ECONOMICS AND INDUSTRY STANDING COMMITTEE

INQUIRY INTO IRONBRIDGE HOLDINGS PTY LTD AND OTHER MATTERS REGARDING RESIDENTIAL LAND AND PROPERTY DEVELOPMENTS

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 17 OCTOBER 2011

SESSION TWO

Members

Dr M.D. Nahan (Chairman)
Mr W.J. Johnston (Deputy Chairman)
Mr I.C. Blayney
Ms A.R. Mitchell
Mr M.P. Murray

Hearing commenced at 12.48 pm

DRISCOLL, MS ANNE MARIE,
Commissioner for Consumer Protection, Department of Commerce, examined:

HILLYARD, MR DAVID MARTIN,
Director of Retail and Services, Department of Commerce, examined:

MEAGHER, MR STEPHEN PATRICK,
Director of Property Industries, Department of Commerce, examined:

The CHAIRMAN: I will go through the usual opening statement. Thanks for your appearance here today. This committee hearing 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 contempt of Parliament. Before we commence, there are a number of procedural questions that I need you to answer. Have you completed the "Details of Witness" form?

The Witnesses: Yes.

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

The Witnesses: Yes.

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

The Witnesses: Yes.

The CHAIRMAN: Do you have any questions about your evidence today?

The Witnesses: No.

The CHAIRMAN: The committee has received your submission. Thanks for your contribution. Do you want to propose any amendments to your submission?

Mr Hillyard: I was reading through it again this morning and I just picked up a typo on page 8 in the fourth paragraph down where it referred to a meeting with two directors from Ironbridge on 19 March and we have "2011" and it should be "2010".

The CHAIRMAN: We will make that change.

Mr Meagher: There are just a couple that I wanted to the raise. On Friday we, obviously, went through the submission to just make sure of the facts and figures with regards to the complaints. We did an exhaustive manual search of the complaints database and there were a few changes to the complaint numbers. Under "Recreation Drive" on page 16, we talked about four complaints, and there have been six complaints. I will explain that a bit later. We also say that there were no matters received prior to 29 June—similar complaints—and there was a matter on 30 June 2008 against a company called HL Pty Ltd. We found four complaints about them. They were a developer offering landscaping packages. We got four complaints—one in 2008, 2009, 2010, 2011—and all those complaints were resolved, but they did not come out in our complaints. There was one other, A & S Nominees Pty Ltd, and I will hand up what that complaint was about. It was on 4 May 2011. We have not determined whether it was just a mum and dad developer or if it was a major developer, but the details of that are there.

Ms Driscoll: Perhaps if I can add that for us to do a search like this, we need to apply several criteria in that we record complaints as an "entity". So it will be a fencing complaint about ABC Pty Ltd, and therefore we obviously get lots of complaints about fencing installations, for example. So late last week, basically, we did a double double–check and applied something like 12 different criteria to try to identify any that we may have missed. It is through that process that we have identified these. Some were done in a branch different from the one you would expect and they were also categorised as different issues—like warranties and misrepresentations under a number of different codes. So, basically, it is very hard. We do not categorise entities at the moment if there are complaints as "developers"; we categorise them as "the entity". So, I think it is the case that the searching that was the done in the past just was not looking at every possible scenario.

I might say, as I was intending to do just through some preliminary opening comments that, indeed, as of 1 July there is a real opportunity for us to look at property issues and regulation in a more holistic way. I am mindful too that we have spoken with members of the committee informally so I am not sure the degree to which you want you us to repeat, perhaps, some matters that were covered in that informal discussion. Is it appropriate to do so?

The CHAIRMAN: Yes.

Ms Driscoll: So the members of the committee may be aware that as of 1 July the department and, in particular, Consumer Protection took responsibility for the regulation of real estate and business agents, settlement agents and land valuers through the abolition of the respective boards that were responsible for those areas. As we look at a number of issues, I think it is the case that historically the department has not been able to see developer issues as essentially one and under the broader umbrella of property. On 1 July, we created a new directorate which has entire responsibility for all aspects of property regulation. Steve Meagher now leads that directorate, and prior to that Dave Hillyard had responsibility for disputes related to the developers. That is why both Dave and Steve are here today.

As of 1 July, we have, basically, residential tenancy matters, real estate agents, settlements agents, developers, land valuers, and park homes, retirement villagers et cetera all under the one area of responsibility. It is the case, even as we prepare for this, that you see, as I have in the past month or two, matters related to a failed development in the south west outer metro of Perth that really the department under the consumer protection banner had not dealt with. That relates to some problems with a real estate agent by the name of Morgan Realty and some developments by a family with the surname Fraser. To me it highlights the fact that here was a major development with losses in the order of $4 million-plus. That really then was not also considered with the lens of the Australian Consumer Law and the former Fair Trading Act. So I think, you know, we have had a level of stovepipes in terms of the way in which property matters were dealt with, and we do now see an opportunity to deal with it more holistically.

Mr Chair, if it is appropriate, I would like to make some other brief introductory comments.

The CHAIRMAN: Sure.

Ms Driscoll: As you will be aware, the regulation of developers at the moment is what might be termed "quite light" in that there is a requirement under the Real Estate and Business Agents Act for developers to be registered. As I mentioned, up until 1 July, that was with the real estate board. In terms of the obligations that arise through that regulation, they are quite limited. The purpose of the registration appears to be to notify the existence of the developer operation, its place of business. It does require that transaction records are kept and that the developer personally or through its appointed CEO needs to be approving developments and the identification of the developer needs to occur through that process.

Separately in the REBA act there is also a requirement that if the developer does not make the sale themselves, then they are able to employ a salesperson, but that person needs to be a registered sales

rep under the real estate act. If I might just correct myself there—indeed, thinking about the act, a CEO would not be able to approve the ad; it would have to be the development company or the individual. It would have to be through whatever decision-making arrangements apply.

In some ways, there is not a great deal of regulation directed upon developers. There are some general provisions in the Australian Consumer Law and, indeed, there is one provision that enhances what was previously under the Fair Trading Act, and that is that now services and goods need to be delivered within a reasonable time. Previously—and this clause does continue—there was a provision that one could not accept payment without an intent to deliver, but, of course, it could be argued that the likes of Ironbridge had an intent to deliver but there were later issues that prevented them from doing so. There are also other requirements such as false and misleading representations et cetera. Under the Australian Consumer Law, the other important thing to point out is that some breaches of the provisions are actually offences under the law which means we can then take prosecution action. Other provisions in the Australian Consumer Law and certainly previously in the Fair Trading Act are requirements under the law but they create civil action possibilities rather than being offences that can proceed as a prosecution.

[1.00 pm]

So in some ways in dealing with Ironbridge, basically the failure to deliver on the good or service became a civil action in that it was not an offence that was possible for us then to take action on, or in terms of some sort of prosecution et cetera.

I might add that in weighing up the tools available to us, we are often considering what is the best tool to effect a positive outcome for the consumer. Sometimes a civil action is actually better in that you get a remedy that assists the consumer. In the past prosecution action simply penalises the provider. It provides a fine but it does not create any redress. Indeed it can, if you like, distract the provider from getting on with the remedy. I might then add that now through the ACL, the Australian Consumer Law, there are new penalty provisions available to us, which mean we can actually take a matter that might otherwise have been an offence but seek penalties that then result in remedies, so it is a much better tool available to us going forward.

Back to developers and the regulation being quite light, obviously this committee will be considering whether the current style of regulation is effective. It is appropriate for us to flag, I think, that the situation in relation to developers is very much a product of the property market at any one time. Obviously any regulation is trying to find the right balance that will meet both the ebbs and flows of the market and consider an appropriate intervention relative to the degree of risk of detriment. One option obviously is considering the concept of whether money should be held in a trust account where there have been promises of later delivery of goods, such as landscaping, fencing and we see some cases of electronic goods as well. While clearly that would provide some security and potentially would be possible perhaps through a lawyer's trust account, there are of course questions that arise about whether that would impact on the financing of the development at the outset. Clearly these moneys would be additional cash needing to be set aside. Would it impact on the overall viability of the development? Might that result in an increased cost of the initial investment or land on the part of the consumer because, if you like, the developer is not relying on the cash flows that might arise through subsequent sales? It is a very difficult question and one that will obviously need to be tested with developers in terms of the potential impact on the range of developments that may proceed and the cost impact to consumers as well as developers in setting up those schemes and being able to, of course, access funding for those through various lenders.

It is appropriate for me to point out that there is one other notable area which is not currently regulated. We have not seen large numbers, to my knowledge at least, of failures in this arena, but there is an inherent risk. Currently it is not mandated that deposits on land being sold by a developer are held in a real estate agent's trust account or indeed a lawyer's trust account. It certainly is the norm that sales of developments are through a real estate agent and that then triggers the

requirement for the deposits to be held in trust accounts, but there is potentially a risk in that, if a developer was selling directly, there does not appear to be a requirement for that to be in a trust account.

As I mentioned before, there have been some issues with five developments related to this—Fraser family and Morgan Realty. On reviewing a fidelity case that is now currently before us, it is clear that there was a range of contracts and agreements between all of the parties. Some of the moneys were provided directly to the developer and on other occasions the money was into a trust account but an agreement that the moneys could be released if it was to then be used for the purchase of the land, in that the land was not even owned by the developer, it was owned by another party who on a certain day would buy the land off the third party and then sell it on to the developer. It was a very complex arrangement. But it just highlights the fact that there is another element of regulation to do with developers that is arguably a loophole, yet, to my knowledge, it has not been one that has commonly come up as a problem, but it sits there in the background. Often when something goes wrong there is a reaction in terms of addressing it, but it perhaps is an area where further consideration is required in terms of a review of perhaps the Real Estate and Business Agents Act.

I would simply in closing just report that after a great deal of inconvenience and impact on the residents of the Ironbridge development that, fortunately, at last most of the fences are now completed. Some painting is still to occur and there are still some landscaping outstanding, but fortunately we are now seeing that some of that work or a large portion of that work is complete. That is not to understate the impact it has had on the residents.

I think the Ironbridge story presents one of the other dilemmas that we have faced through this and to some extent the other two cases—that is, the fact that it has been a long road in terms of there appearing to be genuine promises to have the work undertaken, then evidence of some endeavour and follow-through and then of course disappointment as that does not proceed. Balanced against that has been the fact that the company, Ironbridge, and indeed in some of the other cases, has clearly had major solvency problems. One of the problems for us is always trying to manage, if you like, keeping the company afloat so that the legal remedies available to us live on. With Ironbridge it was evident that there were several matters before the courts that might result in full wind-up of the company and then little opportunity for redress.

It has been a difficult road and a bit of a balancing act. I can say that I think organisationally we have also done a lot of thinking about, "Could we have handled this differently?" In looking at it, I think the emphasis that we placed on this matter was quite appropriate. We were constantly weighing up the legal options relative to the very clear undertakings being made and also, in the end, of course did endeavour to try to unite the group and get some action before the courts.

Since then we have, I think, thought again about , "Is there any way we could do the civil action better in a more coordinated way, in a way that more directly assists people?" Stephen perhaps will talk about the approach we are taking with Olympic at present to provide a little bit more engaged and proactive support to people to ensure that they really are fully enabled and assisted by the department through that process.

The CHAIRMAN: I guess the major question here is, is this a systemic issue with the developers—that is, promising to deliver landscaping and fencing as part of the development and reneging on that? In your perception, is this a systemic issue? Is it a widespread, systemic issue or are there reasons built into the structure of the development industry that say that this is just a one-off and maybe due to the GFC?

Mr Meagher: If it is okay for me to speak, I think from the complaint data it would not show that it is systemic. We have got those Recreation Drive complaints, where I have said there was six of them. We have had the Ironbridge matter, where, albeit tortuously slowly, they have finally got there. We have got one at the moment, Olympic Holdings, where we have got 18 people where we are going to take action on their behalf in court to try to get that. And I mentioned briefly we had

one other company, HL Pty Ltd, where four people over four years came and said , "Oh, I didn't have my fence, I didn't have my landscaping" and we managed to conciliate those complaints. We have got one complaint on 4 May about a company called A & S Nominees Pty Ltd, which have not supplied. All up we have had the five different companies over a period since 2008, and there has been a helluva lot of developments gone on in that time, so I do not think it is a huge number, but it is obviously very painful when it happens.

Mr W.J. JOHNSTON: In respect of Ironbridge in Dalyellup, when we had our public hearing in Bunbury last week there were strong comments from people that they did not believe that the department of consumer protection had provided the level of support that they wanted. There were comments that people had not made complaints because their neighbours had not got joy out of that process. Some of these comments relate to this process of conciliation. Is there any way, do you think, that you could improve the process of conciliation to ensure that, where a company gives an undertaking, the undertaking gets followed through?

Ms Driscoll: Thanks, Mr Johnston. I think it is the case that we have learnt something about our processes here. It is not often that we would take the approach of standing in the shoes of a consumer, but it is a possibility. Indeed in the case of Olympic, we are looking to do so. The other thing that we are doing differently with Olympic is we have heard from some of the residents, but now we have got basically the address and details of all residents, have written to them all to say it is possible for us to basically act on their behalf and take a matter to the court to seek a court order for them. So we are being a little bit more directive and, I guess, ensuring that everyone is involved. We have learnt to some extent from Ironbridge. But as I said, we have on many occasions reviewed what we did with Ironbridge. I would have to say it was a bit different to this most recent case—that is, very senior people were regularly engaging. I think, as we have recorded it formally, it does tell the story—and I do not want to repeat that—but it is very clear that very senior people were regularly involved. At each event we would also then see very clear actions and follow through and then it would peter out again. Then we would again seek some sort of redress. As I mentioned before, against that was the backdrop that other parties as well as the odd consumer were taking matters before the court, and there was a clear possibility that the company was going to be wound up through those actions. So it was us taking alternative actions when there was constant signs of endeavouring to do it and indeed the will of the company appeared to be, "Yes, it is genuinely trying to do this work." Indeed the people who were taking it to court were those very people who should have been undertaking the work and obviously were not getting paid themselves, so they were trying to get contracts for the work to be done. What is the point of completely slamming the organisation to see it just wiped out and there is no possibility of redress?

With this most recent one, as I said, I think we have learned, but at the same time when we look back we were constantly getting reasonable reason to believe the work—we would go down and take photos and, yes, it was happening. I just think there was an element of unusual circumstances in this instance. But I can say, you know, I guess we live and learn and maybe we would have embarked on actions sooner.

[1.15 pm]

Mr Meagher: The thing I think with the Olympic one, the reason why we have jumped into the shoes a hell of a lot quicker is because they have just closed up shop and dialogue and said, "Look, we're just not interested. We're going into receivership." So, with the other one, Ironbridge, with those promises and things happenings, that is why we went down that track. One of the things we have also with Olympic Holdings, where I think we have learnt, is we have done a title search, so we found every resident's name in that pocket. We have actually hand delivered the letters to the people, so we are just trying to get people on board and engaged and we want to get them into court pre the Australian Taxation Office which has applied to wind them up, and that is being heard on 1

November. So, we certainly want to get them in there before that happens so at least if there is a judgement, it will be prior to that time.

Mr W.J. JOHNSTON: When you went through the conciliation, you were getting those undertakings. Do you think it would be useful if you had a procedure to make those undertakings enforceable?

Ms Driscoll: We did not have that power at the time, so they are now enforceable under the Australian Consumer Law, but we did not have that. I guess we could have sought an injunction or some sort of agreement through that.

Mr W.J. JOHNSTON: Registered it?

Ms Driscoll: Registered it, but it is not an overt power that we had. We do now, so we often had undertakings but they were not —

Mr Meagher: Enforceable.

Ms Driscoll: Yes.

Mr Hillyard: I think the other experience we had was to go down and meet with a range of residents of the development. We met with 25 of the people and wanted them to lodge their claims at Bunbury Courthouse. We know only less than half actually filed those applications because, as much as we roll off our tongue, "Take the matter to the Magistrates Court", that is quite a big step for an average Joe to fill out paperwork and go and lodge that at court. So, with that hindsight, when we got to the Olympic approach, for the commissioner to say, "I'll do that for you", that is much more palatable, and more people are putting across their permission for us to do so. It is labour intensive and obviously costly to the agency to do so, but we are getting better outcomes that way.

Ms Driscoll: And I might add that our knowledge of the only way we could do basically a standing in the shoes representative action was that it would involve us taking witness statements from everybody. Now, we were concerned that that would blow out the time line considerably in that we would have to do a full brief and it might take many months to actually access everybody. Through some work through our lawyers we have found that there are probably some ways we could try and just short-circuit some of those steps, because that was another consideration that will actually be far, far slower than someone geared up with a template that we have given them just going straight to the Magistrates Court and getting a court order in their favour. So, you know, I can say on many an occasion we checked on, "Is this the right path to take?" And it was a balancing act, given these constant demonstrations of some will balanced against these other proceedings, balanced against what was the quickest and most efficient way for these people to get redress. And I think again the record does show that the endeavour was quite labour intensive from the department's point of view, whether it was the best absolute way of doing it, but very reasonable under the circumstances. I know, whilst there may have been some criticism, there is also some recognition of the endeavour of the department in trying to work through this process. Fortunately, as I said, there are some changes to the law which make our capacities even stronger in terms of future interventions.

Mr W.J. JOHNSTON: Can I just clarify that, Mr Chairman? Ms Driscoll, those changes to the law are so that now the Australian Consumer Law allows the outcome of the conciliation to be enforceable; is that right?

Ms Driscoll: No, not in those terms, Mr Johnston. There are a couple of changes. One is, firstly, there is an overt requirement under the Australian Consumer Law to deliver a service within a reasonable time, and that creates a capacity to take a range of actions on the part of the department. There are such things as enforceable undertakings as well, which we did not have previously, so another option would be to go and get agreements to a time line as actually, you know, formalised and then enforceable. There are, as I mentioned before, capacities to, instead of taking a prosecution action, seek penalties that in the first instance achieve redress, as opposed to getting a fine that does

not actually directly help the people involved. So, there are a number of things there that would provide more tools to get a satisfactory resolution.

Ms A.R. MITCHELL: Mr Chairman, can I just follow up? Ms Driscoll, you have said that for all of the people in the Ironbridge estate everything is now resolved.

Ms Driscoll: No. Thank you, Ms Mitchell. I said that almost all of the fences are now in place. We believe that all but two are now in place. Some of them, as I understand, have not been painted, and that there has been some advancing of the landscaping. So, the situation continues to very slowly improve.

Mr W.J. JOHNSTON: Could I just make the comment that we drove around and had a look at the estate.

Ms A.R. MITCHELL: And that was on 6 October.

Ms Driscoll: Okay.

Mr W.J. JOHNSTON: What I was going to say was I did not count the number of places without fences but there were still a number without fences. The other thing was in our evidence that we took in Bunbury a number of people said they put fences in themselves but have not been reimbursed and, quite frankly, I did not see the landscaping —

Ms Driscoll: Thank you.

Mr Hillyard: The information we have got as at 11 October is that there were two outstanding fences to be installed, landscaping for about 100 properties to recommence in four to five weeks—so, that is still significant—and there were 12 people expecting reimbursement for having done their own landscaping that still have not been paid. The fence painting was not going to commence until they have finished installing all of them, so that is still underway. So, that was 11 October. And we have been monitoring the various blog sites which are operating amongst the group, and that is generally reflective of what is on the blog sites as well.

Ms A.R. MITCHELL: So, would these commitments that are coming through in this process be now subject to the new law?

Ms Driscoll: No, because the contracts will have been signed up before, so the applicability of the new law is when contracts were undertaken. So, just to reiterate, that advice came as I understand it from —

Mr Hillyard: Ian Wallace.

Ms Driscoll: From Ian Wallace. But then separately the consumers' blog confirms the same picture. So, we understood that it was accurate based on the advice of the developer marrying with that of the blog set up by the residents. So that was the basis to us thinking that the fencing was largely at least installed. In terms of painting, my understanding was that not all of them need painting; it is those that need painting that are an issue.

Mr W.J. JOHNSTON: I do not think it is worth our while going too far into this, but —

Ms Driscoll: Perhaps just to let you know, we did have some basis for making that.

Mr W.J. JOHNSTON: Sure, yes; that is fine. The information has been provided to you.

Ms Driscoll: Yes.

Mr W.J. JOHNSTON: But I mean just from driving around I can remember at least two properties that do not have the "super six" fencing up. And then I think they call them cottage blocks—clearly there are a number of those without fencing. They have got the stonework done but not the fencing. Anyway, as I say, I do not want to get into that as I do not think it is worthwhile.

Mr Hillyard: We also have to, of course, each time we are looking at a particular block, make sure that they have actually got their home constructed in the time frames to quality and all those sorts of issues.

The CHAIRMAN: Recreation Drive: you entered into conciliation but it was unsuccessful.

Mr Meagher: Yes.

The CHAIRMAN: Could you describe why?

Mr Meagher: Yes, because Peter James, the director, was unwilling to settle the complaints due to financial problems. During the conciliation process we did a company search of Recreation Drive, and they went into receivership on 20 August 2010, and we also found out that the Australian Securities and Investments Commission was in the process of striking them off. So, we spoke to ASIC to see whether they could hold back on those actions to at least give people the opportunity to get into court to get an order made, and they certainly agreed to grant an extension to 11 August 2011, and we have asked them for a further 180 days on top of that. So, they have not taken any action to strike them off, and that expires on 22 January 2012. So, that was just pure financial problems was the reason they would not conciliate.

Mr Hillyard: And whilst Stephen has mentioned succinctly that he just did not resolve the matters because he did not come good on his promises, there were a number of occasions where he said he would be at a particular address at a particular time with a trailer-load of fencing and he would bring down some beers and they would all put the fences up together, but he never materialised. So, we had a number of broken promises from him too.

The CHAIRMAN: Can you describe under the ACL the powers you have within the conciliation process; what powers do you have?

Mr Hillyard: The conciliation processes which we follow, the authorities which were established under our Fair Trading Act—that is the state legislation which effectively brings consumer protection into being and the functions of the commissioner—are set out through that process, and then we apply the provisions of the ACL, the Australian Consumer Law, being the rules which businesses should comply with.

The CHAIRMAN: It is conciliation in the sense that you cannot force people as you do not have the powers of enforcement.

Mr Hillyard: That is correct. So, the commissioner is empowered to undertake inquiries and make approaches. We have got internal policies in terms of how we set out the rules and requirements for our own officers to comply. But effectively we are someone who intervenes in an issue and tries to bring it to a solution. If we cannot negotiate that settlement, then we have to look at legal remedies that are available.

The CHAIRMAN: It appears to me that the issue of Ironbridge and others arises because of change in the market and financial difficulties. And when you go out and buy a house from somebody, which is a very major purchase, land and a house on it, an ordinary person would not be able to judge very well the financial position of the person selling them the house. It is not like a car: you get the car and you drive away. A house is different. Is there some kind of mechanisms by which you can inform the general public of the financial capacity of developers to deliver?

Mr Hillyard: Not really. And I guess if we go back to instances where we have had major retailers in the marketplace in the terms of Kleenmaid, you know, they were an Australia-wide company, beautiful showrooms, fantastic equipment being sold, and yet overnight they closed their doors.

The CHAIRMAN: The Good Guys, I think, did that too.

Ms Driscoll: No, it was Rick Hart.

Mr Meagher: Rick Hart was a big one.

Mr Hillyard: Rick Hart, which was not the Western Australian–based Rick Hart but the east coast Clive Peeters group.

The CHAIRMAN: That is right.

Mr Hillyard: So, from a public perception of what is out there in the marketplace to check on things, there is very little chance for people to do a formal undertaking of the viability of a developer or a particular business at any particular time. So, we look for the mechanisms to protect people. So, minimal size deposits. If you buy things on credit and you have got a linked credit provider arrangements, then you have got some drawback. For these particular consumers we have got the promise of future services being provided—the fencing and landscaping et cetera—which is a relatively small cost compared to the cost of the block of land. If it is $190 000 perhaps for the block and they have got maybe upwards to $7 000 or $8 000 worth of goods, so the risk on the promise of delivery is relatively small. And it might be something you would look at by way of having that amount of money secured away in a trust for future delivery, as the commissioner has mentioned, but it is whether or not consumers are savvy enough and in a strong enough bargaining position to argue for those things at the point of sale. It is usually, "We're over the moon. We're buying a block. We're committed. Yep, I'm in. I'll pay the deposit and away we go", and never anticipating that these things can go wrong.

Mr Meagher: We get 150 000 phone calls a year in our contact centre. Each Monday or Tuesday afternoon we meet with the contact centre to see whether there is a retailer with three or four complaints or a developer with a few complaints over a period of time, so we use that intel. But there are some that just surprise you like Kleenmaid and Rick Hart. We just did not have numbers in those weeks leading in that would have alarmed us. But, yes, we certainly use things like that and complaint data.

[1.30 pm]

The CHAIRMAN: Ansett?

Mr Meagher: Ansett.

Ms Driscoll: If I can make a final comment, too, it may be that even the developer does not fully understand their financial position as it will be two years down the track. Perhaps no-one anticipated quite the fall-off in the real estate market that we have seen in recent years. Again, I think the data shows that there was something like half the number of sales of land in, I think it was, 2007–08 relative to two years prior to that. So it is the case, I think, rightly or wrongly, that developers may have a level of risk in the way in which some of them operate, and it was probably premised on history in that generally there have been progressive increases in land prices over time, and it was an unprecedented slowdown. In terms of anyone being able to make an assessment of the financial viability particularly of businesses in this field, I think it would be very, very difficult.

Mr W.J. JOHNSTON: I am just wondering, would there be any difference between the plausibility of these issues if a person had purchased land through a real estate agent as opposed to direct from the developer?

Mr Hillyard: No.

Ms Driscoll: The real estate agent holds the money in trust until the sale is effected—so, until the certificate of title changes hands. From that point, there is no reason for the real estate agent to continue to hold the deposit. Dave has indeed explored the capacity of a settlement agent to perhaps then be the stakeholder managing, say, some sort of a deposit on behalf of parties to a contract for the purpose of landscape and fencing. But we believe on balance that probably the most viable way of doing that would be through a lawyer's trust account, because it would be well beyond the settlement process that the moneys —

Mr Hillyard: So effectively at the point of settlement, the terms and conditions of contract are that the developer will supply these things at a point if you qualify for them. So, it is unlikely that the settlement agent would be able to, at that point, hold back the $6 000 or $7 000 for the fencing arrangement. Of course, you could negotiate that through your settlement agent at that point and say, "Well, we want it in a trust of some kind", but, again the bargaining position of the two parties is likely to come into play there, and whether we are able to argue, as consumers, against a major developer about that sort of money being held aside is another matter.

The CHAIRMAN: Are you seeing very many disputes generally in the house-and-land package market?

Mr Hillyard: No, not compared to the numbers that are out there being sold. The sorts of complaints that come in to us at Consumer Protection might be around, say, a solar package that might have been sold with a particular home and whether you qualify for that, and then a dispute arises as a result. There are obviously significant numbers of disputes about "this house hasn't been built to specifications and it's got faults", but they are with the Building Commission and we do not get involved with those nitty-gritties. So the house-and-land package sales that are generally sold either through real estate agencies or direct, we do not get significant numbers.

The CHAIRMAN: I noticed that the list of operational entities that you have listed that you receive complaints for are not large ones.

Mr Hillyard: No.

The CHAIRMAN: And the larger ones dominate the market in Western Australia. So you are not seeing any problem of this type with them.

Mr Hillyard: I do not know if the larger ones dominate. They are certainly household names; I agree with that. But there may be hundreds of small development companies out there going about their business not causing any ripples. We will never know that they exist because we only hear about things when it goes awry.

Ms Driscoll: Mr Chair, just thinking back, again, we have not necessarily been exposed to all matters by virtue of the fact that our links to the real estate board were not, certainly at the senior levels, close. But I can recall that there have been issues with even, probably some of them, the most significant of the developers in the past, because from time to time there will be an argument about whether a representation was misleading, for example. From time to time issues arise, but, fortunately, to date we have not seen major insolvencies from those that have large estates et cetera.

I might perhaps just mention a couple of things to provide some context. We talked before about the number of cases that we see where developers have had issues with solvency and delivery of goods. On average, we in Consumer Protection receive about 7 000 conciliations a year, just to give some context to the numbers that we work through, and then there is an additional number on top of that that are formal complaints that move to some sort of breach or potential offence of legislation, and that varies quite a bit, depending on whether we include real estate and settlements. So, including real estate and settlements, I think it is probably in the order of about 1 700 or 1 800 per year. So there is just that point.

We talked before, too, about the difficulties in the property market in recent years, and I think it is important to perhaps profile that against the experience of the period leading up to, say, 2007–08 where we actually had the reverse problem, and that was situations where consumers were investing in properties being made available via developers, and in the year or two it took to subdivide and conclude the sale, often the property value had increased markedly, and, indeed, it was the developers who were encountering much larger increases in the cost of works in that inflation generally was increasing, particularly in construction areas where demand was very high. So, there is an element of us needing to consider what is the best way of perhaps managing the market and the risk, having regard to both scenarios, economically.

The CHAIRMAN: Do you get very many complaints about not so much the ad-ons, but the structural provisions of the land; for instance, drainage, access to roads—the issues that the WAPC would probably regulate?

Mr Hillyard: We have certainly had instances of those types of complaints. I could probably think back over 20 years where there have been problems with subsidence, limestone pinnacles coming up as land has settled. I think we have seen some instances where some limestone caves have collapsed and we have lost homes. As the environment has changed and the peat levels have started to shrink, we have seen damage to homes, and that was probably over a period of seven to 10 years that that started to happen. I still do not think they are into significant numbers; they tend to be a particular event that happened at a particular location.

The CHAIRMAN: There is one up north that kind of caved in —

Mr Hillyard: There are a few down on the way to Mandurah that are in the same situation.

The CHAIRMAN: — in her electorate!

Mr Hillyard: But I can think, perhaps going back 20 years, where people first started to get involved in that sort of thing happening where sandfill had actually collapsed. There were people who had not cleared out the ground properly. The stumps had been left, and then they slowly rotted away. With the planning and development approvals that go through now, it all looks very nice. The developer comes in and in go all the limestone walls, and there is no argy-bargy. Well, 15 or 20 years ago, we just got undulating land, and it was left to the various purchasers to sort out who had to cut and who had to fill, and there were all sorts of disputes. The planning approvals have largely cleaned a lot of that up. It has put the price of land up, of course, but it has solved innumerable complaints and arguments.

The CHAIRMAN: On page 21, you argue that the residents of The Tuarts estate have a civil claim potentially arising from a breach of the contract with Ironbridge. Is Consumer Protection empowered to conduct a common law breach of contract proceeding on behalf of the affected residents of a property developer? If so, what factors could persuade Consumer Protection to undertake such an action; what would such a process entail; and what are the pitfalls of such an approach?

Mr Hillyard: I think we have largely canvassed a number of those issues about what the commissioner might take into consideration in doing a representative action. I guess the short answer is that even today we could step into the shoes of these consumers over these disputes, provided we hit certain criteria within our legislation. If we were convinced that taking injunctive action against Ironbridge would result in getting these things resolved more quickly and at less expense, then we could still take that action today.

Ms Driscoll: I think I referred to that possibility being weighed by us at the time that this unfolded. But given our knowledge of what would be required at that time, we understood that we would need to get essentially witness statements individually from every single person involved, and felt that the $79 or so—$76—involved in a Magistrates Court claim, with people supported by a statement pre-prepared by the department and then leaving, of course, people with the opportunity to ensure that they adjusted it to suit their own circumstances, was the quickest way of getting redress, because it would have taken many months for a Magistrates Court hearing to be set above the sort of threshold that we would then be applying. So it just appeared to be the most effective way. Having said that, we have now reviewed that and are looking to try a different approach in relation to Olympic—to some extent having learned that there are better ways of seeking representative action.

I might also mention that there is a procedural element, and that is we need to get ministerial approval to do so, but I certainly would not suggest that that has ever been an issue in terms of getting ministerial support for representative action; it is just an extra step. So we are looking to

take that approach for Olympic, but I also would remind the committee that as we weighed this on the previous occasion, it was the fact that insolvency seem to be so imminent and that periodically there were demonstrations of the work being undertaken, so it was only after a year that we were actively looking at legal action, and again the best way appeared to be through that unsupported action on the part of the individuals. Clearly, 30 people, or 25 plus two, participated in that exercise to entertain that idea. But, again, they too were clearly placated to some extent by the ongoing promises and the clear insolvency risks of the organisation itself. Obviously, an independent lawyer has now taken some action there, too, but, again, that process would only potentially escalate the insolvency if it was followed through.

Mr Meagher: In fact, I think when we met informally previously when we were talking about the insolvency, I advised that the ATO was chasing Ironbridge up for three and a half million. We all thought that that would tip it over, but that has not been the case. They have fought on, and continue to install fences.

Ms Driscoll: My understanding is that the ATO case is due back in court later this week.

The CHAIRMAN: I will make a closing statement. Thanks for your evidence today. A transcript of this hearing will be forwarded to you for correction of minor errors. Please make these corrections and return the transcript within 10 working days of the date of the covering letter. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be introduced via these corrections and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on a particular point, please include this as part of your supplementary submission for the committee's consideration when you return your corrected transcript. Thanks very much.

The Witnesses: Thank you.

Hearing concluded at 1.44 pm