

**ECONOMICS AND INDUSTRY
STANDING COMMITTEE**

INQUIRY INTO KARRINYUP LAKES LIFESTYLE VILLAGE

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
MONDAY, 12 MAY 2008**

SESSION ONE

Members

**Mr R.C. Kucera (Chairman)
Mr G.A. Woodhams (Deputy Chairman)
Dr J.M. Edwards
Mr M.P. Murray
Mr A.J. Simpson**

Mr A.P. O’Gorman (Co-opted member)

Hearing commenced at 10.03 am

CREEDON, MR DAMIAN

**Lawyer, Department of Consumer and Employment Protection,
examined:**

HEWSON, MRS ANDREA HELEN

**Lawyer, Department of Consumer and Employment Protection,
examined:**

MARSH, MR PETER JOHN

**Investigator, Department of Consumer and Employment Protection,
examined:**

NEWCOMBE, MR GARY

**Director of Policy and Strategic Development, Department of Consumer and Employment
Protection,
examined:**

The CHAIRMAN: Good morning and thank you for attending this morning's hearing. We will go through the formal process first and then we will talk about your submission. Peter, I understand that you have had more involvement than most in this matter so we will address some of our questions to you.

This committee is a proceeding of Parliament and warrants the same respect that proceedings in the house itself demand. Even though you are not required to give evidence on oath, any deliberate misleading of the committee may be regarded as a contempt of Parliament. Have you completed the Details of Witness forms?

The Witnesses: Yes.

The CHAIRMAN: Do you understand the notes at the bottom of the form?

The Witnesses: Yes.

The CHAIRMAN: Did you read and receive an information for witnesses briefing sheet regarding the giving of evidence before parliamentary committees?

The Witnesses: Yes.

The CHAIRMAN: Do have any questions relating to your appearance before the committee?

The Witnesses: No.

The CHAIRMAN: Please state the capacity in which you appear before the committee.

Mr Newcombe: I am the Director of Policy and Strategic Development at DOCEP. My area of responsibility relates to legislative review and amendment.

Mr Marsh: I am an investigator with the building and tenancy branch of DOCEP.

Mrs Hewson: I am a senior lawyer in the legal unit at DOCEP.

Mr Creedon: I am assistant general counsel in the legal unit at DOCEP.

The CHAIRMAN: Dr Loraine Abernethie and her assistant, Vanessa, received your submission on behalf of the committee. I thank you for the detail in the submission; it is quite comprehensive. Do you wish to propose any amendments to the submission?

Mrs Hewson: There is one minor amendment. I got the name of an act wrong. Fortunately, it was not one of ours! Paragraph 34 should refer to the Planning and Development Act. I think I put Town Planning and Development Act.

The CHAIRMAN: Do you wish to make an opening statement?

Mrs Hewson: There is one point that we would like to raise, which we have discussed with Dr Loraine Abernethie. There are ongoing proceedings in the State Administrative Tribunal between residents and the owners and there may well be proceedings in the future. Some of what we may say today will reflect the view we have come to on the legal position of the residents and the owners. We are quite anxious that that does not impact adversely on any future proceedings. If we have a question that we think may go down that track, we will say something and then we can decide how best to deal with it.

The CHAIRMAN: I am well aware of that. Thank you for bringing that to our attention. I met with the head of SAT a week ago to clarify those issues. I have a letter here, of which I am happy to provide you a copy. He sees no difficulty with persons giving evidence to a committee otherwise addressing matters that are an issue in the proceeding at the tribunal, including what they consider to be the correct or preferable outcomes in relation to any disputation. However, he does not wish us to address the "I said" and "he said" interchanges between the parties within SAT. We will honour that. Essentially, we have been asking witnesses to describe what they see as the issues and what they see as their role and responsibility in terms of the broader issues. If there are any specific issues that interrelate with SAT, we will negotiate our way through. We as a committee do not wish to interfere in any way with the determinations that the State Administrative Tribunal will most likely reach, the reason being that this committee does not see that it can necessarily deal with the legal issues that SAT is addressing. That is the appropriate place for it to be. We believe that SAT will provide an appropriate determination whatever that may be. In terms of the broader systemic issues, we must discuss some of the issues before SAT so that we can get a picture of what has taken place. Rest assured we have canvassed the issues well with the head of SAT and are well aware of them. Thanks for bringing that to our attention.

What is the Department of Consumer and Employment Protection's responsibility in relation to retirement or lifestyle villages? What is your responsibility as a department?

Mr Newcombe: The department is the administering authority for the legislation. As a consequence, it has certain specific responsibilities, which include the application of the legislation and maintaining the legislation and the code that sits underneath it. Another is to provide information to both the industry and consumers. There is a statutory provision in relation to that. Another is to receive and to act appropriately on complaints that relate to a breach of the code or legislation. The action taken depends on the nature of the complaint. It does enforce both the code and the act by taking legal action where necessary and it also advises residents and the industry of their rights to take matters to SAT and other processes. That is a rough outline. The legislation sets out specifically some responsibilities for the department. However, one thing to note is that the bulk of the regulations of retirement villages depend on individual contracts that are entered into between residents and operators and they are private legal responsibilities and rights which the parties themselves enforce. The department is not involved in the enforcement of contractual rights.

[10.10 am]

The CHAIRMAN: The difficulty with that is that some of that overlaps with the management and the codes.

Mr Newcombe: Yes, that is correct. That is essentially a balancing act but the legislation is clearly structured around private contractual rights. It is possible that certain factual circumstances might give rise to an issue under the code in that a contract might not be compliant with the code or the act. It is also possible that the same factual set of circumstances might give rise to a breach of contract or a breach of the act or the code, so there is clearly overlapping between those two. There is also an issue about the way in which we look at the structure of the code and the act.

The CHAIRMAN: Who has responsibility for enforcing breaches of the contractual arrangements?

Mr Newcombe: The parties.

The CHAIRMAN: The parties themselves. It becomes a civil matter?

Mr Newcombe: Yes.

The CHAIRMAN: Is that a weakness?

Mr Newcombe: It is a difficult question. This is the process that has been set up under this legislation. It is contractual. There are reasons that that is the case. It enables individuals to negotiate a set of arrangements that best suit them. There are reasons the legislation is based on contractual rights. However, I am sure that some of the individuals concerned may find some concern in the need for them to enforce their rights because you do have a situation of an individual who is a party compared to the operator, which might be a larger organisation. That issue is being looked at in the current review of the legislation in terms of what dispute resolution rights might exist. As to whether it is a weakness, that is really for others to judge, but the department does not get involved in the enforcement of individual contracts.

The CHAIRMAN: Generally in these style of villages, particularly as the residents have been there for some time, one would consider that these groups of residents are somewhat more vulnerable than the person who has a house, has the title in his or her hand and owns the piece of land that the house sits on.

Mr Newcombe: The department does acknowledge the vulnerability of seniors who might be resident in this form of accommodation or others. There are issues that do affect the capacity of people. One is the relative bargaining power. Another is the fact that when people move into a retirement village, they may well have restrictions on their financial capacity to go elsewhere or choose other options. Those issues have come out during the review of the legislation and the code. People do feel more vulnerable. The process and the legislation are intended to provide a lot of information up front for people to make choices and decisions. We do know that people do not necessarily fully understand that information or do not necessarily act on it. We know that if people have been resident for a long period and they do not necessarily have an independent income stream, except for what they went in with, they do not have the capacity to replace capital and so on. It is not true of all residents but as people get older, they can be more vulnerable in the sense of dealing with people, standing up for themselves and negotiating. We certainly recognise that residents of retirement villages represent a more vulnerable group in the community and that underwrites what we are looking at in the review.

The CHAIRMAN: You mentioned that some things are contractual and some things come under the code. When something is contractual and it is eventually referred to SAT, what happens to the issues that come under the code?

Mr Newcombe: It depends on the set of circumstances. The general position would be to allow the SAT matter to proceed. If the issues relate to offences, they would be dealt with at the conclusion of the SAT matter.

The CHAIRMAN: Is it standard practice to archive complaints? Do you send them on to SAT?

Mr Newcombe: What do you mean by archive?

The CHAIRMAN: Virtually all the submissions from the residents have been highly critical of the operations of DOCEP in terms of dealing with issues. Whether those criticisms are justified, I do not know. One basis of complaint is that on one occasion in particular where the issues refer to SAT, the remainder of issues were simply archived.

Mr Marsh: You may be referring to the archiving of the initial conciliation file. That is explained in the submission. I think you asked whether it is the practice. When these matters came before SAT late last year, the files that were current at the time remained open. They have not been archived. I do not think it is the practice of the department, particularly in the area that I am working in. The files that were active are still open.

The CHAIRMAN: Given the growth in this industry, is DOCEP adequately resourced to deal with these issues?

Mr Newcombe: It is true that —

The CHAIRMAN: This is a privileged committee. You are not being asked to put your neck on the chopping block.

Mr Newcombe: As you would fully appreciate, issues about resourcing are not ours to decide. We certainly recognise that the issue of retirement villages, residential parks and other issues that are affecting seniors are growing. They are growing in terms of numbers in the sense that we have the baby boomer situation and there is a demographic change. There is no doubt that the problems are getting more complex. There is a view that baby boomers are more prepared to stand up for themselves. Therefore, the disputes become more complicated. We are certainly well aware of that. We are looking at our level of resourcing internally and externally. We have targeted it as an area that is potentially one of our major growth areas.

Mr A.P. O'GORMAN: I wish to return to this archive question. You said that any files that were active at the time are still open. Are they still active or do you stop working on them while it is going through a SAT process?

Mr Marsh: We left them open because they have gone to SAT. They have not been sent away and they have not been archived. They are open. Whilst SAT is running with what it is running with, we are not doing anything on the file, obviously. When SAT is finished, some issues might be dealt with in relation to the code.

Mr A.P. O'GORMAN: They are set aside.

Mr Marsh: Yes, they have been set aside.

Mrs Hewson: One thing that does come up is that we have our two hats—our conciliatory hat and our prosecutorial hat. In this sort of situation where the residents and the owners are very much forced to live together—the owners are not going to sell and the residents cannot move out, so they are forced into a relationship with each other—you can find that your prosecutor's hat can conflict with your conciliator's hat. At the moment there is mediation, which is a very positive step for the residents to be involved in. If we take prosecution action, we are asking the people who are involved in mediation to stand up and give evidence against the people they are mediating with. That creates a difficulty because it is contradictory. You are trying to conciliate on the one hand and then you are in conflict in a prosecution action on the other.

[10.20 am]

Mr A.J. SIMPSON: Peter, you mentioned that a file stays open while the case is being looked at by SAT. How do you know when SAT has finished dealing with it? Do you go back to the file? How do you know when that issue at SAT has been terminated? Do you get notification from SAT that that has happened —

Mr Marsh: Sir, I would hope so.

Mr A.J. SIMPSON: — or does the file just stay on the table until such time as someone goes, “Oi”?

Mr Marsh: I have been attending the SAT hearings, so —

Mr A.J. SIMPSON: You are very much aware of it. Good.

Mr Marsh: — I am very much aware of where it is at. There is no issue yet that we could continue on with as far as I am aware.

Mrs Hewson: SAT and the parties asked us to attend as sort of a friend of the mediation to assist, if required, with background.

The CHAIRMAN: I suppose one of the things that have concerned us as a committee as we have gone through and looked at this is that the issues that have arisen have gone on for almost a decade now—since 1998 when it was first put up for approval. The issues for the residents did not start to apply until about 2003-04, so the issues have probably been going on for about four years. The genesis of the disputes seems to have been laid well before that in the way that the whole structure has been put together. I note that there have been regular breaches of the code that are not to do with SAT, such as the provision of annual financial accounts and the suggested structure of advisory committees. On the face of it, a whole range of things under the code seem to have been ignored and even, in some instances, deliberately avoided by management. What do you do about an issue like that when that occurs? Surely there is a role for you to step in before there is any deliberation by SAT.

Mrs Hewson: When we first had this matter referred to us, the main focus for us was the lease issue. I cannot quite remember the time line of, when we became aware of all the other issues, but the lease issue was definitely the main focus—to get that in place before we did anything else. Again, there was a bit of that competing thing. With the lease issue, we were really trying to get consensus, because it was much quicker to do it that way than go down the court proceedings route, which would have taken much longer and we would have felt that we were on shaky ground anyway in trying to get what we wanted in the courts. In a sense, everything else was put to one side while that happened. Again, you do not want to be prosecuting the people you are trying to negotiate with, because that then puts them offside with what you are trying to negotiate. When we got the lease issue sorted, we wanted to deal with the other issues, and there were so many of them that we felt that mediation was the best way of doing that. We were trying to persuade the parties to mediate, and eventually it went to SAT, which has gone for mediation anyway. It was not that we were not doing anything; we were trying to put that line of tiptoeing along —

The CHAIRMAN: I am sorry if you have misunderstood me. I was not suggesting that you were not doing anything; in fact, the issue of sorting out the leases is good because it was needed. However, what greatly concerns me as chair and, I know, other committee members is the length of time that things do take. In terms of the leases, what would you do differently today if this situation arose at the next village down the road?

Mrs Hewson: I do not know whether we would. We would have to do it the same way. By that stage, the residents were nervous about what the owners were going to do if they did not have proper leases in place.

The CHAIRMAN: I can understand that. I think I, too, would be nervous to realise that I had invested over \$300 000 and it would appear that I had no security; I had an unsecured loan. We are also seeking from you some ways forward. If the situation is the same now and it has to go through this whole process to get to SAT, it appears to me that we have a real weakness in the system whereby people can go through a planning process, anybody can come along and say, “I have a piece of land, I can set it up as a retirement village, I can offer leases out under the act and I can still not comply with the act and put people’s money at risk” and then there is a negotiation process and a conciliation process and eventually it almost has to end up before a tribunal before I can secure

my investment. You can understand when this evidence is given to the committee why we are concerned that, with the growth in this industry, this may happen in the future. What we are seeking from you are not just answers to why it has happened, but also perhaps some suggestions as to how we can prevent this when the next case comes up.

Mr Newcombe: Mr Chairman, they are all valid points and they are issues that we are looking at in terms of possible changes to the structure of the legislation. One of the particular issues which came out in this matter and which you referred to was the question about some uncertainty whether, because of the nature of the lease, the residents had the protection of the legislation. That is an area that certainly needs to be clarified so that there is no issue about whether somebody is a resident and therefore is subject to the legislation, or whether the protections are dependent upon the nature of the lease. That is an issue that is being looked at. One of the difficulties with the current code is that it is not made under the Retirement Villages Act. As you might be aware, it is made under the Fair Trading Act. There are a couple of difficulties with that, and one in particular is in relation to enforcement. The enforcement process requires that the department first seek an enforceable undertaking; it cannot simply prosecute for a breach of the code. If that undertaking is breached, then you go back to SAT and you can seek, effectively, a prosecution, and there are limits on the maximum penalties that are available. One of the things that is being looked at is doing away with having a separate code under the Fair Trading Act and incorporating the fundamental provisions that are really significant in the legislation, so that you can have significant penalties and powers to act. To the extent that you have a code, you put the more minor matters into the code, which is effectively regulation. That is something that is also being examined. The dispute resolution mechanisms are being examined. At the moment, we have a situation in which there are really two options before you go to SAT. One is to seek dispute resolution under the current provisions of the code, which is really that the operator appoints somebody to deal with a dispute and it goes forward. There is also the option of mediation by the commissioner. Mediation by the commissioner is voluntary; you cannot enforce attendance. There may be some need to change the dispute resolution process to make it more independent of operators as well. There are also issues about the management of retirement villages and whether there should be some further controls in relation to management. It is a very difficult area. It is not like, for example, a real estate business, for which we have a full licensing regime. You might, at the end of the day, move in and close down the business. You cannot do that with a retirement village; you cannot close down the village. You do not want a situation in which it is closed down while people are living in it. There are provisions in other jurisdictions, for example, requiring management to satisfy a fit and proper person test, or something similar.

The CHAIRMAN: Should that apply here?

Mr Newcombe: Certainly, that is one of the issues that we are looking at. It has been raised in the submission process. It is not clear whether the operators of the current village—I am not closely involved—would satisfy a fit and proper person test, but if you put that in, it would exclude people who, for example, had committed serious offences or were bankrupt or other sorts of things. We are looking at increasing the regulation, including new provisions in relation to management. We are looking at issues in relation to the contractual position. The state government had previously endorsed in principle the introduction of what is called unfair contract terms legislation. I do not want to divert too far, but you may be aware —

The CHAIRMAN: I actually introduced it as small business minister, but it did not get through the upper house, if you recall.

Mr Newcombe: Yes, I do actually. The Productivity Commission has been reviewing the entire Australian consumer protection framework. It released its final report last week, and it has recommended the introduction of national unfair contract terms legislation and that has really been holding up unfair contract terms legislation.

The CHAIRMAN: Can I just hold you up there for just a second? The evidence given to us has raised issues. This is a unique situation involving retirement villages, or lifestyle villages-whatever you want to call them. The only thing that the people in them buy is a lease for life.

[10.30 am]

Mr Newcombe: Not always.

The CHAIRMAN: In most instances, the arrangements that we have been addressing are lease-for-life arrangements. The only thing those residents have is a lease that allows them to occupy a residency. As you and Peter said earlier, that makes the residents very vulnerable. In this case there seem to have been problems with the initial planning process that have cascaded on to a range of approvals that either have not been forthcoming or have not been ticked off on or, in many instances, have been varied, even by the intervention of ministers. The development of this village has had no set time frames that we could find, other than the time frames that are mentioned in a brochure. There was no evidence of commercial or financial viability of the whole process of this development and there does not seem to be any enforceable legislation that would have enabled the residents to see whether what they were entering into was viable. There do not seem to be any enforceable milestones even though milestones are set in the promotional material. We cannot find a provision in either the code of practice or the code of management to enable you to step in and do anything other than conduct voluntary mediation when what appear to be irreconcilable differences occur between management and the residents. The code provides that the financial accountability of the day-to-day running of the villages should be part of the operations of management. However, in this case that has not taken place for at least four years, and possibly eight years. It was only just in the past month that an audit account was provided and evidence has now been provided of a sinking fund. Also, on the issue of the overview, inspection and enforceability—this is not a criticism of you, Peter because you have been the one who has had to face the brunt of it, and I wonder how you do it; I think one of your relatives at some stage was Solomon—as far as we can see, all of those things put together seem to have contributed to the problems in this instance. It seems that no overall responsibility can be adopted. There is no umbrella of responsibility for a group of people that are, as we have said at the outset, somewhat vulnerable. That is a lot to ask in one question, although it is a statement more than anything. Will your review address those issues, or can the committee assist to make sure that these kinds of situations can be minimised wherever possible?

Mr Newcombe: I will try to deal with each of those issues. Our responsibility for retirement villages legislation does not extend to the planning and approval process. That is dealt with in the same way as every other planning and approval decision. I made that comment about retirement villages not always being a lease-for-life arrangement. There is as significant amount of diversity in retirement villages.

The CHAIRMAN: We are well aware of that.

Mr Newcombe: That is one of the complexities. The issue of titles is one of the fundamental issues. There are a number of purple-title retirement villages, strata-title retirement villages and a number of lease-for-life or licence retirement villages. Every form of title brings its own complexity to it. The planning and pre-approval process is well outside of our current jurisdiction. There is no current proposal that I am aware of to actually look to bring that into our level of responsibility.

The CHAIRMAN: Whose responsibility is that?

Mr Newcombe: Planning is the responsibility of local government, essentially, and the Western Australian Planning Commission.

The CHAIRMAN: Given the unique nature of these villages—they are unique and, as you said, there are a range of them—should the planning process involve at least some indication about the viability of the villages and the milestones that I have talked about? Should that be included before they are ticked off on?

Mr Newcombe: That would be a very interesting approach. This is not my area, so I will just make a general comment. I am not aware of any planning approval process for the future land use that incorporates the ongoing financial viability of the business or the concern.

The CHAIRMAN: When a developer gets approval to develop a retirement or a lease-for-life village, at what stage should that kind of responsibility be attached?

Mr Newcombe: At the moment it is left to the industry operator and it is provided as a business. That is where responsibility lies currently. The legislation sets down some arrangements to ensure that that information is provided. The one additional protection that might be considered within the context of retirement villages legislation is the idea of some form of independent supervisor, which is the position in New Zealand, or —

The CHAIRMAN: Like REIWA?

Mr Newcombe: It is a different concept from a statutory board. I know that a proposal for a retirement villages commission has come forward in the review. I am sure that the committee has received that proposal in its deliberations. That proposal has been put forward as part of the review as well. A number of the proponents of it have dealt with some of the issues that they consider are important and they would like a dedicated organisation to examine this industry. Not many of the submissions that I have seen on the subject are about the planning; they are about the operations. I am not making a judgement about whether that is the right way to go. It must be said that it is an expensive option that must be paid for in some way or another. It would be a very expensive model. It would be different from the situation that applies throughout the rest of Australia. There are issues involved with introducing regulatory models that are not uniform, consistent or generally harmonised with what is happening in the other states. A model that has been put forward—I assume it has been put to the committee—would involve scrutinising each individual contract. An issue of policy development is to ensure that the level of regulation does not make investment —

The CHAIRMAN: The submissions from the residents have not included a submission for a board. The residents have told us that they want DOCEP to be properly resourced and have sufficient clout under the legislation to enforce the day-to-day management of the villages.

Mr Newcombe: The area of difficulty which that presents and which must be looked if a government agency were placed in that role is the role a government organisation would play in determining individual contracts and how they would be enforced. That is obviously an option on the table. The only caveat I would add is that all the regulation must ensure that Western Australia continues to be a place people will invest in future retirement villages because the state government does not provide them, although local government does. We need a balance to ensure that industry will still choose to invest in retirement villages to provide the future needs of Western Australians.

The CHAIRMAN: Putting all of that to one side—I do not disagree with what you just said, and organisations like SAT will deal with those legal issues—when it appears that the vast majority of the issues that have come up, apart from the issues such as the clubhouse not being completed, which are part of the contractual arrangements when people sign the leases, the greatest area of difficulty seems to be the relationship between management and residents. Can you give us any suggestions about how the government and your department might handle that in the future? When an irreconcilable breakdown between management and the residents occurs, what powers would you need to provide some intervention by government?

Mr Newcombe: The problem we have is an issue that Andrea raised earlier. The parties have a day-to-day relationship. In this particular case, the owner is also the manager. The ownership of the land and the management of the land is vested in one person. The options that exist in other licensed occupations include various options for intervention, such as the appointment of a supervisor or administrator or something along those lines.

[10.40 am]

Examples do exist; however, they all operate in areas where the appointment is the precursor to closing down. For example, in real estate a supervisor is appointed to run the business down. That model, it seems to me, is very hard to apply to a retirement village. There are a couple of ways to address this. One might be to have the capacity to encourage the owners to have better management. I agree that one of the things that has come out of our review is that those retirement villages in which there is good management—in terms of good people skills and good communication—are the ones that operate the best and the residents are comfortable and happy. Where there is bad management, other problems arise.

The CHAIRMAN: Would an accreditation process of some kind take care of that?

Mr Newcombe: That is one scheme that is being examined at the moment. You would be aware that there is an accreditation run by the Retirement Villages Association, which is the industry group. It is an entirely industry-run accreditation scheme. It has, as a result, been the subject of some criticism. One is that it applies only to members. You need to be a member of the association. The second is that it is entirely industry run. The third is that the issues that are seen as the key to accreditation are not necessarily those that match the concerns of residents; that is, it is more focused on the way in which the business operates rather than a retirement village. Certainly, options are being considered to that accreditation scheme. One might be to build on it and look for greater involvement by residents and, potentially, involve the department in the accreditation scheme. It could be a joint accreditation scheme running through to the possibility of completely replacing that scheme with a mandatory government-based accreditation scheme.

The CHAIRMAN: Is that part of the review?

Mr Newcombe: It is.

The CHAIRMAN: When is that likely to be completed?

Mr Newcombe: The review is due with the minister by the end of June this year. It is a requirement under the act that the report be tabled in Parliament. When that might occur, I am not certain. It is our undertaking to give the report to the minister by the end of June.

The CHAIRMAN: I come back to the leases. There is still a deal of concern. Can the Department of Consumer and Employment Protection give this committee a guarantee that the leases that the residents now have are valid? It is a serious question.

Mrs Hewson: I know. It is a very complicated area of law. We have had advice to assist us through the legal issues. We have consulted with the Western Australian Planning Commission. As far as we are concerned we are comfortable with the leases. I do not know that I can promise that nobody will raise a point because it is a very complicated area.

Mr Newcombe: At the end of the day, it is a matter that a court would ultimately determine. We could not give you the absolute guarantee. It is a matter that ultimately would have to be tested in a court.

Mr A.P. O'GORMAN: What you are saying causes me great concern. What is coming across to me is that any person, whether a person of good character or whatever, can actually purchase a piece of land; go to WAPC; register that piece of land as a retirement village; submit his plans; and get them approved by WAPC and then sell that development to the public, in this case primarily seniors. He does not necessarily have to comply with either act, because in this instance this guy seems to have ignored WAPC conditions and the contracts he has written do not have to comply with the advertising in which he has said there will be clubhouses and other facilities and that people will be looked after in certain ways. It is of great concern to me that there is no relationship between DOCEP and WAPC. Therefore, when the development moves from the planning stage into the operational stage there would be a linkage and it is enforceable. To me what you are saying is that these people are moving into these leases and there is nothing in them that can enforce the owner of that village to actually comply with what he said to both WAPC and in the

lease agreements. This is what has happened. Essentially he has not complied with anything. He has thumbed his nose at the state and these people. What you are saying today re-enforces that and causes me great concern. In cases where people are thinking of putting up their hand for a lease for life, I for one would be telling them not to do it because there is nothing in it that is enforceable to make happen what the proprietor said would happen when he sold it.

Mrs Hewson: The image that we think of is that before the village is built, the building is in the planning stage. Once it is built we take it forward. That is how we have always thought of it. In terms of linkage, rather than writing to WAPC, as the agency, to seek clarification —

Mr A.P. O'GORMAN: There is a bigger issue here. Surely DOCEP and WAPC, the two government departments, should be able to get together and put forward a process that says if it is, in the case of a retirement village, a lease for life, all these things are happening. Firstly, WAPC should be checking off with DOCEP and vice versa. You should be checking each other to ensure that the approval that has been given is adhered to—it appears to me, in this instance, that it was not adhered to properly—and then DOCEP could then enforce the contractual arrangements that have been entered into. These people are looking for those contractual arrangements that were in their lease. At one point it was unclear whether they had leases. Even today they have leases, but nobody is willing to give a guarantee that they are enforceable. It is a great concern, especially to seniors.

Mr Newcombe: That raises a couple of issues. I take your point on the question of the unification of approvals. The code does require that all the approvals required have been given. A process probably needs to be put in place to ensure that that has happened. In relation to non-enforcement, I will take your last point first; that is, that nobody can give a guarantee. The reality is that nobody can give a guarantee that any contract you enter into is valid. At the end of the day, we can only say that the best advice is that it is. That is the point that we are making. Nobody could honestly give you a guarantee that any contract you enter into in any circumstance is valid until it has got to court.

In relation to enforcement, you made the point that they cannot be enforced. We are in the process of enforcing. As Andrea pointed out, it has been two-staged. One is mediation; that is, trying to get a result that is acceptable. It is proceeding through the State Administrative Tribunal. There is a mechanism for enforcement. SAT does have the authority to make orders. It is enforceable. It is a question of the mechanism you use to enforce them. We have been trying to mediate an outcome.

The CHAIRMAN: The committee's frustration is starting to appear to you, in that you have a group of vulnerable people who have signed leases and agreements to reside in an environment which should suit what it is that they have paid for. To get to SAT is fine. I do not have a problem with SAT. SAT will no doubt deal with the legal issues. I hate to think what it has cost the residents to get to that stage, over and above their leases and operating costs. If they get any change out of \$20 000, I would be surprised. We have these problems occurring in terms of day-to-day management that overlap with either the non-compliance and non-approval of these processes.

Only this morning in *The Australian* there is a report on a major retirement village in Queensland that is on the verge of collapse. With all the money that has been invested, nothing has happened with that village. Some of the difficulties that have occurred there are almost a carbon copy of the difficulties arising in this instance.

[10.50 am]

We are concerned about how we get around this issue. People seem to keep making excuses and passing the buck onto various government departments. We still end up with a group of residents that have this problem. That was more of a statement than a question. I am sorry; it is very frustrating. Will the validity of the leases you are talking about now, and the occupancy, be affected if it is now found that any of those residences have been illegally constructed; in other words, they have not complied with the building codes or the alignment of the premises etc. If a whole series of

issues arise in terms of the actual construction of the village itself, will that be an issue for leases in the future?

Mrs Hewson: As I understand it, that would be more of a private contract issue rather than an issue going to the validity of the lease. For example, I could rent a place at which there might be an issue with planning. If there is an issue with planning, my rights come under the contract rather than the broader planning approvals. That is my understanding of the situation anyway.

The CHAIRMAN: Let us say, for instance, that tomorrow, as a result of all this, the owners decide to walk out. Would the residents be in a position to recover their investment?

Mrs Hewson: Yes. In theory, the lease loan they have put in is a statutory charge against the title. I think it was addressed in the submissions that, even if the leases were invalid, it is quite possible that the act would be interpreted, so their rights would still be a statutory charge. I think under the act, if there is a residence contract—it does not have to be a full lease—a lot of the rights still apply under the Retirement Villages Act. It is not a decided point and you would probably have to go to court to enforce it.

The CHAIRMAN: DOCEP issued a direction, I think on 31 March 2006, regarding the leases when you had sorted out the validity of the existing leases, that Moss Glades was not to market or sell any leases until final and unconditional approval of the leases was granted by the WAPC. I understand that was one of the directions you gave Moss Glades.

Mrs Hewson: I think that was one of the undertakings, back in March I think.

The CHAIRMAN: It was an undertaking.

Mrs Hewson: Yes, it was one of the undertakings, but that was really all tied in with whether approval was required. When the WAPC indicated that approval was not now required under the new legislation, those undertakings sort of fell away because they were directed at the lease issue rather than any more general situation.

The CHAIRMAN: I understand that Moss Glades ignored that and continued to market.

Mrs Hewson: I do not have the information on that.

Mr A.P. O'GORMAN: If it was an understanding, is it enforceable anyway? If Moss Glades continued to market, is there anything DOCEP could have done to prosecute them?

Mrs Hewson: Possibly, if Moss Glades had breached the undertaking before we had made a decision about whether WAPC approval was required. However, the legislation changed. I think the undertakings were entered into at the end of March and the new legislation came into force mid-April, so there was only a two-week hiatus. Once that new legislation came into force, it was interpreted as not requiring approval. If during that two-week period Moss Glades had continued to market, there would potentially be a breach of undertaking.

The CHAIRMAN: When an undertaking is given, what do you do to monitor whether they are being complied with and what do you do if they are not complied with?

Mrs Hewson: We tend to get information from people on the ground if an undertaking is not being complied with. In deciding whether we would enforce, we would have to look at what the breach was. It would have to be a clear breach and there must be evidence supporting it. In this case it was really whether it was serious enough to derail the process. If we take an action for breach of undertaking, it will not get a lease signed up; it is a punishment for the person who has breached the undertaking. It takes us down the track where it is punishment, when what we wanted was the leases in place. One of the considerations in deciding whether we would take steps for a breach of undertaking if we had evidence would have been how it would affect getting the leases in place.

The CHAIRMAN: Do you investigate possible noncompliance of your acts only when there is a complaint?

Mr Marsh: We can commence an investigation if we detect a breach of the legislation along the way.

Mr Newcombe: There has been instituted a process for proactive compliance visits as well, which includes both retirement villages and residential parks, which involves officers going out to visit.

The CHAIRMAN: When did you last visit Moss Glades?

Mr Marsh: I do not know the exact dates, sir, but my last visit would have been August or September 2007 I think, when we went out regarding financial matters. I cannot swear to that date.

The CHAIRMAN: Was that the noncompliance of the code?

Mr Marsh: Yes; it was for noncompliance of the code, financial returns, quarterly reports and things like that. We have also had continued liaison with the parties because we were trying to get someone to explain the process of proposed mediation that we had on foot at that time. While I was on leave another officer continued to organise that. It was soon after that, perhaps late 2007, that residents went to SAT. We were working on the process and everything else right up until that point.

The CHAIRMAN: You put it on hold once SAT kicked in.

Mr Marsh: Yes, sir.

Mrs Hewson: Once SAT proceedings start, the commissioner no longer has jurisdiction to appoint a mediator. We had been looking at the commissioner appointing a mediator, and conducting a mediation, which he can do under the code.

The CHAIRMAN: SAT will not determine any of the issues to do with the code; it will determine only issues to do with the legal niceties that are brought before it in terms of the complaint. With regard to the issue Mr Marsh just raised, it is only in the past month that an audited set of accounts has been given to the residents. I do not think it is any coincidence that that has occurred since this inquiry started. That has been breached every year since the first resident went in there, which DOCEP would have been aware of. Why was nothing done about that?

Mrs Hewson: I think it is really because we were concentrating on the lease as a first priority, then the other things followed. When we had got the lease in place, March 2007-ish, it was from, say, February-March 2007 that we wanted the parties to do the voluntary mediation set up by a mediator appointed by the commissioner, which it was envisaged would deal with all sorts of issues. There were a number of other issues, such as the club house, recognition of the residents' committee and finance, that we wanted to be dealt with that we felt were more efficient to be dealt with at once under mediation.

The CHAIRMAN: A letter from the WAPC to Moss Glades regarding approval of the leases states that WAPC approval may not be required if the commencement date for the leases is after 9 April 2006. If the commencement date is before 9 April, but execution is after, then approval is still required. There was confusion over that. At what stage does DOCEP consider to be the commencement of the leases? One of the problems that has come up, and one of the reasons that has been given to residents for noncompliance is that there have been problems with the statute of limitation. Some of these have been brought about because there has been confusion about what date the leases actually commenced. The file notes in your submission and the evidence in the other submission show that Moss Glades may have been advised by the solicitor that after 9 April 2006 WAPC approval would no longer be needed to validate the leases. There is some speculation that Moss Glades stalled the process of issuing valid leases so that they would not then be in breach of your statutes. Do you have any comment on that? Are you aware of any intention on the part of Moss Glades to delay processing the leases until after approval was no longer required?

[11.00 am]

Mrs Hewson: No, I am not aware.

The CHAIRMAN: Did you form any view about the reason for the continual or apparent unwillingness of Moss Glades to act quickly in sorting out the issue of the leases?

Mrs Hewson: No. All I can say is that they were not being cooperative.

The CHAIRMAN: It was obviously in its best interests, was it not? Had the date been found to be the first date, it would have been subject to prosecution, or it could have been subject to prosecution by you people.

Mrs Hewson: It might. It might still be subject to prosecution. We just have not really had any—we have not been able to get any evidence.

The CHAIRMAN: Yet on 1 March, DOCEP informed Moss Glades that it was in breach of section 10 of the Fair Trading Act due to what was said to be its misleading and deceptive conduct.

Mrs Hewson: That was in relation to the leases issue.

The CHAIRMAN: You did not go ahead and prosecute on that?

Mrs Hewson: No, because then it distributed the leases to the residents for signature, so at that point —

The CHAIRMAN: That was your carrot and stick, so to speak, to get the leases fixed.

Mrs Hewson: Yes.

Mr A.J. SIMPSON: Can I bring you back one step? Part of the submission is a letter from DOCEP to Moss Glades. I think there are about 10 or 11 undertakings that you sent. It was addressed to Natalie Durr, is it?

Mrs Hewson: Yes, Natalie Durr.

Mr A.J. SIMPSON: Basically it was the undertaking by Moss Glades to do these 10 things. This was dated 26 March 2006. Were there any checks and measures to make sure it carried out those undertakings?

Mrs Hewson: A lot of those undertakings fell away once the WAPC approval issue had been sorted out, so Moss Glades' solicitors advised us when they had put its application in to WAPC for approval, and then they sent us a letter they had received from WAPC saying that approval was not required. From that stage we went on to sorting out the leases. A lot of those undertakings are concerned with, "If approval is required, then we undertake to fulfil the conditions." If the approval had been required, we would have had to monitor it to make sure it was complying.

The CHAIRMAN: Just following on from that, I notice that on 2 June 2006 in the notes you have provided us with—again, I thank you for being so precise with them—it documents a conversation with Adrian Padgett, the solicitor for Moss Glades, and in this Mr Padgett stated that the leases were drafted by the owners from a template to save money, and implied—he implied, I presume—that the original leases were a nonsense. This was in the notes that are in your submission. Given this, DOCEP then advised in the notes that the leases were checked against the code. What process does that involve, when you check it against the code?

Mrs Hewson: It was not me doing that, so I can only say what I think it would be.

The CHAIRMAN: That is fine.

Mrs Hewson: I would imagine that they would have just checked that the various requirements were met. There are some specific things in the code about requirements for leases, so I guess that that is what they would have checked for, but I cannot be sure.

The CHAIRMAN: In fairness to DOCEP, you have been trying. I notice that, also in December 2006, in file 1 of your submission at page 332, you wrote to Moss Glades in relation to verbal undertakings given in relation to the completion of the clubhouse. Were they verbal undertakings given to you as a department?

Mrs Hewson: Yes, they were in a meeting. We held a meeting with the owners, at which both me and Peter were present, and some other people. We asked them when they envisaged the clubhouse being completed and they said it would be April 2007. After that, as you can see in the submissions, we wrote to them and they said it was not a proper undertaking. I had my doubts. It was not really given as a formal undertaking; it was given as a response to questions.

The CHAIRMAN: They never supplied any supporting information?

Mrs Hewson: Not to my recollection. Do you remember if they supplied any documentation?

Mr Marsh: In relation to the undertaking?

Mrs Hewson: In relation to the clubhouse. Was there a contract?

Mr Marsh: No.

The CHAIRMAN: I note that in some of its excuses—sorry; I will correct that—some of its reasons, Moss Glade advised that an architect had said that the time frame was unrealistic and you asked them to clarify that. Did they ever clarify which architect, and what advice was given?

Mrs Hewson: I cannot recall. Not to my recollection. I think by that stage we were focusing on the mediation, so we were trying—I guess the emphasis —

The CHAIRMAN: In fact, did it actually reply to or explain any of the responses? You wrote to Moss Glades, I notice, on 22 December 2006. Did it clarify any of the issues or reject anything at all in the letters you wrote?

Mrs Hewson: Is that about the clubhouse issue?

The CHAIRMAN: Yes.

Mrs Hewson: My recollection is that it went in and out of being represented, so it was not continually represented. It would get representation for certain issues and there would be a couple of letters, and then the solicitors would be dis-instructed or it would stop using them, so it was often unresponsive, and that is partially why there were delays.

The CHAIRMAN: On the question of delays, there is a specific submission we had from one resident which stated that the commissioner had advised that proceedings under the Fair Trading Act 1987 could not commence as they were statute-barred due to the three-year time limit. Given that DOCEP got involved very early on in the piece—in 2004, I think—what exactly does that mean? It seems that some of the delays have occurred as a result of what went on with DOCEP. Again, this is some of the frustration that is being expressed by residents—that they feel that they were statute-barred due to a three-year time limit, but part of that time limit has been created by the length of time it has taken for DOCEP to do anything.

Mrs Hewson: The only issue for which statute barring is an issue is the clubhouse investigation, and not for anything else. The committee will notice in that in the undertakings we received to do with the lease issue, there was a specific undertaking to stop the running of time, but that just related to the lease issue and no others. The only issue we are really talking about where time would be a consideration was the clubhouse prosecution. More of a problem for the clubhouse prosecution was the fact that we could not ever get residents who were comfortable enough to come forward and give statements, so that was more of an issue, I think, for the clubhouse prosecution. Time was always going to be a consideration.

The CHAIRMAN: On the issue of taking statements, there is a direct conflict between what DOCEP has said about that and what the residents are now saying. The residents say that they did offer affidavits and statements, and that in the initial case the statements were given but were never acted on, and in the second case, statements were offered but were never taken.

Mrs Hewson: Statements were taken right at the outset of the investigation —

The CHAIRMAN: Sorry; Peter, did you have something to say? I notice you have been trying to jump in a few times! You are the fellow who has to be put on the front-line all the time.

Mr Marsh: Actually, I think I am going to mirror what Andrea was saying. Statements were taken, I think, in late 2005 and early 2006 from five or six residents, and those statements were taken at the time primarily—as I understand it, because I did not have conduct of the file at the time—to deal with the lease issue. They were acted on because we were dealing with the lease issue. Later on, as time went on with regard to the clubhouse investigation, I was asked to investigate that, and I conducted that investigation. The first person I saw was Mr Jim Marsh; no relation, I keep saying to people! When I went out and saw Mr and Mrs Marsh at the village, we also had a look at the clubhouse site and I realised at that very point in time that that particular resident—it was echoed by other residents over time—was very concerned about the lease issue. I understand that Mr Marsh was virtually dying at the time; he was very ill. He said to me that the lease issue was the important thing, and he used the words, “The problem with the clubhouse is that it’s low down on our list of issues,” and I was very mindful of that.

The CHAIRMAN: One of your officers, Anne Phelan, took statutory declarations from five residents on 9 February 2006. They covered a range of issues. Are those the statutory declarations or statements you are talking about?

[11.10 am]

Mr Marsh: They are the statements that were taken by Anne Phelan, yes.

The CHAIRMAN: The residents said that when they signed these declarations they were told that they may have to come forward at a later date, and they all agreed to it. One resident advised she called the DOCEP officer in October 2006 to see about making a statement. She did not hear back from the person and is now concerned about DOCEP statements that on-one would come forward. You are aware of those statutory declarations. What do they actually cover and what happened in relation to those? Let Peter answer.

Mr Marsh: The majority of the statements were over the lease issues there, and every now and again there was a mention of the clubhouse. In my view, later on, if you were going to use those people, then you would have had to have taken fresh statements from the point of view of the focus of the clubhouse. There was not a lot in the statements about the clubhouse. It was mentioned.

The CHAIRMAN: There was a letter on file 1, page 352, from DOCEP to the residents association describing the situation in relation to obtaining witness statements regarding representations made by Moss Glades about the clubhouse and the letter from you—not you, Peter, but DOCEP—says that none of the residents at a meeting in November 2006 came forward to make a statement, and in the absence of these the department could not continue its investigations. Evidence from the residents association, however, says that at least two residents asked to make statement but they were ignored and they were told it was under the three-year time limitation for prosecution. Are you aware of that situation?

Mr Marsh: I would have taken a file note. I do not recall taking a file note with respect to—are they suggestion that they were ignored or that we did not follow them up?

The CHAIRMAN: They simply said that their statements would be of no use and were ignored, even though they were under the three-year time limitation. Yes, they are saying that they were ignored.

Mr Marsh: I do not recall speaking to people, but I think you might have said a moment ago that I would to get back to them. I do not know who might have taken a message.

The CHAIRMAN: No, the letter says that none of the residents at a meeting in November came forward to make statements. The letter says that “the reasons we didn’t do X was because nobody came forward and said anything about X”. The evidence from the residents is the opposite. They are

saying that at least two residents asked to make statements but were ignored. That is the submission that has come to us.

Mr Newcombe: I am sorry, Mr Chairman, are they identifying who they spoke to.

The CHAIRMAN: No.

Mr Marsh: We did call a number of residents, sir, in relation to obtaining statements.

The CHAIRMAN: Why is there so much confusion in relation to the statements about that? What has brought that about? I am talking about the clubhouse now. Why does there appear to be so much confusion, firstly, about the department's capacity to help the residents with the clubhouse? Essentially, is that because it has gone before SAT?

Mr Marsh: No. We could continue with the clubhouse investigation at any time if witnesses came forward. That was said in a letter that I wrote to the committee in, I think, March 2007. I had rung a number of witnesses, who, for a variety of reasons, did not want to give statements, and, sir, during that time I sensed—and I reported this to more senior officers of the department—an absolute anguish at being approached by the department to give statements. You could just feel the “tensity” on the other end of the telephone.

The CHAIRMAN: Why do you think that is?

Mr Marsh: I do not know. I would have thought that they would have expected a call, because I attended a meeting earlier than that with Tim Banfield, who was the manager of building and tenancy at the time. We addressed the concerns at that stage, including the incorporation of the residents committee, the clubhouse issue and other issues. They knew that I was investigating the clubhouse issue at that time. I am just surprised that they were anxious about it. They had sort of met me. I do not know if —

The CHAIRMAN: Would they be anxious about anybody else?

Mr Marsh: Anyone else what?

The CHAIRMAN: There are two reasons why they would be perhaps anxious, which seems to have come from their submissions. Firstly, they would be anxious about the attitude that would be adopted by management if they gave a statement. That has become quite clear in the submissions. The second is this seeming frustration or view that you guys do nothing about any of the complaints that they put in. That has surfaced very strongly in the submissions that we had in this same room just last Friday. I am not including in that the issues where you said that you sorted the leases out. Certainly, that was commendable. However, I do have some concerns now that we are saying that we cannot guarantee those leases, but let me take you back to you. There are two very clear reasons before this committee why people would be concerned about talking to you—not you specifically; I am talking about DOCEP. Please do not take anything I am saying as that. Nobody before us had said anything other than about DOCEP. I am not referring to individuals, but why do you think there is concern about making statements?

Mr Marsh: I just think that they are elderly people. As has been said here earlier, people are there for the quiet life and their retirement. I feel that some of them did feel threatened by what was happening. I mean, I can address a couple of comments that were made, if you would like me to go to my notes.

The CHAIRMAN: Please, if you would.

Mr Marsh: This is when you find you do not bring the appropriate notes! There is no need to mention the people, is there, sir?

The CHAIRMAN: No, you do not have to mention individuals.

Mr Marsh: In one case I drafted a statement for a resident, who at one stage was quite happy to give the statement. I was halfway through drafting it, and I spoke to him again about clarifying

some issues before I went out and saw him again, and he then declined to proceed. He said to me, "Is anybody else giving a witness statement?" I had to tell him the truth, and I said no. He said, "Then on health grounds, I don't wish to proceed."

The CHAIRMAN: I might ask you, if you could, after we close the session today, give the names of those people in confidence to us.

Mr Marsh: Sir, I think you might have it.

The CHAIRMAN: I think we have it already. Those are the notes that came in the submission.

Mr Marsh: Yes, I think so.

The CHAIRMAN: That is fine then, thanks.

Mr Marsh: I am quite happy to, if you do not have them.

The CHAIRMAN: All right. I will get you to talk to Loraine Abernethie.

Mr Marsh: There are other reasons, if you have time to hear them.

The CHAIRMAN: Yes, please.

Mr Marsh: Another person said, "No, I'm happy. Don't want to get involved in the politics of the village." Another person said, "No, not at this time; may later." They changed their mind. "It is not a priority for us." Another one said that "the concern is not completed. The concern is two storey." It does not affect them personally. It is those kinds of reasons; there was a variety, but I did sense that people were worried about giving statements and potentially having to give evidence in court.

Mr A.J. SIMPSON: Peter, in all your dealings with the Karrinyup Lakes Lifestyle Village, how many times did you meet with Mr Martin and Mr Whyman?

Mr Marsh: Verbally, on the phone?

Mr A.J. SIMPSON: Yes.

Mr Marsh: I do not have the specifics here.

Mr A.J. SIMPSON: Roughly?

Mr Marsh: There were lots of telephone calls with Mr Martin and Mr Whyman, and visits to the village, and there was very frequent contact with the residents and the residents committee and Mr Sheridan etc about the progress of various matters and problems with various matters.

Mr A.J. SIMPSON: How did you find Mr Martin in your dealings with him?

Mr Marsh: Eion is a unique character.

Mr A.J. SIMPSON: That is one way to describe it. Yes?

Mr Marsh: He played games. He would often know the answer to a question but not give it to you, to drag it out, but other than that, he was usually helpful. He was not a person I did not feel comfortable to approach or anything like that.

Mr A.J. SIMPSON: Okay. That is one of the issues that came back. Did you also feel that Mr Whyman was just there at the meeting to nod his head and did not say much, that he was the quiet partner of the two?

Mr Marsh: He was more of a supporting role, quieter, and certainly a very different personality to Mr Martin, but when things got tough he had always had an input. He always had an input.

Mr A.P. O'GORMAN: You talked about mediation and that you were setting up mediation and all those sorts of things. At what point did you decide that mediation is a waste of time because one of the parties to the mediation is not cooperative?

Mrs Hewson: We got, I think, back in October '06, in principle agreement from both sides to mediate. You always advise to mediate in this sort of situation where people are forced into a

relationship with each other, because it is better to go forward with consensus because prosecution will not get the clubhouse built.

[11.20 am]

Prosecution will get a fine. Many people have had to poke their heads above the parapet, appear in court, which is very stressful, and, at the end of the day, will not get—it is more a case of DOCEP wearing two hats again. Yes, wearing our prosecutorial hat we will get a prosecution that will be successful but the clubhouse will not be built at the end of that. Really, mediation is the best way of getting the clubhouse built.

In terms of when we give up: we started suggesting that in March 2007 and we had not given up by September by which time we had organised for the mediator—who the commissioner was considering appointing—to do a session with the residents about what the mediation process entailed and what it would involve because they had questions about the process. We would still have gone on with that process but for the fact that the matter was referred to SAT and SAT immediately referred it to mediation, and that is where it needs to be for progress.

Mr A.P. O'GORMAN: Why did it take so long from the time of the initial complaint to get a decision to go to mediation? I think it was about five months later that you discussed introducing a mediator to the process. It was a period of a couple of years; why did that take so long?

Mrs Hewson: The leases were the priority and we finished those in March 2007. Then we suggested mediation and, yes, there were a few months in between. To start the mediation process the residents—or someone—has to request it. We spoke to the residents and asked them to request mediation. They said they were going to the residents committee to discuss the matter. From memory, I think the residents came back with some questions. We answered those questions and we thought the residents were going to request the mediation process. Then it became apparent that their concerns were perhaps deeper than we had initially thought they were and that we were going to have to do a session with the residents and a mediator—that is really what was happening in that period.

The CHAIRMAN: I wish to clarify something in terms of the leases. Two dates have been referred to; the date of deposit and the date when the person moves in. What is considered to be the correct date when applying the Fair Trading Act?

Mrs Hewson: It depends on the circumstances. If you are talking about taking a prosecution action on misrepresentation, I think it depends when the misrepresentation was made; that is, when they sign off. However, it depends on the circumstances and really it is impossible to give a hard and fast rule.

The CHAIRMAN: What date applies if the brochures that were issued misrepresent what the buyer will get and the buyer puts a deposit down only to pay at a later date when they move in? I mean as an old copper I would apply the first date.

Mrs Hewson: Yes, to be cautious, I think that you would probably have to take the first date.

The CHAIRMAN: Thanks for that.

I am mindful of the time. We have gone a little over, however we needed to. The committee will not have time to cover a number of other issues today. We may write to you and give you further questions for you to respond to in a written format.

I will just touch quickly on the provision of financial information, which is one of the key issues raised by the residents. Len Wyman, director of Moss Glades, produced financial information indicating that \$15 000 in fees received was sitting untouched in a bank account—that was on 17 November 2006. Was the financial information you were provided reliable? Does DOCEP have confidence that that money was sitting in those accounts?

Mr Marsh: In the first instance and depending on the investigation, when people provide information you rely upon the honesty of the person giving you the information. If you needed to check that information, you could call up the bank statements or whatever.

The CHAIRMAN: Was the bank account in question ever checked? Could that account have, for instance, constituted the sinking fund or the reserve fund?

Mr Marsh: I was not involved with that part of the investigation. I was involved in the initial part then, I think, I went on leave.

The CHAIRMAN: Okay. Were you were involved in a meeting on 14 July 2007 with Moss Glades?

Mr Marsh: I was involved in that meeting, yes.

The CHAIRMAN: At that meeting, Moss Glades promised to provide DOCEP with the account details—and its balance history—in which premiums were held after Residential 55 ceased to sell units. Moss Glades also promised to provide the department with annual accounts for the financial year 1 October 2005 to 30 September 2006. Were those various documents provided?

Mr Marsh: I know that Moss Glades provided the information that we asked for—well, most of the information that we asked for—but at that stage Mr Bettella was running the file.

The CHAIRMAN: Who?

Mr Marsh: Mr Bettella; the building and tenancy manager.

The CHAIRMAN: Oh, your departmental manager.

Mr Marsh: Yes. As far as I am aware, because Moss Glades was not having meetings and providing financial reports and quarterly reports and things like that we —

The CHAIRMAN: Is that not a requirement of the code?

Mr Marsh: Yes, it is. We developed a program about the holding of meetings, and the presenting of documents etc, etc for Moss Glades to follow. I still cannot directly answer your question, sir. However, what was happening at that time was what was eventually referred to SAT. We would have to check the file to see what documents Moss Glades produced. I understand that we were reasonably happy with what it produced but I could not categorically say —

The CHAIRMAN: The code requires that financial documents be provided to the residents. Did DOCEP follow up on whether those documents were provided and, if they were, what the quality of those documents were? Did you ensure Moss Glades was complying with the code?

Mr Marsh: That is why we commenced our investigation. We always knew things were serious but when we realised that we were waiting for an application for mediation and that that application was not happening, we took the matter very seriously and commenced a separate investigation.

The CHAIRMAN: Which has ceased since the matter's referral to SAT.

Mr Marsh: It is on hold.

The CHAIRMAN: Right; it is on hold. There is a difference between ceasing and putting a matter on hold.

witn: Yes.

Mr Marsh: I have to be very careful there, sir.

Mr A.P. O'GORMAN: On that matter: has the status of the DOCEP investigation been communicated to the residents in those terms? The terminology used by the residents is that, basically, the investigation was shelved, albeit the residents did not use that exact terminology.

Mr Marsh: I would not use that word at all.

Mr A.P. O’GORMAN: Has a letter been sent to the residents telling them that because the matter now has gone to SAT the DOCEP investigation is on hold pending the outcome of SAT’s inquiry?

Mr Marsh: No. We discussed what we would possibly do with those files in the circumstance that we had tried mediation etc. When the matter went to SAT, our investigation was superseded and we are basically awaiting the outcome of the SAT inquiry.

Mr A.P. O’GORMAN: Yes, but has that fact been communicated to the people who have made the complaint—the residents? A letter should be sent back to them indicating where the matter now is and what now is happening. The residents need to be told that as soon as SAT has completed its inquiry, the department will reactivate its files and proceed with the other matters relevant to DOCEP. I take it that has never happened.

Mr Marsh: No; to my knowledge that did not happen.

The CHAIRMAN: So what is DOCEP’s involvement now with KLLV?

Mr Marsh: Andrea and I attend SAT on a regular basis. We have attended each and every meeting and we are assisting where we can.

The CHAIRMAN: I suspect that it would be fair to say that SAT is really only going to deal with the legality of the issues before it and that it is not going to deal with the day-to-day management of the village; however, it may come up with some management suggestions. What would DOCEP’s position be in the event that SAT does not deal with issues such as the provision of financial records?

Mr Marsh: I would discuss the matter with legal. I would really have to take legal advice on where we go from here and look at the best way forward in the circumstances because the matter has been to SAT.

The CHAIRMAN: Is there any course of action for you to take if SAT deals with the particular issues before it? I am not sure SAT will deal with the day-to-day management issues that occur on a constant basis—for instance, the relationship between residents and Moss Glades. Is there any course of action open to DOCEP to assist residents and, if need be, to assist management?

Mr Newcombe: Mr Chairman, I guess there are two elements. One is the examination of whether any enforcement action is required; that is, an assessment of what SAT has dealt with, what matters are left and if those matters warrant a prosecution. In terms of whether DOCEP does any more, the answer is that it does not really have a formal role but that—hopefully this has come through, but maybe it has not—it has attempted to really work with the residents and the management to try to construct a way to go forward; that it has not been a case of prosecute or do nothing.

The CHAIRMAN: That is understandable.

Mr Newcombe: Certainly, I can say that DOCEP would look to do whatever it could but, at the end of the day, this situation is about human relationships and relationships, as you know, are extremely hard to actually resolve. I can say that the department would try to come up with something—perhaps a further sort of informal mediation or something—to try to broker a more acceptable working relationship between the residents and the management.

[11.30 am]

The CHAIRMAN: However, if a village is found to be badly managed, management is not complying with codes through things such as not providing financial information—the kinds of things we have talked about right through this—not communicating with residents, is there no provision, as far as you are concerned, for DOCEP to step in and provide management or install management?

Mr Newcombe: No, sir. The option of appointing something equivalent to an administrator does not exist. I guess if it is a case of effectively winding up the scheme, then the Supreme Court could

make certain orders, but we do not have the capacity to step into the shoes of management or to appoint somebody to take that role on.

The CHAIRMAN: From a personal viewpoint, I do not necessarily see that you would be winding up a scheme. In fact, you would probably be winding it up, if you had better management in an instance like this, because I cannot see that the kinds of management that are being exhibited to us from both sides—the residents and the management—would add to the value of the premises or, indeed, the future development of it. It seems to me that that actually works against it, and to get things back onto an even keel and have it operating properly would actually add to the value of the premises, rather than detract from it. Therefore, I do not necessarily follow that you would be winding the program up.

Mr Newcombe: No, sorry, sir, what I was saying was other than doing that, we do not have any capacity to step in. Therefore, what I am saying is that if the scheme is being wound up, it would be open to the Supreme Court to make orders about it. However, in answer to your question, is there any authority for the department to step in now in a going concern and replace management, the answer is no.

The CHAIRMAN: Peter, in any relationship in these kinds of things there are always faults on both sides—both with residents and with management. As I said, I have been on a board of major aged care homes in the past. With this particular home, though slightly different in that we cannot apply the federal regulations in that there is no hostel care or high care, this is simply a residential arrangement. Do you have any views on how best to handle a total breakdown? What would be your view—you as the frontline bloke, the bloke who has to cop it all the time from both sides, when you go down there—should DOCEP have the role or have a capacity to step in and do something?

Mr Marsh: I cannot answer that question directly. I think, with the powers that we have and the legislation we have, what the legal section was trying to do and mediate was based on, basically, the total collapse of the communication between the parties—that, at that time, was the best way forward, putting a clubhouse investigation aside.

The CHAIRMAN: I am not being critical of what has taken place. What I am looking for from you, I suppose, as a person who is dealing on a day-to-day basis, is: do you have enough power? Do you have enough clout? Do you have enough capacity to step in and say, “You stop doing that and you stop saying that, and we need to do something about this?”

Mr Marsh: I do not think you can tell somebody to stop doing something in the way you described. It is hard for an investigator to answer that question directly because as an investigator you are going out and you are obtaining the facts of a particular matter, and I just —

The CHAIRMAN: But you would be required to administer that also and, obviously, your prosecution section would take action against the owners if they were doing something in breach of the code, but do you have enough power then to go in and monitor and make suggestions—to be proactive?

Mr Marsh: We are proactive wherever we can be. We are proactive at the moment in the caravan industry—there is new legislation there. Whenever we have been out, we have had a lot of meetings with various parties and we have tried to encourage them to comply with the law to do certain things etc. We have had a lot of opportunities to do that.

The CHAIRMAN: How do you see your working relationship with Mr Martin?

Mr Marsh: As far as I am concerned, I have no problem in my working relationship with Mr Martin and I do not believe I have one in working with the committee, or Mr Sheridan, anyway.

The CHAIRMAN: All right. Any other issues anybody wanted to raise?

All of you, thank you very much for your time today. As I said, please do not take any of our questions as a criticism. We have to try to adduce evidence that does a number of things, but mainly we are looking at any future systemic problems that government may have to deal with, particularly in terms of legislation. We would be appreciative if you have any suggestions in line with the submissions. I realise the difficulty. I do not necessarily agree and support your contention that were we to regulate a little more strongly that it would discourage investment in Western Australia. I do not agree with that. I think that if things are properly managed, it would probably encourage people to invest here.

Mr Newcombe: I guess, Mr Chairman, my point was that it would not necessarily lead to that, but that is an important issue to be taken into account.

The CHAIRMAN: Of course it is.

Mr Newcombe: There are competing views about the amount of regulation you should have and some people want to regulate to the nth degree. The probable with that is it would produce that result, but the balance is what needs to be struck.

The CHAIRMAN: Exactly, and I agree that there should be a balance. However, I think we must also realise that retirement villages, in particular, are very vulnerable, when, as Mr O’Gorman said, anybody can come along, it seems at the moment, with a piece of land and say, “I’m going to put a group of vulnerable people on that land.” They do not necessarily have to comply with what appears to be in, in some instances, not deficient legislation but legislation that perhaps does not afford the level of protection that people in these situations require. However, that is just my way of commenting. As I say, if there is anything further that you think would assist the committee, particularly in terms of supporting your department, there is an opportunity for you to, perhaps, Peter, particularly in your area where you are dealing on the frontline. If there are any suggestions that you want to make either individually or as a department, we would be happy to take those from you. Also, we may require some further questions to be answered.

Mr Newcombe: Sure.

The CHAIRMAN: We will either call you back or give it to you in a written process.

Thank you all for your evidence before the committee today. A transcript of the hearing will be forwarded to you for correction of minor errors. Please make those corrections and return the transcript within 10 days of receipt. If it is not returned within this period, it will be deemed to be correct. Thank you, and can I urge you, Peter, to keep up your relationship with the village, because I think it requires help.

Mr Marsh: Yes.

Hearing concluded at 11.36 am