Senate Select Committee on Superannuation and Financial Services

Main Inquiry
Reference (a)

Submission No. 208
(Supplementary to Submission Nos. 150, 151 & 201)

Submittor: The Law Society of Tasmania
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THE LAW SOCIETY

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Our ref:C11.1A:JMM/VMC 15 June 2001

Ms Sue Morton
Secretary
Select Committee on Superannuation
And Financial Services
Parliament House
CANBERRA ACT 2600

Dear Madam

RESPONSES TO SUBMISSIONS TO SENATE INQUIRY

I refer to previous correspondence forwarded to the Society seeking the Society's comments in relation to a number of submissions to the Senate Inquiry.

The Society has considered the responses and comments as follows:-

Submission No 125 – Mr Michael Spaulding

The Society has no comment in relation to this submission except to say that in the Society's view the submission has no apparent relevance to an inquiry into solicitors' mortgage funds.

Submission No 137 – Mr Patrick Toomey

Mr Toomey *"...represent[s] some forty six consumer investors..."* and is *"...a solicitor acting on their behalf in relation to the two matters in relation to McCulloch and Piggott Wood & Baker"*. (See SFS 995 opening paragraph). Whilst the Society would expect Mr Toomey to represent his clients in a fearless and assertive manner to ensure that their legal entitlements, if any, are met, Mr Toomey's submission must be considered in the light of it being put by him as their advocate and the risk of lack of objectivity that that might cause.

1. **Mr Toomey's Written Submission:**

A. **Legal Framework:**

Mr Toomey's references to provisions of *The Legal Profession Act 1993* ("the Act") and the *Rules of Practice 1994* ("the Rules") may be accurate, but they do little to assist the Committee to perform its function. In particular, Mr Toomey fails to explain either adequately or clearly that it is not just the Society which is

authorised by the Act to apply to the Supreme Court for a default order in cases of fiduciary default. The Act authorises a person who claims to have suffered loss or incurred liability of a kind referred to in section 112 of the Act as a result of a fiduciary default to apply for an order declaring a firm to be in default, leading to a Court fund being established in the Supreme Court (see section 111 of the Act). Section 112 of the Act refers to, among other things, compensation for the loss of trust money or other properties suffered by a client as a result of a fiduciary default. The Society has always been willing to apply to the Supreme Court for a default order in those cases where it has been clear to the Society that a default order is appropriate. The Society will not and should not apply for a default order unless it is so satisfied. Before deciding whether to apply for a default order in relation to any of the mortgage funds which have been highlighted at this Inquiry the Society sought advice from highly regarded independent senior counsel about the appropriateness or otherwise of seeking a default order in particular cases. The Society has sought default orders in those cases where it has been advised to do so.

The State's Attorney-General has this week announced his intention to introduce legislation to clarify who is entitled to apply to the Supreme Court for a default order. Although the Society believes that the Act is clear about that, it welcomes the proposed legislation if it removes any perceived doubt about this issue.

Mr Toomey quotes at length from the Society's 1992 submission to the ASC (as it then was) in support of the proposition that mortgage schemes in Tasmania operated by law firms should be exempted from compliance with the Corporations Law. The Society does not resile from the submission it made. At the time it was made it accurately reflected the Society's experience with mortgage investment schemes. It reflected the Society's reasonably held beliefs as to the future operation of such schemes. However, the extent of mortgage schemes grew considerably in ensuing years, leading the Society to conclude in late 1998 that it was no longer able to be the regulatory body for controlled fund operators (law firms wishing to conduct mortgage schemes). At that time the Society informed controlled fund operators that in future they would have to comply with the Managed Investments provisions of the Corporations Law and be subject to the control of ASIC. Since that time the Society has continued to be a regulatory authority, but only so far as those mortgage schemes which are being wound down. Most controlled fund operators have either established responsible entities or transferred control of their mortgage schemes to responsible entities to ensure compliance with the Corporations Law.

B. The Operation of Solicitors' Mortgage Schemes:

Mr Toomey's description of the nature of mortgage schemes is generally accurate. However, of significant concern to the Society is his implicit suggestion under the heading *"Financial Advantages for Firms"* that law firms generally have acted either unethically, in breach of trust and/or contract in relation to the payment of fees and interest. Mr Toomey's wide sweeping comments in relation to these issues are made without providing any corroborative material. For example, he asserts that: *"The practice of the firms' voluntarily effecting payment to investors on the due date while reserving to*

themselves entitlement to benefit from the default or penalty rate allowed them to hide the existence and the extent of a mortgagor not paying interest" (point 2.4, page 6). This suggests that it was a wide spread practice. He produces no evidence to support that proposition.

Mr Toomey refers to trailing commissions (point 2.5, page 6). He appears to suggest that firms generally have not informed investor clients of *"trailing commission"*, without producing any material to support that proposition.

Under the heading *"Defective Operations of some Schemes"* on page 7, Mr Toomey again refers to legal principles, suggesting either directly or impliedly that breaches of those principles have occurred, but without substantiating those allegations.

Under the heading *"Supervision by the Law Society"* (point 4, page 7), Mr Toomey asserts that any defect in a mortgage scheme which would have been uncovered by an audit and not by an inspection results from the Society's voluntary circumscription of its own powers. This is arrant nonsense. Whether an examination of books of account is described as an inspection or an audit, such an examination by its very nature can be no more than an examination of a sample of records, not the entirety of records.

It is worth noting that in August, 1997, at the request of the Society, and because of concerns raised by a member of the Society's Executive Committee about the operation of the Lewis Driscoll & Bull mortgage practice, the Society's trust account inspector inspected both that firm's trust account and mortgage register. The inspector concluded that: *"The records of this practitioner are well maintained and it would appear that particular care and attention is given to the operation of the Mortgage Fund"*. Although the inspector expressed concern about the spread of some loans, he concluded that that was an issue over which the Society had no control and that the firm was conducting its affairs in accordance with the Rules of Practice. It was subsequently discovered in late 1998, when a manager was appointed by the Supreme Court at the request of the Law Society to manage the Lewis Driscoll & Bull practice, that there were problems with some of the mortgage loans operated by that firm. However, this example highlights the inaccuracy of Mr Toomey's assertion.

C. **What amounts to a default and what happens on a default (points 5 and 6, pages 7 and 8):**

As has been already noted in this response, the Society rejects Mr Toomey's opinion about the Society's responsibility in applications to the Supreme Court for default orders. The Society has always acted on independent advice about whether or not it has been appropriate to obtain a default order in particular cases. An investor disenchanted with the Society's view and who believes he/she has grounds for a default order is entitled to apply to the Supreme Court for such an order.

D. **Actions of the Law Society after default (point 7, page 9):**

Andrew Hurburgh – Macquarie Law

Investors did not receive compensation for interest lost because the Supreme Court considered that it was not appropriate that they receive interest. The Court concluded that the principal purpose of the Act is to protect capital sums.

McCulloch & McCulloch

The Society limited its application to the loans referred to on the advice of senior counsel. Investors are unlikely to receive compensation for interest lost because of the view expressed by the Supreme Court in relation to the Hurburgh fund. The Society acknowledges the complaints lodged by Mr Toomey's firm against McCulloch & McCulloch. The Society has previously acknowledged that there has been delay with the finalisation of these complaints. It regrets that, but the Society now has sufficient information to enable it to make a decision about the merits or otherwise of the complaints made against McCulloch & McCulloch.

Piggott Wood & Baker

The Society has not made an application to the Court for default orders because of advice from senior counsel that it was neither appropriate nor necessary to do so. Investors disenchanted with that decision are entitled to apply to the Supreme Court under the Act if they believe that they have grounds for a default order. The Society rejects Mr Toomey's assertion that investors who instituted proceedings have not received co-operation from the Society. Mr Toomey has attempted to use the Society as a vehicle to assist him with the civil litigation he has been conducting on behalf of his clients. Although Mr Toomey's firm has filed a writ against the Society, neither he nor his clients have taken any action in relation to the writ.

The Society has had considerable contact with Mr Toomey about the release of documentation by Piggott Wood & Baker. It concluded, quite properly in its view, that Mr Toomey was seeking the Society to use its investigative powers to assist him to pursue civil remedies on behalf of his clients.

E. **Examples of breaches by some firms (point 8, page 10):**

The Society has sought or is seeking default orders in relation to those McCulloch & McCulloch mortgages which senior counsel has advised warrant a default order. If Mr Toomey genuinely believes that there are other instances of default by that firm, his clients are entitled to apply to the Supreme Court for a default order.

The Society sought advice about obtaining a default order in relation to Piggott Wood & Baker mortgages. Acting on that advice it has not sought a default order. Again, if Mr Toomey is genuinely satisfied that a default order is

appropriate then his clients are entitled to apply to the Supreme Court for such an order.

2. **Mr Toomey's Verbal Submissions:**

Mr Toomey is patently wrong in claiming that a lack of supervision by the Law Society caused funds to be depleted to such an extent that interest was not capable of being paid (see paragraph 5 SFS 995). Interest was not paid in relation to the Macquarie Law – Hurburgh fund because the Supreme Court decided that it was not appropriate for interest to be paid.

Mr Toomey's proclivity towards wide sweeping statements and generalisations has caused him to state: *"but most of the money has been caught up on exactly that type of investment. In other words, they were lending against a pipe dream"*. (See second complete paragraph SFS 997, last two sentences). This suggests that all firms with mortgage investment schemes were engaged in that type of practice. This is an outrageous and totally unfounded allegation.

Mr Toomey refers to an alleged lack of co-operation by the Society in relation to the provision of information (see first paragraph SFS 999, last two sentences). This point has been addressed earlier in this response. In particular, the Society concluded that Mr Toomey was attempting to use the Society's investigative powers for civil litigious purposes on behalf of his clients.

Mr Toomey refers to *"all of these losses"* (see second last paragraph SFS 1002). No one can categorically state that there will be losses of capital sums. If there are losses, they cannot be quantified at this stage.

Submission No 139 – Mrs Janice Holland

The Society has no comment in relation to this submission except to say that in the Society's view the submission has no apparent relevance to an inquiry into solicitors' mortgage funds.

Submission No 158 – Mrs P McIntyre

Although the Society considers that Mrs McIntyre's submission is not relevant to the professed aim of the Committee's Inquiry, her allegation of conflict of interest on the part of the former President of the Society, Mr Bugg, is ill informed and warrants a response. Further, and importantly, Mrs McIntyre fails to mention that her and her husband's investment with Piggott Wood & Baker was repaid in full at an early stage and after considerable assistance from the Society.

The Society considers Mr Bugg's letter dated 14 July 1999 to Mr and Mrs McIntyre, and annexed to Mrs McIntyre's submission, fully addresses the question of alleged conflict of interest. Mr Bugg did not become aware of his firm's involvement on behalf of Piggott Wood & Baker in relation to threatened action against the ABC until after the event. On becoming aware of his firm's involvement he took immediate steps to prevent his firm from continuing to represent Piggott Wood & Baker.

Submission No 164 – Mr P Kang-Scheit

The Society has no comment in relation to this submission except to say that in the Society's view the submission has no apparent relevance to an inquiry into solicitors' mortgage funds.

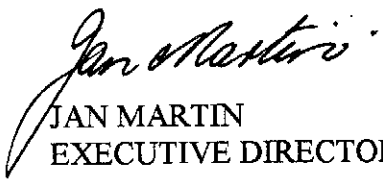
Submission No 172 – Mr James Turner

The Society has no comment in relation to this submission except to say that in the Society's view the submission has no apparent relevance to an inquiry into solicitors' mortgage funds.

Piggott Wood & Baker

The Society refers specifically to paragraph 5 on page 2 of the submission. It refutes the proposition that the fact that no Default Order has yet been sought in respect of Piggott Wood & Baker's fund means that the Society is satisfied that the fund was operated entirely in accordance with the Rules of Practice. This is not correct. No such conclusion has been reached.

Yours faithfully



JAN MARTIN
EXECUTIVE DIRECTOR