



Senate Select Committee on Superannuation and Financial Services

Main Inquiry Reference (a)

Submission No. 149

Submittor: Department of Justice &
Industrial Relations
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The Secretary,
Senate Select Committee on Superannuation
and Financial Services,
Parliament House,
CANBERRA ACT 2600

Dear Sir,

re: *Inquiry into Solicitors Mortgage Schemes*

I am writing in response to your request for advice about the Department's involvement in relation to solicitors mortgage schemes.

The Department of Justice and Industrial Relations mission statement is as follows:

The Department of Justice and Industrial Relations, as a Tasmanian Government Agency, is established to provide advice to Government and to carry out its policies.

The Department contributes to a just and safe society by providing systems and services for the promotion and maintenance of rights and responsibilities, and the resolution of disputes, for the benefit of the Tasmanian Community.

The Department therefore provides policy advice to Government, and implements Government policy. It has service delivery functions across areas as varied as corrective services, the registration of births, deaths and marriages, and the regulation of Tasmania's opium poppy industry.

In addition, the Department provides administrative support to a range of constitutionally or statutorily independent bodies such as the Supreme and Magistrates Courts, the Ombudsman, the Chief Electoral Officer and the Anti-Discrimination Commissioner.

The *Legal Profession Act 1993* falls within the portfolio responsibility of the Minister for Justice and Industrial Relations and therefore is administered by the Department. As you are no doubt aware, under the *Legal Profession Act* the Law Society was continued in existence as an independent corporate body, and was given responsibility for investigations and disciplinary proceedings in respect to legal practitioners.

The Department, therefore, has no direct monitoring or regulating role in relation to solicitors mortgage schemes.

The Department's role in relation to the current problems arising out of failed solicitors mortgage schemes has been to provide policy advice to the Attorney General.

The Department has also provided communication between the Attorney General and the Law Society, in relation to complaints received by the Government from investors. These complaints usually related to what the investors believe was a lack of action by, or information from, the particular law firms involved, as well as what they perceive to be a lack of action by the Law Society. The Attorney General would forward these complaints onto the Law Society with a request for a report as soon as possible. When those reports were received they were forwarded on to the particular persons who had corresponded with the Attorney.

In addition to this communication role, the Department has also had representatives at meetings the Minister has had with the Law Society, when these issues have been discussed, and investors.

You also sought advice regarding a proposal for amendment of the *Legal Profession Act* in relation to the coverage of the Solicitor's Guarantee Fund.

On the 4th April 1995 and the 8th July 1996 the Department received requests from the Law Society for an amendment to the *Legal Profession Act* to extend coverage of the Solicitors' Guarantee Fund to defalcations

from monies received by legal firms from investors and lent on mortgage. Some of these mortgage practices are operated by companies set up by legal firms for administrative convenience and defalcations by those companies do not appear to be covered by the Act. The Society advised that the Australian Securities Commission (ASC) was particularly interested in the amendment to the Act and requested the Society to report progress in relation to it.

The reason for ASC interest was, no doubt, that one of the considerations taken into account by the ASC in providing Tasmanian solicitors mortgage investment schemes with an exemption from the prospectus provisions of the Corporations Law was that they were covered by the Guarantee Fund.

On 26 August 1997, Departmental representatives met with the ASC to discuss proposed amendments to the *Legal Profession Act* to extend the coverage of the Guarantee Fund to cover mortgage management companies operated by legal firms.

The ASC confirmed that the exemption for mortgage investment schemes under the Corporations Law applied to mortgage management companies, but that the exemption was expiring on 30 November 1997.

The ASC provided advice in relation to protective provisions governing solicitors mortgage investment schemes operating in other States as an alternative to the amendments in respect of the Guarantee Fund.

In determining whether or not to extend the class order exemption, the ASC advised that a relevant factor was the coverage by the Guarantee Fund and the level of that Fund.

The ASC advised that it had the powers to inspect and audit the financial records of mortgage investment companies operated solely by lawyers, but it had not exercised those powers for policy reasons and it assumed that the Law Society would ensure that its members complied with the terms of the ASC exemption.

On 17 November 1997, departmental representatives met with the ASC and the Law Society to discuss mortgage investments by lawyers. The issue for consideration was a possible extension of the class order for exemption which was due to expire.

At that meeting the Law Society was advised that the then Attorney-General had concerns regarding mortgage investments which related to prudential aspects. The Law Society was advised that it needed to review its current systems, and provided the Department was satisfied with the prudential aspects of the Law Society's supervision of mortgage investments, it would recommend to the Attorney-General that he amend the *Legal Profession Act* so that the Solicitors Guarantee Fund covered lending by mortgage investments companies.

The Law Society agreed that it was a matter for it to look at this whole issue and to come up with proposals to satisfy the Attorney-General. It was agreed that the Attorney-General would write to the Law Society indicating the areas of concerns in relation to mortgage investments which he would like to see addressed in the Law Society's review.

Subsequent to that meeting the Attorney-General wrote to the Law Society outlining his concerns regarding the current practices of lawyers in relation to mortgage lending and requesting advice in relation to a number of aspects. He advised that he would want to be satisfied in relation to all those aspects before considering an amendment to the *Legal Profession Act* so that mortgages made by mortgage investment companies are covered by the Solicitors' Guarantee Fund.

There was no response to that letter and the Act was not amended.

Yours faithfully,

Richard Bingham
SECRETARY

