

**STANDING COMMITTEE ON PUBLIC ADMINISTRATION**

**INQUIRY INTO WESTERN AUSTRALIAN STRATA MANAGERS**

**TRANSCRIPT OF EVIDENCE  
TAKEN AT PERTH  
WEDNESDAY, 18 MAY 2011**

**Members**

**Hon Max Trenorden (Chairman)  
Hon Jon Ford (Deputy Chairman)  
Hon Ken Baston  
Hon Jim Chown  
Hon Ed Dermer**

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**Hearing commenced at 10.08 am****BANFIELD, MR TIMOTHY****Director, Real Estate and Business Agents Supervisory Board, sworn and examined:**

**The CHAIRMAN:** I welcome you to the meeting, but before we begin I ask you to make either an oath or affirmation.

[Witness took the oath.]

**The CHAIRMAN:** You have signed a document entitled “Information for Witnesses”?

**Mr Banfield:** I have.

**The CHAIRMAN:** Have you read it and understood it?

**Mr Banfield:** Yes, I have.

**The CHAIRMAN:** Thank you. These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard—I see you do have some documentation—please quote the full title of any document you refer to during the course of this hearing for the record and just be aware of the microphones, but we do not tend to have many microphone problems. I remind you that your transcript will become a matter for public record.

If for some reason you wish to make a confidential statement during today’s proceedings, you should request that evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note until such time as a transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Much of that is not so necessary today because we are just taking information from you.

Thank you very much for your contact with the committee. Would you mind just making an opening statement and talking directly about what you have given us and your view of matters? Then we will get into some questions.

**Mr Banfield:** Absolutely. I might start with a little bit of background on myself. I have been in the Department of Commerce since 2004. I commenced as the manager of the building and tenancy industry branch, which is the branch that receives a number of complaints from property industries and is the main branch that looked at complaints regarding strata managers as well, so I have background there. In 2007 I became the manager of the real estate branch and in 2008 I took over as the director of the real estate board, which is the other side of the department where we receive complaints from the clients of strata managers.

The information that I have given the committee so far is related to the board’s views on the potential licensing of strata managers and where they would see the licensing conduct provisions of that pertaining from there. I have also answered a few of the questions that were put to me as far as audit and a few other things, so I am quite happy to expand on those if you wish.

**The CHAIRMAN:** What I would like to hear from you is—you come from a pretty unique place in the people coming before us—what is your just general view on if I just say the industry?

**Mr Banfield:** The strata management industry?

**The CHAIRMAN:** Yes.

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**Mr Banfield:** My experience has led me to form the view that the strata management industry as far as negative licensing is concerned has not been successful. You are really limited to the education and training of the person who is providing that service to the strata company and sometimes it can be a bit hit and miss as far as what quality you are getting. The complaints I have seen generally tend to aggregate towards lack of reporting—particularly financial reporting seems to be a major issue as far as accuracy of accounts—the fact there is no accounts and the service expectation that strata companies expect to receive that they believe that they are not receiving. It has not been my experience that there has been widespread reports of money going missing that has come to me. There has been one instance where the real estate board took action against a sales rep who acted unlawfully and I provided those documents to the committee as well. But generally it is an area that I have concern over. The board also expresses its concern over the lack of regulation for this particular area. It is one of those things that I believe is crying out for stronger regulation.

**The CHAIRMAN:** I was just going to ask you, are you speaking from a vision where you are sitting at REBA—we also need to look at unlicensed strata managers, so have you had any real contact with unlicensed strata managers?

**Mr Banfield:** Not as such. The complaints that come through to the real estate board regarding strata managers who are not licensed real estate agents are non-jurisdictional for us. We are not able to investigate those matters. The matters that do come before the board that we are able to investigate are those where there is a licensed real estate agent who is performing those duties and then we can look at those aspects of that complaint. Because they are limited to a very narrow field, which is the moneys that are collected on behalf of a strata company. That field is very narrow at this stage. That is what our experience has been so far.

**Hon ED DERMER:** You are able to draw on the experience of a proportion of the total strata industry?

**Mr Banfield:** I believe I am, yes.

**Hon ED DERMER:** And the proportion that you described?

**Mr Banfield:** That is right. The licensed real estate agents, that is correct.

**The CHAIRMAN:** Is it reasonable for me to interpret from what you said that there is strong variation in those people who are under the REBA act; you go from very good operators to not so good operators?

**Mr Banfield:** Absolutely. In every industry you will come across that sort of situation; some people are just more highly trained, more highly skilled. Strata management is a specialised field. It is an area that not every real estate agent who is licensed to operate legally in industry actually chooses to go into because it is quite specialised. But those who go into it—my experience has been that there has been a scale of between the more mediocre performers to the more outstanding performers that is there.

**The CHAIRMAN:** From reading the information that you sent on ahead of today, not all your members operate in the same way I presume.

**Mr Banfield:** That is correct.

**The CHAIRMAN:** So, there is not a template or perhaps if there is a template, they do not necessarily follow it?

**Mr Banfield:** I am not aware of any template that is available.

**The CHAIRMAN:** They just do the business as they think they should, except there are some standard rules about trust accounts and other matters?

**Mr Banfield:** If it is a licensed real estate agent, that is correct. If they are operating their strata management company within their real estate business, they fall within the provisions of audit

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under our act. They have certain guidelines they need to follow—I have provided those documents as well—which allows the board to have their accounts audited once a year. The audit is on a sample as well, so it is not 100 per cent complete audit. It is a random sample by the auditor based on what they find. If they look at 10 per cent of the business and all is good, they probably give it a thumbs up. If there are mistakes, they will go and dig deeper from there and then it comes back to us as a qualified audit and we get to look at it from there.

**The CHAIRMAN:** Can we just look at the broader picture then? Why does the real estate board think there should be licensing of strata managers?

**Mr Banfield:** The real estate board believes that all areas of property should be regulated and, in particular, any industry that holds moneys on behalf of another person should have those moneys safeguarded. One of the primary functions of the real estate board is consumer protection and the fidelity guarantee account is one of those primary functions that they provide. The moneys that are held by a real estate agent who is licensed and that operates within their business, it is covered by the board's fidelity guarantee. All those moneys that are held by other entities out there who are performing strata management, they are not protected by the board's fidelity guarantee fund. That is where the board is coming from, from that angle. As a matter of principle they believe that these types of areas are important because it is other people's moneys that are at stake.

[10.20 am]

**The CHAIRMAN:** What would you see as the positive outcomes of a registration and licensing scheme?

**Mr Banfield:** If the government chooses to adopt licensing of strata managers, I would like to see a positive licensing arrangement put into place, because I see that regulation is more effective in a positive licensing arrangement. My experience has been that to get voluntary compliance in the industry, you have to attack things in a combined way. One way of just licensing a particular part of the industry will not necessarily achieve total regulation or protection for consumers or the community that is there. All things must operate in concert, so you will have your licensing, you will have your regulatory side of things, which are your investigations, and there might be prosecutions—deterrence is another good way of getting voluntary compliance. We have annual audits. We have proactive compliance where we go out to the industry once every three years and speak to people who are actually in the industry, working in business, to make sure that their business practices are up to speed, that they are doing everything they are supposed to be doing as far as acts and codes being adhered to. All these things work together to achieve what I believe is good, effective regulation and protection of the community.

**The CHAIRMAN:** Has the board discussed who would do those things? What you are describing requires revenue, requires compliance and those sorts of questions. Has the board discussed those issues, how the board thinks it should happen?

**Mr Banfield:** The board has discussed these issues over a long period of time and I probably should make the committee aware, if you are not already, that the board's lifespan is limited. On 30 June the boards will be abolished and those functions are going to be absorbed by the director general and the Commissioner for Consumer Protection. From that side of things, I am told that it will be business as usual for the community and for the industry members, so things will continue on from there. As far as who does what, I am probably not in a position to really say what the Department of Commerce should or should not be doing. I understand that the commissioner has already presented information before the committee anyway.

**The CHAIRMAN:** We have a range of information given to us; I was just seeking to see if you had a view on it.

**Mr Banfield:** The board itself, prior to knowledge of its demise, has always expressed a willingness to look at the regulation. They felt that it was best with it at that stage, mainly because they were

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already regulating a good proportion of the industry—they had the regulation infrastructure already in place with licensing, they already had the compliance area people in place, they had proactive programs in place, they had everything that was necessary to do good regulation and they felt that the fit was very good because it was going to look at a holistic approach to property. When all of that is absorbed by the Department of Commerce, I understand that that holistic approach is going to be continued and that they are going to have a property director who will look after the whole of property, which will include things like residential tenancies or it will include retirement villages; it will include anything to do with a property or tenancy related issue—it goes back into the one house. It is always best from a consumer's point of view, or from the community's point of view, to have one house that you go to, one place, a one-stop shop to get your information. It also provides the commissioner, I believe, with a fantastic opportunity to provide even stronger regulation if necessary, because they will have more tools available. In the past we have had these lines of demarcation, which were the jurisdiction of the board versus the jurisdiction of the commissioner, and once the commissioner takes over that, those boundaries disappear.

**The CHAIRMAN:** Are there any disadvantages to registration or licensing?

**Mr Banfield:** The only disadvantage I could see is that if I put myself into the shoes of a strata manager who is not a licensed real estate agent, and if I am out there doing the right thing, then I now have to get a licence to say that I am doing the right thing, to continue the business that I am already doing. But I also look at it from the point of view of that if I am in the shoes of that person then I will not have a problem being licensed, I am doing the right thing and therefore I am a representative of the good side of this industry. So, I cannot see, from my point of view, that there would be strong opposition.

**The CHAIRMAN:** What about the code of conduct as a tool? Is the board a fan of the code of conduct?

**Mr Banfield:** Absolutely. The code of conduct actually serves to provide industry with more detailed requirements of what a good agent is and what a good agent is not, so they tend to use the code as the bible of their operations. The code is quite expansive—it goes from due care and diligence all the way to doing a title search when you get a listing and These types of things. So, the code actually is quite useful. The code is also a useful regulatory tool because the board's function is not to punish an agent who does something wrong, it is to discipline and to educate, and we use that code to be able to do that sort of thing as well.

**The CHAIRMAN:** Getting down to the argument, and there is a strong argument out there, about registration or licensing, does the board or you have a view on the difference between registration and licensing; on which one it ought to be or whether it should be neither?

**Mr Banfield:** The board's view is that licensing is probably the best avenue of effecting good regulation, but the licensing cannot sit alone, it has to have things that go with it, it has to be a holistic approach to the positive licensing. One good thing about licensing is that the regulator is able to monitor who goes into the industry and so they are qualified to get into the industry at the very beginning rather than waiting for problems to come up and then having to educate or discipline these types of people. Often, when that happens, people's moneys have gone. You put the effort in beforehand to ensure that the industry components, the people who make up that body that serves the community for that industry, have reached a certain education qualification, they have had specific training. Also, the board has an ongoing educational role where they do compulsory professional development. Agents go and do so many points every year for additional training. All these things add up to ensure that the community is best protected from the outset, rather than waiting for a problem to happen and trying to address it from that point of view. So, that would be the board's favourite position. My experience over the years would probably underpin that as well.

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**The CHAIRMAN:** Also, you have sent earlier correspondence saying with the Stamford report that the board's view was that licensing would not be as expensive as the Stamford report indicated. Can you discuss that for a while?

**Mr Banfield:** I had the opportunity of actually discussing this with the consultants who came from Stamford, I actually did this when I was manager of Building and Tenancy Industries. They were struggling with trying to find a model that would work as far as estimating the cost involved. What Stamford looked at was the model of the Settlement Agents Supervisory Board and establishing it, because they said that the numbers were compatible, there are about 800 licensed settlement agents and they figured that that might be it about the same the same number as in the strata management industry. They asked what it would cost to set up an independent agency. You have got to also understand that sitting behind all of this is a piece of legislation that is not owned by the Department of Commerce, not owned by the real estate board, actually, Landgate is the caretaker of that piece of legislation, so it was assumed that Landgate would be the lead agency that would take on the regulation of those strata managers. Since then, other information has come back to me. I have formed a view that perhaps that approach might not be what is intended at this stage, because I understand it might be the roles of the Department of Commerce, particularly the Consumer Protection Division might take on some of those roles as far as regulation licensing is concerned. If that is the case, then the infrastructure, as I mentioned before, is already there for licensing, for the product of compliance, for the auditing. What is necessary at that stage is just looking at it and saying, "Okay, how do we modify to include this new industry? And what is the additional FTE cost that goes on top of it?" Because, as I said, there are these different arms of the board's regulation that is happening now, that the department is going to inherit, that is going to continue, that is already fully employed regulating those industries, and we are picking up other industries as well that we will be looking at providing these regulations or these functions to. Adding strata managers would probably be an additional burden as far as employment of people is concerned, but as far as the actual mechanics of it are concerned, they are largely there, it is a matter of changing and tweaking and adding to it to include this new industry. The industry is slightly different from the real estate industry because the real estate trust accounts can be quite complex. There is a variation of business that goes on from property management to sales—sometimes they sell off the plan or they hold moneys for a number of years in there. Strata management tends to be little bit more, I think, siloed into levies, bills coming in, bills going out, works being assigned and these types of things. So, it would take some changes as far as the proactive and auditing side of things to account for that. As far as why I felt the Stamford report was wrong, it might have given the government a sense that it is too unwieldy to set up in the first place, but if the infrastructure is already there then it is not as dramatic as what it would be, it is really just an FTE issue and getting the paperwork right.

[10.30 am]

**The CHAIRMAN:** Do you get a feeling that why government has not acted in the past is this fear of high cost of compliance?

**Mr Banfield:** I am not sure I have a sense one way or the other on that. From my point of view, I would have from the very beginning liked to have regulated strata managers. But as far as what prompted the government to do so or not do so, I do not think I have that information, sorry.

**The CHAIRMAN:** Can I just flick across to trust accounts? We have had a lot of information and some pretty emotional argument about trust accounts. How do you see trust accounts sitting in this particular industry, strata management? How important are trust accounts?

**Mr Banfield:** Trust accounts are vitally important not only just for strata management but for any industry where you collect moneys on behalf of someone else and you hold that money as trustee or as stakeholder for that moneys. It is very important. I mentioned before that you are subject to the education level and the goodwill of the person that you employ to work on your behalf as selling

your property or managing your property as far as property management or strata management. If you are unlucky enough to employ someone who is a little bit light on as far as their ability to operate a trust account and their honesty as far as managing moneys, then your moneys are at risk. To me, consumers' money is paramount. I think that is the role of what consumer protection and the board is about; it is providing that consumer protection. I believe, and I believe the board would believe, that trust accounts are paramount.

**The CHAIRMAN:** If you look at the people who are in the industry that are not related to yourself and to the board, many have one account for many different operations and their own business account all in the single account.

**Mr Banfield:** Absolutely.

**The CHAIRMAN:** Do you think that is reasonable practice?

**Mr Banfield:** I probably can answer that in two ways. From my experience, it depends on the size of the strata company. If we are talking about a duplex with just two owners that are there, and one decides to collect the moneys on behalf of the two and go forward, I cannot say that having a trust account would be a major difference, because you have two owners that are cooperating and you have ownership of that, and they have a vested interest in that.

If you are talking about a complex where there might be 100 units, for instance, that becomes more problematic. The size of the trust account becomes an issue at that stage. If there is \$1 million-plus sitting in the trust account at any one time, and that money is unprotected, I go back to the fidelity guarantee provisions that the board provides at this stage. That protection, to me as regulator, is very important to provide confidence to the community and to industry members that, if things do go wrong, then the person who is the most vulnerable, which is the consumer, is protected. The person who owns this unit is not disadvantaged; they have some recourse available to them. If it is managed outside of the board's jurisdiction, then that protection does not exist. That would make it very important.

**The CHAIRMAN:** We have had evidence from people saying that software solves the problem; that if you do have the million dollars in the single account, the software actually identifies the moneys adequately. Do you believe that argument? Is that a reasonable argument?

**Mr Banfield:** My experience points differently. I will go only to the experience of regulating real estate agents. They have access to quite sophisticated software, but yet there has still been instances in the past where agents have committed defalcation, they have stolen moneys and not had proper accounting done, where the board has had to step in and provide fidelity guarantees. My experience would be that it is not an adequate safeguard to say that software is really going to be the saviour to this, because it is only as good as the person who is using it.

**The CHAIRMAN:** Given the point you make about the size of the operation, we have had evidence that we should be recommending separate accounts for each operation. Would you tend to agree with that, or not?

**Mr Banfield:** If we just take the scenario of what we regulate, which is the real estate agents who operate as a strata management company, they need to clearly identify all moneys going into the trust account. How they do that is have different ledgers within a trust account or have separate trust accounts. They then have a multitude of trust accounts for specific purposes. The difficulty when we have a defalcation that comes in, where an agent has muddled the moneys, becomes problematic at that stage where it might take a long period of time to unravel what has gone wrong. Having the separate account is a better way to manage that type of scenario, where if money is coming in for it, that particular strata management is going out, it is easier to account for, particularly when things go horribly wrong.

**The CHAIRMAN:** What about audit? How important is audit in all this function?

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**Mr Banfield:** Audit is—and I have provided some information this morning on some of the audit through the two boards—a program that largely sits in the background. It happens once a year, but the real estate industry uses that as their one time that they have to come clean. Everything gets brought out into the open. I stop short of saying the industry fears the audit, but it is a very effective tool for us as a regulator to look at the agent's trust accounts, to look at their activities that they have done over the years through a separate set of eyes—someone who is professionally trained to look for anomalies in the trust account. Generally speaking, the audits that happen annually have largely not detected defalcation; there has been thefts of moneys which has not amounted to defalcation and there have been employees who have taken moneys where the agent has made good on that, and that is brought out in the audit. Those sorts of occurrences have already been brought to the attention of the board in most cases. On those occasions where it has not been, that is why it is important for us to have an independent set of eyes to look at that and give that information to the board.

We then can take the information. It builds up over the period of years—however long these agents have been in business—and we get a bit of a pattern. We can actually identify where they are weak and certain auditing criteria. We can send our proactive people out, recommend training. We can do a number of things. Even on renewal, we can make their triennial certificate conditional upon doing extra training in these types of things. The audit itself, although it is not invasive as such on an ongoing basis, does provide us with year-long ability to go and look at agents' behaviours. It gives us a good indication of how well they operate their business.

**The CHAIRMAN:** There are at least three levels of auditors, though, in Western Australia. You have the big four. Then you have a whole raft of professional people. Then you have the person who is in the suburbs—not to pick on that person—who is at a different level. Do you have a view about the level of the audit?

**Mr Banfield:** The board requires that they are the more professional body that do the auditing. There is a limited pool of auditors as well. It is not just shared by our industry; it is shared by a number of industries that have to do annual audits all year long. They have to do ad hoc audits when there are companies that are going into liquidation and these types of things. We all share the same pool. That is the reason why between the two boards that I am a director of—the real estate board and the settlement board—the audits are staggered. One year ends at the end of the financial year; the other ends at the calendar year. There is a stagger to try to assist that industry. My experience is that those people who are at that professional level do exactly what the board requires as far as the minimum to ensure that we have good compliance that is out there. I would hesitate to employ or authorise an auditor to a real estate agency who was not professionally qualified.

**The CHAIRMAN:** And the cost? What about the cost of that process?

**Mr Banfield:** That has actually been one of the issues that has been raised before by real estate agents who operate their strata management within their real estate businesses. They have to also audit those accounts of those strata managements. Some of these agents might have a multitude of strata managements, which means that each one gets audited. They can become quite costly. The agent pays for the audit to occur; even though the board requires the audit, the agent has to actually pay for it. One of the reasons for that is to ensure that they have buy in. They have responsibilities that they realise they have to cause to audit to occur; there is not just the repercussions, but they have the requirement beforehand.

The cost can be quite high if they have a number of strata managements, but my understanding of the real estate industry is that they are a fee-for-service industry. If they are required to produce certain things and have certain things that happen as far as their business, they would factor that into their service fee.

**The CHAIRMAN:** Your argument is a little different with strata management though because not everyone, as we have already said, is under your wing. Some of these people are paying their \$300.



I think the average is about \$350 for fees. That becomes a bit bigger as you add all of these things to it. That has been one of the hesitations in the evidence that we have received—putting the cost on the backline.

**Mr Banfield:** I understand that because I own a number of strata properties myself as well. The levies that are charged are a reflection of the age of the complex in amongst a whole range of other things as well as far as the maintenance is concerned. In the actual management, my experience has been that you get what you pay for. If you pay for a low-level of service, that is exactly what you should expect.

**Hon JIM CHOWN:** Tim, I think we all understand the reason compliance auditors are required under the act and for the industry. My question is in regard to investigative audits. In your industry, how is that triggered by the board? How do you come to the assumption that an investigative audit is required for misappropriation of funds either through trust accounts or operating accounts on behalf of the clients?

**Mr Banfield:** There is a range of ways that the trust account investigation—that is our terminology—can happen. It can be derived from a qualified audit that has come through, which is the annual audit. Depending on what the nature of those alleged breaches might be that the auditor has identified, we may say at that stage, “Okay, we are going to close that qualified audit investigation and commence a trust account investigation.” Then the registrar or myself, as an assistant registrar, would give a section 13 direction to investigate. And then the inspectors would go out and actually do the whole investigation of obtaining records, getting witness statements and documents and those types of things. How the board arrives at that or how the registrar arrives at that is in a variation of ways. It could be from the audit. Primarily, it is from complaints from the industry. They believe that some particular person in the industry might be falling on hard times, and then the board would take a particular interest in that. Some of the complaints over the years have been from previous employees who have reported that something has gone wrong. We have had the odd occasion where the agents themselves have come forward and said that I have done something wrong, I have been naughty, and have asked the board to assist them in looking into it.

It could just simply be an assessment by the board or by myself or the registrar through various means of media, that there is an agent who is in trouble. It is any indication that we have, where you have the ability to either launch an investigation or do an inquiry. The inquiry is the lighter end of the investigation, which is just that the board will go and do whatever is necessary to gather the information to satisfy itself that there is no risk or, if it identifies there is a risk, we will go to a section 13 direction to investigate and go from there.

**Hon ED DERMER:** How often would you find yourself doing an inquiry?

**Mr Banfield:** I do not have those figures in front of me at the moment. Just off the top of my head, there would be in the order of about 70 to 80 trust account investigations that happen every year. Not all of those eventuate into adverse finding. Some of them will eventuate into adverse finding but not a prosecution. Sometimes the breach is of a significantly low level that education or even doing an administrative warning to the person is a better outcome than taking and using large amounts of public moneys in going forward with a prosecution.

[10.45 am]

**Hon ED DERMER:** So it might be accident or bad practice rather than ill intent?

**Mr Banfield:** That is right. Some of the mistakes that have come through are not the agents’ fault at all; in some cases the trust account has become in debt simply because the bank has made an error and taken out a payment where they should not have taken out a payment, and these types of things. A variation of factors can sit behind it and it all comes back to the registrar or me or the board to make a determination of the severity of that and the appropriate way to go forward. During the transition, that will go to the commissioner for consumer protection; she will be the one who will

take over the responsibilities of assessing that. She will more than likely delegate that to whomever sits in those areas of investigation and compliance.

**Hon ED DERMER:** Thank you.

**Hon JIM CHOWN:** How is a payment out of the fidelity guarantee fund triggered? Who makes that decision?

**Mr Banfield:** The board decides applications. In the normal course of things, a person who has lost moneys, a consumer, will make an application to the board alleging that moneys have been stolen. There is a requirement on that person to provide enough information for the board to make a determination. In my experience, no consumer has been able to do that and the board has to do its own investigation to support the application. It will look at the defalcation and gather the evidence it needs to be able to, firstly, say that the moneys have been taken and the person has lost those moneys, and, secondly, it was taken by a person who is licensed or had a valid triennial certificate at that time. Then it has to look to see whether the moneys were lost in the course of the agent's business. A range of things then come out of that. It is not an easy process to go through and it is quite time consuming. We have, over the past few years, worked to try to expedite the process and to assist the consumer to more quickly get back the moneys they are entitled to.

**Hon JIM CHOWN:** I have a general question. The committee has found that the strata industry is quite large and a significant number of people operate in it. Why has the industry not come forward to ask for regulation? Why are other bodies, such as REIWA, pursuing regulation? If my memory is anywhere near accurate, we are yet to hear from a single entity in the strata industry asking for regulation.

**Mr Banfield:** I do not know if I can answer that. I do not have any information available to me to say why the peak body would or would not have come forward. I can speak about the two peak bodies that the real estate and the settlement agents —

**Hon JIM CHOWN:** Actually, one has come forward—STIWA has—but out of the hundreds of strata managers, they represent only 142 members.

**Mr Banfield:** I suppose a variation of scenarios could account for that. Maybe they believe they are doing the right thing. Or maybe they believe they do not want to be regulated for various reasons. I cannot really speculate on that.

**The CHAIRMAN:** Mr Banfield, so that the committee clearly understands, could you describe what you perceive to be the differences between positive and negative licensing?

**Mr Banfield:** The main difference, if I may Mr Chairman, is that it goes from the very beginning. Positive licensing is the more attractive type of regulation for many simply because from the very beginning people who go into the industry have to reach a certain education requirement and they have to be a fit and proper person. Before they go in and they start putting other peoples' money at risk, an assessment is made by an independent body that says, "Yes, you have obtained the education qualifications to be able to enter the industry, but now we are going to look at your fitness and your character to be in the industry. Are you a trustworthy person? Is there anything in your past that would tend to indicate that you are not a trustworthy person when it comes to other peoples' money?" Once that assessment has been made based on what the person gives them and the information available to them, that body will say the person is qualified to enter the industry and give them a licence. However, as I mentioned before, there are ongoing licensing requirements that all go to support the positive licensing regime. It is an all-around approach from the very beginning; that is, from the moment they begin practising in the industry to the time they leave the industry. Probably the best way to describe it is that it is like a full-court press. It goes from the very beginning to the very end.

Negative licensing relies upon the good will of the person who is out there in the industry to say, "Yes, I am qualified and I know I can do a good job. I might never before have done this, but I

think I can do strata management.” Having dabbled in strata management in a smaller complex when I owned a unit, I will say it is not very easy. It is actually quite difficult to keep on top of things—to do the accounting and to keep everything on track. That is the reason I, personally, would never want to do the strata management. I would always want to get a professional to do it, because I have trust in professionals, particularly when that trust is underpinned by a agency licensing regime that ensures these people will do the right thing.

**The CHAIRMAN:** In your letter of 13 May you mentioned something of interest to the committee. You describe a scenario in which a licensed real estate agent collects moneys for a strata management company, but the moneys are not received in his licensed capacity. We had not twigged to that.

**Mr Banfield:** Yes.

**The CHAIRMAN:** Could you explain that a little for us?

**Mr Banfield:** Yes. The board’s view is that its jurisdiction begins and ends with a licensed real estate agent who operates a strata management company within his real estate business; that is, a business operated as part of a normal real estate business can be regulated and fidelity and everything else applies. However, when a real estate agent operates any other business outside of his real estate business, and strata management is outside of real estate management, and chooses to operate that as a separate entity—that is, has enough separation of his real estate business to say it is a separate entity—the board’s view is that its jurisdiction has ceased and the agent is collecting the moneys as a strata manager and that is not related to his real estate business. It is separate.

**The CHAIRMAN:** Is that a fairly grey line?

**Mr Banfield:** It is a fairly grey line. The board harkens back to the Law Reform Commission report, which seemed to suggest that it wanted to apply fidelity guarantee to a certain segment of the community who operate and who have real estate agents manage strata funds for them. However, it did not seem to want to go further and say that everyone in the industry needs to be licensed. It did not make that recommendation. Therefore, the board has said that if a licensed real estate agent—the law reform report keeps mentioning a licensed agent—in the normal course of business puts money into the real estate trust account, that account is audited and a whole range of things happen. But if it is a separate entity, the board’s jurisdiction falls away.

**Hon ED DERMER:** Is part of that the fact that real estate agents are used to being licensed in the field of real estate?

**Mr Banfield:** Yes.

**Hon ED DERMER:** So you are going to have a degree of professional business practice that if you did not have you would get into trouble over your real estate licence.

**Mr Banfield:** That is correct.

**Hon ED DERMER:** So you could expect that person running that business in that professional way would carry that degree of professionalism over to what they are doing in the strata field even though they are not licensed in the strata field.

**Mr Banfield:** I think it is a fair assumption to make. It is not one that I can back up with any facts or figures, but from this point of view it is probably a reasonable assumption to make. However, I would say that should the government decide to regulate this and go into it, we may find something different has occurred, because the difference is that for someone who knows that not just this industry, but any industry, is fully regulated with positive licensing and the whole range of things, they know that they are looked at. They may be a fit and proper person as far as that business is concerned, but when no-one is looking, is that same person equally as honest and fit and proper? I cannot say. I can say about this; but I cannot say about what happens outside of it.

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**Hon ED DERMER:** Probably a proportion of those people carry it over to the other field and others may not.

**Mr Banfield:** Again, you are subject to the quality of the person providing the service to you.

**Hon ED DERMER:** But if you were to look at the people who as real estate agents are also strata managers, and your job is to assess what is happening, at least with them you have some chance of assessing what is happening; whereas, for the others you would not even be able to identify who the people are, which would be the first step you have to take in assessment.

**Mr Banfield:** Absolutely. Because of the jurisdictional requirements, when a person who is a licensed real estate agent operating a strata management company within their real estate business has a complaint made against them and I feel there is a sufficient level of concern, I can issue a section 13 direction to investigate and at that stage that does not limit me to just investigation against the moneys collected—although the definition in the act is that a real estate transaction includes the moneys collected on behalf of a strata company—but I can also look at the conduct of that agent and a range of different things pertaining to that agent. I cannot do that for anyone who is not a licensed agent and who is not operating a strata management company within his real estate business.

**Hon ED DERMER:** So you can understand a person or an office with oversight responsibility being hesitant to take on any formal responsibility for the strata managers who are not part of a licensing regime, which real estate ones are, albeit licensed for a different purpose?

**Mr Banfield:** I understand that reluctance, but I suppose policy is not an area in which I can provide value to the committee. It is up to the committee to decide from there what the community is seeking to achieve. As far as myself as a regulator and the board, we have made our position and our concerns known for years. It would have wanted the opportunity to take on regulation of the strata management industry.

**The CHAIRMAN:** We have some extra questions.

In a previous discussion: did an amendment occur as a result of the interim law reform report?

**Mr Banfield:** The amendment happened, from memory, in 1985 when they included the definition of moneys collected on behalf of a strata company to be a part of a real estate transaction. But the emphasis at that stage was on “money collected”. The Law Reform Commission report focused primarily on the need for fidelity coverage for at least a small portion of the industry. At that stage, there was a predominance of small strata companies—the two, four and ten unit complexes. Things have changed. There are a lot of larger strata companies around the place at the moment that might hold large amounts of moneys in trust, amounting to levies; people for instance might have paid levies for the whole year and there might be a sizeable amount of money in the account.

**The CHAIRMAN:** You made an interesting point about industry needing a one-stop shop, which we have heard a fair bit of evidence about. Do you have a view about the future? We are the decision makers, but projecting into the future, what would you perceive that one-stop shop to be and how would you relate that to the questions of SAT and outcomes of disputes?

**Mr Banfield:** It is a difficult one to try to come up with an answer to because of the complexity of the act. The strata act is owned by a totally different agency as such, but that agency has not had a track record in consumer protection and investigation, and regulation of a group of people who provide services to the community. Whether it is some sort of one-stop shop that is a combination of the two agencies, or whether one agency is empowered through a new piece of legislation—I do not know the answer as to which would be better. Obviously, in an ideal world, a regulator who owns a particular act would have more of a vested interest in managing that act in a timely manner. However, in saying that, any involvement consumer protection will have in regulating the real estate agents in the industry will be taken very seriously. It is the same. Business as usual will continue after the board’s demise has come about and the department has taken over. It will be

business as usual. There will be a range of things the commissioner might have new ideas about that we can try and look at, and those sorts of things will probably come out in the next few years after the transition actually happens.

[11.00 am]

**The CHAIRMAN:** Do you have a view about how SAT fits in with them?

**Mr Banfield:** SAT's role is quite an important one because it is the adjudicator of these complaints. These issues that come between a person who is either a strata company or a member of a strata company, who has a disagreement with their strata manager, at the moment the only venue to have that adjudicated is the SAT, or they take it to the Magistrates Court for moneys and that sort of thing. But SAT is seen to be the quickest and easiest vehicle to get these types of disputes settled. As far as the regulator is concerned, SAT has great value in that it assists with applications for discipline, if I take the real estate board's approaches to the discipline of its agents. When an agent has done something wrong, we make an application to SAT, and SAT adjudicates and says, "Okay, this is where I believe the discipline can occur". We can also ask SAT at that stage whether there is sufficient grounds where the person might need time out from the industry to realise their mistake and reflect on themselves. SAT might suspend that person's licence for a period of time, so there is a range of things that actually assist the regulator that SAT performs. I see them all as being in concert with each other.

**The CHAIRMAN:** Just to complete that, we have had a small number of people come back saying positive things about SAT, but that SAT cannot enforce its decisions, so there is another question above that. Is that an important question, relating back to the one-stop shop? I ask that in the context of the consumer's understanding of the industry; we seem to get the strong feeling that they do not understand the industry and do not understand the roles of each player within the industry, and the responsibilities of themselves, councils and strata managers and so forth. Any comment?

**Mr Banfield:** I can probably give you a scenario that exists that we look at as far as the real estate board is concerned; we have a context in which we get a complaint from Joe Citizen, who says that an agent has done something wrong. We investigate that and find that there is a prima facie case for disciplinary action. We take an application to SAT and SAT adjudicates that and says, "Okay, there is a fine involved." There also might be other things that they impose as a penalty, as the discipline is there. If you did not have us as a regulator sitting there, with sufficient resources available to us to enforce the decisions of SAT, then you are again limited to the goodwill of the person who has been taken to SAT and who has had a finding against them to follow through with it. If an agent chooses not to pay the fine, the board's view is that it will take whatever action is necessary to ensure that the fine is enforced. We have the financial means and we have the drive and willpower to take that forward. If that was out of the equation when it was only a private citizen, then you are limited to the drive and the determination of that citizen to say, "I have enough financial resources to press ahead, have that debt registered in a court or competent jurisdiction, and have the fines enforcement registry engaged to try to recover these moneys, and take civil suit to recover the fine and make sure the thing is actually enforced". As long as the regulator is established in such a way as to have enough financial means to take things forward, and the board has enough financial means to do such, then it will enforce SAT's decisions. Where it believes that SAT has not got it right, it has the ability to appeal that decision to a higher court, and we will take that approach as well. I assume that will translate over to the commissioner when she takes over.

**The CHAIRMAN:** We might have to put our minds to that, because you have already said on a number of occasions that it will be business as usual. It probably will be business as usual as far as you are concerned and your members are concerned, but you are actually going into a bigger pool, and there is a range of people who do not have those rules, which we will need to think about.

**Mr Banfield:** Absolutely.

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**The CHAIRMAN:** Do you see consumer protection agencies as having a role in conciliating complaints? That is around about what we are talking about. We have been to Victoria and had a look at its system, and mediation is a big part of the Victorian system and a growing part of the Western Australian system. Do you have a view about that issue?

**Mr Banfield:** My view on that has probably been formed since 2004, when I was manager of the building and tenancy industries branch. We received these complaints and attempted to conciliate results out of those, with limited results and effectiveness because any conciliation is voluntary; you have to have two willing parties who want to negotiate and go forward. The real estate board has the ability to also conciliate disputes; settlement does not have that within its power. Those powers are transitioning over to the commissioner, and in the transition over to the new structure, all the functionalities from the building and tenants industry branch is coming up to the property directorate and we are going to have conciliators located in one common location. They will look after a range of conciliations over a range of areas, which will still include any complaints we get from consumers about strata managers, but within the context of what I have explained to the committee earlier. We still have the legislation as it is written now.

**The CHAIRMAN:** You did say earlier in our discussions that it is a very different industry between real estate and strata management, and we did hear some pretty strong evidence in Victoria about being able to bring some understanding to parties about probable outcomes, and therefore resolving issues even before they get to mediation. Do you think there is a difference between the role that you are playing and the general role with someone looking at strata management?

**Mr Banfield:** The difference will be a question of timing as well. If we take a scenario as it sits right now, with the board still in power, my conciliation is limited to only involvement with real estate agents who are licensed and have that role in their business. Generally speaking we have a fair bit of success with our conciliation because we also are the regulators for licensing and a range of other things. We are involved day-to-day with these agents; they know our business and they know that we look at them for a range of things. The conciliation is, without prejudice, we do not take information out and prosecute anybody, but it is difficult to unlearn what you have learnt about a certain situation, so we look at it a little more holistically than just that. If we transport ourselves into 1 July, what happens is not only do we have that capability, we have the capability of what the commissioner has already in place with her conciliation roles as well, which broadens our powerbase as far as the acts that we regulate, because now we join with her and she picks up these acts. It becomes a more holistic approach to regulating a property industry, if you will, if I can use that terminology, which is more holistic. So we tend to have the ability to look at much more than just the one little complaint that is coming through; we can look at whether or not that particular agent has a record of these types of things happening and there are behaviour issues there. Then we can engage through the proactive side of things and say that although we cannot conciliate this, there is a need to educate this agent, and we will go out and educate the agent and go from there.

**The CHAIRMAN:** There will also be a need to educate some of the consumers as well.

**Mr Banfield:** Absolutely. The board and the department put out a range of publications that educate consumers, and one of our roles is to educate consumers on their rights and on the limitations of what they can expect us to do as far as investigations are concerned and these types of things. There is education in both avenues.

**The CHAIRMAN:** Would it be wise for a strata company employing a manager who is a licensed real estate operative to check that they will get the protection of the act?

**Mr Banfield:** I think it is wise to ask questions and make yourself informed. If it is a scenario where they are employing a real estate agent who says, "I will operate my strata management business within my real estate agency business, and therefore I will provide guaranteed protection and vicarious liability," then that is fantastic, but I do not know whether the consumers out there would know to ask that question.

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**The CHAIRMAN:** No, that is why we asked you the question! We do not know that either.

**Mr Banfield:** I can answer from a personal point of view. Before I enter into any engagement with someone who is going to provide services to me, I ask enough questions to satisfy myself. I would like to think that my fellow citizens would do the same sort of thing. That has not been my experience, however; some people just rely on the fact that you are a professional body, that you have an agency that regulates you, and therefore they trust us.

**The CHAIRMAN:** Members, any further questions? Thank you very much, Mr Banfield. You have actually raised a couple of things that we had not quite got the grasp of, so it was very useful to us. Thank you.

**Hearing concluded at 11.10 am**

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