

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

INQUIRY INTO WESTERN AUSTRALIAN STRATA MANAGERS

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 14 MARCH 2011**

SESSION ONE

Members

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

Hearing commenced at 9.52 am

DRISCOLL, MS ANNE

Commissioner for Consumer Protection, Department of Commerce, sworn and examined:

HILLYARD, MR DAVID

Director, Industry and Consumer Services, Department of Commerce, sworn and examined:

NEWCOMBE, MR GARY

Director, Strategic Policy and Development, Department of Commerce, sworn and examined:

LEE, MR ANDREW

Manager, Strategic Policy, Department of Commerce, sworn and examined:

The CHAIRMAN: Thank you for attending. As you are aware, we are a fair way through this inquiry and we are getting down to the sharp end as far as we are concerned. On behalf of the committee, I welcome you to the meeting. I must ask you each to take either an oath or an affirmation.

[Witnesses took the oath or affirmation.]

The CHAIRMAN: These proceedings are being recorded by Hansard, as you can see. Your transcript of evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you may refer to. I see that you have come a bit armed, so before you refer to a document, can you just state what that document is? Just be aware of the microphones, but we do not seem to have much trouble with the microphones. I remind you that your transcript is to become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as your transcript of public evidence is finalised, it should not be made public. I advise 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. But you are all experienced people and you are aware of all of that. Would you like to give an opening statement? We are aware that you obviously did not make a submission to this inquiry because, to some degree, you are on the periphery. Would you mind just talking about where you are at and what your considerations are?

Ms Driscoll: Certainly, Mr Chair. Perhaps I will make just a few contextual comments and introductions. I have been in the role of Commissioner for Consumer Protection for about three years and, prior to that, have been in the department for a further eight years in the role of director of business services. In that capacity, I had responsibility for the real estate branch in the department. Perhaps I will just provide some context for the two gentlemen on either side of me, because that will probably be the basis of us responding to questions. David Hillyard is a director at the department and has responsibility for a large part of the operational area that takes complaints from consumers and then deals with those as either conciliations or investigations. Gary Newcombe has been a director with a policy responsibility for about 15 years with the department and has, of course, therefore been involved in some of the past considerations of this issue. Currently, Gary is also very much involved in the national licensing scheme and its development, and is involved in some of the national committees. Of course, that is an issue that is very relevant to the proceedings today. Also, collectively, we would certainly like to assist in responding to any questions, but perhaps I will give just a few updates on the material that we provided in writing last week.

Mr Chair, you will be aware through correspondence from our minister that he has recently confirmed the intention to consult on the question of whether, as part of the national licensing system, WA should increase, if you like, the occupational categories for property licensing to include strata titles managers. As a consequence, it is anticipated that we will have a consultation document out to both consumers and industry by the end of March to canvass views on that question and, of course, if there was to be such licensing, on what basis that might operate. It is probably important to clarify for the committee that the national licensing system is very much at the moment focused on a process of looking at individuals being suitable for licence and looking at the criteria on which people might be licensed and the scope of work that they might undertake, but it is not going to in any way take into consideration the conduct requirements that might be necessary. For example, if I get a real estate licence through this scheme, I will therefore be able to practise as a real estate agent in any state or territory, but any rules about how I manage my trust account and how I deal with clients et cetera will actually be continuing as state legislation. So, in essence, we are likely to need tandem laws for some years ahead whereby we basically have a licence through this national authority, but the conduct requirements will be mandated through state legislation. Separately, Consumer Protection is doing some work to try to harmonise some of those conduct requirements in some of the major areas of activity, such as trust account management, but that to some extent is being done quite outside the national licensing system. That is an important distinction so that you fully understand that if we were to consider having strata management licences through the national system, we will still need some separate consideration at the state level about how those conduct requirements might operate.

The CHAIRMAN: Can I just ask a question?

Ms Driscoll: Certainly.

The CHAIRMAN: Sorry to break in on you. You say that you are sending out these surveys. Who are the target groups you are going to?

Ms Driscoll: It is a discussion paper. I might ask Gary just to elaborate on the proposal.

Mr Newcombe: Initially, Mr Chairman, we have got a range of stakeholder groups that we are looking at focusing on, but also the public as well. It is the same group that has really received the advice from the minister. I will just run through those key stakeholder groups if you would like. We have got the Minister for Lands—his responsibility is for Landgate; yourself and the committee; the Real Estate Institute of Western Australia; the Strata Titles Institute of Western Australia; Landgate; the Law Society; the Settlement Agents and Real Estate and Business Agents Supervisory Boards; the Property Council of Australia; the Shopping Centre Council of Australia; the Land Valuers Licensing Board; and the Consumers' Association of WA. They are the key stakeholders, but it would also be a publicly distributed discussion paper and available for comment from the broad community.

Hon ED DERMER: Sorry, Mr Newcombe; I did not mean to cut you off. Have you considered targeting the actual owners of properties in strata structures?

Mr Newcombe: Yes. That will be part of the process. The difficulty, as has been identified in some of the previous inquiries, and you have probably found out as well, particularly in terms of people involved in strata management, is that when they are not licensed, it is difficult to find everybody and identify everybody who is operating. So, one way of doing that is obviously going through those peak groups. But the other is to, with Landgate's assistance and other stakeholders' assistance, try to target all those people who are currently in the marketplace—strata owners, strata corporations and those people who are also undertaking strata management at the moment.

Hon ED DERMER: From the response we have received, I believe that there is quite a detailed and widespread level of concern amongst people who do own properties as part of strata arrangements. I think it would add to whatever you may learn from your discussion paper if that

was part of the targeted distribution of the discussion paper to encourage those owners to consider your discussion paper and to respond.

Mr Newcombe: Sure.

The CHAIRMAN: Can I just make the point that the motivation of this committee has been either tenants or owners overwhelmingly. The second motivation has been from some of the operators. The rest of the people tend to have an agreement, or a perceived agreement, about what is happening out there. There is a big gap, though, in the knowledge of owners, and some of the operators are concerned about how the interaction between owners and councils and strata manages actually operates. That is really the main space that we are in. The discussion paper: would there be a chance of just flicking that to us when you have completed it?

[10.03 am]

Mr Newcombe: Yes. It will certainly come to you, Mr Chairman.

The CHAIRMAN: So before the end of March—around about the end of March.

Mr Newcombe: Well, as soon as it is available, it will come to you.

The CHAIRMAN: We will have an interest in it, obviously.

Mr Newcombe: Sure.

The CHAIRMAN: Sorry to cut into what you were saying, Ms Driscoll.

Ms Driscoll: That is all right. Some of the questions, therefore, that arise in terms of the way in which our licensing regime might operate are perhaps worthy of just flagging as well. Certainly, obviously, there are going to be issues about what is the nature of the strata that might require a licence in terms of any thresholds that might apply, but a key question that obviously arises too is how such a scheme would be funded. Obviously, through the regulatory gatekeeping unit as well, there is quite a requirement to look at the net benefit to the community through such a scheme. I know through some of the history that there is often consideration about fees for the licence, but, obviously, to some extent the real and more significant costs relate to the costs associated with complaint management with investigation breaches of the law, but also, as you move into trust account management issues, there is usually a great deal of effort in terms of reviewing audit returns and following up on issues that might be identified as not meeting the requirements. But, of course, finally, there is also the question of some sort of compensation scheme in the event of defalcation. Those are obviously some key issues.

As you are well aware, through the Real Estate and Business Agents Supervisory Board, there is currently an arrangement where trust accounts actually have a call in terms that the interest that is earned on those accounts goes to fund these activities. One of the key questions that arises, of course, is: how might this work in the case of a strata? Indeed, would it be fair to have that sort of percentage drawn from reserve funds, sinking funds et cetera? So those are some of the questions that arise. Obviously, there is already quite a sum that is in the fidelity funds for both settlement agents and real estate agents. So another issue is: how would it sit alongside that and what are the issues in terms of the various contributors to that? So there are a number of questions. Also, obviously, what would the conduct requirements be like? These are the sorts of issues that obviously need to be assessed through feedback. But, again, in looking at other jurisdictions, clearly there is a very significant range in responsibilities, and, of course, the questions of PI and fidelity insurance as well arise. So there are a lot of questions that clearly the committee is attending to, and it appears that there is quite a range of regulatory options there that really needs that assessment in terms of: okay, to what extent is it warranted in relation to the market as it stands? We certainly note —

The CHAIRMAN: Can I just cut in there and just deal with that issue, because that is one of our core considerations, because there are, as you say, a range of directions in which this could go. But,

for us, from the evidence we are hearing, we hear a lot of complaints about individuals, who do not quite understand the nature of what they are dealing with, having trouble with Western Australian government agencies, obtaining information and obtaining direction on how to fix it up. Then, in the end, if they go through it all and go to SAT, often they end up going to court anyhow. That is one of the core issues that we will be looking at, whether we can do something about that process where we have three agencies that are playing a part in this whole question, but no-one is playing a senior part. You are actually playing a part from different acts—through the Strata Titles Act—but you are still in there. Do you have a comment about how you see that working or whether we should be looking at a different mechanism for the future? I say that because it will make a difference in how we work out how that should be paid for. The question is: who pays? Is it the owner who heads down that task, or is it the state, which supplies a range of free information, or qualified information that is not always free, or, as you say, is it by taxing funds, taxing operators and that sort of argument?

Ms Driscoll: As you know, we are limited in terms of our responses from a policy perspective, so it is perhaps most relevant just to comment —

The CHAIRMAN: I am really just asking you about the structural process.

Ms Driscoll: Yes.

The CHAIRMAN: We are not asking you to structure policy; that is our job. But how do you see yourself sitting beside the other agencies, and maybe you could have a look at putting yourself in the shoes of someone trying to take this journey?

Ms Driscoll: My observation is that the way regulation is developing in recent times, ideally the community that is benefiting are those that pay and, ideally, in a way that is equitable. So it seems to me, whether the response is an education response or a regulatory response, that the ideal is to find some way that is cost effective so that people are paying a small proportion where they are participating in such a scheme.

The CHAIRMAN: What about the question of the three agencies, though? Who do you pay? Should one of the three agencies be a control agency or is the current arrangement appropriate?

Mr Newcombe: Part of it might depend, Mr Chairman, as well on what happens with national licensing when it comes down. But, in general, on the strata titles we would see Landgate as the lead agency, because it has the title legislation and all of that sort of control over what happens with title. This is just a general observation: we are unlikely to be in a position to take the lead role because of all of that technical expertise that is there. So I think the one or two options really are that Landgate would take on the role of distributing information or the two agencies would come together but deliver that in a way that was seamless to the customer, so that there is some sort of frontage arrangement that provides the delivery of integrated information, and the two agencies sit behind it, because the problem you have got at the moment is that you have got some core bits of legislation that do not fit in one place. You have strata titles legislation about titles, and you have got consumer legislation and related legislation about people's rights. We do not have that problem in most other areas that we look after because we have the legislation and the responsibility. So what I would suggest from my perspective would be one of those two things: either Landgate, as the senior agency, with the responsibility for the titles structure, or some form of integrated service delivery under which the customer does not have to go to one or two different places; they go to one place, but the agencies work together to try to deliver it.

The CHAIRMAN: We saw in Victoria that VCAT was looking at a situation in which they are going to negotiate a resolution process heavily, in favour of going to a legal one, and try to get the bulk of their activity out in a negotiated process that is paid for, but a very small fee, I might add. It is only \$37. But, still, they do have to bring up some money. Do you think the agencies should be trying to get some dispute process? I ask that question because in Victoria your counterparts are

doing a lot of that. They have got people in the area of consumer advocacy. They do have people who can give advice and they do have people who counsel. So do you think we should be going that way? One of the options put to us is to try to get some sort of amalgamation of effort.

Ms Driscoll: I come back to the issues with finances. We do need to find some mechanism to pay for it. I think either is possible. It occurs to me that the most likely way of gathering funds is some recognition of accounts that relate to strata companies and some call on those accounts. Whether that is through default arrangements through Landgate or whether it is through licensing—but one of the big problems even there is that it almost potentially penalises those strata companies that are doing the right thing. If they are well managed and have a good sinking fund, there is an issue that they are potentially paying for the rest of the committee that is not doing the right thing in terms of their own strata company. But, unfortunately, a good system is usually backed up by good funding.

The CHAIRMAN: That is right. So the strata managers are really just doing a function, and they charge for that function. The council, in theory or legally, holds the funds. We are hearing these days that there are considerable funds under management—very considerable amounts. But, on the other hand, the professional body would like to see some of that money going their way. Our job is not to strip the owners of all their money; it is to give them some simple resolution to disputes.

Ms Driscoll: Indeed, may I add that it seems that one of the big issues is the really sophisticated strata companies—potentially commercial shopping centre managers et cetera—all have all of their own controls et cetera. Equally, they will have big amounts. So there is probably going to be a lot of resistance from them in that they are potentially supporting the unsophisticated small strata that needs this support and guidance. I assume we would encounter major issues in terms of some sort of draw on these accounts if that was to be entertained, yes.

[10.15 am]

The CHAIRMAN: Again I apologise for breaking in, but continue on.

Ms Driscoll: Just a couple of other contextual things. There is a change to the regulation of real estate and business agents and settlement agents to occur on 1 July in addition to the national licensing scheme that is due to commence on 1 July 2012 for real estate agents. So this year, 1 July, the Real Estate and Business Agents Supervisory Board, the Settlement Agents Supervisory Board, as well as two other occupational licensing boards, one being land valuers, will cease to exist and the responsibilities for those boards fall to the Director General in terms of the management of the financial accounts et cetera, and to the Commissioner for Consumer Protection in relation to the regulatory responsibility.

This decision really follows a range of changes that have been occurring in the marketplace of late. Firstly, the concept of national licensing means there will be much less discretion from a board's perspective in terms of who is licensed. There will be clearer threshold issues and probably a narrower range of criteria. Certainly, for many years there has been a bit of confusion about the role of consumer protection relative to the various boards. This provides some clarity to consumers about where to go if there is a problem. Indeed both the boards and the commissioner have had different powers in relation to something going wrong in the marketplace. The Fair Trading Act, the Australian Consumer Law and the conduct requirements in the various occupational licensing areas were being managed essentially by different investigators even though the issue was often the same. So this provides some clarity and better opportunity to best target the response using the most suitable law available.

As part of that change, it is proposed that a property advisory committee will be formed to advise both the minister and the department on property regulation issues and we have indeed had an interim property committee that has been working over the last year advising us on national licensing, but the formal committee to take us through to the new arrangement is being formed as we speak. That will be chaired by the Director General. It will have two REIWA reps, two AIC,

Australian Institute of Conveyancers; two API, Australian Property Institute; reps and also one from the business agents association as well as one from the Strata Titles Institute. We do have the Strata Titles Institute recognised on that committee that will be advising us going forward. The commissioner will also be an ex officio member of that committee.

We have, in fact, been working directly with the Strata Titles Institute given this national licensing issue. Gary has been working with them and I understand they have formed a working group to consider this consultation process and start thinking through what might be some scenarios in terms of greater regulation in this area. That is probably it from me, Mr Chair, but just some contextual things that are happening in the department to provide you with some information to backdrop your own thinking.

The CHAIRMAN: Can I just talk about some of those matters and other committee members may want to jump in? As I said at the beginning, we are being more driven by owners and most of the issues that have appeared before us are actually in your bailiwick—about consumer matters more than structural matters. Just looking at the form B2 you sent in, interestingly there is some nine or 10 cases there of audit process, but that is for licensed, regulated managers. The complaints that we are receiving are not about that group of people; it is about the unlicensed managers out there. I will do a risky thing, but I will do it in the chair so people can shoot me, but I suspect it is from lack of skill and lack of management amongst some of those operators that they are conducting some of their affairs in the way that they do, which to me is quite risky. If I was an owner of one of those complexes, I would be concerned about it too.

We have issues like: what do you do with proxy voting? Major concern with people who are talking to us because people are getting overwhelmed by proxies, but at the same time everyone is entitled to a vote whether they are at a meeting or not. So most of our concerns will be in those areas that relate to the consumer. Things like a national scheme may fix up some of the issues; that is, you will have the unlicensed licensed, then you might have the unlicensed educated and to some degree, to use a loose word, “regulated” in terms of what they are expected to do. But we are wrestling with issues like: should there be some templates, like the Victorians are considering—that is, a template of reporting. So not a complicated one, far from a complicated one, but something so that people can actually see what is in a trust account, what has been spent on a repair, whether quotes were obtained for those repairs, whether they are receiving commissions from insurance, whether they are actually taking interest, believe it or not, out of joint accounts or taking parts of interest out of joint accounts. We have heard cases of people loading up repair costs by 10, 20, 30 per cent just for income for the strata manager.

There is a range of issues out there, which, if you are looking at all those other people that you regulate, just would not be allowed or at least they would have to declare it. I should not say “would not be allowed”. At least they would have to declare their income where currently unlicensed managers do not have to declare their income.

In short, we have got to do those things that you have suggested—that we are seeing change, but just what that change will do, whether you be a regulator manager here or Victoria, really I think really is of little consequence to us; it is what you do when you are a manager is what we are interested in.

Hon ED DERMER: The consultation document that you seek to have out by the end of this month, what would the process be from there in terms of assessing and drawing conclusions from that process?

Mr Newcombe: The normal process is a standard process. It is consultation achieved, what level of feedback you get. We are looking at the moment to potentially holding some face-to-face or public meetings with groups of people. There is some further research to do in terms of what schemes exist in the other states and which ones we might seem to adopt. We have already asked for information on what people see as the better of the systems in the other states. So it is bringing together all that

evidence, producing some recommendations for government in terms of where we might go. But the most important thing—because it will look at the issue of licensing—for us, we need to construct it in a way that satisfies the regulatory gatekeeping responsibilities in this state. We have to as part of that process do a cost–benefit analysis and we will need to do, I believe, a full regulatory impact statement arising out of that consultation. It has several steps. Consultation is the first bit. We will see from the written consultation, the response, what other consultation we need to undertake to boost that. We will look at evidence available from other jurisdictions and from other sources, and we will then look at where that takes us in terms of regulatory impact, and then we would probably need to move to a full regulatory impact statement.

Hon ED DERMER: Given the scale of that work ahead of you, it is probably very difficult to estimate when you could anticipate a final document being available, but would you care to make a rough estimate?

Mr Newcombe: Well, when you say “a final document”, I guess it depends which one you are talking about there, because there is going to be several in it.

Hon ED DERMER: Okay, range of documents then.

Mr Newcombe: Yes, okay. We are looking to try to have the regulatory impact document done this year. Now, if that leads to a conclusion and the government adopts the conclusion that licensing is to be introduced, then you have a whole other process which you have to go through, which is the cabinet process, the drafting and so on. Best endeavours and if there were decisions about introducing licensing and so on, you are looking at a range of between probably 12 to 18 months.

Hon ED DERMER: From here?

Mr Newcombe: From now, yes.

Ms Driscoll: Gary, is it likely that the licensing component could be fast-tracked given the plan at the moment is to introduce from July 2012 property licensing?

Mr Newcombe: We can do. The problem with this is the dichotomy that Ann referred to in that national licensing would establish the need to be licensed, but what it does not establish is the things you have been talking about, Mr Dermer—the conduct. We probably could not have a licence without the conduct rules around it in some detail. I mean, if government said, “We want it all by 2012,” that is what we would have to work towards.

Ms Driscoll: Yes, although it occurred to me that one option is at least if there was the position of the government that it wanted to progress this, it is in the first instance identifying people and, as identified earlier, there is then some opportunity to target that group in terms of education et cetera. I am wondering, it would be very unusual, but not necessarily a problem to have it almost staged so there is licensing first and then development of some conduct arrangements.

Hon MAX TRENORDEN: But the conduct arrangements are actually quite important. We have had a lot of circumstantial evidence that money goes missing, but we have had two precise process—one manager who has told us that they have witnessed money going and because there is no regulation and no law, could not prosecute. We have had a letter from the police department quite strongly indicating they do not like it. They get complaints, which they think are well and truly worthy of prosecution, but there is no act to prosecute them under, the argument being the chance of winning that in court under a fraud charge is pretty broad. We will have a look in the coming days about audit, but there are people saying they do not want to audit these people, because they cannot find the information to audit. So we think we have got a problem here. I do not see the committee—we will have an interest in the type of person and the type of management and so forth, so licensing components, but really our interests in bulk are about the practice of some of these people.

Hon ED DERMER: In a nutshell, a number of owners who have given us evidence are concerned about the conduct. They see licensing as a means to an end. We have heard evidence to the effect that even when SAT, for example, will issue a direction, the managers decline to fulfil the direction. A case has been put to us—I am doing this from memory, but that is not a bad way of summarising in a sense. The owners that have given us evidence—not all of them, but some of them—have said, “We want better conduct. We would like a system where the managers need a licence to practise and if there was a specified series of conducts that would be attached to a licence, then an owner who was not doing the right thing would be at risk of losing their licence and therefore losing their ability to practice.” Those owners think that such a licensing regime is the most likely strategy in which they will achieve better conduct or, from their point of view, a better service. That is my attempt to put it in a nutshell.

Mr Newcombe: That is generally how licensing regimes are constructed. The point of licensing is: (a) to control who gets into the industry; and then it is the anchor on which you place conduct rules going forward. Usually licensing regimes serve both those purposes.

Hon ED DERMER: With the risk of losing a licence for poor conduct.

Mr Newcombe: Yes, that is the sanction, usually.

[10.30 am]

Hon ED DERMER: It is interesting to me to see how you could have the licensing without having the conduct environment specified.

Ms Driscoll: It was simply a statement of progression. It is just that we have this other tight time line in there that it is probably not possible to develop conduct. It just was a suggestion in terms of sequential activity, but you would want to follow the conduct very quickly afterwards. So there was no suggestion that you would have one without the other. It was simply a recognition that the national scheme is coming on in July 2012, and it would probably be very difficult to get conduct developed and in place both through new legislation as well as the policy side of things by that sort of time line. It was just taking the opportunity to take licensing as it is implemented nationally with a very quick follow-up with the conduct.

Hon ED DERMER: I think some of our witnesses would probably start off by saying, “Conduct one: spend the money that is derived from the owners to the benefit of the owners. Two: explain how you spent it.” That would be a good starting point.

Hon JIM CHOWN: Mr Chairman, is the department aware of the amendments that Landgate is drawing up in regard to the current Strata Titles Act that addresses a lot of the questions you are receiving here in regard to licensing?

Ms Driscoll: We have not had, to my knowledge, recent contact with Landgate about their policy proposals. My recollection is that we have not had contact with them for a couple of years in terms of their plans, and we were not aware that it was developing in a way that changes were imminent.

Hon JIM CHOWN: If these amendments come forward, how does it affect NOLS in regard to the issue you just discussed here for an hour or so—if these amendments go through the Parliament as a regulation or as an amendment to the act, either way?

Ms Driscoll: Again there is a separation between the licence issues and conduct. Obviously there is consultation, which includes Landgate. We would provide them with the opportunity to provide comment.

Hon JIM CHOWN: I am a little surprised there has been no consultation here, because this is really the root of the issue, from my perspective. And I understand there is a bit of delineation in regard to who is actually responsible.

Mr Newcombe: There has been discussion with Landgate about a range of things, including national licensing, quite regularly. I am not aware of the amendments you are referring to that would change the licensing issue. Landgate has not indicated to us that they are introducing licensing. In fact they have always said to the contrary. I am not sure; it is bit hard to say. Sorry, when you were referring to amendments, it does not accord with our understanding of where they are going. Our understanding on that is that it would not affect national licensing at all, and if there was to be a licensing of strata managers, it would need to be a separate thing from what Landgate is doing. If we are wrong on that, we would need to be clear.

The CHAIRMAN: One of the things that has been put to us is that we should be considering a splitting of the responsibilities and giving the physical matters to Landgate and give you the people component to the legislation. That has been put to us, and it is sort of going through our minds. But the last thing we want to do is dramatically increase the cost impost on the individuals here, because if you look at the history of this whole question, the argument was that Mrs Jones down at unit 3 is going to do all this work for nothing. But now we are talking about millions definitely—and maybe tens of millions in some cases—so it is getting more and more professional as every year ticks by, which is some of the evidence that you have given us. Is it something that we should consider—that we separate the functions of the bill to, one, being a physical argument about the buildings themselves and how you operate those buildings in terms of structures and so forth and maintenance, and, two, another question of dispute?

Ms Driscoll: Again, obviously that is for the committee to consider.

The CHAIRMAN: I am just talking functionally. The other option is the one I said before: that we look at forming some sort of small unit that does both, where people could go to and they can get both.

Ms Driscoll: The reality is that it is the sort of work that Consumer Protection does. Clearly, we are involved in assisting people in dispute to find a resolution and, where there is a clear breach of the law, to take some form of proceeding to ensure that there is some redress to the parties. It is an area that we have expertise. It is this problem of delineation, as Gary outlined earlier—this problem that usually we would have direct responsibility for the law and those requirements, and this is a little different. I do not know if, Dave, you have anything you would like to add.

Mr Hillyard: I would raise some concerns about trying to split issues and arguments about maintenance of properties and then saying, “Well, disputes about those maintenance issues should be dealt with another forum in another way,” because they are always interrelated. We recognise of course that we go from the very small strata complex of perhaps three to five units right through to the multi-million-dollar high-rise apartments. But the issue for us—and it has always been a challenge for us—is that individuals come to talk to us about a complaint and we cannot act on their behalf because we have to work for the body corporate. That is way in which we have always operated in terms of trying to resolve the issue. If the individual cannot get a level of support from other residents or other members of the body corporate, then their protestations fall away and we cannot deal with those matters. So that has always been a complex issue about who we can take complaint from and what actions we can take on their behalf. Splitting part of the operation of how you would manage a particular complex and then saying, “Well, they’re the rules for that argument with a department and then a dispute resolution process in a different department” I think would lead to problems.

The CHAIRMAN: We have had a bit of evidence right at the beginning of the process, that people are starting to get more and more disputes on the drawings. You are buying a property off the plan, and the plan might have, say, three towers. Tower one gets built, and by the time tower two gets built it gets changed either sometimes by requirement of government for efficiency or some other argument about changing the plan. Then people are immediately in dispute about those issues, so I think we would agree with you that we have not got to that position.

One of the things we are looking to do is to give people quicker access to information, and to try to get that in some sort of resolution basis, because I think a lot of people's complaints, or some of the complaints that I listen to, would have been settled if people could have got the information or at least information from someone they trusted, as against someone they did not trust, obviously.

Mr Newcombe: If licensing were introduced, then we would expect those sorts of issues about strata managers to be core business for us. They would be about the licensing obligations, information/education. But it comes back to that whole thing as well as what is funded, because there is potentially a significant build-up of interest and demand, and it could not just be layered on top of the organisation without the funding for it. But certainly if licensing was introduced, if we come back to that point, and that is the anchor on which conduct is regulated, then you would be looking at that function to be with us, if we were the licensing entity.

Hon KEN BASTON: So you would need Consumer Protection recognised under the Strata Titles Act. Is it not at present?

Mr Newcombe: Not necessarily. That would in fact keep the Strata Titles Act to more than the technical issues about strata titles to Landgate, which is where it belongs. But if you were introducing licensing and conduct provisions, we would need a new act or amendments for conduct, and that could be stand-alone and not connected to strata titles. The licensing law equally does not need to be. There might need to be—and it gets down to the nitty-gritty when you start to develop it—some interrelationship between the two, but on the face of it it does not have to be connected to strata titles, and we do not necessarily have to be recognised under the Strata Titles Act. But we would need some form of legislation. Our conceptual analysis of this in terms of where we are looking at is we would say, "If you are introducing licensing, we would have a separate conduct law, which would probably fit in some way or another with the existing property laws." So you might bring those together.

Hon KEN BASTON: That is virtually, Mr Chairman, what you were referring to.

Ms Driscoll: Perhaps it is relevant to add that currently where the department gets involved with strata issues, obviously we are dealing with issues that arise as best we can through two mechanisms. One is: if the strata manager happens to be a licensed real estate agent, to some extent we can deal with the matter through that avenue. Although the conduct requirements there mean that there are only a few hooks, if you like, that you are able to use in terms of that law. The other option is to assist in conciliation of matters, and we do that through another branch that is outside the funding of the REBA. Even there, there is some question about our capacity to take legal action in that area, because a strata company is not truly a consumer for the purposes of the act. So we do it because we recognise that a strata company comprises a number of consumers, but we really are providing a service and advice without probably the capacity to take action. We have not fully tested that in terms of legal advice, but it is not clear in terms of our jurisdiction in that area. We are doing what we can essentially at the moment to assist people.

The CHAIRMAN: The question is: are we doing what we can?

Ms Driscoll: Yes.

The CHAIRMAN: Because the issue is just that: we are hearing that there are, I think, unquestionably circumstances out there where people have taken fairly sizeable chunks of other people's money and they have got away with it. The chances of doing that in the future remain. We are pretty clear that we are not talking about anywhere near the majority of people. We are talking about a small minority. Nevertheless, it is totally obscure why, for example, in this world you are allowed to start a bank account called Max Trenorden Pty Ltd and put everyone's money in it, take the interest out of it and it is legal. You could have millions in there in theory—even if it is tens of thousands. My own business expenses come out of that account. The management of the council would come out of that account and the trust funds that are meant to be sitting away for some future

event are also in the same bucket of money. There is a legitimate argument by the better operators that you can buy software where it separates all that, which I would accept immediately, but I just wonder how many people are using that software and how many people are using all of that—and I would say it is probably none—or portions of that scheme for their own revenue without the client having too much of an idea where that money is going.

I go back to what I said. First, are we doing enough? Is there enough strength in the legislation to allow these people to be put into—my interest really is not to bring them to account; my interest is making sure there is a structure in place which you can follow, which the client can follow and can be prosecuted, if need be.

Mr Newcombe: I think the answer to that question is pretty obvious in terms of the current legislation. The answer is no, that is not there. There are a whole range of controls. You referred to the police referring about fraud matters. At the moment it is regulated by the general law, and that would include issues about fraud, about breach of fiduciary duty, about constructive trusts—there are a whole lot of laws that sit around it—but someone would have to take a significant case on to test that. At the moment, strata managers, per se, are not regulated, they are not specifically licensed and they are not subject to specific conduct requirements in this state. If you want to go down that road, the answer is, in my view, you need new legislation or additional legislation.

The CHAIRMAN: And looking at some of the other people that you have responsibility for, all those matters are in place, are they not?

Mr Newcombe: Yes, for those industries that the government has decided to regulate—and in our portfolio that is real estate agents, settlement agents and, to a lesser extent but still, land valuers. There are three property industry occupations that are subject to a positive licensing regime with conduct controls.

The CHAIRMAN: One of the issues with the police is that often it comes to them basically as the third party. It is not something that has been generated for them. The information comes from somewhere else. It has not been gathered by their own officers. That has not been tested in their view, so it becomes less likely they are going to do it because the chance of prosecution again is a step further away. We seem to have been talking ourselves into a bit of a circle here.

[10.45 am]

Hon ED DERMER: Perhaps I can break the circle by asking a related but different question. On the question of spending other people's money, it seems to me that the most obvious solution would be to insist that audited financial statements be done. That already applies for very small incorporated bodies that are dealing with very small amounts of money. It has been suggested, though, that the cost of obtaining audited financial statements may be prohibitive for stratas that are operating with a small scale of money, because the cost of the auditing would be disproportionate. I am interested in your thoughts on that as a potential requirement—its merits or demerits.

Mr Newcombe: I will just make some general comments. It partly depends upon whether you would impose that obligation on everybody or whether you would have sort of a tiered obligation. Perhaps in very small circumstances you might not have an auditing obligation, but you might impose an auditing obligation as you go up in terms of size or amount of money or whatever. There are two issues that we find very regularly with audit obligations. One is that it can be very difficult to get auditors, particularly if the audit is at the end of the financial year. We find quite regularly that incorporated associations, and others, find it very difficult to get people to take on auditing. So that is one issue. The other issue is the cost that may be involved, and that depends on where you go for the audit. So, again, I would say, as a general response, it is a balance. It is something that has been used as a tool in a number of areas, but you would not necessarily apply it to every set of circumstances, because in every set of circumstances you might find that the cost of doing it outweighs the benefits that would come with it.

Hon ED DERMER: From your experience, do those tired requirements work in terms of being quite clear as to what is needed at what level?

Mr Newcombe: Yes and no. It always comes back to how you structure the tier as to whether it is clear or not. That might be based on some very objective criteria, which might, in this area, be about the number of units that are involved, and you do not worry about the dollars; or you might focus on the dollars, or you might focus on the size of the corporation involved. You can make tiered structures relatively straightforward, but sometimes they can also be a bit awkward to deal with. But what we have found pretty much in regular policy consultations over the years is that in almost every group that we have consulted with when we are looking at these sorts of obligations, people want exemptions, because the view is that to impose a blanket obligation on everybody in a particular industry creates a lot of unnecessary cost.

Hon ED DERMER: In that instance, a neutral and wise body should make an assessment of a request for an exemption?

Mr Newcombe: Normally, what happens is that the exemptions are built in, either by tiers or by legislative provision, that says when they will apply, not necessarily in the act, but often in the regulations; or there might be a discretion imposed on the regulator, or provided to the regulator, that would enable the regulator, on request, to exempt a particular entity from the obligation. They are all options.

Hon ED DERMER: In that instance, the person requesting the exemption would have to put forward an argument that would be assessed; which is interesting.

Mr Newcombe: That is correct, and that also builds in bureaucratic cost, because you have to assess that and you have to make decisions and all the rest of it; so it makes the system much more bureaucratic.

Hon ED DERMER: Have you in your experience found certain characteristics of tiered regimes that work and other characteristics that do not work?

Mr Newcombe: I think it is horses for courses, to be honest. Again, it depends on the industry that is being look at, and where you are examining it and the sort of criteria that apply. The area that we have been looking at most recently probably would be incorporated associations—that is an example of a very broad industry, where you might have a bridge club, compared with a very large organisation—and there has been a lot of discussion about how the tiers might work for them. Without going into the detail about how that might be constructed, our discussions with people in the auditing profession, and others, is pretty much that they would support some form of structure around it. The auditing profession themselves are saying that in that sort of area, they cannot necessarily provide auditors, because there is big demand from big business at particular times, and people do not necessarily want to take on small fee-paying jobs. So you can impose an obligation to get an auditor, but it can be very difficult for smaller groups that are not going to pay big amounts to get someone who is prepared to do the work.

The CHAIRMAN: And their professional indemnity risk is pretty large whether it is small scale or large scale.

Mr Newcombe: That is correct. Therefore, for the auditor there is a significant risk for a very low fee in some cases. So, naturally enough, the market works, and people are reluctant to take the work on. What you find often in the incorporated associations area is that it is someone you know, or someone who somebody knows, who does it on a voluntary basis, rather than asking for payment for it. But you cannot really expect that to apply throughout the market, that people are not going to charge for their services.

Hon ED DERMER: That is more likely to apply to a small set of books, such as the ones a bridge club might have; and often they get in someone to do an audit informally who is not necessarily qualified to provide it.

Mr Newcombe: Again, that is the test: what is an audit?

Ms Driscoll: Currently, associations are not required to have an audit; they just have to provide financial statements.

Hon ED DERMER: Is that right?

Ms Driscoll: Yes, certainly with the regulation of charities. We are looking at those thresholds for associations. It certainly is the practice in other states—we are able to refer to what we know in some other jurisdictions. But currently, associations are not required to have an audit, which is interesting.

Hon ED DERMER: I am surprised to hear that.

Mr Newcombe: Regardless of their size.

Ms Driscoll: The new legislation that we propose for this year will set some thresholds, as Gary has outlined.

Hon ED DERMER: Again, based on turnover, I suppose?

Mr Newcombe: Yes. The latest development—sorry; I am no longer involved directly in that, but I think it will be based on turnover, yes.

Ms Driscoll: Yes, turnover. Another example is charities regulation, which is a subset, often, of associations. Certainly there is an approval process where the Charitable Collections Advisory Committee can agree to alternative audit arrangements if it is a small hospital auxiliary, or something, where the local bank accountant, or whatever, can do the books for it as opposed to a formal auditor.

The CHAIRMAN: Going back to the first part of your answer, you said the regulator. Does that mean that you would need to have a full-time new individual to perform that role?

Mr Newcombe: For the licensing of strata managers?

The CHAIRMAN: For regulating. If a licensing scheme was put in place, would this require a full-time regulator?

Ms Driscoll: Do you mean in terms of resources?

The CHAIRMAN: An FTE, I am talking about.

Ms Driscoll: I think all of our reactions would be that we would need much more than one person to do this.

The CHAIRMAN: A lot more than one person?

Ms Driscoll: Yes.

The CHAIRMAN: So we are talking about a fairly expensive process?

Ms Driscoll: We are, because if it was licensing, it seems to me that it would be most cost effective to build it into the real estate licensing system, given that some are already licensed as real estate agents. Of course there is an annual audit return, and each of those audit returns are reviewed to make sure that there are no qualifications. There is a proactive process to periodically over several years visit agents to make sure that they are doing the right things in terms of reporting to clients et cetera, and then there is, of course, the complaints management system and the education program. So it is quite an expensive arrangement in terms of supporting the community so that people will understand their rights and are able to reinforce those with the licensees.

The CHAIRMAN: As professionals, do you think that the education process should be in your hands, or should it be in the hands of professional bodies?

Mr Newcombe: We would normally work jointly with the professional body. If we look at the areas that we currently regulate, we do have a responsibility to undertake education. It is variously

resourced, so you can only do what you have the resources to do. But we do work very closely with the professional bodies. That is the most effective way of getting in contact with people, because at least that helps you with those people who are licensed. Our focus then is probably more on clients—consumers—and also people who for whatever reason are not captured by the professional body. We are not talking, normally, about membership of the professional body being mandatory. That means that you will have people who are licensed practitioners who are not members of the particular organisation, so obviously you will need to contact them. But experience would show that you cannot do education and information from a government perspective unless you work closely with the professional bodies.

The CHAIRMAN: Having watched government for some time, I would imagine that your argument would be that you would look at what should be the core components of that process, and you would tender it out; and would you then hope that the professional body would be the only one that would pick it up?

Mr Newcombe: Not necessarily. If we come back to what the education might be for the managers—again, the revisiting of licensing for strata managers has come about with national licensing. Under national licensing, there would be national set competencies for people to get a licence. That function of the education and training would very much be delivered by private trainers against those designated competencies, and that is what you would have to do. In terms of ongoing education, which is more about, “Do you understand with the law says; do you understand your obligations; how do you operate?”, we tend to do that ourselves, and also we work with the industry bodies, because their intention is to try to improve the standards of their members. So they would do their own work; we would work jointly with them; and we would do our own work. But if you are looking at the issue about the training and the competencies, that would very much be fixed and set nationally, and it would be delivered by registered training organisations.

The CHAIRMAN: Again, that is not our concern. It is the practice. Would it be reasonable to presume that once we get a licensing regime, whether it is a national scheme or our own, that would pull the vast majority into a professional grouping, because it would be dangerous, I would imagine, to operate outside of that?

Mr Newcombe: It depends on the industry. Some industries have a very high proportion of membership of the professional body, and others are less so. The professional body has to make itself attractive: what does it charge; what does it offer its members?

The CHAIRMAN: What it offers its members, which is how to comply, the best computer programs and all of that.

Mr Newcombe: Yes, absolutely. So that would be the challenge. In this state at the moment STIWA and probably the Real Estate Institute of WA as well, would see itself in that marketplace, and that would be the challenge for them.

Ms Driscoll: May I add that the other form of education that we normally get involved in is very much supporting the consumer side of the equation. We provide education to industry, but we also provide a lot of material to consumers, both through phone and other contact, but primarily also through information sheets that they can use to assess whether their provider is doing the right thing. So we provide plenty of material in terms of what they should expect from their strata title manager: you should be asking these questions, and you should be getting these reports. One of the important tools in actually achieving compliance is raising the expectation on the side of the consumers themselves.

The CHAIRMAN: Part of the evidence that we heard is there is a breakdown of councils, with people not wanting to be president, people not wanting to be treasurer and people not wanting to be secretary. Of course under the legislation, the council is the top of the tree. Therefore, in that range of compliance, we also need to think about the relationship between the strata manager and the

strata council, and then the unit holders in that council. It seems to be the case, from your evidence, that there is a reluctance to get involved in councils. Most of the rules of the process give the council the powers. But if the council is dysfunctional, you will have problems.

I now want to set off in a different direction. In your response to our written questions, in paragraph 3, which relates to the national steering committee, attachment A, which you sent to us, refers to the eligibility requirements and states that the committee notes that the Property Industry Advisory Committee has proposed eligibility requirements. Do you have a copy of those what those proposals are?

Mr Newcombe: The eligibility requirements themselves are not public as yet. The reason for that—just to give you an outline of the process—is that the Property Industry Advisory Committee comprises mostly industry representatives who are providing some advice on what they believe should be in one of the occupational groups, which here is property.

[11.00am]

What is happening with the development of those proposals is that they have to go to national regulations. What has been developed at the moment is a set of drafting instructions and draft regulations that are currently scheduled to be released around July this year with a regulatory impact statement. The detail will not come out from the national steering committee until around the middle of the year as part of the draft regulations. That draft set of regulations will cover everything, including eligibility and education requirements, and all of those sorts of things that relate.

The CHAIRMAN: Part of my interest in this, which may not have been Christine's interest—she wrote the questions—is that while we were in the east we heard that there will be grandfathering in the act, so the poor operators will automatically go into the bucket in the bill.

Mr Newcombe: I can let you know what the intention is with grandfathering. Under national licensing, where there is already a licensed category and there has got to be a new category under national licensing, no-one will have to apply for and pay for a new licence; they will be effectively rolled in or grandfathered into the system. That is because it is intended that there be no disadvantage. However, in Western Australia we do not have licensing, so there is nobody to roll in. There are a couple of ways around that: if before the new act, we introduced the state licensing scheme and got everybody licensed and they met certain criteria, they could be rolled into the new national system; or if we introduced national licensing of strata title people after national licensing was commenced, people would have to apply for a licence. The issue in WA, and this is something we have to work through, is that we have a lot of people whose business is doing strata management and we would need to look at the transitional arrangements going in. But the national licensing scheme does not require WA to say that everybody who is currently operating in the marketplace gets a licence. Grandfathering is only about people who have already got a licence and are moving to a new national licence.

The CHAIRMAN: I imagine there will be quite a scramble at some stage.

Mr Newcombe: Sure. As I said, it will be one of two things. I suspect the easiest thing for the industry in some ways would be for state licensing to start first and then everybody gets rolled over. But as Anne indicated, and I think I indicated, that is a pretty tight time line between now and July next year. Equally, I am sure, if licensing was introduced, industry practitioners would be saying, "We've been in the business for 20 or 25 years and we should be licensed without doing more." I think the likely way around that is to say that there will be some recognition of qualifications or prior learning and that would get people over, but they might still need to satisfy the new national probity requirements about what we currently refer to as a fit and proper person, but it will be a different test.

The CHAIRMAN: Usually a fit and proper person relates to criminal and police records, and those sorts of things; more than someone's knowledge of accounting and law et cetera.

Mr Newcombe: The whole system of national licensing is based on people having very clear objective educational qualifications, but not experience. If you meet the education qualifications that are set, which will be nationally set, then you will be entitled to a licence, subject to meeting all those other probity requirements. The test here would be how we worked out the transition across for people. That will be quite a challenge for us, if we were to introduce national licensing, but there is no guarantee, again, under national licensing that everybody acting in the marketplace in an unlicensed licence jurisdiction would automatically get a licence under the national licensing system. There is no guarantee of that in the system at all.

Hon KEN BASTON: What is the time frame to get the required licence if you were studying full-time?

Mr Newcombe: It varies, but to be honest it is not very much. If you were looking at comparatives it depends on a whole range of things—whether you wanted to do it part-time or whatever—but to be honest you could get a number of the qualifications in under a month of full-time study; generally it is out to a year, but it is not huge. It is a certificate IV level, and in most of the related fields it stretches to 12 months and people can do it in a range of ways.

The CHAIRMAN: From what I can gather, you can buy in too. My understanding is that you only need one person in the organisation who qualifies.

Mr Newcombe: Under national licensing, the situation will be that any individuals operating will have to have their own licence, but under a corporate entity you have a nominee and the nominee must be individually qualified for the company to operate.

The CHAIRMAN: That is what I am saying: You could buy a retired licence or something like that, which would give you a very strong chance of complying.

Mr Newcombe: That would be as the nominee, absolutely; but the company is then liable for all of the responsibilities. Yes, you are required to have one nominee.

The CHAIRMAN: I am just making the point that it is not that onerous to get a licence.

Mr Newcombe: No; absolutely not.

The CHAIRMAN: In evidence to the Economics and Industry Standing Committee in 2002, Dr Catherine Bennett noted that general law such as the commonwealth Trade Practices Act, the Corporations Act and the Fair Trading Act 1987 applied to strata managers. Could you please indicate the relevant sections of these acts that would apply? And has any action been taken against strata managers under this legislation? You seem to have indicated that you do not think so. Could you look at that for us?

Mr Newcombe: We will probably have to come back to you, if that is okay.

The CHAIRMAN: We do not expect that now, but if you could have a quick look at where you think those acts apply and if you know of any prosecutions, that would be useful to us. We have come to the end of the process. Thank you very much. We have covered a little bit of territory, but the message we would like to give you is that we want you to understand where our main thrust is coming from. I played a very small part in this previously, and I was the only person who submitted to the Stamford inquiry. I was concerned at that time because it was all about the operators and there was little about the consumers of the acts. Most of what we are doing here today is about the consumers of the acts and how they relate to the various acts. We will be reporting on it, and that will not be a huge length of time away; it will be some time away, but not a long time away. We are talking to operators like you, and then we will start to write a report, hopefully not too far away. If in discussing matters you think there is anything you think we should know, we would appreciate hearing about that. We understand the process, although I should not say "we". I think I understand

the process and that what has been put in front of us will be possible, that is, what you are required to do and what the minister is required to do, but that our time requirements will make much of those time requirements pretty messy. However, I think you can expect us to come down with a report containing a range of considerations in terms of the consumer. You gave us attachment A on the national occupation licensing system. Do you mind if that is a public document?

Mr Newcombe: That is already public, Mr Chairman.

The CHAIRMAN: Thank you very much. Thank you for your attendance and your evidence.

Hearing concluded at 11.08 am
