



ASIC

Australian Securities & Investments Commission

REPORT 05

**Review of the financial
advising activities of real
estate agents—interim report**

July 1999

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CHAPTER 1: INTRODUCTION

1.1 Aim of the interim report

The aim of this interim report is to provide the preliminary conclusions of the Australian Securities and Investments Commission (“ASIC”) arising from its review of the financial advising activities of real estate agents, and to seek public comment on them. The reasons why ASIC has undertaken this review are set out in Chapter 2.

1.2 Structure of the interim report

This report is structured as follows:

- Chapter 1: Introduction
- Chapter 2: Background to and scope of the review
- Chapter 3: Conceptual framework for comparing the regulatory regimes for investment advisers and real estate agents
- Chapter 4: Summary of key findings

This report is accompanied by a detailed technical paper. That paper sets out some details about the nature of the real estate industry and the use of real property as a retail investment vehicle. It then details the regulatory requirements which apply to real estate agents and investment advisers under the relevant New South Wales law and the Corporations Law, respectively, in respect of their investment advisory activities. This analysis forms the basis of the comparison which is summarised in Chapter 4 of this report.

The technical paper is available through the ASIC website, at <http://www.asic.gov.au>. Copies of this interim report may be obtained either through the website or by contacting the ASIC Infoline on 1300 300 630.

1.3 Methodology of the review

In undertaking the review, ASIC has chosen to compare the regulatory regime applying to real estate agents in respect of their financial advising activities with that applying to investment advisers under the Corporations Law. The reasons why ASIC believes that it is reasonable to compare those regulatory regimes in assessing the effectiveness of the regulation of real estate agents are set out in Chapter 3 of this report.

The main features of the regulatory regime under the Corporations Law that apply to persons conducting investment advisory activities under a dealers or an investment advisers licence, and the regulatory requirements that apply to real estate agents operating in New South Wales, are outlined in tabular form in Chapter 4 of this report. These requirements are set out in more detail in the technical paper.

The regulatory requirements governing the activities of real estate agents in the States and Territories are not uniform. For example, the definition of a real estate agent is not

uniform, and therefore the range of activities in which a real estate agent may engage varies in different jurisdictions. While in New South Wales there is a separate licensing regime for real estate agents, stock and station agents, business agents, strata managing agents and community managing agents and on site residential property managers, in other States and Territories some of these occupations are included in the definition of a real estate agent¹.

Because of the level of detailed analysis required, for the purpose of undertaking a comparison of the regulatory regime for real estate agents with that applying to investment advisers under the Corporations Law, ASIC has chosen at this stage of the review to focus on the regulatory requirements for real estate agents operating in New South Wales. While ASIC recognises that there are variations from State to State in the regulatory requirements that apply to real estate agents, it would be unwieldy in this report to attempt to describe in detail each of the laws that apply in each State and Territory. Therefore, Chapter 4 of this report outlines in tabular form the main features of the regulatory regime applicable to real estate agents in New South Wales. These features are described in more detail in the technical paper.

Chapter 4 of the report then compares the regime regulating investment advisers with that applying to real estate agents in New South Wales, and in particular identifies those areas in which the regulatory regime for real estate agents appears to ASIC to be deficient in so far as real estate agents engage in providing financial advice.

Each State and Territory Department of Fair Trading or equivalent has been provided with a copy of this report and requested to identify any significant variations which may exist in their State or Territory from the regulatory regime in New South Wales and to provide any other comments they may wish to make. Any differences which are identified by the States and Territories and any other comments which are provided will be taken into account in forming ASIC's final conclusions.

Where appropriate, key features of the proposed reforms under the Corporate Law Economic Reform Program ("CLERP") which would impact on the regulatory regime applicable to persons conducting investment advisory activities are identified. For full details of the proposals for reform in this area, reference should be made to the consultation paper issued by the Commonwealth Government in March 1999 entitled "Financial Products, Service Providers, and Markets – An Integrated Framework, Implementing CLERP 6"².

1.4 Terminology

In this report the following expressions have the meanings set out below:

"financial advice" relating to financial advice given in relation to investments in real estate, includes advice about:

¹ NSW Department of Fair Trading 1997, Review of the *Property, Stock and Business Agents Act 1941*, Issues Paper, September 1997, page 25.

² Corporate Law Economic Reform Program 1999, *Financial Products, Service Providers and Markets – An Integrated Framework*, Consultation Paper, AGPS, Canberra.

- the possible financial gain to be made from buying or selling real estate;
- the relative merits of real estate as an investment compared with other forms of investment;
- the financing of real estate investment packages, including the promotion of negatively geared investment packages;

“investment advice” means:

- under the Corporations Law regime, any advice given in relation to investments in securities (eg shares, debentures, interests in managed investment schemes and superannuation), and
- under the real estate regime, financial advice in connection with real estate transactions;

“investment adviser” when used in reference to a person regulated under the Corporations Law, means a person who gives investment advice under an investment advisers, dealers or a responsible entity’s licence;

“person operating under a licence” means a person who is a holder of a dealers, investment advisers or a responsible entity’s licence under the Corporations Law or a proper authority holder (ie a representative) of such a licensee;

“real estate adviser” means a person who is a holder of a real estate agent’s licence or a real estate salesperson but does not include “real estate marketeers” operating outside real estate regimes in the States and Territories.

1.5 Request for comments

Before forming any final conclusions, ASIC is seeking and will take into account public comments on the preliminary conclusions set out in Chapter 4 of this interim report.

In particular, ASIC seeks comments on the following issues:

- ASIC’s analysis of the differences between the regulatory regimes for real estate agents and for investment advisers, set out in Chapter 4 and summarised in Part 4.7, and whether any changes need to be made; and
- the proposed method for addressing those differences that have been identified, set out in Part 4.8, and whether any alternative approach should be adopted.

Comments should be sent to:

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or by email to greg.tanzer@asic.gov.au.

ASIC will consider all comments and suggestions received by Friday 27 August 1999.

CHAPTER 2: BACKGROUND TO THE REVIEW

2.1 Aim of the review

The aim of this review is to assess the effectiveness of the regulatory framework governing the financial advice activities of real estate agents, as requested of ASIC by the Government in its response to the Financial System Inquiry report.

2.2 Financial System Inquiry report

The report of the Financial System Inquiry³ stated that the Inquiry considers that real estate agents who promote negatively-gearred investment packages are providing retail financial advice. It noted that to some extent, these activities are already regulated by State and Territory licensing of real estate agents and are also regulated via the responsibility of lenders under the Uniform Consumer Credit Code. The Inquiry noted that it had not reviewed the adequacy of those arrangements.

The report stated that a review should be undertaken with a view to requiring those real estate agents providing investment advice to obtain an investment adviser's licence, unless it can be clearly established that the existing regulatory arrangements are adequate.

Recommendation 16 of the report was in the following terms:

“The existing regulation of real estate agents should be reviewed. Real estate agents providing investment advice should be required to hold a financial advisory licence unless the review clearly establishes the adequacy of existing regulation.”⁴

The Government response⁵ to recommendation 16 of the Financial System Inquiry report was in the following terms:

“Licensing of real estate agents who give financial advice

Real estate agents who promote negatively-gearred investment packages are providing retail financial advice. Other financial market participants are subject to registration and licensing requirements. The existing regulation of the financial advice activities of real estate agents will therefore be reviewed for their adequacy, and on the basis that real estate agents providing investment advice should be subject to licensing requirements, unless it can be established that the existing regulatory arrangements are adequate.

³ Australian Financial System Inquiry 1997, *Financial System Inquiry Final Report*, (Mr S Wallis, Chairman), AGPS, Canberra.

⁴ *Ibid*, page 275.

⁵ Statement by the Treasurer, the Hon. Peter Costello MP in the House of Representatives on 2 September 1997, and additional documentation tabled with the Statement.

This review will be undertaken by the ACFSC, which will be in the best position to coordinate a review of the existing practices and licensing regimes of the States and Territories.”

ASIC came into being on 1 July 1998, and took on the functions of the body referred to in the Government response as the ACFSC.

2.3 CLERP proposals on financial products

As part of CLERP the Government has released proposals for reform to the regulation of financial markets and investment products. In March 1999, the Government released a consultation paper “Financial Products, Service Providers, and Markets - An Integrated Framework”⁶. The paper called for comments by 16 April 1999 and stated that it is expected that draft legislation will be released for public consultation later in 1999.

The paper proposes harmonised regulation of all financial products with a single licensing regime for financial service providers, minimum standards of conduct relating to the provision of financial services including specific requirements when dealing with retail clients and uniform product disclosure obligations to retail clients.

The consultation paper proposes that credit will be brought within the new regulatory framework applying to financial products. However the provision of credit products for private, domestic or household purposes which falls within the scope of the Uniform Consumer Credit Code is not proposed to be included, pending a review of the credit code.

These proposals therefore have significant implications for all persons, whether real estate agents or not, who may be in the business of giving, for example, negative gearing advice for investment purposes as such activities may fall within the scope of the provisions relating to credit.

The consultation paper identifies that one of the advantages of bringing credit within the new regulatory framework is that all persons in the business of giving negative gearing advice will be regulated under the same provisions.⁷

2.4 Activities of real estate agents currently regulated under the Corporations Law

Some investment advisory activities of real estate agents are already subject to regulation under the Corporations Law. For example, where they give investment advice relating property syndicates and serviced strata schemes that are within the definition of managed investment schemes, their activities are regulated under the Corporations Law.

⁶ Corporate Law Economic Reform Program 1999, *Financial Products, Service Providers and Markets – An Integrated Framework*, Implementing CLERP 6, Consultation Paper, AGPS, Canberra.

⁷ *Ibid*, pages 126, 127.

As the first stage of the review of the financial advice activities of real estate agents, ASIC issued for public comment Interim Policy Statement 140 on serviced strata schemes (“IPS 140”) on 6 October 1998.

ASIC consulted widely and considered over 40 written submissions on the content of IPS 140. After taking public comments into consideration, ASIC issued a revised IPS 140 on 16 December 1998.

After considering further public comment, Policy Statement 140 was issued on 5 May 1999. By providing guidance on the application of the Law to the promotion and operation of serviced strata arrangements, the policy statement also provides guidance on the extent to which ASIC sees the Law currently applying to the activities of persons, including real estate agents, who operate, market or give investment advice about such arrangements, which are managed investment schemes.

2.5 Scope of the review

2.5.1 What is covered

The main focus of this review is to compare and contrast the regulation of the relevant financial advice activities of real estate agents which are not covered under the Corporations Law with the way in which the Corporations Law regulates persons conducting investment advisory activities.

Under the Corporations Law, investment advisory activities can be conducted by a person operating under a dealers licence, investment advisers licence or a responsible entity licence. Those advisers who have an economic or other interest in the outcome of a transaction resulting from the advice they give (eg receiving commissions from a fund manager) are considered by ASIC to be inducing the recipients of advice to enter into securities transactions. For example, where an adviser receives commissions from a product provider instead of fees from the client, they are considered to have such an economic interest in the outcome of the advice and must therefore operate under a dealers, instead of an investment advisers, licence (see ASIC Policy Statement 116 for details). This review focuses on the regulatory requirements that apply to persons conducting investment advisory activities under any one of these three categories of licences.

With regard to advice about real estate, the review focuses on such advice where it has a significant component of investment related advice, including advice on the possible financial gain to be made from buying or selling real estate, advice on the relative merits of real property as an investment against other possible investments, and advice about the financing of real estate investment packages, including the promotion of negatively geared investment packages.

ASIC has not restricted the scope of this review to circumstances where financial advice is provided which involves negative gearing on investment properties. Reliance may be placed by a retail investor on financial advice, whether or not the purchase is made for investment or other reasons, whether or not money is borrowed to fund the purchase and

whether or not the cost of those funds exceeds the income which may be derived from the property.

2.5.2 What is not covered

The terms of the Government request to ASIC was to review the current regulation of the financial advising activities of real estate agents.

While ASIC has restricted the terms of this report to examining the financial advising activities of real estate agents and salespersons, ASIC has become aware of significant concerns regarding the activities of persons who are not licensed or registered under State or Territory real estate regimes but who are nevertheless involved in the sale of real property to investors. These persons are sometimes referred to as “real estate marketers” or “real estate marketeers”.

This report does not concern the activities of persons falling outside the real estate regulatory regime in each State and Territory. However, there appears to be no logical reason why such persons should not be subject to the same or similar regulatory regimes which are applicable to real estate agents where they are engaging in similar activities to real estate agents and where the potential for the impact of their activities on consumers is similar to the potential impact of the activities of real estate agents.

Because the focus of this review is on investment advisory activities, this review does not encompass other activities that are conducted by persons operating under the Corporations Law licences. For example, the provisions relating to holding of clients’ funds and assets, accounting requirements and product disclosure obligations of responsible entities, although closely linked with any investment advisory activities they may undertake, are not reviewed in this interim report.

Similarly, the full range of provisions applicable to real estate agents are not discussed in this report. For example, provisions relating to the Property Services Compensation Fund, where there has been a failure by a licensee to account for money and the appointment of a receiver where there is reason to believe that a defalcation has occurred in relation to a trust account, are not covered in this review. Further, the report does not discuss in detail the measures included in the Real Estate Institute of Australia Code of Ethics, because it is currently undergoing significant development and ASIC has not been able to assess how it is currently enforced.

The review does not canvass any specific implementation mechanisms such as which regime should contain the necessary safeguards to address the identified risks, or what specific enforcement mechanisms should be available to the relevant regulatory agencies who will administer any enhanced regulation. Reforms to address such issues are matters more appropriately dealt with by Government.

2.6 Consultation

2.6.1 Public comments

By media release dated 16 December 1998 ASIC invited comment on the issues involved in the second stage of the review by 9 February 1999.

To assist those wishing to make comment ASIC provided an information kit (made available through ASIC's Infoline and internet home page) which outlined the current regulation of investment advisers under the Corporations Law and proposals for the regulation of investment advisers under CLERP.

The information kit invited comments on any issues which may be considered relevant to the review of the financial advising activities of real estate agents. In particular, comments were invited on the following issues:

- To what extent are real estate agents providing advice about real estate that has a significant component of investment related advice? This includes advice about the possible financial gain to be made from buying or selling real estate, the relative merits of real estate as an investment compared with other forms of investment and the financing of real estate investment packages, including the promotion of negatively geared investment packages.
- Are the existing competency, integrity and financial requirements relating to real estate agents adequate to equip them to provide financial advice?
- Does the public have sufficient access to information about real estate agents and the services they offer to enable them to adequately compare and choose real estate agents?
- Are the rules of conduct applicable to real estate agents appropriate to deal with the giving of financial advice?
- Are the existing mechanisms to deal with complaints resolution adequate to deal with complaints concerning the financial advising activities of real estate agents?
- Are there adequate remedies available to consumers to deal with situations involving the giving of financial advice by real estate agents?
- Are the existing disciplinary mechanisms appropriate to deal with situations involving the giving of financial advice by real estate agents?

ASIC received 13 submissions. ASIC's summary of the comments made by the real estate industry, the financial planning industry and other interested parties is at Attachment A.

2.6.2 Consumer Advisory Panel

The Consumer Advisory Panel (“CAP”) was also provided with copies of the media release and information kit and invited to comment on the issues covered in the review.

CAP provides a mechanism for consumers to comment on proposed ASIC policies and to identify issues that directly affect them. CAP, which has ten members, is chaired by Barbara Cail AM, and includes representatives from consumer groups, as well as non affiliated members.

CAP members have expressed strong concerns over the apparent lack of regulation of some real estate investments. They also noted the continuing importance of real estate investments for many Australians. The apparent uneven playing field for the regulation of real estate investments compared to other investments was a concern in this context.

2.6.3 Standing Committee of Officials of Consumer Affairs

In November 1996 the Standing Committee of Officials of Consumer Affairs agreed to establish a working party to examine the potential for agreement on a uniform entry standard for real estate agents licensing and to make recommendations in respect of a uniform entry standard (to be expressed in terms of competency standards).

ASIC has liaised with relevant officials concerned with the working party who have advised that the working party’s proposed entry standards for the real estate agents licence comprise nine units of competence. These were drawn from the review of the *National Competency Standards for Real Estate Agency* conducted by Property Services Training Australia, released in February 1998. The units are:

- implement and monitor financial management systems;
- provide property market opinions;
- obtain property market listings;
- undertake property sale by private treaty;
- monitor process to completion of sale;
- lease property;
- provide property management services;
- conduct property sale by auction;
- maintain trust accounts.

ASIC has been advised that the Standing Committee decided to consult State and Territory stakeholders on the working party’s proposal. However in most jurisdictions the examination of competencies for real estate agents is being examined in the context of competition policy reviews.

CHAPTER 3: CONCEPTUAL FRAMEWORK FOR COMPARING THE REGULATORY REGIMES FOR INVESTMENT ADVISERS AND REAL ESTATE AGENTS

3.1 Introduction

This Chapter discusses the conceptual framework for comparing the regulatory requirements applying to the financial advice activities of real estate agents and persons authorised to give investment advice under the Corporations Law. It commences by examining the differences and similarities between real estate advice and securities advice, and discusses the key regulatory risks which need to be addressed. It concludes with a description of the types of financial advice activities carried out by real estate agents which are most similar to investment advice activities regulated by the Corporations Law.

3.2 Differences between real estate advice and securities advice

While any investment advice that a real estate agent may give generally relates to or has as its basis the purchase or sale of real estate, advisers under the Corporations Law give advice relating to securities (eg shares, debentures, and interests in managed investments). The difference in the underlying product may have led to the development of distinctly different regulatory regimes for the regulation of real estate agents and investment advisers under the Corporations Law.

Investments in securities are different to real estate investments because the purchaser of real estate generally acquires title and possession (and therefore control) of a tangible asset, whereas a person acquiring a security acquires only a promise (a “chose in action”), the fulfilment of which would depend upon the performance of other parties who have direct control of the funds invested. The intangible nature of securities was considered a sufficient ground for providing a distinctive regulatory regime for the protection of persons investing in securities.

There are also differences in the distribution mechanisms applicable to securities as opposed to real estate transactions.

Estate agents generally act for vendors. Therefore, the regulatory requirements that apply to real estate agents have a strong focus on the selling activities conducted on behalf of the client, the vendor, and the obligations owed as between the agent and the vendor. In contrast, securities are distributed through a number of sources such as issuers of securities themselves (eg fund managers operating under their own licence), dealers who undertake selling activities for issuers on a commission basis (which may or may not include other benefits such as soft dollar arrangements), and independent investment advisers who act for clients and get paid only by their clients (and not by issuers). Where advisory activities are undertaken by any one of these persons, the Corporations Law imposes regulatory obligations in relation to the provision of such advice regardless of whether the adviser is acting for the client, selling their own securities or distributing securities for issuers (ie operating under commission arrangements with issuers of securities).

3.3 Functional similarities between real estate and securities advice

The recommendations of the Financial System Inquiry, referred to in Chapter 2 above, recognise that in spite of the differences that underlie the giving of advice by real estate agents and investment advisers, there are sufficient similarities to justify assessing the adequacy of existing regulation of the financial advising activities of real estate agents when compared to the regulation of advisers under the Corporations Law. The key consideration is that there is a strong functional similarity between the advice given to retail investors regardless of whether the underlying investments are in real estate or securities.

There are two key factors that support the conclusion that there is a strong functional similarity between financial advice about real estate and securities.

First, although the underlying products, ie real estate and securities, have product specific differences, the financial considerations that have a direct bearing upon any decision to acquire, hold or divest such products by an investor are often the same. Such financial considerations include the investment needs, financial circumstances (such as social security entitlements, other sources of income and assets) and particular needs of the individual making the decision. Therefore, it could be argued that a person providing any advice to assist or induce investors to make financial decisions relating to such products should act with comparable levels of competency and integrity and be subject to similar conduct standards.

Secondly, investments in real estate and securities are interchangeable investment alternatives.⁸ Investors are invited to choose from a range of investment opportunities including securities, real estate, life insurance and bank deposits, based on their particular financial circumstances and particular investment needs (eg driven by their long or short term needs, their desire for capital growth or income, the taxation implications and so on).

Where an investor is seeking advice about the range of investment opportunities available, or about the particular investment characteristics of a particular investment vehicle including real estate, the function of the advice is the same regardless of the underlying investment vehicle.

To the extent certain investments such as securities, real estate and insurance investments are considered by retail investors as comparable products, advisers may be expected by investors to make comparative assessments. As consumers and investors become more active in choosing their investments and financial services, there is a growing commercial imperative for advisers to provide comparative recommendations relating to those products.

⁸ The significance of real property as a form of retail investment is discussed in more detail in Chapter 2 of the technical paper that accompanies this report.

Leaving aside the functional similarity, there are several factors that bear in favour of providing a consistent regulatory regime for financial advice in relation to securities and real estate.

To the extent that any real estate investments are recommended as preferable to other investments such as securities, such advice may be negative securities advice, ie advice *not* to purchase securities. Such advice is subject to regulation under the Corporations Law regime and should be made, at a minimum, with a sufficient understanding about securities as investments to promote retail investor protection.

Some real estate investments are currently subject to regulation under the Corporations Law. For example, investments in property syndicates (ie where real estate investments are managed as a pool) and serviced strata schemes are subject to regulation under the Corporations Law to the extent such schemes fall within the definition of managed investment schemes in the Law. Although investments in such schemes can be distinguished from other investments in real estate because of the differences in relation to ownership and control by the investor, this in itself may not be sufficient to warrant different levels of regulatory protection, especially where retail investors are being induced to purchase real estate for an investment purpose.

Finally, for the retail investor an investment in real estate usually involves taking on a very significant financial burden. Whereas a retail investor in the securities markets or in other forms of investment can choose a fairly low level of commitment and enter into the market, a real estate investor has to make a significant financial commitment, simply because of the relative cost of real estate. In addition, an investment in real estate tends to be less liquid compared to investments in most securities. The impact that real estate investment can have on the financial stability of a retail investor makes it important that the investor is afforded appropriate protection against incompetent or inappropriate advice.⁹

3.4 Risks to investors

The functional similarities noted above provide the basis for the argument that retail investors who receive financial advice relating to investments in real estate, securities and other comparable investments face similar risks which warrant a consistent level of regulatory protection.

Some of the key risks for retail investors in taking financial advice are that:

- the advice may not be prepared competently;
- the advice may be tainted by conflicts of interests of the adviser;
- the advice may not have a reasonable basis (ie it may be inappropriate to the investor in light of that investor's individual needs, objectives and financial circumstances);
- there may be a lack of information about the nature of the advisory services and rights of the person receiving that advice; and

⁹ These factors are discussed in more detail in Chapter 2 of the technical paper.

- effective and easily accessible remedies are not available to the investor where advisers fail in their advisory obligations.

The relevance of these risks varies depending on the nature of the advice and the context in which it is given.

3.5 Types of advice and associated risks

There are three main categories of advice that may be given by real estate agents in relation to real property, where some parallels can be drawn with the types of advice given in relation to securities:

- *Information about the property itself* - such as title details, sale or expected price and details relating to the sale transaction. This area of product related information can generally be regarded as analogous to product disclosure requirements that apply to the offer or sale of securities.

The key risk that needs to be addressed is that the advice about the property itself is accurate and not misleading. This risk is generally considered to be best addressed by clear product disclosure obligations imposed on parties who have better access to such information. The existing regulation of real estate agents and sale of real property is designed to address this risk, by prescribing the information requirements such as those that must be provided in sale or auction documents, agency agreements and the conduct standards applicable to sales agents.

- *General information or advice relating to the financial viability of a real estate transaction* such as likely capital gains, likely rental income and marketability of the property (ie product specific financial information/advice). Real estate agents often give such advice as part of their marketing of real estate, and such advice can reasonably be considered as an integral part of real estate business.

This activity is analogous to “general securities advice” in relation to which ASIC does not apply requirements such as having a reasonable basis for making such recommendations. It is similar in nature to incidental advice on securities given by solicitors and accountants in the course of their public practice (eg advice given as an integral and incidental part of a tax or legal review of a portfolio of securities). Such advice is generally regulated by the relevant accounting or legal professional bodies rather than under the Corporations Law.

The key risks in this area that need to be addressed are that the adviser is competent to give this advice, that it is accurate and not tainted by conflicts of interest, and that the investor understands that the advice is general advice and is not tailored to their particular financial circumstances and investment needs.

Such risks are best addressed by regulatory requirements such as “warnings” given to intending purchasers that clearly indicate the limited nature of such

advice and that they should consider the suitability of such products in view of their own individual financial and other needs and circumstances. Concerns about the quality of advice can be addressed by product specific competencies applicable to persons giving such advice. Any conflict of interests of the adviser can be effectively addressed through a requirement to disclose any material conflicts of interests of the adviser (eg where the adviser is also acting for the vendor/developer of the real estate in relation to which advice is given to intending purchasers) with the “warning”.

- *Advice about the suitability of the investment to a particular intending purchaser which is or purports to be tailored to the particular circumstances of that purchaser, such as the affordability of the purchase based on the purchaser’s income and taxation circumstances and negative gearing benefits derivable by a particular purchaser (ie individually tailored financial advice).*

The agent may make personal recommendations based on an individual’s particular financial situation and needs. Such advice is analogous to personal securities recommendations made by a securities adviser. Personal securities recommendations are subject to specific Corporations Law requirements, in particular the requirements that there must be a reasonable basis for the recommendation and the adviser must clearly disclose any conflicts of interests that are likely to adversely impact on the recommendation.

Where such recommendations are made to retail investors on an individual basis, and they are likely to act on reliance of such advice, there is a greater potential for losses if:

- the advice does not have a reasonable basis, ie the advice is not prepared in light of the client’s individual investment objectives, financial circumstances, particular needs and adequate product research conducted to match investments to those individual needs;
- the advice is tainted with conflicts of interests of the adviser and its associates; or
- the advice is not prepared competently, ie by a person with appropriate experience and qualifications to prepare such advice.

Without being subject to specific conduct standards that encompass such requirements, it is unlikely that real estate advisers would of their own volition follow such standards when making recommendations about the financial suitability of real estate investments to intending purchasers, particularly in the absence of any legal remedies available to such purchasers that can be enforced against advisers who fail to abide by such standards. As such, this area of financial advice activity warrants regulatory measures specifically tailored to the activity of giving investment advice rather than product specific general requirements designed to regulate transactions (ie buying and selling) and incidental general financial advice.

In view of the higher risks to retail investors, the argument for comparable regulation through greater regulatory intervention in this area is the strongest.

CHAPTER 4: SUMMARY OF KEY FINDINGS

4.1 Introduction

The Corporations Law contains a range of requirements that are designed specifically to deal with risks associated with the provision of investment advice relating to securities. These include:

- competency requirements applicable to advisers that are tailored to investment advisory activities;
- disclosure obligations to address conflicts of interest;
- a requirement that an adviser must have a reasonable basis for making a recommendation;
- access to alternative dispute handling mechanisms; and
- disclosure of key information relating to advisory services in easy to understand and comparable form for the investor.

ASIC, as the regulator, has administrative sanctions available to it to ensure that advisers comply with these requirements (eg licence suspension and revocation powers and banning powers), and application may also be made to the courts for other sanctions.

The real estate regulatory regime also contains competency and integrity requirements, disclosure obligations, alternative complaints handling mechanisms, as well as disciplinary powers available to the relevant State regulator through which real estate agents are regulated. However, given that the real estate regime is designed primarily to deal with real estate transactions rather than any financial advisory activities of real estate agents, the question at issue is whether that regime currently provides a similar level of protection where real estate agents provide financial advice relating to or associated with real estate transactions as is available under the Corporations Law, particularly where such financial advice is or purports to be individually tailored to the needs and circumstances of prospective purchasers.

This Chapter sets out the preliminary findings resulting from ASIC's review to ascertain the comparability of the two regimes undertaken on the basis of the above considerations.

For convenience of analysis, the review focuses on five main aspects of regulation applicable to advisers under each regime:

- authorisation standards, ie competency, integrity and financial requirements;
- disclosure obligations (ie information that must be provided to consumers and regulators);
- conduct standards;
- complaints resolution and consumer remedies; and
- disciplinary procedures.

4.2 Authorisation standards - competency, integrity and financial requirements¹⁰

- Both regimes provide authorisation requirements aimed at ensuring licensees are fit and proper, and have the training and background, to perform their main roles.
- However, the real estate regime does not include competency requirements which appear to be directed at ensuring that real estate agents giving *financial* advice have the training, qualifications and experience to give such advice.
- The Corporations Law regime specifically provides that a licensee is liable for the acts of its representatives, whereas the real estate regime relies primarily on common law agency principles to ensure the licensee's accountability for their salespersons' activities.

Both the real estate regime and the Corporations Law regime have authorisation requirements (ie licensing requirements). The requirements under both regimes encompass an assessment of relevant competencies, integrity and financial soundness of the applicant before the grant of a licence. In this regard, the real estate regulatory regime seems comparable to the Corporations Law regime, in that it seeks to ensure that agents have certain levels of competency, integrity and financial soundness before being authorised to engage in real estate business.

The differences in the relevant licensing criteria under the two regimes arise in the following areas:

- *Educational and experience requirements* - While the ASIC requirements are designed to ensure that applicants (and their responsible officers) have competencies appropriate to giving investment advice, the educational and experience criteria applicable to applicants for a real estate agent's licence appear to focus on competencies relating to real estate transactions, rather than the giving of financial advice, particularly individually tailored financial advice, to intending purchasers;
- *Integrity standards* - Both regimes apply probity standards (ie good fame and character and fit and proper person tests) which encompass a detailed screening process of applicants that include police checks, self declarations in the application and character certificates from associated persons and the absence of banning orders.

However, there are some differences in the approaches adopted under the two regimes in applying some integrity standards. For example, the Corporations Law prohibits the grant of a licence to a bankrupt (or persons against whom bankruptcy proceeding are pending), whereas bankruptcy is not an automatic disqualification under the real estate regime. Rather, applicants are required to declare whether they have been declared bankrupt and the circumstances surrounding any bankruptcy are taken into account in

¹⁰ These requirements are discussed in more detail in Chapters 3, 4 and 5 of the technical paper. This section represents a summary of the detailed discussion contained in those chapters.

the context of the “fit and proper person” requirement.

- *Financial requirements* - While ASIC imposes a performance bond requirement (up to \$20,000) and a surplus funds requirement or a net tangible asset requirement (where no handling of client’s funds occur) on licensees giving investment advice, real estate agents are not generally subject to prudential requirements of this nature.

The supervision of agents and employees under both regimes occur through the licensee. However, while representatives of licensees are not directly authorised under the Corporations Law, salespersons of real estate agents are directly certified (ie authorised) under the real estate regime. This provides the capacity for real estate salespersons to be directly regulated in respect of their educational qualifications, good fame and character and the like. Under the Corporations Law, apart from a prohibition on a banned person acting as a representative, the qualifications for a person to act as a representative are matters for which the licensee is responsible, although licensees are subject to specific requirements as to the appropriate training and supervision of representatives in regard to the responsibilities that are assigned to them.

Further, unlike the Corporations Law regime which expressly provides for the licensee’s liability for the acts of its representatives, the real estate regime seems to rely primarily on common law agency principles to ensure the licensee’s accountability for their salespersons’ activities. To the extent that the Corporations Law liability structure seeks to clarify and strengthen the common law position, the liability of licensees under the Corporations Law for representatives’ actions can be seen as more stringent than that available under the common law provisions.

The following table compares the authorisation requirements applicable under the two regimes.

Table 4.1: Competency, integrity and solvency requirements

Investment advisers	Real estate agents
Licensing requirements	Licensing requirements
<p>Entry level An applicant for a licence must satisfy specific requirements relating to:</p> <ul style="list-style-type: none"> • solvency • educational qualifications and experience • good fame and character • efficiency, honesty and fairness <p>A licence may not be granted to a person who is the subject of a banning order.</p>	<p>Entry level Applicants for a real estate agency licence must be able to satisfy requirements relating to:</p> <ul style="list-style-type: none"> • whether disqualified from holding a licence • must be at least 21 years old • good fame and character • fit and proper person • whether application contains false and misleading material • experience • qualifications • whether registered as a salesperson etc for 2 years

<p>a. Competency</p> <p>An applicant must satisfy the educational and experience standards specified in ASIC Policy Statement 138. For example, a degree or an industry diploma relevant to the financial advice business and a minimum of three years relevant experience will be required to obtain a licence under which investment advice can be given to retail investors.</p>	<p>a. Competency</p> <p>Examinations are approved by the Minister.</p> <p>The Director-General may exempt a person from the requirement to hold qualifications or to have been registered as a salesperson etc for 2 years.</p> <p>In assessing experience, information from the register of supervising licensees can be relied on.</p>
<p>b. Integrity</p> <p>An applicant must demonstrate its integrity. This is generally established by the absence of any:</p> <ul style="list-style-type: none"> • current banning orders; • current convictions; and • evidence of refusal or revocation of membership with relevant industry/professional associations; and, • other information that indicate that an applicant (or its responsible officers) is not of good fame and character. <p>Integrity is assessed by consideration of:</p> <ul style="list-style-type: none"> • ASIC databases • police checks • requirement for declarations of matters such as insolvency, refusal of membership of professional or industry associations and convictions • character references 	<p>b. Integrity</p> <p>Good fame requirement usually satisfied by character references.</p> <p>A police check is part of the fit and proper test.</p> <p>Applicants are required to declare any offence and whether they have been declared bankrupt.</p>
<p>c. Solvency</p> <p>An applicant for a licence must not be insolvent. An applicant must demonstrate its solvency by:</p> <ul style="list-style-type: none"> • not being an insolvent or under administration; • being able to lodge a security bond (up to \$20,000) with ASIC; and • where required by ASIC, by being able to meet financial conditions (eg net tangible asset tests). 	<p>c. Solvency</p> <p>Applicants are required to declare whether they have been declared bankrupt. Circumstances surrounding the bankruptcy may be relevant to the fit and proper test.</p>
<p>Representatives</p> <p>Are not directly licensed/registered but are subject to authorisation and on-going supervision by a licensee.</p> <p>ASIC requires a licensee to ensure that representatives who are involved in giving investment advice to retail clients have appropriate competencies and ethical standards to be able to give investment advice.</p> <p>Licensees are liable for the conduct of their employees and cannot contract out of that liability.</p>	<p>Salespersons</p> <p>Must be directly registered and be under the supervision of a licensee. Registration requirements relate to:</p> <ul style="list-style-type: none"> • minimum age of 16 • must have approved educational qualification • good fame and character • fit and proper person • whether application contains false and misleading matters. <p>Common law principles govern the accountability of the licensee for the acts of salespersons.</p>

Employment restrictions	Employment restrictions
Where a person is subject to a banning order they may not be a representative of a dealer and/or an investment adviser (as specified in the order) and they are ineligible to be licensed as an investment adviser or a dealer.	Restrictions apply to the employment of persons who: <ul style="list-style-type: none"> • are disqualified from holding a licence or whose licence has been cancelled • have had an application for a licence refused • are disqualified from holding a certificate of registration or whose registration has been cancelled.
Breaches of licence conditions	
Breaches of licence conditions must be notified to ASIC within one day.	

4.3 Disclosure obligations — ie information that must be provided to consumers and regulators¹¹

- Under both regimes the regulators must maintain public registers that contain core information relating to the licensee and its operations, which enable members of the public to verify the identity and status of the person with whom they are dealing.
- There is no requirement for real estate agents to disclose to intending investors (except where they are retained by the purchaser) any commission or other benefit they receive from the transaction, nor to disclose any interest they may have in the transaction.

Both the Corporations Law regime and the real estate agents' regime require certain information to be provided. These information requirements fall into two categories:

- (a) information that must be provided to consumers:
 - i) product/transaction specific information such as in the prospectus or contract note required under the Law and the disclosure in contracts of sale under the real estate regime, and
 - ii) the information relevant to the service offered by licensees under each regime, and
- (b) information that must be provided to the relevant regulators for regulatory purposes.

A detailed analysis of the comparability of the information requirements relating to product/transactions (ie that described in (a) (i) above), which are designed to ensure that intending purchasers of securities and real estate have relevant and comprehensive information specific to the product/transaction, has not been undertaken in this review. This is because both regimes contain specific disclosure obligations in this area which are necessary to address product/industry specific needs that are unique to each industry, and therefore best suited to be dealt with under each regime.

¹¹ These requirements are discussed in more detail in Chapters 6, 7 and 8 of the technical paper. This section represents a summary of the detailed discussion contained in those chapters.

The information that must be given to the regulator and consumers which relates to the licensee and its services, which is designed to promote a high level of transparency in the operations of such persons, has been compared as this has wider implications for the regulation of investment advisory activities of real estate agents and Corporations Law advisers.

Under both regimes there is a range of information that must be provided to the regulator, and also information that must be maintained by a licensee as a part of conduct of licensed activities. Regulators themselves maintain some information relating to the licensees. For example, under both regimes the regulators must maintain public registers that contain core information relating to the licensee and its operations. These registers are public and therefore members of the public can access this information to verify the identity and status of the person with whom they are dealing.

In addition, the Corporations Law requires that every licensee, representative and financial journalist (a person who can give investment advice without a licence) maintains a register of material interests in securities held by that person, which enables ASIC to ascertain whether there are conflicts of interest tainting any advice given by such persons. The real estate laws do not include such a requirement.

There are also some differences between the two regimes with regard to the information that must be given to consumers relating to the advice or service offered. For example, the Corporations Law has specific and detailed information requirements relating to the provision of investment advisory services, which do not have identifiable parallels under the real estate regime.

The Corporations Law requires that investment advisers disclose to investors, to whom they make personal recommendations about securities, details of any fees, commissions and other benefits which they or their associates may derive from sources other than the person to whom the recommendation is made as a result of that person acting on that recommendation. This requirement is particularly designed to address conflicts of interests resulting from an adviser having affiliations with product issuers, such as commission arrangements. The disclosure enables prospective investors to make an objective assessment of the impact of hidden conflicts of interest on the recommendations made (such as product biases) before acting on such recommendations.

There is no requirement for a real estate agent to disclose commissions or any other interest the agent may have to an intending purchaser. There is an outright prohibition against the receipt of commissions from any person other than the client of the estate agent, ie usually the vendor. There is also a requirement for agents to display fees and commissions at their place of business. However, those provisions alone are not sufficient to ameliorate the adverse effects of conflicts of interest which a real estate agent acting for the vendor would have when making recommendations about the suitability of that investment to an intending purchaser.

Similarly, under the Corporations Law regime, licensees providing retail investment advisory services must provide certain information relating to those services (ie the retail

investor protection requirements). Under these requirements, before providing such services, an adviser must give to a retail investor an Advisory Services Guide containing key information relating to the nature of the service offered (eg identity of the provider, fees, investor rights and access to complaints handling mechanisms), to assist investors to make a well informed decision in selecting an investment advisory service. There is no comparable requirement relating to any financial advisory services offered by real estate agents to intending purchasers.

The table below sets out the different information requirements applicable under each regime.

Table 4.2: Disclosure requirements

Investment advisers	Real estate agents
Register of licensees	Register of real estate agents
The register includes: <ul style="list-style-type: none"> • a copy of licences, • other information relating to licences such as conditions on the licence, name of licensee, name of its officers, day of grant of licence, • name of the business using the licence, • address where the business is carried on, and • details of any suspension of licence 	The register includes: <ul style="list-style-type: none"> • licences • renewals, restorations, cancellations • refusals of applications • disqualifications • changes in the situation of the registered office or the registered address
Changes to the information relating to the licensee must be notified to ASIC within 21 days.	Changes are required to be notified within 14 days.
Register is open for inspection and copies may be made.	Register is open for inspection on payment of \$20.
Publication of name of licensee	Publication of name of licensee
The identity of a licensee who provides retail advisory services must be disclosed in the advisory services guide.	Real estate agents are required to display their name and their description as a licensee outside their place of business and to put their name and place of business in advertisements. Agents are also required to produce licences to any person with whom they are doing business.
Register of proper authorities	Register of salespersons
Every licensee is required to maintain a register of its representatives containing: <ul style="list-style-type: none"> • a copy of each proper authority issued, • the name, address, date of birth and business address of each representative. <p>ASIC must be notified of any changes to its content within 2 days. The licensee must also lodge an annual statement setting out the number of proper authority holders. This information is posted on ASIC's public database.</p>	The Director-General keeps a register containing: <ul style="list-style-type: none"> • certificates of registration • changes to name and address of the registered employer <p>A salesperson is required to give notice within 14 days of a change in the place of business where he or she is employed.</p>
Register is open for inspection without charge. Charge may be made for copies.	The Register is open to the public for inspection on payment of \$20.
Disclosure by representatives	Disclosure by salespersons
No express requirement, but if a representative acts in a manner that gives a reasonable impression it is acting not as a representative, it may amount to a breach of the prohibition against holding out in s780 and s781.	Salespersons are required to produce their certificate to any person with whom they are transacting business.

Register of interests in securities	
Licensees and representatives are required to keep a register of their interests in securities in a public or listed company. This is not a public register. ASIC may require production of the register and may supply copies of the register to any person if ASIC considers this is in the public interest.	No comparable requirement.
Disclosure to investors	Disclosure to clients
<p>Contract Notes Securities dealers must issue a contract note immediately after entering into a transaction for the sale or purchase of securities. The contract note must generally be issued to the person with whom the dealer enters into the transaction if the transaction is carried out in the ordinary course of business of a securities exchange. The contract note must contain information relating to the transaction such as, the name of the dealer, exchanges in which the dealer is a member, the name of the person to whom the contract note is issued, whether or not the transaction is on-exchange, the price, description, and amount of securities, consideration paid, the amount of commissions charged and stamp duties.</p> <p>Advisory Services Guide (ASG) Investment advisers must comply with the requirement to provide advisory services guides to retail investors. An ASG must contain key information relating to the service offered which enables an easy comparison of services such as:</p> <ul style="list-style-type: none"> • identity of the licensee and any representative responsible for the provision of advice; • the nature and method of remuneration of adviser including other charges; • basic rights of the investor when obtaining the services; and • complaints procedures available to investors. 	<p>Fees and commissions must be displayed at each place of business. A printed guide to fees and commissions must be given to a person before entering an agreement relating to the sale of property. It must be made clear that fees and commissions are subject to negotiation.</p> <p>Agency agreements are required to specify:</p> <ul style="list-style-type: none"> • the duration of the agreement or how the agreement may be terminated • the circumstances under which the licensee is entitled to remuneration, the amount of the remuneration or how it is to be calculated and when it is payable • that the fee has been negotiated between the parties • the circumstances under which a licensee is entitled to be reimbursed • a warranty by the principal that the principal has authority to enter into the agreement with the licensee. <p>Agreements for the sale of residential property must also contain the following:</p> <ul style="list-style-type: none"> • that the licensee cannot act on behalf of the principal unless the licensee has a copy of the proposed contract of sale available for inspection • a term specifying the way in which the licensee's remuneration is to be calculated and an estimate of expenses or charges.
Disclosure of conflicts of interest	
Persons giving investment advice must, when making recommendations about investments in securities to their clients, disclose any commissions, fees and other benefits which they or their associate obtain as a result of those clients acting on reliance of recommendations.	No comparable requirements for disclosure of commissions, fees or other benefits to intending purchasers . However, there are some prohibitions that deal with conflicts of interest: <ul style="list-style-type: none"> • a prohibition from receiving any remuneration from any person other than a person on whose behalf the licensee has agreed to act as an agent (which is generally the vendor); and • a prohibition that commission may not be shared with unlicensed persons other than employees.

4.4 Conduct standards¹²

- Under both regimes misleading or deceptive conduct is prohibited.
- Investment advisers are required to have a reasonable basis for securities recommendations, which requires them to take into account the investor's individual needs and circumstances and match those to investment products suitable for them. Real estate agents do not have a comparable "suitability" obligation.
- In the case of general advice, the Corporations Law regime requires the adviser to warn the investor of the limitations of that advice. There is no comparable requirement for real estate agents.

Both regimes contain broad prohibitions against misleading and deceptive conduct. These prohibitions play an important role in preventing investors from being misled into investing in inappropriate investments.

Nevertheless, there are significant differences in the conduct standards applicable to licensees under the Corporations Law and real estate agents and their salespersons under the real estate regime. The Corporations Law requires that an adviser who makes a recommendation to a client to buy/sell/hold securities must have a reasonable basis for that recommendation. The adviser must undertake a needs analysis of the client and adequate product research before making a recommendation. There is no similar requirement applicable to real estate agents making recommendations to intending purchasers of real estate.

Similarly, retail investors to whom advisory services of a limited nature are provided must be given certain information relating to the limited nature of that service. For example, if personal recommendations are given to a retail investor about whom the adviser does not have comprehensive information, the adviser must inform that person of the limitations resulting from the lack of comprehensive personal information. Similarly, where general securities advice instead of personal recommendations are given or made available to retail investors, such advice must accompany warnings that set out the limitations of such advice (ie such advice is not tailored to the individual needs of investors and therefore unsuitable for use as personal recommendations). There are no similar requirements under the real estate regime.

It is also important to note that Corporations Law licensees are generally accountable to clients for the conduct of their representatives, and licensees cannot contract out of such liability. For example, if a securities recommendation is made to a client by a representative of a licensee without any reasonable basis for that recommendation, the client has the option to recover any financial loss resulting from acting on reliance of that recommendation from the licensee.

The absence of specific conduct requirements such as those relating to having a

¹² These requirements are discussed in more detail in Chapters 9, 10 and 11 of the technical paper. This section represents a summary of the detailed discussion contained in those chapters.

reasonable basis for making a recommendation or information relating to conflicts of interests under the real estate regime can affect not only the advice provided to intending purchasers of real estate, but also any investment advice provided to their client, the vendor. Although there are safeguards available to vendors when entering into agreements for the sale of real estate, such as commission and other remuneration disclosure, these are not designed to provide comparable protection relating to any financial advice given to vendors relating to their intending sale.

The following table sets out the conduct standards applicable under the two regimes.

Table 4.3 - Conduct standards

Investment advisers	Real estate agents
Reasonable basis for making a recommendation	Reasonable basis for making a recommendation
Persons giving investment advice must, when making recommendations about securities to their clients, ensure that such recommendations have a reasonable basis. This requires the adviser to undertake a comprehensive needs analysis of the client, and conduct adequate product research to be able to match the client’s needs with suitable products.	There are no suitability requirements applicable to real estate agents and salespersons.
Warnings	Warnings
Warnings must be given where a licensee gives general securities advice which is not tailored to the personal needs of an investor or where investors do not give their advisers comprehensive information relating to their particular circumstances and investment objectives. Such warnings must alert persons who are likely to rely on such advice of the limitations relating to such advice.	There are no requirements for real estate agents to give potential investors warnings.
Use of the term “independent”	Use of the term “independent”
ASIC has issued guidelines on when an adviser can call their services “independent”. Generally the term “independent” or any other terms which have similar connotations can only be used by advisers who act with no direct or indirect associations or affiliations with product issuers, for example investment advisers who are remunerated solely by clients.	A licensee must not receive any remuneration from any person other than a person on whose behalf the licensee has agreed to act as agent.
Prohibitions against misleading and deceptive conduct and other representations	Prohibitions against misleading and deceptive conduct and other representations
There are prohibitions against misleading and deceptive conduct relating to securities. This encompasses promotional activities including advertising. A licensee may not represent that his or her abilities or qualifications have been approved by ASIC.	There are prohibitions against false and misleading statements. This encompasses promotional activities including advertising.
Conduct of representatives	Conduct of salespersons
A licensee carries liability for any losses resulting from the conduct of representative (whether within actual or ostensible authority). Representatives or licensees may be banned from participating in the securities industry if their conduct is not efficient, honest or fair.	Salespersons may be disqualified and have their registration cancelled where their conduct renders them unfit to be registered.

4.5 Complaints resolution and consumer remedies¹³

- As the real estate regime does not have specific requirements relating to suitability of the advice or the disclosure of conflicts of interests of the adviser, that regime also does not provide investor remedies that are available for breaches of those requirements.
- Both regimes provide accessible external complaints resolution procedures.
- Investment advisers are also required to have internal complaints resolution procedures that meet the relevant Australian standard.

To the extent that the real estate regime does not contain any specific regulatory requirements relating to the provision of financial advice by real estate agents and salespersons which are comparable to the requirements under the Corporations Law, the former also lacks any specific remedies available to persons relying on investment advice given by real estate agents and salespersons. This is important given that any breaches of the investment advisory requirements such as the requirement for a reasonable basis for making a securities recommendation enable an investor incurring losses as a result of acting on such a recommendation which does not meet the relevant conduct standard to recover any loss resulting from the breach from the licensee.

However, under both regimes, there are accessible external complaints resolution mechanisms available to aggrieved parties, with some differences in the type of jurisdictions of the relevant mechanisms. For example, the Fair Trading Tribunal that can be accessed by complainants relating to real estate transactions can generally only make awards up to \$25,000, whereas external complaints schemes that consider complaints about investment advice given to retail investors may make awards up to \$50,000. ASIC is currently considering whether this limit should be increased.

Under ASIC's retail investor protection requirements, licensees who provide retail investment advisory services must have internal dispute resolution procedures that meet the relevant Australian Standard, and membership with external dispute resolution schemes that are approved by ASIC and therefore meet certain minimum standards. There are no similar obligations applicable to real estate agents.

Table 4.4 below sets out the different requirements applicable under the two regimes.

¹³ These requirements are discussed in more detail in Chapters 12, 13 and 14 of the technical paper. This section represents a summary of the detailed discussion contained in those chapters.

Table 4.4: Complaints resolution and consumer remedies

Investment advisers	Real estate agents
External complaints resolution	External complaints resolution
Licensees giving investment advice to a retail investor must be a member of an ASIC approved external complaints resolution scheme.	Disputes are heard by the Fair Trading Tribunal.
Internal complaints handling	Internal complaints handling
Licensees must have internal complaints handling procedures in place in accordance with AS 4269-1995.	No comparable requirement for internal complaints handling mechanism.
Unlicensed persons	Unlicensed persons
Where an unlicensed person provides investment advice, the client has a range of remedies available, including rescission of contracts and recovery of any brokerage, commissions or other fees paid. Such contracts and any obligations to pay brokerage, commissions and other fees are not enforceable against the clients.	Commissions or fees may not be claimed in court proceedings where services were not performed by a licensed person or employee.
Conduct of business standards	Conduct of business standards
Where any recommendations provided to a client by a securities adviser do not satisfy the conduct standards (eg no reasonable basis for the recommendation or failure to disclose conflicts of interest), the client who acts on reliance of that recommendation and suffers loss can recover that loss from the representative who made the recommendation or the principal licensee.	As there are no comparable conduct standards, there are no specific civil remedies available to intending purchasers who act on recommendations made by estate agents/salespersons.
Other remedies	Other remedies
A range of other remedies are available to deal with breaches of prohibitions in the <i>Corporations Law</i> regarding conduct in relation to securities, for example, prohibitions against misleading and deceptive conduct.	The <i>Property Stock and Business Agents Act</i> provides that agreements for the sale or purchase of land may not exclude a purchaser's rights to relief in respect of fraudulent misrepresentations. The Act also provides that the availability of civil remedies is not affected by any proceedings in respect of an offence under the Act.

4.6 Disciplinary procedures¹⁴

- Both regimes provide for suspension or revocation of licences.
- For investment advisers, this power can be exercised by the regulator. For real estate agents, it can only be exercised by the court.
- The real estate regulator has power to issue penalty notices to errant real estate agents. ASIC has no comparable power in respect of investment advisers.

The disciplinary measures available to the regulator make a significant contribution to the effectiveness of the regulatory regime.

There are some similarities between the two regimes as to the type of disciplinary measures that can be applied under each regime. Both regimes provide for suspension or revocation of a licence and disqualification of persons from participating in the relevant industry. However, the grounds upon which such measures can be exercised, and the procedures applicable, are different in some respects.

The Corporations Law allows ASIC to revoke a licence (subject to the procedural fairness requirements of a hearing in certain instances) on the grounds of insolvency, serious fraud, mental or physical incapacity, contravention of a securities law or a condition of a licence, where the licensee has not performed his or her duties efficiently, honestly and fairly, or in the case corporate licensees, where its officers cease to have adequate educational qualifications or experience or become subject to a banning order. In contrast, the grounds upon which a person can be disqualified or a licence can be revoked under the real estate regime are set out in more general terms premised upon the broad concept of the “fit and proper person” test.

While ASIC has administrative powers to suspend or revoke a licence or impose a banning order subject to the procedural fairness requirement for a hearing being given to the persons affected by such action, under the real estate regime, the regulator must resort to court orders to revoke a licence or disqualify a person, which is a more time consuming and expensive process for all parties. However, unlike ASIC, real estate regulators have the power to issue penalty notices against licensees.

ASIC has the power to impose or vary licence conditions that can be used to impose more stringent conduct standards on licensees where ASIC finds their conduct falling short of required standards under the Corporations Law (subject to a hearing requirement). There appears to be no parallel under the real estate regime for this requirement

Table 4.5 below sets out the different requirements applicable under the two regimes.

¹⁴ These requirements are discussed in more detail in Chapters 15, 16 and 17 of the technical paper. This section represents a summary of the detailed discussion contained in those chapters.

Table 4.5: Disciplinary procedures

Investment advisers	Real estate agents
<p>Revocation of licences</p> <p>ASIC can revoke a licence on grounds such as:</p> <ul style="list-style-type: none"> • insolvency of the licensee; • convictions for serious fraud; • mental or physical incapacity; • the application contains false or misleading information or omits material information; • breach of a securities law or a licence condition; • ASIC has reason to believe that a natural person licensee is not of good fame and character; • a corporate licensee’s officers do not have appropriate qualifications and experience with regard to the work assigned to them; • licence held by an officer of the licensee is revoked or the officer is banned from being a representative; • ASIC has reason to believe that the licensees has not or will not perform its duties efficiently, honestly and fairly. 	<p>Cancellation of licences and disqualification</p> <p>Cancellation and disqualification can occur on the grounds of:</p> <ul style="list-style-type: none"> • licence improperly obtained ; • licensee not a fit and proper person; • officer not a fit and proper person; • conduct renders licensee unfit to hold a licence; • corporation’s affairs conducted in a way to render it unfit to hold a licence; • conduct renders officer unfit to be an officer of a corporation holding a licence.
<p>Suspension of licences</p> <p>Licensee may be suspended for specified period on grounds such as inadequate qualifications and experience of officers. Licensees may also be prohibited permanently or for a specified period from doing certain acts.</p>	<p>Suspension of licences</p> <p>Licensees can be disqualified temporarily.</p>
<p>Ineligibility to hold licence</p> <p>A person can be banned from the securities industry for a specified period or permanently. Banning orders can be imposed on unlicensed as well as licensed persons where licence has been revoked. Grounds for imposing a banning order include:</p> <ul style="list-style-type: none"> • insolvency, serious fraud or mental or physical incapacity; • contravention of a securities law; • ASIC forms the view that the person is not of good fame and character; • ASIC has reason to believe that the person has or will not perform the duties of a representative efficiently, honestly and fairly. 	<p>Ineligibility to hold licence</p> <p>Licensees can be disqualified permanently. Former licensees (persons who have been licensed in the previous 12 months) can also be disqualified on the grounds of being:</p> <ul style="list-style-type: none"> • not a fit and proper person; or • unfit to hold a licence.

Banning orders - representatives	Cancellation of registration as a salesperson
See above.	Cancellation and disqualification may occur on the grounds of: <ul style="list-style-type: none"> • registration improperly obtained • not a fit and proper person • conduct renders salesperson unfit to be registered.
Employment restrictions	Employment restrictions
A person subject to a banning order may not be a representative of a dealer and/or an investment adviser (as specified in the order) and is ineligible to be licensed as an investment adviser or a dealer.	Restrictions apply to the employment of persons who: <ul style="list-style-type: none"> • are disqualified from holding a licence or whose licence has been cancelled • have had an application for a licence refused • are disqualified from holding a certificate of registration or whose registration has been cancelled.
Administrative powers	Administrative powers
ASIC has administrative powers to suspend and revoke licenses and impose banning orders, subject to a hearing.	No equivalent
Court orders	Court orders
ASIC can apply to the court for banning orders.	Cancellation of licences and registration and disqualification is carried out through the court.
Fining powers	Fining powers
ASIC has no fining powers in this area.	State regulatory authorities can issue penalty notices.

4.7 Summary of analysis

The regulatory regime applying to real estate agents was not designed for the purpose of regulating the provision of financial advice by real estate agents, particularly individually tailored financial advice. This is significant, especially where the investors are retail investors (ie those lacking in adequate sophistication and resources). Because these activities are not the target of that regulatory regime, consumers do not appear to have the benefit of the full range of safeguards which are available to them when they receive investment advice about securities, especially individually tailored or what purports to be individually tailored financial advice from a securities adviser.

Specifically:

- While both regimes provide authorisation requirements aimed at ensuring licensees are fit and proper, and have the training and background, to perform their main roles, the real estate regime does not include competency requirements which appear to be directed to ensuring that real estate agents giving *financial* advice have the training, qualifications and experience to give such advice.
- The Corporations Law regime specifically provides that a licensee is liable for the acts of its representatives, whereas the real estate regime relies primarily on common

law agency principles to ensure the licensee's accountability for their salespersons' activities.

- There is no requirement for real estate agents to disclose to intending investors (except where they are retained by the purchaser) any commission or other benefit they receive from the transaction, nor to disclose any interest they may have in the transaction.
- Investment advisers are required to have a reasonable basis for any securities recommendation, which requires them to take into account the investor's particular circumstances. Real estate agents do not have a comparable obligation.
- As the real estate regime does not have specific requirements relating to the suitability of the advice or the disclosure of conflicts of interests, that regime also does not provide investor remedies that are available for breaches of the advisory requirements.
- In the case of general advice, the Corporations Law regime requires the adviser to warn the investor of the limitations on that advice. There is no comparable requirement for real estate agents.
- While both regimes provide accessible external complaints resolution procedures, investment advisers are also required to have internal complaints resolution procedures that meet the Australian standard.
- While both regimes provide for suspension or revocation of licences, for investment advisers this power can be exercised by the regulator, whereas for real estate agents, it can only be exercised by the court.

4.8 Recommendations

In view of the functional similarity of financial advice and similar consumer risks that arise where retail investors are exposed particularly to individually tailored advisory services, this area warrants regulatory measures specifically tailored to the activity of giving investment advice in addition to product specific general requirements designed to regulate transactions (ie buying and selling). Therefore, the type of safeguards available under the Corporations Law should be available to retail investors who receive individually tailored, or what purports to be individually tailored, financial advice from real estate agents.

That is, real estate agents who give *personal recommendations as to the suitability of particular real estate investments by reference to investors' individual circumstances and needs* should be subject to authorisation requirements, disclosure requirements, conduct standards and investor redress mechanisms that are comparable to those that are available to retail investors obtaining personal securities recommendations.

By contrast, retail investor concerns arising where intending purchasers are exposed to *general financial advice provided as an incidental part of selling real estate* could be effectively dealt with by regulatory requirements comparable to those which apply to "general securities advice", in particular::

- (a) warnings that:
- the advice is general advice, and therefore has not been prepared by taking into account the individual needs and financial circumstances of the person

- to whom it is given; and
 - intending purchasers should assess the suitability of any investments in the property in light of their own individual needs and circumstances, which they can do themselves or by consulting an appropriately licensed investment adviser; and
- (b) information relating to any conflicts of interests of the adviser (such as if the adviser is also acting for the vendor or the developer).

It may also be appropriate that persons giving this type of advice have appropriate competencies that enable them to provide such financial advice.

As noted in Chapter 2, this review does not canvass any specific implementation mechanisms such as which regime should contain the necessary safeguards to address the identified risks, or what specific enforcement mechanisms should be available to the relevant regulatory agencies who will administer any enhanced regulation. Reforms to address such issues are matters more appropriately dealt with by Government.

This does not preclude the possibility for real estate agents to impose such standards via voluntary industry Codes of Practice. However, for such Codes to be equally effective as a statutory regime, there must be effective enforcement and consumer compensation mechanisms attached to such Codes.

ATTACHMENT A: SUMMARY OF COMMENTS MADE IN PUBLIC SUBMISSIONS

This attachment includes ASIC's summary of the comments made in submissions. It is not intended to provide a complete statement of all the points that were made but rather a brief summary of the key points as ASIC sees them.

1. Comments from the real estate industry

The Real Estate Institute of Australia ("the REIA") considers that on every measure, the regulation of real estate agents compares more than favourably with the regulation of investment advisers under the Corporations Law.

In commenting on the extent of financial advising activities by real estate agents, the REIA stated that the role of a real estate agent is usually defined in State or Territory legislation under which estate agents are required to compile information or prepare reports. This is an essential element of the work of a real estate agent and can be construed as the advising function.

The REIA stated that many people use real estate agents as their adviser when making investments in property. In providing that advice, a real estate agent will provide information on capital gains, rental returns, contractual issues and the availability of investment packages among other things. An agent gathers this information and knowledge from a range of sources including:

- the agent's own experience of property and investment values in the agent's area of influence;
- the agent's training and continuing professional development;
- advisory services and factual aggregate data provided by State and Territory Real Estate Institutes as well as the REIA;
- published information on investment issues produced by financial institutions, other investment advisory services and commercial publications; and
- alliances with financial institutions, accountancy and legal practices and investment advisers.

The REIA considers that practically every real estate agent would provide advice about capital gains, most would provide information about real estate as an investment and many would be able to provide information on the financing options for real estate purchases. These tasks are not only part of the day to day work of a real estate agent but are also, in most jurisdictions, legislatively recognised in the State and Territory regulatory regimes for the real estate industry.

These tasks are confined to the attraction of particular real estate opportunities as a form of investment. The broader question of where such opportunities might fit in an overall

investment portfolio is a matter for other professionals. All Real Estate Institutes advise members to refer clients to investment advisers, lawyers or accountants for such advice.

In relation to competency, integrity and financial requirements, the REIA stated that the real estate industry and licensed real estate agents are regulated by each State and Territory and, while not uniform in every respect, some of the relevant generic regulations which guarantee competency, integrity and financial responsibility include:

- licencing conditions such as good fame and character tests, educational qualifications, industry experience, and minimum age;
- procedures for discipline and revocation of licence;
- prescribed conduct of agents in areas including record keeping, maintenance of trust accounts, a fidelity fund and personal indemnity insurance, dispute resolution mechanisms, complaints review, review of commissions and fees, and annual audit; and
- co-operation with the various State and Territory consumer protection regimes.

In relation to information requirements, the REIA stated that across Australia, around 80% of real estate agents are members of their respective Real Estate Institute, and by affiliation, of the Real Estate Institute of Australia. Each of the Institutes has a public information service which is extensively used. These services provide a broad range of information on real estate and agents in general as well as specific information as requested. REIA considers that these information services, some of which are toll-free telephone services, provide ample information to the public about real estate agency and practice.

On rules of conduct, the REIA pointed out that real estate agents who are members of Real Estate Institutes are subject to internal rules of practice, mandated rules of conduct in some jurisdictions and a national code of ethics which has been undergoing extensive revision in consultation with the Australian Competition and Consumer Commission. REIA considers that these rules of conduct are entirely appropriate to deal with the advising functions of real estate agents.

On complaints resolution and consumer remedies, the REIA stated that all real estate agents, whether Institute members or not, are subject to the various consumer complaints regimes of the States and Territories. Institute members are additionally subject to their respective rules of practice and the national code of ethics. REIA believes that these mechanisms are adequate to deal with any complaints about the activities of real estate agents.

All real estate agents are covered by fidelity fund arrangements in each jurisdiction and it is, in addition, a requirement of membership of Real Estate Institutes that members have personal indemnity insurance. REIA considers that both of these provide adequate remedies for consumers.

In relation to disciplinary procedures, the REIA stated that there are disciplinary mechanisms built into the licencing regimes in every State and Territory which include sanctions up to, and including, revocation of licence to practice. As well, for Institute

members, there are internal disciplinary mechanisms which include sanctions up to, and including, revocation of membership.

In a joint submission to ASIC on Interim Policy Statement 140 by the Real Estate Institute of Queensland, the Queensland Law Society, the Property Council of Australia and the Urban Development Institute of Australia, the view was put that the giving of investment advice and the normal process of the sale of a home unit should be separated for licensing purposes, otherwise there is an irreconcilable conflict of interest whereby the salesperson cannot discharge their fiduciary duty to the seller while at the same time acting properly as an investment adviser. Any person providing investment advice and introducing the buyer to the purchase of the unit as part of that process should be licensed or be a proper authority holder under the Corporations Law.

A number of real estate agents also provided submissions to the review. Comments included:

- it is not necessary for real estate agents to be further licensed, negative gearing is a very simple matter, which is, in any case, just part of the wider picture;
- most investors do not rely on the real estate firm to arrange or assist with finance;
- in general, real estate agents are not qualified to advise or compare other forms of investment such as shares and superannuation;
- adequate State regulatory bodies exist to monitor and regulate estate agents and federal attempts at regulation would result in unnecessary duplication;
- consumers expect estate agents to understand negative gearing, depreciation and the financing of real property and would be poorly served if estate agents were restricted from servicing this important sector;
- an agent would be in a legal and ethical hazard if required to serve both the vendor under estate agents legislation and the purchaser under federal legislation;
- qualifications should be created for those who choose to give investment advice and compliance achieved through independent bodies.

2. Comments from the financial planning industry

The Financial Planning Association of Australia Ltd (“the FPA”) considers that current real estate legislation is not adequate to cover unlicensed financial advice relating to property investments and that investors in real estate should be given the same protections as investors in shares and managed funds

The FPA pointed to a number of special features of real estate investment including:

- the illiquid nature of the investment;
- the difficulty in comparing the prices of real estate investments;
- the property sales process involves a real estate agent or marketer whose undisputed duty is to the vendor or principal;
- high transaction costs such as stamp duty and commissions.

The FPA considers there is clear evidence that real estate agents and others are providing investment advice and that advertising by real estate agents suggests that this advice is now being incorporated as part of a selling technique. This can include seminars and “personal financial profiles”. The FPA considers that:

- real estate agents are not equipped to provide financial advice on real estate investments;
- there is an inherent conflict of interest involved;
- real estate agents are not trained to provide technical investment advice - no courses for real estate agents have a compulsory subject relating to property investment or personal finance; and
- it appears that integrity requirements are not strong enough.

In comparing the system which regulates real estate agents with that which applies to investment advisers, the FPA stated that there is no requirement for real estate agents to disclose their commission to purchasers or to “know their client” when they provide investment advice.

The FPA’s preferred position is that investment property should be included within the regulatory regime proposed in the context of CLERP 6. However, the FPA has also suggested a number of alternative mechanisms to promote consumer protection in this area. These comprise:

- agents being required to provide a written warning to buyers that they should seek independent financial advice on the financial and taxation consequences of the purchase;
- certificates being required to be provided by independent licensed financial advisers regarding the provision of advice;
- agents also being required to provide a written disclosure to purchasers that their paramount duty is to the vendor and there may be a conflict of interest;
- agents being required to ascertain whether the purchase is being made for investment purposes; and
- where a purchase is being made for investment purposes, the agent being required to provide a general disclosure document about the financial implications of property investment.

The FPA provided a draft general disclosure document which outlined some of the risk factors in property investment such as price risk, interest rate risk, liquidity risk and tenancy risk. It is not directed to individual properties.

One participant in the financial planning industry put the view that the Corporations Law should be amended so that it applies to all distributors of investment advice and not just those who provide advice on securities. He stated that a real estate agent can advise a client to borrow to invest in a property without having any real regard for the client’s needs and objectives, cashflow position and risk profile. He considers that real estate agents often provide misleading projections and the risks are rarely explained adequately.

3. Other comments

ASIC received a range of other submissions which canvassed a wide range of views on the issues covered in this review. These include the following views:

- where a real estate agent provides investment advice (eg regarding capital growth potential, income yield, gearing or financial structuring arrangements) they should be subject to vocational licensing and competency standards, but where an agent acts in a representative capacity to facilitate a sale and restricts their advice to attributes of the property and the conditions and mechanics of the sale, a vocational licence should not be required in addition to current State registration;
- while real estate training is relatively good in relation to property valuations and financing, real estate agents may not have a sufficiently broad understanding of consumers' full financial positions to provide comprehensive and sound advice;
- competency requirements for real estate agents are inadequate to equip them to provide investment advice;
- complaints and disciplinary mechanisms applying to real estate agents are inadequate;
- it would be of great assistance if persons giving advice were obliged to disclose their commissions; and
- there is a problem with conflict of interest issues between agents, solicitors recommended by the vendor's agent to act for the purchasers and the financiers.