evidence*, above n 487, 8.

⁵⁰⁴ Mr Bryan Stevens, *Transcript of evidence*, above n 498, 7.

⁵⁰⁵ Mr John Moore, *Transcript of evidence*, above n 487, 7; Mr Gerard Brody, *Transcript of evidence*, above n 486, 7. See also Mr Mark Armstrong, *Transcript of evidence*, above n 500, 11.

7.2.2 Disclosure of property valuations by lenders

The Committee also heard evidence from some witnesses that investors should have a right of access to property valuations obtained by lenders.

Some witnesses argued that this would help to address issues such as two-tier marketing by alerting investors when they were paying more than the market value for a property. Mr Neil Higgins from The Investors Club told the Committee that if valuations ‘had been disclosed to the buying party in the first instance, a lot of grief would have been saved, a lot of mud would have fallen on to those spruikers’ faces no doubt and I think they would have been out of business significantly before they eventually were’.⁵⁰⁶ Ms Monique Wakelin also supported disclosure, telling the Committee that ‘this would go some way to creating that all-important transparency in what somebody might be asking as an asking price for a property’.⁵⁰⁷

There is currently no legal obligation for banks or other lenders to disclose their own valuations to borrowers. The Australian Competition and Consumer Commission took action in the past against a bank that failed to disclose its valuation of a property to a husband and wife caught by a two-tier marketing scheme. The Full Court of the Federal Court found that the bank had not acted unconscionably in the circumstances.⁵⁰⁸

In its 2005 report, the Joint Committee on Corporations and Financial Services recommended that disclosure of valuations by lending institutions to prospective borrowers be made mandatory.⁵⁰⁹

The Committee wrote to a selection of banks and other lenders to seek information about their practices and their views on this issue. Their responses showed considerable variation amongst the policies and practices of lenders.

The Commonwealth Bank of Australia told the Committee that its policy was not to disclose valuations to borrowers. In summary, it told the Committee that:

- in the majority of cases it did not obtain any form of valuation and in other cases it obtained only a desk top or short form valuation
- it had an arrangement with its valuers that valuations would not be provided to borrowers. It noted concerns about the potential impact of disclosure on valuers’ professional indemnity insurance and fees.
- its does not wish to be in the position of giving advice to borrowers purchasing investment property.

The Bank provided a copy of its terms and conditions for consumer mortgage lending. These alert investors, amongst other things, to the need to consider the risks

⁵⁰⁶ Mr Neil Higgins, National Finance Manager, The Investors Club, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 5.

⁵⁰⁷ Ms Monique Wakelin, co-founder, Wakelin Property Advisory, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 6.

⁵⁰⁸ *Australian Competition and Consumer Commission v Oceana Commercial Pty Ltd* [2004] FCAFC 174. See also Sharon Christensen, ‘Marketeers, market value and misleading conduct – can the ACCC protect consumers?’ *Australian Property Law Bulletin*, volume 19, issue 3, 2004, 25.

⁵⁰⁹ Joint Committee on Corporations and Financial Services, above n 485, 47.

of investing, especially with regard to the market value of the property and the existence of schemes involving overpriced property, and recommends they get independent advice.⁵¹⁰

Wizard Home Loans told the Committee it did not provide copies of its valuations to borrowers and also referred to concerns about exposing valuers to legal liability. However, it submitted that the *amount* of the property value should be disclosed to borrowers if it is 85% or less than the purchase price.⁵¹¹

The ANZ Bank told the Committee it did not prevent borrowers from obtaining the amount of its property valuation, and that its staff were equipped to provide this information. It also stated that it took steps to alert customers when its valuation was lower than the contracted sale price by more than 10%.⁵¹²

Westpac Bank told the Committee it did not provide copies of valuations to customers, but that it also informs customers of the amount of the valuation where it varies from the purchase price by 10% or more.⁵¹³

The Committee does not propose to recommend that lenders be required to disclose valuations to borrowers in light of evidence about the impact on valuers and their costs. However, it would like to see all lenders adopt voluntary policies under which they inform consumers of the amount of their valuation where it is at least 10% less than the contracted sale price.

Recommendation 41: Disclosure of valuation amounts by lenders

The Victorian Government should urge lenders to alert borrowers when the amount of their own valuation is 10% or more below the contracted sale price of a property.

7.3 Industry training

Another one of the problems raised during the Committee's inquiry was the lack of training and qualifications for property investment advisers and the impact of this on the quality of their advice.

Some witnesses told the Committee industry training programs and education were one way to address this issue. The Real Estate Institute of Australia noted in its submission, for example, that there is 'a correlation between professional competence, education standards, and consumer protection'.⁵¹⁴

There are now some specialist industry training courses available. The Committee has referred previously to the property investment accreditation course developed by the Property Investment Association and DeakinPrime, and additional courses may be established in the future. However, as the Property Investment Association noted

⁵¹⁰ Letter from the General Counsel, Commonwealth Bank Group to the Chair, Law Reform Committee, 6 December 2007.

⁵¹¹ Letter from Legal Officer, Wizard Home Loans Pty Limited to the Chair, Law Reform Committee, 20 December 2007.

⁵¹² Letter from the Managing Director – Mortgages, ANZ Bank to the Chair, Law Reform Committee, 18 December 2007.

⁵¹³ Letter from Head of Regulatory Affairs, Westpac to the Chair, Law Reform Committee, 11 January 2008.

⁵¹⁴ Real Estate Institute of Australia, *Submission No. 4, 7*.

in its submission, ‘without some form of regulatory requirement, only the interested and diligent will undertake such a program’.⁵¹⁵

If the Commonwealth Government agrees to extend its financial services laws to direct property investment advisers, this will create mandatory training and competency requirements. If the Commonwealth Government declines to do so, the Victorian Government and industry associations will need to consider alternative ways to promote specialist training for investment advisers.

The Victorian Government could amend its statutory training requirements for estate agents to require them to undertake specialist training and some witnesses supported this option. Ms Monique Wakelin was one witness who suggested that ‘there be some compulsory training units for people who wish to specialise in independent property advice, and that could be incorporated into the existing real estate agents courses’.⁵¹⁶ Mr Hugh Jones from the Real Estate Buyers’ Agents Association also told the Committee there would be some resistance but ‘pretty clearly we need additional training if we are offering investment advice’.⁵¹⁷

The Real Estate Institute of Australia did not support this approach. Mr Bryan Stevens told the Committee that the state and territories:

have just gone through the training package in some detail ... and everyone found it was fine ... I would find it remarkable, having just gone through the exercise over the last two years in some enormous depth, that you would suddenly find that it was inadequate.⁵¹⁸

The Committee considers that the Victorian Government should raise the need for investment training when these training requirements are next reviewed. In the meantime, it believes there is scope for industry associations in this area, including the Real Estate Institute, to ensure that property investment is addressed in their own continuing professional development programs.

Recommendation 42: Voluntary industry training

If there is no agreement on national regulation of property investment advisers at the 2008 meeting of the Ministerial Council on Consumer Affairs, the Victorian Government should urge industry associations whose members are engaged in providing property investment advice to include property investment knowledge and skills in their professional development programs.

Recommendation 43: Compulsory industry training

If there is no agreement on national regulation of property investment advisers at the 2008 meeting of the Ministerial Council on Consumer Affairs, the Victorian Government should propose compulsory training for estate agents about property investment when those training requirements are next reviewed at a national level.

⁵¹⁵ Property Investment Association of Australia, *Submission No. 3*, 5.

⁵¹⁶ Ms Monique Wakelin, *Transcript of evidence*, above n 507, 6.

⁵¹⁷ Mr Hugh Jones, Vice President, Real Estate Buyers’ Agents Association of Australia, *Transcript of evidence*, Law Reform Committee public hearing, Melbourne, 12 November 2007, 5.

⁵¹⁸ Mr Bryan Stevens, *Transcript of evidence*, above n 498, 5.

7.4 Consumer remedies

Another way to empower consumers is to ensure that, where property investment services and products fail to meet their expectations, they have accessible and effective avenues for redress.

7.4.1 Existing avenues for redress

There are already some avenues available to investors who are unhappy with their property investment adviser or marketeer:

- As chapter five of this report noted, investors can take their own action under existing consumer protection laws. In Victoria, most consumer-trader disputes can be brought in the Victorian Civil and Administrative Tribunal, which aims to provide a more accessible and cost effective system of civil justice.
- Government agencies such as Consumer Affairs Victoria can mediate complaints and can also take representative legal action on behalf of consumers. Consumer Affairs Victoria, for example, was able to negotiate refunds for a number of Henry Kaye's clients.
- There are other sources of legal assistance including specialist legal services such as the Consumer Action Law Centre, organisations such as Mr Neil Jenman's Homesellers and Homebuyers Protection Fund and litigation funding companies.⁵¹⁹

Some witnesses suggested that avenues which require individuals to take legal action are ineffective. Mr Mark Armstrong from Property Planning Australia told the Committee that '[i]t is very costly to pursue someone who has got deeper pockets than you through the courts ... it is very costly to pursue those avenues'.⁵²⁰ Mr John Moore from the Property Investors Association also noted that:

It is difficult for an investor to take action by themselves. It is an intimidating task to go to an agency and to complain and then get the supporting evidence. There is no organisation at the moment that will actually help them to do that. We hope to be able to do that in that sense, but again, to mount the case for a particular situation, is, firstly, quite intimidating, and secondly, it costs money.⁵²¹

The Committee sought information from the consumer regulators about how often individuals took their own action under consumer protection laws but was advised by the regulators that they did not have such data.⁵²²

The Committee considers that the dispute resolution services offered by Consumer Affairs Victoria could be of greater assistance to consumers. Consumer Affairs Victoria has stated that it recovered more than \$4.1 million for consumers through

⁵¹⁹ See, for example, IMF's list of funded cases at <<http://www.imf.com.au>> at 10 January 2008.

⁵²⁰ Mr Mark Armstrong, *Transcript of evidence*, above n 500, 8; see also Property Planning Australia, *Submission No. 2*, Appendix 1.

⁵²¹ Mr John Moore, *Transcript of evidence*, above n 487, 5-6.

⁵²² Letter from Acting Executive Director, Regulation, Australian Securities and Investments Commission to the Chair, Law Reform Committee, 5 November 2007; Letter from Chief Executive Officer, Australian Competition and Consumer Commission to the Chair, Law Reform Committee, 19 December 2007; Consumer Affairs Victoria, *Submission No. 16*, 25.

dispute resolution across all sectors in 2006-07.⁵²³ It is not clear how much, if any, of this figure related to property investment advisers and marketeers, although in 2003 Consumer Affairs Victoria did negotiate \$140 000 in refunds for consumers who attended Henry Kaye's seminars.⁵²⁴

However, the Committee is concerned that consumers may not be aware that this type of assistance is available from government regulators. Mr Mark Armstrong told the Committee that 'the general public does not really view [regulators] as a serious avenue to get support'.⁵²⁵

Accordingly, the Committee believes that Consumer Affairs Victoria should take steps to raise the profile of its services amongst property investors as part of its consumer awareness strategy.

The Committee did not receive evidence about the particular effectiveness of other existing avenues for consumers, although the Productivity Commission has considered some of these issues in its draft report.⁵²⁶

Recommendation 44: Raising the profile of consumer regulators

The Victorian Government should:

- (a) actively promote Consumer Affairs Victoria's dispute resolution services as part of the consumer awareness strategy outlined in recommendation 35
- (b) publicise the services provided by Consumer Affairs Victoria in its property investment booklet.

7.4.2 Additional avenues for redress

An alternative option which attracted support from a number of witnesses was the creation of an industry-specific alternative dispute resolution scheme to assist consumers of property investment services.

A number of external dispute resolution schemes have been created under the Commonwealth Government's financial services regime. The Financial Industry Complaints Service, one such scheme, outlined the advantages of the schemes in its submission to the Committee, stating they are:

- simpler and more accessible than traditional legal processes
- free for consumers and simple enough to use without lawyers
- able to apply normative industry standards as well as legal requirements
- required to meet benchmarks that ensure they are independent.

⁵²³ Consumer Affairs Victoria, 'Consumer Affairs recovers millions for Victorians' (Press release, 21 November 2007).

⁵²⁴ Consumer Affairs Victoria, 'Consumer Affairs responds on Henry Kaye' (Press release, 4 December 2003).

⁵²⁵ Mr Mark Armstrong, *Transcript of evidence*, above n 500, 8.

⁵²⁶ Productivity Commission, above n 474, 163-170.

The Service told the Committee that these schemes help to improve industry standards generally because they can also provide feedback to industry, and identify and raise systemic issues with regulators.⁵²⁷

Other witnesses also spoke highly of the benefits of these schemes. Mr Gerard Brody from the Consumer Action Law Centre told the Committee that '[w]e are very supportive of such schemes as they provide accessible, free, informal and quick dispute resolution services to consumers'.⁵²⁸ The Centre for Credit and Consumer Law proposed 'an industry wide alternative dispute resolution scheme and/or an industry ombudsperson'.⁵²⁹

The Committee considers that such schemes should be extended to property investment advice services. If the Commonwealth Government agrees to extend the financial services regime to property investment advisers, then advisers will be required to become members of an approved external dispute resolution scheme under those laws. If this does not happen, the Committee would encourage the Victorian Government to work with relevant industry associations to establish such a scheme on a voluntary basis in Victoria.

The Committee is aware that other initiatives that could assist consumers have been raised in the context of the Productivity Commission's inquiry, including more funding for legal aid and financial counselling services. The Real Estate Institute of Australia raised the possibility of a claims fund for consumers in its submission to the Committee.⁵³⁰ The Committee does not believe that it received sufficient evidence during its inquiry to enable it to make considered recommendations on other avenues that would assist consumers. However, it would encourage the Victorian Government to consider other avenues that could assist consumers in its response to the Productivity Commission's report.

Recommendation 45: Alternative dispute resolution

If there is no agreement on national regulation of property investment advisers at the 2008 meeting of the Ministerial Council on Consumer Affairs, the Victorian Government should work with industry associations to establish an industry-based alternative dispute resolution scheme to assist consumers who use property investment services.

⁵²⁷ Financial Industry Complaints Service, *Submission No. 8*.

⁵²⁸ Mr Gerard Brody, *Transcript of evidence*, above n 486, 3. See also Consumer Action Law Centre, *Submission No. 7*, 4; Ms Corinna Dieters, *Transcript of evidence*, above n 492, 2.

⁵²⁹ Centre for Credit and Consumer Law, *Submission No. 12*, 16.

⁵³⁰ Real Estate Institute of Australia, *Submission No. 4*, 10.

Chapter eight: Conclusion

As more and more ordinary Australians aim to build their wealth and financial security through property investment, they face the risks as well as the rewards of the property market. Good investments have paid substantial dividends to investors in recent years, but there is evidence that not all consumers have shared in this success. No government can eliminate risks for investors. However, governments can play a role by ensuring that advisers and marketeers promoting property investment operate professionally, fairly and competitively and by protecting vulnerable consumers.

In the course of this inquiry, the Committee received 16 written submissions and heard evidence from witnesses representing 14 different organisations at public hearings. These stakeholders identified a broad range of problems associated with the current operation of property investment industry. Problems include conflicts of interest, high-pressure selling techniques, failure to disclose risks and ‘one size fits all’ advice. Many stakeholders also highlighted the difficulties associated with the regulatory gap between property investment advisers and financial advisers.

While stakeholders often agreed about the shortcomings of the current regulatory system, they presented a variety of ideas and options for reform. Most agreed that there was no single ‘solution’ to the many issues in the property investment industry.

In this report the Committee sets out a comprehensive approach involving multi-faceted, regulatory and non-regulatory strategies. Figure 14 provides an overview of how the different strategies proposed by the Committee address the main problems identified in the course of this inquiry.

In recognition of the fact that the property investment industry is a national industry and that property is widely considered to be a financial product, the Committee recommends national regulation of property investment advisers under the Commonwealth’s financial services regime. While the Committee is confident that a national approach is achievable, this report also sets out a model by which Victoria can act alone in the interim. Consistent with the limited evidence about property investment marketeers, the Committee recommends state-based disclosure requirements for these businesses.

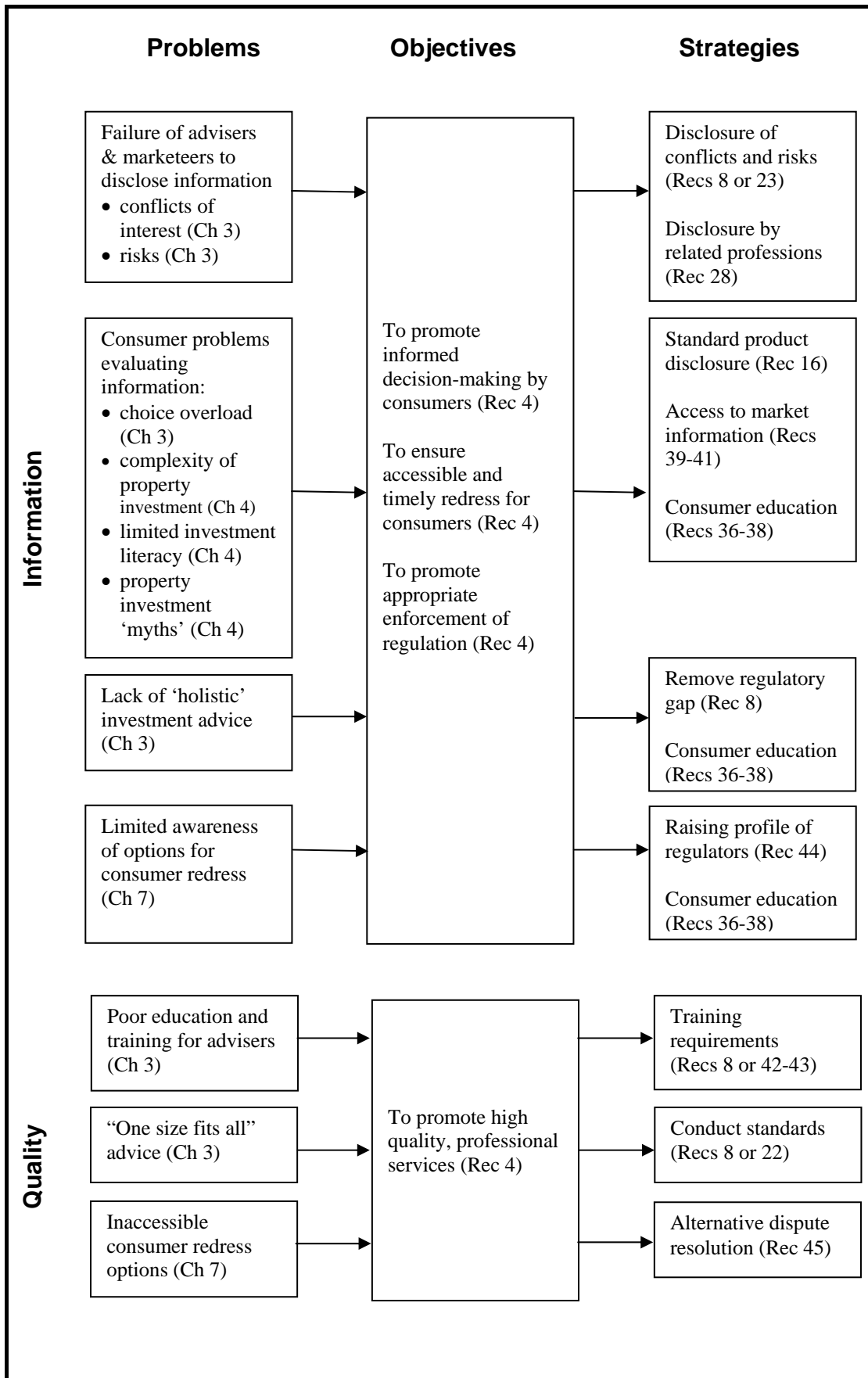
The Committee has also identified a range of non-regulatory solutions that will support and enhance the regulation of property investment advisers and marketeers. These include increased consumer education, improved industry training and increased access to mechanisms for consumers to seek redress.

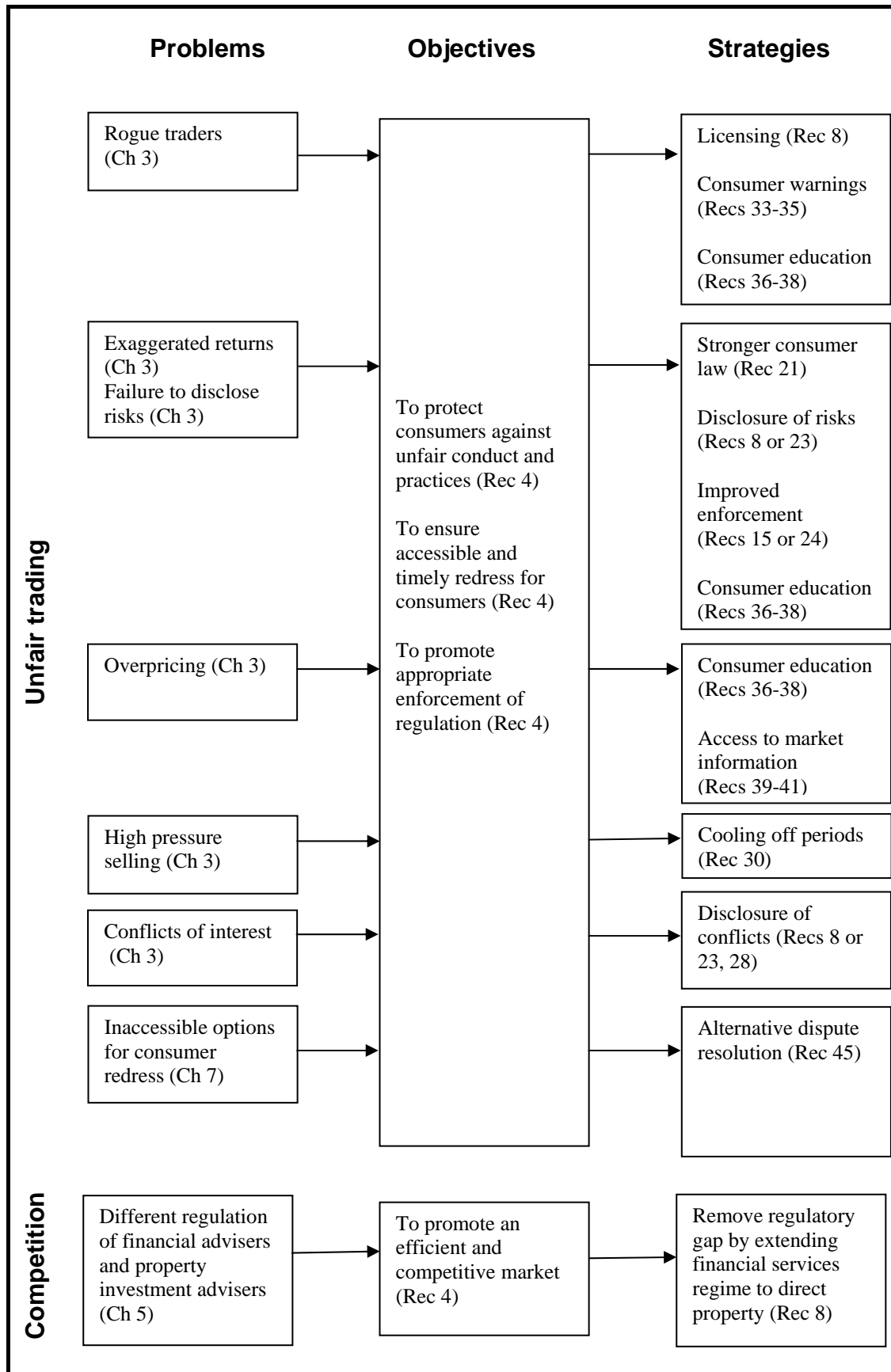
Property investment in Australia is important to the wider economy and community as well as for individual investors. The Committee is confident that the solutions proposed in this report will not only provide enhanced protection for Victorian investors, but will also increase the skill and reputation of businesses within the property investment industry.

Adopted by the Law Reform Committee

12 March 2008.

Figure 14 – Problems identified by the Committee and proposed strategies





Appendix A – List of written submissions

| | Name of individual or organisation | Date received |
|----|--|-------------------|
| 1 | Mr Rodney Van de Hoef | 5 July 2007 |
| 2 | Property Planning Australia | 9 July 2007 |
| 3 | Property Investment Association of Australia | 16 August 2007 |
| 4 | Real Estate Institute of Australia | 5 September 2007 |
| 5 | Confidential (individual consumer) | 5 September 2007 |
| 6 | Property Investors Association of Australia | 3 September 2007 |
| 7 | Consumer Action Law Centre | 7 September 2007 |
| 8 | Financial Industry Complaints Service | 7 September 2007 |
| 9 | Mr Paul Latimer and Mr Mark Bender, Faculty of Business and Economics, Monash University | 20 September 2007 |
| 10 | Ms Lang Thai, School of Law, Deakin University | 25 September 2007 |
| 11 | Mr Albert Hopkins-Shirley | 15 October 2007 |
| 12 | Centre for Credit and Consumer Law, Griffith University | 24 October 2007 |
| 13 | Association of Financial Advisers | 12 November 2007 |
| 14 | Australian Property Institute | 9 November 2007 |
| 15 | Mr John McLennan | 2 January 2008 |
| 16 | Consumer Affairs Victoria | 2 January 2008 |

Appendix B – List of witnesses

Public Hearing, 15 October 2007
Room G1, 55 St Andrews Place, East Melbourne

| Witness(es) | Organisation |
|--|--|
| Mr Mark Armstrong, Director Mr David Johnston, Director | Property Planning Australia |
| Mr John Hopkins, Chairman Mr Noel Browne, General Manager Mr Phil Emery, Program Director, DeakinPrime | Property Investment Association of Australia |
| Mr Gerard Brody, Director – Policy & Campaigns | Consumer Action Law Centre |
| Mr John Moore, President | Property Investors Association of Australia |
| Individual consumer (Confidential) | |
| Mr Bryan Stevens, Chief Executive Officer | Real Estate Institute of Australia |

Public Hearing, 12 November 2007
Room G1, 55 St Andrews Place, East Melbourne

| Witness(es) | Organisation |
|--|---|
| Dr David Cousins, Director | Consumer Affairs Victoria |
| Mr Rob Pepicelli, Victorian Division | Australian Property Institute |
| Ms Corinna Dieters, Chair Mr Peter Dunn, Certified Financial Planner, Moneyplan Australia | Financial Planning Association of Australia |
| Mr Neil Higgins, National Finance Manager Mr Troy Gunasekara, Branch Manager | The Investors Club |
| Ms Monique Wakelin, Co-Founder | Wakelin Property Advisory |
| Mr Hugh Jones, Vice President | Real Estate Buyers' Agents Association of Australia |
| Mr Neil Jenman, Consumer Advocate | |
| Mr Kerry Sharp, State Director Ms Pina Sciarrone | Association of Financial Advisers |
| Mr Michael Hayes, Commercial Law Section Ms Karen Cheng, Property and Environmental Law Section | Law Institute of Victoria |

Appendix C – Sources surveyed for the Committee’s survey of property investment advisers and marketeers

The Committee conducted research to identify the scope of the property investment industry. This research sought to identify the businesses and individuals advertising investment properties or property investment services. The results of the Committee’s research are set out in chapter three.

The major publications and internet websites examined by the Committee in conducting this research were:

1. National and Melbourne metropolitan newspapers

- *The Age*
- *The Sunday Age*
- *Financial Review*
- *Herald Sun*
- *Sunday Herald Sun*

The Committee viewed issues of these newspapers published between 12 October 2007 and 9 November 2007.

2. Suburban Melbourne newspapers

- *MX*
- *Pakenham Cardinia Leader*
- *Dandenong Leader*
- *Moreland Leader*
- *Hume Leader*
- *Whittlesea Leader*
- *Knox Leader*
- *Free Press Leader (Dandenong Ranges)*
- *Lilydale & Yarra Valley Leader*

The Committee viewed issues of these newspapers published between 15 October 2007 and 20 November 2007.

3. Regional Victorian newspapers

- *The Border Mail* (Albury-Wodonga)
- *The Gippsland Times*
- *The Advertiser* (Bendigo and Central East Victoria)
- *The Guardian* (Northern Victoria & Riverina)
- *Stawell Times*
- *Sunraysia Daily* (Mildura)

The Committee viewed issues of these newspapers published between 15 October 2007 and 20 November 2007.

4. Wealth, financial and property investment magazines

- *Australian Property Investor* (July 2007, November 2007)
- *Your Investment Property* (December 2007)
- *Your Mortgage* (July 2007, October 2007, November 2007)
- *Wealth Creator* (July/August 2007, November/December 2007)
- *Financial Review Smart Investor* (December 2007)
- *Money* (December 2007)

The Committee viewed at least two issues of each magazine, where available.

5. Internet websites

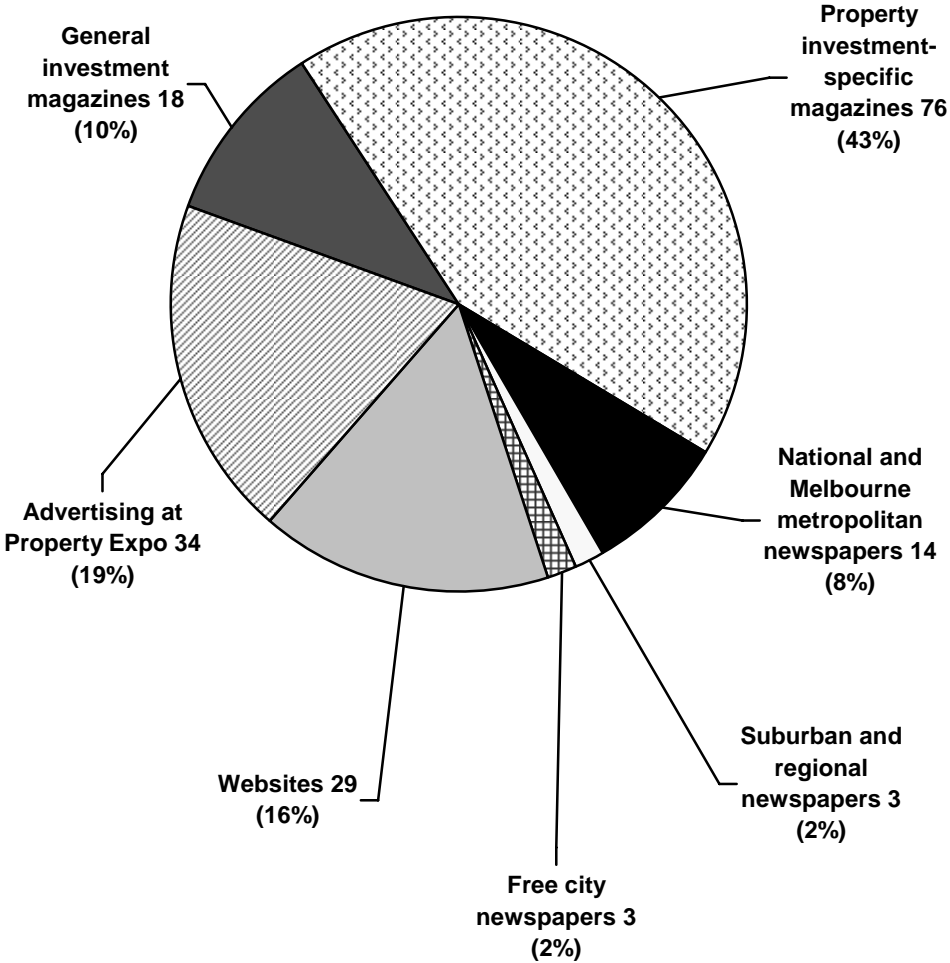
These websites were found by:

- following website addresses included in printed advertisements of the abovementioned newspapers and magazines
- conducting Google searches on the terms 'property investment' and 'property investment advice'
- following sponsored advertising links from search results pages for 'property investment' and 'property investment advice' from Google, Yahoo and Ninemsn Websites
- following advertising links featured on property investment magazine websites *Your Investment Property* (<<http://www.yipmag.com.au>>), and *Australian Property Investor* (<<http://www.apimagazine.com.au>>)
- looking at the websites of specific companies identified by witnesses and those providing submissions to the inquiry.

Appendix D – Location of advertisements

The Committee surveyed the advertisements and promotions of property investment advisers and marketeers in October and November 2007. The survey found a total of 177 advertisements and promotions for 114 businesses marketing investment properties and/or providing property investment advice. Figure 15 sets out where these advertisements and promotions were found by the Committee. Further results of this survey are discussed in chapter three.

Figure 15 – Location of advertisements by property investment advisers and marketeers



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