

29<sup>th</sup> June 2008

Financial Services and Credit Reform Green Paper  
Corporations and Financial Services Division  
Treasury  
Langton Crescent  
PARKES ACT 2600

### **SUBMISSION RE THE GREEN PAPER ON "PROPERTY SPRUIKERS"**

I refer to the Green Paper issued on 3<sup>rd</sup> June 2008 in relation to the proposed regulation of "Property Spruikers".

As identified in the paper, this term has been and can be seen as a term of derision, perhaps with good reason based on the actions of some in the industry.

As a participant in the Property Investment Industry, as well as the Mortgage Broking Industry and soon to be the Financial Services Industry, I believe we are well placed to comment on the proposed regulation of Property Investment promoters.

#### **Current Situation**

At this point, it is prudent to outline the current legal obligations of promoters and advisers of various financial and property related services to end user consumers:

#### **1. Financial Products**

##### **(a) Whose interest must a Financial Services Licensee act in?**

Under Section 945A and other provisions of the Corporations Act, there is a positive obligation on the Licensee (and by extension their Authorised Representatives) to give appropriate advice to the client given their circumstances (often called the "know your client" rule).

This obligation applies regardless of whether or not the Financial Services Licensee receives a fee from the client or a fee from the providers of products they recommend (in the form of a commission or other benefit).

**(b) What disclosure obligations are there on the part of Financial Services Licensees to disclose fees they receive from Financial Product providers?**

A Financial Services Licensee must disclose to a client in the Financial Services Guide how they are remunerated. In addition when the Statement of Advice is given, the Financial Services Licensee must disclose the exact amount of commission or benefits they will receive.

**2. Mortgage Services**

**(a) Whose interest must a Mortgage Broker act in?**

Currently Australia does not have national regulation of Mortgage Brokers. However, some States do regulate Mortgage Brokers. Under Western Australian law, a Broker is legally required to act in the clients best interests and the client (borrower) is deemed to be the principal, not the lender. For example the Finance Brokers Control (Code of Conduct) Regulations 2007 (Western Australia) at clause 5.1 states:

*Subject to this Code (including clause 5.2), a finance broker must always act in the best interests of the finance broker's principal and give that principal undivided loyalty unaffected by any interest of the finance broker (including, without limitation, any interest referred to in clause 5.3) or of any other person.*

**(b) What disclosure obligations are there on the part of Mortgage Brokers to disclose fees they receive from product providers?**

As the laws are State and Territory based, it varies by jurisdictional region. Currently Western Australian Law requires full disclosure of commissions. Some states require disclosure at the loan writer level and some states require no disclosure. It is expected that the proposed national regulation of Mortgage Brokers will provide a uniform system of Mortgage Broking commission disclosures.

**3. Property Investment Services**

**(a) Whose interest must a Property Promoter act in?**

While Mortgage Brokers (in some states) and Financial Services Licensees are required to act in the best interests of the investor or user of the services, there is no such obligation on the part of property promoters.

The legal obligation of real estate agents has been derived from the common law principles of Agency. It is quite clear under common law that an Agent owes an obligation to his or her principal, which in the case of a Sales Agent, is the seller, not the buyer.

A review of the various State and Territory real estate legislation shows that there is no legal obligation for the Sales Agent to act in the best interests of the Buyer in a property transaction,

other than the requirements under Federal Trade Practises legislation and respective State and Territory Fair Trading legislation, to not be misleading or deceptive.

Another problem exists with real estate promoters in that many are not licensed to sell real estate and operate outside the various real estate laws applicable in each State and Territory. They receive "referral fees" and other benefits and are able to act outside the legislation applicable to Real Estate Agents. In addition, many property spruikers are actually selling their own property. Again in both these instances, there is no obligation to act in the interests of the property purchaser, other than to not be misleading or deceptive.

As many property promoters are able to evade the State and Territory real estate laws, simply regulating Real Estate Agents only will not solve the problem.

**(b) What disclosure obligations are there on the part of property promoters to disclose fees they receive from sellers?**

In all States and Territories except Queensland, there is no obligation to disclose fees or charges to property buyers. In Queensland many promoters have been able to get around the commission disclosure by painting the fees they receive as "marketing charges" and therefore appearing to be paid a lesser commission.

**Conclusion**

It is clear that there is a deficiency in the current real estate laws of the States and Territories that allow promoters of real estate to promote property investment to end consumers with very limited legal obligation to act reasonably or in the interests of investors. There is also a clear deficiency that allows property promoters to act outside the various State and Territory real estate laws.

It is impossible at law for a Sales Agent or property promoter representing a seller and / or receiving a commission or fee from a seller to act in the best interests of a property purchaser. Similarly, a property promoter selling his or her own property cannot act in the best interests of the property purchaser.

Recently there has been a notable trend of Buyers Agents entering the property market. Buyers Agents are paid by the purchaser to represent them and act in their best interests in purchasing property. They are required under common law, to act in the best interests of their principal, which in this instance is the purchaser of property.

Therefore if consumers do not receive the service they have paid for or they are given bad advice by the Buyers Agent, they have legal grounds to take action against them. Sadly most property investors are not aware of the services of Buyers Agents and still purchase investment properties from Property Promoters or Sales Agents.

Most advertising and marketing material published by property promoters selling product on behalf of developers, or selling their own property projects, gives the impression that the Sales Agent or Promoter is acting for the buyers, when legally this is obviously not the case. Many pronounce that

their services are "free" when in fact they receive substantial commissions from the property sellers which are clearly factored into the end sales price.

While it may seem that the easiest solution to simply regulate property investment as a financial product under the Corporations Law, this is likely to have a number of unintended consequences and difficulties while the regulation of Real Estate Agents remains a State and Territory based function.

In the first instance, we recommend that a uniform agreement by all States and Territories to an enhancement of disclosure laws will provide for better informed consumers who will make wiser decisions. Offering uniform cooling off periods will also allow consumers to withdraw from contracts entered into under excessive pressure. Also actually enforcing the existing regulatory powers under Fair Trading and Trade Practices legislation will provide for better informed consumers.

### **Recommendations**

#### **Recommendation 1 – Disclosure in marketing and advertising material**

It is our recommendation that the first step in regulating property investment is to ensure that consumers are informed as to the legal obligations of the Selling Agents and the other participants who receive a fee or benefit from the sale of the property and that consumers are informed as to the level of commissions and / or benefits that property promoters may receive.

Practically, it will not be possible for a complete disclosure to be made in marketing and advertising material (due to the space and cost constraints), however a limited form of disclosure will make consumers more aware of the roles and obligations of the property promoters before entering into any serious discussions with them in relation to the purchase of property.

Any marketing or advertising material or seminar which proclaims property to be a good investment or proclaims a particular property to be worthy of investment where the promoter is receiving a fee or commission or other benefit from the seller, should contain the following disclosure:

***Warning: We receive a fee, commission or benefit from the seller for the sale of property to you. We recommend that you seek your own independent advice on the merits of property as an investment and also whether it suits your individual circumstances.***

For those promoters who are selling their own properties, the disclosure should be as follows:

***Warning: We are property owners (or a related party to the owners) and we will benefit from the sale of property to you. We recommend that you seek your own independent advice on the merits of property as an investment and also whether it suits your individual circumstances.***

Any property promoter who receives a fee, commission or benefit from the property seller or who owns the property they are selling and does not disclose the above, should be subject to a penalty plus be required to pay to the property purchaser all commissions and other benefits received from the property sale.

## Recommendation 2 – Disclosure at the point of entering into a contract for purchase

Not all property investors will purchase property from a property promoter, hence disclosure only in marketing and advertising material will not catch all property spruiking. Quite frequently Sales Agents selling properties will make comments to prospective purchasers as to the relative investment merits of a particular property.

It is therefore our recommendation that all States and Territories should legislate for compulsory commission disclosure and require a statutory warning be provided to the Buyer when the property is being purchased by an investor and require the prospective investor to acknowledge receipt of the statutory warning before entering into a contract to purchase an investment property.

We recommend disclosure should be something similar to this:

1. Property sold by a Sales Agent or Promoter receiving a fee or commission

### WARNING

*We will receive a fee of \$xxxxx for the successful sale of this property (including all marketing fees and other payments). Legally we are obligated to represent the seller and obtain the best possible terms and price for them.*

*We therefore cannot advise you on the relative investment merits of this property. We recommend that you seek your own independent advice on the merits of this property as an investment and also whether it suits your individual circumstances.*

2. Sold by a developer or property promoter who owns the property

### WARNING

*We are the owners, or are a related entity to the owners of this property you are purchasing.*

*We therefore cannot advise you on the relative investment merits of this property. We recommend that you seek your own independent advice on the merits of this property as an investment and also whether it suits your individual circumstances.*

To limit the ability of Sales Agents or promoters to get around this by arguing that they were not aware that the purchase was for investment purposes, the onus should be on the Seller or Sales Agent to determine the prospective purchasers intentions and if in doubt they should have the prospective purchaser sign the statutory warning, even if it turns out to be for the purpose of owner occupancy.

## Recommendation 3 – Cooling off period

Cooling off periods have been criticised by some property industry participants. They are clearly not appropriate for auction sales. However a nationwide limited 3 day cooling off period

(excluding for auction purchases) will allow some consumers who were pressured into a property purchase to withdraw from the contract.

#### **Recommendation 4 - Enforcement**

Currently the Australian Competition and Consumer Commission and State and Territory Fair Trading Departments have wide ranging powers to act where property promoters act in a misleading or deceptive manner.

Promoting services to property investors where they indicate that they are acting for the purchaser and their services are "free" would seem to be clearly misleading and deceptive conduct when in fact they are receiving fees or commissions from the seller.

Therefore we recommend that the ACCC and the various State and Territory Fair Trading Departments act to enforce the current legislation as it applies to property spruikers

If you have any further questions in relation to our submission, please do not hesitate to contact me on 1-800-000-159 or [damiandc@momentumwealth.com.au](mailto:damiandc@momentumwealth.com.au)

Sincerely



Damian Collins  
Director

## **About Us**

Momentum Wealth is a full-service property investment consultancy group. Our core focus is building the long-term wealth of our clients by assisting them in the strategic selection, acquisition and management of their investment properties. Through understanding our clients' needs and applying our own highly-developed real estate investment strategies, we strive to deliver maximum return for our clients in the shortest time-frame possible.

We provide Mortgage Broking services across Australia. We are also a licensed Real Estate Agency in Western Australia, however we act for Buyers only and are paid by our clients. We do not receive any fees or commissions from property sellers.

## **The Author**

Damian Collins, age 39, is a highly successful property investor and entrepreneur. Throughout his investment career, Damian recognised the need of time-poor investors for a trusted source of advice that could guide their property investment decisions. Damian launched Momentum Wealth to fulfill this role and assist investors in achieving their long-term property wealth goals.

Damian owns a multi-million dollar property portfolio and as the founder and Managing Director of Momentum Wealth he applies his many years of experience to help investors accelerate their wealth creation through property investment. His own carefully developed system for selecting the best performing property investments is used to find clients the finest investment properties.

To date, Damian has earned the following qualifications:

### **Academic Qualifications**

Bachelor of Business (Accounting) RMIT  
Completion of the Professional Year – Institute of Chartered Accountants  
Graduate Certificate in Financial Planning (FINSIA)  
Graduate Diploma in Applied Finance and Investment (FINSIA)  
Graduate Diploma in Property (Curtin)  
Certificate IV in Financial Services (Finance / Mortgage Broking)

### **Professional Memberships**

Member of the Institute of Chartered Accountants (CA)  
Fellow of the Financial Services Institute of Australia (FFin)  
Member of the Australian Institute of Management (AIMM)  
Accredited Mortgage Consultant with the Mortgage and Finance Association of Australia (MFAA)