

Victorian Parliament Law Reform Committee
Inquiry into Property Investment Advice

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LRC Inquiry into property investment advice

Property investment and property marketeers

The issue of regulation of the investment property industry has been the subject of three government reviews in as many years, the Ministerial Council on Consumer Affairs (MCCA) released discussion paper in August 2004 and the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services report was released a year later in July 2005.

An important question raised by this inquiry is the respective roles of the Victorian and Commonwealth Governments in regulating financial and property investment advice.

We appreciate the efforts of State and Territory governments in this area over the years and the involvement of Ministerial Council on Consumer Affairs. However, we submit that in the modern national Australian economy, property investments should be seen as a national matter to be regulated Australia-wide by ASIC – people frequently invest in property across state and territory borders and anecdotal observations of the practices of investment property marketers suggest that interstate marketing is prevalent. Investment properties in some Queensland coastal regions have been heavily marketed into Melbourne and Sydney in recent years, presumably with factors such as relatively lower purchase prices and coastal proximity expected to assist in inducing buyer interest.

A national approach to property investment builds on ASIC's existing track record in financial services with its regulation of the financial sector.

ASIC regulation is in place in this area, as illustrated by current ASIC matters involving the collapse of property investments involving Westpoint, Fincorp and Australian Capital Reserve.

1. ASIC regulates “financial products”

ASIC regulates “financial products as defined in *Corporations Act 2001* (Cth) s 763A.¹ One aspect of a financial product in s 763A(1)(a) is making a financial investment. This includes managed funds which could invest in property.

Financial investments are defined in s 763B² as occurring when:

“(a) the investor gives money or money's worth (the contribution) to another person and any of the following apply:

(i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;

(ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);

(iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and

(b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.”

Note 1(b) to s 763B includes as an examples of an action that constitutes making a financial investment a person contributing money to acquire interests in a registered scheme, because the scheme uses the money to generate financial or other benefits for the person and the person, as a member of the scheme, does not have day-to-day control over the operation of the scheme.

Note 2(a) to 763B includes as an example of an action which does not constitute making a financial investment the under this subsection a person purchasing real property.

The s 9 definition of “investment” refers to an investment in a company, disclosing entity or other body by means of a share, debenture, a legal interest in a share or debenture, or an option to acquire or dispose of such investment.

¹ This section is cloned in the *Australian Securities and Investments Act 2001* (Cth) as s 12BAA for the purposes of unconscionable conduct and consumer protection in relation to financial services.

² Paralleled in ASIC Act 2001 (Cth) 12BAA(5).

2. Specific “financial products”

More financial products are included in s 764A.³ These include a registered scheme (s 764A(1)(b)) and a managed investment scheme (s 764A(1)(ba)), and would include agricultural investments such as agribusiness investments (olives, pinetrees).

Each includes investment in a time share.

3. Specific exclusions from “financial products”

Section 765A contains exclusions from financial products, of which the most important for this submission is the exclusion of retirement villages in para (a) as an “excluded security”, defined in s 9 as a retirement village. Retirement villages are also excluded from the definition of “managed investment” in para (b) of s 9.

4. “Financial product” regulation by ASIC – licensing, marketing, disclosure

There is extensive ASIC regulation of financial products under Corporations Act Chapter 7, updated by the *Financial Services Reform Act 2001* (Cth).

The Corporations Act provides for the licensing of providers of financial services (brokers, dealers and investment advisers), administered by ASIC if the following pre-requisites are fulfilled.

ASIC regulation includes the need for an Australian Financial Services Licence (AFSL):

AFSL	Chapter 7 Financial services and markets
1. AFSL: Australian financial services licence (brokers/dealers/advisers):	ss 911A - 911D
(1) "person", who	person or entity
(2) "carries on"	regular course of conduct
(3) a "financial services business" (s 761A), which provides a "financial service" (s 766A), which includes	
(a) "financial product advice", which includes .. advice on a "financial product", which means	s 766B ss 763A, 764A (www, talkback radio etc)
... "makes a financial investment" (shares), and	s 763B
... "manages financial risk" (futures)	s 763C
(b) "dealing" in financial products (broker)	s 766C
(4) no AFSL if FP "only incidental"	s 763E
	s 913A; reg 7.6.03

³ Paralleled in ASIC Act s 12BAA(8).

2. No AFSL needed - exemptions	s 911A(2); <i>Corporations Regulations</i> reg 7.6.01
eg not "financial service"	s 766A(2) -
• Accountant	reg 7.1.29 (accountants)
• clerk or cashier	s 766A(3)
eg not "financial product advice"	s 766B
• Lawyer	s 766B(5)
Financial product only incidental	s 763E

5. Regulation of advertising, marketing, representations or advice

Regulation under the Corporations Act includes disclosure of "property investment advice" in the Financial Services Guide, the Statement of Advice and the "know your client" obligations.

This includes disclosure of the matters of concern to the inquiry:

"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)."

ASIC can mandate further disclosure and requirements under the Corporations Act by imposing licence conditions in s 914A.

ASIC can monitor the fulfilment of are the obligations of the licensee under s 912A, and especially the obligation to act "efficiently, honestly and fairly".⁴

The Corporations Act contains existing restrictions on the use of the words "independent", "impartial" or "unbiased" (s 923A).

6. ASIC supervision and co-regulation of Australian financial services licensees:

	Chapter 7 Financial services and markets
1. ASIC can suspend or cancel a licence - without a hearing	s 915B

⁴ eg Paul Latimer, *Providing financial services "efficiently, honestly and fairly"* (2006) 24 *Company and Securities Law Journal* 362.

2. ASIC can suspend or cancel a licence - with a hearing	s 915C
3. ASIC banning order – with or without a hearing	ss 920A - 920E

7. Work Cover case

There is no doubt that Commonwealth can regulate any aspect of corporations under the corporations power (Constitution s 51(xx)) – what are now called “constitutional corporations”. This was confirmed in the workplace relations case in 2006,⁵ where the High Court rejected the challenges by the States and unions to the constitutional validity of the Commonwealth Government’s new workplace relations laws based on s 51(xx). The court held that the power under s 51(xx) includes regulation of any aspect of foreign, trading or financial corporations - including relationships third parties or its employees.

Add to this the Commonwealth’s other powers to regulate the national economy under its powers over trade and commerce, and post and telegraph, as used in for example the *Trade Practices Act 1974* (Cth).

Only the most determined “states’ righters” would not accept that in modern Australia the Commonwealth Parliament should have 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.

8. Consumer protection legislation in regulating property investment advice - Misleading and deceptive conduct

Should the propositions above not be accepted, either generally, or in the context of a specific case, resulting in a view that real estate investments do not fall under the ASIC Act as investments, there are provisions of the Commonwealth Trade Practices Act and that apply to and could be used to regulate conduct in relation to the promotion and sale of investment properties. The consumer protection perspective was understandably the primary approach adopted by the MCCA when considering this issue.

Trade Practices Act

s51A - representations to future matters - reasonable grounds

s52 - Misleading deceptive conduct generally

⁵ *New South Wales v Commonwealth of Australia* [2006] HCA 52; (2006) 81 ALJR 34.

53A(1)(b) - false or misleading representation concerning characteristics of land

These provisions provide for some regulation of estate agents and others who may be involved in the promotion of investment properties. The Commonwealth review⁶ suggest that the consumer protection provisions 'only allow corrective action to be taken after misconduct has occurred'. This is true to an extent, however the *Trade Practices Act* does provide for interlocutory injunctions which can have a preventative effect in relation to future conduct.

9. Misleading and deceptive conduct action against estate agents

These provisions have been the basis of action against agents engaging in price based misleading and deceptive conduct, *ACCC v Gary Peer & Associates Pty Ltd*⁷. Whilst the ACCC action against an agent for misleading and deceptive conduct (underquoting to prospective purchasers) in the *Peer* case was successful, the sentence, merely costs, could not be considered to have sent a clear message to estate agents that there were significant risks from breaching consumer protection provisions. The only deterrent that could be reasonable expected from this outcome might be an understandable reluctance on the part of the ACCC to commit finite resources in efforts aimed at regulating estate agents. The ACCC Chairman Graeme Samuel is quoted as describing the decision described as "a slap over the wrist with a feather".⁸

Whilst not directly concerned with the provision of property investment advice this case shows the applicability of the Trade Practices Act to those selling property. While the Real Estate Institute of Australia (REIA) argued in the MCCA process that part of the problem with investment property marketers was that they are often not licensed real estate agents so have had no relevant training,⁹ estate agents who are duly trained and licensed in Victoria are frequently having their conduct called into question in relation to misleading prospective buyers as to price of properties for sale.¹⁰

8. Consumer protection legislation in regulating property investment advice - Unconscionable conduct

High pressure sales techniques are frequently cited as a characteristic of investment property marketing. The unconscionable conduct provisions of the *Trade Practices Act* may apply if such conduct can be established.

10. Conclusions

⁶ June 2005 Parliamentary Joint Committee on Corporations and Financial Services Property Investment Advice – Safe as Houses? p12.

⁷ [2005] FCA 404.

⁸ Chantal Rumble and Ben Schneiders Under attack, *The Age*, 25 May 2007, available at <http://www.theage.com.au/articles/2007/05/24/1179601572013.html?page=fullpage#contentSwap2>.

⁹ Ms Verhoeven, Transcript of evidence, 28 April 2005, p. 7.

¹⁰ Chantal Rumble and Ben Schneiders Under attack, *The Age*, 25 May 2007, available at <http://www.theage.com.au/articles/2007/05/24/1179601572013.html?page=fullpage#contentSwap2>.

It is suggested that there exists in current legislation, provisions that can be effective against misleading and deceptive conduct in relation to investment properties. The low incidence of actions brought under these provisions may be indicative of the resources¹¹ or political will available to regulate the conduct of estate agents at Federal level, but this situation and the penalty outcome in the case outlined above do not indicate a legislative deficiency in the ability of the Commonwealth to regulate misleading and deceptive conduct, in whichever industry it occurs.

Demarcation issues between ASIC and the ACCC were raised in the Federal Parliamentary Joint Committee review¹², it was suggested that 'in recent times the ACCC and ASIC have cooperated more closely through the exchange of information, the referral of matters to the gency best placed to take them on, and the cross-delegation of powers' this was formalised with the signing of a Memorandum of Understanding in December 2004.

Whilst the legislative provisions currently in place will apply to the property investment industry, it is clear that the field is not adequately covered at present, this view was evident in many submissions to the Federal Parliamentary Joint Committee review and remains accurate.

As was concluded from the Federal Parliamentary Joint Committee review the Commonwealth should act to legislate and regulate more comprehensively in this area as it has done to regulate the franchising industry for example.

¹¹ WPA, Submission to Parliamentary Joint Committee on Corporations and Financial Services Property Investment Advice – Safe as Houses? 15, p. 5. The REIA made a similar point about resource constraints, Mr Stevens, transcript of evidence, 29 April 2005, p. 11.

¹² Parliamentary Joint Committee on Corporations and Financial Services Property Investment Advice – Safe as Houses? p15.