SELECT COMMITTEE INTO THE FINANCE BROKING INDUSTRY IN WESTERN AUSTRALIA

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
THURSDAY, 5 OCTOBER 2000

SESSION 1 OF 1

Members

Hon Ken Travers (Chairman)
Hon G.T. Giffard
Hon Ray Halligan
Hon Norm Kelly

Committee met at 2.15 pm

SOLOMON, MR DOUGLAS HOWARD,
Barrister and Solicitor, Solomon Brothers,
Level 40, Exchange Plaza,
2 The Esplanade,
Perth, examined:

The CHAIRMAN: Good afternoon. On behalf of the committee, I welcome you along today. I will take the opportunity to introduce my colleagues, Hon Ray Halligan, Hon Norm Kelly and Hon Graham Giffard. Hon Greg Smith cannot be with us today.

I have a few questions to ask you and then I will invite you to make an opening comment. You have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Mr Solomon: Yes, I have.

The CHAIRMAN: These proceedings are being recorded by Hansard. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. A transcript of your evidence will be provided to you and I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session before speaking about the matter. Further, the committee may of its own motion resolve to take evidence in closed session. The taking of evidence in closed session may be relevant when, for example, the committee believes the evidence may breach term of reference 3 of its inquiry that states -

> The committee in its proceedings avoid interfering with or obstructing any inquiry being conducted into related matters and in particular inquiries by -
>
> (a) the police;
>
> (b) any liquidator or supervisor of any company;
>
> (c) the Gunning inquiry;
>
> (d) the Australian Securities and Investments Commission; or
>
> (e) any prosecution.

Further, even if your evidence is given to the committee in closed session, that evidence will become public when the committee reports on the item of business to the Legislative Council unless the Legislative Council grants an ongoing suppression order at the time the committee tables its report. The committee has some questions to ask you later but if you would like to make an opening statement to the committee, please do so.

Mr Solomon: I have prepared this statement at the invitation of the committee in my own time, at my own expense and on a pro bono basis. I have done a lot of work in the past two years on that basis. I hope that what I have to say will be viewed as in the public interest. I request that every word I have to say be public. I request that I be permitted to read my opening statement and give copies to the media. I have provided seven copies asked for in your letter and I have provided it electronically as well. I can therefore give you that and then read it.

The CHAIRMAN: Would you like to table that?

Mr Solomon: Yes; and, as I said, there is a disk with it as well. I have copies of that document to give to the accredited media that are present if the committee agrees; however, I am aware of your rules and I will not distribute anything if there is a question about it.

The CHAIRMAN: It has now been tabled and we are in a public session; therefore, it becomes a public document.

Mr Solomon: Therefore I can release it?

The CHAIRMAN: Yes, if committee members are happy with that. That is my understanding of it as it is being tabled as a public document in a public hearing.

Mr Solomon: I was asked in the letter that I received inviting me to provide a submission to focus in particular on term of reference (3)(b). I am referring to your letter, Mr Chairman, to me of 22 September 2000 inviting me to give evidence at this committee. The document I have prepared focuses, as requested, principally on that matter. Firstly, I have dealt with whether a duty of care at common law is owed by various parties. The parties I am dealing with in this matter are the State of Western Australia under the respondeat superior doctrine; the Finance Brokers Supervisory Board, which is a body corporate established by section 6(2)(a) of the Finance Brokers Control Act; and the members of the board. As I have noted in 1.1 of my statement, an immunity in limited terms is conferred by section 87 of the Act. However, it is my submission that subject to that immunity, the board and its members owed a common law duty of care to a class of citizens comprising lenders who have made loans arranged by finance brokers whose licences should have been cancelled, to take reasonable care to prevent reasonably foreseeable loss and damage. I am saying that it is the class of people who dealt with licensed finance brokers after their licences would have been cancelled had the board operated competently and efficiently. That is the limited class of victims to whom a duty of care is owed.

I refer to the judgment of now retired Chief Justice Sir Gerard Brennan of the High Court in Pyrenees Shire Council v Day in which he dealt with the question of the imposition of a common law duty of care on a statutory body - in that case a municipal council which had failed to follow up an inspection which revealed that premises were unsafe and liable to catch fire, and in fact did catch fire. I will not read the entire passage from his judgment.

The next point I make is very significant. Section 87 of the Act confers an immunity from suit in limited circumstances. The plain legislative intention is that, when that limited immunity does not apply, there will be liability. Paragraph 1.2.3 deals with the reason that the limited class I am referring to comes within the classes to whom a duty of care with respect to pure economic loss may be owed. I have expressly excluded from that limited class, people to whom would apply what is often called the ripple effect; that is, people whose dealings with an investor are affected would not be within the class, otherwise the liability could become almost infinite. The courts have long since been cautious about allowing that expanded liability under what they call the ripple effect. For example, I do not believe a claimant could pursue a claim if he suffered loss because a person, who had primary dealings with a finance broker, could not pay that claimant. That is an example of inappropriately applying the ripple effect and the reason that I suggest the class is limited to the people who had primary dealings with the finance broker.

Last year in Crimmins v Stevedoring Industry Finance Committee, an appeal to the High Court from Victoria, that statutory authority was held liable for personal injury under the common law of negligence. However, a useful statement is contained in the judgment of Justice McHugh, with whom Chief Justice Gleeson agreed; that is, the class of persons to

whom a statutory duty is owed is often appropriately identified by the scope of the power of that statutory authority. His Honour said -

> Where powers are given for the removal of risks to person or property, it will usually be difficult to exclude a duty on the ground that there is no specific class. The nature of the power will define the class - e.g., an air traffic control authority is there to protect air travellers. Furthermore, a finding that the authority has powers of this type will often indicate that there is no supervening reason for refusing to impose a duty of care and that no core policy choice or truly quasi-legislative function is involved.

The purpose of the Finance Brokers Control Act was plainly to protect lenders and prospective lenders, not only at the time of negotiating loans but also when collecting interest after a loan was made. I understand the Gunning inquiry recommended one change to the Act: That finance brokers be involved only in their capacity qua finance broker until a loan has been completely negotiated and not thereafter when they collect interest. In that view the Gunning inquiry overlooked the words of section 48(3) of the Act relating to the regulation of trust accounts which states -

> Loan moneys received by a finance broker in the course of negotiating or arranging a loan -

Then the material words follow -

> - and moneys received by a finance broker in respect of interest on loans, shall not be withdrawn from his trust account except for the purpose of completing the loan or paying in accordance with subsection (4) the moneys in respect of interest on loans . . .

Those who have therefore taken the view that the function of collecting interest on loans is not regulated by this Act, with all due respect to the lot of them, are plainly mistaken.

The next reason that this Act exists to protect the lenders is the express terms of section 83. Anyone who suggests that subsections (2)(b) and (d), which have been in the Act since it was enacted, give rise to inadequacy in this legislation is promoting a view that is best described as absurd. Why? Because section 83(2)(b) confers power on the board to discipline brokers if, with respect to their dealings with a borrower or a lender or a prospective borrower or lender, that conduct prejudices or may prejudice the rights or interests of the borrower, lender or prospective borrower or lender or - under paragraph (d) - any other cause exists that in the opinion of the board renders the finance broker unfit to hold a licence.

I have not dwelt on the legal opinion referred to in the Gunning inquiry. I heard about that legal opinion long before the Gunning inquiry was established. I read a letter dated 13 July 1998 in common form sent to a number of investors before I ever heard of that inquiry. The first time I saw that letter and read these sections in the Act, I knew the letter to be expressing a view that was palpably absurd. I became significantly concerned that gross and serious problems of maladministration existed in the Finance Brokers Supervisory Board and with those who provided administrative assistance.

The Gunning inquiry appears to have articulated a view that no such opinion was ever presented or in any event it was qualified and whatever else. The long and the short of the matter is that section 83(2)(b) referred to conduct concerning borrowers or lenders, or prospective borrowers or lenders, and it was absolutely ridiculous to say that a lender could never be a client of a broker. I was alarmed the moment I heard of the existence of such an opinion. Section 83(2)(d) is so wide that the board could deal with the conduct of a broker where any other cause exists that in the opinion of the board renders the finance broker unfit to hold a licence. The areas in which the board could review the conduct of a broker and

decide that a broker was unfit to hold a licence were as wide as the possible range of conduct in which a broker could engage. Whatever brokers did, if the board considered that conduct rendered them unfit to hold a licence, the board could take it from them. The board has had the widest possible power since 1975 to thoroughly regulate this industry. Those who suggest there was something wrong with this Act have been horribly mistaken and have misled everybody. The problem has not been the Act; the problem has been the woeful maladministration of it.

Let us look at the question of immunity, because immunity will be the interesting question about this duty of care. It is a curious section. Section 87 in the Act is headed "Immunity of Board and officers". However, the text of the section says -

> No liability shall attach to a member or the deputy of a member, or the Registrar, an inspector, or any other officer, of the Board for any act or omission by him, or by the Board, in good faith and in the exercise or purported exercise of his or its powers or functions, or in the discharge or purported discharge of his or its duties under this Act.

If it is conduct of the member or conduct of the board, and if it can be shown that it was in good faith and in the exercise or purported exercise of his or its powers or functions or in the discharge or purported discharge of his or its duties under the Act, that member, deputy member, registrar, inspector or other officer of the board is immune from suit, but not otherwise. That is paragraph 2.2 of my submission.

Sections 13 and 14 of this Act, under the division "Powers of investigation and inquiry", provides that the registrar may, of his own motion, and shall at the direction of the board, and an inspector shall, at the direction of the board or registrar, make any investigation or inquiry for various purposes, including breaches of the Act or offences. Section 14 creates a duty on the Commissioner of Police at the request of the board or the registrar to make an investigation and provide a report. Section 15 then confers wide-ranging, coercive powers in the nature of search warrant powers; requirements to attend inquiries, give evidence on oath or to self-incriminate; and all manner of provisions to enable investigations and inquiries to be done. Section 13 says that the registrar may and shall at the direction of the board, the inspector shall at the direction of the board and the Commissioner of Police shall at the request of the board do it. It is a matter of great regret for me, as a practising legal practitioner of more than 20 years' standing, to have heard the views of the chairman of the board that, despite these sections, which expressly confer powers and duties on the board, the board was unable to exercise the powers and fulfil the duties because of what he perceived to be rules of natural justice. I will explain the view expressed by Mr Urquhart, which he continues to express in his resignation letter despite the fact that the Gunning inquiry agreed with me. There was never the slightest possibility that the board could not be involved in the processes of investigation and inquiry in accordance with the sections of the Act which expressly confer powers and duties on it to do just that.

As I say in paragraph 2.3, the fallacy in the views of the board, expressed through Mr Urquhart, and of Mr Urquhart himself, is that in exercising the powers of superintendence conferred by sections 13 and 14, the board is not acting as prosecutor; it is merely superintending the powers of investigation and inquiry by its own officers. Each person working and providing proper functioning of the board is an officer - that is section 12(1) - who may also hold other public sector offices. This is the second part of the great problem of where the administration of this Act has gone so violently and negligently off the rails for so long that the State cannot wash its hands of liability for it. Why? Section 12 of the Act deals with the constitution of the board. The board itself is referred to in section 6, and the composition of the board is dealt with in section 7. All are appointed by the Governor in

Council. All can be removed under section 8(3) by the Governor in Council. Under section 6(2)(b) the board is the licensing and supervisory authority for the purposes of the Act. Then one comes to those who work for the board in section 12, which states -

> (1) There shall be a Registrar of the Board and there may be such Deputy Registrar, Assistant Registrars, inspectors and other officers of the Board -

The next words are important -

> - as are necessary for its proper functioning.

Under section 12(2) they hold office subject to and in accordance with part 3 of the Public Sector Management Act. Under subsection (3) of section 12, the officers of the board may hold office as such in conjunction with any other office in the Public Service of the State. Every person appointed to a position involving the proper functioning of this board was an officer of this board. The idea that the board and the ministry are separate is utterly fallacious. The board is an employing authority. The definition of an "employing authority" in section 5(1)(c)(ii) of the Public Sector Management Act makes express reference to boards, like this board, being employing authorities. Under section 64 the board could employ those whom it required in order to fulfil the requirement of section 12(1); that is, as are necessary for its proper functioning. Every person who was engaged as a registrar or a deputy registrar, an inspector or another officer of the board is an officer of the board. They were employed by the board. They were subject to direction and control by the board. The fact that administrative arrangements were made whereby these people may have been paid by an amorphous aggregation called a Ministry of Fair Trading is nothing more than an arrangement for their payment complying with section 12(3); that is, they may have held another office under the Public Service in conjunction with their office as officers of the board. However, the board was entirely responsible for these people. It employed them, it controlled them, and it was to superintend them. If the officers did not do what the board told them to do, the board could and should have sacked them. Instead, what did we have? We had a board that said, "We are powerless to do anything because the ministry is the one which does the investigation and inquiry function." This is fictional. If there were not so many people who have suffered so gravely and so much and who continue to do so, one would describe the views expressed by the board, and by Mr Urquhart in particular, as ludicrous. Unfortunately, it is a great tragedy and an extremely sick joke.

In terms of the fact that the rules of natural justice prevented the board performing the very functions that sections 13 and 14 directed it to perform, there is the clearest and longstanding authority of the highest level that, in carrying out that role, the board is not infringing the rule of being prosecutor and judge in the same case. There was not the slightest, bull's roar chance that that view was ever possibly, even remotely, likely to be correct. The authorities to which I have referred in paragraph 2.3 of the notes - in particular, the full Federal Court decision of a couple of years ago dealing with the predecessor of the Australian Securities and Investments Commission, the National Companies and Securities Commission, which conducts informal inquiries and investigations and can then move from that point to having a formal inquiry as per this Act under section 82 - conclusively rejected such a view as absurd. Indeed, it was noted at the end of that case that, if that were right, the worse the conduct complained of, the less the board could have carried out its role of investigation and inquiry.

Paragraph 2.4 says that the rules of natural justice in this field have long been subject to a statutory exception; namely, if an Act is inconsistent with the rules and in this case the Act expressly confers the powers and duties. The reason one must deal with this point is to identify how these members might try to come within the limited immunity, because one must view their conduct correctly. That is in paragraph 2.5 of my notes. This is not the case of a

board which, to put it in the colloquial, "had a go and made an error". A good example of that is that the board receives a complaint, tells its inspector to look at it and pursue it. However, it overlooks telling the officer to do something in particular, which, with common hindsight, one might say was an error and was even negligent. It was trying to fulfil its functions, but it did it negligently. It would come within section 87. However, somebody like the board, under the chairmanship of Mr Urquhart, that refuses point blank to do anything can never come within an exception and an immunity that provides it protection for what it does in the exercise or purported exercise of its powers, functions or duties. This board wilfully failed to exercise its powers, functions or duties at all. Just last year a water board in New South Wales tried this sort of argument in the High Court and was found liable. The High Court confirmed this in the case of Puntoriero, and confirmed what has long been the rule of construction by the courts of sections conferring immunity from suit. Not only are they construed strictly in favour of the citizen, but also they are construed jealously in favour of the citizen. If the statutory officer does not come within the clearly expressed immunity conferred by the section, there is none. In Puntoriero's case, one will find that the particular board simply had not exercised its powers either. The immunity, by unanimous decision of the High Court, did not apply. In any event, section 87 confers immunity on only the members, registrars and officers; it does not confer immunity on the board itself. It confers immunity on the members, registrars and officers with respect to the conduct of the board, but it does not confer immunity on the board as a body corporate itself.

I have dealt with the question of the liability of the board under section 3. It is incorporated and the members are appointed. The board must also report to the minister annually under section 86. That report comes to both Houses of the Parliament. Of course, it has long since been the law that the Crown is liable to be sued in the same way as other citizens. In my opinion, the State will be liable under the principle of respondeat superior, which is a Latin term that means let the superior body respond. There is an exception that that principle does not apply when a statutory officer exercises an independent duty under a statute. However, in my view that exception will not apply here because the functions, powers and duties are directly imposed by the Act. They are not independent. Furthermore, the board is a government body; it is composed of people who may be appointed and removed by the Governor in Council.

I make the point in paragraph 3.6 that no doubt all of the members of the committee know what I mean by the Burt commission provisions therein. Two of the other Acts administered under this portfolio contain provisions whereby boards like this are required to be accountable through ministers to the Parliament and, ultimately, to the people. Those provisions were included in the Real Estate and Business Agents Act in 1994 and in the Settlement Agents Act in 1995. They give the minister the power to give directions to the board - either general directions or specific directions on a specific matter. They give the minister power to obtain full information and answers to questions and documents. When a direction is given, it is to be tabled in the Parliament. It thereby ensures that the board is accountable through the minister to the Parliament and through the Parliament to the people.

For reasons that I cannot explain in terms of a Government elected to provide open and accountable government or of a Government managing an efficient legislative program, those provisions were not included in the Finance Brokers Control Act. They were inserted into the Real Estate and Business Agents Act in 1994 and the Settlement Agents Act in 1995. I can only assume that it is another example of inappropriate administration. I am sure it was a policy to put such provisions into the Finance Brokers Control Act; however; they are not there. It would be somewhat perverse for the Government to avoid responsibility for liability

that would have clearly attached if it had enacted the provisions that it had planned to enact but which, through nothing more than inadvertence, it failed to do.

It is well known that I wanted to cross-examine the minister when he voluntarily elected to give evidence to the Gunning inquiry. I heard the minister give evidence to counsel assisting on the one day I attended the hearing. He was re-examined after I left. I do not have a transcript of the evidence, but I heard him say that he met with the chief executive officer of the Ministry of Fair Trading and the chairman of the Finance Brokers Supervisory Board, and that his officers dealt with ministry officers. In other words, the interplay between the minister, ministerial staff attached to his office, the board, board members and the ministry - which was fallaciously treated as different to the board - was such that the minister had full access and involvement, as he did with the boards that were subject to the Burt commission provisions. If the minister did not deal with the board, the members and the officers as if Burt commission provisions were in place, his sole entitlement to involvement would be an annual report, prescribed by section 86 of the Act, which states -

> (1) The Chairman shall, on behalf of the Board, as soon as practicable after 1 July in each year, submit to the Minister a report on the activities under this Act of the Board for the year ending on 30 June last preceding . . .
>
> (2) The Minister shall cause the report to be laid on the Table of each House . . .

He would be entitled to an annual report, and he would also be subject to the secrecy provisions under section 88. That would mean that communication between the minister and the board or board members would breach the secrecy provisions. Plainly, it did not operate that way. It could not be suggested that it ever operated that way. Accordingly, it was ignored that no Burt commission provisions were in the Act. All the Acts under the minister's portfolio were administered in the same way: The minister was entitled to information and to documents, and to give directions in an informal way.

The CHAIRMAN: When an employee of the Ministry of Fair Trading operates on behalf of the Finance Brokers Supervisory Board, does he act as an officer of the board? Does an investigator conducting an inquiry about which the minister is aware operate as an officer of the board?

Mr Solomon: I read the second reading speech that was made when the Bill for this Act was introduced into Parliament in 1975. The same speech was given in each House. The speech said that section 12(3) would prescribe that officers who serve as officers of the Finance Brokers Supervisory Board will also serve as officers of other boards, as that would provide administrative savings. There is nothing wrong with that. However, every person engaged in investigation work for the finance brokers board should be formally appointed under section 12(1) as an inspector of the board. It is not simply a matter of formality. Section 15 provides the inspector with very wide powers. Formal appointment as an inspector of the Finance Brokers Supervisory Board is needed for the inspector to exercise those powers. He may hold another appointment as an inspector of the Real Estate and Business Agents Supervisory Board or the Settlement Agents Supervisory Board.

The CHAIRMAN: Or he might simply be an officer of the ministry.

Mr Solomon: He may be an officer of the ministry for payment purposes. However, to exercise the powers this Act confers on the board and its officers, he should be formally appointed as an inspector, registrar or deputy registrar under section 12(1). Section 5(c)(ii) of the Public Sector Management Act defines an employing authority, which is referred to in section 64. The board is empowered to give those employment documents, which it needs. If a person without proper appointment exercised the power of the board to demand someone to

give entry to premises, to answer questions or to hand over documents, he would be a trespasser and liable for false imprisonment. It is not a matter of formality; it is of significant importance. The Act confers on a duly appointed inspector the ability to grossly and strongly interfere with the property and privacy rights of citizens. That inspector might be paid a salary by the ministry, but to exercise powers provided by the Act, he is required to have a piece of paper signed by the chairman of the board.

Point 3.9 of my submission deals with whether the State is responsible for this calamity of maladministration. The committee should bear in mind that, because of the fallacious view that the ministry is different from the board, ministry officers have usurped the powers, functions and duties conferred on the board. To the extent the officers are not duly appointed as inspectors of the board; they act unlawfully and beyond power. The view has prevailed; and the ministry, and not the board and duly appointed officers, exercises the powers prescribed by section 12 of the Act. How can the State deny responsibility for those actions? The Ministry of Fair Trading answers to the Government through the Minister for Fair Trading. The transcript of the evidence the minister gave to the Gunning inquiry will show that he said ministry personnel provide him with information about the board's activities and that they are under his control. He suffered from the fallacious view that everybody had, from the chairman down. The long and the short of it is that the State cannot wash its hands of the matter. It is impossible for it to do so. Point 3.10 of my submission outlines why, in my view, it would be extremely surprising if the State of Western Australia - the party that is sued under section 5 of the Crown Suits Act - were to say it is not responsible for the board: First, it would need to rely on its inexcusable failure to include in the Act proper accountability provisions recommended by the Burt commission. Second, Minister Shave has always dealt with the board through its members, officers and ministry personnel - either by himself or through those employed in his ministerial office - as if the section 88 secrecy provisions did not apply to him and as if the Burt commission provisions were included in the Act. Third, ministry personnel usurped, without lawful authority, the functions, powers and duties of the board, which, in dereliction of their duty, the board and its members failed to perform. Fourth, even if the respondeat superior argument could get the State off the hook, it could not get the board or its members off the hook. I cannot perceive any legitimate purpose for pursuing the argument that respondeat superior does not apply to the State, because a judgment could be obtained against the board. The Parliament appropriates money to the board. If there were a judgment against the board, and the State had avoided liability, the money appropriated by Parliament would be taken by the judgment creditors. The Government could avoid liability only by passing an Act to abolish the board. As 3.10.4 of my submission says, the possibility of that legislation passing the upper House is so remote as to be negligible. I make no comment about the lower House.

The CHAIRMAN: I take it you would urge us not to pass legislation to abolish the board.

Mr Solomon: I would not advise you to abolish it for fear that a judgment will be made against it. If the respondeat superior argument were successful, the Parliament would appropriate money to the board for its purposes, and the bailiff would be at the door waiting for the cheque. Where would that get anybody?

How should the claims for the victims who suffered losses through this woeful exercise of maladministration be run? Paragraph 4 states that it is clear that a number of licensed finance brokers traded for years after their licences should have been cancelled. I am not fully in the loop to be able say precisely when, if the board had acted appropriately, each of those brokers would have been put out of business. The first step in pursuing a claim for the benefit of plaintiffs who have suffered losses is a process called pre-action discovery, which will get from the board, board members and officers all the documents necessary to form an opinion

as to precisely when, had the board and its officers acted with reasonable diligence, an inquiry would have been held and those people found to be unacceptable to be licensed to handle public money and told to hand in their licences and exit the industry. The committee may be unclear about the type of proceedings that will be pursued. The limited class of victims about which I am talking comprises those who dealt directly with the broker. I do not suggest that people who have dealt with victims, or any in a chain of knock-on effects, are also plaintiffs. That would never be the case. It has always been paramount in the minds of judges that there not be indefinite and unlimited liability for economic loss. The limited class about which I am talking contains thousands of people. Each is in that class; some will also be in the class of people who dealt with other brokers after they should have been put out of business. This jurisdiction does not have what could be called - if one watched plenty of late-night television - American-style class actions. However, it has representative proceedings, which are a longstanding derivative of proceedings in the old court of chancery. Under the rules of court, an individual can apply to be appointed to represent each person in the class and pursue a claim for the benefit of the class. I mention in my submission a case that went to the High Court in 1995 called Carnie v Esanda. That was a representative proceeding for the benefit of a class of people who had dealt with Esanda about a breach of consumer credit legislation. In a representative proceeding, the court would declare that everybody within the class is entitled to have their losses paid by whomever the judgment went against - the State, the board or the members. The representative proceedings will then end and each individual will be able to use that declaration to recover his or her losses, through either negotiation with the Government or, if they cannot agree, separate cases to determine the outstanding issues. Nothing has happened in this regard in the past year and a half, although it clearly should have happened. A number of people are pursuing individual claims, which is regrettable, costly and inefficient. I act for a few people, but many others are acting in different ways, pursuing their own claims and running up costs. If a representative proceeding is successful, people will put their hands up and say they acted reasonably. They would then outline the costs they incurred, which could include 35 lawyers with their clocks running at an hourly rate. The taxpayers will pay the costs. It is highly inefficient. It would have been far, far better to have not only those costs but also the likely costs, if we have the representative proceedings, of finalising the individual claims. It is common knowledge that many people out there have mortgages over properties that were grossly over-valued. I know many of them. They have had auctions. They cannot get a bid. They have properties that are essentially worthless. If we get a declaration, those people will want to say to the State, "I have a mortgage. Sure, I'll give credit for it, but it's not worth anything." The State will say, "Oh, no, it's worth something." Then we will have case after case to work out exactly what their losses are, because with property that has not been sold, one has to either agree a value for some of these essentially worthless securities or have a judge determine all of that. Therefore, there is a mighty lot of inefficiency, cost and expense even in finalising the proceedings if the representative proceedings result in a declaration.

What I have said in point 6 is what I have been trying to present as a coherent view for the past year and a half; that is, these proceedings should not happen. It would be far better for the Government to accept that it cannot legally or morally avoid responsibility for the losses of victims who have dealt with finance brokers whose licences should have been cancelled years ago. As I said at point 6.1, the woeful maladministration of the Act by the board , the members, the officers and the ministry has allowed vulnerable, mostly self-funded retirees to be preyed on and exploited by people who were extremely dangerous, because they have largely had the combined factors of what I identify as three things cumulatively: Number one, they are dishonest; number two, they are deluded, sometimes almost appearing to think of their businesses as banks; and number three, they are licensed to handle public money and

able to proudly and strongly promote themselves as such. If one puts those three factors together, with a number of these people dealing with some of the most vulnerable people in our society - elderly, self-funded retirees - it is dangerous. Those people have been let loose on the retirees of our State as a result of the most woeful maladministration in my experience.

As I said at 6.2, if the Government decided to accept responsibility for these losses, it could be implemented in this way: Each victim would be paid his principal and interest and costs incurred in exchange for an assignment of all property, which is mainly mortgage rights, or other rights and remedies that those victims have against auditors, solicitors, directors of brokers or whatever to recover their investment and losses. The committee may be aware that what are called mere claims in tort are generally not assignable, and this scheme would therefore need a special Act.

I said at 6.3 that, if that was implemented, the result would be that the investors' hardships, which have gone on for far too long already, would terminate. The Government could then effectively and efficiently pursue all available recovery avenues. To the extent that recovery by the Government is achieved, the cost to government will just be the cost of providing interest pending recovery and any unrecovered recovery costs. To the extent the losses are not recovered, they will be appropriately borne by the State. Why? Because all of these elderly victims should not be left to bear the brunt of losses which they have suffered as a result of gross governmental maladministration. This would never have happened if the board had simply acted in accordance with the powers, functions and duties of the Act.

Go back again to the second reading speech. Why was the Act introduced? The committee will see that it was introduced because, even in the early 1970s, we had problems with some of these people. It was because of that that the Act was introduced in the first place. The second reading speech says so. It was negotiated, according to the second reading speech, with a very extensive consultation process among industry groups, which had considerable input. There was considerable compromise. The trust account provisions are adequate. I have looked at the conduct of brokers many, many times, and how they have run their trust accounts is completely in breach of the trust account provisions. If they complied with these trust account provisions, nothing could go wrong. The provisions were simply not complied with.

I first became involved with this issue more than two years ago when I saw a first group of investors who were involved with a hopelessly over-valued property. They had not had money on account of interest for months. They had had lies under the guise of promises from the broker for months. They had received nothing. They were very distressed. I got control of that first group, in the sense that I got to act for all of them. I then demanded from the broker all of the documents and a full accounting - when I say "accounting", an accounting of the investors' financial position with the broker and of the borrowers' position with the lenders' - and I got the ledger cards. I looked at the ledger cards. Solicitors run trust accounts too. I have been running one for more than 20 years. What did I find when I looked at the ledger cards? I found that money had gone out to the borrower before it was all in from the lenders. If the committee knows anything about trust accounting, it would know that that is absolutely unacceptable.

That was the first transaction I saw with Global Finance Group Pty Ltd. I was alarmed. I thought to myself, "This is the first transaction I have seen and he's overdrawing the ledger card. The likelihood is that this is endemic." What did I do? I got hold of the regulator, and I found out that the inspector, Mr Willers, made appointments to see those six people in the group on successive Mondays, although, to my recollection, he did not keep a couple of the appointments. However, each of those investors had essentially the same piece of paper - the

same proposal letter, the same receipt. One did not need to see six of them over six weeks to find out what one already knew.

My relationship with Mr Willers did not get past this transaction, because I tend to adhere to the view that one should speak the truth in matters like this. I rang him and asked him, "What are you doing?", to which the line went click - he hung up on me. I complained to his chief executive officer, Mr Walker, in writing. I got a response back in writing, which said that my version of the facts was not correct. I know what the facts are. I do not really care what Mr Willers and Mr Walker think the facts are. However, from that moment on, I knew that there were very serious problems with that board and that ministry. From there on, it just got worse.

Eventually, Mr Buchholz, who then held the position of registrar, came to my office with Willers about it. Willers would not even shake my hand in the reception area; he would not speak. I said to Buchholz, "Get that man out of my office. If he is not big enough to speak to me, just send him away." Anyway, Buchholz told him, "No, you've got to talk to him, Jack." Fine. I spent two hours with those gentlemen. I now realise that I was dealing with concepts that they were not remotely qualified or equipped to even understand, assuming they are honest, because what we were dealing with was a concept of a resubdivision of a strata lot. Some committee members might have heard how one strata lot can actually be subdivided into different strata lots, how a mortgage that was on the original lot came out on all the other lots, how this particular group ended up with a second mortgage rather than a first mortgage, but, most importantly, how the ledger cards that I got from Global Finance showed that it had been overdrawing its trust account.

Five or six months later when a voluntary administrator was appointed to Global Finance, nothing had been done by Mr Willers of the Ministry of Fair Trading. Ever since my first dealing with those people, in my own mind I have described the board and the ministry as the Keystone Cops. If they were not dealing with so much public money and meant to be protecting the affairs of so many vulnerable, elderly people, who have saved a small retirement amount after many, many years of hard work, only to find it lost, one might find some humour in how pathetic and woeful that outfit of the board and the ministry has been. One need only be like Denise Brailey or me and actually deal with these victims for a while to see how absolutely devastating their plight has been and continues to be. Everybody involved with the administration of this State should hang their heads in shame that our elderly citizens have been treated, and are continuing to be treated, like this. I hope the cabinet room does not have any mirrors anymore because I would not think anyone in there could look in one.

As I have said at point 6.4, two weeks ago I spent a whole week at the Supreme Court, where we have an absolutely monstrous mess trying to work out who gets the little of what is available through the Grubb fiasco. We have many people who have no registered interest at all. They just got bits of paper from Grubb saying that they were in this investment or in this mortgage - they are not anything. Their money has gone missing. No-one in the State has yet set up a commission to find out where that money has gone out of all these brokers, and people are trying to sort out a solution. Counsel at the Supreme Court are asking a judge of the court to effectively impose what can only be done by legislation. The court cannot do that. The court works on an adversarial system, where there must be a plaintiff and a defendant. Some people in Grubb have registered mortgage interests; many others do not. To take away the indefeasible title they have, there must be a plaintiff. No-one can be a plaintiff because nobody can trace anything through what happened with the Grubb trust account. He treated his trust account like a food blender: One piles up apples, oranges and pears on this side, puts them through the blender for three minutes and then wants to say which one is the apple. It is just impossible. It is calamitous that all these people are being left to try to sort

this out through the Supreme Court. This has been crying out for a legislative solution for the past year and a half and more. It is still crying out, and it is just getting worse.

The Government has put in supervisors on two companies, Global and Grubb. It has done nothing on others, like Blackburne and Dixon Pty Ltd - not even a liquidator, let alone a supervisor under this Act. If one looks at this Act insofar as it has a special part to deal with supervisors, it is a special role to wind up the business of a finance broker. In the first place, the Act has an interesting section 74(1)(b), because under that section, where a supervisor is appointed by the board, the board may authorise the supervisor to obtain an advance from the Treasurer, which the Treasurer is hereby authorised to make. It does not need an appropriation; it is already appropriated. Therefore, those who passed this legislation in the 1970s contemplated that, if it all went awry with a finance broker, a supervisor would be appointed and the State would pay to sort out the affairs. That was the scheme.

Under section 74(1)(a), the board is given power to appoint the supervisor on such terms and conditions as to remuneration and indemnity as the board thinks fit. However, the duties of the supervisor are not in the power or discretion of the board. They are fixed in the Act, and they are very limited. They are dealt with in section 75(1), which states -

> The supervisor shall carry on the business for the purpose of concluding or disposing of matters commenced but not concluded on behalf of clients of the business and, where necessary, for the purpose of disposing of, or dealing with, documents relevant to those matters, . . .

That is it. What has been done by these supervisors appointed by the board and paid by the State? With great fanfare, in the best traditions of politics, the Government claims that it is doing everything it possibly can for these victims by paying these supervisors? I wonder if the committee knows what has really been happening with them.

The supervisors have effectively been setting one victim against another. The Grubb liquidator is trying to fight the position of the registered against the unregistered. The supervisor has had money frozen all over the place, as has the Global liquidator. As far as I am concerned, it is all entirely ultra vires, and plainly without any power under section 75 of the Act. At the end of the day, someone will sue those people also and the State will pay for their conduct. They are officious intermeddlers.

The purpose of section 75 is limited. The purpose of it is not to claw in millions of dollars, which is what has been done. Not only have many investors been suffering interminably, but they also cannot get their money because the government appointed supervisors, PPB Ashton Read and Mr Conlan of RSM Bird Cameron, have ordered it to be frozen. I feel nauseous when I hear politicians say that they are doing everything they can to help the investors by spending money to help them, when they are actually hindering them and, if we face up to this, covering this issue up entirely. At the end of my submission, I say that we need a compensation scheme; we do not need it now, we needed it in February 1999. The Act should be passed and a comprehensively empowered royal commission established not only to find out precisely what went wrong in the industry, but also to find out precisely who was responsible and who may be liable for the losses so that the State can get its money back. The commission should also find out where all of the missing money went and how it can be recovered, because that has not been done.

The Gunning committee had no term of reference to find out where the money went or how it could be recovered. Its terms of reference were palpably inadequate on the day they were announced. I held that view then and I hold it now. It has never been done. There has not been anything in the nature of an investigation, and that is what the legislators of this State owe the people. There must be a proper inquiry into precisely how this absolute fiasco was

allowed to develop under the supposed watchful eye of ministers and boards with legal practitioner-chairman and the like; it must be carefully examined. We must find out who was responsible and where the money went. Hopefully we can learn from this fiasco so that it does not happen again.

The CHAIRMAN: Thank you for that comprehensive submission. One of the key issues about compensation will be identifying the point at which a finance brokers' licence should have been cancelled.

Mr Solomon: The cancellation of a finance broker's licence could be done more broadly by way of legislation; however, if I pursued it with the rigour of a claim pursued in the Supreme Court, a point must be identified. As far as the court is concerned, there will be some fluidity because anything that is hypothetical has fluidity, like any claim: In a claim by a person who gets injured there are contingencies such as how long that person will be off work, what the effect of the injury will be, how much money it will cost in the future etc. There will always be contingencies, but the court will ultimately come up with a view, on the balance of probabilities. It will depend on the evidence available of what was known to the board, the board's officers and the ministry.

The CHAIRMAN: Allegations were made against certain finance brokers which, for whatever reasons, were not investigated or pursued. The committee has seen a copy of an auditors' report concerning the Global finance group that records the statement of funds held in a trust account as at 30 June 1996. It lists funds against that which are in deficit. Obviously issues like that -

Mr Solomon: That is so abysmal as to be horrifying. A trust account in overdraft is a contradiction in terms. That people can talk about a trust account in deficit, that an audit submitted to a statutory board can provide for that, and for that body to continue trading is horrendous.

The CHAIRMAN: I have used that as an example of a matter that was brought to the board's attention and it failed to act. Should matters such as that have forced the board to investigate either that broker or other brokers?

Mr Solomon: I do not want to criticise individuals, but views were expressed that if there were only seven or nine formal complaints against a particular broker over a period of years, it was not enough for the alarm bells to ring. If, in my field - I do not think it should be any different in the field of finance brokers - my trust account goes into overdraft and my auditor submits a report to the legal practice board, as he should, and I cannot thoroughly explain that by reference to mere inadvertence, and if there is any reason to suppose dishonesty and misappropriation from that trust account, I would expect my licence to practise as a solicitor to be on the line for that one breach. I would expect it to be provisionally liable to be cancelled, or at the most, to get one chance. Comments put about by the minister that the ministry was not alarmed because only seven or nine formal complaints were made - not to speak of the hundreds of complaints that did not get past the desk because the people complaining were said not to be clients because they were lenders - is like the police saying that they interviewed a chap who has held up only seven bank branches and, until he does 10, they cannot do anything about it. That is the quality of the logic that the public has unfortunately had poured down its throat during this debate. If people were properly and fully informed of the facts, they would realise that the logic that has been put about to try to defend the palpably indefensible conduct of the board and the ministry is absolutely hopeless. The quality of the debate would get an F for a grade 6 debate.

The CHAIRMAN: Is it about proving not just that physical breaches were brought to the attention of the board, but also that other indications should have led it to that point?

Mr Solomon: Both. Obviously material had to be made available to the board through its inquiries. It would probably have been the case that the whole thing was like a set of dominos. If, in about 1992 or 1993, the rest of the industry woke up one morning and opened *The West Australian* to find that the board had cancelled the licences of the brokers who were the subject of complaints, they would have changed. As it happened, they seemed to follow each other. The situation became worse and worse and nothing was done about it. Had it been properly policed in the first place, I do not think the unacceptable excesses that developed would have happened. That is the deterrent aspect of these type of things.

The CHAIRMAN: Is this an area of law that you generally practice in, or have you only become involved in -

Mr Solomon: There unfortunately was not an area of law in pursuing delinquent finance brokers because unfortunately it never happened. I became involved in it in this way -

The CHAIRMAN: I am not a lawyer. When someone like you outlines the issues like this to the committee, it makes it clear. Should a lawyer who did not necessarily have a great deal of expertise in the area have been able to quickly pick up the issues you have raised?

Mr Solomon: I glossed over this point in section 2.5 of my submission. I got a copy of Mr Urquhart's resignation letter from that man Mr Weir. I suppose that everybody else also got a copy, and I can only assume that Mr Urquhart had authorised him to do that. I have a copy of it here -

The CHAIRMAN: I am sure the committee clerk will appreciate the smiles from members of the public gallery about that comment.

Mr Solomon: In a number of respects Mr Weir is an interesting man. I had the interesting experience of having a live debate with him on talkback radio on the Liam Bartlett program. The transcript is good if anyone is having trouble finding a bit of humour. On the first page of his letter of resignation to minister Shave, Mr Urquhart says that the Gunning committee had failed to appreciate the fundamental principles of administrative law. That is a view which I think is palpably wrong. The Gunning committee is right that the division between investigations and disciplinary functions must not be separate. Mr Urquhart does not understand the difference between a prosecutor and an investigator exercising a statutory duty. Mr Urquhart says that this always has been and always will be his view and that his view is endorsed by the ministry's legal opinion. At section 2.5 of my submission I have stated that Mr Urquhart should have received independent legal advice. The matter should have gone to the Crown Solicitor's office, or at the least, to a fully briefed independent barrister, but not to the in-house ministry legal team, if that was as far as it went.

Any competent person in this field would have been able express the views that I have expressed that sections 12, 13, 14, 82 and 83 of the Act could be clearly understood. For at least the past decade, the Law Society has had a rule that it is unprofessional to advise in a field in which one is not competent. There may have been a time when the average sole practitioner-solicitor in the suburbs could have a fair crack at everything, but that time has long since passed. The fields of law are wide and not everyone knows everything. A lawyer who was competent to advise in this field could and would have so advised; my claim is predicated on that. The negligence on Mr Urquhart's part is in not taking that advice. It was inadequate for him if, according to his resignation letter, there was an opinion by ministry legal officers that endorsed what he said. He was negligent to not obtain that advice from the independent Crown Solicitor's office, or at the very least to have the ministry's lawyers send it to a properly briefed independent barrister for opinion.

Hon NORM KELLY: Would there not have been an expectation that Mr Urquhart, in seeking that advice from the ministry's legal officers, would have expected that they would have had the relevant expertise to give that legal opinion?

Mr Solomon: I do not know. He seems to think that he had it. Despite the fact that the retired Judge Gunning with the assistance of Mr Chaney has come up with another view, Mr Urquhart seems to be fairly omniscient. He says that the Gunning committee has failed to appreciate the fundamental principles of administrative law. One suspects that it is a line-ball decision as to whether his arrogance or his ignorance prevails.

Hon NORM KELLY: It has been put to the committee a number of times that the board had insufficient resources to investigate complaints and to fully inquire into these matters. Is it your reading of section 14 of the Finance Brokers Control Act that, in essence, the board had unlimited access to the Police Service to investigate complaints for which it did not have the resources?

Mr Solomon: There is that, and section 12(1) is important. That section says there shall be a registrar of the board and there may be such deputy registrars, assistant registrars and inspectors and other officers of the board as are necessary for its proper functioning. That is mandated by an Act. As an employing authority it was the board's role to engage those officers. It was up to those responsible for the budgeting of the taxpayers' money through the Parliament to ensure that was done unless and until section 12 was changed. In addition, I do not think that section 14 is the answer to the question. Section 14 is probably more to do with the fact that perhaps the expertise of inspectors on particular matters may have been inappropriate. It may have been more appropriate for the police to investigate. There may also have been a prima facie position on a quick look at a matter that it involved a serious criminal matter and the police should start on it immediately. They should also report to the board, which will deal with the offender in a disciplinary sense. However, the police should move on criminal prosecution aspects as well. The primary answer to the idea that there were insufficient resources is in section 12. The Parliament mandated in 1975 that there shall be officers as are necessary for the board's proper functioning. It really does not lie in the mouths of Mr Urquhart, and whoever else is telling you these things, to say such things in the face of section 12.

The CHAIRMAN: At the very least the board should have included in the annual report that it had insufficient resources.

Mr Solomon: That is without doubt. They should have reported a breach of this Act by the Treasury and those responsible for allocating the State's money; that is, the money required by this decision of the Parliament in this Act stands until the Parliament changes it. The officers were to be employed there. If it could not afford them, and it had to somehow allocate scarce resources in a different way, it needed to change section 12, but it did not.

The CHAIRMAN: In terms of the law relating to the role of the Commissioner for Fair Trading, as opposed to the role of the Finance Brokers Supervisory Board, have you identified any statutory responsibilities that may have applied to the Commissioner for Fair Trading with respect to finance brokers?

Mr Solomon: The answer to that is that it is part of the overall misconception and fallacy. Unless the Commissioner for Fair Trading was appointed as a board officer under section 12, in addition to his role as commissioner - which could have been done - he had nothing to do with it. As the commissioner, I think he is probably the only person in the State who has complete immunity to make public warnings. Perhaps the Commissioner of Health can as well.

The CHAIRMAN: That is not the question I asked. Did the Commissioner for Fair Trading have a statutory responsibility? Even if one accepted the argument that this did not come under the Finance Brokers Control Act, would a complaint to the Ministry of Fair Trading require the Commissioner for Fair Trading, under that legislation, to act? It may be an area that you have not looked at.

Mr Solomon: I can have a go. Unless and until the Commissioner for Fair Trading were made an officer of the board he would have no role at all with respect to the board. Indeed, he should not even be told. The secrecy provisions would apply and he would have no right to know anything, unless he had a piece of paper saying he was an officer of the board. It could have been mandated that he could exercise both roles in conjunction, and use information that he got as an officer of the board - if he were one - in his role as Commissioner for Fair Trading for issuing warnings and the like. It would require a legislative change to the secrecy provisions in section 88 for the Commissioner for Fair Trading to hold a position as an officer of the board and use information that he obtained as an officer of the board for the purpose of fulfilling his role under the Fair Trading Act. The board should have issued the warnings, because the immunity provided under section 87 would apply to them. If Mr Urquhart as chairman of the board issued a warning to the public with respect to problems with finance brokers, he would be acting in purported exercise of his powers, functions and duties under the Act. He could issue warnings. The answer is that, if the Commissioner for Fair Trading were to do it, he would need, first, to be an officer of the board and, second, to have the right to use the information he got from an officer of the Finance Brokers Supervisory Board in his role as Commissioner for Fair Trading under the Fair Trading Act to issue public warnings and the like.

The CHAIRMAN: The point I am making relates to a complaint that is lodged with him as the Commissioner for Fair Trading.

Mr Solomon: He should refer it to the board.

Hon NORM KELLY: What if those complaints were lodged initially with the Ministry of Fair Trading and passed on to the board?

Mr Solomon: That is where the confusion arises. When it is lodged at the Ministry of Fair Trading, the ministry is simply an administrative base to provide services to board officers. The only people who were entitled to deal with that information, from the moment a complaint arrived or a complainant telephoned, was an inspector or officer of the board. It could happen that they were employed and paid by the ministry, but they must be a board officer to even deal with it. To even start at the point at which the Commissioner for Fair Trading and his team got the complaints and dealt with them is to already cross the red line. That is where the separation fallacy has already started. That is why this thing has been a complete and woeful mishmash of maladministration.

Hon G.T. GIFFARD: That is because everything they do is completely without authority.

Mr Solomon: That is right. The Ministry of Fair Trading is simply a means to provide a suitable administrative support base for a number of these boards. Section 12(3) of the Finance Brokers Control Act makes it clear that the officers hold other offices. The second reading speech in 1975 made it clear that that was intended. If I worked for the Ministry of Fair Trading and the person on the next desk works for the Real Estate and Business Agents Supervisory, that person does not get fair trading stuff and I do not get real estate stuff. If we are both officers of each board, either of us can deal with it. We have on a different cap each time we deal with an issue, and we are allowed to hold those different offices. The idea that the ministry was something separate is wrong. The ministry is administrative support for the

board, the registrar, the assistant registrar, the inspectors and other people who are called board officers.

The CHAIRMAN: The point I am getting at is that the ministry has powers under the Fair Trading Act to act with general complaints.

Mr Solomon: No, it does not. If it were not for section 88 of the Finance Brokers Control Act, what you say would be right. It is because of the secrecy provisions of section 88 that the information that any officer has cannot be disclosed except in the performance of a duty under or in connection with the Finance Brokers Control Act; it is not under or in connection with the Fair Trading Act. If one wanted to run the board and employ the board members, registrar and other officers referred to in section 12, in conjunction and as a conglomeration with the ministry, one would need to amend section 88 to do so.

Hon NORM KELLY: What if the person who has received the complaint is not an officer of the board?

Mr Solomon: He would have no proper function other than to give it to an officer of the board to deal with. Let us look at the person who gets it. They have all of these powers. Firstly, they must report to the board about what is happening. The board should have a comprehensive superintending function. The board should have known in detail every complaint that came in. I will give an example in which Mr Urquhart is wrong. The board meets periodically. A report should come to the board about complaint X, Y and Z about these brokers, and these complaints. The board should say to the inspector, "Have you interviewed this person?" If the answer is no the board would say, "Well, go and interview them and investigate this and that." That is not prejudging as the prosecutor. That is saying to the officer, "What are you doing? Look at this and that, interview that witness, and seize these documents." Then they would get it together. They would then say to the officer, "Put in a formal inquiry and we will hold a hearing." That is how it should have worked. The only person who should have got the material in the first place is the person with a piece of paper that says they are an officer of the board under section 12. That person can then go around the State as widely as they like under section 15 holding a piece of paper saying, "I am an inspector of the Finance Brokers Supervisory Board. Open the door, give me the documents. Sit down; I am putting on the tape; answer these questions on oath and you must self incriminate." They have very wide powers. However, one must be an inspector to do that.

The CHAIRMAN: One of our requirements is to look to the future. Does the federal Managed Investments Act 1998 adequately cover and regulate the finance broking industry or is there still a requirement for the Finance Brokers Control Act in some form?

Mr Solomon: That is a separate question, and to answer it I must go back a little. Prior to the Managed Investments Act provisions in the Corporations Law and its predecessors regulated types of investments called, in the olden form, prescribed interests. Prescribed interests were basically pooled or common investments. These pooled mortgages that developed with these brokers were, in my view, clearly prescribed interests. I am pursuing proceedings based on this for some complainants, but that has not gone to trial yet. Let us say that an investor is in a group of 35 people who are all to be put into one mortgage of $3m - plenty of them were like that. It is one mortgage; one title is mortgaged. If there is a default there is one power of sale. All those people must combine to exercise that power of sale. They do not even know who the others are. That was one of the great problems with the pooled mortgage regime. It is what I would call a classic divide and conquer regime. The only association that those 35 investors have, one with each other, is that they are common clients of a particular broker. If there is a problem they must all act together. It is because they need someone acting in the middle on their behalf that it was plainly - it always was - a

prescribed interest to offer these interests in pooled mortgages. Before the Managed Investments Act was enacted on 1 July 1998, under the old provisions of Corporations Law, those prescribed interests should have complied with the Corporations Law. What would have been required was a prospectus lodged with the Australian Securities and Investments Commission, a trustee separate from the manager who holds the property and a comprehensive management agreement setting out a range of provisions which each investor would enter. It would set out how the thing was managed, how they could get out of the investment and a range of things. There was power for ASIC to grant exemptions from compliance with the prospectus. Approved trustee management agreement requirements had to be gazetted. Exemptions were granted, but not in this State. They were primarily granted in the eastern States for pooled funds run by solicitors. The published reason that ASIC granted those exemptions was that the solicitors had professional indemnity insurance. There were no exemptions in this State for finance brokers. The result is that ASIC should have stamped out the pooled mortgage aspects. It cannot not exempt and not enforce. It either makes a decision to exempt and publishes its reasons and they are gazetted, or it enforces the law.

ASIC's conduct is also in question here. However, its conduct and role was limited only with respect to the noncompliance with Corporations Law requirements for prospectuses. The responsibility for the operation of trust accounts and licensing of brokers rested with the Finance Brokers Supervisory Board. Unfortunately, in this case four or five different bodies are pointing to everyone else and no-one is putting their hand up as being responsible for it. ASIC has been pointing its finger at the Ministry of Fair Trading and vice versa. In fact, they are all responsible in different ways. It was the responsibility of the Finance Brokers Supervisory Board because it was the licensing body; it was the body responsible for dealing with the trust accounts. As I said, ASIC's liability related to pooled investments being offered without prospectuses, an independent trustee or an exemption. That was changed in 1998 and the Managed Investments Act is now part of the Corporations Law. A number of amendments have been made. The separation of the trustee and the manager was scrapped. It is now a single responsible entity, not an independent trustee such as Perpetual, which would hold the property and a manager separate. These investments are regulated under the Corporations Law.

My experience since the ASIC regime was implemented fully last December is unfortunately that supposed compliance with the Corporations Law requirements is now being misleadingly used in the same way that licensing was under the Finance Brokers Control Act. I have seen a number of transactions which purport to comply but which palpably do not. They are full of self-serving material about how the law has been tightened up and that the arrangement complies with the requirements of the Corporations Law when it does not. Unfortunately, as a politician said, the band is playing on.

Hon NORM KELLY: Should the current Finance Brokers Control Act be repealed as long as it is not done to avoid possible compensation?

Mr Solomon: No.

Hon NORM KELLY: What is the best solution?

Mr Solomon: Deregulation was misconceived and still is. This fiasco has proved that we need more regulation of these people, not less. ASIC is not - I stress not - thoroughly reviewing anything. A party that has become an SRE lodges a part 1 document as a generic prospectus. It contains self-serving material that would lead most investors to think that there was someone significant seriously looking over the shoulder of the broker concerned. That is the only documentation viewed by ASIC. Part 2 of the prospectus is then transaction specific.

A person getting a prospectus from one of the new SREs would feel warm and cosy with the part 1 document. It states that since all the requirements have been changed, the company is complying with this, this and this. In fact, it states that the Corporations Law lists a number of things that must be done. However, part 2, which deals with the particular transaction, is not lodged with ASIC. I have seen documents in which part 2 is palpably inconsistent with part 1. ASIC does not even see it. We now have the same high level of false comfort for investors, but it is in the guise that these provisions of the Corporations Law are being complied with - some of the prospectuses even list them. I can say very sincerely that they are not.

Hon NORM KELLY: It is not so much a change of legislation that is required, but proper enforcement of the current legislation.

Mr Solomon: It is a change of backdrop. We once had a backdrop that stated "Licensed by the Finance Brokers Supervisory Board"; it now states "Licensed by ASIC". It is the same dishonesty.

Hon NORM KELLY: What do you think would be the best avenue to follow from here?

Mr Solomon: I am not an advocate of deregulation in this field. The amount of self-funded retiree money in the system 30 years ago was much less than it is today. We are moving more towards personal responsibility for one's own affairs in retirement, particularly with lump-sum superannuation. Regrettably, many of the people who receive those payouts are simple - I do not mean that in a pejorative sense. They are not thoroughly conversant with complicated investment matters; they are vulnerable and they are liable to be preyed upon. The more people have significant sums to look after themselves, the more we must monitor those who are licensed to advise them and to receive their trust and confidence. These investors need someone in whom they can place that trust and confidence, and we need a regulatory system to ensure that the brokers are competent and honest. They all need to know that, if they foot fault once, they are out; there will be no second chances. They are dealing with large amounts of money, often for elderly people who depend upon their life savings being safe but earning the best possible income. To move towards deregulation, in a time of increased self-reliance on invested retirement money, is an invitation for the crooks and spivs to take the lot.

Hon RAY HALLIGAN: I took issue with your opening statement about being upset that the evidence you were providing might not be made publicly available.

Mr Solomon: What is the issue?

Hon RAY HALLIGAN: I will tell you in one moment. If I believed I had a good reason for invoking Standing Order No 358, I would have done so. I do not feel intimidated, no matter how upset you may feel.

Mr Solomon: I did not come here to intimidate.

Hon RAY HALLIGAN: That is the way it came across.

Mr Solomon: I was asked to come here. As I have with a great deal of the work that I have done in this field, I have spent considerable time preparing this submission. I would have hated for it not to be made public as a result of some personal, partisan or political reason. This is such a grave, serious and significant issue that partisanship, and particularly political partisanship, should not have ruled the day. I wish the politicians could see that we need a bipartisan response to sort out this problem. I was very keen, having done this at my own expense and in my own time, at least to have the public know what I think, even if Mr Halligan does not think it is worth it. That was my concern.

Hon RAY HALLIGAN: You stated that the board should have taken competent independent legal advice.

Mr Solomon: That is correct.

Hon RAY HALLIGAN: You have provided advice to the committee and members. Thank you for that.

Mr Solomon: That is my opinion.

Hon RAY HALLIGAN: We will be obtaining further legal advice, and I will try to ensure that it is competent.

Mr Solomon: You are welcome. I do not have a monopoly on the correct legal advice. If I hold an opinion tentatively, I will say so. I will say I hold it subject to qualification and caveat. If I hold an opinion strongly and certainly, I will also say so. As far as my opinion about the views enunciated by Mr Urquhart being palpably untenable is concerned, I hold that opinion strongly and certainly. By all means, the committee can get it checked elsewhere, but I would be very surprised if any competent advice contradicted what I have said about natural justice and the proper construction of sections 12, 13, 14, and 82 of the Finance Brokers Control Act.

Hon RAY HALLIGAN: That is up to the committee to determine.

Mr Solomon: Then again, differences of opinion are what makes the legal world go around.

Hon RAY HALLIGAN: That is what keeps solicitors in business.

Mr Solomon: That is correct.

The CHAIRMAN: Thankfully you are doing this pro bono, so it does not make the money go around as well.

Hon RAY HALLIGAN: We will keep you for as little time as possible so that this time is not costly. How many people do you represent in the finance broking matter?

Mr Solomon: I do not have the exact numbers with me. There are differing numbers in different groups. I am not sure whether it is 1 000; it may be less.

Hon RAY HALLIGAN: Do you have any clients who are investors with both Graeme Grubb and Global Finance Group Pty Ltd?

Mr Solomon: Probably.

Hon RAY HALLIGAN: Are your clients registered or unregistered?

Mr Solomon: With which broker?

Hon RAY HALLIGAN: Just your clients generally.

Mr Solomon: That question is so general that I cannot provide a useful answer. There are different issues with different brokers. If the member were to ask me about the different brokers, I could probably provide a useful answer.

Hon RAY HALLIGAN: You said you had about 1 000 clients, and I accept that you do not know the exact figure. Are they all registered mortgagees?

Mr Solomon: The proceedings now pending in the Supreme Court in relation to Graeme Grubb are designed to sort out who is entitled to what. In that case, I am acting only for registered mortgagees. It was a great difficulty in that obviously Mr Conlan, the supervisor, could not represent unregistered mortgagees. Liquidators, trustees, supervisors and so on cannot take sides. A trustee cannot involve himself in a dispute between two beneficiaries; the beneficiaries must be left to sort it out. Mr Conlan could not represent the unregistered

mortgagees against the registered mortgagees. Unfortunately, at the end of the day, no-one in the unregistered mortgagee group could afford to fund appropriate representation. It is a great sadness that we have a State Government that has spent a large amount of money on liquidators and supervisors, but it has not allocated money to employ competent counsel to represent the other position. Justice Owen of the Supreme Court was extremely concerned that that happened. At one point, there was a suggestion that the board or the ministry was going to fund counsel to represent the views of the unregistered mortgagees. However, after an adjournment of a couple of days, it turned out there was no money. It is woeful that the State is spending money only on liquidators and supervisors and is not providing funding for a proper contradictor; that is, someone to represent the views of the unregistered mortgagees. I would have been far happier had that happened. I would like to see the judge make a decision with the benefit of the best possible arguments on all sides. We want a just result.

Hon RAY HALLIGAN: Have you taken on the role of looking after the unregistered mortgagees?

Mr Solomon: I thought I had told the member once already. I have acted for the registered mortgagees. One cannot act for competing interests in litigation. I cannot stand up before the court and say that I represent the registered mortgagees while I am also representing the people who have a claim against them.

Hon RAY HALLIGAN: It would be a conflict of interest.

Mr Solomon: I would not have my practising certificate for very long if I were to do it. The judge would stop me before five minutes of the case had elapsed. It does not happen that way.

The CHAIRMAN: You referred to potential claims against supervisors in the future due to their actions. The committee has been provided with documents by the Ministry of Fair Trading over which there is a Supreme Court order by Justice Owen. It goes to the issue about which concern was expressed by the ministry that a suppression order exists over the contract between the board and supervisors of Graeme Grubb Finance.

Mr Solomon: That order does not bind you.

The CHAIRMAN: I understand that. Are you aware of any reason that that order would have been made? Will the suppression order affect your clients' or anyone else's case?

Mr Solomon: I know all about this.

The CHAIRMAN: I want to ask questions but I do not want to impact on an outside court case?

Mr Solomon: It will not impact on an outside court case but on a limited suppression order. In the course of my representing the registered mortgagees in the case concerning Grubb and with respect to the claims of unregistered claimants, there are a range of possible models for resolving the problem. In my view, unfortunately Mr Conlan, the supervisor, has acted way beyond his powers for a considerable time in that he has purported to act as a judge and decided who could have claims admitted and who could not, who could have a mortgage and who could not, and who could have the proceeds of a settlement and who could not. He allowed $6m to go to mortgagees who he decided were entitled to keep their money. His decision was based on an absurd line of logic.

If a line were drawn across the middle of a graph for the balance of the overdraft of the Grubb trust account, another line could have been drawn in waves above and below the line when it was in and out of credit. There were periods when it was above and below credit. That is how Grubb worked. Strange as it may seem, it was in overdraft at close of business for 84

days over a three-year period, which is a peculiar situation. When there is a credit balance, that credit balance is not due only to money paid into the account between when the account got into credit and stayed in credit; it is also the money of the people that was paid in to bring it back out of overdraft and the money of people paid in earlier and which was swiped that took it into overdraft.

Conlan came to the view that money invested when it was in credit and money went out on a mortgage while it was in credit was clean and the investors could keep the mortgage. The investors knew nothing about the overdraft. If the account was in overdraft when the money was paid in, or it went into overdraft before the money was paid out, the investors could not keep the money. He has therefore impounded all the "unclean" money and let $6m go from what he decided was "clean" money.

The unregistered claimants think that, because Grubb is such a mess, there should be a trust over everything; that is, no-one should keep any registered mortgages; no-one should have a claim to anything; it should all go into a pool and be realised. The liquidator's fee would be $X and the claims would be worth $Y, from which everybody would get so many cents in the dollar. It is all a bit late to do that due to Mr Conlan's having parted with $6m worth of claims.

I asked the judge for the terms of Mr Conlan's appointment under section 73 of the Act. Justice Owen said he wanted to look at that. He then said he wanted to see the document and that he would hear submissions from the board and the supervisor as to whether any part of it should be subject to a suppression order. My general experience as counsel is that we are officers of the court and, unless there are exceptional reasons justifying otherwise, we would expect to be involved in deciding the issue of confidentiality for the purpose of argument, even if at the end of the day a suppression order is made. If that were the case and I had been involved in the argument of the issue, I would be subject to the suppression order, but I could have at least made an argument. However, I was not permitted by Justice Owen to make any submissions or to see the document. A document with about five big areas in it - I have not brought it with me; I have a copy of it at the office - was made available. Justice Owen made an order that the existence of that document could be mentioned and the fact that the document contained the terms of appointment could be mentioned, but nothing more. However, that order applies only to the knowledge of that document obtained through the court process. For instance, if the entire document were here and the committee wanted to show it to me and asked me to comment on it, no suppression order by Justice Owen would stop me from seeing it here and commenting on it. If that were to happen, there is certainly no suppression order by Justice Owen that could possibly cut across the powers of the Parliament to subpoena the entire document.

At the end of the hearing on the day that he made the order, I asked to see him in his private chambers and did so in the presence of other counsel. I told him I may have a personal difficulty with respect to his suppression order, in particular because I anticipated being a witness at a committee of the Parliament. I said that I did not want to become meat in the sandwich in an issue of parliamentary privilege and contempt of court. As a result of that, the next morning he said on the transcript that his suppression order covered only access to the document obtained through the court. It was made perfectly clear that, if the Parliament wanted the document in full, the Parliament would get it. Neither he nor any other judge would try to cut across the right of the Parliament to have documents, or across the right of me or anyone else to see the document in another capacity.

In addition, counsel from the state Crown Solicitor's Office, Mr Mitchell, who appeared in those proceedings as counsel for the Registrar of Titles - he took the same position as me in

those proceedings that indefeasibility of title should be preserved with registered mortgagees - said to the judge that he may in the future have to advise on that document as an officer of the Crown Solicitor's Office. The judge made it clear that, if Mr Mitchell were asked to advise on it in another capacity, the order would not apply. The judge's order is merely limited to not disclosing what had been provided through the court action and that is all. I do not know why you have only an extract.

The CHAIRMAN: Sorry, the extract is a copy of the extract of Justice Owen's comments in the court. It is not the order because he did not make a separate order, but it is a copy of the transcript of proceedings in which he makes the order.

Mr Solomon: On both days?

The CHAIRMAN: Only on the one day; that is, 22 September. The other was not brought to our attention by the Ministry of Fair Trading.

Mr Solomon: I have mentioned in my submissions to you that irrespective of whether the supervisors are liable under respondeat superior or under indemnity, which may be included - section 74(1)(a) provides that a supervisor can be appointed by the board on such terms and conditions as to remuneration and indemnity. I should not discuss that document so I will leave it at that. I cannot say whether there is indemnity or not. If you ask me the question, I do not know because I have not seen that part of the document. I discussed this privately with Justice Owen and it was made very clear between us and certainly the next day in court that I may be here today and, if the Parliament wanted to call for a document or had called for it, I would be dealing with a source from the Parliament, not from the court.

The CHAIRMAN: Based on what is in the documents provided to the committee by the Ministry of Fair Trading, there has been ongoing debate between the Ministry of Fair Trading and the supervisor regarding liability. Clearly the supervisor has been requesting liability to the point the supervisor has indicated to his own insurers that he is concerned about potential claims against him in the future.

Mr Solomon: I let him know, with regard to the $6m he paid out, that if it is found there was a trust and the money must come back, if he wants to find why that money is missing, the best way he could start would be by looking in a mirror.

Proceedings suspended from 4.10 to 4.28 pm

The CHAIRMAN: I remind you that this is a public hearing and that the details and the Information for Witness document that you signed earlier still stand.

You raised the issue of potential claims against the supervisors for their action. As you will note from this document, the board, at the initial stage, had not granted immunity -

Mr Solomon: Indemnity.

The CHAIRMAN: Indemnity. The board was relying on its private indemnity insurance. Without providing you with the documents, it is clear that that was a point of contention between the board and the supervisor for some time thereafter. Some of those instructions strike me as going to the heart of the issues that you have raised -

Mr Solomon: Indeed. The point about it is this -

The CHAIRMAN: He is operating under clear instructions from the board.

Mr Solomon: However, the board has no power to give those instructions. That issue of the purported conferral of power is ultra vires. Why? Because of this. You need to look at the relevant sections of the Finance Brokers Control Act 1975 - sections 73, 74, 75, 78. You mentioned among yourselves, before the committee reopened, that the appointment of a

supervisor is made, in the first place, by the board, but with the approval of a District Court judge. The board goes to the District Court and gets approval to appoint the supervisor.

The District Court may authorise the board to appoint a supervisor. The court gives the authority but the board makes the appointment. Section 74 states -

> Where an order made under section 73 -

That is an order of the District Court -

> - authorises the board to appoint a supervisor, the board, during the currency of the order -
>
> (a) may on such terms and conditions as to remuneration and indemnity as the board thinks fit first appoint a person as supervisor.

The terms and conditions that can be specified in that appointment are limited to remuneration and indemnity. They do not extend to conferring power. In fact, section 75 spells out what the duties are. Under the heading "Duties of supervisor" subsection (1) states -

> The supervisor shall carry on the business for the purpose of concluding or disposing of matters commenced but not concluded on behalf of clients of the business and when necessary for the purpose of disposing of or dealing with documents relevant to those matters.

It goes on, which is not relevant to this matter, to refer to the business of a deceased finance broker carrying on the business until it can be otherwise dealt with according to law.

Section 75(2) gives the supervisor power which is conferred by the Act, not by the terms of appointment, to require people to hand over documents and give information.

Section 78 reads -

> The District Court may, on the application of the board or the Treasurer or the finance broker or the person representative of the deceased finance broker referred to in an order made under section 73, make further orders.

Those are orders of the District Court, not of the terms of appointment. The District Court may discharge or vary the original order it made or, under paragraph (b) direct that any moneys in any account affected by an order shall be paid to the Treasurer by the bank on such terms and conditions the District Court shall think fit.

Under section 78(2), if an order is made under section 78(1)(b), that is to pay the trust account money to the Treasurer, the money goes into Treasury and the Treasurer prepares a scheme for distributing the moneys as compensation to each person who claims compensation within six months. When the scheme is prepared, it goes to the District Court for approval. Section 78 contemplates that there is a fund of money available, although that fund may be deficient. I do not believe section 78 ever contemplated someone like Grubb whose fund was something like $20m overdrawn. It contemplated a fund, although it may be deficient. However, who determines how to allocate that fund? The Treasury gets the money, works out the scheme and gets the approval of the District Court. The board, in terms of appointment and conferring power, gets leave of the District Court to make an appointment and can then sort out under section 74(1)(a) the terms and conditions as to remuneration and indemnity and under paragraph (b) can authorise the supervisor to obtain an advance from the Treasurer. This provision is important as it also infringes section 74(1)(b). It is the Treasurer - the Premier in this State at the moment - who is authorised to make advances on such terms and conditions as the Treasurer thinks fit. The terms and conditions which can be imposed on the money appropriated under section 74(1)(b) for the costs of the supervisor are not determined by the board but by the Treasurer.

Hon NORM KELLY: Those terms and conditions being the carrying on of the business?

Mr Solomon: Whatever the Treasurer might decide.

Hon NORM KELLY: Section 74(1)(b) states -

> . . . on such terms and conditions as the Treasurer thinks fit for the purpose of carrying on the business.

Mr Solomon: Yes, it must be limited to that. However, the funny thing is that clause 6 of this document states that the board will authorise a supervisor to obtain an advance from the Treasurer, an amount to be advised and such moneys to be held on trust by the board. That is ultra vires section 74(1)(b). The only person who could impose that condition is the Treasurer - that is the Premier - not Mr Urquhart and his little band of Johnny-come-latelies.

The CHAIRMAN: Section 74(1) states -

> The board during the currency of the order may authorise the supervisor to obtain an advance from the Treasurer.

Mr Solomon: Yes, but it then goes on -

> . . . which the Treasurer is authorised to make on such terms and conditions as the Treasurer thinks fit.

The CHAIRMAN: So the Treasurer could be authorised to do that?

Mr Solomon: If the money had to go in trust to the board, that is a matter to be decided by the Treasurer, not by Messrs Urquhart, Weir and sundry other members. That is a complete usurpation of the power of the Treasurer.

The CHAIRMAN: The supervisor could have been authorised to get an advance from the Treasurer.

Mr Solomon: And then it would be up to the Treasurer to determine the terms and conditions.

The CHAIRMAN: Yes.

Mr Solomon: Yes, and that is a question for your own appropriation committee to decide why and how that has happened. However, all these powers for the supervisor to do things that are purportedly conferred by this instrument are ultra vires. All the board could do was stipulate terms and conditions of remuneration and indemnity and authorise the supervisor to get an advance from the Treasurer. His duties and powers are hard-wired in section 75(1) of the Act.

Hon NORM KELLY: What parts are you saying are ultra vires?

Mr Solomon: I will go through them. Anything that purports to confer powers on the supervisor to do anything is ultra vires. When the supervisor is appointed, his powers of remuneration and indemnity are to be agreed with the board under section 74(1)(a). His remuneration in terms of the advance is to be agreed with the Treasurer; if the board agrees he can approach the Treasurer. However, all his duties and functions are spelt out in section 75(1). They are not matters that are capable of variation by the board, by the supervisor or by anybody else and are not discretionary. Under the heading "Duties", that subsection states -

> The supervisor shall carry on the business for the purpose of concluding or disposing of matters commenced but not concluded on behalf of clients and where necessary for the purpose of disposing of or dealing with documents relevant to those matters.

That is the end of the matter. The only other thing he can do is get the agreement of the board. When the Parliament passed this as an Act, it contemplated a supervisor coming in to

a broker and finding the trust account in a mess. If that occurred, section 78(1)(b) contemplated that the supervisor would go back to the District Court and say to the judge that he had looked at the matter and it was a horrible mess. The judge would ask why it was a mess and the supervisor would say that paragraphs 4 to 27 of his affidavit and all the annexures would show what a mess it was and he now wants authority to buy out of the matter and pay the money over to the Treasury. Of course, when the money is paid to the Treasury, what does that mean? It means that the Government must sort it out. Treasury must then work out the scheme, which is plainly a public function with public money, within six months. Section 78(2)(b) states -

> The Treasurer on receiving moneys paid pursuant to an order under subsection (1)(b) . . .

That means the supervisor goes to a District Court judge and states that it is too big a mess for him and he wants to buy out of it. The money gets paid to the Treasurer and the Treasurer shall then cause the moneys to be paid and may prepare a scheme as compensation to each person within six months after it receives the money and proves that the person has a loan or interest. The point in section 48(3) about interest, which I mentioned in my submission, arises again - I had not noticed that before - in section 78(2)(b). That is in respect of losses on a loan or interest thereon. The claims are made and if the moneys are insufficient to pay the claim, the scheme shall show where the moneys are to be apportioned. Subsection (3) states -

> Where the Treasurer prepares a scheme, he shall apply to the District Court for approval of the scheme and for directions.

Subsection (4) states -

> The District Court may give such directions in respect of the separate account for Treasury the moneys, the persons to whom and what amounts to hold for any portions to be paid and as to payment and balance of the moneys then remaining in the account.

The whole system existed to sort out a mess and it was to be done by the Treasury. The supervisor or the board then goes back to the District Court and says that the matter is a lot worse than they thought at the start and the whole lot goes to Treasury. Treasury prepares a scheme, goes to the District Court and states that it has worked out that scheme. No doubt the District Court will then give directions about the people who are affected by the scheme. Those people will get notice of it and anyone who wants to come in by themselves or with counsel and make submissions about whether it should be this or that will be heard. It is a bit like the former schemes of arrangement under the Corporations Law when they were called approved schemes of arrangement for creditors of companies etc. They were advertised and notified to claimants and a Supreme Court judge would be given the job of deciding at the end of the day how the company was wound up. That was all that this part provided for but the duties of the supervisor are those in section 75(1) or, if he goes back to the District Court under section 78, he then says that he is out of there, gives the money to the Treasurer and the Treasurer determines the scheme. Everything in this Act that purports to confer power on the supervisor to do various things is simply ultra vires. Not only is it ultra vires but also the supervisor has acted, as I said in my submission, as an officious intermeddler and tortiously as a trespasser, at times in detinue and in conversion for various tortious remedies.

On reading paragraph (1)(d) of this letter, one can see where and how it came to be that I have such strong complaints about Mr Conlan for his conduct. However, he is really just a puppet of the board and the board is just a puppet of the Government. Therefore, Conlan and his insurers are really just victims. Subsection (1)(d) states -

> To facilitate and assist the proper registration of investors' interests . . .

When one bears in mind that Conlan is the supervisor of Grubb, a hopelessly insolvent mish-mash which ran in overdraft, how could he possibly work out who would be entitled to registration? This is the funny thing that we must deal with in the litigation concerning Grubb. Our system of land registration - the Torrens system – which has been in place for 125 years, provides protection by registration. In some circumstances that is a good thing; perhaps some do not think it is a good thing. Before we had the registration system there was all manner of uncertainty with property title. There were all sorts of unknown equitable claims of various types, as under the old system one took a title by deed or by chain of deed. Suddenly, something could come up from here or there and there would be a competing claim and title was precarious. However, the registration system provides that once the title is registered, one's title is indefeasible except for fraud, either registered by oneself or by people acting on one's behalf, or one's own personal conduct. Apart from that, once you are registered, if you have not been fraudulent, you have a title that is state guaranteed; that is our system. It means that registration is all-important. Some people involved with Grubb were registered and some were not. However, it is astonishing in the circumstances of Grubb that, for anyone who was not registered, it would purport to give Conlan that power in paragraph (d). Similarly in (1)(e) which reads -

> To determine the quantum of the trust account's financial interest in advances to borrowers whether or not supported by a registered mortgage . . .

Paragraph (g) reads -

> To determine the trust account's financial interest in mortgages as a consequence of Rowena's funding of interest payments . . .
>
> (h) To protect the trust account's interest in mortgages.

Perhaps paragraph (k) is one of the starkest examples of how ultra vires this appointment is because it states that he has power -

> To maintain Rowena's existing agency contracts with investors and the determination of the contracts where considered appropriate;

Rowena Nominees Pty Ltd traded as Graham Grubb Finance Broker.

Hon NORM KELLY: It is more than a power, it is a requirement.

Mr Solomon: That is palpably inconsistent with section 75 which states that the business can be carried on for the purpose of concluding or disposing of matters commenced but not concluded and, where necessary, disposing of or dealing with documents. I know that many clients I have acted for in respect of Grubb did not want Conlan to be their agent. In fact, what had the registered mortgagees done wrong? They invested their money through a man who said, "I am Graham Grubb, licensed finance broker No 15, been in business 30 years and never lost a cent." The seductiveness of the promotions was extreme. They believed him, they paid over the money and got a registered mortgage in some cases. Those registered mortgagees did nothing wrong. Grubb turns into an absolute calamity and a supervisor is put in. Those mortgagees say it has nothing to do with them as they invested their money and have a mortgage. The only thing the supervisor had that they needed was the duplicate title which they asked for. It is their mortgage, they are registered and the supervisor held the title as a bailee for them which was determinable at will with no formal agency involved. They wanted their title. I wrote to this man, Mr Conlan, on behalf of many people saying, "Give us the title, they do not want to have anything to do with you." If somebody out there says, "You're a registered mortgagee, I am unregistered and I want to make a claim against your interest as a mortgagee", I have been telling them for a long time to put up their hand. Where was my clients' fraud? They knew nothing about what was going on in Grubb. They handed

over the money to Grubb. They did not know whether his trust account was in overdraft. They had not the slightest notion of it. They get registered on a title and say, "Fine. I got that; that is the system. If there are winners and losers in this, it is because of the Torrens system, not because of anything I did. Give me the title. You sort out the issue yourself." I now find for the first time - I do not believe that particular clause is in the edited document that I have seen before - that he was to maintain agency contracts. This is a matter of most appalling concern.

The CHAIRMAN: It also flies in the face of the definition of "client".

Mr Solomon: I have had great concerns about how this whole issue generally has been handled in so many ways. I have said a number of times that I would not be surprised by anything else I saw; yet I see this and I am surprised again. I am a person who has become fairly desensitised to really abhorrent conduct by government agencies in this matter.

Hon NORM KELLY: On that point, you are saying that it is abhorrent conduct by the board, but what sort of onus should be placed on Mark Conlan for accepting these terms?

Mr Solomon: You should look at paragraph 7(3), which says that the board shall provide to the supervisor such legal services as it considers necessary. In paragraph 9 Conlan agreed to keep all his communication, including this retainer, strictly confidential. Notwithstanding that, I think he probably contravened clause 9. At early times after he was appointed, I tried to sort out some issues. I said to him, "Why don't you get some independent legal advice about all this?" He told me that he was constrained by the terms of appointment to use the ministry lawyers. I said, "Well, that is just hopeless." I then wrote to the board, the ministry and everyone else - I think Denise Brailey probably wrote freedom of information requests, which all ended up as wallpaper - trying to get this contract, but I was never given it.

The CHAIRMAN: Why would this contract need to be confidential?

Mr Solomon: No reason at all. You may have heard evidence from Denise Brailey. I know she asked for it and probably sent an FOI request. It has never been given to us. When it was raised with the Supreme Court, I got only an edited version subject to a suppression order to which I was strongly opposed, but overruled on. I cannot explain why this has been done, except that a lot of people seemed to want this thing to go on for a long time before anything was sorted out.

Hon RAY HALLIGAN: Do you have evidence of that?

Mr Solomon: I can infer that from this document.

Hon RAY HALLIGAN: That is fine; infer all you like, Mr Solomon.

Mr Solomon: Perhaps in the course of your obtaining a second-guessing opinion on my views, you might want to check what I have to say about this and about sections 73, 74, 75 and 78.

Hon RAY HALLIGAN: You can be assured that that is exactly what I will do.

Mr Solomon: Good. In any event, I am here giving you my sworn evidence of what my opinion is. I am a mere humble barrister and solicitor of a bit over 20 years' experience. That is all I can claim to be. I do not know quite what you are or where you came from. All I can tell you is that I think this is palpably ultra vires. I do not how any competent lawyer could have ever advised the board to execute it. One should infer some very unfortunate and misconceived motives behind it. This document is dated 21 July 1999. I act for hundreds of people who have had their affairs tied up and confused by the conduct of Mr Conlan pursuant to this document. We still do not know who are the winners and losers in Grubb. I assume

we will not know on the day that the State Government stands for election either. That is a great pity.

Hon RAY HALLIGAN: If you are so sure of your grounds, why did you wait for parliamentary privilege to make this known? Why did you not say it out there?

Mr Solomon: Pardon? Say it to whom?

Hon RAY HALLIGAN: Say it to the Press.

Mr Solomon: Do you read newspapers and watch television? I have made comments about this issue until the media is sick in the face of seeing me.

Hon RAY HALLIGAN: Why did you start by saying that you would have been totally upset had you not been allowed to submit what you have submitted and say what you have had to say if you have already said it?

Mr Solomon: I have not provided publicly the precise level of detail that is in my submission.

Hon RAY HALLIGAN: May I ask why?

Mr Solomon: Yes. I have to eat a dinner at night. For the past two years I have spent hundreds of hours on voluntary work trying to help all these poor people. I have a central city office with staff, equipment and rent to pay for. There is a limit to what I can do. If you had the vaguest possible notion of how much I have done after-hours, day-in day-out, weeknights and weekends, you would realise that your questioning is the most appalling insult I have ever heard from a politician, and that is saying something.

Hon RAY HALLIGAN: Certainly, you have made some assertions about politicians and this committee as well.

Mr Solomon: No, I have not.

Hon RAY HALLIGAN: They are all recorded in Hansard.

Mr Solomon: I do not quite know why you want to attack me.

Hon RAY HALLIGAN: I have a question, if I may.

Mr Solomon: Thank you.

Hon RAY HALLIGAN: Plenty of people have been questioning us about why they have been unable to get some of their money. You would be aware that Mr Conlan prepared an affidavit in consultation with the Global investors coordinating committee for the distribution of funds -

Mr Solomon: No, I would not, because the Global investors committee acts with Mr Herbert from PPB Ashton Read. I would not like your question to be perpetually recorded with such faulty factual assumptions. Maybe you would like to get the assumptions right and I can give you a sensible answer.

The CHAIRMAN: If you let Hon Ray Halligan complete the question, you can then make comments.

Mr Solomon: Fine.

Hon RAY HALLIGAN: We have advice that around 400 of the investors agreed with an agreement, and if that agreement had been accepted in time, the issues could have been considered now before the courts. Are you saying that you had no involvement with the non-acceptance of this agreement? It is an agreement that you knew nothing about?

Mr Solomon: Hang on, what agreement?

Hon RAY HALLIGAN: This is the one that the supervisor of Global Finance -

Mr Solomon: That is Herbert, not Conlan.

Hon RAY HALLIGAN: And the affidavit.

Mr Solomon: The document that I am commenting on is from Conlan of Grubb.

Hon RAY HALLIGAN: I beg your pardon.

Mr Solomon: Do not beg my pardon.

Hon RAY HALLIGAN: I stand to be corrected.

Mr Solomon: I would like to know what it is you think you believe you are asking me about.

The CHAIRMAN: Order!

Hon RAY HALLIGAN: That comes from your answer to my question, and then I will know.

Mr Solomon: We are talking about Global.

Hon RAY HALLIGAN: Can I repeat the question?

The CHAIRMAN: For my own benefit, is Hon Ray Halligan moving on to another area of questioning or is it related to this document?

Hon RAY HALLIGAN: We have already spoken about people getting back their money. I will repeat the question: Are you aware that the supervisor of Global Finance prepared an affidavit in consultation with the Global investors coordinating committee for the distribution of funds and other assets held by Global?

Mr Solomon: When?

Hon RAY HALLIGAN: I do not know that.

Mr Solomon: There are a number of affidavits. I was asked to meet the Global investors coordinating committee, which is a committee of mere creditors under the Corporations Law. I attended a meeting with them some time back when I was asked whether I wanted on their behalf the job of presenting a model to the Supreme Court for the resolution of the Global Finance issues. I told them that I thought the model was flawed. My view on Global is similar to that on Grubb. I will explain the only difference between Global and Grubb. You may be aware that a person who is a trustee - like a trustee of a deceased estate or anything else - has an obligation in equity to keep the trust fund separate. If I am trustee of my dad's estate and trustee of my uncle's estate, I must keep all accounts separate - separate bank accounts and separate property – from my own money. That is the duty of a trustee. That duty of keeping a trust fund separate can be abrogated by statute. It is abrogated by statute with respect to many people who keep large amounts of money - for example, solicitors and finance brokers. Under section 48(1) of the Act, finance brokers are required to maintain at least one trust account designated or evidenced as such with a bank. It goes on to require that in that bank account they can then divide up the moneys of their individual clients with separate ledgers. Because their business handles a lot of other people's money, they do not have to bank every person's money in a separate bank account; they can bank it in one or more trust accounts designated as such; that is, the account must say X Pty Ltd trust account. The bank must know that it is a trust account. Section 48(2) makes that account immune from any claims against the broker, because it is other people's money. By this statutory abrogation, the ledgers in that trust account have the same status as a separate bank account altogether if there is no statutory abrogation. It is just me, my dad's estate and my uncle's estate. What happened with Global was that the bank account itself generally was not

overdrawn, but the ledger cards were. Because those ledger cards have the same status as a separate bank account, you cannot identify them. If one ledger account is overdrawn, where does that come from? You cannot trace where it was overdrawn from out of the whole trust account. It is the same problem as Grubb, except Grubb went one step further because the whole bank account was overdrawn. In terms of the law of trusts, it is no different, because the ledger cards in a statutory trust account are as sacrosanct as a separate bank account.

With Global, some people are registered and quite a lot of people are not registered. Global had a company called Global Mortgage Investments Pty Ltd that held interests on titles. Grubb had a company called Oakleigh Acquisitions Pty Ltd that held interests on titles. It is a similar thing. The question was whether people who were not registered could be entitled to a transfer of an interest in a mortgage from Global Mortgage Investments. There are equitable rules - not common law rules - with respect to trust property called tracing. If people give me their money to invest in a particular purpose, it goes into my trust account. If my trust account is run properly, all the ledgers are in credit. I record in a ledger that it goes in. I record that it goes out and that it acquires a particular mortgage. The rules of equity are that you can trace it straight through. At the highest level, judges have held that when a trust account is overdrawn, the remedy of tracing is impossible, because a trust account in overdraft actually means that the trustee has borrowings; it is a debt. The trustee owes money to the bank; the trust fund has ceased. The trust fund in Global has ceased. I do not consider tracing is available. I told the Global investors committee that I thought that, as far as the legal remedies go - which then leaves losses - those who are registered will keep what is registered and those who are unregistered will form a pool. All the Global Mortgage Investments' interests will be pooled, and all of those who have claims against that pool will rank pro rata for them. I told that committee that was my opinion. That was not the model it wanted to promote. I told the committee that I was not interested in a retainer to promote the model it wanted to promote and that it should get someone else to do it.

Justice Owen is managing both of these problem finance broking files. Unfortunately for him, it is a horrible job to land. He gave directions in February to resolve Global Finance Group Pty Ltd. My views were detailed in written submissions months ago. Mr Herbert is the one who has been delaying, and delaying grossly. I have a number of clients with interests in mortgages and settlements. Mr Herbert, as the administrator of Global Finance, has made claims to hold moneys pending resolution of the proceedings. He holds either all or part of the money in a trust account. Those are joint accounts and the money is tied up. My clients are very concerned about this. The delay continues, but it was not caused by me. If the member wants to find out the history of the matter, he should ask Mr Herbert when the Supreme Court made directions - my best recollection is February this year - and why it has not been decided. He is another man who will find the reason in a mirror. If somebody has suggested to you that I am somehow the cause of that, he should say it outside the Parliament. I will stand and deal with a few of these issues; you tell whoever has told you that to publish it outside the House. It is absolutely wrong.

The CHAIRMAN: We are running out of time. If you do not feel competent to comment on this issue, you may provide it to us in writing. We have heard about a conflict of interest between the role of the liquidator and supervisor. Do you believe that to be the case?

Mr Solomon: Do you mean the role of supervisor and the role of liquidator have an inherent conflict of interest?

The CHAIRMAN: Yes. Mr Conlan is both the liquidator and supervisor of Rowena Nominees Pty Ltd. Have you identified a conflict with the interests of each role?

Mr Solomon: I do not want to blow my own bags, but I am in the source of the idea of the supervisor. Global Finance was the first broker in this lot to go into involuntary solvency administration. Initially, two voluntary administrators - Mr Read and Mr Herbert - were appointed. If there is no approved scheme for arrangement is met, the company can move straight into liquidation. Those men were appointed as voluntary administrators on 19 February. A first meeting must be held for the limited purposes of changing the administrator. That publicised meeting was held at the Parmelia Hilton on 26 February. The company went into liquidation in April after a second meeting of creditors at the Italian Club (WA). The problem for Mr Read and Mr Herbert was that they had no money. They got an order ex parte - that is, in the absence of anybody else - to fund the liquidation from trust account moneys. Global Finance had a trust account that contained about $1.6m. Overall, the company was deficient, but that money was there. There was liberty to apply to set that order aside, and I made an application and had the order set aside on a provisional basis. Mr Read and Mr Herbert were liquidators of a trustee and did not have a right to take the trust funds as payment. We reached a kind of stand-off: They had the trust property and would not let it go, but they could not get a court order to allow them to pay themselves out of the trust property. I suggested to them that the Finance Brokers Control Act created a special position of supervisor, which, under section 74(1)(b), provided for the State to pay the costs. I suggested that they apply to be appointed under that section. Nobody was funding Read and Herbert. Although the Australian Securities and Investments Commission had promoted the voluntary administration, it was not providing funding for the liquidation.

The CHAIRMAN: I am conscious of the time. Are you saying that you cannot identify an inherent conflict of interest?

Mr Solomon: A massive conflict exists if they are trying to act under an ultra vires letter such as this.

Hon G.T. GIFFARD: Do you see a natural conflict between the two positions?

Mr Solomon: No. The great growth in trading trusts in the past 30 years has been tax driven. Many businesses have a family trust. The only real purpose for using the law of trusts is tax benefits. As a result, many trustees have been liquidated. The trust funds are administered through the liquidation process. The supervisor can operate under the limited powers of section 75. I suggested the supervisor role to Mr Read and Mr Herbert because we had an impasse and there was a provision in the Act for the Government to pay their fees.

The CHAIRMAN: I am not sure of the details, but I think Mr Herbert is appointed under different terms from Mr Conlan.

Mr Solomon: I have not seen the details of his appointment. Mr Read and Mr Herbert are both liquidators, but only Mr Herbert is a supervisor. Mr Read does not have the dual appointment.

The CHAIRMAN: Could you provide any comments you would like to make about the terms of the appointment in writing? Have you represented anybody who was involved with Blackburne and Dixon Pty Ltd?

Mr Solomon: Yes.

The CHAIRMAN: Are they experiencing problems because a supervisor was not appointed to that company?

Mr Solomon: There have been numerous problems. The Australian Securities and Investments Commission tried to put in place a regime that at least required the company to provide the names and addresses of the co-investors so that arrangements could be made. Considerable problems have been experienced.

The CHAIRMAN: Would the situation have been easier if a supervisor had been appointed?

Mr Solomon: Yes. The State owes it to the people to at least appoint a liquidator to examine and report on the transactions of these companies. That is the other reason I am concerned. No examination of the books and transactions is taking place.

The CHAIRMAN: In view of the time, I ask if there are any brief questions from other members.

Mr Solomon: I do not mind coming back at another time.

The CHAIRMAN: The committee will consider whether to call you back. It is under time pressure not only today, but also with its reporting date.

Hon NORM KELLY: I have a couple of questions to which you may be able to respond to the committee in writing. Paragraph 20(1) of the letter to Mr Conlan deals with the appointment of the probity auditor.

Mr Solomon: That role is not referred to in the Finance Brokers Control Act.

Hon NORM KELLY: That probity auditor was involved in discussions prior to the writing of this letter. Is there any conflict with her being involved in the formulation of the terms and then being appointed as probity auditor?

Mr Solomon: There is no reference to a probity auditor in the Act. There is no power to make Mr Conlan respond to Diana Newman. I think he used to work for her. She was at Bird Cameron before she went out on her own. Mr Conlan worked for her for years.

Hon NORM KELLY: The supervisor must comply with the request of the probity auditor.

Mr Solomon: That is palpably ultra vires, like most of the document.

Hon NORM KELLY: Point 1.2.3 of your submission refers to the role of the Finance Brokers Supervisory Board. You cited the legal case that determined that the role of an air traffic control authority was to protect air travellers.

Mr Solomon: I included that to identify the relevant class of people to whom a duty of care is owed.

Hon NORM KELLY: Do you see the Finance Brokers Supervisory Board as having a supervisory or controlling role? There are some arguments about the level of influence the board should have on the industry - whether it should be a regulatory, supervisory or a controlling board.

Mr Solomon: I will give the short answer and provide more detail in writing. The High Court decision in the case of Perre v Apand Pty Ltd identified the range of issues relevant to deciding whether a duty of care exists. The highly material issues are vulnerability of the investing public; knowledge or constructive knowledge; and the purpose of the board being to supervise and regulate the industry and to weed out people whose conduct is unacceptable. A range of factors are looked at, particularly those of the vulnerability of the class and the knowledge and power of the board. There used to be a doctrine of general reliance, in which a plaintiff had to prove he expressly or constructively relied on the board. In the end, the judges said it was artificial. All the factors here show a duty of care. The purpose of the board is to protect that class of people, particularly when it is vulnerable.

The CHAIRMAN: I close the hearing. Once the committee has gone through what you provided it today, it may ask you to come back. Please remember, however, that it is under time constraints.

Mr Solomon: That is all right.

The CHAIRMAN: If there is anything else that you believe that you think is important, you may provide it to us in writing.

Mr Solomon: I will not, unless you tell me that you want something more from me. If you do not have time to have me back and there is something on which you would like me to comment, I am more than happy to do that in writing. Thank you for the opportunity.

The CHAIRMAN: Thank you for spending your time. I appreciate the fact that your submission and the information has been provided pro bono.

Committee adjourned at 5.12 pm