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LAW REFORM COMMITTEE

Inquiry into property investment

Melbourne — 15 October 2007

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Mr B. Stevens, Chief Executive Officer, and

Mr M. Munro, Policy Manager, Real Estate Institute of Australia.

The CHAIR — Good day, Bryan. It is Johan Scheffer speaking. I am chair of the committee. Thank you very much for taking some time to speak us to this afternoon, and I am sorry about the slight misunderstanding about the time. I hope it is okay.

Mr STEVENS — That is fine.

The CHAIR — I would like to introduce to you Robert Clark, who is the deputy chair.

Mr CLARK — Good day, Bryan.

Mr STEVENS — Good afternoon. And I have got Mathew Munro with me, my policy manager.

The CHAIR — Okay. Also we have Luke Donnellan. Robert, Luke and I are members of Parliament and members of the committee. Also we have with us Kerryn Riseley, whom you have spoken to before, and also Susan Brent, who is one of our researchers.

Mr STEVENS — Good afternoon.

The CHAIR — This conversation is being recorded by Hansard reporters. We will send you the transcript, and you are free to make minor changes to that to make sure it reflects the meaning of what you said, but obviously not wholesale changes. You will get that shortly after the hearing. Also I need to advise you that anything that you say or indeed that we say during the course of this hearing is subject to parliamentary privilege, but what you say outside the context of this hearing is not afforded such privilege. Okay?

Mr STEVENS — No worries.

The CHAIR — As I said previously, thank you very much for sending us your submission. The way we run these hearings is that you will have about 45 minutes. We will give you whatever time you require to perhaps give us a bit of a background to where the Real Estate Institute of Australia sits in relation to our terms of reference, and then we will jump in with whatever questions we have and have a conversation from there on. Is it that okay with you?

Mr STEVENS — That is fine.

The CHAIR — All right. It is over to you and Mathew.

Mr STEVENS — Thank you, Chair, and good afternoon to members of the committee. I just might open with a few remarks before we go into questions. By way of background, the REIA is the peak body representing the real estate profession. We have eight members across Australia. They are the eight state and territory institutes, and through those institutes we represent roughly 80 per cent of real estate agencies across Australia. We have two key alliances at the strategic level. The first is with the National Real Estate Franchise Association of Australia. Its members are all the big franchises in Australia — for example, L. J. Hooker, Raine and Horne, Ray White, Century 21, Elders, Richardson and Wrench, and one or two others. We also have a key alliance with the Australian Commercial Property Agents Association, which is a loose federation of all the big commercial people in Australia, including Colliers, Savills, Knight Frank, Jones Lang LaSalle and CB Richard Ellis. What that means is we actually represent the full breadth of the real estate sector — commercial, residential, large and small independent franchises across Australia. Just to give you some idea of the magnitude of some parts of it, there is around \$430 billion in residential property assets under management by licensed real estate agents in Australia, representing an industry that directly employs about 77 000 people.

While this issue is being addressed in Victoria, the issues relating to the provision of property investment advice and the actions of property investment advisers are being considered by other jurisdictions and, as you know, they have been considered at the national level in recent years. In 2002-07, in the wake of the Henry Kaye affair, the REIA made several public statements regarding unregulated property investment marketeers, calling upon state and federal governments to address the consumer and industry concerns in order to stop predatory practices by unqualified property seminar spruikers, as we saw it.

In August of 2003, the Ministerial Council on Consumer Affairs set up a working party and announced an inquiry into property investment. In December 2004 the Parliamentary Joint Committee on Corporations and Financial Services in the federal government also announced an inquiry into the regulation of property investment advice.

The latter inquiry handed down its report, as you know, ladies and gentlemen, in June of 2005. The REIA agreed with a number of its findings and recommendations, but regrettably no action has been taken since, in particular by the Ministerial Council. My understanding is that the Ministerial Council held its inquiry in abeyance until the joint parliamentary committee's report had been tabled. A couple of examples of the findings of the joint parliamentary committee which we thought were very important and which we agreed with include that the report recommended that this issue was a Commonwealth responsibility. It also found that there should be a specific carve-out — not a general carve-out — for real estate agents in the normal course of selling and managing property.

The Ministerial Council report remains outstanding, and given the important role of MCCA in facilitating a consistent national approach to regulatory matters affecting consumers we believe it should be finalised as a matter of priority, and as some of you may know I have taken that issue up with the federal government and have also written to the various state ministers. The activities of some property investment promoters have the potential to cause significant, or should I say, continue to cause significant consumer loss, and there is substantial evidence quantifying previous losses which have occurred.

Problems associated with property investment promoters can be summarised, I think, in a number of areas: for example, the provision of financial advice while not licensed; conflict of interest and non-disclosure of information; misleading and deceptive conduct; high-pressure selling strategies; and finally, high fees and difficulties for consumers in obtaining refunds.

Potential consumer detriment can occur in a number of different instances — for example, they: are ill advised through group seminars and make financial commitments which are not appropriate to their individual circumstances; receive inappropriate financial investment advice from unqualified people; pay a purchase price for property which is above the market value as a result of misleading or deceptive conduct during the seminars or as a result of subsequent marketing to the consumer; have difficulty obtaining refunds, and finally, are not aware of non-disclosed information pertaining to the advice they receive.

The REIA considers that this is a financial services issue and should be addressed by the Commonwealth Government under the Financial Services Reform Act. In other words, there is a view at a federal government level that this is a property issue which should be dealt with by the states, but the REIA does not concur with that proposition. The REIA proposes a number of things, and there are five of them. Firstly, anyone providing financial services advice, including financial advice which compares investment and property to other asset classes and personal investment advice such as borrowing, should be licensed under the FSR Act. Next, anyone who sells property — as their business, that is — must be licensed in accordance with state and territory legislation. Next, those who are licensed to provide financial services advice and/or sell real property should comply, at least, with education and training standards already in place.

Next, real estate practice is already highly regulated by state and territory governments. Therefore, any change to regulations should not unduly affect the so-called 'high street' real estate agent in accordance with the current application and spirit of the intention of the FSR Act; and finally, there should be reform of existing legislation with additional requirements to ensure the full licensing regime because it would enhance conduct and disclosure requirements, and ensure that those measures apply to all those who give property investment financial advice.

In short, Chair and members of the committee, the REIA recognises the need for nationally consistent regulation of property investment advice. To this end the REIA would ask the committee not to introduce specific legislation or recommend the 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. I would like to thank the committee again for being able to make this opening statement, and giving us the opportunity to speak with you today.

The CHAIR — Thank you very much, Bryan. Maybe I can start off. In your presentation you talked about the broader impact of spruikers and marketeers. You said the problem is not just involved with their activities but is more widespread, and you enumerated some of those detriments that consumers experience. I wonder if you could talk to us about whether or not you have conducted any research, or you have any data on the extent to which agents are involved in giving property investment advice, and also whether you have any information about the extent of these sorts of problems in Victoria.

Mr STEVENS — We have not conducted specific research into this but anecdotally we have canvassed through the Institute's members, and there are a number of our members — or should I say more accurately members of the state institutes — who conduct property seminars, but by and large they are licensed under the FSR Act and operate legally. We think that is a bona fide business that can be run provided it is done, for example, within the auspices of the Trade Practices Act requirements so there is no misleading and deceptive conduct. We do not know how many are being run, but so far as we know many are licensed. The ones that have come to our attention who we think are conducting these things in a manner which is misleading, we have tried to highlight that publicly.

I think one of the good things that came out of the Henry Kaye affair was that ASIC and the ACCC got together far more closely as a result of that, and you could confirm with the heads of both of those organisations that they now have in place a much closer regime to stipulate the demarcation lines and responsibilities between the two organisations to try to be a bit more proactive rather than waiting for complaints to be lodged.

Mr CLARK — I just wanted to explore the boundary line or dividing point between provision of property investment advice which you argue should be subject to federal regulation under the Financial Services Reform Act on the one hand and the high street real estate agent on the other whom you have submitted should continue to be regulated under the state regulation of real estate agents. With activities such as providing people with free appraisals or giving advice to people on a sales strategy or a property management strategy for a piece of commercial property or indeed making property against property comparisons of potential investment returns, I wonder where you would regard each of those as being categorised. I note on page 6 of your submission you quote the ASIC letter which delineated what is referred to as the carve out where it said comparing investment property with other financial products may be financial product advice but implicitly comparing one investment property with another would not. Do you agree with that definition of the dividing line and, if not, how would you draw the dividing line on the various aspects I have referred to?

Mr STEVENS — We very much agree with the current so-called carve out insofar as what it is saying is that provided you stick to property and you do not engage in activity that would constitute personal financial investment advice, or compare property with other asset classes, then you would qualify for that carve out. We would agree with that.

Mr CLARK — So, if I could just explore that a bit further, if an agent says to someone who comes into the office, 'Here is the rate of return you're going to get and the potential capital growth on this property, and this is the rate of return and potential capital growth on that property and here are the other considerations', I take it you would say that is not property investment advice and should not be under federal regulation. If the agent then goes further and says, 'Based on what you have told me about your circumstances, it seems to me property A is more suited to you than property B', would you regard that as property investment advice that should be under federal regulation or would you consider that to still come within the terms of the carve out?

Mr STEVENS — Generally speaking, what we are saying is that with a normal high street agent in the normal business process he goes through, if someone suggests they are looking for an investment property, the agent would base any advice that he might give with respect to investment property on publicly available historical property data. The REIA, amongst a number of other commercial providers, is a source of that property data. Once the agent starts to get into the speculative business of what is likely to happen in the future, insofar as he is comparing it with other assets — for example, if the agent was to suggest a property should be purchased because it is likely to provide a better return than say investment in gold or BHP shares might be concerned — he has clearly crossed the current lines under the Financial Services Reform Act and he would need to be licensed accordingly.

Mr CLARK — I take that latter point if he compares it with gold or BHP shares, but if he compares property A with property B and offers an opinion or advice about which is likely to be better for the particular investor, would you consider that to have crossed the line?

Mr STEVENS — What we would consider is that if there were four properties that someone is looking at, the agent cannot give advice, unless he is appropriately licensed, with respect to that person's individual financial circumstances — in other words, the extent to which he or she may be negatively or positively geared and how they might offset that property against their other personal income. He is not licensed to do that unless he has an FSR qualification. But I think he or she is quite at liberty within the current regime, and we think in the future as well in any change to the regime that he or she might well say property A historically has a yield of X per cent on a rent of

\$Y against outgoings of \$Z and show the client what the return and yield has been in, say, the last five years indicatively over that property or to comparable properties in the marketplace.

The point of the story here is I think that if someone goes to a financial planner and asks for advice on property, that financial planner is highly unlikely to give any advice on direct investment in property as opposed to listed trusts and what have you. I think there are two reasons for this. One is they simply do not get a commission on suggesting someone should go into direct property investment. There is nothing in it for the financial planner unless his or her business is based on a fee for service in a strict sense of the word. The second thing is because they do not offer property investment advice, they are not really qualified or, should I say, they do not have experience in giving that advice. But real estate agents do because that is what they do for a living. They are qualified because they have done various courses which are now part of the national property education training package which has just been signed off by all the state training ministers and therefore are qualified and they are licensed by your state governments to practise in that area.

The CHAIR — Moving to the issue of the behaviour of regulators, your submission was critical of action taken by regulators. I am wondering whether you might be able to throw some light on what your members are saying is happening in Victoria. Within the present regime of regulations under consumer law, do you think the laws could be better enforced than they are currently?

Mr STEVENS — The criticism is levelled really at the extent to which there appeared to us to be clearly misleading and deceptive advertising in the marketplace. For example, you would have all seen advertisements on the Web or in newspapers along the lines of ‘If you come and attend one of our seminars, we will give you investment strategies that will allow you to be a millionaire within a very short period of time’. Clearly that is misleading, in our view. What we wanted to see is some more proactive action by regulators to stamp that sort of behaviour out. I am pleased to say that we are more confident now as a result of that Henry Kaye affair than we were prior to it that ASIC and the ACCC are more proactive in their dealings with that, and they have publicly stated as much.

The CHAIR — Do you have any sense of what the likely costs would be for real estate agents if the government introduced licensing for advisers and marketers?

Mr STEVENS — I am sorry, are you saying if real estate agents were required to have a second licence to do their current business?

The CHAIR — Yes.

Mr STEVENS — The first thing I would say is I think that would be a totally unnecessary point. Indeed the point I am trying to make is that on the one hand you have said, through state governments, that people need to be educated and licensed to sell and manage property, which is fine; we are very comfortable with that. We 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 they have been doing in the past, letting aside property seminars — I will come to that in a minute. I do not see the point of that. If what you are saying is that the current education and licensing system for real estate agents is inadequate, then that is a matter of addressing that education and licensing regime. That said, we have just gone through the training package in some detail. We have reviewed it across all governments, and everyone found that was fine; it needed to be changed a bit, and the new training package has just been agreed to by everybody. I would find it remarkable, having just gone through that exercise over the last two years in some enormous depth, that you would suddenly find that it was inadequate.

The second point with respect to licensing of property seminars, for instance, is that that is a different issue. What we are saying is, depending on the way in which those seminars are conducted, that is the whole point of these inquiries. Indeed we would suggest that your seminar spruikers trivialise them under the Financial Services Reform Act.

Mr CLARK — The current regime, of course, requires people who sell various forms of financial product to be licensed and regulated at a national level. Your submission is that property investment advice should be nationally licensed and regulated, but you seem happy for the regulation of real estate agents to continue at a state level. If you were to play devil’s advocate, you could say that real estate is in a sense another form of financial product and it would make more sense for the regulation of real estate agents generally to be at a national level rather than a state level. Do you have a view on that line of argument?

Mr STEVENS — The REIA does have a view on that line of argument, and that is we believe there should be one licence across Australia for real estate agent practice. As part of that objective we were instrumental over the last couple of years in getting under way this review that has just finished on the education and training package across Australia. We also have in place a review being undertaken by SCOCA, the Standing Committee of Officials on Consumer Affairs, to look at harmonising real estate practice licensing across Australia. We were also part of the task force that COAG has under way with respect to mutual recognition, which is to be introduced to ensure that there is fully effective mutual recognition according to the COAG requirements by December of next year. The very quick answer to your question is that yes, we would like there to be nationally consistent education and licensing across Australia, but that is a little way off yet. It is one step at a time. We see the national training package as one small step in the right direction.

With respect to where we are now, we had to be pragmatic and realistic about this in the sense that it is a little way off in terms of our strategic objective. The world has to get on with what it does at the moment, and it would be quite impractical to suddenly turn around and elevate everything to the federal level for a number of different reasons. The other point I would make is that we do not see property seminar spruikers as being a property issue. Nor do the state governments, to our knowledge, believe it is the case. We see this as a financial services issue, and hence would quite rightly sit under the FSR Act rather than under state property acts for regulating real estate agents. I think a lot swings on the definition of ‘property investment promoter’. Once that definition has some clarity I think the general points that I am trying to make become a lot easier to deal with.

So, for example, just to give you some line on our thinking on it, we think licences would be required under the FSR if they met a number of criteria — for example, ‘The financial services licence permits the conduct of financial investment advice’ presently comes under the FSR act for property seminars and financial planning scheme courses. ‘The real estate licence permits the conduct of property seminars’ is confined to property and does not include forecasts, predictions, comparison to other asset classes or legal financial tax advice. Any seminar or course that involves, say, the sale of a property can only be conducted under a real estate licence. So, for example, we believe that the Henry Kayes of the world who are actually also selling property have to be licensed accordingly, and they were not, as far as we were aware. Any registered training organisations are permitted to conduct education courses in investment. I think some sort of clearer definition of what we are talking about would be very useful.

The CHAIR — Thank you, Bryan. Just moving to another area, the committee has heard evidence from other witnesses urging that governments should publish data about property sale prices so that consumers know whether or not they are paying a fair price. Do you have a view on that?

Mr STEVENS — There are a number of commercial providers in the marketplace, and not all of our data is the same. That is because the data is collected in slightly different ways and covers slightly different aspects of the market. The ABS already publishes property data. Are you aware of that?

The CHAIR — I was not personally, but others may be.

Mr CLARK — Yes. That it is only aggregate, though, Bryan.

Mr STEVENS — But what that is going to say is because there are a lot of different sources in the marketplace, what you are really after is a trend in prices, which I think is useful. If the government chose to publish it, I am not sure it is covering a gap in the market, because the market is already all covered.

The CHAIR — I guess from the committee’s point of view our focus and our responsibility are on consumers and what puts them in the best position to be able to make assessments around property investment, and it has been put to us that if there were a standard that was, I guess, managed by governments, that would give the public as speedy as possible access to the movement of property prices, then that would be a good thing for consumers because of its transparency.

Mr STEVENS — Yes, I take your point. I think it is fairly transparent now. What is not transparent about property prices is the question.

The CHAIR — I guess the question that is being put to us is that people engaged in the business of making decisions on where they should put their money in purchasing property cannot see clearly what is happening in specific localities and, more broadly, around what is happening around fluctuations. You are saying

that they are readily available, I guess on the basis of some professional advice, and what witnesses have been saying to this committee is that that is not clear enough to people, and I think it is fair to say people should not be made to purchase it; either that it should be freely available and as broadly available as possible and according to a standard so that people know they are comparing apples with apples.

Mr STEVENS — I would say that data is already available in the marketplace. For example, the REIV already publishes that, and I think it is in the papers — the *Age*, I think, off the top of my head, already publishes that in conjunction with the Real Estate Institute of Victoria down to suburbs across Victoria. That data is already available, and I do not know how much more transparent — I am not quite sure what ‘transparent’ means. If you mean how is the data collected — is that what you mean?

Mr DONNELLAN — No, more so from the point of view of someone like me who is buying a place, going to Box Hill and looking at all the recent sales in Neville Street, Box Hill, and being able to get that in an easy manner. Some years ago I worked as a valuer, so I could get that information from the local council in a timely way. If someone wanted to make an assessment of what the per square foot value of a vacant block in a particular street was, it is still a bit difficult to get that information on a street basis — that is what I think we are really getting at.

Mr STEVENS — You can do that on some websites now, is my understanding. Also I think the committee would need to be mindful of the Privacy Act here. That is something that we are very mindful of, the extent to which you can collect data. We have been talking with the Commonwealth Government, and in the current Law Reform Commission review that is being conducted on the Privacy Act we have been saying that some valuers are having difficulty getting up-to-date data on sales in the area because of the Privacy Act, and we were asking for an exemption for valuers so that they can get on and provide a good service to the public in a timely way. That is something we have been taking to federal government under the Privacy Act now since the Privacy Act was introduced.

Mr DONNELLAN — That makes sense.

Mr STEVENS — If the committee took that up as an issue with respect to valuers, we would certainly welcome it.

Mr DONNELLAN — More timely information, too, because it takes three months before the State Revenue Office gets it.

Mr STEVENS — Yes, it does; that is quite right. All we are saying with respect to that issue is that it is not a matter of getting data that valuers should not have, it is just a matter of getting it in a more timely way, because they are eventually going to get it, but why should you have to wait three months? You are not doing the public any good service, because they are the ones who want an up-to-date and accurate valuation.

Mr DONNELLAN — True.

The CHAIR — Bryan, another area is the changes to Queensland developer and marketeer laws. Have you had a chance to have a look at those, and does the Institute have a view on them?

Mr STEVENS — No, we have not gone into them in detail. We are aware of them. We leave that specific issue to the Real Estate Institute of Queensland to deal with. There is one thing I would say with respect to your own examinations and the fact that New South Wales, as you know, I think a year or so ago now introduced its own legislation.

I can understand that the Victorian government and certainly demonstrably the New South Wales government would be becoming impatient with the federal government’s inquiry because they have a problem they want to deal with, and the Ministerial Council is apparently not dealing with it, or if it is, it is taking an awfully long time. They therefore got on and introduced some legislation. I can understand that. However, if you accept that having the broader thrust of harmonisation of legislation on some issues, including this issue, is a useful thing to do, introducing your own state government legislation makes it much more difficult in due course to harmonise that legislation across Australia. We were hoping the Ministerial Council inquiry, which clearly the Victorian government is part of and has influence in, would lead the way on this issue.

The CHAIR — And lastly, I just want to ask you to turn your attention to the issue of dispute legislation. In your submission you talked about consumer dissatisfaction with current legal processes. How do you think your proposed claims fund for consumers would work, and could you perhaps tell us how it might be resourced or funded?

Mr STEVENS — I am not sure that we had a view on a claims fund. Are you referring to our own submission?

The CHAIR — Yes, I believe so. It is at page 10.

Mr STEVENS — Can you just stand by just for a minute?

The CHAIR — You talk about the establishment of a claim fund for consumers.

Mr STEVENS — Can I take that on notice and come back to you?

The CHAIR — Yes, sure.

Mr STEVENS — I would like to do that.

The CHAIR — Okay, that is fine. I am done and my two colleagues are done as well, so with that, I thank you, Bryan, and also Mat, who I gather was listening very attentively there, for your contribution to our inquiry this afternoon. As I said, you will receive the copy of the Hansard transcript, to which you can make any slight adjustments, and Kerry Riseley and Susan Brent will no doubt be in contact with you to follow up some of the issues that have been raised today. Thank you very much.

Mr STEVENS — Thank you, ladies and gentlemen.

Committee adjourned.