

Investing with *safety*?

Product comparisons:

- Lower returns....Term Deposits

Term Deposits offered by banks, building societies, credit unions and other prudentially regulated institutions. Lower risk because the institutions are specially regulated.

- Medium returns....Mortgage Debentures

Offered by companies through a prospectus. By law must be secured by first mortgage over land given to the trustee. Loan to valuation ratio may not exceed 60%. Investors have a trustee to act for them. Accuracy of land valuation is a key issue. Typically medium returns.

- Medium returns.....Debentures

Offered by companies through a prospectus. By law must be secured by first mortgage over land or a 'charge' over tangible property sufficient to repay the money raised.

Investors have a trustee. True value of land or other property is crucial.

Typically medium returns.

- Higher risk.....Unsecured note or unsecured deposit notes.

Offered by companies through a prospectus. Not required to have a first mortgage over land nor any 'charge' over tangible property. Investors rely entirely on the financial strength of the company.

ASIC Editorial note:

If fixed interest investments are offered to you without a prospectus, you can check with ASIC's Infoline by emailing infoline@asic.gov.au to see if the offer is lawful.

Source; The Comet (APSL) Aug/Sept 2003

We are all aware of the "Lower Risk category, ie Banks and Building Soc interest rates. Some of us aware of the medium interest rates and the reduced confidence of a guaranteed return.....Those that hoped for higher interest with security over property soon found out that the 'First' were the banking institutions, but not the investor...he was the loser!

Trustee or Custodian ‘supervised’.

With the failures of numerous ventures throughout Australia of non trustee supervised companies [“First” Mortgage schemes] some companies are now offering ‘Medium interest’ **with** trustee or custodian supervision (but not guaranteed).

‘The Custodians Role’The Public Trustee of Queensland) in this case....

The Public Trustee of Queensland and ***** entered into a custody agreement in 1999, through which ***** appointed The Public Trustee of Qld as custodian of the assets over the Mortgage Trust.

The responsibilities of the custodian under the custody agreement include (in this case);

- To receive all monies subscribed;
- To act as a custodian of all cash and investments of the Mortgage Trust, including holding title documents relating to the underlying securities;
- To act on the instructions of ***** and its authorised personnel; and
- To use all due diligence and vigilance in carrying out its duties.

(The Public Trustee’s custodial systems are audited by the Qld. Audit Office)

Mortgage Trust;

*The Mortgage trust is designed to provide investors with secure, regular income from a pool of high yielding and secure first mortgage Loans. All money provided by Investors is placed in a single pool and, subject to stringent approval procedures, ***** advances funds to borrowers which are secured by a registered first mortgage over the security property.*

Generally, borrowers are required to make monthly interest payments.

Prospectus “A”

On Call offering 7.1% pa

Term Fixed – 12 months offering 8.35% pa

The above was lodged with ASIC on 27th Aug 2002.....the manager, nor their associates or directors guarantee the success of this investment, the repayment of capital or any particular rate of return.

Prospectus “B”

Term 6 months offering 5.75% pa

Term 5 years offering 9.50% pa

Newspaper advert;

“Earn up to 9.5% pa...paid monthly.

The above 'promotions' indicate the continuing invitations to risk your capital, with no security or guarantees for the investor. BUT, the 'sales pitch' reassures all the credentials for fixed and secured returns without liability.

As an indication of *fraud or deceit, or just plain lies*.....the following are the facts with failed mortgages in other states.

First Mortgage and LVR (66%) details 8/4/03

Federal Court decision 2nd April 2003

Justice Heerey (Federal Court), handed down his decision as to who has priority on the net proceeds of the sale of the property in question: namely Rutherglen Holiday Village at Hadspen, Tasmania.

There are five 1st mortgages in this loan.

Justice Heerey has decided that - and we cannot quote the total seven-page document - but it is basically favouring the FIRST REGISTERED MORTGAGE - with any surplus funds going to investors in SUBSEQUENT MORTGAGES in order of priority of registration.

Source; A Seir****. 2/4/03

Law Society Senate Submission No. 150 (p8) quote:-

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".

Attachment to Sub. 137 enlarges upon this theme.-

Source; JH...Tas 7 April 2003

Procedure of registered mortgages:

The actual documents don't depict whether First, Second, Third, ranking etc. It simply states the word MORTGAGE.

As they are sent in to be lodged at the Titles Office, they (TO) simply register each one in order of processing. For me and everyone else to ascertain whether Mr X is on a first second or third etc, we simply look at the title (which the lawyers knew that was never the case - lenders never bothered to search and check up on the lawyers work) and the first mortgage on the list is deemed "FIRST MORTGAGE" etc for

ranking purposes- It is like, if you were in a queue for tickets: you are the first in the queue but you do not have a label saying "first in the queue."

The law takes the first one standing in this position as the rights to the proceeds of sale and the rest take the leftovers.

That is our Torrens Title system and is an excellent one.

That gives priorities to the Banks that a registered first mortgage is first in line and they do not advance the money until THE DAY they search the property a second time to ensure no one sneaked another mortgage ahead of them in the queue, say the day before.

When that document is executed, lodged and stamped the process is complete (set in cement) and the money is handed over to whoever is to receive the cash.

The title then becomes the ABSOLUTE SECURITY for the bank and anyone else who wants a first mortgage. This is precisely why the lenders should have paid their own independent solicitors to do the registration and settlement on their behalf, not the solicitors who acted for the borrowers and the planners. An independent solicitor (a competent one) would have not handed his clients money over unless the titles office verified there were no other mortgages in place on the hour of registration and handover of monies.

However, the lawyers in question cleverly assured the victims they would look after everyone's interest and failed to advise the lenders to seek independent advice. That is the case, I believe, against the legal fraternity involved in this disgraceful mess.

LVR (66%)

The 66% Loan/Value ratio was an arrangement dating back to the original discussions between ASIC and all the State law Societies to take charge of their own regulation by enforcement of discipline against their own.

ASIC agreed to self-regulation on the basis of INSURANCE.

The Law Society in each state had to provide PII Insurance arranged through the Law Societies network and all member solicitors had to comply and contribute also to a Fidelity Fund.

The Insurance Companies would only insure against mortgage lending if no greater than 66% of LVR due to the risk of over inflation of valuations as was prevalent in the eighties across Australia. Hence the new provisions in Corp Law in 1992.

Rules of Practice are important as the mechanical means of the Law Societies "policing" the activities.

It appears Tasmanians were lending mortgage money without insurance?

All were stated to comply with 66% but it is now obvious the old practices of **over valuation** crept back into the system and it may mean a loophole for the insurers even if insurance premiums were being paid.

If criminal activity then claim relies upon the solicitors Fidelity Funds that have been wiped out. The only remedy is a case against the Government.

The latest lobbying by solicitors to Federal Govt is a situation of "proportional liability." ie the consumer wears a portion of the risk if dealing with these legal morons.

Once that is made law (very soon) then the Tasmanian lenders will only be seeking partial recovery.

Rules of Practice Page 27 Part 5

MONEY FOR MORTGAGE INVESTMENT

Division 1-Mortgages and securities

62-(1) A first mortgage is a mortgage that has priority over any other encumbrance or over any charge, other than a statutory charge, in respect of the land to which it relates and under which the amount advanced does not at the time of any advance under the mortgage exceed-

- (a) Two-thirds of the security valuation if the mortgage is not insured; or
- (b) 90% of the security valuation if the mortgage is insured in respect of so much of the amount advanced as exceeds two-thirds of the security valuation; or
- (c) 50% of the government valuation in force at the date of the mortgage if there is no security valuation.

Source; Jan H. Tas.

Types of Investment Schemes.

There are various types of managed investment schemes under the Corporations Law, namely,

- Registered schemes. A scheme must be registered if it has more than 20 members, is promoted by a person who is in the business of promoting managed investment schemes or is subject to an ASIC requirement that it be registered.
- ASIC - exempt schemes. ASIC may exempt schemes that may otherwise be required to be registered. ASIC has exercised its power both by class order and

on a case-by-case basis.

- Other unregistered schemes. These schemes are those that do not require registration because there are fewer than 20 members, or all interests in the schemes that have been issued are excluded from the fundraising requirements."

Source; <miareview.treasury.gov.au/content/publicsubmission.asp>

Submissions to be forwarded.

The fact is that ASIC maintained the database of the KNOWN (known to ASIC and State authorities) rogues: why were those operators permitted to set up another dozen \$2 companies to conceal their exploits?

1. Why has ASIC decriminalised that conduct which Parliament deems and continues to deem illegal?
2. Why were the obvious patterns ignored by ASIC when the same model surfaced in the sixties and thousands lost money in those days?

Due to very few prosecutions those who played a major part in lost funds have been permitted to resurface as "honest" financial planners and advisors.

3. Why were issues of public safety and economic security ignored due to the fact that ASIC knew who the major offenders were and the law firms involved yet did nothing to warn the public?
4. Why did ASIC not consider the fact that information known to ASIC could have been vital in protecting the public for the past seven years?
5. Why didn't ASIC prosecute those responsible for these scams, involving overvaluation of assets, in order to safeguard the public interest and send a clear message to the industry that such behaviour and conduct would not be tolerated by ASIC?
6. Why did ASIC tolerate such behaviour for seven years?
7. Why didn't ASIC pass on the misleading activities of the industries involved to the ACCC for their scrutiny?

Freedom of choice is a very valued aspect of Australian lifestyle, but Fraud and deceit are not.

Truth in sentencing is important, just as much as truth in Advertising.

Superannuation.....a different matter??

Superannuation is a more complex and detailed source of information.....part of which is shown below.

Both sides of politics are clamouring for the 'moral' ground on superannuation but mortgage investments don't claim the same attention. *The risk is left to those who can afford the loss!!!!*

Part 23 of the Superannuation Industry (Supervision) Act 1993 (SIS Act) enables a trustee of a superannuation fund to apply to the Minister for a grant of financial assistance where the fund has suffered a loss as a result of fraudulent conduct or theft. The Minister must be satisfied that loss has caused a substantial diminution in the fund's assets leading to difficulty in paying benefits, and that the public interest requires a grant to be made. The first grant of financial assistance under the provisions of Part 23 of the SIS Act occurred in 2002.

The issue of compensating members affected by fraud or theft in superannuation funds was raised in the October 2001 Issues Paper released by the Government, *Options for Improving the Safety of Superannuation*, which can be found on the Department of Treasury webpage at

<http://www.treasury.gov.au/content/superannuation.asp?ContentID=344&titl=Superannuation>.

The Final Report of the Superannuation Working Group (SWG) into the Issues Paper recommended that the provisions not be changed at that time, but that the Government should review the operation of Part 23 and consider possible amendments to it, in consultation with relevant stakeholders, once the first decision under Part 23 had been made. In responding to the SWG recommendations, the Government agreed to review the operation of Part 23.

The Aust. Securities Comm (ASIC was established as an independent body in 1989. The aims were to protect the interests of companies and investors by providing information about companies, helping businesses to interpret the law and taking action against 'offenders'.

Source; Annual report.

ASIC also published "In the last 10 years more than 100,000 investors have lost their life savings. www.asic.gov.au/fido/fido.nsf~

The Aust Securities and Investments Comm. (ASIC) must consider a number of factors when deciding what enforcement action to take; whether it is to seek a criminal conviction, a civil penalty, a voluntary undertaking or some other type of remedy. ASIC would need to determine whether evidence it possesses would be sufficient to support a prosecution.....criminal offences must be proved 'beyond reasonable doubt', whereas civil proceedings are usually determined 'on the balance of probabilities', which is a lower burden of proof.

ASIC also needs to decide which remedy will provide the best outcome for investors who may have lost money. For example, it may be preferable for ASIC to seek compensation for investors rather than to seek custodial sentence.

In any event, the fact that ASIC takes civil action does not preclude its ability to take further criminal action in respect of the same conduct.

It is noted, ASIC is an independent body that carries out its activities at arms length from the executive government.

Source; Sen I Campbell 19 March 2003

In contrast to many countries, the Australian financial system is not protected by an explicit guarantee over the deposit and insurance policy liabilities of financial institutions. Responsibility for keeping financial promises rests squarely with the board and management of financial institutions. Recognising the importance of financial stability to the economy, the Government also applies an additional layer of prudential regulation to promote sound-risk management and provide for early warning and intervention where an institution faces financial difficulty.

Source; SIS Part 23 Gov't paper

End.

With apologies to any sources not acknowledged and many thanks to all contributors.

Richard D Holmes.