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Law Reform Committee
Parliament House
Spring Street
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Submission No. PI/10
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24 September 2007

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Victorian Parliament Law Reform Committee
Parliament House
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Melbourne VIC 3002
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Fax: (03) 8682 2818 (14 pages) & Post

Dear Ms Riseley,

Re: Inquiry into regulation of property investment advice

Thank you for your letter dated 25 June 2007. I received a copy of the letter from my colleague Professor Anne Rees, Head of School of Law, and I am delighted to respond and express my interest in contributing to this inquiry and to the Law Reform Committee's work.

Attached is my submission in response to your request for comments on the possible reform to the regulation of property investment advice.

Should you have any queries regarding the attached submission, please feel free to contact me on Tel: (03) 9244 6060 or by email (Lang.Thai@deakin.edu.au).

Sincerely yours,

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cc. Submission on Inquiry into regulation of property investment advice.

Submission on Inquiry into regulation of property investment advice

Submission from: Lang Thai, School of Law, Deakin University

To: Executive Officer, Victorian Parliament Law Reform Committee

Date: 24 September 2007

INTRODUCTION:

I refer to your letter addressed to Professor Anne Rees dated 25 June 2007. I am happy to respond to your Call for Submission on the Inquiry into regulation of property investment advice, with regard to the following terms of reference:

(1) 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; and

(2) the respective roles of the Victorian and Commonwealth Governments in regulating financial and property investment advice.

I am of the view that the law in this area is in need of reform and I would express my full support for a single federally enacted Act to regulate matters concerning property investment advice, and would venture to say that Commonwealth would be a better choice in legislating for Victorians on this matter. In order for me to comment on the Inquiry's terms of reference and to explain my reasons for stating my support, it would be appropriate for me to first set out my background understanding to the work already carried out at the federal level.

BACKGROUND:

I am aware that a similar inquiry has been carried out at the Commonwealth level and subsequent to that inquiry, the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services produced a report in June 2005. In that report, a number of recommendations were made and the more crucial one was that the property investment advice laws be regulated federally within the current Chapter 7 of the *Corporations Act* 2001. It was acknowledged that Chapter 7, in the current form, deals specifically with the provision of "financial services" and "financial products" and that the Chapter does not apply to property investment advice as part of the so-called "services" or "products" as such. As a consequence, further recommendations were made that Chapter 7 be amended to include real property as a separate asset class and be amended to include licensing, conduct and disclosure provisions.

The Commonwealth Parliamentary Joint Committee was not in favour of the idea of having both ASIC and ACCC holding concurrent legislative powers in the regulation and enforcement of property investment advice laws, despite the existence of an agreed Memorandum of Understanding between the two authorities.

I have also read some of the submissions received by the Commonwealth Parliamentary Joint Committee and note the compelling reasons for the support of a uniform legislative regulatory

framework in the provision of property investment advice, particularly in light of the recent Henry Kaye's case.

I am of the view that this area of the law be regulated federally, but I do not think that it should come within the "financial services" provisions contained in Chapter 7 of the *Corporations Act* 2001 (C'th). It would be best to have entirely a separate piece of uniform national legislation and to create entirely a separate regulatory authority to deal with such important and growing issue in our community. I now proceed to explain my reasons and the terms of reference as requested and will endeavour to avoid any overlap on the work already discussed.

Term of Reference No. 1:

Reviewing the regulatory framework for the provision of property investment advice, with the objective of establishing how best to control the exploitation of Victorians:

The current regulatory framework for the provision of property investment advice is indeed in need of review in order to protect good faith investors from being exploited in this industry. In the current form, when a potential investor is looking for advice on property investment, there is no certainty that the investor will be speaking to the right adviser nor is there certainty that the advice given will be trustworthy. There is also no certainty of a successful action against a property promoter for misleading or deceptive conduct or for unconscionable conduct. This is because the provisions dealing with misleading or deceptive conduct and unconscionable conduct under Part V and Part IVA of the *Trade Practices Act* 1974 (C'th) ("TPA") are vague in their substance in the context of property investment advice, which is discussed in greater detail in the next heading.

Further, in the current form, there is no law that deters a person from claiming to be an expert in the giving of advice on property investment. There is no requirement for a property promoter to prove his good standing or to prove that he has appropriate qualification, training or licence. The promoter could be anyone who is desperate enough to make fast cash from the booming property market by setting up and providing the so-called educational seminars around Australia and then following up with the more personalised one-on-one sessions in order to make a quick sale and close the transactions. Given the vagueness of the law in this area, it is unlikely that the promoter would be worrying about the consequences, the fines, the penalties or the jail term. This was precisely the scenario in Henry Kaye's case.

Currently, there is no single piece of legislation that covers the situation. Property investment advice is regulated under the general consumer protection laws and this is made up of a large body of State and Commonwealth legislation, together with the various common law precedents. For example, an investor who has suffered economic loss due to the incorrect property investment advice given may wish to bring legal actions against the promoter under a range of options:

- The general and broad misleading unconscionable conduct provisions under Part V and Part IVA of the Commonwealth *Trade Practices Act* 1974;
- The misleading unconscionable conduct provisions under Part 2 Division 2 of the Commonwealth *Australian Securities and Investments Commission Act* 2001, which

applies to "financial services" and "financial products" that do not fall into the disclosure, licensing and conduct framework of Chapter 7 of the *Corporations Act* 2001.

- It may be possible to expand the definition of the terms “financial service” and “financial product” under Chapter 7 of the Commonwealth *Corporations Act* 2001 to include property investment advice;
- The Victorian *Fair Trading Act* 1999 and other Fair Trading legislation from other states could be relevant if the property promoter is a sole trader;
- The Victorian *Estate Agents Act* and other state equivalents are currently regulating the licensed estate agents and the laws in respect to that area could be extended to cover other kinds of property promoters;
- The uniform *Consumer Credit Code* that operates throughout the States and Territories that could be used against the property promoter if the promoter is also arranging finance or acting as a finance broker;
- Common law fraudulent misrepresentation may be another cause of action, but proving it is more difficult than s.52 of the TPA because there is a requirement that the litigant proves *intention* to defraud;
- The general tort of negligence, the duty of care doctrine and the neighbourhood principle under *Donoughue v. Stevenson*[1] and *Shaddock & Associates Pty Ltd v. Parramatta City Council*[2] could be used against the person acting in the assumed position of a property promoter and the person has negligently given wrong advice knowing that the investor would rely upon such advice;
- According to the *Amadio* principle and the *Garcia* principle, the lender in a stronger position is obliged to warn the weaker party to seek independent advice before signing the contract of sale. Arguably, a property promoter who has cheated an investor by providing incorrect investment advice may be subject to being sued on the ground of unconscionable conduct as per the common law principles in *Commercial Bank of Australia v. Amadio*[3] and *Garcia v. National Australia Bank Ltd.*[4]

It should be noted that the above list is non-exhaustive and that other State legislation may well be applicable in circumstances where advice has been given to the investor in segments and in different states. For example, the investor may have given the initial advice through an "educational seminar" in Victoria and then further advice in Queensland where the property is located and the transaction finalised.

In the current state of the laws on property investment advice, the more serious problems and limitations are these.

Problem 1: Cross-jurisdictions and conflict between ACCC, ASIC and the various state departments:

Perhaps the biggest problem is the crossover of jurisdictions between ACCC, ASIC and the various state consumer affairs departments. Each department has its own power in some way

[1] *Donoughue v. Stevenson* [1932] AC 562
[2] *Shaddock & Associates Pty Ltd v. Parramatta City Council* (1981) 150 CLR 225
[3] *Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447
[4] *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395

to investigate and prosecute offenders who breach their respective fair-trading legislation and each has its own dilemma when it comes to dealing with property investment advice cases. In the current state of the law, it is not clear as to which department or agency should be charged with the responsibility of regulating property investment advice matters. There are two folds to this matter.

First, the problem is apparent in the way it is now, because none of the currently available Acts in Australia deals specifically with matters concerning property investment advice. In fact, Australia does not have a piece of legislation that says that a property promoter must have a licence to practise in the giving of property investment advice. The currently available Acts administered by ACCC, ASIC and other State consumer affairs departments contain provisions dealing with a range of misconduct, but such provisions are either too general or too restrictive in character. For example, the misconduct provisions in the Commonwealth *Trade Practices Act* and the state *Fair Trading Acts* are too general and broad, creating the effect of vagueness in their applications.[5] Conversely, the misconduct provisions in the Commonwealth *Corporations Act* and the ASIC Act are applicable only to matters falling within the listed "financial services" and "financial products" which do not include property investment advice.[6] Overall, this creates a sense of confusion amongst the different agencies.

The second point is following on from the first. It is therefore unclear as to which department or agency has greater power (or greater responsibility) in dealing with matters concerning property investment advice. If a Commonwealth agency is seen to have greater power over the State departments because of s.109 of the *Commonwealth Constitution* which states that the Commonwealth legislation has supremacy over the State legislation, then the State departments have no further involvement in the matter (provided that there is no constitutionality issue which will be discussed later in this paper). However, the problem does not stop here. There is further confusion as to whether regulation of property investment advice should be the responsibility of ACCC or ASIC as both agencies are within the Commonwealth jurisdiction.

I am aware of the signed Memorandum of Understanding ("MOU") between ACCC and ASIC which came into existence in December 2004. There is a term in that MOU that reads:

> "The agencies agree to assist each other in the exchange of information, the referral of matters and the delegation of powers, and to cooperate on compliance, education and enforcement activities within the framework of this MOU and consistent with all relevant laws."[7]

The MOU went on to list the processes for achieving these objectives.

The problem with the MOU is that it is merely a memorandum of understanding between the two Commonwealth agencies – ACCC and ASIC – where both agencies are independently controlled by their own respective Commonwealth Acts and have their own distinct powers

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[5] For the Trade Practices Act 1974 (C'th), see s.52 and s.51AC; and for Fair Trading Act 1999 (Vic.), see s.9

[6] See Chapter 7 of the Corporations Act 2001 (C'th); and ss.12DA and 12CC of the Australian Securities and Investments Commission Act 2001 (C'th).

[7] See ASIC MR 04-420. ASIC and ACCC sign new MOU (21 December 2004) which has a link to the MOU, at http://www.fido.gov.au/asic/asic.nsf/byheadline/

and duties. These two agencies stand independently of each other entirely. There is no certainty of any legal effect in that memorandum if and when there is a serious conflict between these two agencies. It is unfashionable to then drag in an independent arbitrator (whoever that may be) to sort out their differences as to who is responsible for what while the consumer matters such as property investment advice matters are likely to be neglected.

Further, the MOU is still relatively new. It was signed a year after the Federal Court has handed down a single-judge decision in the Henry Kaye's case,[8] but there appeared to be some doubts as to whether ACCC had acted within its legislative duties.[9] It is still an early stage. No one knows how the MOU will actually operate in the heat of the moment or how the court would react to that memorandum when it is to be compared and interpreted against the *Commonwealth Constitution.*

As noted earlier, the law in this area is made up of a large body of both state-based consumer protection Acts and the Commonwealth equivalent. The problem is not so much on the inconsistency between the State Acts and the Commonwealth Acts, but it is more to do with the way in which the various Acts have been enacted that the provisions are so broad and so general that they can be confusing to apply at times. For example, s.52 of the Commonwealth *Trade Practices Act* states that a corporation must not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive. For the same reason, s.9 of the Victorian *Fair Trading Act* 1999 contains a substantially similar provision, except that the Victorian Act applies to "a person" instead of "a corporation". Furthermore, s.12DA of the Commonwealth *Australian Securities and Investments Commission Act* 2001 ("*ASIC Act*") also has a substantially similar provision as in s.52 of the TPA, with the exception that ASIC Act only applies if the misleading or deceptive conduct is "in relation to financial services". The long list of "financial services" contained in the ASIC Act does not include "property investment" or "property investment advice". Interestingly, all three Acts have substantially the same wording on prohibition on misleading and deceptive conduct and yet all three Acts have avoided mentioning matters in relation to property investment advice.

In the current state of the law, if a property promoter has given wrong advice on property investment and is not a qualified licensed estate agent or a licensed financial adviser as governed under the specific Acts such as the Victorian *Estate Agents Act,* then it is unlikely for us to see any department or agency willing and prepared to take a proactive approach and claim that it is their responsibility to take actions against the promoter for acting unconscionably or for engaging in misleading or deceptive conduct. 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. The overall effect of this crossover of jurisdictions is the build up of conflict and tension between the agencies or departments while in the meantime the property promoters who have acted unconscionably or have engaged in misleading or deceptive conduct will be walking away unnoticed and unpunished.

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[8] ACCC v. Henry Kaye and National Investment Institute Pty Ltd (in liq) – decision handed down by Kenny J at the Melbourne Federal Court in October 2004.

[9] Mr Henry Kaye lodged a Full Federal Court appeal against the decision on 12 November 2004. An appeal hearing date was then set for 16 May 2005, but he withdrew his appeal application on 23 March 2005.

The only way to resolve the jurisdictional issue is to have a uniform legislation at the national level and to create a separate department to deal specifically with matters in relation to property investment and advice.

Problem 2: Lack of clarity and depth in s.52 of the *Trade Practices Act*:

Putting aside the issue of conflict of jurisdictions between ACCC, ASIC and the State consumer affairs departments, and assuming that a particular department has greater responsibility in pursuing against a property promoter for engaging in misleading or deceptive conduct in the giving of property investment advice, for example, under s.52 of the *Trade Practices Act*,[10] the next point to consider is how flexible is the section that reads "A corporation shall not in trade or commerce engage in conduct that is misleading or deceptive...". Section 52 is problematic for two reasons.

The first is to do with the need for conduct to be "in trade or commerce". If a corporate entity in the business of trade or commerce was providing advice on property investment, then there may not be any problem in applying the *Trade Practices Act*. On the other hand, if an entity was not in the business of trade or commerce, that is, was not in the property investment advice industry, and the entity had given property advice only once to its employees, would the same Act that refers to "in trade or commerce" apply? The High Court in *Concrete Constructions (NSW) Pty Ltd v. Nelson*[11] has pointed out that the words "in trade or commerce" can in some instances cause problems on the application of the relevant provisions in the *Trade Practices Act*. In that case, the Court expressed the view that:

> "the reference to conduct 'in trade or commerce' in s.52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character."[12]

It is clear from *Concrete Constructions (NSW) Pty Ltd v. Nelson* that for conduct to come within the *Trade Practices Act*, it must bear a trading or commercial character and this means that there has to be a number of similar activities or transactions. On this basis, it is unlikely that s.52 of the *Trade Practices Act* would apply to all cases of misleading and deceptive conduct, especially in cases where the property promoter has given property investment advice once or twice only which may not be sufficient evidence to argue that the promoter was "in trade or commerce".

The second is in relation to the "misleading or deceptive conduct" element. It may be true to say that when a property promoter is providing inflated figures and unrealistic advice on the potential growth and incomes in the property intended to be sold at a mark-up price, the best

[10] Note that it is not conclusive that ACCC has the power to deal with matters involving misconduct in the provision of property investment advice. The Trade Practices Act has been chosen as an example, because unlike the ASIC Act and the various other state fair-trading Acts, s.52 appears to be less problematic that the other counterparts. The words in s.52 of the TPA appear to be clear and unambiguous, while the words in s.12DA of the ASICA expressly point out that misleading and deceptive conduct must be in relation to financial service and this last part is complicated due to the convoluted definition of "financial service".

[11] *Concrete Constructions (NSW) Pty Ltd v. Nelson* (1990) 169 CLR 594

[12] *Concrete Constructions (NSW) Pty Ltd v. Nelson* (1990) 169 CLR 594, at 604 (per Mason CJ, and Deane, Dawson and Gaudron JJ)

cause of action against the promoter would most certainly be on the ground of misleading and deceptive conduct under s.52 of the *Trade Practices Act* (or the equivalent provision from the state Fair Trading legislation if the promoter is a sole trader). Although, the element in s.52 appears to be clear and unambiguous, proving a breach of that element is in fact difficult when the case turns to property investment and potential growth and incomes, the subject of which involves opinions, predictions and some calculated guesswork.

It is well known that when advice given involves opinions and predictions about a future matter, such advice must be based on facts. What is not clear is this: Will the property promoter be held liable under the "misleading and deceptive conduct" element if, at the time of providing advice on property investment and potential growth and incomes, the advice was well founded and fact-based, but subsequently that advice is no longer true because of the sudden change in the property market which has affected the true nature of that advice? Further, it is discovered subsequently that the promoter was unlicensed and unqualified investment adviser, will the promoter be in a position to put forward a defence that the advice given was sound and reasonable (given that the current provision is a strict liability provision)? In short, the real difficulty is whether an advice in the form of opinions and predictions can be interpreted as misleading really depends on the circumstances and the background facts of each case and there is no short cut to the analysis.

While s.52 has general application in respect to misleading and deceptive conduct, there is no indication that it can be used in relation to regulating property investment advice. This is because under the same Act, s.53A provides instances of misleading or deceptive conduct in connection with the sale of land and creates an offence if the corporation is:

> "... making a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land."

Section 53A is an extension of s.52. Essentially, s.53A applies when a false representation has been made in respect to the "land" itself (such as the dimension or the quality of the land) and the section has absolutely no bearing on matters concerning property investment advice or matters concerning any future financial gains connecting to the land.

If the provision in the TPA were to apply to property investment advice cases, then the element of "misleading and deceptive conduct" needs to be clarified and be amended to broaden the scope and include future matters connecting to financial gains and property investment.

It should be noted that in the Henry Kaye's case, although ACCC was successful in establishing a breach of s.52 at the Federal Court, the defendant appealed against the single judge decision on the ground that s.52 was irrelevant and that ACCC had no jurisdiction. The defendant however withdrew his appeal application before the hearing. It is uncertain as to whether the Federal Court will again adopt a similar approach in the future given that there was a near challenge to the application of s.52 in the area of property investment advice.

Problem 3: Anybody can become property investment adviser without licence, training or qualification

In the current system, there is no law that prevents a person from entering into the property market and give investment advice. In other words, there are no barriers to entry into the property market. Anybody can walk into the market and become "a property investment adviser" without the need to have any formal qualification, training or a reference check.

The current system is open to abuse. It does not segregate people who are legally qualified to provide property investment advice (such as the real estate agents, the certified property valuers and the like) from people whose only intent is to get rich fast by coming into the property market and take advantage of the loopholes wherever possible (sometimes known as "property spruikers"). It is unlikely that these property promoters (or "spruikers") will be too concerned with fines, penalties or punishment that are already in place in the various Acts. When the community knows that the law is loose, then between the choice of playing safe and getting rich fast, there are certain property promoters who may be willing and prepared to take risks.

The absence of clear barriers to entry is a serious cause for concern in the area of property investment advice. Although one could argue that the heavy fines and penalties contained in the various Acts are enough to operate as a warning to discourage people from engaging in misleading or deceptive conduct or in unconscionable conduct, the reality is quite different and this is evident from the voluminous court cases on s.52 and s.51AC. The current provisions[13] only allow corrective actions to be taken *after* misconduct has occurred and only *after* the matter is proven in court that any compensation to be received is a matter of discretion for the court. On this point, the current system is inadequate as protection for consumers at large.

What is necessary is a firm set of barriers to screen out certain unqualified people from entering into the property market in the first place, otherwise the already licensed estate agents, licensed property valuers, qualified accountants and the like are financially and competitively in a serious disadvantaged position.

Problem 4: Definition of "financial service" and "financial product" in the ASIC Act are too restrictive

In the current state of the law, what is commonly understood to be a "financial service" may not be so under the *Corporations Act* and the ASIC Act. The term "financial service" has a special meaning under those Acts. Currently, there is a serious disparity and unequal treatment between the regulation of investment advice about shares, bonds and other intangible securities and regulation of investment advice about real property. In the former, the giving of investment advice about shares, bonds and other securities is regarded as "financial service" under the *Corporations Act* and the ASIC Act, and is therefore regulated under those Acts. In the latter, there is no absolute regulation on property promoters unless

[13] This is indicated in s.52 which reads "A corporations *shall not* in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive." Similarly, s.51AC reads "A corporations *must not* in trade or commerce ... engage in conduct that is in all the circumstances unconscionable." (italics added)

the property promoter happens to be a licensed estate agent or a licensed property valuer, in which case the state *Estate Agents Act* would apply to regulate him, her or the corporation concerned.

Under Chapter 7 of the *Corporations Act*, a person who is intending to provide "financial services" is required to apply for an Australian Financial Services licence from ASIC and such person will then be regulated under the licencing, disclosure and conduct framework within that Chapter. On the other hand, a person who is not a holder of such licence and who is providing financial services will be subject to punishment under Part 2 Div 2 of the ASIC Act. Both of these parts have been in existence since March 2002 and they both have the same meaning for the term "financial services".

It is interesting to note that Part 2 Div 2 of the ASIC Act is modelled substantially similar to Part V of the *Trade Practices Act*. For example, s.12DA is phrased substantially similar to s.52 while s.12CC is substantially similar to s.51AC. Section 12DA is about prohibition on misleading or deceptive conduct in relation to "financial services" while s.12CC is about prohibition on unconscionable conduct in relation to "financial services". It is clear that Chapter 7 would not apply to the current situation as the emphasis is on having a licence.

Under the current wording of Part 2 Div 2 of the Act, s.12DA and s.12CC are again unhelpful. The ASIC Act provides a very narrow meaning to the term "financial service" which is said to mean and include "financial product". In turn, the term "financial product" is said to cover such things as consumer credit, securities, derivatives, general and life insurance, superannuation, deposit accounts and non-cash payment facilities such as smart cards and cheques. The definition does not include property investment or property investment advice. In fact the Act makes no mention of the term "real property" or "real estate". On the whole, the Act does not recognize property investment advice as a form of financial service when in the ordinary sense of the meaning it is classed as in the same group. In the current form, the licensed estate agents and the licensed financial advisers are being regulated while the unlicensed property promoters are still on the loose – this is clearly inconsistent and unacceptable.

Problem 5: Lack of definition of property investment advice, etc.

As mentioned earlier, the terms "property investment advice" and "property investment adviser" are not defined in any Acts at all. This may be a contributing factor in causing uncertainty and confusion as to which Act or which piece of law is most appropriate to use and apply in initiating proceedings against a property promoter for engaging in, for example, misleading or deceptive conduct or unconscionable conduct.

Suggestions for reform:

The current system could be improved by putting in place a uniform legislative scheme designed primarily for the regulation of real property investment advice (as opposed to personal or other intangible properties) and not to be mixed in with the currently existing laws on "financial services" and "financial products" under Chapter 7 of the *Corporations Act*. In my view, based on the constitutional structure, ASIC may not have the jurisdiction to

administer and oversee matters concerning real properties and real property investment advice (which is a matter I will discuss in the next heading). It would be better to have the new proposed law managed and administered by an entirely new Commonwealth agency under an entirely new separate piece of national legislation.

In the new proposed law, there should be terms regulating how an individual can become a property investment adviser by satisfying a set of entry criteria. There should be a mechanism to prevent property promoters from entering into the market in the first place and take advantage of the vulnerable and less educated investors and first home buyers. Terms regarding barriers to entry to be included in the proposed legislative model could be:

- The requirement for appropriate qualification, training and a licence to practise;
- The requirement for character and good standing reference;
- The need to have professional indemnity insurance and to pay annual premiums to protect consumers when receiving property investment advice; and
- The need to participate in on-going professional developments and education.

A summary of other operational terms to be included in the proposed model are:

- Terms that have the effect of codifying the duty of care and standard of care expected from a licensed property promoter;
- The requirement of a Disclosure Statement to be given to the potential investment advice seekers before any investment advice can be given and this also applies to a promoter presenting an educational seminar on property investment and the like;
- Statement of conflict or potential conflict of interest in the property concerned to be disclosed, either actual or apparent conflict or otherwise a mere sense of conflict included;
- The term "property investment advice" and other related terms be defined as broadly as possible in order to capture all kinds of investment advice dealing with real properties;
- A prohibition on the promoter arranging finance or acting as finance broker on the same transaction;
- A requirement that the promoter advises client to seek independent advice after contract given and prior to execution
- A set of protocols be included to deal with various forms of misconduct, including the adaptation of the misleading and deceptive conduct and unconscionable conduct provisions from Part V of the *Trade Practices Act;* and
- In order to ensure that the proposed Act would apply to a single act of misconduct or a one-time only activity, the misconduct provisions should be phrased so as not to include the element of "in trade or commerce".

In designing the proposed model, one should bear in mind that all people of all age groups and of all backgrounds have the potential to become a property "investor" and seeking property investment advice. They are not necessarily an investor as such in the sense of an occupation, but they do need good basic property investment advice in order to make a firm decision on, for example, purchasing a family dream home or a retirement home. Further, although, computers and technologies are rapidly growing in our community, one should bear in mind that not all people are using computers to access information. The elderly citizens

and the migrant workers are unlikely to know how to use computers effectively. For these reasons, it is essential to have provisions in the proposed Act requiring the various types of Disclosure Statements to be readily available in printed form and in different languages, perhaps the more popular languages.

Term of Reference No. 2:

COMMONWEALTH'S ROLE IN REGULATING FINANCIAL AND PROPERTY INVESTMENT ADVICE:

As mentioned above, the laws in respect to the regulation of real property investment advice are currently in a state of confusion and uncertainty. There is a disparity in the treatment between investment advice about real property, which is currently unregulated (or regulated under a large body of both State and Commonwealth Acts and common law) and investment advice about other intangible financial products such as shares bonds and securities, which are subject to strict regulations. In other words, when a property promoter has given wrong advice about property investment, both the States and the Commonwealth are unsure of their respective roles because of the conflicting legislation. In order to serve the consumers and the community in the best possible way, the most appropriate approach would be to combine the laws into one single uniform Act to be administered by a Commonwealth agency. The question is does the Commonwealth have the power to enact laws in respect to property investment advice?

Under the *Commonwealth Constitution,* s.51 contains a list of subject matters in which the Commonwealth Parliament has the power to make and enact laws. The s.51 list does not specifically refer to "real property" or "property investment". The closest provision is perhaps s.51(i) which permits the Commonwealth Parliament to enact laws with respect to "trade and commerce with other countries, and among the States". This, however, is unhelpful.

In the absence of clarity on the Commonwealth's legislative powers under s.51, the individual States are presumed to have the residual powers. For example, s.16 of the *Victorian Constitution* states that the Victorian Parliament shall have power "to makes laws in and for Victoria in all cases whatsoever." Other States have the equivalent provisions in their own Constitutions.

One way in overcoming this predicament is for all the States and Territories to refer their powers to the Commonwealth and for the Commonwealth to then legislate on behalf of all the parties. This referral of powers is possible under s.51(xxxvii) of the Commonwealth Constitution where that section states that the Commonwealth Parliament has power to make laws in respect to:

> "Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law."

This referral of power under s.51(xxxvii) has been used previously and appears to be working harmoniously. The most recent example was in 2001 where, because of the constitutional challenge on the validity of the federalized nature of the Corporations Law scheme which was

wrongly passed by the Commonwealth,[14] the States subsequently agreed to resolve the constitutional crisis by referring their powers to the Commonwealth to enact on their behalf. The Commonwealth and the States also agreed that the referral would have a sunset clause to allow a State to terminate it after five years. Consequently, the Corporations Law scheme became the *Corporations Act* 2001 (C'th). This referral of power has since been extended for another 5 years. With the use of s.51(xxxvii), the legislative framework for the regulation of property investment advice could follow a similar model to achieve a desired outcome.

It has been suggested by a few commentators[15] that property investment advice should be incorporated into the existing financial services provisions in Chapter 7 of the *Corporations Act* 2001 and be regulated in the same way, because property investment advice is in actual fact a form of financial service. I hesitate to go down that path for the following reasons:

- The financial services provisions in Chapter 7 of the *Corporations Act* are still relatively new. The provisions were introduced as law through the Financial Services Reform package in March 2002 and many of the principal provisions have not been tested in court for their validity. There is a chance that if the court strikes down the Financial Services Reform package for lack of clarity or for whatever reasons that may be, the property investment advice component may also be struck down with it.

- Traditionally, the *Corporations Act* has always been thought of as an Act regulating companies, shares, bonds, securities and all other types of intangible properties and choses in action. It is an Act that was specifically designed to deal with all matters relating to and incidental to companies. The Act was never thought to have a sense of consumer protectionism. The sheer volume of the *Corporations Act* is already a disincentive for some law practitioners and academics to get a good handle on it. To add any more unrelated topics such as 'real property' into the Act would potentially cause a melt down, as this would naturally expect law practitioners and academics to become not only corporations law expert but also property law expert.

- It is anticipated that "property spruikers" will always be there and around in our community. There is a vastness of land in Australia and the housing developments will continue to grow. The laws with respect to property investment and property investment advice will also continue to grow and become even more complex as further changes and developments are added to the existing laws. For these reasons, it is sensible to keep all related laws in one place under the same Act wherever possible. A new Act to regulate property investment advice would be a good start.

- Chapter 7 of the *Corporations Act* is not just about regulations of "financial services" and "financial products"; it also has provisions dealing with insider trading of securities and other forms of market manipulation. It would be conceptually difficult to insert "property investment advice" provisions into that Chapter. Changes to the definition of "financial services" and "financial products" would in turn require changes to some other provisions both within and outside Chapter 7. It would be

[14] See *Re Wakim (*1999) 17 ACLC 1055, *Bond v. R* (2000) 169 ALR 607, and *R V. Hughes* (2000) 171 ALR 155
[15] These commentators are referred to in the June 2005 Report of the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services.

simpler however to use the Chapter 7 model and draft a whole new Act to regulate property investment advice and property investment advisers.

CONCLUSION:

I hope the above submission is useful for the Law Reform Committee's consideration. My areas of research and teaching are in corporate/commercial law.

I would be happy to answer further queries that you may have. I would also be interested to receive follow-up materials on this matter.

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