

Senate Select Committee on Superannuation and Financial Services

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THE LAW SOCIETY OF TASMANIA



**SUBMISSION TO THE
SENATE SELECT COMMITTEE ON
SUPERANNUATION AND FINANCIAL SERVICES
SOLICITORS' MORTGAGE SCHEMES IN TASMANIA**

May 2001

The Law Society of Tasmania
Submission to the Senate Select Committee on
Superannuation and Financial Services
Solicitors' Mortgage Schemes in Tasmania

This submission to the Senate Select Committee on Superannuation and Financial Services ("the Senate Select Committee") is made by the Law Society of Tasmania ("the Law Society") in response to the advertisement inviting submissions on solicitors' mortgage schemes in Tasmania. This is part of the Senate Select Committee's general inquiry into prudential supervision and consumer protection for superannuation, banking and financial services.

There are no specific terms of reference for this part of the Senate Select Committee's inquiry. The Law Society has taken the view that it needs to provide the Senate Select Committee with an overview of the following:

- The Law Society of Tasmania
- the Tasmanian legal profession
- how solicitors' mortgage practices evolved in this State;
- details of the extent of solicitors' mortgage practices
- the Law Society's powers in relation to regulation and supervision of solicitors' mortgage practices
- the problems with the four solicitors' mortgage practices that are or have been the subject of investigation by the Law Society
- the Law Society's investigation of those four practices
- criticisms levelled at the Society about its management of the four practices
- ASIC's role under the *Managed Investments Act 1998* and the role of the Law Society in regulating solicitors' mortgage practices
- an assessment of what is outstanding and the likelihood of recovery in respect of the four mortgage practices

- the inquiry by the Tasmanian police.

The Law Society of Tasmania

The Law Society of Tasmania is a statutory body corporate. In its present form it was established by the Law Society Act 1962 but in one form or another there have been Law Societies in Tasmania for well over 120 years, since the Tasmanian Law Societies Act 1887 established separate Law Societies in the north and south of the island.

The Law Society's functions and powers include the regulation, promotion and representation of the legal profession in Tasmania. Its current legislative framework and powers are derived from the *Legal Profession Act 1993* ("the Act") and the *Rules of Practice 1994* ("the Rules") made pursuant to Section 17 of the Act. Copies of both the Act and the Rules can be downloaded from the following website: www.thelaw.tas.gov.au/.

The Rules of Practice are subordinate legislation drafted by the Parliamentary Draftsman, administered in the Department of Justice and certified by the Attorney-General to be in accordance with the law.

The Tasmanian Legal Profession

There are currently about 450 legal practitioners practising in the private profession in Tasmania. These in turn practise within 150 firms including sole practitioners who are described as firms for the purposes of the Act. More detail on the current composition and current profile of the Tasmanian solicitors is contained at **Attachment A**.

In Tasmania, legal practitioners are admitted as barristers and solicitors. In other words, it is described as a fused profession. A small number of legal practitioners choose to practise solely as barristers. They presently number approximately 12.

Under the Act, the Law Society is responsible for the regulation and supervision of all legal practitioners. As part of this role, the Law Society issues practising certificates to eligible practitioners giving them an entitlement to practise. All practitioners are required to hold compulsory Professional Indemnity Insurance.

Solicitors' Mortgage Practices in Tasmania

Solicitors' mortgage practices have existed in Tasmania for as long as the corporate memory of the Law Society goes back. The practice of some solicitors in Tasmania managing investments on mortgage of and for clients has a long history. It is a role traditionally played by the legal profession in Tasmania in the provision of mortgage finance, as well as playing a significant part in the professional practices of some in the profession.

It must be understood, however, that only a very small proportion of Tasmanian firms and solicitors have had any involvement in contributory mortgage schemes. A contributory mortgage fund is a fund where money contributed by a number of investors is loaned to a particular borrower. A pooled fund, in contrast, is one where investors' money is pooled and loans are made from the pool so that investors are not linked to particular borrowers.

In March 1992, as the result of the enactment of the Commonwealth Corporations Law which replaced the Companies Act, the Law Society made representations to the Australian Securities Commission (ASC - as it then was) for a Class Order Exemption which would exempt the Law Society from

compliance with certain provisions of the Corporations Law concerning investment of money by solicitors. We believe this was a process undertaken by similar institutions elsewhere in Australia. In its 1992 submission to ASC, the Law Society said:

“On the whole, the history [of solicitors’ mortgage practice] has been a most honourable one. The legal profession has had its defaulters but has not had its record marred by the traumatic and substantial collapses which have characterised the corporate life of Australia from its early days.”

The submission went on to recount that in the history of the legal profession in Tasmania, there have certainly been clients who have suffered loss and who have not been fully compensated. In 1992, the last known loss not wholly satisfied occurred in the decade of the 1960s. It was reported that since 1972 clients had suffered loss but always, so far as was collectively known to the committee (of the Law Society), there was complete compensation. In its representations to ASC, the Law Society undertook to establish rules which would govern the manner in which money invested was to be safeguarded. In fact, the Law Society’s proposed draft rules were included in its submission to ASC.

The Law Society was granted the initial exemption by ASC in 1992. Since then, the Law Society has made application annually to ASC and subsequently ASIC, for an extension of the Class Order Exemption. In its application to ASIC each year, the Law Society must satisfy ASIC that it has the capacity to supervise solicitor mortgage practices. The current Class Order Exemption expires on 31 October 2001 and a copy of the notification from ASIC dated 21 February 2000 approving the Law Society as an Industry Supervisory Body (ISB) is attached at **Attachment B**.

Later in this submission, the Law Society makes further points about its role as a regulatory body in the context of the *Managed Investments Act 1998*.

Law Society Rules

The draft rules proposed to ASC in 1992 were introduced concurrently with ASIC's Class Order Exemption. Division 2 of the current Rules sets out the requirements for what is described as "Controlled Fund Operators". There is no clear definition in the Rules of the expression "controlled fund operator". Rule 3 provides as follows:-

"controlled fund operator" means a fund operator that -

- (a) operates a controlled fund; and*
- (b) is registered under rule 67;*

Rule 67 provides as follows:

- 67** - (1) *A fund operator must not operate as a controlled fund operator unless it is registered with the Society.*
- (2) *A fund operator may apply to the society to register a fund operator as a controlled fund operator.*
- (3) *An application is to be –*
- (a) in writing; and*
 - (b) lodged with the Executive Director.*
- (4) *The Society is to register a fund operator as a controlled fund operator if it is satisfied that the fund operator will comply with the provisions of this Part.*

At the time of the commencement of the operation of the Rules, the Society through its then Executive Director, Mr Tony McMahon, established the register required by Rule 67. Firms were registered once they had provided details of the conditions and terms of investment. By 1993, there were approximately 30 firms on the Society's register of Controlled Fund Operators.

The Society discovered in 1997 that it had overlooked formally delegating to its Executive Director the process of registration of Controlled Fund Operators. However, in the course of his judgment in respect of the application for Default Orders in relation to the McCulloch & McCulloch fund Mr Justice Wright held that that did not affect the firm's status as a fund operator and did not prevent a Default Order from being made. It is clear therefore that that oversight did not in any way prejudice investors and that it in no way affected the Society's regulation of funds.

Extent of Solicitors' Mortgage Schemes

At the time of ASIC's initial Class Order Exemption, solicitors' mortgage practices had been operating in Tasmania for many years and had been operated successfully. By that, the Society means that there had been no major defalcation in relation to solicitors' mortgage practices.

The Society has no historical information and data which would indicate the amount of money invested through Controlled Fund Operators as at the commencement of the new Rules. The Society knows that as at November 1998, there were approximately 30 Controlled Fund Operators registered with the Law Society with approximately \$650M on investment. This was ascertained by a Law Society survey of the Controlled Fund Operators.

Currently, only 17 firms out of a total number of 150 firms are operating mortgage investment funds.

Investments by Controlled Fund Operators

A "Fund Operator" includes a firm which controls a fund of money for investment where the securities arising from that investment are held or controlled by the firm with authority to advance in the acquisition of mortgage or other securities. Pursuant to Rule 71, a Controlled Fund Operator is forbidden from investing money for investment other than with an approved institution or in a first or second mortgage or on loan to a short term money market dealer in accordance with conditions specified in the *Trustee Act 1898*.

Role of the Law Society in Regulating Controlled Fund Operators.

The Law Society's powers to regulate Controlled Fund Operators are not comprehensive. The Rules do not entrust the Society with any additional powers to inspect the records of a firm with a mortgage beyond those that permit inspection of a firm's trust account. The books of account and other accounting records relating to a Controlled Fund are taken to be part of the books of account and records of the related firm. The only powers of inspection are those that relate to a firm's trust account under Part 3 Division 2 of the Rules (Rule 74). All the Society was empowered to do under the Rules was to undertake an inspection at least once in every period of 12 months. The powers of inspection are given in Rule 50. A copy of the provisions of Rule 50 as **Attachment C**.

Until June 1998, the Society employed, pursuant to Rule 47 a Trust Account Inspector (a qualified accountant) who carried out inspections as required by the Rules. The Trust Account Inspector was an employee of the Law Society.

The Senate Select Committee needs to be aware that the nature of an inspection of trust accounts is that it is not and cannot be comprehensive. Of necessity, it is a random inspection of a sample of a practice's trust account records. Similar inspections are undertaken by other Law Societies and regulatory authorities in Australia. A sample of transactions of mortgage investments are selected for examination.

There is no requirement in the Rules for legal practitioners or Controlled Fund Operators to furnish the Society with an annual independent audit of their trust accounts. The Select Committee also needs to be aware that Controlled Fund Operators are not required to establish a special account. The money is all transacted through the solicitor's trust account.

The Society makes the observation that with the benefit of hindsight it is clear that the annual inspection was probably insufficient in respect of mortgage funds and that the legislation should have provided for an annual audit undertaken by approved external auditors. We can only assume that this was not perceived by the ASC who approved the Rules, the Parliamentary Draftsman who prepared them or the Department of Justice who, through the agency of the Attorney-General, certified them.

In 1998, because of financial constraints on the Law Society of Tasmania, the Law Society changed the inspection procedure it had previously adopted. It appointed a panel of authorised accountants in private practice from whom firms were required to appoint an inspector of their accounts. The person appointed had to be a member of the panel who was not the firm's own accountant.

In 1996, the Law Society became aware that there were problems in the management of two Controlled Funds, namely Andrew Hurburgh Macquarie Law and McCulloch & McCulloch. Later the Society became aware of problems involving two other funds, those operated by Lewis Driscoll & Bull

and Piggott Wood & Baker. In this submission the Society proposes to give an account to the Senate Select Committee of the problems with each firm and the steps taken by the Law Society to address those problems.

Default Orders, the Solicitors' Guarantee Fund and the Solicitors' Trust

Before considering each firm, the Law Society gives a brief overview of its role and the operation of Default Orders, the Solicitors Guarantee Fund and the Solicitors' Trust.

The significance of a Default Order should be explained to the Senate Select Committee.

The Society and the Trust operate independently of each other and have separate functions and powers. Both are bodies corporate established by statute. The Society has no functions or powers in respect of the Guarantee Fund. The Fund is administered by, and claims against it determined by, the Solicitors' Trust.

If the Supreme Court is persuaded that there has been a fiduciary default by a legal practitioner, it may make a Default Order. Upon a Default Order being made a Court Fund is established and any claim against the practitioner becomes a claim against the Court Fund. There is to be paid into the Court Fund such money from the firm's trust account as the court orders. If there is not sufficient in the Court Fund to satisfy claims against that fund, then there is to be paid into the Court Fund such money from the Solicitors Guarantee Fund as the Court orders.

In short, a Default Order may eventually give those who suffer loss of capital as a result of a fiduciary default, access to the Solicitors Guarantee Fund to cover that loss but the Act only permits claims against the Fund for loss of capital.

When a Default Order is made the Court may also make an order appointing a Manager to the firm (e.g. McCulloch & McCulloch) but a Manager may also be appointed without there being a Default Order (e.g. Lewis Driscoll & Bull). The appointment of a Manager permits the most effective pursuit of recovery of outstanding loans and realisation of securities at the least expense to investors.

The functions and powers of the Solicitors' Trust are contained in Section 97 of the Act; its main function being to administer and manage the Solicitors Guarantee Fund.

On the making of a Default Order in respect of a firm, the rights and interest of any person arising from any default incurred in respect of the which the Default Order was made are assigned to the Solicitors' Trust. In effect, the Solicitors' Trust stands in the place of the mortgagee on the realisation of securities.

In respect of those mortgages where the Court is satisfied that there is a fiduciary default (that is a breach of the Lending Rules under the Rules of Practice 1994), a Default Order is made.

Under the provisions of the Act, an Application for a Default Order in respect of a fiduciary default may be made by, the Law Society, or by a person who claims to have suffered loss or by a firm or legal practitioner corporation.

Section 3 of *Legal Profession Act 1993* defines "fiduciary default" as follows:-

"fiduciary default" means –

- (a) a defalcation, misappropriation or misapplication of money or other property held on trust by a legal firm or legal practitioner corporation; or*
- (b) the failure of a firm or legal practitioner corporation to account for that money or property held on trust by that firm or legal practitioner corporation;*

practice” as required by the Act. The order appointing Mr Leslie as Manager was made on 31 December 1996. On the same day, the Supreme Court ordered Mr Leslie to furnish a report on the management of the practice by 27 January 1997.

On 13 January 1997 Mr Hurburgh was struck off the Roll of Practitioners (for matters unconnected with the mortgage practice).

It quickly became apparent that Mr Hurburgh had been guilty of “fiduciary default” in the form of misapplication of money held on trust and invested through his mortgage fund. In consequence the Law Society successfully applied to the Supreme Court on 21 January 1997 for a Default Order.

The management by Mr Leslie of the mortgage fund continued, and through realisation of securities, and successful claims against the Solicitors’ Guarantee Fund, all investors recovered 100% of their capital.

In contrast with other firms which the Law Society has investigated, Mr Hurburgh managed a “pooled” fund.

McCulloch & McCulloch

Problems with this fund came to light when one of the partners (Mr Alistair McCulloch) informed the Law Society that he had not complied with the *Rules of Practice* in respect of four mortgages in his fund.

On 7 November 1997, the Society successfully applied for a Default Order in respect of those mortgages. By then Mr McCulloch’s partnership with his brother Mr Quentin McCulloch had been dissolved and Quentin McCulloch had commenced practice under the firm name of McCulloch & Associates as a sole practitioner.

Accordingly on 14 March 1998, the Society's Council revoked the registration of Alistair McCulloch (by then also practising as a sole practitioner) as a Controlled Fund Operator. On 28 May 1998 a senior practitioner, Mr Peter Joyce, was appointed by the Court on the Application of the Society to manage the fund and Mr Alistair McCulloch was suspended from practice.

On 22 August 1998, the Society's Council resolved to investigate the conduct of both Alistair McCulloch and Quentin McCulloch in respect of their administration of the McCulloch and McCulloch Mortgage Fund.

When Mr Joyce took over management of the fund, the total invested funds were approximately \$4.3M. In respect of those mortgages where a Default Order was appropriate, every investor has already received reimbursement from the Court Fund of 100% of invested capital amounting to \$1.665M.

The Society has successfully made two subsequent applications to bring further investments in other properties involved in the McCulloch Mortgage Fund within the terms of the Default Order. The most recent Order was made on 23 April 2001 and it is expected that will shortly result in return to investors of as much as \$1.5M.

In relation to other mortgages being managed by Mr Joyce, it is clear that some investors' funds may not be recoverable because borrowers cannot repay and, in some instances, have already been declared bankrupt. Those losses cannot properly be made the subject of Default Orders, as there is no evidence of a fiduciary default in relation to those loans on the part of the practitioner. Recovery action and/or realisation of securities is still under way in respect of the remaining invested funds totalling approximately \$1.2M.

The investigation into the practitioners' administration of their fund has been an extremely complex one and has inevitably taken considerable time. The investigation is continuing.

The Society has been criticised for the length of time it has taken to finalise this matter. The Society responds to these criticisms by saying the Society's ability to bring the investigation to a conclusion has been frustrated by:

- changes of counsel,
- in one case because counsel investigating the matter was appointed to the Supreme Court bench with the result that the process had to virtually begin again.

While the Society accepts that the investigation has taken a long time, and that both investors and the practitioners of McCulloch & McCulloch themselves can be justifiably concerned about that, the delay has been largely unavoidable and very substantially beyond the control of the Society.

With the benefit of hindsight, it may have been better for the Law Society to have limited its investigation to these practitioners' conduct, rather than pursue, as it has, a wide ranging investigation of all aspects of the management of the fund. The Law Society submits that in relation to the investigation of this matter, it has acted in good faith and on sound advice in undertaking the wide inquiry.

While the Law Society acknowledges that the delay in prosecuting the practitioners in this matter has been unfortunate this has not prejudiced investors. The Law Society moved immediately to appoint a Manager. It immediately set about to seek a Default Order, when there was clear evidence of fiduciary default and all investors in those mortgages the subject of the Default Order have been able to recover their capital, despite the fact that the professional conduct prosecution has not yet been undertaken.

The investigation is expected to be completed within the next few weeks. The Council of the Society will then have to consider whether there is any, or sufficient, evidence of professional misconduct to justify prosecution.

Lewis Driscoll & Bull

Lewis Driscoll & Bull was a firm operated by a sole practitioner, Thomas Peter Baron.

The Society became aware of irregularities in the management of the Lewis Driscoll & Bull Mortgage Fund in 1998 and moved immediately to appoint a manager to that practice. The Manager, Mr Peter Worrall, was appointed pursuant to an order of the Supreme Court under Section 119 of the Act on 11 December 1998.

After investigation of matters revealed in the early stages of management of the practice the Law Society successfully applied to the Supreme Court for an Order that was made on 12 April 1999 striking Mr Baron off the Roll of Legal Practitioners for professional misconduct in connection with the management of his mortgage fund.

No Default Order application has been made in respect of this fund because the Law Society has accepted independent legal advice that the available evidence is not sufficient to be satisfied that an application for a Default Order has reasonable chances of success. However that situation has been under constant review, and the Society has maintained the position that if that advice changes it will seek a Default Order.

The Society has been criticised for not seeking a Default Order. It has also been suggested that if investors applied for their own Default Order, they would carry a greater burden of proof. This is quite incorrect. It must be understood that any investor is free at any time to seek a Default Order, if he or she believes that the evidence exists to support an application.

Suggestions that have been made that the Law Society alone has standing to seek an order, or that investors carry a greater burden of proof of defalcation, are quite incorrect.

At the commencement of Mr Worrall's management of the fund, there was approximately \$7.5 million of investors' funds on loan to various borrowers. Of that amount, just over \$5.5M has already been recovered for investors leaving \$2M still outstanding. The amount of \$5.5M covers the return to investors of all capital and all interest from the realisation of the securities.

Proceedings have been taken to recover outstanding capital and interest. There are 103 investors who still have money invested through the firm. Of those:

- 56 investors have less than \$10,000.00 in capital remaining in the fund; and
- 47 investors have more than \$10,000.00 in capital remaining in the fund.

There are only 14 borrowers who owe all of the outstanding funds of \$2M.

The final realisation of investments and winding up of the firm faces a number of difficulties, some of which relate to the acknowledged downturn in the Tasmanian economy. The Manager is actively pursuing the realisation of the remaining securities.

Piggott Wood & Baker

The difficulties with the Piggott Wood & Baker Mortgage Fund came to light in late 1998. As a consequence of the Society's investigation, an Application has been made to the Supreme Court pursuant to Section 80 of the Act to hear and determine complaints of professional misconduct in respect of two former partners of the firm, Messrs Kench and Turner.

The allegations of professional misconduct against Messrs Kench and Turner concern the administration of the firm's mortgage investment fund. The matter has been ready for hearing for some time, but the hearing of the matter has been delayed by the fact that most of the judges have disqualified themselves from hearing the Application.

The matter is to be heard by Mr Justice Crawford in June 2001.

Shortly after commencement of the proceedings, an order was made by the Chief Justice that until further order, the applications should proceed in Chambers. Thus all interlocutory proceedings have been in Chambers and the Society has necessarily been unable to make any public comment of any substance in respect of them. Such formal interlocutory proceedings ordinarily are held in Chambers. That does not mean the hearing of the allegations itself will not be in open Court.

The hearing itself must, unless the Supreme Court otherwise orders, be in open Court (Section 80(2)). The Law Society's view is that, prima facie, the hearing should proceed in open Court. In the event that either Mr Kench or Mr Turner seeks an order that the hearing be in Chambers, it will be a matter for them to persuade the Court and for the Court to determine that application. The Society will not support such an application and will simply point to the legislation as requiring that the proceedings be in open Court.

The advice that the Law Society has from Piggott Wood & Baker is that almost all remaining investors in that fund are either waiting for recovery of outstanding loans or the realisation of securities, or the completion of litigation that has been commenced by the firm against valuers who the firm has been advised gave negligent valuations on which loans were based.

Throughout 1999, the then President, Mr Tim Bugg and the Executive Director, Mrs Jan Martin met regularly with the Attorney-General and with the Regional Commissioner of ASIC for the purpose of providing progress reports

on those funds under investigation by the Law Society. At one such meeting held on 22 June 1999 with the Attorney-General, Dr Patmore, Mr Richard Bingham, Secretary Department of Justice, Mr Peter Maloney Director of Legislation, Strategic Policy and Industrial Relations and a representative of the Treasurer, Mr Martin Wallace, the discussion focussed on concerns in relation to recent difficulties with the Piggott Wood & Baker Mortgage Fund. At that meeting it was agreed that whilst the Society should actively continue its investigations of Piggott Wood & Baker every reasonable effort should be made to minimise publicity in relation to the difficulties being experienced by that firm in relation to its mortgage fund.

There was considerable concern that publicity had the potential to cause a “run” on other mortgage funds invested in the State. It was agreed that such a “run” had the potential to be disastrous for, not only other mortgage funds, but the State’s economy generally.

The Outcome for Investors

The Law Society is unable to quantify for the Senate Select Committee what the final outcome is likely to be in respect of the four funds which it has investigated. In this part of the submission, it will deal with each fund separately.

Andrew Hurburgh Macquarie Law

As explained earlier in this submission, investors recovered 100% of their capital and there has been no loss to investors.

The Law Society is informed that an amount of approximately \$9.2M was repaid to investors from a realisation of securities, repayment of loans by borrowers and with some contribution from the Guarantee Fund.

McCulloch & McCulloch

The exposure of capital for this fund was approximately \$4.3M. As outlined earlier in this submission, \$1.665M has been refunded to investors. It is expected that an additional amount up to \$1.5M will be refunded to investors shortly.

The Society understands this will leave approximately \$1.2M outstanding, in respect of which there is continuing recovery action as referred to earlier in this submission. The Law Society understands from the Manager that some investors' funds will not be recovered, as some borrowers have already been declared bankrupt.

It is impossible to inform the Senate Select Committee of the amount that investors will not recoup. This will depend on how successful the pursuit of outstanding loans is and whether assets can be realised.

Some investors have sought to have their investments brought within the current Default Order. An Application to the Court by those investors was recently dismissed by Mr Justice Slicer and his Judgment is presently the subject of an Appeal. If that Appeal is successful further funds may be returned to those investors from the Court Fund.

Lewis Driscoll & Bull

This fund consisted of approximately \$7.5M of investors' funds at the commencement of the management. An amount of \$5.5M has already been recovered for investors leaving an amount of \$2M outstanding.

As detailed earlier in the submission, recovery work is continuing. There may be a shortfall in respect of this fund, but the Law Society is not in a position to quantify it. This will depend largely on the sale of properties. None of the

investors has yet had access to the Guarantee Fund as explained earlier in the submission.

Piggott Wood & Baker

It is very difficult for the Law Society to report on this fund. The Society understands that ASIC's audit established that the fund currently consists of approximately \$16M of investors' funds.

The fund is still being managed and operated by the firm and there has been no application for an Order for the appointment of a manager or any Default Order.

As has been referred to earlier in the submission, there are disciplinary proceedings in respect of two partners of the firm. Those disciplinary proceedings relate to the legal practitioners' conduct in respect of the firm's fund.

Summary Of All Funds

As can be seen from the above, it is impossible for the Law Society to quantify for the Senate Select Committee what losses might eventuate. It would be irresponsible, speculative and misleading for the Society to attempt to do so.

The Law Society suggests that ASIC is better placed to inform the Senate Committee of the current financial state of Tasmania's mortgage funds. ASIC will be aware of this because of its current audit. However some caution must be exercised in respect of estimates offered by ASIC because it is plain from the Society's discussions with ASIC that its assessment of potential losses includes all loans where the borrower is presently in default of repayment obligations to any extent at all no matter how transient that may be.

ASIC has a very different role to that of the Law Society. Of necessity, the Society's emphasis and focus must be on the legal practitioners and firms and default on their part. ASIC concentrates its attention on the borrowers.

Moreover, ASIC takes a very different view as to what constitutes default. If a borrower misses one payment, ASIC would say that the borrower is in default. This would of necessity inflate any estimate by ASIC of mortgage investment funds at risk, but does not necessarily mean any wrongdoing on the part of the practitioner.

Recent print media reports assert that \$20M is already lost to investors. The Law Society concludes this part of the submission by saying that those reports of a "loss" of \$20M are incorrect and not substantiated.

Police Inquiry in Respect of Mortgage Funds

On Tuesday 24 April 2001 the Tasmanian Police Commissioner announced a Police Inquiry into mortgage funds in Tasmania. The Society contacted the nominated Police Investigator and was advised that the inquiry relates to matters of which the Society is already aware and in respect of which it is already pursuing its own investigation.

At various stages the Society has reported matters to the Director of Public Prosecutions and/or to the Police. One fund to be investigated by Police was in fact referred to the Director of Public Prosecutions by the Society on 10 July 1997.

In October 1998 on enquiry from the Society the Director of Public Prosecutions reported that little progress had been made by Police. To date this matter remains unresolved by Police.

Managed Investments Act 1998 and ASIC

In the period between May 1992 and 1999, the Australian Securities and Investments Commission (ASIC) (and its predecessor, ASC), provided Class Order Exemptions for mortgage investment schemes operated by solicitors and finance brokers. This included Tasmania, where the Law Society was authorised as an Industry Supervisory Body, in respect of solicitors' funds as discussed earlier in this submission.

In the period when Class Order Exemptions were given, there were several failures of mortgage businesses throughout Australia, in some cases involving large amounts of money and large amounts of investment. The ASC (as it then was) commenced a review of the effectiveness of the regulatory regime applying to mortgage schemes governed by class order arrangements. It commissioned an independent analysis from a report into the industry which it received in September 1997. That review led to the enactment of the Managed Investments Act 1998.

The Managed Investments Act prescribes a new system of regulation for managed investment schemes in Australia. The legislation fundamentally changed the nature of the regulation that previously existed.

In October 1998, the ASIC issued a policy proposal paper on Mortgage Investment Schemes and consulted widely in respect of the most appropriate regulatory framework for mortgage investment schemes, having regard to the fact that the Managed Investments Act had passed. This included extensive consultation with Law Societies in Australia, including the Tasmanian Law Society.

The Council of the Society subsequently resolved that the Society would no longer be willing to act as a regulatory body for solicitors' mortgage schemes except for those in "run-out mode".

As a transitional measure, ASIC left in place the existing Class Orders which exempted certain solicitors' investment funds, under the supervision of the Law Society, from the prospectus, prescribed interest and securities hawking provisions of the Corporations Law.

ASIC also exempted solicitors carrying on managed investment schemes under the supervision of the Law Society from compliance with the new Chapter 5C of the Managed Investments Act.

On 20 July 1999, ASIC released an interim policy statement on mortgage investment schemes. The new rules took effect in December 1999.

Since December 1999, ASIC has been the regulatory body for solicitors' mortgage schemes. The Law Society's responsibility is to monitor the winding up of those mortgage practices which have elected not to make the transition to ASIC's regulatory regime. The Law Society's role is to ensure solicitors comply with the conditions imposed by ASIC on pre-December 1999 mortgages.

In February 2001, ASIC announced a nationwide audit of solicitors' mortgage schemes. It is understood that the audit focuses on the run out of mortgage schemes which elected not to make the transition to ASIC's regulatory scheme. Part of the investigation includes Tasmania and it is currently underway.

The Law Society understands ASIC's audit has identified a number of problems in winding down some Tasmanian funds, attributable to borrower default and the reduced value of properties in Tasmania, because of the downturn in the Tasmanian economy. The Law Society understands that the problems identified are not related to unprofessional conduct or professional misconduct on the part of the legal practitioners involved.

There are currently 17 solicitors' mortgage investment funds operating in Tasmania. Of those, 3 have sought from ASIC, and obtained, "responsible entity" status that permits them to continue to receive funds for investment. This has already placed them fully under the control of ASIC. The Law Society no longer plays any role whatsoever in the regulation of those funds.

One other firm has sought but not yet obtained "responsible entity" status.

The other funds are in "run-out mode". That is, they may not take any new funds for investment and must effectively be wound up by 31 October 2001. Any fund which has 20 or more investors as of 31 October 2001 will come fully under the control of ASIC and if not managed by a responsible entity, will be subject to whatever course of action ASIC then determines it should take in relation to them.

Present indications are that only four of the firms in current run-out mode may still have loans that will not be repaid or have loans that are not due before 31 October 2001. The total number of loans in that category is 34. There is only one firm that is expected to have more than 20 investors as of 31 October 2001. This firm has either not sought or obtained responsible entity status. In this firm's case, the number of loans expected to be still outstanding at 31 October 2001 is only 24.

Firms which as of 31 October 2001 have 20 investors or less will substantially fall outside ASIC's jurisdiction. They will, however, continue to be subject to various parts of the Corporations Law, and they will continue, to a limited extent, to be subject to Law Society regulation. As referred to earlier in this submission, the Law Society's powers are not extensive. The Law Society's role as a regulator of funds has always been limited to the powers conferred on it by Part 3 of the Rules (Rule 74). The Society has never had the extensive powers that are conferred on ASIC in respect of other investment funds and the powers which it now has in respect of responsible entities.

In its role as an Industry Supervisory Body for the purposes of the Corporations Law with the responsibility of supervising the "run-out" funds until 31 October 2001, the Law Society and ASIC are consulting to facilitate the orderly winding up of those funds that are going through that process. ASIC has not expressed any concern to the Law Society as to the Society's conduct of that process.

On Friday 20 April 2001, the President and Executive Director of the Law Society met with ASIC representatives in Tasmania as part of the national review of monitoring run-out schemes. The meeting was arranged at the Law Society's request for the purpose of consultation concerning the run-out schemes and certain aspects of the Law Society's supervision of some of them. The Law Society cannot disclose the details of that meeting, because it plainly involved various matters that must remain confidential in respect of particular firms and funds. The Law Society has obtained some advice and assistance from ASIC in relation to certain concerns that it has as to the difficulties encountered in winding up the McCulloch & McCulloch and Lewis Driscoll & Bull funds.

Criticism of the Law Society

Media reports have criticised the Law Society for a lack of action or vigilance in the regulation of solicitors' mortgage schemes. This criticism is neither true nor fair. There has been considerable misinformation published in the print media about the Society's role and function. In addition, there has been considerable confusing material published about Default Orders, the Solicitors' Trust, Court Funds and the Solicitors' Guarantee Fund. All of this has demonstrated an apparent lack of proper research or enquiry.

The problems with solicitors' mortgage funds are not simply due to lawyer misconduct. In the four cases detailed above, lawyer misconduct has been proved or is under investigation by the Law Society. The Society has demonstrated that it can and does effectively discipline legal practitioners who

do not comply with the *Rules of Practice* and, or, are guilty of professional misconduct.

A major problem encountered by solicitors' mortgage funds, as with many commercial ventures in Tasmania has also been the downturn in the Tasmanian economy. This has affected the capacity of some borrowers to repay or to meet their mortgage commitments. In addition, it has adversely affected the value of real estate in Tasmania.

In addition, there are always investors who seek a higher rate of return than that offered through the banks and financial institutions. In business, investments offering a higher rate of return, sometimes have higher risks attached to them. Businesses sometimes fail, or a borrower may no longer be able to service the mortgage. The Law Society submits that from the investor's point of view, it is no different from a person investing in the share market. There is no cast iron guarantee their money is safe and they have to make their own decisions about security and returns.

Much mischief has been caused by some financial advisers and others who have misled investors into believing that their investments were somehow fully guaranteed by the Law Society.

Solicitors' mortgage schemes have never been promoted by the Society or the profession in Tasmania as being 'guaranteed' or rock solid investments. Unlike other forms of investment (eg the share market) investors do have some recourse if they suffer a loss because of the professional wrongdoing of a legal practitioner. In this case, there can be resort to a Court Fund which is supplemented by the Guarantee Fund. This at least ensures that investors can recover their capital.

The Law Society is acutely aware of the hardship which losses from mortgage practices are causing many Tasmanians. It deeply regrets that some money will be lost. Where possible it will be recovered. As outlined above, the Law Society does not expect the losses will be as great as has been asserted.

The Law Society considers that much of the mis-information published in the print media has been irresponsible and has not assisted those investors who have not recovered their money.

10 MAY 2001



RECEIVED TIME 12:49 11 MAY 2001

PRINT TIME 12:55 11 MAY 2001

THE LAW SOCIETY OF TASMANIA

28 Murray Street, Hobart, Tasmania, 7000
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Phone: (03) 6234 4133 Fax: (03) 6223 8240
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FACSIMILE TRANSMISSION

TRANSMISSION OF 12 PAGES (INCLUDING THIS ONE)

DATE: 11 MAY 2001
COMPANY/FIRM: SENATE SELECT COMMITTEE
ATTENTION: MS SUE MORTON - SECRETARY
ADDRESS:
FAX NUMBER: (02) 6277 3130
FROM: JAN MARTIN – EXECUTIVE DIRECTOR

MESSAGE:

Dear Sue

SENATE INQUIRY – SOLICITORS’ MORTGAGE FUNDS

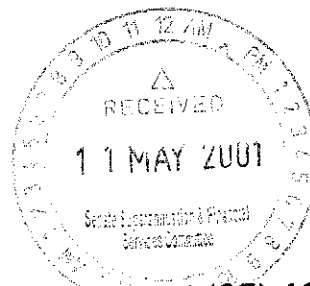
I refer to my ‘E’ Mail today forwarding the Society’s Submission to the Senate Inquiry.

Further to that ‘E’ Mail please find attached the 3 “Attachments” referred to in the ‘E’ Mail namely:

- Attachment ‘A’ A statistical profile of the Tasmanian legal profession.
- Attachment ‘B’ A copy of ASIC’s Class Order Exemption.
- Attachment ‘C’ Rule 50 of the Rules of Practice 1994 concerning Trust Account examinations.

Thank you.

JAN MARTIN
EXECUTIVE DIRECTOR



If you have problems receiving this facsimile please telephone (03) 6234 4133



ATTACHMENT 'A'

**STATISTICS – THE LEGAL PROFESSION
AS AT 1 SEPTEMBER 2000**

NO. OF FIRMS	SOUTH	NORTH	NORTH- WEST	TOTAL
9 Partners	3	0	0	27
8 Partners	2	0	0	16
7 Partners	0	0	0	0
6 Partners	1	2	0	18
5 Partners	0	3	0	15
4 Partners	6	2	1	36
3 Partners	5	1	4	27
2 Partners	8	6	5	38
Single Practitioners	47	12	10	69

Members of the Law Society

Partners in firms	104	50	26	180
Single Practitioners	47	12	10	69
Employed Practitioners	157	34	27	218
Community Legal Centres	3	3	1	7
Environmental Defenders Office	1			1
Women's Legal Service (Tas) Inc.	3			3
Interstate Practitioners				16

Barristers

Queen's Counsel (not Government Department)	4			4
Juniors	12	3		15

Associate/Non Practising 39

ATTACHMENT ' B '

**ASIC**

Australian Securities & Investments Commission

Regional Office - Tasmania
Level 2, Telstra Centre
70 Collins Street, Hobart
GPO Box 9827 Hobart TAS 7001
DX 195 Hobart

Telephone: (03) 6235 6800
Facsimile: (03) 6235 6811

Writer's direct line: (03) 6235 6817
Our reference: HRL 1999/10629
Your reference:

21 February 2000

Mrs Jan Martin
Executive Director
Law Society of Tasmania
DX 111
HOBART

BY FACSIMILE 03 6223 8240

Dear Mrs Martin

Solicitors Mortgage Investment Schemes

I refer to the relief from the managed investments and fundraising provisions of the Corporations Law which the Australian Securities and Investments Commission ("ASIC") has granted Solicitors Mortgage funds in Tasmania and I enclose a copy of class order 99/1039 for your information.

Those funds in Tasmania which are currently operating under the transitional relief for "run out schemes" (see part 5 of the class order) are due to lodge an audit certificate with ASIC by 1 March 2000.

The scope of the audit required is set out in the class order.

The audit certificate may only be signed by a registered company auditor as it appears that the alternatives are not available for Tasmanian schemes.

I am writing to ask that the Law Society remind those law firms which are operating "run out schemes" of their audit obligations under the terms of the class order relief.

If you have any queries regarding this matter, please do not hesitate to contact the writer.

Yours sincerely

Christopher Green
Manager Investments and Markets

**Australian Securities and Investments Commission
Corporations Law
Paragraph 601QA(1)(a) and Subsection 1084(2)
Exemptions**

Pursuant to paragraph 601QA(1)(a) and subsection 1084(2) of the Corporations Law, the Australian Securities and Investments Commission hereby gives the following exemptions.

1. Definitions

In this instrument:

an "Audit Certificate" is a certificate which:

(a) is signed by:

- (i) a registered company auditor;
- (ii) an "approved auditor" for the purposes of the Legal Profession Practice Act 1996 of Victoria;
- (iii) a "trust account inspector" or an "investigator" for the purposes of the Legal Profession Practice Act 1987 of New South Wales; or
- (iv) an employee of the relevant ISB who is approved for the purpose by ASIC; and

(b) states that the person who signs the certificate:

- (i) has within the last 6 months reviewed the compliance arrangements of the Mortgage Business and of any Unregistered Related Schemes (together "the schemes");
- (ii) has reviewed the loan books of the schemes. The certificate must state the total value of the loans managed under each of the schemes;
- (iii) has been informed by the operators of the schemes whether each of the schemes is operating as a registered managed investment scheme or under an exemption in this class order. In relation to each of the schemes, the certificate must specify the relevant exemption or state that the scheme is registered; and
- (iv) in the light of that review, has no reason to believe that the operators of the schemes have not complied or will not comply with the conditions of the relevant exemption or exemptions;

the "ISB conditions" are that:

(a) each loan under the Mortgage Business or any Unregistered Related Scheme

which is made after 17 December 1999 or is outstanding after 31 October 2001 is secured by a mortgage over land which has been valued at not less than:

- (i) 125% of the amount agreed to be lent and any equal or prior security; or,
- (ii) where the loan is insured in full by a person authorised to insure mortgages under a relevant law of a State, at not less than 105% of that amount.

The valuation must be based on the unencumbered present day value of the land at the time of entry into the mortgage, not taking into account any future development which is to occur on the land;

- (b) after 17 December 1999, interests under the Mortgage Business or any Unregistered Related Scheme are not offered or issued to persons whose usual addresses are outside the jurisdiction in which the security property is situated (except for local offers in border areas);
- (c) after 17 December 1999, interests under the Mortgage Business or any Unregistered Related Scheme are not offered by public advertising;
- (d) after 17 December 1999, investors under the Mortgage Business and any Unregistered Related Scheme choose the mortgages in which their funds are invested; and
- (e) after 17 December 1999, cash forming part of the scheme assets of the Mortgage Business or any Unregistered Related Scheme is held in a designated trust account which complies with the rules of the supervising body and is regularly audited;

Note: These conditions apply to new business and to renewal of existing loans, but not to the continued operation of pre-existing loans. An operator which cannot comply with these conditions, because of existing loans which will not fall due until after 31 October 2001 should approach ASIC with a view to obtaining individual relief.

"made", in relation to a loan means there is an agreement to provide funds, performance of which is subject only to making title to the property securing the loan and completion of documentation;

"Mortgage Business" means a managed investment scheme, the only investments of which are mortgages over real estate and deposits with Australian ADIs;

in relation to a Mortgage Business, a "Related Scheme" is any managed investment scheme concerning mortgages over real estate which is operated by the operator of the Mortgage Business or by an associate of the operator or of a partner of the operator. If a Related Scheme is not a registered scheme, it is an "Unregistered Related Scheme";

2. Schemes With Less than 20 Investors (Permanent Relief)

A person is exempt from Chapter 5C and Divisions 2, 3, 3A, 4, 5 and 6 of Part 7.12 of the Corporations Law in relation to:

- (a) operating;
- (b) offering for subscription or purchase interests in; and
- (c) inviting persons to subscribe for or buy interests in,

a Mortgage Business which together with any Related Scheme (whether or not it is a registered scheme) has no more than 20 members (applying subsections 601ED(4) and (7)).

3. Registering a Mortgage Business as a Scheme (Permanent Relief)

The operator of a registered scheme comprising a scheme, the only investments of which are mortgages over real estate and deposits with Australian ADIs is exempt from section 601ED to the extent that subsection 601ED(1) may require each mortgage operated under the scheme to be registered as a separate scheme.

Note: see also the modification relating to liquid schemes in Part 7

4. Small Industry-Supervised Schemes (Permanent Relief)

A person is exempt from Chapter 5C and Division 5 of Part 7.12 of the Corporations Law in relation to operating a Mortgage Business, if:

- (a) the Mortgage Business and any Unregistered Related Scheme are operated under the supervision of one of the following bodies (each an "ISB") and in compliance with any applicable rules and directions of that body:

 - Law Society of New South Wales
 - Law Institute of Victoria
- (b) the Mortgage Business and any Unregistered Related Scheme are operated in accordance with the ISB conditions;
- (c) the total principal of loans outstanding under the Mortgage Business and any Unregistered Related Schemes does not exceed 7.5 million dollars; and
- (d) the operator of the Mortgage Business lodges an Audit Certificate with ASIC, by 1 March 2000, or in accordance with a schedule agreed between ASIC and the relevant ISB.

5. Run-Out Schemes (Transitional Relief)

A person is exempt from Chapter 5C and Division 5 of Part 7.12 of the Corporations Law in relation to operating a Mortgage Business, until 31 October 2001, if:

- (a) the Mortgage Business and any Unregistered Related Scheme are operated under the supervision of one of the following bodies (each an "ISB") and in compliance with any applicable rules and directions of that body and with any additional requirements set out in the Schedule under the name of that body;

Law Society of New South Wales
 Law Institute of Victoria
 Law Society of Queensland
 Law Society of Tasmania
 The Finance Brokers Institute of South Australia Incorporated; and

- (b) the Mortgage Business and any Unregistered Related Scheme are operated in accordance with the ISB conditions or with any additional or alternative requirements set out in the Schedule under the name of the relevant ISB;
- (c) no new loans are made under the Mortgage Business or any Unregistered Related Scheme. Existing loans may be renewed, if ASIC has offered the operator of the scheme or an associate a securities dealer's licence which would authorize the offeror to operate the scheme and the offer has not lapsed or been withdrawn; and
- (d) the operator of the Mortgage Business lodges an Audit Certificate with ASIC, by 1 March 2000, or in accordance with a schedule agreed between ASIC and the relevant ISB. *- agreed as 1st June 2000 for Tasmania*

NOTE

John

A person is exempt from Divisions 2 and 5 of Part 7.12 of the Corporations Law in relation to an offer or invitation to invest in a loan renewed in accordance with paragraph (c).

Note: This transitional relief can be used pending registration under Chapter 5C, or the run-out of a scheme's book to qualify for continuing ISB relief or to reduce the number of lenders to less than 20. The conditions applicable to this exemption will cease to apply to a scheme, once it falls into one of the continuing categories. Where the operator of a transitional scheme secures registration of a scheme under Chapter 5C, existing business can continue under this exemption, or be transferred to the registered scheme. The prospectus relief will lapse on commencement of CLERP.

6. Small Industry-Supervised and Run-Out Schemes (Secondary Sales Relief)

The operator and a vendor of an interest under a scheme to which Part 4 or Part 5 of this instrument applies are exempt from section 1043D in relation to offering for sale an interest in an existing mortgage if the transferee of the interest is given:

- (a) a copy of all information in respect of the scheme provided by the scheme operator to the vendor at the time the vendor entered into the scheme; and
- (b) a statement of any information received subsequent to the date of the creation of the interest being sold and which is material to the decision of the transferee to invest in the scheme known by the scheme operator.

and the requirements of the relevant ISB are complied with.

7. Modification in relation to Registering Mortgage Businesses - Permanent Relief

Pursuant to paragraph 601QA(1)(b), the Commission declares that subsection 601GA(4) and Part 5C.6 will have effect in relation to the registered schemes to which Part 3 of this instrument applies, as if each reference in those provisions to a scheme which is liquid (or not liquid) were a reference to a mortgage administered under the scheme which is liquid (or not liquid), and references to members of the scheme were references to members who have interests in the mortgage. This does not apply to references to the constitution of a scheme.

8. Revocations

Pursuant to paragraph 601QA(1)(a) of the Law the Commission revokes the class exemptions below, all dated 23 December 1998, with effect from 18 December 1999:

- (a) Class Order [CO 98/2581];
- (b) Class Order [CO 98/2582];
- (c) Class Order [CO 98/2584];
- (d) Class Order [CO 98/2585]; and
- (e) Class Order [CO 98/2586].

Schedule

Queensland Law Society - Additional Conditions for Transitional Relief

1 The scheme operator or Queensland Law Foundation Pty Ltd, ACN 066 550 687 (QLF) as nominee of Queensland Law Society ("QLS"), holds current insurance cover of at least \$950,000 (mortgage fidelity insurance) in respect of direct pecuniary loss suffered by another person arising out of the person's fraudulent or dishonest acts in relation to a Mortgage Business conducted by the person :

2 Either QLF or QLS holds from the scheme operator a bond or bank guarantee under which an amount of not less than \$50,000 can be immediately and unconditionally demanded or called upon in respect of claims for pecuniary loss

arising out of the person's fraudulent or dishonest acts in relation to a Mortgage Business.

3 The QLF and QLS shall ensure that mortgage fidelity insurance is provided by an insurer authorised by law (and fully re-insured under a contract or contracts of re-insurance as may be appropriate with a re-insurer authorised by law) to enable claims to be made in respect of a period of up to 5 years following the expiry of the current term of the mortgage fidelity insurance cover held in respect of that person.

4 That QLS shall not add to, amend or revoke any rule affecting the conduct or operation by a person in connection with a Mortgage Business without ASIC's prior written consent.

5 The loan secured by the mortgage is repayable not more than 3 years from the date it is made.

Law Institute of Victoria - Alternative Condition for Transitional Relief

If the Mortgage Business is operated by a person whose name is entered on the Solicitor's Contributory Mortgage Practice register maintained by the Solicitor's Contributory Mortgage Practice Committee of the Law Institute then a loan forming an interest in the scheme, instead of complying with paragraph (a) of the ISB conditions, may be secured by a mortgage over the legal title to land situated in the Commonwealth of Australia (where the loan is uninsured), with a municipal valuation of not less than 400% of the total amount of the loan and all other indebtedness secured over the land with equal or prior security.

Note: The prospectus provisions in Part 7.12 of the Corporations Law will lapse on commencement of the Corporate Law Economic Reform Program Act, and the prescribed interest provisions will cease to apply when the transition to the Managed Investments Act is complete on 30 June 2000. The parts of this instrument which deal with those provisions will then cease to operate. Relief from the prospectus provisions of the Corporate Law Economic Reform Program Act will be continued under another class order.

Dated the 23rd November 1999


Signed by George Durbridge on behalf of the
Australian Securities and Investments Commission

*Division 11—Trust account inspectors***Examinations**

50—(1) A trust account inspector is to carry out an examination, at least once in every 12 month period, of each legal practitioner who holds a practising certificate.

(2) An examination is to consist of the following:—

- (a) an examination of the book-keeping system in each place of business of the legal practitioner to determine whether or not the system complies with the requirements of this Part;
- (b) a check of a sample of postings to each trust ledger from records of receipts and payments of clients' money;
- (c) a check of the arithmetical accuracy of those records;

- (d) a comparison of a sample of lodgements into, and payments from, the trust account, as shown in bank statements, with the records of receipts and payments of clients' money;
- (e) a check of the system of recording costs and making withdrawals in respect of costs from the trust account;
- (f) a sample of transactions recorded in each trust ledger during the accounting period in order to ascertain—
 - (i) whether the entries relating to those transactions are in accordance with the rights of each client as those rights appear to the trust account inspector from the documents held by the legal practitioner; and
 - (ii) whether the accounting has been carried out in accordance with this Part;
- (g) a check of the extraction of balances of the trust ledger accounts at any one date during the accounting period including—
 - (i) a check of the additions of the extraction of balances; and
 - (ii) a check of the reconciliation of the total of the balance with the balance shown in the bank statement; and
 - (iii) a check that any amount shown in the reconciliation as being money in hand was promptly deposited; and
 - (iv) direct confirmation with the bank concerned of the accuracy of the bank balance used in the reconciliation;
- (h) a check that, as at the date chosen for the check of the extraction of balances and the check of the reconciliation, the total of any debit balances in the trust ledger account was covered in accordance with rule 37;
- (i) a check of some money taken to the credit of the office account of the legal practitioner to ascertain that the credit was not money which should have been credited to a client's trust account;
- (j) an inquiry into the amount on deposit with the Trust.

(3) A trust account inspector may carry out an approved inspection of a legal practitioner's affairs if the inspection relates to the operation of that legal practitioner's trust bank account.

(4) The Council may fix and impose a scale of fees for an examination.

No. 229

Rules of Practice

1994

(5) A trust account inspector may carry out an examination in the presence of a legal practitioner appointed by the Council under subrule (6).

(6) The Council may appoint a legal practitioner to be present at an examination.

