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SENATE

SELECT COMMITTEE ON SUPERANNUATION AND
FINANCIAL SERVICES

**Reference: Prudential supervision, global financial services and superannuation
guarantee charge**

FRIDAY, 15 JUNE 2001

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SENATE
SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL SERVICES

Friday, 15 June 2001

Members: Senator Watson (*Chair*), Senator Sherry (*Deputy Chair*), Senators Allison, Chapman, Conroy, Hogg and Lightfoot

Senators in attendance: Senators Hogg, Lightfoot, Sherry and Watson

Terms of reference for the inquiry:

For inquiry into and report on:

- (a) prudential supervision and consumer protection for superannuation, banking and financial services;
- (b) the opportunities and constraints for Australia to become a centre for the provision of global financial services; and
- (c) enforcement of the Superannuation Guarantee Charge.

WITNESSES

BUGG, Mr Timothy Gerard, Past President and Council Member, Law Society of Tasmania	1198
CLARK, Mr Cyril Elliott (Private capacity)	1182
DWYER, Mr Sydney Paul (Private capacity)	1182
HARRINGTON, Mr Bernard Michael, Retirement Manager, Centrelink	1257
HARVEY, Ms Christine Susan, Deputy Secretary-General, Law Council of Australia	1198
JACKSON, Mr Philip, President, Law Society of Tasmania	1198
MARTIN, Mrs Jan, Executive Director, Law Society of Tasmania	1198
PAXTON, Ms Judith Margaret, Tasmanian Legal Ombudsman.....	1237
RAE, Mr Louis Gould, Chairman, Valuers Registration Board	1224
WESTWOOD, Mr Raymond Marchbank, Chairman, Complaints Commission; Board Member, Australian Valuation and Property Standards Board; and Tasmanian Divisional Chairman, Australian Property Institute	1224
WILSON, Mr Paul Gregory, Tasmanian Divisional President, Australian Property Institute	1224

Committee met at 9.32 a.m.

CHAIR—I declare open this public hearing of the Senate Select Committee on Superannuation and Financial Services. This is a supplementary public hearing into term of reference (a) of the committee's main inquiry into prudential supervision and consumer protection for superannuation, banking and financial services. The aim of today's hearing is to focus further on the issues relating to the recent failure of some solicitors mortgage schemes in Tasmania. The committee reiterates its statement made on the last occasion that it recognises only a small proportion of solicitors in Tasmania are, or ever have been, involved in mortgage schemes, and that an even smaller number appear to have been involved in any unscrupulous activities associated with some of the schemes in question. Today the committee's interest is to follow up some of the issues raised at the last hearing held in Hobart on 18 May and the hearing held in Sydney with ASIC on 12 June.

Since our last hearing, Garrisons have announced that they are making arrangements to return capital equal to the capital invested by their clients into faulty mortgages and that they are assembling a team of experts to pursue the parties involved, to recover the capital, with the aim of maximising the chances of returning the interest also. Garrisons have also advised that they will not be appearing today, and they have told the committee why. I will read a letter dated 14 June from Garrisons. It says:

Dear Secretary

Following my earlier letter (and your conversations with my office), I would like to outline our reason for not accepting your invitation to appear at tomorrow's Hearings.

Garrisons' primary concern at this stage is its clients. Following the announcement of our rescue plan earlier this week, we are now extremely busy in dealing with our clients as they are keen to take up our offer so they can get on with their lives.

The mechanism for assisting clients is a complex one because each client's particular situation is different and can involve Centrelink entitlements, tax implications, suitable reinvestment strategies etc. Garrisons is currently investing a considerable amount of time with each client in order to expedite this matter.

We appreciate the good work of the Committee in addressing this issue for all investors involved in the Solicitors First Mortgage schemes. I am sure you can also appreciate the high degree of importance we place on resolving this matter for our clients with the utmost urgency.

The committee would also like to acknowledge that there has been a refreshing change in the response of the regulator ASIC to these sorts of issues. The fact that ASIC is now conducting a nationwide investigation of solicitors mortgage schemes is a welcome development.

We observe that neither representatives of ASIC nor representatives of the Law Society could perceive developments in the mortgage management operations to be later brought on with such disastrous results by a few solicitors in Tasmania. We note that Mr Worrall made a claim that he had identified the problems with the claims within a few hours of his appointment as manager. We commend the speed with which he proceeded with this problem. However, the committee understand that he did receive considerable help from a Law Society investigator.

All of the witnesses who appear before the committee are protected by parliamentary privilege with respect to the evidence given before the committee. This means that they are

given broad protection from action arising from what they say and that the Senate has power to protect them from any action that disadvantages them on account of the evidence given before the committee. Parliamentary inquiries can, at times, generate tensions, particularly for witnesses. It is a matter of some concern to the committee that, after the last hearing, it was reported to us that some witnesses pledged that they had been harassed by attendees at the hearing.

The committee wishes to emphasise in the strongest terms that interference with witnesses amounts to a contempt of parliament, and there will be no hesitation in taking appropriate action should this be repeated. I also ask the audience for absolute quiet when people are presenting their evidence or being cross-questioned, to enable everybody to hear the messages that are being given. The committee prefers to conduct its hearings in public. However, if there are any matters which you wish to discuss with the committee in private, the committee will consider your request. I wish to emphasise that the hearings are directed at determining what went wrong with the solicitors mortgage schemes and what can be done to remedy these problems as well as prevent them from happening in the future. The committee's primary concern is the issues of regulation and consumer protection which have arisen in relation to these schemes.

Senator SHERRY—Chair, just before we proceed, can I just make some points about Garrisons? Firstly, the nonattendance or refusal of Garrisons to attend is unsatisfactory. It amounts to a contemptuous attitude to the committee. Many of the questions that have been put on notice to Garrisons have not been answered. We do not know why Garrisons channelled millions of dollars into particular firms' solicitors mortgage funds. We still do not have any answers as to what the financial arrangements were between Garrisons' advisers and particular solicitors mortgage funds.

Whilst Garrisons should be congratulated on their actions to date, it is somewhat belated. Frankly, if the Law Society can turn up, Garrisons can turn up. Garrisons' actions remind me a little of the poacher attempting to turn themselves into the gamekeeper. I think it is beyond the pale for Garrisons to heap all blame and responsibility on the Law Society. At the last hearing, in response to my request, Garrisons indicated that the financial advisers who were involved—there were some four or five—would be here. They are not here, and I think that is totally unsatisfactory. There are also some questions that hang over the package that Garrisons have announced and the way it will be implemented. While now is not the appropriate time to consider what actions we will take with respect to Garrisons' nonattendance, I emphasise again that I think it is grossly unsatisfactory that they are not here. It is not up to Garrisons to determine whether or not they have washed their hands and cleaned everything up; it is not up to them to determine that. Also, in evidence in Sydney on Tuesday, ASIC indicated to us that Garrisons are continuing to be investigated and they face the possibility of serious charges being laid.

All the points I have mentioned can only lead me to conclude that Garrisons are attempting to dodge their responsibility in answering our questions as to why these problems started in the first place. We cannot deal with it now, but I put on notice, Chair, that at a future meeting of the committee—probably in Canberra next week—we will have to consider what we do with Garrisons. I also note, of course, that Garrisons did agree to attend. They are listed as witnesses for this morning's hearing. We found out only late yesterday afternoon that they would not be appearing. Despite the secretary and, I understand, yourself, Chair, going back to Garrisons

reiterating that they should be here, they still refused to attend. It is unsatisfactory. I think we are going to have to consider next week how we deal with Garrisons in ensuring that they front up and answer the basic questions that remain unanswered.

CHAIR—All witnesses attend our hearings quite voluntarily. However, the committee has the power to subpoena witnesses they believe can give important information or who are critical to the inquiry. That is a matter that the committee will have to consider at a later date at one of its private inquiries—probably next Tuesday when we hold our normal inquiry in Sydney—and that will certainly be a matter on the agenda. Senator Sherry, I thank you for raising the matter but, at the same time, I think we should also acknowledge that Garrisons, in making a recognition of contributing a return of capital, have set a very important precedent in terms of the advisers' roles with respect to their clients, and I do not think we should take that matter lightly. I regard that as a very significant development, and it is a matter that we will be seeking to uphold very strongly in the future.

Senator SHERRY—While I do not decry that package, it comes with strings attached, as I understand it. Garrisons should be here to explain the strings that come with that package and, more importantly, to answer the other questions that remain unanswered about their activities.

CHAIR—That is not in dispute.

[9.44 a.m.]

CLARK, Mr Cyril Elliott (Private capacity)

DWYER, Mr Sydney Paul (Private capacity)

CHAIR—I welcome two former employees of the Tasmanian Law Society: Mr Clark, former executive officer, and Mr Dwyer, former trust officer and account inspector. Do you have anything to add to the capacity in which you are appearing?

Mr Clark—I am a legal practitioner, but I do not currently practise. I am in the tourism industry. I do not appear here in any special capacity. The main reason why I am here is because Senator Sherry rang me and requested that I appear, and I agreed to do so.

Mr Dwyer—I am a retired certified practising accountant, and I was not, as stated, an employee of the Law Society—I was engaged in a private capacity to carry out the inspections, which I did. I just mention that as a matter of correction.

CHAIR—I invite you to both make an opening statement or to comment on any matters in relation to this inquiry.

Mr Dwyer—I have given you a description of what I consider to be a fairly broad and concise situation, as I saw it. My willingness to appear here today was at Senator Sherry's request and my thinking is that, unless you would like it otherwise, I would be prepared to try and expand a bit on my written submission.

CHAIR—Mr Clark, do you have an opening statement that you would like to make, otherwise we will proceed to questioning?

Mr Clark—I can give you the general background of Mr Dwyer's appointment and the arrangements that were in place for prudential supervision at that time and what happened in relation to those, if that is appropriate.

CHAIR—Yes, that would be helpful.

Mr Clark—I really agreed to appear here and to get involved in this matter when I attended the last hearing and saw that the Law Society was to some degree in the gun. You must realise that in my lifetime I have been sacked by the Law Society, so I am no great supporter of it. But I do think that the current people at the Law Society have been handed a poisoned chalice. Really, the responsibility for what has largely gone on rests back about 10 years ago and the current people, whilst perhaps they should have been more aware of what the situation was, were carrying on what was the accepted practice then. If we go to the early 1980s when I was first appointed, the prudential supervision of solicitors trust accounts was minimal, to say the least. It consisted of a report of an approved accountant—the accountant being appointed by the firm—and that being forwarded to the Law Society once every six months. It was rare for those reports to show any discrepancies or any problems.

Along with some other people, I was concerned about this, and we made some investigations into what was done in other jurisdictions. We found the system of random inspections applied in a number of other areas, in particular South Australia and Victoria. We pinched their idea, with their assistance, and we were able to convince the council that we should set up a similar system in Tasmania, and that was done. We called for applicants and received a number, of which Mr Dwyer was one. He was subsequently appointed and sent to Victoria for an orientation program so that, whilst he was a fully qualified accountant and inspector, he could see how this particular function was carried out. That system proved to be very successful, and I think he in fact remained with the Law Society from about late 1983 until 1990, or thereabouts.

We had a system whereby the council took virtually no part in the inspections, because it would have been odious for them to have said, ‘Do this one, don’t do that one,’ because it may have involved their own firms, firms with whom they had contact or firms with whom they were in dispute—bearing in mind that lawyers are usually in dispute with other firms around the place. So the arrangement was that the program for inspections was carried out by Mr Dwyer in consultation with me, and that was where the matter stopped. We endeavoured to inspect every firm at least once every year and, if there were problems in a firm, we inspected it much more than that. He also carried out an educational role: if people had problems and wanted help, he provided it. As I say, it was very successful and he was very well accepted by the profession, so much so that some of them invented a nickname for him—Syd Vicious.

As a result of some of those investigations, a number of prosecutions of firms were launched. Some of those prosecutions resulted in serious penalties, including being struck off. I am not necessarily referring to actual mortgage funds here; I am talking about trust accounting generally. Surprisingly, most of the firms who were prosecuted accepted that they had done the wrong thing and there were very few problems with them. However, there were two firms which held a serious grudge against the society, and particularly against me and Mr Dwyer. The first one of those was Clerk Walker and Stops. Clerk Walker and Stops were prosecuted in the Supreme Court for a number of trust accounting breaches, the principal one being that they had taken moneys from their clients, had invested it—usually in a bank rather than mortgage investments, because it was at a time of very high interest rates of 17 per cent, 18 per cent and 19 per cent—and had paid to the client an amount of interest which was often 50 per cent or less of the amount that they had collected. They were prosecuted, and the Supreme Court found a number of those charges proved and penalised them.

The time then came for Mr Dwyer to do a further inspection of that firm, and we were advised by the firm that they would not accept him as the inspector. There was never any suggestion that he had done the wrong thing: he had given evidence against them in the Supreme Court and he had been involved, obviously, in preparing the case. We are talking about Clerk Walker and Stops and also a Mr David Walker, who had left that firm and had formed his own firm—but that is just a minor matter. They applied to the Law Society to have Mr Dwyer taken off their inspection and have someone else do it. That went originally to the society’s executive. A council of 16 elected members runs the society and there is an executive of those members which usually consists of four people, being the three principal office bearers—the president, vice president and treasurer—and one other appointed person. Bear in mind that I am speaking now of the 1980s and early 1990s; I have not investigated what the present position is, but I imagine it is similar. The committee said, ‘No, there is no way that we are going to stop somebody doing the audit of the firm.’ They then asked that the matter be referred to the

council. It was referred to the council. I have here the resolutions of the council that appeared at that time. These are the resolutions which led to Mr Dwyer being forced to resign. Perhaps at this stage it might be appropriate if I hand the copies to you so that you know what I am talking about. Would you like me to do that?

Senator SHERRY—Yes.

CHAIR—It is agreed that the document should be tabled.

Mr Clark—The matter was referred, as I have said, to the council from the executive. It first went before the council on 4 February 1990. There is an excerpt from page 12. I obtained these documents on a search of the Law Society's minute books. The Law Society made them available to me during the week, and I thank them for that.

CHAIR—On a point of clarification: on page 5, is that the Mr Hurburgh who appeared in the press recently?

Mr Clark—No.

Senator SHERRY—We should be clear which Hurburgh it is. Do you know his Christian name?

Mr Clark—James Robert Hurburgh—J.R. Hurburgh—is the one referred to here. The other gentleman is his brother, Mr Andrew Hurburgh.

CHAIR—Are they both lawyers?

Mr Clark—Yes. You will note that it went before the council. I was present at that meeting. The council was reminded that we should proceed with the inspection by Mr Dwyer. There was considerable discussion. Mr Fabian Dixon was there. It was asked that it be deferred until Mr Dixon was there, because he had relevant material to place before the council. The council discussed that further, and then a motion was moved. It is the formal motion that is normally moved when an investigation is to be carried out, and that is the one that says that the council require Messrs Clerk Walker and Stops to produce its records in accordance with rule 33, et cetera. You will notice that there was opposition to that motion. Two people are expressed to have opposed the motion, being Messrs Estcourt and Crisp. There was then a motion that it lie on the table, and that motion was carried.

It was flicked back to the executive committee by the next motion, by the narrowest of margins—six to five—as you will see on page 13. You will notice that, by that stage, four people asked to have their names recorded as being opposed to what was going on: Messrs Barker, Tremayne and Doolan and Miss Imlach. There is a similar motion in relation to the trust account of Mr D.B. Walker. The matter went back to the council on 1 April 1990. You will notice that there was discussion on the motion which lay on the table, et cetera. Then there was a resolution by Mr Tremayne and Mr Doolan that they required Clerk Walker and Stops to allow Mr Dwyer to inspect their records, and that was lost.

Then there was a motion by Messrs Cable and Dixon that an alternative inspector be appointed. Again, you will see that there are a number of dissentients to that motion. That was the motion that was passed by the council. It was my job to tell Mr Dwyer that he was not to go ahead and carry out that inspection, and to arrange for the appointment of an alternative inspector. That is when Mr Dwyer found himself in some difficulty professionally in carrying on and he resigned.

Considerable lobbying went on during the course of that meeting. I have never quite understood why people wanted—nobody gave any firm reasons why we should not inspect this firm or why Mr Dwyer should not do that. As I say, there were no allegations against him that he had acted improperly in some way. However, the lobby group which consisted of the late Mr Kable, Mr Fabian Dixon and Michael Crisp was successful in convincing a majority of the council not to permit the inspection. The motion was passed denying him the right to go back and do the inspection. As I say, that is what brought about his resignation and what turned out to be the downfall of a very successful system.

At the same time as the prosecution of Clerk Walker and Stops had taken place, Mr Dwyer had reported on some irregularities in the trust account of Murdoch Clarke. Mr Dixon is, and was, a partner in the firm of Murdoch Clarke. Those irregularities, in the main, related to investing part of the trust account in interest bearing deposits and failing to account to clients for the interest on them.

Senator SHERRY—What do you mean by ‘failing to account to the clients for the interest’?

Mr Clark—Failing to pay them and keeping the money.

Senator SHERRY—So not paying them the interest?

Mr Clark—Not paying them. To be fair to Murdoch Clarke, I should say that they maintained that this was a proper action in relation to some English cases that existed, and that the prosecution against them was not successful in that it failed on a technical point because, way back in the sixties or seventies, the Law Society was found to have issued a statement which, in effect, said, ‘We know about this particular practice. We’re not too sure whether it’s proper or not and we’ll let you know.’ So far as we were able to establish, no-one had ever been made known about it. However, the matter went before the disciplinary tribunal and this document was produced to the disciplinary tribunal and, in the circumstances, the Law Society was forced to drop the matter.

CHAIR—You raise some very serious matters and obviously you appreciate that the committee will have to give each of these gentlemen the opportunity to defend their positions in terms of natural justice. Mr Dwyer, why do you think that Clerk Walker and Stops were unhappy about you conducting the audit? I have been an auditor in my time and, from time to time, there can be personality difficulties and all sorts of problems when they sometimes say that there may be conflicts of interest or prior involvements and perhaps a more independent mind might be able to approach the audit with a little more objectivity. What circumstances do you believe led to your problem with this particular firm? As an accountant, you would appreciate the sentiments that I have just expressed.

Mr Dwyer—As I mentioned in my submission, I could find no reason at all as to why this was being denied to me and why I should not go back to reinspect Clerk Walker and Stops. As I later found out, Mr D.B. Walker had also lodged an objection to me. The only thing I could come up with was that there was quite an amount of litigation against the firm in the Supreme Court. The judgments—

CHAIR—Did you have any involvement in providing any material for that?

Mr Dwyer—Yes, indeed. I provided the bulk of the evidence, as I understand it, that was used in court. In other words, I had copies of parts of their records—the whole gamut, as you would understand. Naturally, if you are preparing a case of this magnitude, one has to be very careful not to (a) invent evidence or (b) overlook any. My investigation of that particular firm took quite a long time because I found that I had to keep going back for a little bit more. The next time I would uncover something else another trail would open and I would be forced to follow that trail.

Senator LIGHTFOOT—Can you give the committee an indication of how long that took?

Mr Dwyer—It probably took four or five days—in slots of time, that is. It was not necessarily four or five days on end, but in toto.

Mr Clark—It was actually a very hard-fought case. No-one fights harder than a lawyer when charged with misconduct. Senior counsel was brought in from the mainland. I personally spent three days under cross-examination during that matter. I think it probably went a number of days more than that, but I cannot recall—

CHAIR—I would just like to indicate that I think it would be inappropriate for our committee to adjudicate on this matter, and I hope you are not seeking an adjudication from us—merely that you are giving us an outline of some of the problems that were encountered. Obviously you would recognise that we have to give these other people an opportunity to state their case. It is not our role to adjudicate on claims and counterclaims. We are not here to test the evidence—that is for other people and other bodies.

Mr Clark—I am certainly not asking you to do that. All we are saying to you is that—

CHAIR—That there were problems.

Mr Clark—There was a good system of prudential control within the Law Society in the 1980s. We are giving you the reasons we believe that that system was broken down and virtually dismantled by around 1990 or 1991. As far as I am concerned, I was dismissed and I have sued and been compensated for my loss of position. We are in no way asking you to be an adjudicator or anything—

CHAIR—That is the way it appeared it was heading.

Mr Clark—I understood you wanted us to tell you what had happened and why this position applies currently. You may have thought I had finished, but I had not.

CHAIR—Continue.

Mr Clark—I mentioned Mr Dixon in particular because he was involved in both of those matters. After the Murdoch Clarke prosecutions, Mr Dixon stood for the council and became a member of it. He held various positions on the council and always exhibited a great degree of animosity towards me. He became president in October 1992. Within about 10 days of becoming president, he demanded that I should resign. There was no reason that I know of—or no reason that he would give me or that I have to this day been given—as to why my resignation was demanded, except that he held me responsible for the prosecution of his firm that had taken place.

Senator SHERRY—Did he state that?

Mr Clark—No, he did not state it. He simply refused to give any reason. He then convened a meeting of the council to back up his request that I resign. I refused to resign, of course. I asked repeatedly for the right to address the council meeting that was considering it and I was denied that. I found it amazing that the Law Society would deny anybody the right to at least be heard before them. But that is what happened. They had the numbers—it is a bit like politics, isn't it?—so I was sacked and, as I said, I took action against the Law Society and, after about six years, I got a judgment against them. They eventually did not go before the courts, so none of these matters were tested in court. They agreed to pay damages for the wrongful dismissal and also for a matter of defamation which had occurred along the way.

Senator SHERRY—Were reasons ever given at any stage?

Mr Clark—No. Presumably, had we gone to court, they would have had to give some reasons. It went to court in the sense that it was sued. I should also comment upon the process after Mr Dwyer was forced to resign, because at that stage they dropped the system of the independent random inspector.

Senator HOGG—Can I get a time line on that please? What date was that roughly?

Mr Clark—1990.

Senator HOGG—So we are now looking at the era post-1990?

Mr Clark—Yes. They did propose to appoint another inspector, but he was to be an in-house employee. Actually, two inspectors have been appointed since then to my knowledge. One of them did not last very long, for reasons which are not relevant to this inquiry. The other one was also charged with doing the full accounts of the Law Society and its subsidiary bodies, like the Solicitors Trust, the Law Foundation and so on. I do not know the details from then on. The problem with that is that, for a person to be a direct employee of the Law Society, it puts them in a terrible position when they go out to inspect firms, because they are in effect inspecting and reporting upon the affairs of their bosses. They have also got the history and know what happened to Dwyer and me. I do not believe that an inspector can be other than an independent consultant from outside carrying out the normal functions that an auditor would carry out in any other organisation.

Mr Dwyer—Chair, you did ask me if I knew of any reason why I should not be allowed to go back and inspect that firm. I can only suggest it was animosity towards me for having provided the evidence before the court which found each of them guilty of unprofessional conduct and earned them the ‘disapprobation’ of the court. This was the ruling given by the then Chief Justice Green. At the conclusion of his summing up, he said:

However, whilst giving full weight to those considerations and the other matters which have been put to me, I must also keep steadily in mind that in breach of their duty as solicitors the respondents JB Walker and DB Walker were instrumental in the firm gaining a benefit from the use of clients’ monies and that they and JR Hurburgh failed to deal with their clients with the complete candour which should characterise the dealings of legal practitioners with their clients. I have reached the conclusion that the court’s responsibility to the public and to the profession requires it to formally express its disapprobation of those breaches of duty.

I imagine that was part of the reason why Clerk Walker and Stops and D.B. Walker did not want me back in their office: the three partners being found guilty, I repeat, of unprofessional conduct by the court.

Senator SHERRY—Just let me get clear on this: were any of the three who were found guilty—the two Walkers and Mr Hurburgh—members of the council of the Law Society?

Mr Clark—Not at that time as I recall. We are talking here of James Hurburgh; it is not the Andrew Hurburgh who has become known for other reasons. David Walker was a member of the firm at that time but had left sometime during this time and set up his own firm. That is why you will notice resolutions there that talk separately about Mr D.B. Walker’s firm. Peter Benson Walker was the senior partner of the firm and he died during the proceedings. By members of the Law Society, I presume you mean members of the council; I certainly do not think James Hurburgh was. He would have been the only one and I am virtually certain he was not.

Senator SHERRY—My understanding is that the Law Society have a number of subcommittees of the council that have a range of responsibilities.

Mr Clark—Yes.

Senator SHERRY—One of those is a subcommittee responsible for overseeing solicitors mortgage funds. Is that correct?

Mr Clark—It was not at that time. Again, I cannot speak for the Law Society now. There was a committee called the Solicitors Accounts Rules Committee, but that was really concerned with changes to the rules and altering the rules. It was a general committee and did not look at specific cases of specific oversight. The process in my time was that Mr Dwyer or whoever would report to the society on their findings and that would be dealt with by me. Sometimes if it was relatively binding, you would simply write to the people and tell them to get their act in order or what have you. If it were more than that, you would refer it to the investigating committee, which is the prosecutor, if you like, for the Law Society. That is the committee that actually looks at all complaints or allegations made against lawyers and determines what action will be taken upon them and whether or not prosecutions will be made.

Senator SHERRY—Mr Dwyer, given your experience—and I suppose in some senses this is with the benefit of hindsight looking back to the period of the early 1990s—do you think it is a

satisfactory situation where, in this case, not just a perceived conflict of interest but a real conflict of interest between the Law Society and a particular law firm arose and resulted in your resignation? Do you think the case you have outlined illustrates particular problems with the then and current management and oversight arrangements?

Mr Dwyer—I am not aware of the current arrangements, of course. Certainly, in my case I was denied any chance of appeal. There was no appeal. It was a finished job. That was done. I might also add that, up until the time of my resignation, the six-monthly audit reports were coming in from the various legal firms and they were really not worth half the paper they were written on.

CHAIR—But you and Mr Clark prepared these reports. How can you say they were not worth the paper they were written on?

Mr Dwyer—Sorry, you misunderstand me. These are the reports coming in from outside auditors who were doing a six-monthly inspection of all legal firms.

CHAIR—Who were they doing the audits on behalf of?

Mr Dwyer—They were doing it on behalf of themselves because they had to supply the Law Society with a six-monthly approved accountants report.

CHAIR—I see. So you are suggesting that the independent law firms' auditors were showing clean bills of health, whereas you were showing there were problems.

Mr Dwyer—Exactly.

Senator HOGG—Could I clarify: you use the words 'audit' and 'inspection'. One of the confusions that I think arose last time was the difference between audit and inspection. Were these genuine audits that the auditors were undertaking?

Mr Dwyer—They were carrying out what were known as 'approved accountant reports'.

Senator HOGG—So they were not audits in the true sense of the word, as I understand it?

Mr Dwyer—It depends on the interpretation of the word 'audit'.

CHAIR—They sign an audit certificate which says that, in their view, the accounts are correct, or words to that effect. Do they have similar words?

Mr Clark—I can possibly help you with this. There was a form they were required to complete, and that form had been drawn up by the Law Society in consultation with the accounting bodies. It really represented a compromise, because to have a full audit done of every firm would have cost a lot of money. On the other hand, the accountants were not happy to sign off on jobs that they really had not spent the time on, so it was agreed that a certain number of questions would be answered. The questions were along the lines of whether the books balanced, whether there was a proper system of record keeping in place and whether they

had done one or two test checks on specific transactions. It was termed an inspection because the accountants felt it was not appropriate to call it an audit, which was probably right. When Mr Dwyer said that a lot of those were not really worth much, it was largely the fault of the form and the system rather than a criticism—in my view, anyway—of the accountancy billing.

CHAIR—It was a limited oversighting by the auditors rather than an audited certificate showing the correctness and stewardship of the accounts?

Mr Clark—That is right.

Senator HOGG—What was your role, Mr Dwyer? Was yours more that of being the auditor to these books?

Mr Dwyer—Yes. I was really the watchdog of the watchdog, if I could put it that way. My inspections or investigations or audits—whatever you wish to call them—went far deeper than these approved accountants reports.

Senator SHERRY—In what ways were your inspections deeper?

Mr Dwyer—I suppose the clearest way to put it is that I was looking underneath and behind the scenes. It did not concern me whether last week's bank reconciliation did or did not balance. I would always look back six or eight months previously—where things that had happened could not be changed. There was a whole litany of things which, in my mind, should have been reported on previously by some of the accounting firms. One that comes quickly to mind—and I have taken a note of it here—is that bank reconciliation statements in quite a few cases were improperly drawn up. One or two instances come quickly to mind of an item called 'an outstanding deposit'. This was added to the reconciliation statement, which was supposed to have been prepared at the end of each month. In the particular case that I am thinking of, those outstanding deposits were not banked until somewhere into the third week of a succeeding month.

CHAIR—The third week?

Mr Dwyer—Yes. Anybody with any sense at all in inspections or auditing should have had a look at that outstanding item and realised that it had not been deposited as it was required to be—within 24 hours. That was never reported on. The further I dug into that particular case, I found that the firm's trust accounts had been out of whack—in other words, in debit—for at least 15 years and, in the entire time before I turned up, there was no adverse report on that firm. That is the type of thing that I was looking for.

CHAIR—How much in debit?

Mr Dwyer—About \$30,000-odd thousand.

CHAIR—What was the inference from that comment? Was it that the lawyer owed the trust account that amount of money? Who owed the money? What was the significance of the amount in debit?

Mr Dwyer—The significance is this: at all times, the trust account moneys should equal the credit balances within the trust account ledger. In this particular case, the bookkeeper was allowing moneys to be drawn from accounts that had no credit funds in the trust ledger—in other words, if there were rate certificates or something like that to be obtained, cheques were drawn on the trust account and debited to that client's particular ledger account, without money having been received from that particular client. Come the end of the month when he was doing his reconciliation, the bookkeeper would discover quite a number of accounts with overdrawn balances.

CHAIR—But wouldn't they immediately raise an invoice to that particular client to say, 'We have paid on your behalf the following accounts and would you give us a cheque within seven or 14 days'?

Mr Dwyer—That did not happen. What happened was that the bookkeeper, when he was able to get his reconciliation and find out how much the total of the debit balances were within the trust account ledger, drew a cheque on the firm's account and paid it into the bank to replace the moneys that had already been taken out. That is the reason why the deposit, which was shown as outstanding at the end of month A, was not made to the bank until the second or third week in month B.

Senator SHERRY—Going back to the earlier question that Mr Dwyer took about the conflict of interest, both real and perceived, in the Law Society overlooking and inspecting various accounts of its constituent member organisations and the experience that you have outlined, do you believe that highlights the problem of the Law Society overlooking its own members?

Mr Clark—Yes. That is a specific instance of what can happen. I think you are really opening up the whole question of whether the Law Society should have its own disciplinary rules and practice and have the right to discipline its own members. During most of my professional life, I have been an advocate of the fact that it should be the arbiter of that, but I have become convinced that, particularly in Tasmania, where we have a very small profession—you are talking about, at any one time, 500 practising lawyers—it is impossible to run a just system, both for the lawyers and for the public that they should be protecting, if you are operating a self-disciplinary arrangement. You have too many possible conflicts.

When you look at complaints put to the Law Society, they have to go before the investigating committee and probably before the council. There are 16 members on the council, usually all representing different firms. Inevitably there will be some who have some involvement, there will be some whose friends are involved and there will be some whose enemies are involved. I was warned of this very early in the piece in this job by the then Secretary of the Law Institute of Victoria. He said, 'In a very small jurisdiction like yours, you're going to find it hell to try to sort these things out, because everybody knows everybody, lots of people are friends,' and so on. I believe it is just not possible to do it completely fairly. I believe that, basically, the Law Society has made a good effort over the years. I am not decrying what they have been able to do, but I think it is time to look at appointing some statutory authority to do it, with certainly an input or membership to the Law Society. I would hate to see just a public servant receiving complaints and dealing with them. But I think it is time to go down another path.

Senator SHERRY—The process you have outlined and the minutes you have given us highlight a debate, a dispute, on the council itself about whether or not Mr Dwyer should go back and carry out the inspection. Was this the first example in your time as an officer of the law council where this occurred, or did this happen on a regular basis? What is the story?

Mr Clark—No, that was the first time that I recall it happening. I think probably what had happened was that there had been renewed disciplinary action, or increased disciplinary action, because of the matters that Mr Dwyer had discovered on his inspections. You have to remember that this was a whole new ball game; it was a new broom going around and finding problems. As he says in his report, a lot of those problems were quite minor—somebody had paid out the money before they had it, not realising that trust moneys must never be paid out until they are in hand; you are in breach of trust if you pay out for the house today when you are expecting the money in tomorrow—but he also brought up a number of serious matters, some of which have been mentioned here and some we have not mentioned. Some of the matters, as I said, resulted in the striking off of legal practitioners. None of them that I recall was specifically in relation to mortgage funds as such; they were otherwise breaches of trust accounts and so on. But, in answer to your question, I do not recall that sort of problem arising earlier.

Senator SHERRY—You have mentioned that the system changed after Mr Dwyer's resignation. Approximately when was that; and what were the changes that occurred? Also, you did not indicate to the committee what your view of the changes were—whether you were asked about them or whether you disagreed with the proposed changes—and how these changes came about.

Mr Clark—I certainly did not agree with them. It was proposed that things could be made easier by appointing an in-house accountant. At that stage we simply had a bookkeeper and for the more major part of the accounting system used outside accountants. So it was proposed that we should appoint an in-house accountant, and it should be part of his job to carry out the random inspections. But the point was that he was to be an in-house employee—and that part I disagreed with. I also felt that, if he were to do the whole of the rest of the accounting of the society and its subsidiaries, there would be no way on earth that he could do a good job on going out and doing the rounds of the firms. In the state there were about 100 firms that he had to get around to on a regular basis.

Senator SHERRY—Was that person appointed while he was still with the Law Society?

Mr Clark—Yes.

Senator SHERRY—Was he still employed by the Law Society at the time of your dismissal?

Mr Clark—No, he had left.

Senator SHERRY—What happened after he left?

Mr Clark—After he left, another person was appointed in the same position and, as far as I can recall, under the same sorts of conditions. He was there for a number of years but has since left or retired—I am not sure which.

Senator SHERRY—But that was after your—

Mr Clark—No, I think he was appointed whilst I was still there.

Mr Dwyer—Senator Sherry, I am not too certain whether it was you or Senator Hogg who asked for some specifics of what I had uncovered that had not been reported on by the accountants. Could I just read you a few of them, please?

Senator HOGG—Yes. As a matter of fact, I have marked here on your statement that that is one of the things I was going to come to.

Mr Dwyer—One of the minor things was failing to keep proper records. In other words, the records were set out specifically in the rules of practice and in lots of cases these were not adequate—in my view, anyway. I have talked about bank reconciliations and how they came about. They were supposed to have kept their records at all times written up. Sometimes when I would arrive at an office the ink was hardly dry on the paper. None of these matters have been reported on previously.

I have touched on the question of debit balances or overdrawn balances within their trust ledgers. There were innumerable instances of these in the early stages of my inspections, or whatever you would like to call them. One of the trust accounts had a shortage of \$8,000 in it, spanning a period of two, three or four years—I have forgotten which now. The approved accountants consistently gave a tick to that being shown on the bank reconciliation statement as an outstanding deposit. I reported this to the Law Society on a number of occasions. But in no way could I convince the Law Society that this firm was in error, partly because their approved accountant was called to give a ruling on the matter and he said that that was a proper way of dealing with this money—which was, in fact, not where it should be.

Finally I was able to get the agreement of two accountants within this firm that what I was saying was correct: there was an absolute shortage of \$8,000 within those trust moneys. Put simply, if the total of your trust ledgers added up to \$9,000, there was \$1,000 in the bank and \$8,000 shown as an adjustment. Finally—I am repeating myself a little here, and I am sorry for that—the Law Society decided that something should be done about it, and the firm had to repay that money themselves. I do not think that endeared me to them very much, but that is another matter.

Another item I found that was not reported on was a number of long outstanding cheques. You may ask what significance this has. In several cases, these cheques were made payable to the recorder of titles, or whatever the case may be, and were handed to the bank who attended at settlement—the bank being the lending authority here. Subsequently, the situation must have changed because the bank did not need to register its mortgage and, consequently, the transfer of the title was not registered. To me, that was a fairly serious matter that should not have been overlooked.

There were goodness knows how many cases of what I call ‘dormant ledger balances’—amounts that were owed to clients that had been there for years and years. These consisted of the refund of land tax, the refund of rates, part settlements of claims and a whole variety of things. It was money sitting there that really should have been returned to the clients, and it had

not been. I found that trust account moneys were held in non-trustee investments. Again, this should have been obvious to anyone—and I am thinking particularly of firms along the north-west coast. With the first round of visits I made up there, I think there would have been something like \$200,000, \$300,000 or \$400,000 worth of trust funds held in non-trustee investments. At that time they were held as at-call accounts with building societies. Building societies were not trustee investments at the time, except for deposits—if my memory is correct—fixed for at least three months. But these were at-call moneys. That caused a bit of a furore, as you can imagine, because the legislation had to be changed to accommodate that.

There were instances of trust moneys being held in the names of legal firms and the profit from these being retained by the firms concerned. Interest rates at that time were somewhere between 15 per cent and 18 per cent, and their clients in most cases had no idea that this was going on. Money that should have been in the trust bank accounts was not there. A three-monthly, I think it was, return had to be given to the Solicitors Guarantee Fund. The object of that was that half the minimum balance in their trust bank account had to be deposited with the solicitors trust. At the end of, say, the third month these firms were taking large sums of money out of their trust bank accounts and putting them into building societies or somewhere else. The object of that, of course, was to reduce their commitment to place funds with the solicitors trust. Basically, in order of importance, they are the matters that I uncovered.

Senator SHERRY—Did you ever look at property valuations? One of the central issues of dispute is the valuation of properties in the current situation. Do you have any knowledge of that area?

Mr Dwyer—Yes. I have dealt just with pure trust account matters here, but I also insisted on inspecting deeds packets. I did that, firstly, to make sure that the mortgages were registered and, secondly, that the things were insured. Believe me, the number of buildings in the cities under mortgaged which were uninsured was tragic—and I thought that was rather remiss, to say the least.

CHAIR—And you reported on it?

Mr Dwyer—Yes. With valuations, part of my inspection was: yes, I wanted to see the valuations of these various things. There were some occasions where even second mortgages were being taken—and, as you would understand, first mortgages were the only things they were allowed to use as trustee securities.

Senator SHERRY—Why would a firm take out or allow the taking out of a second mortgage when it was not allowed or was illegal to do that?

Mr Dwyer—I cannot answer that. I do not know why.

Mr Clark—There can be an instance where the investor consents to lending on a second mortgage; he will get a higher interest rate. But that is not a trustee investment within the normal course of events.

Senator HOGG—Mr Dwyer, given the nature of your role in inspecting the various firms of solicitors, were there occasions when you felt that your independence as the duly appointed

inspecting officer was interfered with because of the things that you had been uncovering and discovering, as opposed to those that had been reported or not reported by the various firms' accountants?

Mr Dwyer—No. I must emphasise here that practically every firm that I inspected, whether I had reported on them previously adversely or not, treated me with courtesy and respect. Mind you, my morning cup of tea was often cold, as was the afternoon cup of tea.

Senator HOGG—I understand that.

Mr Dwyer—But there was no direct interference, until the matter was raised with Clerk Walker and Stops.

Senator HOGG—That is what I wanted to clarify. Thank you.

Senator LIGHTFOOT—Mr Clark, I understood you to say in your opening statement that you were sacked; is that correct?

Mr Clark—Yes.

Senator LIGHTFOOT—What year was that?

Mr Clark—That was 14 November 1992. It was the Saturday that followed Friday the 13th of November.

Senator LIGHTFOOT—It was just after Armistice Day too. What was the reason for that? Are you able to tell the committee the reason for that?

Mr Clark—No. I have tried to say that I asked for reasons a number of times, and I got no real reason. I was told at one stage that the society wished to take a different direction; at another stage it was that the council did not think they could get on with me. The council was heavily divided on the question. But even afterwards, even when we instituted proceedings, we never got any real allegations about what I was supposed to have done or not done, as the case might be. As I say, because the Law Society then decided that it was going to pay into court and, in effect, pay the damages without a hearing, there was no court hearing, and so there was still nothing elicited.

Senator LIGHTFOOT—It was a fairly regular sort of parting, wasn't it? It was not done with any ulterior motive; you were not being too obstreperous with respect to—

Mr Clark—No. There were two or three reasons. The principal reason was that we had taken action against some of these firms, and the partner from one of the firms was then the President of the Law Society, and they wanted me out.

Senator LIGHTFOOT—Could you tell the committee what firm it was?

Mr Clark—It was Murdoch Clarke, and the partner was Fabian Dixon.

Senator LIGHTFOOT—Do you think there were any other firms involved in that?

Mr Clark—There were other people involved. I do not say that this was a Murdoch Clarke conspiracy against me; it was Fabian Dixon who was doing it. Whether his partners had any part in it or not, I have no idea whatever. But he was the one who had always indicated to me that he bore a grudge against the proceedings we had taken against that firm.

CHAIR—The committee is impressed with your diligence, Mr Dwyer, and the manner in which you have pursued irregularities in relation to the audits that you have undertaken. But we also note that in 1987 the Chief Justice actually made no adverse finding in relation to defendants which you gave evidence against. To the credit of the Law Society, they appealed and were unsuccessful. In trying to get some perspective into this, I think that the Law Society's inspectors had found irregularities, as you have stated, which led to prosecution. From the position of chair—I have also been an auditor and a fellow of a number of professions—I do not find it surprising that the firm did seek an alternative inspector on the next occasion. I believe it could reasonably be argued that the society's inspector might have had a preconceived conception of what he might find and what might necessarily be prejudicial. Under the circumstances, I think it was probably unfortunate for you and the Law Society that you chose to resign over one audit, because they certainly needed you and you needed them.

Mr Dwyer—When I was first told that I was not to go and revisit Clerk Walker and Stops, I wrote to the society and told them that I would not brook any interference with my work. It was not the place of the council or the society to tell me how to conduct my audits. I was professionally embarrassed. I had two problems there. One was that they were going to appoint another inspector who, ethically—as you would appreciate—would have to get my consent.

CHAIR—He would have to discuss it with you?

Mr Dwyer—Yes, and there was no way that I was going to hush up why I thought I was being pushed out. The Law Society were given very clear indications that, if they persisted in interfering with my work, I would have to consider my situation. I did that, and in my letter of resignation to them again repeated why I was resigning. I resigned because I could not continue. Whether that was predetermined by somebody, I have no idea. I can only assume that it was an opportunity for interested people to get rid of me.

CHAIR—Mr Dwyer and Mr Clark, thank you for your evidence.

Proceedings suspended from 10.48 a.m. to 11.05 a.m.

CHAIR—I reiterate a comment that I made in my opening address: parliamentary inquiries can, at times, generate tensions—this inquiry certainly has—and those tensions can be particularly severe for some witnesses. It is a matter of some concern to the committee that after the last hearing it was reported to us that some witnesses had been harassed by attendees at the hearing. The committee wishes to emphasise in the strongest terms that interference with witnesses amounts to a contempt of parliament, and there will be no hesitation in taking appropriate action should this be repeated. I understand—and it is regrettable—that there is a document in circulation this morning. I have not seen that document, but I am told that it could be construed as a document of harassment, and I therefore ask for its collection and withdrawal forthwith.

[11.07 a.m.]

BUGG, Mr Timothy Gerard, Past President and Council Member, Law Society of Tasmania

JACKSON, Mr Philip, President, Law Society of Tasmania

MARTIN, Mrs Jan, Executive Director, Law Society of Tasmania

HARVEY, Ms Christine Susan, Deputy Secretary-General, Law Council of Australia

CHAIR—Welcome. In your opening presentation you might like to comment on a number of matters that may not necessarily be in your earlier formal presentation.

Mr Jackson—I want to comment on what we have heard this morning from Messrs Dwyer and Clark. I should point out that the Law Society received from the committee Mr Dwyer's written submission only yesterday, and we have not had any previous submission from Mr Clark. A great deal of what you heard this morning, unfortunately, is factually incorrect—demonstrably so—and it should not be left uncorrected on the public record. The firm Clerk Walker and Stops, which consists of a number of practitioners who have been named here this morning, was prosecuted initially in 1987, I think, on the basis of evidence gathered by Mr Dwyer on a trust account inspection.

It needs to be emphasised at the outset that the prosecution had nothing whatsoever to do with the operation of a solicitors mortgage fund. The allegations that were made against the firm were confined solely to the operation of its ordinary trust account. The second main point I want to make is that the prosecution substantially failed. It failed substantially because it was found that Mr Dwyer had not understood the firm's accounting system and that his perception of what had happened was not correct. Those were specific findings of the disciplinary tribunal; of the judge at first instance appeal, the then Chief Justice, Sir Guy Green; and of the judges on appeal in the Full Court: Justice Nettlefold and, as he then was, Mr Justice Cox.

Perhaps the most serious misstatement that you have heard this morning, and one that has been printed in the media, is that there were findings of unprofessional conduct in relation to that prosecution. That is quite wrong. There was no finding of professional misconduct or unprofessional conduct. In each case, the then Chief Justice, Sir Guy Green, and Justices Nettlefold and Cox expressly refused to find any professional misconduct or unprofessional conduct.

I take the time to read from the last page of the judgment of His Honour, the then Chief Justice, Mr Justice Green, published on 27 April 1989. These are the orders that His Honour made when the matter was returned to him after the Law Society's unsuccessful appeal:

The Court declares its disapprobation of the conduct of James Robert Hurburgh, James Benson Walker and David Benson Walker ... The Court declares its strong disapprobation of the conduct of James Benson Walker and David Benson Walker ... Order that the Law Society of Tasmania pay the costs of PHT Stops and PB Walker (deceased). All allegations against those practitioners having been dismissed.

There was an order that the Law Society pay 75 per cent of the costs of J.R. Hurburgh, J.B. Walker and D.B. Walker. That order was made because the prosecution of those practitioners very substantially failed. Those practitioners were ordered to pay only 25 per cent of the costs of the Law Society in respect of the prosecution. I think it is fair to say that those orders put the matter very much in perspective and completely correct the impression you would have been left with by what Mr Clark has told you.

That prosecution cost the Law Society in excess of \$140,000, based on the evidence provided by Mr Dwyer. Subsequently, Clerk Walker and Stops with substantial justification, one would have thought, said, 'We do not want Mr Dwyer to be our account inspector. We want somebody else to do it.' I believe you will find amongst the minutes that Mr Clark has handed to you this morning a reference to a specific request from the firm that another named accountant carry out the inspection on the basis that that person was more or less an alternate for Mr Dwyer already. That request was initially refused by the society, but on reconsidering the matter, it was resolved that it was a perfectly proper request in the circumstances and agreement was reached that another inspector be appointed to inspect that firm's accounts. I cannot emphasise strongly enough that the society, in council, resolved at that time that, in the circumstances that had occurred, it was a perfectly proper request to accede to. Mr Dwyer subsequently declined to do any further work for the Law Society. I cannot speak as to his reasons for that. I was not on council at the time. I was not in any way involved in the administration of the Law Society at the time.

Mr Dwyer said this in his written submission and in his statements this morning. In his written submission, he said:

After my resignation had been forwarded to the Society representations were made for me to re-consider, however, for the above reasons I could not.

That is not true. The minutes of a meeting of the executive committee of the society held at Hobart on Monday, 28 May 1990 at 1 p.m. record that a letter was tabled from Mr Dwyer indicating the level at which his fees would be charged if the society wished him to carry out further work on their behalf following his resignation as trust account inspector. It was resolved that the fees as proposed be paid for any work done by Mr Dwyer. I will hand that up to the committee.

CHAIR—Thank you. It is resolved that this document be accepted as a document of the committee.

Mr Jackson—I state again before leaving the Clerk Walker and Stops matter, because it cannot be said often enough: it had nothing whatsoever to do with a solicitors mortgage fund. You heard mention this morning of Murdoch Clarke. I am in a somewhat difficult position because I acted for Murdoch Clarke; the firm was my client. I have spoken with the firm, and I am authorised to tell you what the true position was in relation to that prosecution. In 1986 the Law Society, through its counsel Mr W.P.M. Zeeman, who later became Mr Justice Zeeman, prosecuted Murdoch Clarke for alleged professional misconduct, based on the operation of part of its trust account. I emphasise again: that had nothing whatsoever to do with that firm's solicitors mortgage fund. The prosecution was based on a report by Mr Dwyer to the Law Society that the firm Murdoch Clarke carried on the practice of taking out of its trust account

the core of its trust account, which was a standing deposit, if you like, that never moved—it never shifted; the balance in the trust account never, or rarely, dropped below that amount—put it into interest-bearing deposit accounts and retained for itself the interest on those accounts.

When the prosecution commenced, it was clear that the practice had begun in the late 1950s or early 1960s. It was a practice that had been commenced by the then partners of that firm under a different name. In the very early 1960s, in 1961 or 1962, the firm wrote to the law society in England and sought advice from the law society in England as to the propriety of that practice. The response, based on English authority because there was no Australian authority, was that the practice was an appropriate one, with certain qualifications. The firm adopted the practice from the late 1950s, I believe, onwards.

In the early 1970s Mr Clark made reference to a letter from the Law Society concerning this. His reference to it is misconceived. I believe the letter that he referred to is a memorandum to accountants inspecting the firm's accounts, drawing attention to the practice and setting out guidelines as to how the inspection should be done to ensure that the practice was properly followed. There was a proposal in the early 1970s that rules of practice be introduced to either regulate or outlaw the practice. That never happened. It was established as a hearing before the disciplinary tribunal in 1986—I cannot give you the date precisely, but I believe it was late 1986—that there was nothing wrong with what the firm had done. The proceedings were dismissed after a day's hearing and the Law Society was ordered to pay the firm's costs.

Senator LIGHTFOOT—Mr Jackson, is this still the firm of Murdoch Clarke?

Mr Jackson—Yes. The references this morning to that firm were quite unnecessary and brought into question the activities of that firm quite unnecessarily and in a way that has no relevance whatsoever to anything that this committee is properly inquiring into. I should also say that the prosecution failed at the end of the first day of the hearing, not on a technical point, as Mr Clark wanted you to believe, but because the firm was able to produce evidence that the Law Society had not produced—of the Law Society's own 1970 memorandum concerning the matter as well as the evidence of the firm's advice obtained from the English law society. The prosecution failed because the firm demonstrated that it had done nothing wrong—it was not on a technical matter. Mr Clark wanted you to believe that, but it is not true.

Senator LIGHTFOOT—Was that in front of Justice Zeeman?

Mr Jackson—No. Mr Justice Zeeman prosecuted the matter for the Law Society when he was still in private practice. At that stage he was not a judge of the court. The prosecution was brought before a disciplinary tribunal of five members, as I recall. It is important that those matters be made clear, because absolutely nothing of what you heard from Mr Clark and Mr Dwyer this morning had anything whatsoever to do with mortgage funds.

The Law Society takes a very strong position that any suggestion that Mr Clark's employment with the Law Society was terminated because of anything associated with Murdoch Clarke or Clerk Walker and Stops is quite wrong. It gives me no pleasure whatsoever to say this, but the fact of the matter is that Mr Clark's employment was terminated for incompetence. There was a special general meeting of the Law Society to canvass the issues surrounding Mr Clark's termination. Mr Clark came to that meeting. I was not a member of the

council of the Law Society at that stage, but I was at that meeting. At no stage did Mr Clark assert to that meeting or, to the best of my knowledge, to anyone else who has been able to provide me with any information going back to those days—and there is no evidence of it in the records of the Law Society—that the termination of his employment had anything to do with the prosecution of Clerk Walker and Stops or Murdoch Clarke.

Senator LIGHTFOOT—And this is a recollection you have, Mr Jackson, of over a decade ago? Is that correct?

Mr Jackson—I am talking about the Murdoch Clarke matter on the basis that I was solicitor and counsel for that firm. My recollection of that matter is extremely clear indeed.

Senator LIGHTFOOT—Nonetheless, it was over a decade ago.

Mr Jackson—It was over a decade ago, but I looked at the files less than a week ago.

CHAIR—I must state that in no way will the committee be adjudicating on this issue. Allegations have been made. People have their right of response, and their right of response is entitled to be heard in silence.

Mr Jackson—Thank you for that. I emphasise that I am responding on behalf of these people—this is not my response. You challenge my recollection. My recollection is very sound. As I just said a moment ago, I last looked at the files less than a week ago. As far as Clerk Walker and Stops is concerned, I have in front of me the three judgments: the judgment of Chief Justice Green of 29 July 1987; the judgment of the Full Court—Justices Nettlefold and Cox—of 30 November 1988; and the judgment of Chief Justice Green of 27 April 1989. I am content to make copies of those available to the committee at a later time. The first of those is a judgment that has only recently become specifically available to me, but its terms are very clear.

Again, you challenge my recollection, but I do not speak entirely from my own recollection. I have of course made inquiries about these matters in the last week or two, based on the rather unfortunate media reports that occurred in relation to what Mr Dwyer and Mr Clark had to say. What I am speaking to is not from my own recollection so far as the Clerk Walker and Stops matters are concerned but from the information I have obtained from the society's records and from the corporate memory of those who were on the council at the time.

Mrs Martin—I am the Executive Director of the Law Society—a position I have held since late 1997—and I am also a legal practitioner. I would like to say that, during the past period of time, there has been heightened aggression towards the Law Society. I and my staff, whom I must say are all female, have been threatened, and on two occasions in the last week it has been necessary to call the police. In each of the instances of this aggression, the aggressor has related their hostility to what they have read in the *Mercury* newspaper day after day after day. I would like that recorded. I find it quite tragic that things in this small community have reached this stage.

CHAIR—If you give us names, we will take appropriate action.

Senator SHERRY—Can Mrs Martin give us names?

CHAIR—She might wish to take counsel on that.

Mrs Martin—I would prefer to.

Senator SHERRY—You can do it privately if you wish.

Mrs Martin—I would quite prefer that, thank you.

Senator HOGG—I think we should have more than names; we should have some reasonable description of what has taken place.

Mrs Martin—Certainly I can provide that.

Mr Jackson—I think I should add to that: that is the sort of harassment that occurred at the last hearing as well—quite substantially outside the hearing.

CHAIR—Do you have anything further, Mrs Martin?

Mrs Martin—No, thank you.

CHAIR—Thanks for drawing our attention to that. It is a very important issue and we wish to protect all our witnesses.

Senator SHERRY—If a formal outline of the conduct that was alluded to is provided to the committee, it is a matter that can be referred to the Senate Privileges Committee.

Senator HOGG—That is referring specifically to your last statement, Mr Jackson.

Senator SHERRY—And to Mrs Martin.

Senator HOGG—Yes.

CHAIR—Are there any further comments any of you would like to make?

Mr Bugg—One thing that I think is worth noting is that, since this issue of mortgage practices by solicitors has been going to greater press coverage in recent weeks, many practitioners have spoken to me—Mr Jackson and Mrs Martin about their considerable angst and concern as to what has been happening. It must be stressed that the concerns that the committee is looking at are limited to a very small number of practitioners. The vast majority of practitioners in the state are appalled at what has been happening. It has cast them in a very poor light. There are some 450 lawyers in the state. There are many firms that have carried on mortgage practices for many years without any blemish, and it is important that the committee understands that.

CHAIR—Do you wish to make any further comments?

Mr Bugg—No, thank you.

Ms Harvey—No.

Senator SHERRY—Does the Law Society have a subcommittee that is responsible in some way for oversighting solicitors mortgage funds?

Mr Jackson—I can only speak about the present and the last few years. We do not have a committee that is specifically dedicated to solicitors mortgage funds, but there is an accounts rules committee which deals with matters concerning firms' trust accounts, which encompasses mortgage funds.

Senator SHERRY—So it encompasses the whole gambit?

Mr Jackson—Yes. The inspection reports go to that committee. That committee reports back to the society as to any action that needs to be taken in respect of any defalcation or apparent mismanagement of the trust account, and so on.

Senator SHERRY—Can you tell me who the current members are?

Mr Jackson—I cannot. I can tell you that the chairman of that subcommittee is Mr Peter Roach, but as to the rest the members I cannot say.

Senator SHERRY—Is it true that Mr Turner or Mr Kench is either currently a member or in the recent past has been a member?

Mr Jackson—Not to my knowledge, but Mrs Martin will be able to tell you that.

CHAIR—I think you might have to be careful because this is sub judice. These are matters before the court.

Senator SHERRY—I am being careful.

Mr Jackson—Mrs Martin can tell you who the current members of the committee are, but the chair is perfectly correct: we cannot possibly comment on the Piggott Wood and Baker situation because, as you well know, it is the subject of a reserved judgment.

Senator SHERRY—Yes. I am aware of the limitations, but I do not think we have quite reached that yet.

Mrs Martin—I am more than happy to answer your question. The chairman of the committee is Mr Peter Roach, who is a considerable senior barrister and a former lecturer in tax law and currently a member of the taxation review board. The other members of the committee are me; Mr Ross Byrne, a senior partner of Moore Robsons; Ms Eva Plachta, the general manager of one of our largest firms; and Mr Michael Crisp, the chairman of the Solicitors Trust. To my knowledge—and I can only speak for the last four years—the two practitioners to whom you have referred have never been members of the committee.

Senator SHERRY—Have any of the other practitioners who have been raised so far in disputes involving solicitors mortgage funds been members of that committee in the recent past?

Mrs Martin—In recent years, and I speak of the last four years, the membership of that committee has been static—apart from the general manager of one of the firms and that position changed this year because the other person left the state.

Mr Bugg—In response to one of Senator Sherry's questions, there was indeed a mortgage subcommittee of the Law Society for a number of years. When I was president of the society, I called it to a meeting because at that stage the society had resolved—and this was in late 1998—that it would no longer be a regulatory authority in relation to the operation of mortgage funds. The society recognised the changing times, the changing nature of mortgage practices. As has been highlighted in some of documents that have been given to the committee, mortgage lending changed somewhat from the early 1990s to the late 1990s in that at least some firms were actively seeking investors and funds for investors, whereas in the old days, if I can call them that, investment funds came from clients and were not actively sought from the general public. The society recognised in 1998—some 2½ years ago—that it would be no longer appropriate in such a changing climate for it to be a regulatory authority because of the prudential requirements that were clearly needed for the changing circumstances.

Senator SHERRY—Thank you for that. Are there currently any complaints against the firm of Henry Wherrett and Benjamin that the society is aware of?

Mr Jackson—I do not think I can answer questions about current investigations or prosecutions of practitioners.

Senator SHERRY—I am not going to ask for details for obvious reasons, but is there any complaint before the council involving that firm?

Mr Jackson—I am happy to go in camera to discuss that with the committee.

CHAIR—We do not have official information.

Senator SHERRY—I have information about Henry Wherrett and Benjamin. Last time I did raise—not specifically Mr Turner and Mr Kench by name—an allegation—

CHAIR—You cannot repeat that today.

Senator SHERRY—I am not going to repeat it—which you, Mr Jackson, properly stated was a matter for investigation. What I am trying to do is to elicit whether there is a complaint and/or an investigation in respect of the firm Henry Wherrett and Benjamin, and that is where I intend to leave it.

Mr Jackson—The fact that there has been a prosecution of two former partners of the firm Piggott Wood and Baker is a matter of public record. I am not prepared to discuss with this committee, except in camera, any investigation the Law Society might currently be undertaking in respect of any legal practitioner.

Senator SHERRY—Aside from the four firms that we have dealt with to date—and you would be aware of the names—is the Law Society carrying out any other investigations on any legal firm in Tasmania at this point in time in respect of solicitors mortgage funds?

Mr Jackson—I am prepared to discuss these matters with you in camera but not in public.

Senator SHERRY—I do not want to go to the details; I really do not. I want to try to establish the extent of the problem we are dealing with. We have knowledge of four firms. I get information given to me about other firms. I do not want to go into the detail of that for obvious reasons. If there are charges to be laid, so be it. I am just not sure at the moment: are we confining an outcome to four firms or are there other firms involved?

Mr Jackson—I think you asked similar questions of ASIC the other day, and you seem to have accepted the response from ASIC that they could not discuss with you current investigations. That is a proper position to take. The Law Society takes the same position. The Law Society has a very high obligation in respect of investigations of complaints, not only to carry out those investigations properly and thoroughly but to carry out those investigations in a climate of some confidentiality, in the same way that ASIC, the police and other investigative instrumentalities must do so.

Senator SHERRY—The difference between the view you are putting this morning and the view of ASIC is that ASIC did clearly state on the record—and I must say it was a surprise to the committee and particularly to me—that, yes, there was a continuing investigation of Garrisons. They then said they were not prepared to go to the detail of the investigation; I accepted that. But it was certainly news to the committee that ASIC were continuing an investigation of Garrisons. I am not asking you to name a firm. What I am asking you to indicate to the committee is: are there continuing investigations of another firm or firms in Tasmania on these matters?

Mr Jackson—I can only say again that I am prepared to canvass these matters in camera. I will not do so publicly. This is not an inquiry into the Law Society's regulatory regimes or functions; it is an inquiry into the prudential aspects of the management of superannuation funds and the like.

Senator SHERRY—I have to disagree with that statement.

Mr Jackson—I can read to you from the terms of reference if you wish, but I think you would be very familiar with them.

Senator SHERRY—Yes. I am familiar with the terms of reference, but part of the outcome and part of the inquiry itself is the manner in which these particular financial products are regulated. But you are not willing to answer, so I will leave it at that.

Mr Jackson—No. I did not say that, and let me make that very clear.

Senator SHERRY—Sorry, you will only answer in camera.

Mr Jackson—I said I was prepared to canvass these issues in camera.

CHAIR—Can I intervene. As chair of the committee, and having had a lot of experience of taking in camera evidence, I am rather reluctant to accept in camera evidence because quite often it has unfortunate consequences. It seems at times to get into the domain of the press and the ability to handle that has always been quite unsatisfactory and raises questions of impropriety, which I think is unfortunate. So unless these matters are really germane to our inquiry, I think any consideration of taking evidence in camera would have to be taken very, very seriously indeed.

Mr Jackson—I accept that, but I am not prepared to discuss these issues in public.

CHAIR—I can understand that, and I am not asking you to do that. At the same time, I do not want to give you the avenue to think that we will accept it automatically in camera.

Mr Jackson—No. I am perfectly happy with that. Could I remind you of what the committee said in a public statement on 15 May 2001:

This inquiry is not intended as a ‘witch hunt’. The Committee’s interest is not to identify specific individuals who may or may not have been involved in improper conduct. The Committee intends to examine solicitors’ mortgage schemes in the context of broader prudential supervision, and consumer protection issues, and to draw from this any lessons for improvements to Australia’s regulatory framework at the Commonwealth level.

That does not permit an inquiry into the Law Society’s general regulatory functions and regime, with great respect.

Senator SHERRY—Well, with respect, I disagree, but that is an issue we will deal with at a future time.

Ms Harvey—Then of course we have to look at the role of the Managed Investments Act, which has completely changed the regulatory scheme for the operation of these types of funds. That has been enacted since 1998. As at October this year, the run-out schemes, which the Law Society has responsibility for the management of, will just basically finish unless there are some new arrangements with ASIC.

Senator SHERRY—I understand that.

Ms Harvey—In relation to the evidence given by ASIC on Tuesday in Sydney, there was questioning about Garrisons, that is quite true. I will read from the transcript at page 1140:

In Tasmania a significant proportion of ASIC’s enforcement resources have in recent times been employed in investigating matters relating to mortgage schemes. Our submission details some of those matters, including three specific investigations in relation to solicitors mortgage funds in Tasmania. The potential outcome from those matters includes the full gamut of criminal, civil penalty or civil recovery proceedings.

That was all that they were basically prepared to say: that the investigations were ongoing.

Senator SHERRY—However, ASIC did then go on to indicate—as I say, to my surprise, because there was an assumption, apparently a wrong assumption on my part, that the inquiry and the actions in respect of Garrisons had ceased—that there were other investigations still being carried out in respect of Garrisons, which was totally new evidence to the committee.

Mr Jackson—That is a matter for ASIC. I am not surprised that you were surprised.

CHAIR—ASIC have a role here which we are not attempting to usurp in anyway whatsoever. I now go to another issue. The past president noted that the society decided in 1998 it would no longer be the regulatory authority for solicitors mortgage schemes. Some will be covered by ASIC; others will be wound up. The wind up concludes in October 2001. However, the new regulation by ASIC will not cover funds with fewer than 20 members. What will the society be doing in relation to these funds to protect investors?

Mr Jackson—The society is having present discussions with ASIC and has had so for some time. Those discussions are continuing as to precisely what is going to happen after 31 October 2001. That is as much as I am able to tell you at this stage.

Ms Harvey—The matter is on the agenda for the Law Council of Australia, which is meeting in Hobart in two weeks, as to whether there should be any future involvement by legal professional associations in the management of the 20 or fewer investor funds.

Mr Bugg—It is also important to note that, when this issue arose in 1998, inquiries that I made of the profession with the executive director indicated that all firms intended to either transfer their funds to a responsible entity—many of which had done that—or wind down their practices completely. So the society expects that post October this year firms which still have remnants of funds will be working actively to wind those funds up.

CHAIR—Thanks. That is very clear.

Senator SHERRY—I do not know whether you have seen the specific written announcements by Garrisons. Have you seen any documents from Garrisons at all that they have issued?

Mr Jackson—I have only seen one document that came to us this morning when we came into this room. Apart from that, all I know about what they have done is what I have read in the media.

Senator SHERRY—Is that their letter of feeble excuses for not turning up today?

Mr Jackson—That is your characterisation of it. It is a letter dated 13 June 2001 and a letter dated 14 June 2001.

Senator SHERRY—Garrisons have said publicly, and I have looked at some of the public transcripts, that they are placing full responsibility on the Law Society for the problems that have occurred, and they have foreshadowed various legal actions. It is not a view I share, by the way.

Mr Jackson—They would, wouldn't they?

Senator SHERRY—My next question is: what is your response to the attitude of Garrisons as has recently been enunciated in the last week?

Mr Jackson—Which attitude?

Senator SHERRY—The attitude that the Law Society is the responsible body. They did enunciate that view at the last hearing. I think they appeared after the Law Society. That was very clearly the attitude they continued to project.

Mr Jackson—We reject it entirely.

CHAIR—We cannot expect you to indicate in advance what your likely position is going to be when you have not received any correspondence from those persons.

Mr Jackson—That is a fair comment, but I am prepared to say that the society rejects entirely any assertion by Garrisons that losses to their clients are a consequence of anything the society has done or has not done. We reject that proposition entirely.

Senator SHERRY—Garrisons have foreshadowed some legal action. Have they taken any action yet?

Mr Jackson—I could not possibly comment on that. We know nothing about that, apart from what we have read in the newspaper.

Senator SHERRY—The state government recently announced some changes to the operation of the guarantee fund. I have not seen the specific proposed legislation. I understand the Law Society has welcomed that. What is your understanding of the effect of the changes that have been announced?

Mr Jackson—I have no present knowledge of any proposed changes to the guarantee fund or the way that it operates. I understand the Tasmanian Attorney-General said yesterday that he will ensure the guarantee fund is maintained at its proper level so that funds will be available to meet the consequences of any defalcation. As I understand it, the fund currently is at its required statutory level. I believe the Attorney went on to say that he will, if necessary, increase the level of the fund. Whether there is any specific proposal to do that at the moment, I am not aware.

CHAIR—How does that place moneys owing other than the Garrisons moneys? Does that mean people will have an assurance of ultimately being paid their capital?

Mr Jackson—The Attorney has said—and the Law Society would clearly endorse this—that steps will be taken to ensure that the guarantee fund will be sufficient to meet the consequences of genuine defalcations as opposed to pure commercial losses.

CHAIR—Are the matters under question commercial losses or are they defalcations?

Mr Jackson—It is a combination. ASIC made that clear to you the other day. At page 1150 of the transcript, Mr Johnston told you that ASIC's attitude was the same as ours—if there simply had been market loss, one would expect the investors to bear that loss. There are market losses involved here, as well as some losses due to default.

CHAIR—How do we consider excessive valuations—valuations in relation to the lending on property which was subject to the loan? Where do they fall?

Mr Jackson—If I understand you correctly, you are asking: what is the position where a valuer has grossly overvalued the property?

CHAIR—Yes.

Mr Jackson—One would have thought that the valuer might, contingently, have a liability for a negligent valuation.

Senator SHERRY—Prima facie, that does appear to have happened.

CHAIR—Providing he has plenty of indemnity insurance.

Mr Jackson—Where are we heading with this discussion? You are talking now about the responsibility of valuers for their own negligence or breach of contract. This has nothing to do with the Law Society, with great respect.

CHAIR—The issue was the adequacy of the indemnity fund to cover issues. It has been revealed that the indemnity fund has a very narrow base in that it covers fraudulent activity rather than perhaps the wider range of losses that may be suffered by the great majority of people. Is that right?

Mr Jackson—No, that is not correct. The guarantee fund is not available only to cover losses caused by fraud. It is available to cover losses caused by fiduciary default. Fiduciary default has, under the act, certain meanings. There is some debate about how wide that is. The government is at the moment moving to widen the definition. The guarantee fund is available to meet losses caused by fiduciary default on the part of legal practitioners. The guarantee fund does not indemnify for losses caused by the negligence or some other wrongdoing of valuers.

Senator SHERRY—A number of cases have been drawn to our attention where there at least appear to have been grossly inflated valuations beyond what would be considered reasonable. Let us assume that at some point in time that is established. Are you saying that, if that were established, the neglect or otherwise of the valuer and the losses that occurred from their actions cannot be met by the guarantee fund and will have to be met through some other mechanism?

Mr Jackson—Yes. You are probably aware—it is certainly a matter of public record—that Piggott Wood and Baker are in fact currently taking proceedings against some valuers for their valuations.

CHAIR—Can you give us as a rough percentage how many clients under these mortgage arrangements would fall into the category of protection through the indemnity fund, and how many would have to seek recourse as a result of direct litigation? Is it five per cent or 50 per cent? Just give us a rough indication.

Mr Jackson—I could not possibly give you any idea as to that. I think I made a point strongly the last time I was here that this is a moving feast.

CHAIR—I know.

Mr Jackson—I should say that it is very much a moving feast because the Law Society has under constant review the question of where we can and should obtain default orders. A default order is, of course, a mechanism by which one gets access to the guarantee fund.

CHAIR—That is right.

Senator SHERRY—This is a very important issue for the people who are waiting for their money. To what extent should operators of solicitors mortgage funds take at least some responsibility for the valuations that occurred—if any?

Mr Jackson—I do not know that I can answer that. One would suppose that if a loss is caused by a negligent valuation, the consequences for that would fall on the negligent valuer, just as the consequences of any negligence falls on the negligent tortfeasor.

Senator SHERRY—We were given a couple of the examples at the last hearing—I do not know whether you were here—of a massive revaluation of one particular property which, to any reasonable person—you are not a valuer, and I am not—seemed to be very extraordinary. Shouldn't the solicitors involved in the solicitors mortgage funds have at least checked, where any reasonable person could conclude an inflated value was given and moneys lent out against that inflated value?

Mr Jackson—One has to be careful not to be too judgmental about this. Let me give you an example. It was put by the society last time, and as part of our written submissions, that one has to keep in mind that much of the problem that has occurred in Tasmania has been the result of economic downturn and reduction in the values of properties—

Senator SHERRY—Ha, ha.

CHAIR—I am sorry. Could we have silence? I missed that comment, Mr Jackson. Could you repeat it?

Mr Jackson—Much of the problem has come about through the consequences of the economic downturn of a general kind and a reduction in the value of properties. I know that particularly Senator Sherry expressed some scepticism about that; and I have read the transcript of your exchanges with Mr Toomey and I know that Mr Toomey expressed some scepticism about that. But the fact of the matter is that that is acknowledged by ASIC as a specific cause of part of the problem in Tasmania. ASIC plainly said so on Tuesday last at page 1141 of the transcript. Mr Johnston said:

Specifically, there are some differences, of course, in the market in Tasmania, whereby there have been declining property values.

He went on to say that to some extent that had also happened in northern Queensland. Let me give you an illustration. The Law Society has just sold in Hobart for \$550,000 a building which it purchased in the early 1990s for \$1.3 million. That is the sort of reduction in property values that we have been facing in some areas in Tasmania in the last 10 years.

Senator SHERRY—I understand that. I am not disputing that there is some decline, depending on the property area, of values in Tasmania. My questions went to the issue of an example given to us at the last committee hearing of a property being revalued dramatically within the same week. Where do we draw the line?

Ms Harvey—What is the question you are asking, Senator? Is it: should the solicitor be responsible for, in effect, scrutinising the valuation?

Senator SHERRY—Yes—or bear some responsibility.

Ms Harvey—You made the point earlier that solicitors are not valuers. You are not a valuer and nor are the solicitors. So you are relying on the expert to provide you with that valuation.

Senator SHERRY—I understand that. But they are operating the fund, and presumably they would have to look at the valuations as they come across their desk prior to loans being entered into.

Mr Jackson—Senator, let's cut to the chase: if what you are trying to suggest is that there must be some responsibility on the part of legal practitioners who may have colluded with valuers to secure valuations to support lending—

Senator SHERRY—That is the next issue I was going to get to.

Mr Jackson—That is something that we would plainly investigate and prosecute if there were sufficient evidence to do so.

Senator SHERRY—But the difficulty in that, of course, is proof.

Mr Jackson—Absolutely.

Senator LIGHTFOOT—By way of preamble, I will frame my question as follows. In Western Australia, the new state government has recently appointed Justice Ian Temby to head, I think, a judicial inquiry. I do not think it is a royal commission, but I could be wrong. The growth in Western Australia has been significant—in fact, outstanding among all states—and property prices have not declined. However, there has been some clear evidence that valuers have given spurious valuations—some of them have been double and certainly significantly less than the realised prices. So the genesis of those massive losses seemed to be based on crooked valuations. Let's not beat around the bush: they were crooked valuations. That is where the problem seems to have emanated. I do not want to pre-empt Justice Temby, but that is where it seems to have emanated from.

But, Mr Jackson, you are apparently saying that it is not solely that valuation—that the valuations have in fact been in decline and it is a declining market. But shouldn't a valuer have taken into consideration what everyone knows—that is, that there have been declining property prices in Tasmania for a decade or more? You gave evidence just then that you recently sold to the Law Society for \$550,000 a building that had been purchased seven, eight or 10 years ago for over a million dollars. A lot of people are of the opinion—which I do not necessarily share—that solicitors are not good businessmen. But, to me, that is an appalling loss. My question is: is it at the stage in Tasmania where the government of Tasmania ought to be seriously considering at least a judicial inquiry into mortgage brokers and the losses?

Mr Jackson—I cannot comment on that. I think you are far better placed than I am to—

Senator LIGHTFOOT—Mr Jackson, with respect, you head a very serious organisation in Tasmania, composed of 450 solicitors, practising or otherwise. You must have an opinion on that.

Mr Jackson—The Law Society, as a very serious organisation, is concerned with solicitors mortgage funds. In relation to solicitors mortgage funds, there are continuing investigations by the Law Society, ASIC and the police. If you want a judicial inquiry, you are far better placed than we are to determine whether that is an appropriate thing.

Senator LIGHTFOOT—Is it correct that your inquiry is largely with respect to solicitors?

Mr Jackson—We have no function outside the legal profession. We have no jurisdiction to do anything other than regulate the legal profession.

Senator LIGHTFOOT—But you are not opposed to a judicial inquiry, or something more significant perhaps?

Mr Jackson—That is matter entirely for personal opinion, philosophy and politics. I am not going to express a view about that.

Senator LIGHTFOOT—Don't you run the risk, Mr Jackson, of giving the impression—perhaps wrongly—that you are protecting solicitors in your society?

Mr Jackson—I am not in the business of protecting legal practitioners. The Law Society vigorously prosecutes those practitioners whom it believes to be guilty of wrongdoing and it prosecutes those practitioners through the proper channels—those being the disciplinary tribunal, established under the Legal Profession Act, and the Supreme Court. Any suggestion that I personally or the Law Society has any role to play in protecting the legal profession from prosecution for genuinely perceived professional misconduct or unprofessional conduct is completely and utterly outrageous.

Senator LIGHTFOOT—That was not my suggestion. I ask you again: could you be so perceived—perhaps wrongly?

Mr Jackson—No, absolutely not.

CHAIR—Ms Harvey, would you like to comment—

Members of the audience interjecting—

Mr Jackson—Mr Chair, let me just respond to the hecklers—and I do ask you to please control the room—that the Law Society has, on two occasions now, sat quietly and allowed witnesses before this committee to say what they have to say and answer questions. Let me say to you, Senator Lightfoot, that there is no room for any such perception. Let us look at what we are dealing with here. Hurburgh Macquarie Law—Andrew Hurburgh struck off; Lewis Driscoll and Bull—Thomas Baron struck off; and Piggott Wood and Baker—two former partners the subject of a reserved judgment. We are still investigating other matters, ASIC are investigating other matters and the police are investigating other matters. What more can we say?

CHAIR—Ms Harvey, would you like to comment in relation to the national issue?

Ms Harvey—Just to say that my comment in response to Senator Lightfoot would be that the Law Society is properly fulfilling its regulatory and disciplinary role. I urge you to read the society's first submission in which it detailed the disciplinary action it had taken and the action it had taken in relation to the management and identification of the problems with the funds that were in difficulties. I urge you to do that so that you can put this into context.

Senator LIGHTFOOT—Perhaps I could ask you the question then: do you believe there should be an inquiry into the mortgage brokers scandal?

Ms Harvey—When you talk about the 'mortgage brokers scandal', I am not sure what you are referring to. This inquiry—

Members of the audience interjecting—

CHAIR—Order!

Ms Harvey—I referred to an inquiry into the 'mortgage brokers scandal'—I said, 'What do you mean exactly?'

Senator LIGHTFOOT—You have heard the evidence here this morning that there is wide concern in Tasmania about the losses through mortgage broking. Do you think it is at a sufficient stage, as someone practiced in law and as someone that reviews these situations from time to time, albeit through the media, that there should be an inquiry into the whole affair?

Ms Harvey—My personal belief is, I think, irrelevant. This is a matter for the Tasmanian government. This inquiry is looking into, specifically as a case study, what may have gone wrong with solicitors mortgage funds and what should be done in the future. What I say is that we have a new regulatory regime which is now going to be superimposed on all this. In some ways, what we are doing is just looking, with the benefit of hindsight, at what has happened in the past.

One observation I would like to make concerns David Knott's evidence, which I thought was very revealing. You were not there, Senator Lightfoot, but David Knott, the current chairman of ASIC, was talking about the regulatory role or function of ASIC in the context of HIH, CNA and of course this particular case study. At page 1128, he said:

We are not mandated to prevent financial failure or investor loss, but rather to police the requirements of the Corporations Law ... Obviously, we attempt to have a preventative impact through our educational, regulatory and enforcement activities. But, to my knowledge, there is no free market economy in the world that expects its securities regulator to prevent investor loss.

Basically, where something has been done which is unprofessional or professional misconduct on the part of the practitioners, the Law Society have acted and acted properly.

Mr Bugg—To put things into some context, Mr Chair, I would make the comment that, towards the end of 1998, there was some \$650 million invested through law firms in this state. A figure of \$23 million, I note, was mentioned at the ASIC hearing—if I can call it that—earlier in the week. Of course, the ASIC representatives made it quite clear that ASIC's definition of default is quite different from the society's. The society believes quite strongly that the losses, if indeed there will be any capital losses, are absolutely nowhere near that sort of figure. To date, no-one has lost capital from mortgage investment through solicitors in this state. The Hurburgh—

Members of the audience interjecting—

Mr Bugg—I am talking about capital; interest is another issue. As far as capital is concerned, the Hurburgh mortgage fund was wound up and investors received their capital in full.

CHAIR—But it would be true to say that there has been some delay in terms of not meeting capital when it has fallen due?

Mr Bugg—There is no doubt about that. The process that has been followed, I believe quite appropriately, by the society, is to ensure that there is a reasonably judicious approach to the winding up of mortgage funds to enable properties to be disposed of in an appropriate way to ensure that investors receive their capital. That is the approach that the society followed and I do not believe that there is any need for the inquiry referred to by Senator Lightfoot.

Senator SHERRY—Mr Jackson, you reeled off the list of actions taken by the Law Society in respect of a number of cases in the recent past.

CHAIR—It was not necessary concluded.

Senator SHERRY—No, it was not necessarily concluded; there may be others, who knows? In his opening introduction, Mr Bugg made the point, I think appropriately, that we are dealing with a small minority of solicitors mortgage funds that have had problems in this state out of the total number that are operating. What strikes me is that we are not dealing with an isolated incident in recent times; we are dealing with a number of incidents, both prosecuted and concluded—and as of yesterday, two more people—and perhaps something in the future, who knows? It is not isolated. Can you explain why the Law Society believes that the number over the past five years has grown significantly?

Mr Jackson—The number of what?

Senator SHERRY—The number of actions has grown significantly compared to the previous 10 years.

Mr Jackson—I do not think that it is correct to say that. It is just that the society has discovered a number of situations in which it ought to investigate and prosecute and it is doing that.

Senator SHERRY—So you do not believe that what has happened in the last two or three years is unusual?

Mr Jackson—You are talking about solicitors mortgage funds—

Senator SHERRY—Yes.

Mr Jackson—In the years preceding the period you are talking about, and continuing beyond that right up until today, the Law Society has investigated, and continues to investigate and prosecute, all kinds of professional misconduct.

Senator SHERRY—I understand that. I am referring to solicitors mortgage funds. It seems to me—and otherwise, frankly, what are we here for?—that the number of cases we are dealing with in recent times, and which you are currently still dealing with, is greater than occurred in the past. Can you explain why that is the case?

Mr Jackson—At the moment, you are talking about four firms and fewer than 10 practitioners—

Senator SHERRY—You do not consider that that—

Mr Jackson—out of a profession of 450 practitioners and 150 firms.

Senator SHERRY—I accept that. I am contrasting the level of current activity and the activity in the recent past, starting with Hurburgh Macquarie Law, up to today, with the previous five to 10 years in respect of solicitors mortgage funds. It seems to me that there has been a greater level of activity by the Law Society in this area recently than there has been for a long period of time.

Mr Jackson—There has been no greater activity on the part of the Law Society in the general area of investigation and prosecution. Let us be clear about that. If I understand correctly what you are putting to me, you are asking why only in the last few years have we investigated and prosecuted people in relation to solicitors mortgage funds—

Senator SHERRY—No, I am not saying that. That is not what I am asking.

Mr Jackson—I am completely at odds with you.

Senator SHERRY—Why has the number of cases significantly increased in the last five years?

Mr Jackson—I cannot answer your question because, to be frank and with no disrespect, I do not understand it. I do not understand where you are going.

Senator SHERRY—What concerns me is why, in Tasmania—

Mr Jackson—I thought I asked you whether your question was really why have there been a number of investigations and prosecutions in relation to mortgage funds in the last few years and you said that, no, that was not your question. I then thought that was the question you put to me. If that is your question, I do not really know the answer, but it may simply be because, as opposed to in the past, some practitioners did begin to get themselves involved in more speculative lending through the early and mid-nineties.

Senator SHERRY—Does the Law Society have any other view as to why this has occurred? You mentioned speculative practice.

Mr Jackson—That is the only one we can clearly identify.

Senator SHERRY—In respect of practitioners who are successfully prosecuted by the Law Society and when moneys have to be paid out of the guarantee fund, is there any mechanism by which the Law Society or the court can obtain redress for the guarantee fund in a monetary sense from those individuals who are found guilty?

Mr Jackson—The two are not linked. The right of an investor to claim against the guarantee fund flows from the making of a default order, not from a finding of professional misconduct. If a default order is made and a claim is successfully made under that order against the fund by an investor, then the fund becomes subrogated to the rights of the investor as against the practitioners, and the fund can then seek to recover from the practitioner.

Senator SHERRY—Has a fund sought to recover from the practitioners?

Mr Jackson—Not as yet. In relation to Mr Alistair McCulloch, he is bankrupt; in relation to Mr Hurburgh, he is bankrupt.

Senator SHERRY—But the society does have that option available to it?

Mr Jackson—Yes, I believe it is available under the act—not the society but the Solicitors Trust. Let me just clear up one thing while I think of it: Mr Clark spoke to you this morning about the Solicitors Trust, the Law Foundation and the Law Society and their interrelationship, and displayed some misconception about that. The Law Foundation and the Solicitors Trust are not subsidiaries of the Law Society; they are quite separate and independent statutory corporations from the Law Society. They do not operate as subsidiaries of the Law Society.

Senator SHERRY—There have been some 300 people affected in various ways. Can you put a time line on when you believe the matters can be concluded, whether or not they are concluded to the satisfaction of people who have complained? Is it another year or two years?

Mr Jackson—I cannot answer that. It is a bit like asking me: how long is a piece of string? I think we explored this at some length last time. I cannot give you any better answer. We simply do not know. The process of calling in loans—winding them up in the normal course of events in many cases, realising securities where that has become necessary and pursuing defaulting borrowers—is an ongoing process.

Senator SHERRY—That leads to my last question. Garrisons have made an offer: capital return to their clients—that is approximately 70 people, as I understand. Why can't the Law Society make the same offer to the other 230 people who have claims outstanding?

Mr Jackson—There are many answers to that but the first answer is: why should it? In other words, there is no basis on which the Law Society currently can be said to have any obligation to do so. There is nobody out there, as Mr Bugg has pointed out, who can yet demonstrate a capital loss that has not been covered by the guarantee fund. Secondly, do not put the Law Society in the same basket as Garrisons.

Senator SHERRY—I do not.

Mr Jackson—The Law Society has never referred investors to solicitors. The Law Society is not an investment broker and it never has been. It is not in the same situation as Garrisons. One might speculate as to why Garrisons have done this but the Law Society is not in a situation where it can even begin to contemplate giving money to investors because it has no relationship with those investors and never did have.

Senator SHERRY—There is a different set of relationships—I accept that. However, the Law Society had the prudential role—

Mr Jackson—We are back where we were last time, aren't we, Senator?

Senator SHERRY—I just wonder, because Garrisons have changed their attitude in the last few weeks for whatever reason.

Mr Jackson—There is no doubt that you heard it but I ask you to sit down and carefully read all the evidence that ASIC gave on Tuesday.

Senator SHERRY—I do not need to. I know what their response was.

Mr Jackson—The Law Society was a regulator but you know very well by now what the limits to that were and are. The Law Society has not incurred any liability through its regulatory functions.

Senator SHERRY—What I am trying to get at is this: the Law Society reconsidered how to deal with the investors who, at this point in time, have not had their capital returned. The reason

I raise that is that people, I think understandably, are worried about the time it is taking—and you have said, ‘It is as long as a piece of string.’ If the Law Society has not reconsidered its view, fine—tell us. I am interested to know this, because we have to make some recommendations.

Mr Jackson—So far as investors are concerned, in cases where it can be shown that a capital loss has occurred through some fault on the part of a legal practitioner constituting a fiduciary default, they will have access to the guarantee fund. So far as other investors are concerned who simply cannot get their capital back because borrowers are not repaying it—borrowers are defaulting on their payments because securities are taking time to realise—why should investors in solicitors mortgage funds be treated any differently to investors in any other sort of investment in this country? Why should they be treated as a special group?

Senator SHERRY—Well, for a start, the Law Society gave various guarantees as to their safety and security.

Mr Jackson—We have never given anything of the kind, Senator. That is a complete misconception of the law under which we operate.

Senator SHERRY—I do not agree with you. If you read the Law Society’s submission—

Mr Jackson—We gave no guarantees whatsoever. We made certain assurances to the ASC in 1992 based on what the situation then was. ASIC made it very clear to you on Tuesday that they share and endorse our view that one has to be very careful about judging the extent to which law societies and other institutions—throughout Australia, not just in Tasmania—were able to meet those assurances, given the very substantially changed circumstances through the mid to late 1990s. That was put to you in the very clearest possible terms by Mr Johnston at page 1143 of the transcript. He said this:

... in the context of the day it was a very different industry at that time. Our understanding would be that law firms were conducting lending as an incidental part of their practice, and they were generally matching clients who needed to borrow money with clients who were able to lend money. There is no doubt that the whole industry grew from there and that solicitors then started extending themselves beyond just the client relationship and were advertising for both lenders and borrowers. Perhaps at the time it was made that was a more considered statement and perhaps a more defensible statement.

You cannot get away from that. That is what I was putting to you the last time we were here. ASIC has now endorsed it and confirmed it.

Senator SHERRY—Since that time, if we accept changed circumstances—in some cases in Tasmania I accept changed circumstances, in others, I do not; but let us assume that that is right—why didn’t the Law Society change the commitments it gave in 1992?

Ms Harvey—It did.

Mr Jackson—What the Law Society did was change its commitments to the extent that in 1998 it resolved that it would no longer be the regulator.

Senator SHERRY—Yes, I understand that up till 1998, and we know why that occurred, but what about the period between 1992 and 1998?

Ms Harvey—Well, things only went wrong in 1996.

Mr Jackson—You have to give us some lead time, Senator. Things only began to go wrong in about 1996.

Ms Harvey—The end of 1996.

Mr Jackson—At the end of 1996, in fact, yes.

Mr Bugg—The other important point to note is that, from the material I have heard and what I have seen, it has not been established in any way, shape or form that the Law Society through its regulatory role has been causative of loss to anyone who has invested in mortgage schemes through law firms in this state.

Senator SHERRY—In regard to the issue of practitioners who have been found guilty of some particular impropriety, misconduct or whatever where capital funds are paid back, do you believe it is reasonable in those circumstances that interest and costs should be covered as well? If not, why not?

Mr Jackson—The court has expressed a view about that—

Senator SHERRY—I am not interested in the court's view; I am interested in the Law Society's view.

Mr Jackson—We are very interested in the court's view, because we generally operate in this country under the rule of law.

Senator SHERRY—No, I am asking you about the Law Society's view, not the court's view.

Mr Jackson—Are you not going to give me an opportunity to answer you properly?

CHAIR—Order! Senator Sherry.

Senator SHERRY—But you rephrased the question.

CHAIR—Order! Senator Sherry.

Senator SHERRY—Well, Mr Jackson is rephrasing the question.

CHAIR—Let him finish his response. Come on.

Senator SHERRY—Let me just make the question clear.

CHAIR—No, let him finish.

Senator SHERRY—Where a practitioner is found guilty of misconduct and capital is restored, what is the Law Society's view about the return of interest and the covering of legal costs?

Mr Jackson—Will you sit quietly while I answer your question?

Senator SHERRY—Yes, I will.

Mr Jackson—Thank you.

Senator SHERRY—If you answer the question I put to you—

CHAIR—Order! Senator Sherry!

Senator SHERRY—not one you pose yourself.

CHAIR—Senator Sherry!

Mr Jackson—Senator, I am not going to answer your question.

CHAIR—Senator Sherry, you will allow the witness to respond as he wishes.

Mr Jackson—I think the transcript will reveal that I have already answered your question, but I will do it again in this way. In this country we operate under the rule of law. The court has resolved what the position is in relation to capital and interest in relation to claims against a guarantee fund. The Law Society is bound by the decisions of the court, and it will adhere to them.

Senator SHERRY—You have stated the court's position. Has the Law Society discussed this matter recently—as a matter of policy?

Mr Jackson—Senator, I do not think you understand how the law in this country works. We are part of the common law world.

Senator SHERRY—But the Law Society does debate policy and its view of the world and the way in which it perhaps might like the law changed. What I am asking is: has the Law Society discussed this matter of interest and the covering of costs for complainants?

Mr Jackson—No. Legislative change is not a matter for the Law Society; it is a matter for the government of the state.

Senator SHERRY—I understand that. But you are consulted about legislative change, aren't you?

Mr Jackson—Sometimes we are—

Senator SHERRY—Yes, and sometimes you are not.

Mr Jackson—and sometimes we are given a very limited period in which to comment on legislation—but that is an aside. Yes, we are. We have not been consulted by the government in relation to the question of whether interest might be recoverable from the guarantee fund.

Senator SHERRY—I put to you again: what is your view? Maybe Mr Bugg can give us a view.

Mr Jackson—My view is completely and utterly irrelevant.

Senator SHERRY—You do not have a view?

Mr Jackson—I said that my view is completely and utterly irrelevant. I did not say that I did not have a view. Do not put words into my mouth.

Senator SHERRY—What is your view?

Mr Jackson—My view is completely and utterly irrelevant.

Senator SHERRY—So you are not willing to share with us your view about the payment of interest and costs?

Mr Jackson—I am not prepared to discuss irrelevancies.

Senator SHERRY—We understand your position, Mr Jackson. Mr Bugg, do you have a view about the payment of interest and costs?

Mr Bugg—I agree with what Mr Jackson has said: my view is irrelevant.

Senator SHERRY—Ms Harvey, has this issue been considered by the Law Council nationally?

Ms Harvey—No, it has not.

Senator SHERRY—Do you have a view that you are willing to share with us?

Ms Harvey—Not my personal view, no. Senator, what you seem to be really asking is: should there, as a public policy issue, be reimbursement totally for every investor in Australia who invests in any form of investment?

Senator SHERRY—No. My question went to the issue of where a default is found, where it is concluded by the relevant authority that there has been misconduct or malpractice by a solicitor—in those circumstances.

Ms Harvey—I think that the president has answered.

Senator SHERRY—The reason for my asking that—if you do not want to answer it, fine—is that we have to give some recommendations to the state government. Senator Watson posed this question at the last hearing.

Ms Harvey—That could be one of your recommendations.

Senator SHERRY—If you do not have a view, fine. So be it.

Mr Jackson—Senator, I did not say that I did not have a view, Mr Bugg did not say that he did not have a view and Ms Harvey did not say that she did not have a view.

Senator SHERRY—Yes, you are not going to share it with us.

Mr Jackson—We have all said to you, in the clearest possible terms—and you might indicate which part of it you do not understand—that our personal views are not relevant.

Senator SHERRY—Because you are responsible officers of the Law Society, I am interested in your personal view—but you are not willing to share it with us.

Mr Jackson—No. Our personal views—

Senator SHERRY—That is fine.

Mr Jackson—Our personal views are not—

Senator SHERRY—If you do not want to share your view, fine. That is it.

CHAIR—The issue, ladies and gentlemen, is that we must take care to ensure that all questions put to witnesses are really relevant to the committee's terms of inquiry. One of the issues that we are particularly concerned about is consumer protection. We are not interested in particular persons' views. We are interested in the law, how it can be applied and through what avenues it can be applied in terms of redress, if that is possible. I would ask senators to try to confine their questions to that particular purpose.

Senator SHERRY—I am sorry, Chair, but I am not just interested in the law; I am interested in some justice. Unfortunately, the law does not always provide justice.

CHAIR—I am reading from the Senate orders, 'Parliament of Australia witness protection'. I think we have to make sure that, in conducting all these inquiries, we are governed and abide by the Senate standing orders.

Senator SHERRY—Sure, Chair. But it is perfectly legitimate of a member of a Senate committee to ask for the view of persons who hold a particular responsibility and position in society—perfectly valid. They have refused to answer—fine. If they do not want to give a view, they do not have to.

CHAIR—But you do not have to press that issue.

Senator SHERRY—I am pressing it because it is fairly important. But if they do not want to give a view, then that is it.

CHAIR—The law is the law.

Senator SHERRY—Yes; but I am still allowed to pose the question, Chair. Whether or not the witnesses want to answer it is up to them; I cannot force them to.

CHAIR—There being no further questions, I thank the Law Society. I think the committee does seek an assurance from the Law Society that the lessons learned from this inquiry will be applied in the development of the Law Society's procedures for dealing with funds after October this year, particularly in relation to the '20 members or less'. I would also like to take this opportunity of thanking you and your staff for the considerable amount of time that has been taken in presenting the very voluminous set of documents and other materials to the committee; they have indeed been helpful. I think we should put on the public record our appreciation of the time it has taken and your preparedness to put these on the record. We thank you.

Mr Jackson—Thank you, Mr Chairman.

Mrs Martin—Thank you, Mr Chairman.

Ms Harvey—Thank you, Senator.

Senator SHERRY—Can I also add, Chair: despite the exchange we have just had, I do appreciate the cooperation of the Law Society and the material they have provided—in contrast to Garrisons, I have to say. Secondly, I think it is important to note that current officers Mr Jackson and Mr Bugg were not officers of the society, and it has been particularly difficult for them to have to represent the society in those circumstances—and I do understand and appreciate that.

Mrs Martin—Senator, could I also correct the record? I was not an officer of the Law Society at that time also.

Senator SHERRY—Yes, Mrs Martin also.

Mrs Martin—Thank you very much.

Proceedings suspended from 12.26 p.m. to 12.36 p.m.

RAE, Mr Louis Gould, Chairman, Valuers Registration Board

WESTWOOD, Mr Raymond Marchbank, Chairman, Complaints Commission; Board Member, Australian Valuation and Property Standards Board; and Tasmanian Divisional Chairman, Australian Property Institute

WILSON, Mr Paul Gregory, Tasmanian Divisional President, Australian Property Institute

CHAIR—Welcome. I invite you to make an opening statement.

Mr Rae—In brief, I have been a practising valuer from 1972 to the current day, with two years off doing project work and property development. The whole course of my employment has been with the government. I am Chairman of the Valuers Registration Board because of my position as Valuer General. I became Valuer General in November last year. The Valuers Registration Board comprises three members: myself as chairman, an industry appointed representative, and a government appointed representative. All three members are qualified valuers and practising valuers.

Mr Wilson—I have been practising as a valuer in Tasmania since 1981. I am here to represent the Australian Property Institute, which has over 7,000 members in Australia; in Tasmania, we have about 105 members of whom approximately 70 would be considered to be active valuers. The institute also represents the interests of other members who are not necessarily property valuers. To become a valuer, you need to undertake a degree in valuations, you need a minimum of 18 months practical experience under the direct supervision of a qualified valuer, and you need to pass a viva voce examination.

The institute provides a modern framework covering the education, admission, standards, ongoing training, regulation, promotion and advancement of its members, and membership is regulated by the institute's constitution, by-laws, code of ethics and rules of conduct. Within the constitution and by-laws there are comprehensive guidelines for handling complaints against members, the available penalties and the appeals procedures. The institute has not had any substantive complaints from the public concerning the ethical procedures of valuers within the past five years. We have, however, received queries regarding fees charged, property values—quite often, people complain that they are too low—and discrepancies between two valuations of the same property. The institute organises a continuing professional development program for its members, and there is a requirement that members obtain a minimum of 20 CPD points a year. If the requirement is not met, the valuer can be penalised.

The institute has distributed practice manuals to all of its valuers, and the manuals provide standards, guidance notes and best practice standards for its members. These practice standards have been developed in conjunction with the Australian standards board, which contains members of the Australian Property Institute, the Bankers Association, the accounting profession, the Property Law Group and the New Zealand Property Institute. The institute I represent is the premier institute for property professionals in Australia.

Mr Westwood—I am here as chairman of the complaints committee of the Tasmanian division of the Australian Property Institute. I am a foundation member of the Australian Valuation and Property Standards Board, which was constituted in 1994 in Australia, and I have been a continuous member of that board since, producing standards and guidance notes for the valuation profession. I am a past valuer general for the state in Tasmania and a former state and national president of the institute.

CHAIR—Thank you for your appearance before us today. We invite you to make an opening statement individually.

Mr Westwood—My main function here today is with the complaints committee process, which I am sure the Senate committee would be very interested in—that is, the regulation of complaints by the Australian Property Institute in this state. The process is covered in the national constitution and the by-laws of the institute, and under those rules there is in each division and each state established a divisional complaints officer and also a divisional complaints committee, of which I am the chairman. There is a process whereby complaints that are referred to the institute are dealt with in various ways. The institute receives a lot of complaints by telephone, for a start, which are dealt with by the institute's executive officer here in Tasmania. A lot of those complaints are regarding fees for valuers and also complaints by mortgagors who find it very difficult to understand that valuations are not up to what their expectations are of their property values, which is probably quite a different situation from that which you are dealing with here today. But those complaints do occur.

Where the executive officer does speak to those people, they are advised that a complaint to the division must be in writing. That is a very important point, because taking a valuer to task professionally is very similar to taking a lawyer to task. There is a risk through this process that that value might be disbarred. There are various remedies, which I think you have in the submission before you, as to what can happen to discipline our members by this process. That is why the constitution requires that the complaint must be in writing.

If that occurs there is then a process through the constitution to have the matter investigated by the divisional complaints officer. That officer is appointed for the purpose of looking at the complaint and deciding whether in fact there is a case, whether it is vexatious or frivolous or, for whatever reason, it should not be proceeded with. If it is to be proceeded with, there can be discussion between the divisional complaints officer and the complainant to try to settle the matter at that stage. If not, it then goes before the divisional complaints committee, of which I am the chairman. That committee consists of five members; one must be a non-member and one must be a legal practitioner. That committee will decide the complaint. It will hear evidence from both parties. There is not allowed to be legal representation. On the basis of that committee's decision, the matter is referred back to the divisional council, which can then give a decision as to the remedies available if the member is found guilty.

There is a process, following that, of appeal. It is very constitutional. It can go to a national hearing, a national review panel, and they go through the same process, basically, of hearing the complaint, if there is a review, and the remedies are slightly different from those decided at the first hearing. Basically, there can be a fine, the member can be admonished, the member can be suspended or disbarred and all of those things that are put in front of you. That is the complaints process that I want to speak about. Also, I would like to speak later possibly about the process

of valuation guidance notes and practice standards, which essentially have to be followed by members. The practice standards are compulsory for our members. The guidance notes are not compulsory, but they are there for guidance in doing valuations. No doubt later you will have some questions about how you would approach valuations, and so on, which possibly we can deal with later.

Mr Wilson—Basically, the address I initially started off with was a coverage of our submission and I think that is a full brief of what I need to say at this stage.

Mr Rae—I will provide a little bit more information for those who do not understand what the Valuers Registration Board is about. The Valuers Registration Board comes under the legislation of the Valuers Registration Act 1974. Around this time, all states had introduced the registration of valuers. Since 1994, some states have now deregulated the valuation practice; that is, valuers do not necessarily need to be qualified within the particular state to perform the work of a land valuer. This state still actively has valuers registration, but it is prudent to point out that, in only the last week, cabinet has approved the abolition of the Valuers Registration Board. It will be replaced by what they call a negative registration system, which ensures valuers, to practice in this state, still require all the educational qualifications and practical experience.

However, what will vastly differ will be the process in which somebody can make a complaint against a valuer's registration. The process will be that the Director of Consumer Affairs and Fair Trading will administer the provisions of complaints. We believe that will give the general public a fair and reasonable course of action to take a complaint against a valuer. It will be investigated by properly qualified people that are independent. They can seek valuation advice on technical matters and they can actually prosecute a case through the court. The Valuers Registration Board does not have that ability. It cannot compensate complainants where a valuer is found to be acting in misconduct. All the powers of the board are that it can either reprimand a valuer, it can temporarily suspend a valuer from registration, or it can remove the registration. A valuer so affected may appeal through the Land Valuation Court. What we have is a changing situation with the Valuers Registration Board. That has occurred partly through deregulation. But commonsense says that the consumer requires proper protection, and we have taken every step now to put it fair and square with the Director of Consumer Affairs and Fair Trading. He will prosecute under his act. Under the new act that we have we will give him that power to do so and to investigate complaints.

CHAIR—Are you aware that losses incurred in the mortgage schemes have been partly attributable to incorrect or inflated valuations of property? Gentlemen, what are your responses to these claims?

Mr Rae—Currently, to date we have had no complaint before the Valuers Registration Board. Since the last sitting here we have had two inquiries: one from one of the administrators of the mortgage fund asking us about the process in which they could lodge a complaint, and the second one from the Australian Property Institute on similar matters. We have written to both of those and advised them on the process for lodging a complaint and the form in which the complaint should be.

Mr Wilson—We are in similar vein, in that we have not had any complaints against any of our members regarding a solicitors mortgage fund within the last five years.

Mr Westwood—It is dangerous to talk about specific cases, so therefore I support the president's view on that.

CHAIR—There are no cases before you at the present time?

Mr Wilson—No. We have not had any complaints within the past five years.

CHAIR—Has your attention been drawn to evidence given to the committee at the last hearing about problems of valuation and the consequences of those excessive valuations and the manner in which those valuations appeared to take place?

Mr Rae—The Valuers Registration Board has not been provided with a transcript. My knowledge comes from newspaper reports and television reports.

CHAIR—We might ask the secretary to forward you details and the transcript of the last hearing.

Senator HOGG—If you could take that on notice, read the transcript and then get back to us with your view of what is expressed in that transcript, that would be helpful indeed.

CHAIR—It is going to be fairly difficult for us to ask you questions, you not having seen the transcript. We will have to give you the transcript and ask you, as my colleague Senator Hogg has said, to take the questions on notice.

Senator SHERRY—Are any of you familiar with solicitors mortgage funds? Do any of you have knowledge of the relationship between valuers who do work for solicitors mortgage funds in this state?

Mr Wilson—As a valuer, I am aware that solicitors do request valuations for solicitors mortgage funds.

Mr Rae—As a government employee, obviously I am not directly involved with performing valuations—supervising valuations for that purpose. The nature of my work is limited to government work.

Mr Westwood—My part in this would be the guidance that the institute provides in practice standards, et cetera.

Senator SHERRY—Looking at your submission, Mr Rae, it said:

At best, penalties have included admonishments or mild rebukes. To balance the equation it may be argued the Act was designed to control poor practice by valuers and where causes of negligence or fraud existed such punishments would be enforced by common law through the court system.

Is it reasonable to conclude that if a person wants financial redress—compensation—then the remedy is common law action through the courts against the particular valuer?

Mr Rae—Yes, it is.

Senator SHERRY—Are you aware of any legal actions that have commenced, in the context of solicitors mortgage funds and valuers?

Mr Rae—I am aware of what I have read in the paper and heard in the news. I am unaware whether some of the actions are actually official or newspaper documentation.

Senator SHERRY—Where do you think the buck stops? A client goes to a solicitor who is operating a solicitors mortgage fund. They are dealing with a solicitor face to face. They are not, as far as I am aware, dealing with the valuer in any first-hand sense. Where does the responsibility fall—with the client, with the solicitor, with the valuer, or is it a mixture of all or some or none?

Mr Rae—As I am not directly involved with taking instructions from solicitors to perform valuations, I can only comment not from direct practice but to say I would think a valuer would confirm instructions so that he is sure that the instruction he is given and the service he is performing meet those requirements. I would want to be sure that the valuer knew exactly what they were being asked to perform, that it could not be said that they were acting under another set of instructions.

Senator SHERRY—That would be with the solicitor?

Mr Rae—It would be a solicitor-client—that is, solicitor-valuer—relationship.

Senator SHERRY—My understanding is that, for the individual who goes to a solicitors mortgage fund to place moneys, it is very rare for them to have any contact whatsoever with the valuer; it is with the solicitor.

Mr Rae—It is probably prudent that you ask the gentlemen in private practice.

Senator SHERRY—Do you have any knowledge of that?

Mr Wilson—Basically, the relationship at that stage is between the person depositing the money and the solicitor, I would have thought.

Senator SHERRY—And the relationship in terms of valuation is between the valuer and the solicitor, not between the valuer and the person depositing the money?

Mr Wilson—The relationship is between the valuer and the person instructing the valuer.

Senator SHERRY—Right.

Mr Westwood—And that is the institute's recommendation through their practice standards.

Senator SHERRY—So the buck stops with the solicitor?

Mr Westwood—It is a shared responsibility, the way I see it. The solicitor receives the valuer's report but in the context of what that report says it just does not stop with, 'Bang! There is a figure.' There is a lot more to it than that.

Senator SHERRY—I understand that. So it is a shared responsibility between the solicitor and the valuer?

Mr Rae—In my opinion, it is.

Senator LIGHTFOOT—Mr Rae, as Valuer-General, does your department keep tags on all properties that are sold: commercial, general, farming, domestic, et cetera?

Mr Rae—I think you will find that there is a legal requirement to lodge notice of sale, and that lodgment would come in the form of a transfer. Because the Recorder of Titles—which is where the transfers are lodged—records those on the department's database, details of sales are public information.

Senator LIGHTFOOT—I assume that is a yes.

Mr Rae—It is, yes; the department does keep a record of all sales.

Senator LIGHTFOOT—As Valuer General, have you ever had any cause to be worried about any properties that have had a valuation on them but have not been sold, or are you and your department unaware of that occurring? In other words, what I am getting at is this: there have been significant overvaluations of property for one reason or another—and I will try to come to those in a minute in the short time available to me—but has it ever been brought to your notice that properties of a nature similar to those that have been sold reasonably contemporaneously have been valued in such a way as to cause concern?

Mr Rae—From my perspective we have to understand what a rating valuation is, because that is the nature of the valuations I control—not private enterprise valuations. For example, every property in Tasmania is valued, whether it be on a five-, six- or seven-year cyclical basis. When a municipality is valued, it is valued at a point in time. That sets the level of values for all valuations in that municipality. People then pay rates based on that valuation until the next revaluation is done at that same point in time. There may be reason to change some valuations—that is, a property may have additions, land may be subdivided or a property could be destroyed by fire. So we alter valuations from time to time but, until the next revaluation, the level of the previous figure is used. What you are asking is: am I aware that there are changes in the market? I am acutely aware of changes in the market, because the ratepayer out there will write to my office and to ministers, and I have to respond. But I supervise the rating authorities within the state, and we are limited to the legislation that says you will perform rating valuations at a particular point in time. So, if there are properties for sale out there and the market has changed, that will be reflected at the next point in time when the general revaluations are done.

Senator LIGHTFOOT—Let me perhaps be more definitive. I was not really alluding to the value of properties for the purposes of rating them for local government assessment of their rates; I was alluding to the sale of properties—and I understand your department keeps an accurate record of all sales and what the gross sales were. Does your department supply on request the value of properties that have been sold in recent times, or at times have you been requested to supply a comparison of a value of a property for the purposes of someone else establishing the mortgage value of that property—not the rateable value of it?

Mr Rae—The only information we keep on record is statutory valuations—that is, rating valuations.

Senator LIGHTFOOT—Not sale prices?

Mr Rae—People can access sale figures through the Recorder of Titles; that is public information. The industry can subscribe to our information and sales output, but they are required to sign a confidentiality agreement whereby the up-to-date sales information may be used by societies' banks for the purpose—

Senator LIGHTFOOT—Who are the main users of that—banks?

Mr Rae—I would think banks, valuers. If I can just finish: we have until recently provided sales information on a property print-out which, because it was a public document, we were able to do. However, we had various complaints from the general community saying that people's privacy was being breached. So, if somebody came in off the street, they could still get access to a property but, if they wanted the sales information about that property, they would go to the Recorder of Titles section and pay the appropriate fee to view the transfer.

Proceedings suspended from 1.00 p.m. to 1.34 p.m.

Senator HOGG—Is there a minimum number of valuations that are required to be taken on a property that is to be used in a mortgage relationship such as the solicitors mortgage funds?

Mr Westwood—I think that the trustee act says two.

Mr Wilson—My understanding is that one valuation is done up front to work out whether it is an appropriate lending property.

Senator HOGG—I got conflicting answers from Mr Wilson and Mr Westwood, which was very interesting—that is why I asked the question.

Mr Westwood—The trustee act is a different process, isn't it, from the mortgage fund process?

CHAIR—The one under the trustee act requires two valuations—

Mr Westwood—Under the trustee act, but under the mortgage funds I think there is only one.

Senator HOGG—So there is a differing requirement. Why is there a different requirement under the trustee act and the mortgage fund process?

Mr Westwood—I cannot answer that.

Senator HOGG—Does it seem reasonable, therefore, that a minimum requirement should be two valuations so as to eliminate the possibility of the overvaluations that my good colleague Senator Lightfoot referred to, whereby many people are rolling their superannuation funds and other investments into things such as solicitors mortgage funds?

Mr Westwood—It is a matter for the inquiry as to what steps should be taken to tighten the process up.

Senator HOGG—I understand that. It is a possibility that the inquiry could recommend something such as that. I am just trying to seek your view as to whether it is safer in protecting the funds of many ordinary consumers out there that there are two valuations rather than a single valuation. I know that in the case of many major businesses, if they were seeking to do something with their property, they would not rest on one valuation. They would seek a number of valuations to confirm the high and the low and probably what is more accurately going to be reflected by the one in the middle—if they have a third valuation—which they will probably plump for as being a realistic valuation of their property.

It seems to me that we are dealing with people who are at arm's length from the actual valuation itself and who have no real ability to test or judge the veracity of the valuation. They are reliant upon the solicitor, in this case, to accept the valuation on their behalf whereas, if there were two valuations, the solicitor would at least have been able to say, 'Well, look, there is something wrong. The valuation has come in at \$450,000 and someone else has given a value of \$200,000. There is clearly something wrong in the valuation process.' I just want your comments as to whether it is something that is a wise move. Where would it be applicable and how would it be applicable? You may well need to take that on notice, because I have not thought the issue all the way through at this stage.

Mr Westwood—I can give you my personal opinion, which you were speaking about this morning. My personal opinion is that anything that can give a level of comfort in those circumstances is very worth while.

Senator HOGG—How accurate do you believe single valuations are? Are single valuations generally very reliable or is there a degree of uncertainty in single valuations which does not occur where there are multiple valuations? What is your experience?

Mr Wilson—My experience is that the major lenders—as in the banks—require a single valuation and they do that under their standing instructions and put fairly strident criteria in place in front of the valuer as to how the valuation has to be performed, when it has to be performed and under what conditions. They seem to get a significant level of comfort out of a single valuation.

Senator HOGG—So the banks put fairly strident conditions, I think you said, before the valuer as to how that valuation is to be performed. Were those same strident conditions given by solicitors in getting valuers to do valuations on properties for solicitors mortgage funds?

Mr Wilson—Basically, the conditions are as set out in our practice manuals which, as you can see, I have copies of here. They were built up using the institute, as well as the Bankers Institute, et cetera, to develop the standing instructions as per how the valuation should be undertaken. In general, I would think that the valuations undertaken via our standing instructions should be the same for banks as for anybody else.

Senator LIGHTFOOT—To continue the line of questioning that I started prior to the luncheon adjournment, how is it possible that a valuation could be accepted for, say, twice the real valuation, when details are available from your department on the Net that could give similar valuations for similar types of commercial, industrial or domestic transactions?

Mr Rae—To answer it fairly simply, yes, the department does provide sales information to subscribers—that is, the industry—and it has been doing so for at least 15 years in one format or another. Most practising valuers and other financial institutions would subscribe to that information. A valuer can extract the same information as any other valuer or person can extract. It is not so much getting the information, because it is there and it is easy to obtain, it is the interpretation of the information that the valuer puts on it.

Without getting into a long drawn-out question, there are various methodologies of valuation, depending on the property. You might capitalise the rental. In such a case, sales are not very useful—they are a check to see, hopefully, what similar properties are selling for. In some cases judging by the real estate itself it is very hard to tell what a business is doing, whereas in the residential market it should be very easy, by direct comparison, to say, ‘That sale is comparable to that property.’ Valuers can avail themselves of the information that is available on all sales, except for company trust sales and company units—it is not available through our department; they can go elsewhere for that. They can get the information, analyse it and apply it. It comes down to the opinion of the valuer in the interpretation.

Senator LIGHTFOOT—Given that accessibility of the information, where is the onus? Is the onus on the investor with respect to the mortgage schemes that are now in question, is the onus on the valuer who gives the valuation for the particular property in which the investor invests, or is it both? If it is both, does that mean that an investor is subject to the law of caveat emptor?

Mr Rae—It would probably be better if my private enterprise colleague answered that question, but I will express an opinion. A reputable, trained valuer will access all information that is available. It does not start and stop with sales—it may be property investigations, such as zoning, any orders sitting on the property, or any heritage requirements. There is a long list of property attributes that a valuer should check and where he should go to check them. Valuers who are worth their salt should go through that checking process to ensure that they eliminate irrelevant applications and ensure that they hit the applications to that property. Reputable valuers will go through that whole process.

Senator LIGHTFOOT—What if the property is devoid of those things that you mentioned very briefly? We do not mean properties that are juxtaposed to each other, where one is zoned industrial or commercial and the other is zoned farm. We do not mean, therefore, that the farm should have the same value as the property that has been rezoned industrial or commercial. But where it is not rezoned, where there are no heritage matters, and where there are no native title claims that would bring it down or inflate it, any property that was valued at, say, twice its price without valid reason would seem to be highly questionable.

Mr Rae—I agree with you.

Senator LIGHTFOOT—What do you have to say, Mr Wilson, with respect to that?

Mr Wilson—I agree also. If it were valued at twice its true value, that would seem unrealistic. As Mr Rae has said, the procedures are set out in the standards manuals as to what process to follow to come up with an accurate valuation. If they are followed, the value should be accurate.

Senator LIGHTFOOT—From my brief analysis of some of the documentation that has been presented to me over the past week or so, it seems that in some of the transactions here which have been highly questionable, the onus is not on the investor, it is clearly on the valuer who may have started the chain of events that has led to the problems we are having. In other words, the opprobrium of the transaction should be sheeted home to the valuer and not to the investor.

Mr Wilson—If the valuation is proven to be wrong, that would possibly be the case, but I am unaware of any valuations having been proven to be wrong at this stage.

Senator LIGHTFOOT—Mr Rae, as Valuer General, have you ever had cause to strike any valuer off the registration list over, say, the past decade?

Mr Rae—Have we deregistered a valuer? No.

Senator LIGHTFOOT—None at all?

Mr Rae—None at all.

Senator LIGHTFOOT—Do you think it is likely to happen? Without divulging anything that is of a commercial nature or sub judice, is that likely to happen in the next few months?

Mr Rae—It is probably prudent to say that the majority of complaints to the Valuers Registration Board are of a minor nature. No solicitors fund has come through, up to this stage, with a complaint. Because the Valuers Registration Board can, in effect, suspend a valuer, even if it finds a valuer to have acted through misconduct, it cannot give the complainant any joy with monetary compensation for that loss. As I said before, that has to be done through the court. The chances are that the majority of complaints that are laid with the Valuers Registration Board are of a minor nature. They may have to do with the valuer's conduct—that he was rude or turned up late. Those are the sorts of things we have had in the past. There may be some grey areas where all sorts of accusations might be made. In that case, we avail ourselves of the resources of the Solicitor-General's office to see if that complaint is valid and whether the board

has the jurisdiction to hear it. However, the board has determined that it has not received in the last 10 years, or since its inception, a complaint that is sufficient to deregister a valuer.

CHAIR—But in a sense, while you may not have received any complaints against particular valuers, people who have been dissatisfied may have got direct compensation by threatening court action and the matter was settled out of court. That would not come before your files on the complaints register, would it? It is quite possible that there may have been a whole series of settlements, either through the court or prior to going to court, that never get onto your register.

Mr Rae—Clearly, if there are secrecy provisions in any action elsewhere, nobody is going to allow a complaint under those provisions. If someone is not proven guilty elsewhere, it is not the board's job to go out and try to prove something different.

CHAIR—Or if it is settled out of court.

Senator LIGHTFOOT—What about the suggestion that has been made, although perhaps not at this meeting, about an entrepreneurial fee being paid by a potential developer or a vendor of land to a valuer to inflate the price of a property or properties? How do you respond to that?

Mr Rae—Misconduct.

Senator LIGHTFOOT—So that would be misconduct. Has that ever been brought to your attention?

Mr Rae—No, there have been no complaints regarding misconduct to the Valuers Registration Board.

Senator LIGHTFOOT—Of that nature?

Mr Rae—Yes, of that nature.

Senator LIGHTFOOT—Thank you, Mr Rae.

Senator SHERRY—Following on from the question asked by Senator Watson about complaints, would it not be reasonable to assume in the cases we have been looking at in relation to solicitors mortgage funds that the complainants are focusing on the activities of the solicitors who ran the funds rather than on the valuer, given the relationship?

Mr Rae—It probably gets down to a philosophical answer—and I am not answering as Chairman of the Valuers' Registration Board—that trying to apportion guilt can go in any direction. It would depend on the instruction given to the valuer, the valuer's interpretation of the market, the risk of the enterprise and how much a solicitor may be lending on valuation and what the market does. As has already been mentioned, a valuer can interpret the current market, but there can be instances where the market will take a turn up or down that really could not have been predicted. I guess that is all offset in the risk that a lender would make, but the market can be volatile and there can be reasons for the market changing. If a valuer has gone through the process of doing all the investigations, interprets the market and puts his valuation

in front of people, saying, 'Well, there is the valuation. Here is my interpretation of the market. There are the sales,' I would think that he has followed correct process. Unless he perceives there to be a risk, he cannot value three, four or five years in advance.

Senator SHERRY—But in this case we have approximately 300 people who have placed money with solicitors mortgage funds who are concerned, and my question went to this: would not their concern focus on the solicitor with whom they have the relationship rather than with the valuer?

Mr Rae—That would be the client relationship, yes.

Senator SHERRY—Finally, could I just draw your attention to the transcript that has now been provided to you. Please take this on notice: Mr Rae, could you speak to Mr Worrall who gave evidence here in May and, after your contact with him, provide this committee with your opinion about the particular example of the valuation that he gave that he was particularly concern about—

CHAIR—That he received.

Senator SHERRY—that he received, yes—of a property owned by a company called Dessipur Pty Ltd with a valuation of \$200,000 that was immediately revalued to \$455,000 and, in Mr Worrall's opinion, was suspect and there was collusion involved. That was his evidence. If you could contact Mr Worrall—

Mr Rae—Perhaps I could answer that now.

Senator SHERRY—If you are able.

Mr Rae—It is probably prudent that the institute answer that on the basis that, if there is found to be a complaint against a particular valuer, that complaint will be laid with the Valuers Registration Board. Any opinion I may express will be seen as prejudicing the case against the chairman and against the board. So, if you are really asking for a comment about the valuation, it is probably prudent that you go to the institute to make that comment.

CHAIR—Perhaps the representatives of the institute would like to take that on notice.

Senator SHERRY—You take that on notice and, for that matter, any other matters of valuation that Mr Worrall may bring to your attention in your contact with him.

Mr Wilson—We will take that on notice. Could you just highlight the page you are quoting from?

Senator SHERRY—It is page 1075 and 1076.

CHAIR—But there are other matters of valuation that were raised during the course of the hearings that we would like you to comment on as well.

Mr Wilson—Sorry, there are other specific matters?

CHAIR—Yes, other matters of valuation that were also raised during that day that we would like you to comment on as well.

Senator SHERRY—Perhaps if the secretariat could—

CHAIR—They will draw your attention to them.

Senator HOGG—That is right. The secretariat should draw up a proper list.

CHAIR—Thank you very much for appearing before the committee.

[1.54 p.m.]

PAXTON, Ms Judith Margaret, Tasmanian Legal Ombudsman

CHAIR—Thank you, Ms Paxton, for appearing before the committee this afternoon. We appreciate your attendance. We invite you to make an opening statement, commenting on matters that may have been raised at the previous hearing, in addition to new matters that you may wish to draw to the committee's attention.

Ms Paxton—I think that what I have already put in the statement that I submitted stands on its own; I do not wish to add to it.

CHAIR—Would you like us to go straight into questions?

Ms Paxton—Thank you.

Senator SHERRY—Ms Paxton, I note on page 2 of your submission that you receive a copy of all complaints lodged with the Law Society and that you keep statistics on the nature of the complaints, the time taken to handle them and any trends in the nature and the volume of complaints. Can you indicate to the committee what has happened with respect to solicitors mortgage funds and the nature and volume of those complaints in recent times?

Ms Paxton—In 1999 there were, give or take, about 33 complaints about mortgage funds. Last year there were only about two. In about 1998 there were approximately four, I think.

Senator SHERRY—Do you have any data prior to that time?

Ms Paxton—No. Just to qualify that no, that is a no in my head. When there is a trend, in the annual report I say 'mortgage funds' or 'handling of money', or what have you. If there is just one, then it would probably go under 'miscellaneous', or something. But when it starts being a collection, then it would go under a heading 'management of funds' or something.

Senator SHERRY—Is it fair to say that the incidence of complaints about solicitors mortgage funds soared in 1999?

Ms Paxton—Yes, and I think that was because of the Piggot Wood and Baker ones. Prior to that, it was because of the McCulloch ones.

Senator SHERRY—Which year was that?

Ms Paxton—I would have to go back, but the first McCulloch ones, as far as I can recall, came in in 1996 and built up in 1997. That was about the end of it. After that, there were complaints relating to the handling of those complaints.

CHAIR—What action did you take when you became aware both of the early McCulloch ones and when they so-called soared in 1999? What action did you take as the Legal Ombudsman?

Ms Paxton—As Legal Ombudsman, I have no power to investigate the actual complaints; I can only investigate the manner in which they are handled.

CHAIR—The manner in which they were handled?

Ms Paxton—Yes; and/or I can report to the Attorney-General. I reported to the Attorney-General in relation to the handling of the McCulloch ones and the Piggot Wood and Baker ones, because I was concerned at the time it was taking. I also raised my concerns with the Law Society. After I had written to the Attorney-General, he also raised my concerns with the Law Society.

CHAIR—Would you share those concerns with us: those concerns put to the Attorney-General and those concerns put to the Law Society?

Ms Paxton—In relation to the McCulloch ones, I said that I was concerned about the length of time the investigation was taking—and there were a couple of other issues I was concerned about. But I do not think it would be appropriate to tell you what I told the Attorney, without his permission.

CHAIR—Would you seek his permission to get that released for the committee?

Ms Paxton—I can ask him, certainly.

CHAIR—That would be appreciated.

Ms Paxton—It was a confidential letter, and I would have to ask him. He may well happily give it to you.

CHAIR—What about the information that you gave to the Law Society: can you release that with their permission?

Ms Paxton—In relation to the Law Society, I orally drew to their attention my concerns about the time—and they were well aware of it.

CHAIR—Would you share with us the nature of those concerns?

Ms Paxton—The length of time it was taking for the investigations of the complaints to be heard, to be finalised; and the length of time that it was taking for any prosecution action to be completed. In the case of the McCulloch action, those disciplinary hearings still have not happened.

CHAIR—Why do you think it took such a long time?

Ms Paxton—We are talking about the McCulloch ones now?

CHAIR—Yes.

Ms Paxton—At first there was, I believe, some difficulty in the society coming to grips with the defalcations—the size of the problem. Once that had happened, then there were problems, I think, beyond the society's control. For example, the first counsel whom they hired was slow and the second one was promoted to a judge. So these are things they had no control over.

CHAIR—So you thought the issues were beyond the capacity of the society to control?

Ms Paxton—In relation to the counsel they employed to investigate and prosecute, the Law Society fell into the situation of ordinary clients: when a client finds a solicitor who just will not act, the client has to decide whether to go and get another one and start over again and just live with the extra time and the extra cost. The Law Society, in my view, found itself in exactly the position that ordinary people find themselves in, and I think they decided for quite a long time to employ the counsel they had already employed, because of the delay. Finally they decided that it was not worth it and they hired somebody else who then got promoted to be a judge—so then they had to start again. Certainly I think they should have put a rocket under the first counsel more quickly.

CHAIR—Normally ombudsmen's reports are very transparent and open, and are presented to the parliament. Why is it that the Legal Ombudsman's reports are such a closed shop? They are secretive and you have to get permission to get them to report. We have the Tax Ombudsman and the Ombudsman and all their reports are quite public in terms of what they do.

Ms Paxton—With respect, all of my reports are tabled and are public. The letter that I wrote to the Attorney-General in relation to my concerns about the McCulloch and Piggott Wood and Baker investigations was a private letter—it was not a report—but my reports have all been tabled and are all on the public record.

CHAIR—Did your public record reports indicate that there were problems? It is all very well to write private letters and then say, 'Well, yes, I have got a private letter here, but here is the public report,' and then the public report does not draw attention to your concerns.

Ms Paxton—The public reports did indeed draw attention to my concerns.

CHAIR—What was the nature of that? Can you share that with the committee?

Ms Paxton—Certainly. The report said things like, 'These investigations are taking a very long time,' and that I was concerned about them, and that there were deficiencies in the system that allowed them. For three reports in a row that is what I said, more or less.

CHAIR—And no action was taken?

Ms Paxton—Last year there was a review of the Legal Profession Act 1993.

CHAIR—If they are public reports, can we have those for our records? Can you share them with us?

Ms Paxton—Certainly. I have got two here and I can get the rest some other time.

CHAIR—That would be lovely, thank you.

Senator HOGG—Just a brief question following on: what actually triggered your concern? Was it a representation by a person or a body? What made you become concerned?

Ms Paxton—About which ones?

Senator HOGG—About McCulloch or any of the matters because, as you said in your submission, you can only deal with the manner in which it is handled, not the actual complaint.

Ms Paxton—People would write to me or ring me and say that they were upset that they could not get information about their complaint—which they had lodged how ever many months before—from either the Law Society or Piggott Wood and Baker or McCulloch, as the case might be.

Senator HOGG—Without going into a particular case, was it a volume of correspondence or of telephone calls, or whatever, over a period of time?

Ms Paxton—Or just one.

Senator HOGG—It could be just one that triggered your action? The reason I am asking is that I note your plea here that you have got very few staff and so on, so I am interested in—

Ms Paxton—If somebody rang me or wrote to me and said, ‘I am not getting anywhere,’ it would not matter if it was one person, two people or six people, I would still take the matter up with the Law Society.

Senator HOGG—In terms of not being able to pursue the actual complaint but being able to pursue the manner in which it was handled, how do you satisfy yourself that the manner in which it is being handled is satisfactory or unsatisfactory? Do you have a set of criteria?

Ms Paxton—I have a set of criteria in my head, I suppose, like anybody else would.

Senator HOGG—What I am trying to get to is how you know you are not being triggered by frivolous and vexatious complaints—

Ms Paxton—That is the one thing that is probably misquoted.

Senator HOGG—as opposed to a complaint of some substance. I am not saying any of the complaints you received on this occasion were of that nature, but I am trying to get a feel for how you deal with these issues.

Ms Paxton—I think the nature of the representation to me tells me, by and large, whether there is substance and, furthermore, I have already got a copy of the complaint in the first place, so I in fact know about it. I then go to the Law Society and say, ‘Could you please tell me what is happening with this?’ They would probably say, in the case of the Piggott Wood and Baker or the McCulloch ones, the mortgage ones, ‘Well, that’s with all the rest, and at this stage we are at

this stage.’ Having attended the investigations meetings I probably know what ‘that stage’ means—that is, it is still with counsel or it has gone before the tribunal or the manager is still looking at it. I know all I can do then is say to the society, ‘Well, would you please inform Mr and Mrs Smith, or whatever, of the status of their complaint?’ Invariably the Law Society has in fact responded to the complaint. Actually that is not quite true: there were a couple of occasions when they were very tardy in responding.

Senator LIGHTFOOT—Ms Paxton, with respect to the Law Society’s fortnightly investigations committee that you attend—more often than not, anyway—when in your memory did the subject matter first arise at the fortnightly meetings?

Ms Paxton—The subject matter? Which subject matter?

Senator LIGHTFOOT—With respect to the inquiry into solicitors mortgage schemes.

Ms Paxton—The subject matter came up with respect to each one as the complaints came in. For instance, when—

Senator LIGHTFOOT—When did they first arise?

Ms Paxton—I cannot remember when the first one came in.

Senator LIGHTFOOT—You would have documentation, I guess.

Ms Paxton—Yes, I would have that.

Senator LIGHTFOOT—Could you take that on notice, then, and let the committee have that, please. You say you also attend some meetings of the council of the Law Society when disciplinary matters are to be discussed, so you get notice of a disciplinary matter, either by telephone or by post, that such a disciplinary meeting is to take place at the Law Society. Once again this is testing your memory: when did that arise—has it arisen—and when did it first arise?

Ms Paxton—The society advises me when there is an agenda item relating to a disciplinary matter coming before council.

Senator LIGHTFOOT—And they advise you in writing?

Ms Paxton—They send me a copy of the agenda. I then decide whether to go or not, depending on my resources, how much time I put into it.

Senator LIGHTFOOT—When was that? When did you first receive an agenda item that said a disciplinary action was proposed to be discussed with respect to some allegations levelled at solicitors who were handling mortgage schemes?

Ms Paxton—Probably in 1996, but I could not swear to that. That would be about right.

Senator LIGHTFOOT—Do you keep a record of the agenda items?

Ms Paxton—Yes.

Senator LIGHTFOOT—Would you take that on notice and get that for the committee please, Ms Paxton?

Ms Paxton—Yes.

CHAIR—I refer Ms Paxton to her correspondence to the Attorney-General about delay in the McCulloch matters and investors' inability to get information in relation to the investments with Piggott Wood and Baker. In your submission, you say:

Further, in about October last year, because I was uneasy about the Piggott, Wood and Baker complaints, I sought briefings from both the Law Society and the DPP.

What was the nature of the response? What was the outcome, in terms of the briefing from both the Law Society and the DPP? You do not mention them in your submission.

Ms Paxton—They were oral briefings. I asked to be briefed by somebody independent of the Law Society.

CHAIR—Were you satisfied that everything was in order?

Ms Paxton—First of all, I went to see the DPP. We discussed the sorts of concerns that I had which were: whether the Law Society had discretion about whether it took out default orders; whether they could do it at a later date, and the pros and cons of that sort of action.

CHAIR—Was the DPP really concerned about the issues that you were raising?

Ms Paxton—Yes.

CHAIR—Did they dismiss them or did they take them on? What happened as a result of your deliberations with them?

Ms Paxton—The DPP was asked to advise me as to the law, which he did. We went through the act and what was appropriate to be done.

Senator LIGHTFOOT—Was that written or oral?

Ms Paxton—That was oral.

CHAIR—But did they not feel that they had the responsibility to take something on board? Because, after all, you are not a lawyer, you are not the DPP, and yet you have drawn their attention to some serious matters of delay and you say that the DPP briefed you and told you what the law was, but they were not prepared to take the matter on. They did not think it was serious.

Ms Paxton—With respect, I do not think that is right.

CHAIR—I am just trying to get further information from what you have told us.

Ms Paxton—I wanted knowledge. I wanted knowledge independent of the Law Society. I wanted the Law Society's point of view as well, which I got. Because I am a layperson I had to go to somebody independent, so I went to the DPP.

CHAIR—So briefly, you were seeking knowledge?

Ms Paxton—Yes.

CHAIR—Okay. And having got that knowledge—

Ms Paxton—I was happier.

CHAIR—so then, obviously, you were in a position that you had to do something about that knowledge. What did you do in terms of the sort of knowledge you got from the DPP and the Law Society? What action did you take as a result of getting that knowledge? Were you satisfied that everything was quite okay and above board?

Ms Paxton—Yes. I was satisfied that things were proceeding normally and that, eventually, the public would be protected, which was my big concern.

CHAIR—They would ultimately be protected, however it was taking a long time.

Ms Paxton—Yes.

CHAIR—And you were quite happy about all that?

Ms Paxton—No. I was not happy with the length of time. But I was happy that court orders could be taken out—

CHAIR—This is all very theoretical, isn't it? You can be advised theoretically that this could happen or something else could happen but, after all, you are the Legal Ombudsman, you are a pivotal person here, and if you referred something to the DPP, or you referred something to the Attorney-General, we would have expected some action. What was the positive action that you were taking? Having now got all this information, you cannot tell us that you were satisfied that, in time, some action, if need be, might be able to be taken.

Ms Paxton—If I had not been happy and had been really concerned, then I would have taken action. The only action that I could have taken would have been to draw my concerns to the attention of the Attorney-General or the Law Society. They are the only powers that I have.

CHAIR—But you did not do that.

Ms Paxton—No, I did not.

CHAIR—So, having got all this information that lawyers were in default, that they were behind in paying interest and all this sort of thing, you were happy that, in the full course of time, at some time somebody would take some action.

Ms Paxton—I was happy that the process was legal.

Senator SHERRY—On the issue of process—

Ms Paxton—I was happy that although everything was taking a long time, the due processes were being followed that were there to be followed. For example, in the act it says that the law society may take out default orders but it does not say that it has to.

Senator SHERRY—On that point, in your view, should it say that it ‘shall’ take out default orders, rather than ‘may’?

Ms Paxton—I do not have the knowledge to pass that sort of opinion.

Senator SHERRY—With due respect, why do you hold the current position?

Ms Paxton—Because I am a layperson, to make that decision I would have to go and do a lot of research. Part of the reason that I am a layperson is to reflect community values and perspectives. As an initial reaction I would say that they should, but that is as a layperson.

Senator HOGG—Is that a gut feeling?

Ms Paxton—When I was getting briefed by the DPP, there were the pros and cons of whether you should take out a court order. A lot of people who talked to me thought that they would get their money more easily if they sued for negligence, and they would get it through the insurance. If a court fund were applied to, it is my understanding that that avenue would be cut out for them. There are these balances, pros and cons, to think about. As a layperson I would still have to consider those actions. For example, a lot of people, as soon as the insurance fund HIH collapsed, started to think more closely about the disciplinary action and the guarantee fund. Before that, they did not want to know—they just wanted to know about the insurance.

Senator LIGHTFOOT—Do you think your position would be better served if it was filled by a solicitor or someone with a legal background?

Ms Paxton—No.

CHAIR—On the other hand, as a layperson you would have realised, having got a scent of the problem, that justice delayed is justice denied. Obviously, as a legal ombudsman, you must have been concerned, even as a layperson, that if there were certain defaults in not meeting a person’s legal obligations on time in terms of capital and in terms of interest, that people have to live. As a layperson, did you not feel that you had a responsibility to try and expedite these matters rather than rely on the concept that ‘in the due course of time’ matters would work themselves out? True, we could wait 10 years or 100 years, but we might all be dead in that time.

Senator SHERRY—Some already are dead who cannot speak for themselves.

CHAIR—We have a lot of people whose lives have been affected in an enormous way.

Ms Paxton—I have been extremely concerned about these people. From as early as 1999, when I first wrote to the Attorney-General, I expressed my concerns about the time it was taking for these investigations to be completed. I have regularly, in every report, raised these issues. It is not through lack of concern, and in fact there have been a number of occasions when people have got responses and I have urged that they change counsel or do something because of just the concerns that you have expressed.

Senator LIGHTFOOT—Do you see yourself as something of a weak link between the Law Society and the complainant? Do you think some people take advantage of the fact that you do not have a legal background, that you are not a hard-nosed legal practitioner, a table thumper? Do you think people exploit that?

Ms Paxton—You can be a table thumper without being a lawyer.

Senator LIGHTFOOT—I thump the table myself.

Ms Paxton—I do not know. There are pros and cons. There are a lot of people who come to me and are glad that I am not a lawyer. Just because you are not a lawyer does not mean that you are not intelligent.

Senator LIGHTFOOT—Of course not.

Senator SHERRY—There are no lawyers on this committee and we would certainly agree with that.

Senator HOGG—You have a 4-0 vote that way.

Senator LIGHTFOOT—Some people think that lawyers and intelligence is an oxymoron—but I do not, of course! Could you tell the committee who meets your salary and expenses?

Ms Paxton—The Solicitors Guarantee Fund, and I have to say that that is something that does not sit comfortably. The guarantee fund pays it directly to Justice; Justice pays it to me. Justice picks up all my superannuation.

Senator LIGHTFOOT—So the generators of that fund are the lawyers themselves; is that right?

Ms Paxton—Yes, and it is not a comfortable thing. They used to give that money to Legal Aid—they still give some—but it is my understanding that as part of their community commitment they give some of that to me.

Senator LIGHTFOOT—In effect you are answerable to the Law Society, which is—

Ms Paxton—No, I am not. I am answerable to nobody, except perhaps the Attorney-General.

Senator LIGHTFOOT—Where is the division between the legal practitioners fund, who meet your salary and other expenses, and the Law Society? Are you happy that that is sufficiently removed?

Ms Paxton—It does not look good, but I believe it is sufficiently removed because they just put the money straight into Justice and they pay me. Whenever I think about something I do not think, ‘Goodness, my money comes from the Solicitors Guarantee Fund.’

CHAIR—Ms Paxton, reading your report dated 21 May 2001, as a layperson or as Attorney-General, I would have taken the view that all is well and above board, and there is nothing to worry about because I read these conclusions:

This year I have made no recommendations. As already discussed, the new complaints handling protocol introduced by the Law Society should address some of the deficiencies that are of concern to me and the recent review of the *Legal Profession Act 1993* may well result in significant changes to the way complaints about legal practitioners are handled overall.

Given all the problems that we have heard over two days, I find that an extraordinary conclusion. I am not surprised that the Attorney-General and others have said, ‘We have an independent report, and all looks well.’ We have heard today that all is not well. You have raised your concerns, and you have been satisfied in the course of time that everything will be all right. There is an urgency about some of these things from time to time. I think that when we get appointed to these responsible positions, we really have to discharge those responsibilities to the public.

Ms Paxton—In my 1999 report—

CHAIR—I am talking about your 2000 report.

Ms Paxton—In my 1999 report—to which I refer in the 2000 report—I said that the system had to change. I said that the way it was at the moment it would never be any good and recommended that the whole system be changed. Seeing that this has come up, I would like to—

CHAIR—Where is your follow-up in the year 2000 report? Was it changed?

Ms Paxton—In the year 2000, I put in a submission to the Legal Profession Act review body, in which I made strong recommendations for change. I outlined where the deficiencies were, and that is what I refer to in the conclusion of my 2000 report. I then proposed a different method, where you have an independent legal commissioner instead of the Law Society. I would like to tender that, please.

Senator SHERRY—I was going to get to that issue. In terms of the current arrangements—both perception and reality—you have come to the conclusion that it is not good enough for the Law Society to handle solicitors mortgage funds complaints in this case.

Ms Paxton—That is what I believe. That is what I said in 1999 and in that review report there. The reason I made no other recommendations in last year's report is that I had already made them. There were no more recommendations that I could make, other than that they need to change the system.

CHAIR—I would have thought that, as a prudent legal ombudsman, you should have referred to outstanding matters from your previous report that had not been followed up on. As already discussed, it should address some of the problems.

Ms Paxton—They are in the body of the report.

Senator SHERRY—You have entered an opinion about the Law Society and perceived and real conflicts of interest. Take the case of a solicitor who has been found guilty of malpractice and may or may not have been struck off—presumably struck off—where a default order is made in respect of the guarantee fund and the principal is repaid. Do you believe that interest should be repaid and that court costs should be covered as well?

Ms Paxton—No, I cannot give you an opinion.

Senator SHERRY—Why can't you?

Ms Paxton—Because I haven't the knowledge to give it.

Senator SHERRY—You are an experienced layperson who is there to protect the public, to take up their concerns—

Ms Paxton—I do not understand why interest is not paid, and until I know why, I cannot give an opinion.

Senator SHERRY—We know legally why interest is not paid, but do you think the law is correct on this matter? Should the law be changed?

Ms Paxton—I believe, as a very personal opinion, that if somebody has lost their funds as a result of a default, then they should be paid the interest.

Senator SHERRY—Thank you. And court costs as well?

Ms Paxton—And court costs, because if you are going to pay them one thing, you cannot just stop there. But that is my personal opinion.

Senator SHERRY—That is fine. In the case of McCulloch and McCulloch you said, I believe, that the Law Society had 'some difficulty in coming to grips with the signs of the defalcation', and that was in the context of a timing delay. What did you mean by that—that they had 'some difficulty coming to grips with the size of the defalcation'? Did they react, 'Oh, shock, horror! Gosh, what can we do?' Did that lead to procrastination? What was the meaning of that comment?

Ms Paxton—Precise dates and things I cannot—

Senator SHERRY—I will not hold you to precise dates.

Ms Paxton—My understanding is that the two McCullochs went to the Law Society in and around 1996 and said, ‘We have found that we have not complied with all the rules. We are ashamed and unhappy about it and we are trying to fix it up,’ and that the society said ‘Okay, we accept that. You had better fix it up.’ A bit later the society started to realise that this was the tip of the iceberg. I would say it took—again, don’t hold me to dates—probably at least another six months before they realised that there was an iceberg under this tip.

Senator SHERRY—So initially they had taken the self-confessed assurances of McCulloch and McCulloch, accepted them at face value and then later discovered that the problem was much more significant?

Ms Paxton—Yes, and as they discovered that the problems were more significant, it came up in little bubbles, as it were, and then it became a big bubble.

Senator SHERRY—What was the response to the big bubble?

Ms Paxton—They put in a manager and investigated the investment registers and they finally got counsel to—

Senator SHERRY—You mention that you are aware of all the complaints that are made.

Ms Paxton—A copy is sent to my office, and I read them all.

Senator SHERRY—Are there any outstanding complaints?

Ms Paxton—About anything?

Senator SHERRY—About solicitors mortgage funds.

Ms Paxton—Oh, yes.

Senator SHERRY—Can you give me an indication? I do not want detail.

Ms Paxton—For instance, in regard to the 33 or whatever it was that came in in 1999 and the ones that have come in since, because the disciplinary process has not finished one way or the other, those are outstanding.

Senator SHERRY—These cases that are outstanding are not just the cases with respect to Lewis Driscoll and Bull? There are other cases with respect to other firms that are outstanding?

Ms Paxton—I would have to check all the records, but I think the ones that relate to mortgages would be Piggott Wood and Baker. I am not sure about the Lewis Driscoll and Bull one as to whether the disciplinary action has happened there or not.

Senator SHERRY—Are any investigations yet to be concluded with respect to other firms?

Ms Paxton—In relation to mortgages?

Senator SHERRY—Yes.

Ms Paxton—I do not think so.

Senator LIGHTFOOT—Ms Paxton, were you aware that the Attorney-General advised of difficulties with respect to the solicitors mortgage funds as early as 1999? I think you alluded to it briefly and indirectly.

Ms Paxton—I am sorry; was I aware that the Attorney—

Senator LIGHTFOOT—Yes, that the Attorney-General was concerned about the funds as early as 1999?

Ms Paxton—I certainly wrote to him about 1999. I think he was concerned before I wrote. I do not know.

Senator LIGHTFOOT—What about the Crown Solicitor? Do you have anything to do with the Crown Solicitor?

Ms Paxton—Occasionally, but not in this respect.

Senator LIGHTFOOT—What is his name?

Ms Paxton—Mr Bale.

Senator LIGHTFOOT—Is that the Crown Solicitor's name?

Ms Paxton—He is the Crown Solicitor.

Senator LIGHTFOOT—He was appointed as Crown Solicitor in 1998. Did you have any feeling of disquiet? Are you happy with that appointment?

Ms Paxton—I have no feeling whatsoever about the appointment. I know nothing about the appointment.

Senator LIGHTFOOT—My last question then is with respect, inter alia, to—

Ms Paxton—I am sorry; you meant Mr Bale's appointment?

Senator LIGHTFOOT—Say again?

Ms Paxton—I am sorry; I think I got confused. Did you mean Mr Bale?

Senator LIGHTFOOT—I am not sure what the name of the Crown Solicitor is.

Ms Paxton—I know nothing about those appointments.

Senator LIGHTFOOT—Okay. On page 2 of your letter to the Chairman, Senator Watson, you alluded, *inter alia*, to the fact that you receive:

I receive a copy of all complaints lodged with Law Society and keep statistics on the nature of the complaints, the time taken to handle them and any trends in the nature and volume of complaints and whether a particular practitioner is receiving a number of complaints against him or her.

Who stands out as ‘him or her’?

Ms Paxton—I do not think that I can answer that, Senator.

Senator LIGHTFOOT—Why not?

Ms Paxton—Because the act prohibits me from divulging information that I may gain in the course of my role.

Senator LIGHTFOOT—Prohibits you from?

Ms Paxton—Disclosing information which I may gain in the course of my position, and that would be one of the things that I could not say.

Senator LIGHTFOOT—You have partly answered my next question but you can perhaps affirm it. Are you prepared to divulge to the committee—you have already said you will give certain information to the committee on this—those areas where you said that you receive copies of all complaints lodged? Are you prepared to give the committee copies of all the complaints lodged?

Ms Paxton—No, because again I cannot do that.

CHAIR—Not even those relating to solicitors mortgage funds?

Ms Paxton—No.

Senator SHERRY—You are protected by parliamentary privilege.

Ms Paxton—I would have to go to every single person who had lodged a complaint and ask them if they objected to me giving a copy of their—

Senator SHERRY—How many complaints? Are there a lot?

CHAIR—We only want to know those in relation to specific mortgage funds, not those that were lodged against the society generally. Our focus is just on the solicitors mortgage funds.

Ms Paxton—At least 33 in 1999.

CHAIR—Pardon?

Ms Paxton—There are at least 33 in 1999.

CHAIR—Sixty?

Ms Paxton—Something, relating to mortgage funds.

Senator LIGHTFOOT—On mortgage funds?

Ms Paxton—Yes.

CHAIR—But they weren't all solicitors mortgage funds, were they?

Ms Paxton—Yes.

CHAIR—They were.

Senator LIGHTFOOT—You have statistics, as you say, showing the time taken to handle them and any trends in the nature and volume of complaints. Are you prepared to give the Senate committee that statistical information?

Ms Paxton—That is in my annual report. The statistical information which is not there, and which would be inappropriate to be there, is if I see a trend—if one solicitor is getting a number of complaints about delay or something—that is not in there, obviously.

Senator LIGHTFOOT—Are you prepared to make that available in so far as it affects mortgages? That is statistical information with respect to complaints against practitioners that is available? You have collated it, haven't you?

Ms Paxton—By name? It is there in the report.

Senator LIGHTFOOT—That information is there as well, is it?

Ms Paxton—Yes, it is.

Senator LIGHTFOOT—So the only information that you are not prepared to give the Senate committee is with respect to the complaints lodged?

Ms Paxton—Yes, that is correct. I would be breaching the confidentiality of the complainant, and I would have to go to enormous lengths to ask everybody if they minded if I gave you a copy of their letter.

Senator HOGG—On page 3 of your submission, under the heading 'Complaints about Mortgage Schemes' you refer to:

The majority of people who have approached me about their investments in lawyers' mortgage schemes were concerned at their inability to get any information from either the firm concerned or the Law Society and delay in the finalisation of the investigation of their complaint if they had lodged one.

What were you able to do, as the Legal Ombudsman, to overcome the major difficulty that was confronted by those people, that they could not get any information from either the firm concerned or the Law Society? Do you have teeth there to help those people who are or were affected? How did it manifest itself in this particular instance?

Ms Paxton—In the majority of cases the Law Society have responded to the complaint when I asked them to. They might not be able to say very much, other than that it is being handled or what-have-you, but the society have responded when I asked them to.

Senator HOGG—So it does not necessarily go to the quality of the answer; it could be just the fact that they are told, 'Your complaint is noted and we are proceeding with it.' I understand in this particular case that part of the frustration of the people who are concerned with their funds is that when they approached the relevant firm or the Law Society they felt they were running into a brick wall, that they were getting nowhere at all, that they were getting no answers or none that were meaningful. Having run into that brick wall, they turned to you as a person in one area that might help them. Is there a weakness in that? I suppose it is the old story: you can lead a horse to water, but you cannot make it drink. But is there some way that legislation might be strengthened, as a result of recommendations from this inquiry, to enable you to get more meaningful answers—rather than the very nebulous types of answers which they might give—out of the likes of a particular firm of solicitors or the Law Society? In other words, do you have the ability to allay the fears and concerns of the broader public?

Ms Paxton—In my report for last year I drew attention to the fact that under the act anybody who has a complaint about a default can get very detailed information from the Law Society, including copies of all the documents and the name of who is handling things. The trouble is that they can only get those if the Law Society has decided to put the complaint in the default basket. I do not think that is good enough, and I have asked that that be looked at. That would certainly solve some of the problem.

Senator HOGG—Would that conceivably reduce the number of complaints coming to you then, if there were some teeth in the legislation to require people to respond in a meaningful way?

Ms Paxton—Yes. I have to say, though, that generally speaking—except in one instance—the Law Society has gone out of its way to respond to complainants who have come to me.

Senator SHERRY—Is that a recent development, or has that always been the case?

Ms Paxton—It has certainly been the case in more recent times.

Senator SHERRY—But it was not as responsive two or three years ago? What do you mean by 'recent times'?

Senator HOGG—I think we should establish this: how long have you been in the position?

Ms Paxton—Since 1994. It really depends on who is the president and who is the executive director. I have to say that recently the attitude has changed, and I think there is greater transparency.

Senator SHERRY—That could be for a number of reasons, couldn't it?

Ms Paxton—Yes, it could indeed.

Senator SHERRY—Surely the public attention on these matters would have—

Ms Paxton—It could be for any reason. I am just saying that there is a change in attitude.

Senator SHERRY—You said that you were appointed back in 1994. I assume from what you are saying that the volume of solicitors mortgage funds complaints in the last two or three years has increased compared to the earlier period of time when you were in the job, back in 1994-95?

Ms Paxton—Yes, that is correct.

Senator SHERRY—I assume that you have some familiarity with the nature of the complaints and the problems that have occurred. Can you give us a view about why these problems have occurred in recent years?

Ms Paxton—The increase in volume is because, I suppose, the mortgage funds have been collapsing.

Senator SHERRY—I understand that.

Ms Paxton—It sounds pretty basic.

Senator SHERRY—Have you formed any view about the reason for their collapse? Can you make any observations about it?

Ms Paxton—That comes into two categories: it is either market forces, or misapplication or mismanagement of the funds. In about 1995-96 the firms were small: Lewis Driscoll and Bull, or McCulloch and McCulloch. They did not have the volume that appeared on 1999, say, when we had a big fund with hundreds of mortgages. I guess if one is going down so are the rest of them.

Senator SHERRY—That is certainly the case with some funds. From looking at the evidence, some solicitors mortgage funds grew dramatically in size.

Ms Paxton—Yes.

Senator SHERRY—I am not sure of the position with Macquarie Law, for example, whether that exploded in terms of its size and coverage. Do you have any observations to make about that?

Ms Paxton—No, because I did not have the statistics. There were no great numbers of complaints about Macquarie Law. There are a lot of people with mortgages with Macquarie Law, but they did not lodge complaints so I do not have them in my records.

CHAIR—In your submission to the Legal Profession Act review, did you draw attention to deficiencies in your powers and what powers would you, or should you, be seeking? What are the deficiencies in your powers?

Ms Paxton—I believe that my role is closer to that of a lay observer, such as they have in South Australia. I think the term Legal Ombudsman is a misnomer. People think that I have primary investigative powers, which I do not. I think you should either have a lay observer or you should have an ombudsman with appropriate investigative powers.

CHAIR—Did you draw attention to that in your submission to the review?

Ms Paxton—Yes, particularly in the attachment.

CHAIR—What did the review state in response to that submission?

Ms Paxton—It is my understanding that the review body has recommended the appointment of a legal commissioner with investigative powers.

CHAIR—When do you think that person will be in place?

Ms Paxton—I am not sure but the Attorney-General mentioned in parliament just the other day that the matter was going to cabinet.

CHAIR—So you feel that you should be armed with more legal powers and investigative powers?

Ms Paxton—I believe that the legal commissioner should have investigative powers and that the complaints handling process should lie with that officer, supported by somebody who is a lawyer.

CHAIR—Do you think that the review has adequately addressed the concerns that you have raised?

Ms Paxton—Judging from what I understand is going to the government.

CHAIR—You have not seen the—

Ms Paxton—I have not seen it, no.

CHAIR—It would appear that substantially it has been addressed, but you want to see the act or the deed of appointment?

Ms Paxton—Yes.

Senator SHERRY—You obviously are very aware—I do not think anyone could help but be aware—of the considerable public concern generated by the problems involving solicitors mortgage funds. Very obviously, you would be aware of the concerns of the individuals who have been hurt. Do you think it is in the public interest that these matters be cleared up as soon as possible?

Ms Paxton—Yes. It is very much in the public interest.

Senator SHERRY—You would not like to see it drag on for another year or two?

Ms Paxton—No. I most certainly would not. I believe it has dragged on for far too long now.

Senator LIGHTFOOT—How long have you been the Legal Ombudsman?

Ms Paxton—Since 1994. I was appointed in December 1993 and took up the position in 1994.

Senator LIGHTFOOT—That is quite a long time. You would recall then that Mr Bale was Crown Solicitor in 1998.

Ms Paxton—He is Solicitor-General.

Senator LIGHTFOOT—There are two levels of those solicitors: there is the Crown Solicitor and there is the Solicitor-General.

Ms Paxton—Yes. Mr Bale is the Solicitor-General.

Senator LIGHTFOOT—Okay. So he is the Solicitor-General. On 13 May 1998, a Mr Kench was appointed.

Ms Paxton—Yes.

Senator LIGHTFOOT—But I understand that he lasted only a month. Do you recall that? There was an avalanche of criticism about his appointment.

Ms Paxton—I understand that he stood down for personal reasons.

Senator LIGHTFOOT—Have you ever received any complaints in your position as the Legal Ombudsman with respect to Mr Kench?

Ms Paxton—No.

Senator LIGHTFOOT—Not in all that time?

Ms Paxton—Not that I recall.

Senator LIGHTFOOT—What do you recall then of Mr Kench and the reason for his resignation after such a short time?

Ms Paxton—I recall that he said that he was not taking up the position for personal reasons.

CHAIR—Thank you very much, Ms Paxton, for appearing before the committee today. I appreciate the evidence that you have given.

[2.48 p.m.]

HARRINGTON, Mr Bernard Michael, Retirement Manager, Centrelink

CHAIR—Welcome. Mr Harrington, I invite you to make an opening statement.

Mr Harrington—We welcome the chance to appear before the committee. We were concerned about the press publicity following the recent hearing here, which showed Centrelink as uncaring and not supporting people who needed income support. As you would be aware, no-one in genuine hardship is refused assistance from Centrelink at all. The same rules apply to all investments, whether people have money in questionable solicitors accounts or other sorts of accounts. We look at the asset value under the asset test and we look at deemed income under the income test. Where some of these funds are in difficulties, or undecided, we can adjust the value of the asset to reflect what that investment is really worth. The other side is under the income test, where we can seek approval to reduce the amount of deeming that we normally apply on these sorts of investments. We have been doing this for a number of individuals, over about the last 18 months to two years, as they have come to our attention. We look at their individual investments, their individual circumstances and their need for ongoing income support under the income and asset test.

CHAIR—A number of these clients come from the solicitors mortgage funds, who have not been able to access their capital, where the date of repayment is uncertain and where they are not in receipt of income. Do you effectively reduce the deeming rate where you put your own value on the capital?

Mr Harrington—We have the capital valued—what we think the value of their asset is there to work it under the asset test—but we also apply for an adjusted deeming amount. It can be zero or it could be up to 3½ per cent or up to 5½ per cent, depending on the amount of the investment. We calculate the pension under the income or the asset test in those situations. We have had some people come to us who have other significant funds and are not entitled to assistance under the income or asset test because of those funds they have.

CHAIR—In a sense, if I came to you, and my whole retirement income and capital was derived through solicitors mortgage funds, how would you assess me?

Mr Harrington—We would look—

CHAIR—Nothing to live on, no capital that I can pull back, no interest received.

Mr Harrington—We would look at the value of your assets and what you might expect to get back.

CHAIR—Say \$100,000.

Mr Harrington—With \$100,000, we might regard 10 per cent of that as an asset, 20 per cent of that as an asset or, in some cases, 60 per cent. These funds are all different. They all have varying degrees of success or whatever at the moment.

Senator SHERRY—I am sorry; we do not know—it is hard to work out—but there must be some time line that this takes to evaluate.

CHAIR—We have to finish this question because we have a problem in that our whole capital is tied up in solicitors mortgage funds. We cannot get our capital out, we cannot get our interest out, so I am asking: what is the view of Social Security? Do I get an entitlement or don't I?

Mr Harrington—At the first, if you came to us with the worst-case scenario—

CHAIR—Just give a view.

Mr Harrington—Not anything there of worth at all, we would disregard the value of that asset. We would look at the amount under the income test. We do not have the delegation to change the deeming amount on that investment under the income test. We apply to the minister. In that case we would exempt that under the income test, and we would pay you the full amount of the pension or benefit that you would be entitled to.

CHAIR—Have you had to refer to the minister and have people been paid benefit as a result of the minister's discretion?

Mr Harrington—Yes, certainly. This is an ongoing—

CHAIR—Under the solicitors mortgage funds.

Mr Harrington—Under these schemes we have been doing this for the last 18 months in some way.

CHAIR—How many people would have been concessionally assessed by Centrelink in terms of problems arising from the failed solicitors mortgage schemes? How many people approximately would you have helped, either in whole or in part?

Mr Harrington—We do not keep accurate records on these, but I would say about 20 or 25 at the outside of these people, mainly in Hobart. We have some in Launceston and some on the coast.

CHAIR—How many people would have been rejected? If they had been rejected, it would have been on account of their other assets, would it?

Mr Harrington—Usually it does not get to the stage where a person puts in a formal application. They are usually discussing what their situation is and asking for assistance. We have the financial information service which helps people understand their investments, gives them the options, educates them there, and quite often it comes as an inquiry, 'How does the income and asset test work? Would I be entitled to any payment?'

CHAIR—I see. If there is anybody in the room who has been disadvantaged, they could apply to Social Security and maybe have an opportunity of getting some social security.

Senator SHERRY—Are there any outstanding cases at the moment?

Mr Harrington—I think there are two under consideration by the minister that have only gone up very recently.

Senator SHERRY—Most things are usually not black and white. A person will not know how much they are going to get back because, for many of the investors, what they get back will be dependent on the sale of the asset at some future date. What do you do in those circumstances?

Mr Harrington—We try to work out what we think the reasonable estimate would be at the moment because we are trying to calculate what their need for ongoing income support is at the present time, so we are looking at their current situation. We look at the best-case scenario that we can to work it out under the asset test, which is usually the one that affects these people the most.

CHAIR—Thanks very much, Mr Harrington. We are very pleased at the approach taken by Centrelink. It shows a very caring approach, and maybe there will be others who will apply as a result of your visit here today. Thank you for volunteering.

That concludes the committee's hearings and proceedings. On behalf of the committee I thank all witnesses who have given evidence for their participation today. I thank the audience for their forbearance and interest.

Committee adjourned at 2.54 p.m.