



Senate Select Committee on Superannuation and Financial Services

Main Inquiry Reference (a)

Submission No. 151

(Supplementary to Submission No. 150)

Submittor: **Law Society of Tasmania**
GPO Box 1133
HOBART TAS 7001
Mr Phillip Jackson
President
 - (03) 6234 4133
 - (03) 6223 8240

THE LAW SOCIETY OF TASMANIA



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

May 2001

The Law Society of Tasmania

Supplementary Submission to the Senate Select Committee

on Superannuation and Financial Services

Solicitors' Mortgage Schemes in Tasmania

Complaints and Requests for Information

During the past four years the Law Society has received regular enquiries from investors about the four solicitors' mortgage practices and has responded promptly to all reasonable requests for information from investors. Some of these have been formal complaints. Those enquiries and complaints have been investigated by the Law Society.

The Senate Committee needs to be aware that the current staff of the Law Society comprise the Executive Director, one full time secretary and a full time administrative office position. The Executive Director, Mrs Jan Martin, has occupied the position since August 1997. She is a legal practitioner with extensive experience in legal practice and public administration.

The Law Society does not have the financial resources to engage any further staff.

Once a Manager is appointed to a practice, the Law Society no longer has any direct role to play in respect of that firm. The Manager, appointed upon the Law Society's application, is appointed by the Supreme Court and he or she is then required to report to the Supreme Court, not to the Law Society. In many cases of enquiry investors are referred to the Manager of the practice or, in the case of Piggott Wood & Baker, the Managing Partner, Mrs Mills.

The Tasmanian Ombudsman has publicly stated that the Law Society has, in three instances in respect of solicitors' mortgage practices, refused to provide

information sought to be obtained from it under the Freedom of Information Act.

The Ombudsman has taken the view that the Society is bound by the Freedom of Information Act because it is an "agency" as defined in the Act and that it is an "agency" because it was established for a public purpose. In her letter to "The Mercury" newspaper on 11 May 2001 the Acting Ombudsman claimed that the Society takes a different view because it disputes that it serves a public purpose. That is quite incorrect and that has never been the Society's position. The Society has simply cited and acted upon the advice that was given to it in March 1999 that ". . . the Law Society of Tasmania has available to it perfectly respectable arguments, not overruled by authority, that it is not subject to the Freedom of Information Act 1991 (and the Society) would be entitled to conduct its affairs . . . on the basis that until the Supreme Court holds to the contrary it is not subject to the Fol Act". That advice was based on a careful and detailed analysis of the Act and relevant case authorities. Both the Ombudsman and the Acting Ombudsman have, in the view of the Society, overlooked in forming their own opinions the important differences that exist between Freedom of Information legislation in Tasmania and similar legislation as it exists in other States.

Putting that to one side, the information that the Law Society has declined to provide is subject to legal professional privilege. The three requests that have been publicly referred to by the Ombudsman were made by investors in the Lewis Driscoll & Bull fund. The investors have been seeking information about why there has been no Default Order application made by the Law Society in respect of that fund. This is referred to in detail at pages 16-17 of the submission dated 10 May 2001. In particular the applicants wanted a copy of the legal advice obtained by the Society. This advice is subject to legal professional privilege – the Law Society is the client and the recipient of the advice. The Law Society has determined, as is appropriate, that it is not prepared to waive the privilege.

There are two reasons why the Society is not prepared to waive that privilege. First, the written advice contains information concerning a number of investors and borrowers which the Society cannot properly disclose to others. Secondly, the written advice does not stand alone and has been supplemented by verbal advice which significantly affects the substance of the written advice with the consequence that the written advice read alone may be misinterpreted.

The Law Society responds to the Ombudsman's public position by asserting that even if it was subject to the Freedom of Information Act, the requests that have been made would have to be refused because the applicants were seeking documents that would be exempt documents under the provisions of the Freedom of Information Act.

By letter to the Acting Ombudsman dated 11 December 2000, the Society accepted an invitation from her to discuss what public purpose would be served by making the Law Society subject to the Freedom of Information Act. The Society has said that that invitation has not been taken up. The Society stands by that statement despite the Acting Ombudsman publicly stating in her letter to the newspaper on 11 May 2001 that she ". . . did have some informal discussions with (the President of the Society)". That is quite incorrect. The fact is that the President of the Law Society has only ever met and spoken with the Acting Ombudsman on one occasion. On 26 March 2001, during drinks following a seminar conducted by the Medico-Legal Society at the Repatriation Hospital in Hobart, the President of the Society repeated the invitation which to date has still not been taken up. There has been no other discussion whatsoever between the President of the Law Society, or any other representative of the Law Society, and the Acting Ombudsman, concerning the Freedom of Information Act.

It is also meaningless for the Acting Ombudsman to say, as she did in her letter to "The Mercury" of 11 May 2001, that the "spirit and intent of the Fol Act apply to the activities of the Law Society". As any competent lawyer understands, the Society is either bound by the Act in its terms, or it is not. It

cannot be bound by the "spirit and intent" of legislation if it is not bound by the legislation.

The Law Society contends that its actions are entirely consistent with the spirit of the Freedom of Information legislation in any event. The Society has provided, and will continue to provide, to complainants and investors such information as it properly can provide to them regardless of whether it is bound by the Freedom of Information Act. The Act would give those people access to no more information than they have already had.
