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SENATE SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL SERVICES

SECOND REPORT ON INQUIRY INTO PRUDENTIAL SUPERVISION AND CONSUMER PROTECTION FOR SUPERANNUATION, BANKING AND FINANCIAL SERVICES – SOME CASE STUDIES

RECOMMENDATION	PROPOSED GOVERNMENT RESPONSE
Recommendation 1 **The Committee recommends that, in conjunction with APRA, the Queensland State Government, through the Department of Industrial Relations and in consultation with the Queensland Industrial Relations Commission and the Queensland Industrial Court, conduct a review of all superannuation provisions in State awards and agreements with a view to ensuring their consistency with national standards.**	This is a matter for the Queensland Government. The Government understands that the Queensland Government has responded to the Committee. Nevertheless, we would prefer that superannuation provisions be regulated under nationally consistent Superannuation Guarantee legislation. That said, we note that this could lead to considerable increases in superannuation contributions in some industries as award earnings bases are removed. The Federal Government has indicated in this regard that it will consult with industry to establish whether it is feasible to move to a simplified earnings base provision over a period of time.
Recommendation 2 **The Committee recommends that, in conjunction with APRA, all other State Governments conduct a similar review of all superannuation provisions in their own State awards and agreements with a view to ensuring their consistency with national standards.**	This is a matter for the State Governments.

Recommendation 3 **The Committee recommends that the *Superannuation Industry (Supervision) Act 1993* be amended to tighten the requirements applying to trustees to ensure that trustees notify the regulator of any significant adverse event which might impact on any superannuation product under APRA's regulation.**	More work required. The SIS Act already includes provisions requiring trustees to notify APRA of certain events. The Government agrees that it is timely to review these provisions. It is noted that the Superannuation Working Group (SWG) also examined options to improve disclosure by superannuation funds. The Government is considering its response to the SWG's recommendations.
Recommendation 4 **The Committee recommends that the *Managed Investments Act 1998* be amended to ensure all funds that invest monies for superannuation purposes come within the regulatory framework supervised by APRA.**	The Government does not support this recommendation. Superannuation funds are not within the managed investments regulatory framework for managed investment schemes administered by ASIC. The definition in section 9 of the *Corporations Act 2001* of 'managed investment scheme' does not include 'a regulated superannuation fund, an approved deposit fund, a pooled superannuation trust, or a public sector superannuation scheme within the meaning of the *Superannuation Industry (Supervision) Act 1993*'. A broad interpretation of this recommendation would mean that any trust or investment vehicle that accepts superannuation monies must fall under the direct supervision of APRA. Arguably, a superannuation fund which invests in a non-superannuation managed fund (excluded or otherwise) would lead to the managed fund also being caught. This would have an undesirable impact on the broader managed investments industry. Implementation of such a recommendation could severely limit investment options and reduce returns.

Recommendation 5 **The Committee recommends that the $10,000 fee requested by the replacement trustee of Commercial Nominees of Australia Pty. Limited be waived and that APRA bear the cost of rendering the small superannuation funds compliant.**	The Government does not support this recommendation. The level and setting of fees by the acting trustee is a matter for the acting trustee and APRA. It is not Government policy to intervene in commercial decisions by businesses. The Government has made determinations regarding 197 small APRA funds formerly under the trusteeship of Commercial Nominees of Australia Pty Ltd. (CNAL) affected by losses in the Enhanced Cash Management Trust. These grants of financial assistance included an allowance for the fees charged by the acting trustee, Oak Breeze Pty Ltd. It is noted that the costs of a replacement trustee are often higher than a substantive trustee. In the case of CNAL, a number of the duties of the replacement trustee have related to activities that were necessary as part of CNAL's obligations as an Approved Trustee, but were not completed. As part of its duties, the replacement trustee has had to arrange for completion of annual returns and tax returns for both the 2000 and 2001 financial years so that the funds can maintain their complying fund status and their tax concessions. Because of poor record keeping by CNAL, the acting trustee has had to do significant work to rebuild accounts and records. As such, the level of fees of the replacement trustee was determined to be attributable to the actions of CNAL and outside of the normal trustee costs and therefore were included as part of the losses incurred in the Government's determinations. The appointment of a replacement trustee puts no onus on APRA to meet costs associated with that trustee.

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<tr><td>Recommendation 6</td><td></td></tr>
<tr><td>The Committee recommends that the Minister for Financial Services and Regulation expedite the application lodged under section 229 of the Superannuation Industry (Supervision) Act 1993 by the trustee of Commercial Nominees of Australia Pty. Limited on behalf of the affected investors.</td><td>On 14 June 2002 the Minister for Revenue and Assistant Treasurer announced the successful applications of 197 small APRA funds that suffered losses in the Enhanced Cash Management Trust, under Part 23 of the Superannuation Industry (Supervision) Act 1993 (SIS Act), with further determinations to be made on other applications.

The Government is concerned about the hardship experienced by superannuation fund members able to demonstrate that they have suffered losses as a result of fraudulent conduct or theft. The Government worked as quickly as possible to assess the applications received.

A number of conditions for an application under Part 23 must be met before a determination can be made, including:

• the fund must suffer an eligible loss. That is, a loss as a result of fraudulent conduct or theft (a conviction is not required);

• the loss must have caused a substantial diminution of the fund leading to difficulties in the payment of benefits; and

• the application must be in writing and be accompanied by such information as the Minister determines.

The Minister may also request any additional information as the Minister considers necessary for an application to be determined. The Minister must also seek APRA's advice on the application. Further, if a grant is made, the Minister must determine that the public interest requires a grant to be made. If one is, it can be funded out of consolidated revenue or a levy on other superannuation funds.

The Government will review the process for making applications under Part 23 of the SIS Act to assess where improvements can be made.</td></tr>
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Recommendation 7 **The Committee recommends that ASIC work with both the Tasmanian Government and the Law Society to devise strategies for the ongoing management of McCulloch and McCulloch and Lewis Driscoll and Bull to the benefit of the clients awaiting compensation.**	This is a matter for ASIC and the Tasmanian Government. ASIC advises that it works co-operatively with relevant State law societies.
Recommendation 8 **The Committee recommends that ASIC work with State Governments and relevant law societies to ensure that appropriate strategies are developed for the supervision of mortgage investment funds with fewer than 20 members which will continue after 31 October 2001.**	This is a matter for State Governments. ASIC does not have jurisdiction or power to regulate mortgage investment schemes outside the purview of the *Corporations Act 2001* or to exchange or pass on information to State regulatory bodies and law societies. However, ASIC advises that it continues to work co-operatively with relevant State law societies in regulating small industry supervised mortgage practices.

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Recommendation 9

The Committee recommends that the Tasmanian Government further review the *Legal Profession Act 1993* in order to ensure that the benefit of the amendments to the *Legal Profession Act 1993* and the *Freedom of Information Act 1991* are available to the clients who have lost funds, as well as those who may do so in the future. The review should also consider the following areas:

- **disciplinary procedures and penalties for legal practitioners who are guilty of professional misconduct;**
- **complaints procedures, including independent investigative powers by a separate body;**
- **regular independent audits of legal practices;**
- **consumer information; and**
- **a requirement that the Law Society of Tasmania be subject to regular reviews conducted by an external unrelated body. The reviews should focus on the extent to which the Society meets its statutory obligations to its members and their clients.**

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This is a matter for the Tasmanian Government.

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Recommendation 10 **The Committee recommends that the Law Society of Tasmania adopt a more strategic, open and less rigidly insular approach to its relationships with consumers as well as its members.**	This is a matter for the Law Society of Tasmania.
Recommendation 11 **The Committee recommends that the Tasmanian Government improve access to compensation for all victims of failed solicitors' mortgage schemes.**	This is a matter for the Tasmanian Government.
Recommendation 12 **The Committee also recommends that the Tasmanian Government continues to ensure that the Solicitors' Guarantee Fund is maintained at a level which is sufficient to meet anticipated needs. This might include legislating to require solicitors to contribute in advance to the fund to ensure an appropriate level of liquidity.**	This is a matter for the Tasmanian Government.

Recommendation 13 **The Committee recommends that the Tasmanian Government:** • **evaluate the proposal developed by the Australian Property Institute with a view to incorporating its features in its review of the *Valuers Registration Act 1974*; and** • **consider amending the solicitors' Rules of Practice to require solicitors to obtain more than one valuation for properties securing mortgages under the solicitors' mortgage schemes.**	This is a matter for the Tasmanian Government.
Recommendation 14 **The Committee recommends that financial advisers ensure that the consumer information provided to investors in mortgage schemes is concise, in plain English, thoroughly researched and complies with ASIC disclosure and information requirements.**	Support. The *Financial Services Reform Act 2001* (FSRA) makes provision for licensing of financial advisers (including those giving advice on mortgage schemes) by ASIC. ASIC may impose conditions on a financial adviser's licence. Licensees are obliged under the FSRA to ensure their representatives are adequately trained and competent to provide financial advice. In this regard, ASIC has released Policy Statement 146 – Licensing: Training of financial product advisers. This sets out detailed training standards for financial product advisers to retail consumers to ensure that they will meet statutory obligations, among them, that they carry out their duties efficiently, honestly and fairly. In addition to this, the FSRA requires a financial adviser to give a retail consumer specified written material before transactions are entered into to enable the consumer to make informed decisions about whether to invest or not.

Recommendation 15 **The Committee recommends that ASIC and Garrisons Financial & Retirement Specialists ensure that compensation payments to be made under the rescue package negotiated between ASIC and Garrisons are made to clients without delay.**	Support. ASIC secured undertakings from Garrisons Pty Ltd, among other things, to pay interest at 6 per cent per annum by 31 December 2002, to clients who have been unable to redeem their investments in non-performing solicitors mortgage investment funds in Tasmania (and who have signed a deed of assignment with Garrisons). Garrisons has also to pay clients the capital investment offered by Garrisons on 13 June 2001 upon receipt of signed deeds of assignment to Garrisons (under these deeds, the clients will assign some rights to Garrisons). Under ASIC's agreement with Garrison, the latter agreed to report on payments made to clients in September and March each year.