

**SELECT COMMITTEE INTO THE  
FINANCE BROKING INDUSTRY IN WESTERN AUSTRALIA**

**TRANSCRIPT OF EVIDENCE TAKEN  
AT PERTH  
THURSDAY, 2 NOVEMBER 2000**

**Members**

**Hon Ken Travers (Chairman)**

**Hon G.T. Giffard**

**Hon Ray Halligan**

**Hon Greg Smith**

**Hon Norm Kelly**

**Committee met at 2.15 pm**

**NULSEN, MS SUSAN,**  
**Registrar, Finance Brokers Supervisory Board,**  
**Ministry of Fair Trading,**  
**219 St Georges Terrace,**  
**Perth, examined:**

**HARVEY, MR GREG,**  
**Deputy Registrar, Finance Brokers Supervisory Board,**  
**Ministry of Fair Trading,**  
**219 St Georges Terrace,**  
**Perth, examined:**

**NEWCOMBE, MR GARY,**  
**Director, Projects,**  
**Ministry of Fair Trading,**  
**219 St Georges Terrace,**  
**Perth, examined:**

**The CHAIRMAN:** On behalf of the committee, I welcome you to today's meeting. To begin, could you please state the capacity in which you appear before the committee.

**Mr Harvey:** I appear as the Deputy Registrar of the Finance Brokers Supervisory Board.

**Ms Nulsen:** I appear as the Registrar of the Finance Brokers Supervisory Board.

**Mr Newcombe:** I appear as the Director of Projects, Ministry of Fair Trading.

**The CHAIRMAN:** You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

**The Witnesses:** Yes.

**The CHAIRMAN:** These proceedings are being recorded by Hansard. To assist the committee and Hansard, could you please quote the full title of any document you refer to during 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. As Ms Nulsen has not appeared before the committee previously, I indicate that 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 if, for example, the committee believes that the evidence may breach term of reference (3) of its inquiry, which 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.

However, even if 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.

I realise that there probably will not be anything you want to bring before the committee by way of an opening statement, but if there is, I invite you to do so. If not, the committee has some issues that it wishes to discuss with you this afternoon.

**Hon GREG SMITH:** One of the things that seems to be, I suppose one could say, a vexed question within the committee is the appointment of the supervisors and the power and authority given to them regarding unsecured and secured creditors. The committee has had evidence from other people - legal advice - that what is being done by the supervisors may not be proper; it may be ultra vires -

**The CHAIRMAN:** Outside the power of the Act in respect of the appointment of the supervisors.

**Hon GREG SMITH:** Can whoever is best equipped to answer the question explain how you decided to appoint the supervisors under the terms that they are appointed?

**The CHAIRMAN:** For the purposes of this afternoon's hearing, we will focus on the supervisor for Grubb or Rowena Nominees Pty Ltd, Mr Conlan. I think that will probably be the easiest.

**Mr Harvey:** Okay. I am not sure of the dates, but I think it was in about June 1999 that the board made application to the District Court of Western Australia under the Finance Brokers Control Act to have approval from the court to appoint a supervisor. It would have been around that same time that the board also sought legal advice from Professor O'Donovan - I think I have given evidence before about Professor O'Donovan's role. Based on that legal advice, lawyers within the ministry prepared a list of duties, I suppose for want of another term, for the supervisor for both Grubb and Global Finance Group Pty Ltd. I believe the committee has a copy of that on its records.

**The CHAIRMAN:** The terms of appointment; yes, it does.

**Mr Harvey:** From then - I suppose this is probably going back again to my earlier evidence - Professor O'Donovan tried to give the widest possible opinion or interpretation of the Act on the role of the supervisor to try to get the best result for all investors generally. The supervisor for Grubb Finance in his court actions at the moment does not take a position on either party. His circulars to investors clearly tell them that he remains in a neutral position, and he encourages those investors to make their own representations to the courts. Whether they be registered or unregistered, whether or not they be lenders to Hardie Developments Pty Ltd, all investors are encouraged to give evidence in this particular test case. Does that answer the question?

**Hon G.T. GIFFARD:** Who said he would take a neutral position?

**Mr Harvey:** The supervisor.

**The CHAIRMAN:** I will start with that point and work back. Dealing with the neutral position, the committee understands and the evidence given to us by some of the investors is that the supervisor has been proffering an alternative opinion to the view being put by lawyers on behalf of another group of investors - I guess this is the issue of people who are either secured or unsecured on the mortgage. Is that your understanding? His position may be neutral, but he is raising the question about an alternative to that being put forward by the solicitors or lawyers for the secured creditors.

**Mr Harvey:** In the hearing that finished on Tuesday, the unregistered mortgagees were self-represented. I think one of the unregistered mortgagees was able to get legal representation on the last day. I do not know whether that addresses your question that the supervisor is proffering a different view. To me, that sort of supports that the supervisor is remaining in a neutral position, so he is not representing the unregistered mortgagees.

**The CHAIRMAN:** No, he is not, but the committee understands that he has certainly been putting forward arguments that would be to the benefit of unregistered -

**Mr Newcombe:** I think the position probably is that the supervisor would regard it as putting forward a position which is in the best interests of all the investors. I think that would be the supervisor's position. Obviously, the committee would need to take evidence from him on that point. The issue that must also be borne in mind is that there may be differences of legal opinion. However, the matters are being taken before the court, and the court will rule on the scheme. Therefore, it is not a question of the supervisor acting simply on his own without recourse to the courts, and the fact that some lawyers disagree both with the terms of his appointment and his action is not surprising, given they are acting for a particular group of clients. We are not here to give legal advice about what the situation is. The position is simply that the terms of the appointment of the supervisor were based on legal advice. There may be a conflicting view, but that is not uncommon. The action that the supervisor is taking in relation to the scheme is a matter before the court. The parties are putting their points of view, and the court will have an opportunity to rule on that.

**Hon GREG SMITH:** What is the question being put to the court?

**Mr Newcombe:** It is a question about the appropriate arrangement and the distribution of funds. Mr Harvey might be better qualified to answer this, but there is a question about the rights of registered persons as opposed to unregistered persons.

**Mr Harvey:** Yes, I think that is putting a very complex situation in simple terms. A whole range of issues need to be addressed by the court.

**The CHAIRMAN:** Obviously, the committee is not here to make those sorts of decisions or to try to second-guess. Is it the view of the board that it has the ability to direct the supervisor?

**Mr Newcombe:** We are not the board.

**The CHAIRMAN:** No, I realise that, but the registrar and the deputy registrar are here, and obviously you have provided the advice on which the board is operating. Does the advice you have provided to the board include a view that the board has the power to direct the supervisor?

**Mr Harvey:** I believe so, because the duties that were developed on that legal advice from Professor O'Donovan were presented to the board before becoming a final document.

**The CHAIRMAN:** In that, one of the matters is that the board has the power to direct the supervisor in his actions. Obviously, one of the contentious matters is whether there is the power.

**Mr Harvey:** I do not remember whether that is in there, but I will take your word for it.

**The CHAIRMAN:** Has the board given any direction to the supervisor about how he is to conduct himself with regard to the court cases?

**Mr Harvey:** No, not that I am aware of.

**The CHAIRMAN:** So he would be acting on his own behalf?

**Mr Harvey:** Acting on the legal advice provided to him.

**The CHAIRMAN:** Is that his own independent advice, or is the advice provided through the ministry to the supervisor?

**Mr Harvey:** It is two things, I suppose. There is advice that comes from barrister Michael Hawkins, and there is also legal support from legal officers within the Ministry of Fair Trading. Just recently the supervisors have been told that to replace the legal advice that was previously provided by the ministry, they can now get their own independent legal services.

**The CHAIRMAN:** Mr Hawkins was engaged by the ministry, not by the supervisor.

**Mr Harvey:** That is right.

**The CHAIRMAN:** Therefore, would the advice under which Mr Conlan operated have been provided by the ministry or by the board?

**Mr Harvey:** By Mr Hawkins.

**The CHAIRMAN:** Yes, but was Mr Hawkins engaged by the ministry or by the board?

**Mr Harvey:** The letter of appointment that went out was probably from the board, if I remember correctly. In fact, the committee probably has that in its records.

**The CHAIRMAN:** One of the key questions on which we have received evidence about that is that, in effect, the action taken by the supervisor - I think some of Mr Newcombe's comments alluded to it - is to the benefit of unsecured lenders, and that is being effectively funded by the State, whereas the secured lenders must fund their own legal action in a matter in which they did not necessarily have any choice. For instance, I refer to the Hardie Developments test case. They were not given a choice whether they wanted to try to sort it out; it was just chosen and used as the test case.

**Mr Harvey:** I think that was chosen by the court, though.

**The CHAIRMAN:** But on the request of the supervisor?

**Mr Harvey:** I do not know whether it was on the request of the supervisor. I think initially the court looked at the Grubb issue and thought that, due to the complexity of it, the court would be better served if it was put down into a chunk, I suppose. I believe the court picked four borrowers that it believed covered a fair range of all the problems associated with Grubb Finance. Then the court felt that even those four borrowers were too large to look at, and it is my understanding that the court then selected one of those borrowers, and that is the Hardie Developments case.

**The CHAIRMAN:** Someone must have been giving advice to the court.

**Mr Harvey:** The supervisor would have certainly provided those records to the court, yes.

**The CHAIRMAN:** As a suggestion of which one it should be?

**Mr Harvey:** I do not know whether that suggestion was made.

**The CHAIRMAN:** As someone operating as an agent of the board, the supervisor would make recommendations to the court on whom to choose. I might be wrong, but I would be very surprised if the court went through all of the documents in the files of loans made by Mr Grubb and said, "Oh, that's the one we want." It must have come from somewhere .

**Mr Harvey:** That is possible, though I am not sure.

**The CHAIRMAN:** You also mentioned earlier that Mr O'Donovan tried to give the widest possible interpretation to the powers of the appointment of the supervisor. Is that because those were his instructions?

**Mr Harvey:** No, it would have been because under the Act, in its simplest form, the supervisor's duties would be far too limited. The Act simply says that a supervisor's role is to complete unfinished finance broking business.

**Mr Newcombe:** The issue is that the Act is not the clearest piece of legislation. Anybody who looks at the Act will realise that. None of us here was involved in the issue of instructions to Mr O'Donovan, or anybody else. That was dealt with by staff who are no longer at the ministry. The point is that in looking at things, one can take a very strict black-letter law approach or a more general approach. Mr O'Donovan provided an opinion, and it is been acted on. However, the Act is not clear. It is not a simple issue; it is one on which lawyers will have differences of opinion. One could ask 10 lawyers and get 10 different opinions. The point is that Professor O'Donovan is a highly regarded person, and other advice was taken as well. If Mr Solomon or anybody else

chooses to dispute that advice, that is up to him; but it does not make his opinion any better than anybody else's opinion.

**Hon G.T. GIFFARD:** I am not sure whether Mr Solomon necessarily disputes the point that you have put. There seem to be two issues: One relates to the statutory rights and duties of a supervisor, and I am not sure that Professor O'Donovan's view of that is under challenge; I will have to check on that. The issue in my mind is that, even if one were able to establish that, what right does the board have to prescribe that? The board could, for example, appoint a supervisor and give them a copy of Professor O'Donovan's opinion saying, "This is what Professor O'Donovan says are the range of your rights and responsibilities." The board might take an alternative approach and set out in contract what you are now saying; that is, based on Professor O'Donovan's advice, these are your rights and responsibilities and this is what you will do. The board appears to have embarked on the latter course of action. I am wondering, as you answer these questions, whether Professor O'Donovan's advice to you included whether the board had the capacity to set out in a contract what those rights and responsibilities were, and actually contract the supervisor to do that? What was the focus of Professor O'Donovan's opinion? Was it, "This is what the supervisor can do," or "This is what the board can contract the supervisor to do?"

**Mr Newcombe:** We are getting into the nitty-gritty of some legal advice, and the committee is aware of the difficulty with that.

**Hon G.T. GIFFARD:** I am not asking you at this stage to tell us what he said; I am asking what areas did he address.

**Mr Newcombe:** We are constrained in answering that, on the basis that we were not involved - certainly I was not involved - in any of the discussions, the appointment or in negotiations with Professor O'Donovan.

**The CHAIRMAN:** Who was?

**Mr Newcombe:** The lawyer who was involved was Mr Castiglione, who gave evidence at the Gunning inquiry. He is no longer an employee of the ministry.

**Hon NORM KELLY:** Mr Harvey, you were involved in correspondence with Mr Conlon prior to his appointment. You were obviously aware of the appointment process and the terms and conditions of that appointment.

**Mr Harvey:** That is right.

**The CHAIRMAN:** Were you aware of what instructions were given to Mr O'Donovan?

**Mr Harvey:** No. They would have been prepared by a legal officer from the ministry.

**The CHAIRMAN:** You did not see them, or know what they were?

**Mr Harvey:** I do not believe I have seen them, no.

**The CHAIRMAN:** In terms of who requested Mr O'Donovan to try to provide the widest possible interpretation -

**Mr Newcombe:** I do not think that we have established there was a request for that. Mr Harvey said that he felt that Mr O'Donovan took that view. I do not think that we have established there was a request that he take the widest possible interpretation.

**Hon NORM KELLY:** However, he provided an opinion that provided for the widest possible interpretation.

**Mr Newcombe:** I think that is a reasonable interpretation, yes.

**Hon NORM KELLY:** Can you give us an idea of why he gave that very wide interpretation?

**Mr Newcombe:** There are issues about what the supervisor would do and why a supervisor is appointed to a finance broking business. When we appoint somebody to a business which has to all

intents and purposes collapsed - bearing in mind that Grubb's records are appalling, so the capacity to put it back together is different - and there is a range of competing issues and a range of people with competing interests, the question is whether we want to sort that out by giving someone the authority to sort it out, or do we just want a very minimalist approach which may be achieve no end at all. It is a very difficult situation to be in. It is a difficult situation for the supervisors to operate in as well.

**Hon NORM KELLY:** I appreciate that it is a difficult position to be in. However, there is a difference between what you may want the supervisor to do and what the supervisor is allowed to do by law. You referred earlier to an inadequacy in the Act to the extent of what the supervisor could do. It would appear from your answers today that the intent was to try to interpret the Act as widely as possible and take it to the limit, so that the supervisor could be more effective. However, it appears it could be going to the limits of the law if not beyond the law to achieve that.

**Mr Newcombe:** The basis of Mr O'Donovan's advice was not to take it beyond the limits of the law.

**Hon NORM KELLY:** Who provided the instructions to Mr O'Donovan?

**Mr Newcombe:** Mr Castiglione, I believe.

**The CHAIRMAN:** We understand that at least two other legal opinions were sought.

**Hon G.T. GIFFARD:** Before we get off this matter, I want to get some understanding of whether my question was answered. I do not think it was addressed it all. The response was "bear in mind that we did not write it", and from there we went on to other questions. Is it the evidence of Mr Harvey, Ms Nulsen and Mr Newcombe that they cannot tell me whether Professor O'Donovan's advice addressed the issue of whether the board was entitled to enter into a contract of that nature with the supervisor?

**Mr Newcombe:** I cannot recall, because it is a while since I read his advice. I cannot answer that.

**Hon G.T. GIFFARD:** You do not know what is in it?

**Mr Newcombe:** I do not have it in front of me. I read it once. I cannot recall.

**Hon G.T. GIFFARD:** Can anyone else?

**Mr Harvey:** I do not know what is in it.

**Hon G.T. GIFFARD:** So no-one can assist the committee. It strikes me as remarkable that no-one knows whether Professor O'Donovan told you whether you could enter into the contract that you did. **Mr Newcombe:** We are not saying that. You asked whether any of the three of us could tell you.

**Hon G.T. GIFFARD:** We have the registrar and the deputy registrar here.

**Mr Newcombe:** That is right. However, you then said that nobody from the board could tell you.

**Hon G.T. GIFFARD:** Who can?

**Mr Newcombe:** Probably a number of people, but they would be those involved in the legal issues - Mr Hawkins or other people involved such as the supervisors. The point is that we received no advice on why we were asked here this afternoon, so naturally we have not refreshed our memories on the issue.

**Hon G.T. GIFFARD:** The last time you were here we discussed it. I do not think Mr Newcombe was here.

**Mr Newcombe:** No. I am sorry, but my only problem is your statement that nobody can tell you what is in it. I am saying that the three of us have said we cannot tell you.

**The CHAIRMAN:** As a side issue, was Mr Castiglione appointed as an officer of the board?

**Mr Newcombe:** I do not know; I assume so.

**Mr Harvey:** I could not be certain.

**The CHAIRMAN:** Could you check on that and advise the committee?

**Hon NORM KELLY:** Also, if he was appointed, when was that?

**The CHAIRMAN:** Also, could you advise in what capacity he was appointed?

**Hon NORM KELLY:** From whom did Mr Castiglione take his riding instructions?

**Mr Newcombe:** At the time he was a legal officer of the ministry, so he would have reported to Jane Brazier, who was the director of the relevant division. He was providing legal advice to the board, so he would attend the board and provide legal advice to the board.

**Hon NORM KELLY:** We would need to find out from Mr Castiglione who gave him instructions on how to instruct Professor O'Donovan.

**Mr Newcombe:** Yes, I believe so.

**Hon NORM KELLY:** We do not know whether it was the board or the ministry that asked for that interpretation.

**Mr Newcombe:** Yes, unless Mr Harvey knows.

**Hon NORM KELLY:** Do the people at the table know who instructed Mr Castiglione?

**Mr Newcombe:** No.

**The CHAIRMAN:** We understand that you have given evidence that two other legal opinions were sought - one from the Crown Solicitor's Office and one from Mr Michael Corboy.

**Mr Harvey:** The opinion from the Crown Solicitor's office was in relation to the process that the board would go through to apply to the court to have a supervisor appointed. I think I may have corrected earlier evidence that Mr Corboy was the legal officer who represented the board at that hearing.

**Hon NORM KELLY:** Would the Crown Solicitor normally provide you with the advice that Professor O'Donovan provided?

**Mr Harvey:** I could not be certain without asking them that.

**Mr Newcombe:** They could be a source of that advice, yes.

**Hon NORM KELLY:** Who at the board should we talk to do find out what transpired between the board, Mr Castiglione, Professor O'Donovan, the Crown Solicitor and the like?

**Mr Harvey:** I would think that the key person of all those people you mentioned would be Mr Castiglione.

**Mr Newcombe:** Or Mr Urquhart as chairman of the board.

**Hon NORM KELLY:** Mr Castiglione worked for the ministry?

**Mr Harvey:** Yes.

**Hon NORM KELLY:** That is, if the board was involved.

**Mr Newcombe:** Yes, but either of those two.

**The CHAIRMAN:** I want to clarify what you have just advised. On the basis of your previous advice, in determining the duties, powers and the contract - for want of a better term - of the appointment of the supervisor of Grubb, the advice on which the board relied was from the ministry's legal officers and the Crown Solicitor's Office?

**Mr Harvey:** No, the duties -



**The CHAIRMAN:** Sorry, it was the advice of the ministry's legal officers and Dr Jim O'Donovan, professor of law at the University of Western Australia?

**Mr Harvey:** Yes, that is correct.

**The CHAIRMAN:** Did the Crown Solicitor's Office provide advice purely with respect to the mechanism for appointment?

**Mr Harvey:** That is right.

**The CHAIRMAN:** Was Mr Michael Corboy the barrister who sought the order in the District Court for the appointment of the supervisor?

**Mr Harvey:** That is correct.

**Hon G.T. GIFFARD:** Mr Harvey, is it your evidence that Professor O'Donovan's advice related to the nature of the relationship that the board entered into with the supervisor? I think that is what you said.

**Mr Harvey:** I cannot be certain. As Mr Newcombe said, it is some time since any of us have seen that legal advice. I have had no need to look at it for whatever reason since then, so I cannot be certain.

**The CHAIRMAN:** Were the terms and conditions on which the supervisor was appointed based on the advice of Mr O'Donovan.

**Mr Harvey:** That is right.

**Hon GREG SMITH:** You said that when the court looked at Grubb it looked at four deals and then narrowed it down to one deal. Did the supervisor take that to the court to get the court to answer the question?

**Mr Harvey:** When you say "answer the question", does that relate to the fact that it should be narrowed down from four to one?

**Hon GREG SMITH:** I would imagine that the supervisor has gone to the court with a question on what he should do in certain circumstances?

**Mr Harvey:** Yes.

**Mr Newcombe:** Yes; the supervisor seeks a ruling from the court about the weight a matter should receive.

**Hon GREG SMITH:** Has the supervisor been asking what he should do?

**Mr Newcombe:** Yes.

**Hon GREG SMITH:** As I understand it, he is not asking about any weighting; he is seeking clarification.

**Mr Newcombe:** Yes, he is seeking a ruling from the court on which way to proceed, what is the authority and whether he has the authority to do that. Each of these matters raises complex legal questions. They are not simply about secured versus unsecured loans. The supervisor has taken a relatively conservative view by regularly referring back to the court to seek directions on how he should proceed.

**Hon GREG SMITH:** In the normal course of events, there would be no question about the entitlement to assets of a person whose name was registered on a mortgage.

**The CHAIRMAN:** There are exceptions, but Hon Greg Smith has his view on that matter.

**Hon GREG SMITH:** If a person's name is not registered, he would have no right to funds. Why has a grey area been created due to the involvement of the unregistered mortgagees?

**Mr Newcombe:** That would be perfectly normal if records showed what had occurred. For instance, you may have paid money to a broker on the basis your name would be on the registered title of a block of land. Unfortunately, due to the mismanagement of loans by the businesses concerned, funds were provided for security, but in some cases the person's name was not registered on the mortgage, even though it should have been. Due to error, fraud or whatever, the person's name was not registered.

**Hon GREG SMITH:** Do they have documentation indicating that they are registered?

**Mr Newcombe:** Yes, but in Mr Grubb's case, the whereabouts of documentation is blurred. In other circumstances, a person may have provided funds but his name may have ended up on the mortgage relating to a different property. This is part of the problem. People may have advanced funds and have been registered on a mortgage for a property that is totally unrelated to their loan. A question that arises is why those people have any right to funds against that property. They did not advance funds for it, but due to an administrative error or fraud their names ended up on the mortgage. Consequently, a complete mishmash of people's names are on a mortgage when they are not entitled to be on it because it has nothing to do with the deal into which they entered. People whose names should be on the mortgage are not, even though all the paperwork was completed and the funds were advanced. It is not a straightforward situation. The question now is: What can be done in the best interests of the people involved to enable them to get some return. Should the fact that people's names ended up on the mortgage, more by good luck than anything else, be the sole determinant on their recovering money compared with someone whose name is not on the mortgage?

**Hon GREG SMITH:** People may have documentation from Grubb saying "Thank you for your \$20 000; it has been invested on such and such a mortgage" but the liquidator has found that the information on their personal documentation does not correspond with that which is on the mortgage.

**The CHAIRMAN:** You said it was a matter of what is fair. Is it not a matter of what is legal? Has the Department of Land Administration advised the Ministry of Fair Trading that it holds the view that people whose names appear on a title have an indefeasible right?

**Mr Newcombe:** The issue of indefeasibility of title is fundamental.

**The CHAIRMAN:** That has not always been agreed to between the ministry and DOLA, has it?

**Mr Newcombe:** I do not know whether there has been a formal disagreement on that issue. The normal rule is that a person registered on a title on the basis of the Torrens system is protected by indefeasibility of title.

**The CHAIRMAN:** The question of whether defalcation has occurred also arises. It may give a person not registered on the title an interest in the title. That matter must be fought in the courts.

**Mr Newcombe:** That is what the supervisor is doing.

**The CHAIRMAN:** Yes; but he is fighting on behalf of one class of investor versus another.

**Mr Newcombe:** I suppose the judgment will be made about whether it is on behalf of one group.

**The CHAIRMAN:** I am not necessarily questioning the motives for doing it.

**Mr Newcombe:** That is a matter for dispute. Clearly some people who believe they have a mortgage and that they can sell the property and get their money back, will say they should be allowed to do that.

**The CHAIRMAN:** If someone else believes they obtained it fraudulently, it is incumbent on that person to take legal action, which he would be entitled to do to claim the money.

**Mr Newcombe:** That would result in a multitude of legal actions that would go on forever.

The supervisor is trying to work through those issues with the court authority by taking the matters to the court for a ruling. The court is the appropriate place for that to occur. These are complex issues. As you just identified, significant issues are involved such as what is just and reasonable, indefeasibility of title and the way in which the various facets of fraud and so on operated. That is what the supervisor is addressing. Some people agree with what he is doing and some disagree with it. The alternative approach would result in an almost unending series of litigation.

**The CHAIRMAN:** Has the Ministry of Fair Trading or the Finance Brokers Supervisory Board considered whether the various classes of investors should be funded to assist them in their legal action?

**Mr Harvey:** Not in relation to Graeme Grubb Finance investors. I think an ex gratia offer was made early in the piece to a number of Global Finance Group investors to help with the cost of legal services.

**The CHAIRMAN:** Was it not considered in relation to Grubb?

**Mr Harvey:** No.

**Hon G.T. GIFFARD:** Were those investors secured creditors?

**Mr Harvey:** No, it is a whole different ball game with Global Finance.

**The CHAIRMAN:** You have given evidence that you have taken the widest possible interpretation. However, it strikes me that the wider you try to take the interpretation, the greater the probability that you could go outside what is allowed under the Act. Do you accept that?

**Mr Harvey:** To be fair, the ministry has been criticised by some people for not going wide enough.

**Mr Newcombe:** Taken to its nth degree, the proposition is correct. It is the court's role to make a decision. The court may take the view that the supervisor is acting beyond his powers in these matters.

**The CHAIRMAN:** The court may not be in a position to test that point. The supervisor is also wearing the hat of a liquidator.

**Mr Newcombe:** In different capacities.

**The CHAIRMAN:** I understand that, but I am referring to the actions of the court. You are correct that the court may make a final decision on those matters. It may not be relevant to the case; therefore, the court will not make a decision on the powers of the supervisor but on the cases put before it.

**Mr Newcombe:** Yes, assuming the powers of the supervisor are not relevant to the case. At least one legal practitioner has a different view and has the capacity to argue that point. I am sure the courts have been made well aware of the issue.

**The CHAIRMAN:** As I said earlier, it is not for us to get into an argument about whether the courts are doing things correctly. We are trying to establish the actions of the ministry and the impact it is having on the investors and their losses and whether those actions are clearly within the powers of the Act.

With respect to Mr O'Donovan's advice, was it clear that the actions you have taken are within the powers of the Act?

**Mr Harvey:** Without referring directly to his legal advice -

**The CHAIRMAN:** I am not asking for legal opinion, but whether it was very clear in his opinion that the ministry's actions are within the powers of the Act.

**Mr Newcombe:** The advice was given before, so if you are asking whether Mr O'Donovan has approved everything the ministry has done since, we could not answer that because the advice was the basis on which the action was taken. All we can say is that the action has been taken on the

basis of that advice. I cannot answer your question. Advice was given before we took action so we could not say he justified all the actions the ministry has taken.

**The CHAIRMAN:** Were not the supervisor's powers provided to him under the terms of his appointment based on the advice given by Mr O'Donovan?

**Mr Newcombe:** I cannot answer that categorically. I do not have the relevant information in front of me.

**The CHAIRMAN:** As a general rule was that the case?

**Mr Newcombe:** Yes. As a general rule, the ministry's actions have been based on Mr O'Donovan's advice.

**The CHAIRMAN:** Surely, if the ministry's actions were not based on his advice, there must be some other advice.

**Mr Newcombe:** I am saying that the ministry's actions were based on his advice, but I am being careful in my answer to your question, which was whether every single aspect of the contract is based on his advice. I have not looked at the two documents side by side, so I cannot give you a categorical answer. However, action was taken based on that advice.

**The CHAIRMAN:** Are you an officer of the board?

**Mr Newcombe:** No.

**The CHAIRMAN:** You were obviously involved in that discussion.

**Mr Newcombe:** No, I was involved after the event. My involvement with the finance broking situation began this year. My involvement has been with the Gunning inquiry and this committee. I have become familiar with documentation since then. I had no involvement with the appointment of the supervisor or any action prior to this.

**The CHAIRMAN:** What is your involvement in advice given to the board?

**Mr Newcombe:** Through a range of mechanisms. If you are alluding to the issue about the secrecy provision, the ministry has a statutory role under the Consumer Affairs Act to assist the minister in the administration of all the legislation in his portfolio, which includes the Finance Brokers Control Act.

**The CHAIRMAN:** That has not always been the view of the ministry has it?

**Mr Newcombe:** I think it has.

**Hon G.T. GIFFARD:** Mr Harvey, were you deputy registrar when this occurred in 1999?

**Mr Harvey:** Early in 1999 I was probably the acting registrar.

**Hon G.T. GIFFARD:** I think you gave evidence when you were here early in October about the sequence of events. It seems to me that the Crown Solicitor has given you advice generally on how to make application to the District Court and how to get a supervisor appointed. However, as I understand it, the supervisor's role was addressed primarily by Professor O'Donovan. Is that a fair assessment?

**Mr Harvey:** Yes.

**Hon G.T. GIFFARD:** Did you seek Crown Solicitor's advice and advice from Professor O'Donovan because you had not been in that position before?

**Mr Harvey:** That is right.

**Hon G.T. GIFFARD:** It was a groundbreaking situation for you in June 1999 when you were the acting registrar. No doubt you were very interested in the advice you received from Crown Law on what to do. I am sure you would have been very interested in the advice from Professor O'Donovan on what the supervisor should do. Is that a fair assessment?

**Mr Harvey:** To be fair, that advice was sought and received by legal officers in the ministry, not by me.

**Hon G.T. GIFFARD:** Did that advice not go to the acting registrar of the board?

**Mr Harvey:** No.

**Hon G.T. GIFFARD:** Did you not see Professor O'Donovan's advice?

**Mr Harvey:** Not in the first instance.

**Hon G.T. GIFFARD:** What do you mean not in the first instance?

**Mr Harvey:** Professor O'Donovan would have responded to Mr Castiglione.

**Hon G.T. GIFFARD:** Did you see the advice?

**Mr Harvey:** I have seen it, but I do not remember when I saw it.

**Hon G.T. GIFFARD:** You do not remember when, but was it some time between mid 1999 and now?

**Mr Harvey:** Yes, it would have been around then.

**Hon G.T. GIFFARD:** This was groundbreaking stuff - it was not a matter of minor importance. It was about appointing a supervisor for the first time, Crown Law advice on how to do it, and Professor O'Donovan's advice on the functions of the supervisor. I am struggling with the notion that you cannot remember whether Professor O'Donovan's advice addressed the issue of whether the board was empowered to enter into the contract that it did.

**Mr Harvey:** I can appreciate what you are saying. The committee must also appreciate - it would have seen it in the records that have been provided - that a lot of water has passed under the bridge since that time.

**Hon N.D. GRIFFITHS:** This was the first time a supervisor was to be appointed. Can you not remember?

**Mr Harvey:** No.

**Hon NORM KELLY:** Did you see the Crown Solicitor's advice when it came back?

**Mr Harvey:** I would have seen it at some stage.

**Hon NORM KELLY:** Would you explain that?

**Mr Harvey:** It would have been directed to the legal officer, not to me. I am sure that at some stage I was given a copy and asked to file it.

**Hon NORM KELLY:** Would Mr Castiglione have then, without any discussions with you, pursued further advice from Professor O'Donovan?

**Mr Harvey:** About the duties, yes.

**Hon NORM KELLY:** Would Mr Castiglione have discussed with anybody what instructions he should give Professor O'Donovan regarding getting that advice?

**Mr Harvey:** I do not know whom he would have consulted prior to that stage.

**Hon NORM KELLY:** In early October, you stated that having received that advice from the Crown Solicitor's Office, you sought more advice from Jim O'Donovan.

**Mr Harvey:** Yes.

**Hon NORM KELLY:** That suggests that you had an understanding of the advice you were seeking.

**Mr Harvey:** There are two different issues: The Crown Solicitor's advice concerning the appointment, and Professor O'Donovan's advice concerning the functions or role of the supervisor.

**Hon NORM KELLY:** In your evidence in October, it would seem that you were aware of what you were seeking from Professor O'Donovan. Earlier, when I tried to find out what parameters were given to Professor O'Donovan, I was told that I would need to talk to Mr Castiglione or Mr Urquhart about that information. Do you know what parameters were asked of Professor O'Donovan?

**Mr Harvey:** Mr O'Donovan would have received a written briefing from Mr Castiglione.

**Hon NORM KELLY:** I appreciate that he would have. Are you aware, either in detail or in a general sense, of what information Mr Castiglione was seeking from Professor O'Donovan.

**Mr Harvey:** I cannot say that I would have been aware of anything.

**Hon G.T. GIFFARD:** I have made it clear that there are two aspects; that is, the roles and duties of the supervisor, and the ability of the board to enter into what I would term a prescriptive contract with the supervisor. Would you comment on the proposition that the legal advice you received from Professor O'Donovan addressed the roles and duties of the supervisor but did not address whether the board had the right to enter into a prescriptive contract of the sort it did with the supervisor? Professor O'Donovan's opinion did not address that; it addressed the rights and responsibilities of the supervisor.

**Mr Harvey:** I still do not know the answer to that. I know what you are saying, but I do not know what was contained in Dr O'Donovan's opinion.

**Hon G.T. GIFFARD:** Is that the opinion the committee has previously sought from the board?

**Mr Harvey:** I am not sure what the committee has sought from the board.

**Hon G.T. GIFFARD:** That would provide the answer to the production of that document. If the committee were to see that, it would know whether the board acted on advice from Professor O'Donovan or did so of its own accord.

**Mr Harvey:** That is reasonable.

**Hon NORM KELLY:** Is Mr Castiglione still with the ministry?

**Mr Newcombe:** No.

**Hon NORM KELLY:** Where is he now?

**Mr Newcombe:** In private practice.

**Hon NORM KELLY:** Is it true that the two people the committee talked to, Mr Castiglione and Mr Urquhart, no longer have any connections with the ministry?

**Mr Newcombe:** That is correct.

**Hon NORM KELLY:** Ms Nulsen, when were you appointed by the board as registrar?

**Ms Nulsen:** A week and a half ago.

**Hon NORM KELLY:** Were you made aware of why there was a need for a new registrar? Did you inquire into that?

**Ms Nulsen:** I am aware that there was a general feeling of the CEO of the ministry that some additional resources were warranted in that area. The Gunning inquiry recommended that a full-time registrar for the board be appointed, at least for a time, given that a number of the recommendations relate to the operation of the interface between the board and the ministry. That is my understanding of why I was asked to take the appointment.

**Hon NORM KELLY:** Are you working full time for the board?

**Ms Nulsen:** I am.

**Hon NORM KELLY:** You have been involved with the finance broking issue since early this year. Can you explain your role prior to being appointed to the registrar?

**Ms Nulsen:** In mid-February I was asked whether I would form a temporary task force to deal with issues surrounding the finance broking industry. At that time, the ministry was facing some difficulties. The ministry ran the risk of resources being drawn from other areas, which would have created other problems. A temporary task force was formed to address the issues in the finance broking area from a number of different perspectives. A policy officer, one investigator and additional compliance officers worked in that area. My role was to manage and put that team together. I found staff and accommodation for the team from mid-February until a week and a half ago.

**Hon NORM KELLY:** Was that task force appointed by the board as investigators or was it separate to the -

**Ms Nulsen:** The people in the task force are public servants and are employees of the Ministry of Fair Trading, but each of them became appointed as an officer of the board in the appropriate capacity.

**Hon NORM KELLY:** Do you take your instructions from the board?

**Ms Nulsen:** I understand that that is the case. My appointment is administratively responsible to the director of industry and consumer services.

**Hon NORM KELLY:** Who is that?

**Ms Nulsen:** Noela Taylor. Functionally, I am responsible directly to the board and the chairman of the board.

**The CHAIRMAN:** Has the minister sought advice about the board's appointment of supervisors? Has the minister provided any instructions on how he believes the board should proceed on this matter?

**Mr Harvey:** There are two parts to that question. First, he would have received regular briefings on the role of the supervisor as different matters progressed. Secondly, I am not aware whether he has given any direction on how the supervisor would have performed his function.

**Mr Newcombe:** That is my understanding as well.

**The CHAIRMAN:** Would the minister have been briefed prior to the appointment of the supervisor?

**Mr Harvey:** Yes.

**The CHAIRMAN:** Mr Harvey, the committee has previously discussed the letter dated 21 July 1999, signed by you to Mr Mark Conlan of Bird Cameron. Is that the document on which the terms and conditions between the board and the appointment of the supervisor are outlined?

**Mr Harvey:** That is correct.

**The CHAIRMAN:** Was that document prepared and signed by you?

**Mr Harvey:** It was not prepared by me; it was prepared by a legal officer and signed by me.

**The CHAIRMAN:** Do you recall which legal officer prepared it?

**Mr Harvey:** Looking at the initials on the bottom, I would say it was Thomas Staples.

**The CHAIRMAN:** Is Mr Staples more likely to know the issues rather than Mr Castiglione?

**Mr Harvey:** It depends on what questions the committee wishes to ask. Mr Staples had not been in the ministry at that time - I do not know when he joined. Mr Castiglione was at the ministry early on in the piece. Mr Staples might have arrived after that process had commenced, I cannot be certain.

**The CHAIRMAN:** You did not prepare the letter, but you signed it. Were you satisfied that it was correct and that you had the power to do it?

**Mr Harvey:** Given that it was prepared by a legal officer, I was reasonably satisfied that it would have been correct.

**The CHAIRMAN:** Did you take it on face value that because a legal officer of the ministry had prepared it, that it was a legal document?

**Mr Harvey:** That is correct.

**The CHAIRMAN:** The beginning of the document states -

Further to your meeting with Pat Walker, Thomas Staples and Diana Newman on 16 July 1999 the following terms and conditions are proposed:

Did you attend that meeting on 16 July?

**Mr Harvey:** I attended one of the meetings, and it may well be this one to which the letter refers. It is possible that I was at that meeting on 16 July.

**The CHAIRMAN:** Were the terms and conditions of the appointment of a supervisor discussed at those meetings.

**Mr Harvey:** I am not sure whether they were discussed to any great degree. The primary focus of the meeting I attended was to discuss the rates of remuneration.

**The CHAIRMAN:** Do you recall whether the terms and conditions were discussed?

**Mr Harvey:** I cannot recall. It is possible that they may have been, but they would not have been the primary intention of the meeting.

**The CHAIRMAN:** Why would you refer to that meeting at the commencement of the letter unless it was to discuss the terms and conditions?

**Mr Harvey:** Possibly because the terms and conditions referred to in the letter concern remuneration. The remuneration does not appear to be in writing, but I dare say that the level of remuneration would have been one of the last matters to be dealt with, hence the reference to that last meeting.

**The CHAIRMAN:** Following that letter, were any concerns raised with the ministry - other than by investors - about the terms and powers on which the supervisor had been appointed?

**Mr Harvey:** To be fair, a number of questions were raised by the supervisors, who required legal clarification on a number of aspects.

**The CHAIRMAN:** Do you recall what some of those clarifications were?

**Mr Harvey:** They would have been many and varied, according to a case-by-case basis.

**The CHAIRMAN:** Do you recall receiving a letter dated 10 September 1999 from Mr Conlan of Bird Cameron Partners in which he sought clarification of his position as supervisor?

**Mr Harvey:** I do not recall the letter. I obviously received it if you have it in front of you.

**The CHAIRMAN:** I have only one copy. I will skip over it until we have copies made.

Has the board had drawn to its attention, or held any discussions with the supervisor regarding what should happen to moneys received on properties with disputed interests sold by mortgagees?

**Mr Harvey:** The supervisors from both Grubb and Global have made a presentation, for want of another word, to the board about the issues they face. I am sure that the issue you talk about would have been one of a number of issues addressed.

**The CHAIRMAN:** Do you recall whether the board has given any direction on the matter to the supervisors on how they should deal with the finances?



**Mr Harvey:** I do not believe it has.

**The CHAIRMAN:** The supervisors would have outlined what they proposed to do -

**Mr Harvey:** Based on their legal advice.

**The CHAIRMAN:** If the board were not happy with the way the supervisors intend to proceed, the board - based on what you have told us - has the power to direct them to do otherwise.

**Mr Harvey:** I believe so.

**The CHAIRMAN:** Are you aware that an option for mortgagees selling properties is requiring people to place that money into trust accounts?

**Mr Harvey:** Yes.

**The CHAIRMAN:** Do you know the reason for it to be placed in the trust accounts?

**Mr Harvey:** It is based on legal advice.

**The CHAIRMAN:** Of what nature?

**Mr Harvey:** I think the basis of the legal advice was that it is not certain that those people have entitlement.

**The CHAIRMAN:** The legal ownership of the money is still to be determined.

**Mr Harvey:** That is one of the issues before the court, yes.

**The CHAIRMAN:** Am I correct in stating that the matter of which trust account into which the money is placed is not a concern of the board, as long as it goes to a trust account, be it the solicitor's, the supervisor's or some other trust account?

**Mr Harvey:** I am aware that money has been held in different trust accounts. As long as the supervisors and all respective parties are happy with that arrangement, I do not believe the board would have a concern.

**The CHAIRMAN:** Has the board sought advice on the exact trust account into which the money should be placed?

**Mr Harvey:** Not to my knowledge.

**The CHAIRMAN:** Are you aware of the order handed down by the District Court for the appointment of a supervisor?

**Mr Harvey:** I know that an order would be handed down, but I do not know what it contains.

**The CHAIRMAN:** Does the board consider those moneys to be part of the trust account of the mortgage broker until legal ownership is determined?

**Mr Harvey:** I do not know the board's view on that matter. I dare say that it would take legal advice on that point.

**The CHAIRMAN:** Do you know whether it has?

**Mr Harvey:** No. I do not know.

**The CHAIRMAN:** You do not know whether it has taken advice, or has it definitely not done so?

**Mr Harvey:** I am not aware whether it has taken legal advice.

**The CHAIRMAN:** Would you expect to be aware if the board had taken that advice?

**Mr Harvey:** That is most likely.

**The CHAIRMAN:** Therefore, it is most likely the board has not taken legal advice as you are not aware of it.

**Mr Harvey:** Yes.

**The CHAIRMAN:** What happens to the interest accrued on the money held in trust?

**Mr Harvey:** I am not certain without discussing it with the supervisors, who would have that information.

**The CHAIRMAN:** Are you aware whether the board has discussions with the supervisor about that matter?

**Mr Harvey:** I am not aware.

**The CHAIRMAN:** Would the board have been advised by the supervisors in that regard?

**Mr Harvey:** The supervisors provide regular reports to the board. I would not be aware without checking whether it is addressed in the reports provided.

**The CHAIRMAN:** As I understand it, the interest from those trust accounts is being paid to people who held the registered mortgages; however, those people cannot access their capital. I wonder whether the board sought any legal advice or has been involved in any discussions on that point. Is the board aware that it is occurring?

**Mr Harvey:** I am not aware on either of those two counts.

**The CHAIRMAN:** Do you think the board should be aware?

**Mr Harvey:** The board would rely on the legal advice provided to the supervisor in the performance of his duties.

**The CHAIRMAN:** That would be the subsequent, not the original, legal advice?

**Mr Harvey:** Yes.

**The CHAIRMAN:** I am happy for Mr Newcombe to jump in here. If the legal ownership of the money cannot be determined, and therefore cannot be distributed to the mortgagees, I cannot see how the interest payments can be paid. Nevertheless, I understand it is happening.

**Mr Newcombe:** I am not in a position to give you an answer. I do not know whether it is a matter for determination before the court or whether it has arisen. I accept your word that it is the case. I am not aware of details on the supervisors' operations. I appreciate the opportunity to comment, but I cannot do so.

**The CHAIRMAN:** Can anyone else comment? I am trying to find the answer to that question. The supervisors put money away into an account and say that it cannot be touched until legal ownership is determined, yet interest payments can be distributed.

**Mr Newcombe:** Is it a matter you raised with the supervisors when you took evidence?

**The CHAIRMAN:** No.

**Mr Newcombe:** Obviously that is the best source of the information.

**The CHAIRMAN:** Can you check whether correspondence was exchanged or discussions held between the supervisors and the board on requiring moneys to be placed in a trust account and regarding the interest received? I take your advice that we should talk to the supervisor. Based on your earlier evidence that the board can direct the supervisors, the board should be interested in that matter; that is, the supervisor is acting as an agent of the board. It says to someone, "You cannot have the capital because ownership is still to be determined; however, the interest can be repaid to you." Can you check that out?

**Mr Newcombe:** I will have a look.

**The CHAIRMAN:** Also, can you see which trust account that money must be paid into? Has any consideration been given to determine whether money from properties sold by the mortgagees is potentially money that belongs to the finance broker's trust account?

**Mr Harvey:** Is that as opposed to the money going into a solicitor's trust account?

**The CHAIRMAN:** That is right. The order of the court required the money to be placed into a trust account with Treasury. I want this question answered: Why is that money allowed to be placed in a number of trust accounts across Perth and not into a trust account held at Treasury in accordance with the order of the supervisor? Has it been discussed by the board, raised by the board or contained in any reports from the supervisor outlining what they are doing?

You now have a copy of the 10 September 1999 document; do you recall it?

**Mr Harvey:** No, I do not. I am sure I would have received it at that time.

**The CHAIRMAN:** It strikes me that it is a document which is fairly challenging to the actions of the board, and I assume it would have caused a kafuffle when it was received.

**Mr Harvey:** I cannot remember, without looking at the file, what correspondence followed from this. I assume it would have been referred to the legal officer for advice.

**The CHAIRMAN:** It outlines a range of areas: First, the supervisor's independence. Mr Conlan clearly questioned the role of the board. Do you recall whether that matter was resolved?

**Mr Harvey:** I do not recall without looking at the file. To my knowledge, Mr Conlan has certainly not raised it of late.

**The CHAIRMAN:** Are you aware as a result of that letter whether any of the actions of the board has changed in the way it deals with Mr Conlan?

**Mr Harvey:** To my knowledge, I do not believe it would have done so.

**The CHAIRMAN:** The supervisor indicates that his view of the Act is that he should be given broader terms of independence and that the board has no power to direct him; that is, he should act independently of the board. Point 2.4 of the letter best sums it up -

My present opinion is that I should act independently of the Board and not at the specific direction of the Board.

Nevertheless, the board continued to specifically direct him.

**Mr Harvey:** I do not believe there was any change to his original appointment. I can only assume that the matter was clarified with Mr Conlan at some subsequent stage.

**The CHAIRMAN:** Are you aware whether other concerns he raised were ever addressed by the board?

**Mr Harvey:** No.

**Hon GREG SMITH:** I have a question for whoever wants to answer it: Have you seen the advice provided by Professor O'Donovan? I assume someone has looked over it.

**Mr Harvey:** It would have been referred to legal officers.

**Hon GREG SMITH:** Have either of you looked through it?

**Mr Harvey:** I have certainly not analysed it.

**Mr Newcombe:** I briefly read it on one occasion some time ago.

**Hon GREG SMITH:** Is it a brief document, or voluminous?

**Mr Newcombe:** It is relatively brief.

**Hon GREG SMITH:** Does it comprise 10 pages.

**Mr Newcombe:** It numbers less than 10 pages, from memory. It is not a large document.

**Hon GREG SMITH:** Are you able to share with us, without going too far, whether he based it on any precedents concerning why certain things should be done?

**Mr Newcombe:** My recollection is that he equated the supervisor to a trustee. That is my recollection. It is some time since I read it. I understand he had reference to the powers of the trustee in relation to how the supervisors would act. I cannot be more specific. I read it out of general interest, not for a specific purpose.

**Hon NORM KELLY:** With regard to your earlier remarks about Mr Conlan, and his degree of independence, do you believe that these issues may have been brought about because the Act has been interpreted very widely, and that the role of the supervisor is probably a lot wider than originally stated in the Act?

**Mr Harvey:** I do not think I would relate it back to that.

**Hon NORM KELLY:** This refers back to what we were talking about earlier in the hearing, as to the interpretation of the Act, and the reason for getting the opinion, and the like. I appreciate that, in trying to do your best for the people involved, it may have been easier to give very wide powers to the supervisor, to obviate any difficulties created by the narrow interpretation, but perhaps this in itself has caused some problems for the supervisor, in trying to work out his role.

**Mr Newcombe:** Given that it is a unique arrangement, there is a situation of learning as it goes, and there will be issues. I do not think that is surprising. It is quite common even in liquidations under unusual circumstances, for there to be to-ing and fro-ing as to exactly what should be done. People with experience have different views about how things should happen. There is not a lot of history to go on to indicate how a supervisor should work, and the people involved relate it back to liquidation. There is a very well defined set of rules about how a liquidator works, and a lot of law and history. The supervisor is a different animal, and it is not surprising, and comes from the fact that there is not a lot of guidance on what a supervisor should do, and there is not a lot of precedent. In those circumstances, given also the complexity of the matter he is looking at - there are a lot of problems in the area - that is the cause of questioning and answering, more than anything else.

**Hon NORM KELLY:** That is probably why there are legal people around who question how those powers have been interpreted.

**Mr Newcombe:** It is area in which there would be differing opinions, because there is not the guidance; people cannot refer to an easy textbook on supervisors of finance brokers.

**Hon NORM KELLY:** Ms Nulsen, is it your understanding that the minister has the power to direct the board, or the board's officers?

**Ms Nulsen:** My understanding is that the minister does not have the power to direct the Finance Brokers Supervisory Board.

**Hon NORM KELLY:** Or the board's officers, and staff?

**Ms Nulsen:** My understanding is the minister has the power to direct all the officers of the board, who are appointed as public servants under the Public Sector Management Act.

**Hon NORM KELLY:** Are you a full-time registrar for the board?

**Ms Nulsen:** That is the position I hold, but I am an employee of the Ministry of Fair Trading, and of the Government. Public servant is the nature of my appointment.

**Hon NORM KELLY:** Who do you feel you are responsible to?

**Ms Nulsen:** I have a job description which makes me administratively responsible to the chief executive officer of the ministry through the director of industry and consumer services, and functionally responsible to the chairman of the board and the board, but my understanding is that I am bound in the same way that all other public servants are, under the Public Sector Management Act.

**Hon NORM KELLY:** Are you aware of directions from the minister in regard to the legal opinions we have been talking about today?

**Ms Nulsen:** Yes, I am.

**Hon NORM KELLY:** What is your understanding of that direction?

**Ms Nulsen:** That those legal opinions are subject to legal professional privilege, and I am not at liberty to provide them if requested.

**Hon NORM KELLY:** The committee does not agree with the arguments that have been provided to it by the previous registrar as to arguments about withholding those legal opinions. Hopefully we have made it clearer today that it is difficult, when we are deciding the merits of the case one way or another. We have been provided with a number of legal opinions saying that the board or the Ministry of Fair Trading has acted beyond its powers in the appointment of the supervisor, and we do not have any supporting evidence to say otherwise. That is one of the reasons we are keen to have a look at the legal opinions that you say support the appointment of Mr Conlan. It makes it very difficult for us to support your arguments when we produce our report. I imagine, from your last comment, that the situation remains the same, that you will not be providing any of those legal opinions of the ministry's legal officers, Professor Jim O'Donovan and Mr Michael Corboy. Is that correct?

**Ms Nulsen:** That is correct. I understand the directive from the minister precludes me from doing that.

**The CHAIRMAN:** Have you sought independent legal advice on that?

**Ms Nulsen:** I have not.

**Hon NORM KELLY:** Do you think it would be warranted to obtain legal advice on whether that was a legal direction?

**Ms Nulsen:** I may well do so. I had not realised that I was going to be asked about that.

**Hon NORM KELLY:** I appreciate that we have brought you in cold. Even though this committee has only been operating for a few months, there still is a high turnover on the board when it comes to people in charge.

**The CHAIRMAN:** Did the board consider appointing a supervisor for Mr Jamieson?

**Mr Harvey:** I am not aware of that.

**Ms Nulsen:** To my knowledge, the board has not yet considered that option. Anything could happen in the future and I do not know whether the board's consideration has reached that stage.

**Hon NORM KELLY:** How often does the board meet?

**Ms Nulsen:** Generally, once a month. My experience is limited, but certainly in the last two or three months it has been required to meet on two days in the month in order to deal with its agenda.

**Hon NORM KELLY:** Our previous evidence in regard to the vacancies on the board was that they were not going to be filled until further work has been done on the restructuring of the board, or on the later report of the Gunning inquiry. Is that correct?

**Mr Newcombe:** The one industry-elected position is vacant and a decision has been made to hold off until Gunning reports, and an assessment can be made of what sort of recommendations for structural change have been made.

**Hon NORM KELLY:** That is correct, because, hypothetically, the recommendation may be that no industry-elected board appointments be made.

**The CHAIRMAN:** Has the board considered yet whether to appoint a supervisor for Mr Jamieson?

**Ms Nulsen:** To my knowledge the board has not had a discussion about that.

**The CHAIRMAN:** Prior to your current position, you were the deputy registrar since about February -

**Ms Nulsen:** An assistant registrar.

**The CHAIRMAN:** - and you have been involved in investigations.

**Ms Nulsen:** That is right - as an assistant registrar.

**The CHAIRMAN:** Is it still your view that the option of appointing a supervisor may be considered by the board in the future?

**Ms Nulsen:** I cannot answer that. I do not know. At this stage, I guess the answer is that maybe they will consider it, but to my knowledge it has not been discussed by the board up to this point.

**The CHAIRMAN:** Are you the deputy registrar?

**Ms Nulsen:** I was one assistant registrar, on the third tier. Mr Harvey has been the deputy registrar throughout this period.

**Hon NORM KELLY:** Would all recommendations of that nature go through the registrar, to the board, when it comes to things such as the appointment of supervisors and the like? Would that be the normal process?

**Ms Nulsen:** I would say yes. The reporting of the investigators, for instance, would be channelled through the registrar.

**Hon NORM KELLY:** Mr Harvey, are you aware of any of these actions? I am not trying to play one off against the other, but I am thinking that in the changeover there may be something that Mr Harvey is aware of that Ms Nulsen may not be.

**Mr Harvey:** If you are referring to Mr Jamieson, I am not aware of any discussions that the board has had.

**The CHAIRMAN:** As I understand it, it would be incumbent on the board, by its own motion, to say to the registrar at the start that a supervisor needed to be appointed to Mr Jamieson's company.

**Mr Newcombe:** That is one option.

**The CHAIRMAN:** Alternatively the registrar could initiate action and communicate concerns about Mr Jamieson and recommend the appointment of a supervisor. Are you saying that, at this stage, neither of those events has occurred?

**Mr Harvey:** I am certainly not aware of it.

**The CHAIRMAN:** Are you aware that Mr Jamieson has a number of problems with his finance broking business?

**Mr Harvey:** I am.

**The CHAIRMAN:** Are you aware that he has now gone into bankruptcy?

**Mr Harvey:** I think I did hear that.

**The CHAIRMAN:** What would be the grounds, then, for appointing a supervisor?

**Mr Harvey:** I would imagine that, given the duties of the supervisor, you would firstly have to check whether there are any incomplete finance broking transactions.

**The CHAIRMAN:** The widest possible interpretation of the Act says that a supervisor can do a whole range of other things. Surely you would look at those.

**Mr Harvey:** I do not think it does. A lot of people would like to think that the supervisor does recovery action on the part of defaulting loans, but clearly a supervisor does not have that role.

**The CHAIRMAN:** In your letter of 21 July, you outlined a whole range of things a supervisor can do, which are clearly of assistance to investors.

**Mr Harvey:** If the grounds are there for the appointment of a supervisor.

**The CHAIRMAN:** What would you consider the grounds for the appointment of a supervisor, then - that the finance broker is unable to continue the business?

**Mr Newcombe:** I do not have a copy of the Act, which spells it out.

**The CHAIRMAN:** I find it extraordinary, and I am trying to clarify why the board or the officers of the board who would be empowered to start action themselves, have not even considered whether appointing a supervisor to Mr Jamieson's company is appropriate.

**Hon NORM KELLY:** Section 73(1) of the Act states -

Where the District Court, on the application of the Board, notice whereof shall be given to the finance broker, is satisfied that there are reasonable grounds for believing that a finance broker is, for any reason incapable of properly conducting his business, or is not conducting it in accordance with this Act, the District Court may -

- (a) suspend the finance broker from carrying on his business for such period as may be specified in the order;
- (b) restrain the finance broker and his bankers and their respective servants and agents from dealing in all or any of the bank accounts of the finance broker, subject to such terms and conditions as the District Court thinks fit;
- (c) authorize the Board to appoint a supervisor of the business of the finance broker;

I am not totally conversant with the Jamieson case, but going into bankruptcy could be reasonable grounds.

**The CHAIRMAN:** The business could not be continued, so bankruptcy itself would mean a person was no longer capable of acting as a finance broker, I would have thought.

**Mr Harvey:** That is true, but I think also you need to look at what are the duties of a supervisor and whether the appointment of a supervisor will facilitate unfinished finance broking business.

**The CHAIRMAN:** Have you made any inquiries into Mr Jamieson's company.

**Mr Harvey:** I am not part of any inquiries into Mr Jamieson. My role is purely with Grubb and Global.

**The CHAIRMAN:** I will ask the registrar whether she is aware of any inquiries into Mr Jamieson's company?

**Ms Nulsen:** At this point I am feeling a bit uncomfortable, and wonder whether we should not have this discussion in camera?

**The CHAIRMAN:** I am happy for that, and without taking in camera evidence - not that that would be hard since we are the only ones here - I take your point. I will not necessarily ask you about the nature of those inquiries.

**Ms Nulsen:** Okay.

**The CHAIRMAN:** I just want to ask whether inquiries are going on. If you still feel uncomfortable answering that I am happy to go into a private session or leave it.

**Ms Nulsen:** That is fine. I am happy to go as far as saying that investigations are going on. I hesitate to use the word "Inquiry" because it has a particular meaning under the Act. There are certainly investigations going on because the ministry has received complaints.

**Hon NORM KELLY:** Are you willing to say whether recommendations are being prepared for the board to consider? If you do not want to answer I appreciate that I might be going too far.

**Ms Nulsen:** Yes, recommendations are being prepared.

**Hon NORM KELLY:** When does the board next meet.

**Ms Nulsen:** On 8 November.

**The CHAIRMAN:** Would anyone like to make a comment before we conclude?

**Mr Newcombe:** We will respond to the matters on which you have requested some additional information.

**The CHAIRMAN:** Thank you. We will leave the subpoenas standing in case we have any further questions. We appreciate your attending at such short notice.

**Committee adjourned at 3.47 pm**