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LAW REFORM COMMITTEE

Inquiry into property investment

Melbourne — 12 November 2007

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Dr D. Cousins, Director, Consumer Affairs Victoria.

The CHAIR — Dr David Cousins, welcome to the Law Reform Committee's inquiry into property investment. Thank you very much for coming. I think you are very familiar with the procedures of these hearings. I am bound to inform you that the hearings are subject to parliamentary privilege; anything you may say outside the building is not subject to that privilege. The proceedings will be recorded by Hansard, and you will be provided with a transcript of those. Thank you very much for coming along. What we normally do, as you know, is to give you a bit of time to set up and tell us about the work that you do in relation to the terms of reference of the inquiry, and then we will jump in with any questions. I think we have 1 hour.

Dr COUSINS — Thank you very much, Chair. I am conscious that the Committee has requested information and a submission from Consumer Affairs Victoria which we have not been able to provide it with yet. I thought I would at least come along with perhaps a bit of a presentation. I understand we need to get things on the transcript and so on, but with your indulgence I could go through this material I have prepared, and I will provide copies to the Committee.

Some of the material we can go over fairly quickly because I am sure the Committee is well aware of some of it, but just in relation to the background and the issues relating to property investment advice and the work of the Ministerial Council on Consumer Affairs, I guess it is fair to say these issues really came to prominence in 2001–03, particularly with the Henry Kaye group of companies and the wealth creation seminars which seemed to burgeon around that time. Henry Kaye, of course, went into liquidation at about the end of 2003. Prior to that there certainly were issues to do with so-called second-tier marketing, particularly in Queensland, which were relevant. But it was really the 2001–03 period which led to quite a lot of work being undertaken by the Ministerial Council, looking at whether or not the regulatory framework was appropriate.

Queensland in fact initiated, through the Ministerial Council, the formation of a working party, which it chaired, which looked at these issues, and in August 2004 a discussion paper was issued, which I know the Committee has a copy of. Subsequently, there was a further report prepared by in fact the Australian Parliament's Joint Committee of Corporations and Financial Services entitled *Property Investment Advice — Safe as Houses?*, prepared in June 2005. That really took, I think, the discussion paper prepared by the Ministerial Council working party, and indeed most of its submissions at that stage, and came out with certain recommendations in this area.

Subsequently to that the Ministerial Council working party has continued its work. It had drafted a regulatory impact statement, which is necessary under the COAG arrangements where proposals for national change to regulation are mooted. It is fair to say there was some angst about that process. This is not the only area where particularly the states and territories have had some difficulty with what was formerly the Office of Regulation Review, now the Office of Best Practice Regulation, that oversights, if you like, and makes assessments of the adequacy of regulatory impact statements. In this particular case there was some kickback from the Office of Best Practice Regulation, to the extent that in the end Queensland has largely thrown up its hands about the whole process and has indicated that it wishes to remove the item 'investment advice' altogether from the Ministerial Council agenda. I will say a bit more about that as we go.

I would just like to provide the Committee with some general numbers in relation to property investment advice. I think getting the precise classifications here has been a little difficult, but in terms of total complaints coming to Consumer Affairs Victoria, in 2004 we had 110 logged, of which 22 were formal written complaints; the others were inquiries and oral complaints. That number fell to 23 in total in 2005, was 28 in 2006, and 19 in 2007. So over the four years there were a total of 160 complaints, of which 34 were written complaints.

It seems likely that there have been some significant changes in the property market — it flattened off from that 2001–03 period for a time — and clearly as well there has been more activity from the regulators. Some might suggest it was somewhat slow, but nevertheless there has been quite a lot of activity from the regulators, both at Commonwealth and state-territory level. Indeed one hopes that consumers and investors themselves have started to get some understanding of the need for caution in this area.

The CHAIR — David, could I just stop you there. With that numerical data, could you give some indication of how that might sit in the context of other areas where there are complaints? Is this just a drop in the ocean?

Dr COUSINS — I would say that I would not see the number of complaints as being particularly large, but then complaints are never themselves a particularly good indicator of consumer detriment. So I would certainly say the number of complaints there are significant, but it is not substantial.

Mr BROOKS — Chair, through you, if I can, while we are on this table, is there any information on when those complaints were followed through, how many of them resulted in action on behalf of CAV? Do you have figures on those?

Dr COUSINS — If I could take some of these questions on notice, I will certainly try to come back to you on that.

The CHAIR — Okay. We will try not to interrupt you again.

Dr COUSINS — I will try to talk a little bit about some matters that were followed up.

The general issues that I think have been identified in relation to property investment advice, and certainly I think the Ministerial Council discussion paper did cover off on these, and this mirrors our own experience, are that there have been questions about how competent operators have been to give property advice. There have certainly been questions about whether they have been conflicted through links with finance and property development companies and so on. There have certainly been concerns about exaggerated claims that have been made in terms of prospective returns and concerns about not disclosing the risks, downside risks in particular, to investors. There have been some concerns about obtaining redress for consumers, particularly associated with the running of seminars, where people wanted to pull out and did not feel that they had what they expected. We have had some success in that area; however, I will talk a bit about that.

Just generally, there have been concerns particularly about the nature of the wealth creation seminar-type arrangements, the heavy sell and so on associated with those. The point that I would make about these issues is whilst they really came to light in the early 2000s, from our experience these issues are still very prevalent and relevant today. It is not an issue that we would say has gone away. The issues are still out there, and one expects in any strong property market that this will be the case.

In relation to the Victorian regulatory framework, I would just point out that the key legislation that we have is the Fair Trading Act, which covers a range of matters, and misleading and deceptive conduct, false or misleading representations, unconscionable conduct are particularly relevant here. We also regulate real estate agents under the Estate Agents Act and also the Consumer Credit Code. These have some relevance to the regulation in this area. The point perhaps about this framework, though, is it really was not designed to deal with problems associated with property investment advice and marketing. This is legislation which predates, I suppose, a lot of the concerns here. Just to make the point, the Estate Agents Act is I think primarily concerned about protecting vendors of real estate rather than focusing on protecting investors.

In relation to CAV's activities in this area, we have done a range of things. Certainly media releases have been issued with warnings advice for consumers, urging the Commonwealth to be more active in this area. Our annual reports have commented on the property investment advice area. We have produced some fact sheets on things like vendor term sales and so on, and we have run a series of home-buying seminars, both in metropolitan and regional areas, where we do try to provide some education for consumers. Frequently our inspectors will also attend the wealth creation seminars that we are aware of and that have been advertised, and at those we will frequently hand out leaflets of warning advice to consumers to make sure that they know what they are doing, that they get independent advice and so on.

We have been a very active participant on this Ministerial Council working party, and we have also been active in investigating those complaints that I mentioned. We do have some significant powers. We have a substantiation power, which came in in 2004, which we have used to seek to have people substantiate claims that they have made. In terms of our investigations often matters do raise issues that are within the bailiwick of ASIC, particularly where they link to financial advice, so we have had close liaison with it on a number of matters that it has subsequently taken to court. We have also taken a number of cases to court ourselves, and we do have three significant current investigations.

One thing about these investigations is that they are very time intensive, so that whilst we had hoped that we would have had a couple of these in court already, we have not yet managed to achieve that. But a general point I would

make about CAV's role here is that we have been one of the more active consumer regulators in relation to property investment advice and marketing. There are a couple of cases I would mention, and if the Committee wants to get further details of these cases, we could certainly provide them to you.

The first two I would mention are very significant: Astvilla, Perna and Livio Cellante was a matter that we took relating to misleading and deceptive conduct and unconscionable conduct in relation to a vendor sales case. That matter, first heard in the Magistrates Court, was appealed to the Supreme Court and the Court of Appeal. Subsequently an issue coming out of that case was raised in the High Court which we sought leave to appear at, which was granted. It was successful I think in establishing a significant point around the liability of individual employees for their actions. In the Cellante case it was very important that we did that and avoid the situation where companies may well have just been liquidated avoiding liability. After a long period of time we are pleased that the lady concerned in that case managed to in fact get her damages paid to her.

The Australian Finance Direct case involved the financing arm for Henry Kaye wealth creation seminars. We took that case to VCAT as a credit code case. Subsequently that was appealed to the Supreme Court and also to the High Court. We did win on a key point in the Supreme Court, and we are awaiting the High Court decision as we speak. That was quite a significant case as well — the first credit code case I believe to have gone to the High Court.

Another matter relating to European Land Sales Partnership also went to the Supreme Court, where we were successful in getting injunctions particularly in relation to claims around the ability of that company to determine planning outcomes.

The CHAIR — Each of these three, were these direct property investment schemes?

Dr COUSINS — Yes. I would put them in that category. I guess it is where we put the boundaries around this, but I would certainly see all of these as very linked to the property investment area.

As I said previously, all these cases that we have taken have involved extensive investigation, preparation and considerable time going over several years. One case we have in play now has being going for well over two years in terms of its investigation but it is a very significant case and will, if we are successful, establish some important precedents. As a regulator it is important to try to get some balance between, if you like, cases that are important from the point of view of clarifying the law and pushing the law perhaps in some cases, and other cases we can take and get quick outcomes.

I just mention Henry Kaye and CAV — we were probably the first regulator to take action against Henry Kaye, and that goes back to 2001 when we were successful in getting Magistrates Court orders requiring substantiation of testimonials made by Henry Kaye, which turned out to be testimonials from his employees. We were successful and negotiated something like $140 000 in refunds through our conciliation work over the period 2002–03. I mentioned we have taken the case in relation to Australian Finance Direct, and we have liaised with ASIC in relation to matters that it took against Henry Kaye.

The question all this raises is whether the regulatory framework is adequate. Are there gaps in the general law? Is the division of responsibilities of the Australian state and territory regulators clear and appropriate? How should industry-specific regulation, if we go down that track, be expressed? Is licensing necessary and desirable? I would like to pick up on some of those areas.

Firstly, in relation to the gaps in the general law I will focus on our own Fair Trading Act, which will possibly be of most interest to the committee. This Act regulates trading practices especially relating to the supply of goods and services to consumers. A point to make is that the Act does not cover all unfair conduct. The Act, as I mentioned, picks up areas of unfair conduct, like misleading representations and unconscionable conduct, but there is a gap in the sense that the conduct that might be regarded as unfair could be broader than that. I suppose this is an important point, and I have written separately about this particular point. When we look at some of the overseas jurisdictions — the USA and Europe — the law is in fact broader than our law under our general Act. It covers unfair conduct and indeed ASIC's law under the financial services regime requires companies to act efficiently, honestly and fairly. So it in a sense goes beyond our general law as well.

There are some gaps in the Fair Trading Act in respect of property investment. The definition of 'goods', for example, does not explicitly include land, though the 'services' definition does include rights in real property. In practice this has not been a major limitation; it is just a little unclear why the definition of 'goods' would not

include land. Some provisions only cover goods and services for personal, domestic or household use so they do not necessarily cover, for example, investment purposes or business purposes. Also the non-contact sales provisions do not cover seminars held in hotels or similar venues. So, for example, people are protected in relation to cooling-off rights when they are contacted at home or even when they are driven to the offices of a business but with a seminar held in a hotel people will not be, if you like, protected through having a cooling-off right. If they sign up for a seminar or a course of a so-called education program for $15 000-odd, they will not be protected by a cooling-off right in that case.

Importantly, as has been pointed out in the discussion paper and elsewhere, general law does not require specific disclosures in relation to product information, likely risks, conflicts of interests and so on.

On the question of the division of responsibilities between the federal, state and territory governments, this is quite important because I think there are areas where consumers can be quite confused about whose role and responsibility it is in these areas. With the general consumer laws there is the Trade Practices Act, of course, which is administered by the ACCC, and in relation to financial services, ASIC.

The fair trading Acts largely mirror that Trade Practices Act, but I would have to say that in our own case we believe our Act has gone beyond the Trade Practices Act, where the Commonwealth has not been particularly engaged in consumer protection activities in recent years. For example, in Victoria we have a law in relation to unfair contract terms which is I think a path-breaking law for Australia. There are real estate laws, which I mentioned previously, where the states and territories are actively involved; and credit laws, where the states and territories are also involved; but with ASIC its general financial services powers include credit so it can, for example, deal with cases of misleading and deceptive conduct relating to credit, unconscionable conduct and so on. Under the Corporations Act and financial services reform laws ASIC has significant powers in relation to financial services; licensing and other provisions apply there.

The question of whether there needs to be some specific industry regulation in relation to property investment has certainly been raised. There are some general points on this that one might make. Yes, it may be necessary if the general law to deal with problems is inadequate. We would focus first on the general law and desirably make as much use of that as we could before we looked for additional industry-specific law. One thing to say about industry-specific law is that it is often more prescriptive and raises more concerns about regulatory burdens, industry capture and so on — hence, the inclination to look more closely at the use of the general law. Industry-specific regulation may be expressed in a range of different ways: as legislation, or even as quasi legislation, codes of practice and so on. It may also be expressed or implemented in other ways. It may be implemented as a self-regulatory code, for example, or by co-regulation involving perhaps the government industry development of a code which may well be enforced by government.

The question of licensing in this area has been raised. It is worth making a few points about licensing. A benefit of licensing, perhaps, is that it allows some standards to be set that new entrants have to reach before they are allowed into an industry. Licensing can be very heavy-handed; at the other extreme, it can be quite light-handed. Licensing has perhaps a bad history in one sense, in that some licensing schemes have been very restrictive, setting up barriers to entry and reducing competition.

A distinction is usefully made between positive and negative licensing. Positive licensing is basically a situation where everyone has to jump through various hurdles up front in order to obtain entry to an industry. Negative licensing applies where someone may well be excluded from an industry on the basis that they have done certain things which has been considered illegal or unethical. One involves a much greater impact on people who are operating legally or ethically; the other is trying much more to focus clearly on those who we do not want to be operating in an industry.

Moving on, the report of the Australian parliamentary committee in this area — that is, the Parliamentary Joint Committee on Corporations and Financial Services — as I said, covered the same ground as the Ministerial Council working party. But it concluded that property investment advice should be regulated by the Commonwealth — that is, ASIC — in a parallel way to the regulation of financial advice. This would involve a positive licensing scheme; significant disclosure requirements; the test of efficiency, honesty and fairness in relation to conduct; dispute resolution provisions — internal dispute resolution and also a requirement to belong to an external dispute resolution scheme; and also significant remedies applying for victims. The Commonwealth has

not been prepared to accept this position, which I have to say has been the preferred option of the states and territories.

I mentioned that the working party, subsequent to its discussion paper and responses to it, had moved to prepare a regulatory impact statement. This has not been made public, but five options were fleshed out in it: the status quo option; the voluntary self-regulation option; co-regulation option; a disclosure requirement option; and a comprehensive licensing, conduct and disclosure regime similar to that recommended by the Commonwealth parliamentary committee. The Office of Best Practice regulation reviewed this regulation and in typical fashion seemed to have some yet further concerns about it and sought further information. At that point progress has really stalled. The Commonwealth has indicated in the Standing Committee of Officials of Consumer Affairs meeting that it preferred the co-regulatory option.

In conclusion, Chair, the inclusion of property investment advice under the FSR scheme seems the obvious thing to do, but in the absence of an agreed national response Victoria really needs to decide its own response. The problems encountered with property investment advice are likely to be more evident at particular times, but I believe that they reflect some ongoing changes in the economy and that the problems are not such that we can ignore them and they need to be addressed. In all of this, the general law, our Fair Trading Act, I think is critical. Also it is critical that there is appropriate administration of that general law by the regulator. I think we are doing a good job in that respect, but we are always open to constructive advice on that point.

The CHAIR — Thank you very much, David. Just by way of opening, in that last comment you made, that Victoria needs to decide its own response to some extent, going back to page 4 of the copy overheads, where you talk about gaps in the general law, the Fair Trading Act, and a bit further on, where you say that one of the important things to do is focus on that law rather than have industry-specific regulation or law regimes, are Community Affairs Victoria and the government working on proposing amendments to the Fair Trading Act that will close those gaps that you alluded to?

Dr COUSINS — I would have to say that this is sort of a work in progress, in that I think it has been the case for the past three or four years that the Victorian government has taken a strong view on the need for a strong general law and certainly that is the direction that we have been heading in. I think this is also seen in the context of reducing the regulatory burden. If we can reduce the reliance on industry-specific law, we will certainly go some way to achieve that. Certainly that is an ongoing piece of work. I guess in relation to property investment in particular that is something that will need to be addressed I think to some extent, depending on the outcome of certain events at the Commonwealth level and whether the Commonwealth in fact will change its mind on these issues.

The CHAIR — Maybe for the first part we should have questions specifically on the presentation.

Mr BROOKS — I have just a fairly general question, David. You mentioned the Estate Agents Act focusing primarily on how to protect vendors, as opposed to buyers, in general terms. I am just wondering in what ways you might see that being improved to better protect buyers?

Dr COUSINS — Investors, in this case. I think it is issues around whether that particular legislation, for example, could go further in terms of including requirements on agents that they have undertaken training, for example, in property investment issues, whether those acts should in fact require agents to, for example, provide better disclosure for investors around property investment purchases. It is those sort of issues that I think I was alluding to there.

Mr FOLEY — David, just a couple of points regarding other jurisdictions that you have referred to. There was a comment there regarding Queensland and their frustrations, I think it is fair to say, and I suppose I was interested to know the basis of what they saw as their frustrations. The Office of Best Practice Regulation review you referred to, with the Commonwealth supporting a co-regulatory review, I was wondering what you saw as the relative merits of that and more broadly where the other jurisdictions might be up to?

Dr COUSINS — In relation to the basis of Queensland's frustrations, they perhaps experienced it before other jurisdictions did, so were more conscious of some of the happenings in this property investment area than the other jurisdictions were. I think their frustrations were — and this is not just a Queensland view; a number of the states have shared this view — to put it reasonably bluntly, that the Commonwealth has in fact conveniently perhaps hidden behind the regulatory impact statement process.

It does so happen that the Office of Best Practice Regulation is a Commonwealth agency and I guess there is a concern about the real independence of that agency and whether that agency is more in fact at the end of the day reflecting a Commonwealth view on regulatory issues in some of these areas where the states, territories and the Commonwealth are involved, rather than an independent view. I think the perception that some of the states and territories have is that the Office of Best Practice Regulation is a bit of a blocker for getting sensible national regulatory change in place.

In relation to the co-regulation idea of the Commonwealth, this is one that was thrown on the table by the Commonwealth at a late stage. It is one that is certainly worthy of consideration but the basic view is that it would not deal as effectively with the problems that have been highlighted as would the proposal that property investment should be treated no differently from financial investment, that in fact they are often provided by the same person, often they are alternatives and part of the one total advice package. I am sure that a co-regulatory option would be better than nothing. I think everyone agrees that the status quo is not satisfactory but the issue is, if you like, putting in place the regulatory regime which appears to give us the greatest net benefits — that is, balancing the benefits opposed to any costs.

Mr FOLEY — So that debate with the Commonwealth has gone to an officer level now, where this position with the Office of Best Practice Regulation has come and it has not come back to the Ministerial Council since November of last year; is that right?

Dr COUSINS — I think the Ministerial Council has had a number of discussions of this, and I think the states and territories are reasonably frustrated with the positions that have been taken by the Commonwealth. In fact the Commonwealth shifted its position. It was in fact favouring the fourth of those options that I talked about up until not too long ago, and that is the sort of option requiring just disclosure and so on, but it switched to this co-regulatory option which just added more frustration to where the states and so on were at on the issue. I think there was a possibility that the states and the Commonwealth could have aligned around option 4, which was just the disclosure option without the licensing and so on associated with it, but anyway, that is not the case now.

Mr FOLEY — Other than Queensland and the other jurisdictions, has anyone moved on the property issue?

Dr COUSINS — I think the states and territories have had different views about the licensing option to be honest. Some jurisdictions have been much stronger in favour of a positive licensing scheme than others, but the thing there is that it has been clear that there has been a willingness to compromise to achieve a uniform national outcome, which I think everyone has recognised has been the sensible way to go if we can achieve it.

The CHAIR — Just before we go to you, Edward, in relation to that global debate that is going on between the states and the Commonwealth, in relation to the specific laws that Queensland introduced, could you just spell out some of them? Are you familiar with them?

Dr COUSINS — I am not that familiar with them to be honest. They pick up developers. I think some of that is actually covered by our own real estate law, but they attempt to apply, as I see it, some of what our general law is specifically to developers. I suppose the general point I would make is that I am not sure that they go that much further than, in fact, our general law already goes.

Mr FOLEY — And they were not really designed for the second-tier kind of problems up there?

Mr O'DONOHUE — Thanks very much, David, for your presentation. You said that complaints are not necessarily a good measure of consumer detriment. How would you measure consumer detriment? What is a good measure?

Dr COUSINS — That is a very good question; a difficult question. Essentially we are talking here about people losing money upfront, being conned and getting themselves into activities which result in them losing out in some ways. I think there are issues here because in many cases we are not just dealing with innocent victims; there are issues of greed and other things that come into play here. What we have experienced is that the most educated of people, who in a sense should know better, are still lured into these arrangements. Do we say that is an issue that we should be concerned about as regulators, and what is the detriment there? I agree it is a very difficult area. What we have done in the last year or so — that is Consumer Affairs Victoria — is conduct a couple of what we call

consumer detriment surveys. Again I am not aware that any other agencies in Australia have conducted surveys like this.

The surveys question people about the problems they have encountered in buying goods and services — this is broader than property marketing. It seeks an assessment of the impact of those problems on the individuals, and seeks to calculate a total level of consumer detriment across the economy. In going through that exercise in Victoria — and we have issued a publication on this — we calculated there was a level of detriment of something like $3.5 billion per annum that consumers suffered as a result of problems with their purchases. The survey did not go so narrowly down as to distinguish, if you like, property marketing, but nevertheless I think that work is quite significant. As I said, it has not been done before in Australia, and it is an attempt to try to assess directly the detriment that consumers themselves perceived that they encountered as a result of difficulties with their purchases.

Mr O'DONOHUE — I note your comments about industry-specific regulation law, licensing or legislation. Is there a concern though with, say, strengthening the general law that could affect other industries or other bodies unnecessarily?

Dr COUSINS — Certainly that is right in relation to things like unfair contract terms. As we are rolling that out over other industries, industries subject to that are suddenly realising they are subject to that, do feel a sense of grief if you like. But the point to make, of course, is that it is only if you step outside that law and engage in unfair contract terms that the law will actually impact on you. The general law sets a basic general standard of operation for all traders. It is only if you step outside that that it will actually impact on you. From that point of view we would see the general law as generally having less impact on business and being a preferable way to go rather than keeping developing these industry-specific laws. As an agency we have 50 Acts that we administer — 50 — and some of our interstate counterparts have even more than that. I think there has always been a tendency in the past when a problem has arisen to think we need a new law to deal with that problem. Actually what we often needed was creative use of the existing law from an enforcement point of view to see whether we could have dealt with the problems.

Mr O'DONOHUE — You have spoken about the litigation you have had on foot, and High Court clarification of powers et cetera. Do you have the resources to fight those sort of battles? They are expensive, lengthy.

Dr COUSINS — They are. We do not have a separate litigation budget per se, so we do this within our existing budget and the allocation we have to our compliance enforcement area. It helps to win of course, because we get our costs back eventually — —

Mr FOLEY — Generally?

Mr O'DONOHUE — You only get a proportion back, as it works.

Dr COUSINS — That is right. What we do not get is, if you like, when we do get those costs back they generally go into consolidated revenue rather than direct to us. But it does help that we actually do not, if you like, fork out more. It is very much a balancing act. As a significant regulator we do need to be a credible regulator and therefore we do need to take some cases. It is a short-term/long-term thing. The long-term thing is if we can clarify the law and highlight conduct that we think is covered by the law, we will be more successful in the long term by doing that. But there are costs associated with that, there is no doubt about that. It is a balancing act of trying to take the relatively easy, if you like, administrative options, and we do that, but we want to balance it with taking a number of specific cases to courts.

The CHAIR — When you talked in your presentation about the complaints CAV received over that 2004 to 2007 period you said in response to my question that it was significant but not substantial, I think were your words. You said you would say a little bit more about that later on. I know it has been touched on in a number of the answers that you have given but have you got more to say on that? Also, if you could link up that with the issue that Martin raised about two-tier marketing as being a specific problem in Victoria. Just that cluster of things, if you could say something about them?

Dr COUSINS — I suppose if you look at some areas of activities, a classic example would be something like funerals. We get very few people who will complain to us about funerals, for obvious reasons in a way — it is

not a good time for people. But that in no way indicates, if you like, the level of problems that people do encounter in dealing with funeral services, it is just that people do not tend to complain about that.

The general point I am making there is that the number of complaints we get in a particular area does not indicate the level of detriment or the seriousness of the particular issues that are raised. In a general sense, in any event, complaints are just the tip of an iceberg. It is the nature of the complaint which is really the important thing. Is the complaint raising a systemic issue that we may have had only one person bring to us but may actually affect thousands of people who either do not know about CAV or it is too much trouble for them to complain for whatever reason? Particularly with vulnerable people often where the difficulty in complaining is that much greater, whether because of education, language or whatever. We try not to get too hung up by complaints as a guide to action. That is one of the reasons we have gone down this track of trying to survey consumer experience more directly and finding out what are the key levels of detriment and so on.

I suppose in relation to these property marketing complaints, we think they are significant. Often there are large sums involved for individuals, and that is one factor that makes them more significant as well. The second part of your question related to — —

The CHAIR — The two tiers, whether that was a significant problem in Victoria.

Dr COUSINS — The two-tier issue often seemed to link to people not having knowledge of the particular marketplace. For example, in Queensland what people were doing is they were lobbying people in Melbourne about the prospects of real estate investment up on the Gold Coast. People not knowing relative values on the Gold Coast, they were often marketed properties at values which significantly exceeded independent valuations. Indeed, one of the problems is the valuations were not so independent. The advisers that were lined up to assist people when they made the visits to Queensland also were not that independent. It was a bit of a scam.

We had a similar sort of situation in relation to the Astvilla-Perna matter in a sense. This was a case of a single lady with three kids who was very much in a rent bind, was desperate to get out of paying high rents in the city and was attracted by an advertisement to a property in the country, which seemed to be very good. Not knowing anything about values really this woman was taken down to the country, given the heavy sell, not given an opportunity to assess alternatives or get independent advice, believed that she was buying a very good value property. In fact this particular property she paid $50 000 odd for in the initial stage was not even owned by the operator who was wanting to sell the property. It had been on the market for something like seven years at half the price that she was offered it. She was well aware of values in the city but had no idea of values in the country, so there was this sort of playing on people's lack of knowledge and vulnerability in the sense that she thought she was getting a good deal when in fact she was getting ripped off. It has elements of the second-tier marketing scams that went on on the Gold Coast.

The CHAIR — In one of our submissions the authors did not want to put up any proposals or recommendations because they said, in effect, there was no evidence base or an insufficiently strong evidence base to predicate any recommendations. Given everything you have said, would you agree that we are not at that point yet where we have got a strong evidence base?

Dr COUSINS — No. I think the discussion paper did indicate that the agencies did not have detailed figures on the number of people being impacted on here, but it did make a point that there were thousands of people who were being induced to attend some of these seminars and so on. We certainly believe that that is the case, and these things are still happening. We are still having operators flying out from the US and running seminars and so on, so this is impacting on large numbers of people. Indeed some of the cases that we are investigating now raise very serious issues of concern in terms of the behaviour of some operators and the way they have taken advantage of vulnerable people.

Mr FOLEY — David, if uniform national regulation, which seems to be what the CAV would prefer to be the outcome, is not forthcoming, at what point does it become critical that there be some movement in the general law in Victoria to round these schemes up — or further round them up, might be more accurate — and at what point does there need to be industry-specific regulation around that?

Dr COUSINS — I think you are right. Our strong preference — and it has always been the case — is for a national solution, for the obvious reason that we are dealing with a marketplace which is national. We are mindful of the importance of ensuring compliance costs for business are kept as low as possible — and that has impacts on

consumers — but there also needs to be a clear understanding by consumers as to where they need to go when they have issues and so on. And there can be no ducking of responsibilities between regulators; that is absolutely clear. That is our absolutely strong view on this.

I guess in reality the outcome of the federal election and the views that whoever is in government at that stage takes on this issue will really decide things. I think if we are in the same scenario, then it is clear that Victoria will need to consider whether or not it goes its own way on this. If we cannot get past the regulatory impact statement process at the Commonwealth level — Queensland has moved to have this item removed from the Ministerial Council's strategic agenda, and what that is really saying is, 'We do not believe that we can in fact get a national solution in place, and therefore each of the jurisdictions needs to go its own way'. It would be nice if, in that scenario, there was sufficient commonality for the states and territories to put in place something that is pretty similar.

Mr BROOKS — My question ties in with that. Given the lack of appetite on the part of the Commonwealth to pursue this issue, I was wondering if you have got views on what the reasoning behind that is and what its concern is.

Dr COUSINS — I can only surmise a little bit, but at a basic level I guess there may well be a philosophical view about the need for more regulation and what that should look like. It has been said along the way that ASIC had a relatively new regime covering financial services, that it had a big job bedding that in, and that to take on property investment advice as well at this stage would be a bit onerous. There have been issues raised about the cost of who pays for this scheme. If it went to the Commonwealth, presumably the Commonwealth would need to organise that in some way. I do not think that should be too hard through the licensing scheme. I guess those have been the main things that I think have been raised about this.

Mr BROOKS — Do you think it is a question of resourcing of ASIC?

Dr COUSINS — That seemed to be a concern that the Commonwealth had with its focus on bedding down the financial services program and its concern about the funding of this. I think there is an issue that also has been there — and the Commonwealth has been mindful of this, and the states and territories need to be mindful of this obviously as well — that it has not generally been involved in the regulation of land and property in that sense. Real estate agents and so on are with the states and territories, and so there was a bit of a view, certainly in the earlier stages, that 'If we are dealing with land and property, this is an issue for the states'. Of course the issue goes significantly broader than just simply real estate agents.

Mr BROOKS — Aren't real estate agents carved out of the recommendations of the federal parliamentary Joint Committee report?

Dr COUSINS — I think the issue is that some of their functions clearly would continue under state law, but in relation to property investment advice the proposal was that this be a functionally based regime, so it would pick up agents in relation to their provision of property investment advice. That then raised another issue, of course, about then having people subject to dual licensing arrangements. There would be a state licensing arrangement governing property and there would be a Commonwealth arrangement governing property investment advice, and how would that work? Would there be issues and so on to deal with along the way?

The CHAIR — We are out of time. David, could I thank you very much for your generous allocation of time to the Committee's work today. We have not got through all the questions that we had prepared, but that is okay. I am sure that Kerryn and Susan will follow up with you, if there is anything that we need to know in addition. You will receive a copy of the transcript. Thank you very much.

Dr COUSINS — Thanks very much for your time.

Witness withdrew.