

# CORRECTED VERSION

## LAW REFORM COMMITTEE

### **Inquiry into property investment**

Melbourne — 15 September 2007

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#### Witness

Mr G. Brody, Director, Policy and Campaigns, Consumer Action Law Centre.

**The CHAIR** — Thank you for coming along to talk to us this morning. I think you probably know everyone on the committee, so I will not need to introduce you to everyone. Welcome, and thank you very much for your written submission as well. I am bound to advise you that what you say in this hearing is protected by parliamentary privilege, but if you say perhaps the same things outside, that is not afforded to you. We run the hearing informally. If you spend 15 minutes or so to set up and tell us about your submission and about your views on the terms reference, that would be good, and then we will have a general discussion.

**Mr BRODY** — I do have a prepared statement. Thank you for providing me with the opportunity to give evidence at the hearing. To give you some background, my name is Gerard Brody and I am the director of policy and campaigns at the Consumer Action Law Centre. Consumer Action is an independent not-for-profit campaign-focused casework and policy organisation. It was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service. It builds on the significant strengths of those two centres. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and it is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues.

I am sure committee members have read the submission from Consumer Action so I will not repeat it in detail, but I would like to make a few points from it. Firstly, we are concerned about the current regulatory and analytical framework that quarantines property investment advice from financial advice. As you are aware, financial advice is subject to the Commonwealth FSR regime, which requires licensing and disclosure requirements and has oversight by the Australian Securities and Investment Commission. Conversely, property investment advice is only regulated in a limited way. This has two consequences for consumers: most obviously, consumers could be subject to property investment advice that is of poor quality or involves significant misconduct, and I will come back to that point. But equally important is the fact that 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. It is Consumer Action's view that it is only when the market for advice is truly competitive and open that consumers will benefit. We believe the current regulatory framework prevents that.

I know the committee has asked for evidence of consumer detriment in relation to property investment and advice, particularly in relation to spruikers that operate through seminars. I must say that Consumer Action has received fewer complaints about property investment advice and seminars in the last 18 months than previously. However, we believe that these matters are cyclical and that it is very possible that misconduct could happen again in the future. We continue to see advertisements that concern us. Typically these are for wealth building, and the provider does not disclose any form of financial services licence. By not providing such a licence the provider is likely to be providing property investment advice or education. I have got two recent advertisements here that I am happy to circulate.

Consumer Action's predecessors assisted many consumers with matters relating to the infamous Henry Kaye. Consumers who dealt with Henry Kaye were subject to high-pressure sales conduct and unfair contracts. Particularly vulnerable consumers were targeted. I want to tell you about one of our clients, a Miss M. She did not deal with Henry Kaye but with a Kaye protégé known as George Mihos and his outfit, the Today Not Tomorrow Institute. 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 Tonight* — Today Not Tomorrow Institute, not *Today Tonight*, sorry — —

**Mrs MADDIGAN** — Although now that you mention it — —

**Mr BRODY** — 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 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.

We were also concerned about a number of websites or ads that promote property investment as a way of mortgage minimisation or using equity acceleration — common buzzwords. One such site is [homeequity.net.au](http://homeequity.net.au). The main message of these ads is that they can cut years off your mortgage, but further examination suggests this is done by borrowing more funds, secured by equity in your home, and investing in property. It appears that the company would advise, and probably arrange, the property investment. There is no suggestion that investments can go down in value or that risks are involved. ASIC has recently obtained Federal Court orders against an outfit that promised large savings by refinancing consumers into a mortgage minimisation product — a statement that turned out to be untrue. We are similarly concerned that these products are misleading, yet are able to trade without hinder.

Other concerning examples involve promotions relating to wrapping. Wrapping involves investing in property that is then subject to a vendor-terms agreement with an end consumer. The promoter arranges and manages the relationship between the investor and the end consumer. Our service has assisted many consumers on the consumer side rather than the investment side of these arrangements. Often the consumers are disadvantaged because of unfair terms in those vendor-term contracts, even when they have been evicted, because the property investor has fallen into arrears on their investment loan and the ultimate mortgagor has sought to recover the property. Many of the promoters of these schemes portray the schemes as normal real estate transactions and that are virtually free. Commonly they also say they are providing a social benefit by providing or allowing low-income consumers to enter the property market.

I want to talk a little bit about the regulatory environment and possible solutions. Firstly, I understand the committee is interested in possible self-regulatory approaches. 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.

We would also be concerned about any solution that relied entirely on improving the financial literacy of consumers. While we support financial literacy initiatives, much of the advice that is sold in seminars is actually done by way of encouraging consumers to increase their knowledge about financial matters and the property market through education seminars. These seminars are targeted at people who are trying to improve their financial literacy. If it is these consumers who are then being subjected to high pressure sales or, worse, misleading information, then improved financial literacy will not be the answer.

In our submission Consumer Action supported a national response to regulation so that property investment would be regulated in a similar way to other financial services. We believe this would be the simplest and most sensible approach. All states and territories could legislate on their own in the absence of federal regulation. We believe this would just encourage forum shopping by rogue traders. The particular benefit of the national regime is the licensing framework which charges one regulator — that is, ASIC — with oversight of the whole industry. Such monitoring, compliance and enforcement powers are conducive to an environment of high-conduct standards. The national regime would also require membership of industry external dispute resolution schemes. We are very supportive of such schemes as they provide accessible, free, informal and quick dispute resolution services to consumers.

One concern we do have with the national regime is its overreliance on disclosure as a consumer protection mechanism. We are 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.

We are also concerned about how disclosure is used to address conflicts of interest. We think this is inappropriate. In our submission we refer to research that shows that people do not sufficiently discount advice from biased advisers as much as they should. In fact where conflicts of interest are disclosed they are often more likely to trust the adviser as they think they are being honest rather than distrust them.

I am of the view that it is better to eliminate conflicts rather than manage them. I am aware that the committee is interested in how any regulatory regime for property investment apply to real estate agents who are already licensed. Real estate agents act for vendors, not investors. If they provide property investment advice to vendors, then this would be a significant conflict of interest. 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.

Finally, I want to say something quickly about cooling-off periods, which I understand is another protection being considered by the committee. We agree that cooling-off periods can be helpful for some vulnerable consumers. However, in other markets we are increasingly seeing consumers experience difficulties, despite the existence of cooling-off periods, and we are concerned that there is a feeling that, if there are cooling-off periods in place, complementary protections are not required.

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. This is similar to the way we always overvalue how much our own house or car is worth. 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 choice; otherwise we would be admitting to ourselves that we cannot make good decisions and are not to be trusted. If we get into that cycle, we would be constantly depressed and never make a good 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. I will finish on that.

**The CHAIR** — Thank you very much. You talked about regulatory schemes and around federal legislation not having voluntary schemes. I wonder if you could talk to us a bit about how that might apply to so-called educational seminars and products? While you are doing that, could you reflect a bit on Queensland laws relating to marketeering and also some changes made in New South Wales? I wonder if you have looked at those. Could you reflect on that cluster of issues?

**Mr BRODY** — I am not so much aware of the New South Wales laws, but I am aware of the Queensland laws. The major problem we see with the marketeering laws in Queensland is that they do not create a licensing regime, and therefore they do not really give the power to a regulator to have a clear understanding of who the players are in the market and to provide enforcement activity when it is required. I think that there needs to be more thinking by policy-makers about the difference between advice and education. I think 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.

**The CHAIR** — Would they describe their activities as part of promotion and advertising, and how might you regulate that or control that to some extent?

**Mr BRODY** — We do already have good regulation for advertising in relation to misleading conduct and also unconscionable conduct. We think that regulators should be better able to enforce the legislation when they see instances of misleading conduct in the promotion of education seminars and promises that people will get rich quickly when that is not necessarily the case.

**The CHAIR** — Do you think that the agencies that are currently responsible for implementing consumer law are acting quickly enough or with enough energy?

**Mr BRODY** — We think there would be more of a case for better enforcement and quicker enforcement. 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 enforcement action.

**The CHAIR** — But is that a weakness of the regulations themselves or a weakness of the regulators acting on the regulation?

**Mr BRODY** — I think in this circumstance it is probably more a weakness of them acting on the regulation; that is right.

**Mr CLARK** — I would like to ask about the two advertisements that you very helpfully distributed for us. One of them was in the name of Custodian WealthBuilders in an unnamed publication dated 8 October 2007. The other one, headed ‘Advanced Warning’, advertises a seminar to be held on 23 September — I presume of 2007.

**Mr BRODY** — That is right.

**Mr CLARK** — It gives the name of someone called Peter Flanagan. I suppose my question is in three parts: first of all, do you think there is necessarily a problem with both of those advertisements; if so, secondly, do you think there is action that can and should be taken against the publication of either of them or of the things that may underlie either of them under the existing legal regime; and thirdly, if you think the existing legal regime that deals with them is not adequate, what changes do you think need to be made to the legal regime in order for them to be properly dealt with?

**Mr BRODY** — Without having attended the seminars, it is difficult for me to say whether they are actually engaged in conduct that is in breach of current regulations or is creating detriment that needs new regulations. I think that the regulators involved should be ensuring that people running those sorts of seminars out there are not engaging in misleading conduct. We have received complaints in the past from consumers who are told about how to get rich quickly, only to be subject to high-pressure sales at the seminars. We think that more oversight of what goes on at those sorts of seminars should be undertaken. But perhaps the reason that there is not that oversight is the fact that currently those property investment advisers are not required to be licensed in the same way that financial services investment advisers are. Financial services investment advisers are usually considered more of a professional, not having to advertise in the free *mX* magazine. It is about improving the quality and standards of the advice that is delivered. I think that better regulation or the same regulation that applies to financial services should apply to property investment advice to improve the conduct standards of those involved.

**Mr CLARK** — If you had this licensing regime, would you then presumably require the licence number or the qualifications of the presenter to be included in any advertisements advertising seminars?

**Mr BRODY** — That is correct.

**Mrs MADDIGAN** — Do you have a client profile of the sort of people you have dealt with in relation to property investment problems?

**Mr BRODY** — As I said earlier, we have not had a lot of recent ones, but usually they are young people, often naive, who are struggling with their finances already, as in the case that I mentioned. We see these advertisements in the free weekly magazines and the local papers that are targeted at those sorts of consumers, so I think that would be the general consumer.

**The CHAIR** — You implied there are fluctuations and that at the moment we are at a point where there are not a lot of problems coming through but they could re-emerge. What drives that?

**Mr BRODY** — I am not entirely sure what does drive it — maybe just changes in the market. I did touch a bit on the mortgage minimisation schemes and things like that. We are increasingly concerned about those in the market currently because there is increasing mortgage stress in Australia and interest rates have increased recently, and people will be looking to get a better deal. We are concerned that consumers will not be getting a better deal when they refinance with some of those products, and some of them, such as the one I described, involve property investment as a solution.

**Mrs MADDIGAN** — What is the best way to get to young people to educate them, do you think?

**Mr BRODY** — Education is a difficult thing. I think it should start in schools. Financial literacy should really start in schools to ensure that people are adequately cautious about what is being advertised or targeted at them. But it is not only going to be education that solves the problem.

**Mrs MADDIGAN** — Tell us how else to solve the problem. I will put that in the context of what the Property Investment Association of Australia was saying to us before. It is drawing up codes of conduct for its various members, and its view was that if this code of conduct is breached by a member, then it would perhaps have the right to expel that member from the Property Investment Association of Australia, which would be fine for people who work in the property investment industry, but I would have thought that most consumers would not know what the Property Investment Association of Australia was anyway. So it really is trying to have some sort of avenue either of regulation or education that actually gets to the consumers that is the real difficulty, isn't it?

**Mr BRODY** — I think that if, for example, there was a licensing regime that operated alongside the property investment association's code of conduct, and if they breached those ethics and then they were actually expelled from providing property investment it would be a more appropriate outcome.

**Mr DONNELLAN** — That would apply whether they were giving sales advice or the whole lot. In a sense it is really like brokers. They sell and they advise — some advise. I guess some of them are financial planners. You would really have one system and it would be central and national, maybe run by ASIC. You would have to have an accredited — I do not know what the property-speak is; I do not know what we would call it — but have a specialised course like the securities course people have to do, and then there would be the regulations. I have worked in various of those industries in the past, in financial planning and property valuations and the whole lot. What is your experience with fee for service versus commission, because when I was in the financial planning industry many years ago I saw the beginning of the Financial Planning Association of Australia, and its intent at the time was to have a fee for service. I do not know whether that is ongoing or whether it has been varied because its membership has grown — you know what I mean — —

**Mr BRODY** — Yes.

**Mr DONNELLAN** — And there are pressures to get rid of that.

**Mr BRODY** — There have been changes in how fees have been taken in the financial services industry. Originally it was commission, but it is moving more to fee for service. Often it is now based on the asset value of what is being sold. I guess we are similarly concerned about fees on asset sales not being in the interests of consumers because there are incentives to upsell them and things like that.

**Mr DONNELLAN** — Yes.

**Mr BRODY** — We think a fee for service is a more appropriate result, but we are aware that for many people it will mean they are priced out of any sort of financial service advice.

**Mr DONNELLAN** — Yes.

**Mr BRODY** — And I think that is an issue that we all have to explore more.

**Mr DONNELLAN** — You said 'priced out'?

**Mr BRODY** — For low-income consumers or people who might not have the money. It is too big a barrier to getting that advice.

**Mr DONNELLAN** — Really? The investment guys were saying before that they thought people would not be able to get that advice if it was not partly commission based on rebate based or whatever. If someone is investing in a \$200 000 property, in your experience what amount would they expect to pay for that advice? I know this is not something you are doing on a day-to-day basis.

**Mr BRODY** — No. I do not know the answer to that. I am not sure about what is a competitive price for financial service advice, but I think that especially for people investing smaller amounts, a fee for service, when it is charged on an hourly rate, can be prohibitive.

**The CHAIR** — You mentioned in passing about disclosure and how declaring a conflict of interest can have the opposite effect to the one you might think it might have, which is a really interesting piece of information. Are there ways that we can effect disclosure requirements that could actually improve the situation, or are you saying they are always counterproductive?

**Mr BRODY** — No, I do not think they are always counterproductive. It is about requiring disclosure that is easy to understand and clear and gives the important messages up front. I know ASIC is currently doing a lot of work to ensure that product disclosure statements are reduced in size because who reads those big booklets when you get them? No-one. I think it is trying to get to a four-page maximum, and I think that is a good start. There should be some sort of guidance to ensure that the important information about the risks of the product and conflicts of interest are displayed prominently up-front so consumers read them.

**The CHAIR** — What are the key conflicts of interest that are relevant here?

**Mr BRODY** — I think in property investment advice if the adviser is getting commissions or fees from whatever it is they are selling that is a key conflict of interest. In the case of some of those schemes where there is a manager operating for both sides — for example, the vendor term is ‘wrapping arrangements’ — you are paying someone to provide you with the service who is providing it to both parties, and it is not necessarily in your interest. I think there is a range of conflicts of interest.

**The CHAIR** — Okay.

**Mr CLARK** — Can I follow up the proposal to require property investment advisers to be licensed? I just want to probe the issues of how you define who has to be licensed and how you draw the boundaries. Do you have a definition in mind of what property investment advice is for the purpose of requiring people to be licensed? How do you deal with overlapping professions, as it were, such as estate agents? Would you require them to be licensed? If so, for what sorts of activities? What could they do unlicensed? Similarly educational institutions that might run courses for people on how to become property investment advisers. Does that in itself amount to property investment advice that requires licensing? Your thoughts on those issues.

**Mr BRODY** — I think they are difficult questions, and I do not have all the answers. I think we need to do more research on the issue of what the definition of property investment is, and what it covers. My thinking up-front is that it should be a broader definition to ensure that it includes, for example, education seminars which couch themselves as ‘education’ when in fact advice is involved. I guess more analysis and more thinking needs to be done on that issue.

**Mrs MADDIGAN** — Could you perhaps tell us a bit more about the concerns you have with the Queensland legislation? Why don’t you think it is effective?

**Mr BRODY** — It is my understanding — and I am not close to how it works in Queensland — is that because it does not involve a licensing regime, and 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.

**Mrs MADDIGAN** — That is really the hard part, isn’t it, when it comes to the definition of licensing because there is such a broad range of people who give property investment advice.

**Mr BRODY** — That is right; I think you are right.

**The CHAIR** — An issue that we have raised with the other witnesses we have spoken to thus far has been about the publication of property sale prices to help consumers. What are your views around that?

**Mr BRODY** — We think that is 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, including the value of property. Without that information you cannot really say you are able to have a market that works. We think the prices of property should all be published.

**Mrs MADDIGAN** — Even if the owner does not want it to be published?

**Mr BRODY** — Yes.

**The CHAIR** — Even if it is a private sale?

**Mr BRODY** — Yes.

**The CHAIR** — That is clear. Good.

**Mr CLARK** — You talk at page 2 of your submission about licensing of property investment advice through a regime similar to the AFS licence scheme and then you say an alternative response could involve the states and territories enacting uniform regulation of property investment advisers. Do you have a preference as to whether it be Commonwealth regulation or uniform state and territory regulation of licensing? Flowing on from that, do you have a preference as to whether other aspects of regulation of property investment advice additional to licensing should be handled at the Commonwealth or the state levels or at a mixture?

**Mr BRODY** — I guess that our experience with uniform regulation is that it is often inflexible and unable to respond to changes in the market. I thinking particularly of the regulation of credit in Australia and the uniform consumer credit code that operates. There have long been quickly identified 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. For that reason I think that national laws that come from the Commonwealth are the preferable option with a second best being the uniform laws. As far as the enforcement of it goes, I think that the consumer protection agencies can and do work well together. They have a coordinated understanding of how they enforce and monitor the fights with consumer protections.

**Mrs MADDIGAN** — If Victoria went by itself and licensed people in the property investment market, would that work — if the state did it by itself and not as a national initiative, do you think?

**Mr BRODY** — I think it would work. That would be a start. 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 that includes fees and charges 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.

**Mrs MADDIGAN** — So would they still be able to operate and have seminars in Victoria if the company was based in Queensland?

**Mr BRODY** — No. Victorian law would apply to them if they were operating in Victoria.

**The CHAIR** — Gerard, just coming back to these ads here, could you tell us which publications these appeared in?

**Mr BRODY** — I think they were both in the *mX* magazine.

**The CHAIR** — Also, do you monitor these ads and have a bit of a file on them?

**Mr BRODY** — Look, we try to. It is really just when we get the papers. We do not do it systematically but we do have some over the last while.

**The CHAIR** — So if Susan or Kerryn got in touch, you would be able to tell us what publications they are more likely to turn up in and we could have a bit of a look at them ourselves?

**Mr BRODY** — Yes. In our experience it is often the free daily papers or the free regional newspapers, your *Leaders* and *Melbourne Times* and things like that.

**Mr CLARK** — To follow on from that, I was particularly looking at one of these advertisements, the Flanagan one, and with others you see over time and the paid commercials on commercial radio: in the past in particular you often read them or hear them and you think this is outrageous, why aren't the regulators being proactive and taking action against them? One of our previous witnesses said the ACCC should be cracking down on them, ditto Consumer Affairs at a state level. Do you have any observations on how regulators are reacting or failing to react to these sorts of advertisements? Have you tried to get regulators to be more proactive and if so, what sort of response have you got?

**Mr BRODY** — I think that we commonly write to the regulator or raise issues with the regulator with advertising we think is inappropriate or advising that there are these sorts of seminars. In the last couple of years Consumer Affairs has actually been quite good. Although I mention the story that when my client contacted

Consumer Affairs they had not received any complaints about the Today Not Tomorrow Institute, they soon did and were quite quick in ensuring that that entity was investigated. I think it no longer operates any more. Consumer Affairs was the first one in Australia to do that. I think they can be quite good; it is just a matter of making sure they have the resources and capacity to do so.

**Mrs MADDIGAN** — Perhaps it should be like political advertising — you should have to have it authorised by someone.

**The CHAIR** — We will think of that for a recommendation. Gerard, you have done really well. We are 10 minutes ahead of time and we have gone through everything I think we needed to ask you. Thank you very much. This is not the end of it, though. I am sure you would be very happy for Kerryn or Susan to contact you to follow up any other information. Thanks for your contribution and submission. You will receive a copy of the Hansard transcript and you can check over that to make sure it accurately reflects what you have said today.

**Witness withdrew.**