



Government of **Western Australia**
Department of **Commerce**

Office of Director General



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Dr Michael Nahan, MLA
Chair
Economics and Industry Standing Committee
Parliament House
PERTH WA 6000

Dear Dr Nahan

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

Thank you for your letter, dated 19 August 2011, advising of the Parliamentary Inquiry into Ironbridge Holdings Pty Ltd and Other Matters Regarding Residential Land and Property Developments in Western Australia and inviting the Department of Commerce to make a submission to the inquiry.

Please find enclosed the Department's submission to the Economics and Industry Standing Committee for your consideration. Officers from the Department are willing to appear before the Committee if requested.

Yours sincerely

Anne Driscoll
A/DIRECTOR GENERAL



Government of **Western Australia**
Department of **Commerce**

Inquiry into Ironbridge Holdings Pty Ltd and Other Matters Regarding Residential Land and Property Developments

Submission to the Economics and Industry
Standing Committee

Department of Commerce

26 September 2011

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The Department of Commerce unique identifier for this document (Objective reference) is A2593989.

Background

On 18 August 2011, the Economics and Industry Standing Committee commenced an inquiry into Ironbridge Holdings Pty Ltd and Other Matters Regarding Residential Land and Property Developments in Western Australia.

The Consumer Protection Division of the Department of Commerce (Consumer Protection) has responsibilities in this area primarily through its administration of the Australian Consumer Law in Western Australia, and welcomes the opportunity to provide a submission to this inquiry.

More than 10,000 blocks of land are sold in Western Australia each year, in addition to more than 23,000 sales of established houses. Most of these purchases are completed successfully. For those purchases from developers that do not proceed as smoothly, Consumer Protection is able to accept complaints.

When compared to the number of property and land sales that occur each year, the number of complaints received by Consumer Protection relating to property developers is relatively small. While the concerns of all complainants are taken very seriously by Consumer Protection, issues of the type encountered by the clients of Ironbridge Holdings Pty Ltd do not appear indicative of a wider endemic problem amongst the property development industry.

The history of complaints to Consumer Protection about developers tends to reflect the wider economic climate. In 2005 and 2006, both the average price of blocks of land and homes in Western Australia and the number of sales increased significantly. Concurrently, Consumer Protection received a number of complaints about developers rescinding sales contracts for blocks of land or 'off-the-plan' properties and then offering the land and/or property for resale at a higher price. A clause in the sales contracts (the *Joint Form of General Conditions for the Sale of Land* – prepared by the Law Society of Western Australia and the Real Estate Institute of Western Australia) allows either party to withdraw from the contract in the event that planning approvals or other required works are not completed within 12 months.

At that time, the main driver for these pressures was the resources demand that resulted in significant economic growth in Western Australia, particularly from 2001 - 2007.

This boom produced significant unprecedented growth in the State's population and resulted in an increase in the demand for private land, established dwellings and rental accommodation.

Although growth in WA continues to be driven by mining, other sectors of the economy have not been so strong in recent years, reducing overall pressure on the house and land market. This is likely related to the tightening of finance for dwellings and the lack of confidence in the housing sector.

Table 1: Economic growth in Western Australia & Australia 2001/02 -2009/10

Percentage change - Gross State product per capita/Australian Gross Domestic Product									
	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Western Australia	6.3%	5.0%	4.2%	9.3%	15.8%	14.0%	9.5%	9.1%	-0.2%
Australia	5.6%	4.7%	6.3%	5.8%	6.6%	7.3%	6.6%	3.6%	0.3%

Source: ABS, Australian National Accounts cat. no. 5220.0

Chart 1: Number of Land Sales – WA

Financial year	Number of sales
2001-02	17,775
2002-03	20,761
2003-04	20,160
2004-05	22,452
2005-06	29,218
2006-07	18,696
2007-08	12,049
2008-09	14,371
2009-10	18,220
2010-11	10,076

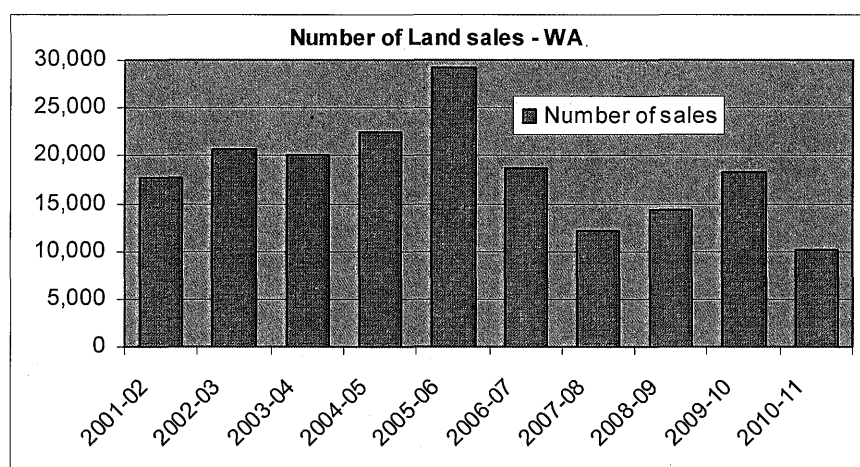
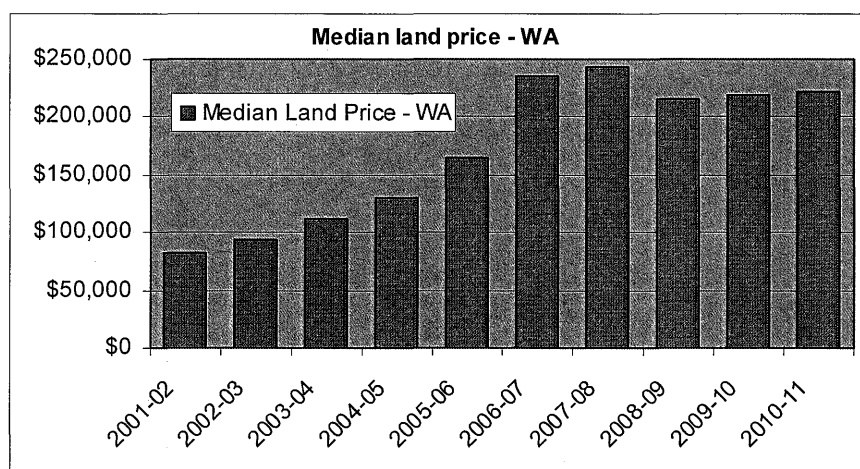


Chart 2: Median Land Price - WA

Financial year	Number of sales
2001-02	\$82,500
2002-03	\$94,500
2003-04	\$111,500
2004-05	\$130,000
2005-06	\$165,000
2006-07	\$235,000
2007-08	\$243,000
2008-09	\$215,000
2009-10	\$218,000
2010-11	\$222,000



Source: Landgate, Land Price Statistics, Maximum Land Price & Median Land Price – State of WA

The first complaint to Consumer Protection about a developer's failure to deliver contractually agreed works was received in June 2009. This coincided with a softening in the real estate market in Western Australia. There was a fall in both the number of blocks sold, and the median block price since the peak in the market during 2005-2007. During the 2010-2011 financial year, the land market softened further, with just one third of the sales of blocks of land compared to 2005-2006.

This placed pressure on developers in a number of ways. Firstly, it affected cash-flow, as less deposits were taken, and correspondingly less settlements proceeded. Secondly, it had the potential to limit the amount of finance supplied by financial backers, as the developers did not have signed contracts to act as security. This occurred alongside the much more stringent lending requirements put in place globally over the past few years.

It is likely that the recent failure of at least three developers to honour, or complete, their contractually agreed works is linked to the weakening property market, the failure of the developer to hold funds aside for the provision of the services and the subsequent inability of the developer to raise finance to provide the services when requested.

It is relevant to also note other events, that Consumer Protection is aware of that have occurred within the property development industry in recent years which can be related to the recent softening of the Western Australian property market.

A number of buyers who invested when prices were buoyant have recently sought to renege on contracts. Three actions were heard in the Supreme Court in April 2011, about the right of the purchaser to avoid the sale of the off-the-plan property as the strata plan was not registered in the time frame agreed to in the contract. However, the implication of media reporting was that the purchasers were trying to avoid settlement as the market price of the property was now below its original purchase price. The Supreme Court ruled on 24 June 2011 that the three purchasers of luxury apartments at Mirvac's Beachside Leighton development who tried to back out of their contracts must uphold the terms of sale.

Investors participating in the funding of property developments have lost money due to the failure of development proposals to proceed, where titles were unable to be issued.

One example of this is linked to five development projects promoted and sold by former real estate agency Morgan Realty on behalf of a number of subsidiary companies established by Ken, Ron and Morag Fraser (the developers). These five developments were pre-sold off the plan as concepts; prior to actual acquisition or development of the lots.

The purchasers of the future lots all signed an offer & acceptance document and (in addition to the expression of interest fee) paid deposits totalling up to \$4,267,800 into Morgan Realty's trust account or direct to the developers. A special condition of the offer and acceptance documents provided that the deposit monies paid could be released to the seller and utilised by the seller with respect to the acquisition and development of the land prior to a new title being issued for the property and settlement of the contract.

At no stage had the developer held title for any of the proposed lots and consequently none of the proposed subdivision eventuated. The activities of the licensee and a real estate representative of Morgan Realty have been the subject of proceedings before the State Administrative Tribunal where their licences were cancelled and the entities unable to reapply for their licenses for a minimum period of two years. Subsequently, the Department has paid out and is currently assessing a number of fidelity guarantee claims from the failed purchasers in relation to their lost deposits.

Economics and Industry Standing Committee Terms of Reference

On 18th August 2011, the Economics and Industry Standing Committee, advised the Legislative Assembly of the Committee's terms of reference for an Inquiry into Ironbridge Holdings Pty Ltd and Other Matters Regarding Residential Land and Property Developments. The terms of reference are:

- 1. The conduct of Ironbridge Holdings Pty Ltd in meeting its contractual obligations on its residential property developments in Western Australia with a particular emphasis on The Tuarts estate in Dalyellup.*
- 2. The Committee will also investigate:*
 - a) The incidence of late or non-delivery of items offered by residential land and property developers under "incentive packages".*
 - b) The redress available to buyers for late or non-delivery of such items.*

Purpose of this submission

The purpose of this submission is to specifically address the Committee's Terms of Reference from the perspective of Consumer Protection in order to:

- provide details of the regulation of developers in Western Australia;
- outline the role of the Consumer Protection in regulating developers and conciliating disputes between consumers and developers in Western Australia; and,
- provide details of past, current and emerging issues relating to developers.

1) The conduct of Ironbridge Holdings Pty Ltd in meeting its contractual obligations on its residential property developments in Western Australia with a particular emphasis on The Tuarts estate in Dalyellup.

Background

The Consumer Protection Division of the Department of Commerce (Consumer Protection) has received 33 complaints about Ironbridge Holdings Pty Ltd's (Ironbridge) failure to meet its contractual obligations in relation to its residential property development, The Tuarts estate, in Dalyellup. There have been no other complaints about any other Ironbridge property development.*

Ironbridge's conduct in the matter can be characterised by a failure to provide the contracted services in a reasonable time, poor handling of complaints, a lack of timely updates to residents and frequent unfulfilled promises to see work completed. On many occasions, work would commence only to stall a short time later, contrary to the undertakings made by Ironbridge.

In essence, Ironbridge has never denied its responsibility and on a number of occasions has identified an impending business event that would address their obligations but it has continually frustrated its clients and Consumer Protection by not completing the promised work.

Between January 2007 – July 2008 Ironbridge developed and marketed 270 of a potential 780 building blocks at The Tuarts estate, in Dalyellup.

The complainants entered into contracts using the standard pro-forma 'Contract for the sale of land or strata title by offer and acceptance'. Two special conditions applied to these contracts:

- Special condition 1 - provided for landscaping with various values between \$3,000 and \$3,150 at the expense of the seller's (Ironbridge).
- Special condition 2 - provided for fencing to the side and rear of homes at the seller's expense. The value was not listed; however information supplied to Consumer Protection about the cost to employ other contractors to provide the fencing show costs likely varied between \$2,233 and \$6,468.

To qualify for the landscaping and fencing packages buyers had to build their homes within twenty months of the settlement date.

* While Consumer Protection has not received any other complaints about Ironbridge regarding other property developments, there is an open complaint about the real estate agent responsible for selling land owned by Ironbridge at Dongara. This is not technically a property development project - see page 15 for further details.

The complaints

From 29 June 2009 to 31 August 2011, Consumer Protection received 33 complaints against Ironbridge, regarding the non-provision or delay of landscaping and fencing at The Tuarts estate, Dalyellup.

The complainants listed a number of ways Ironbridge had failed to meet its contractual obligations through its:

- failure to provide, complete, or paint fencing;
- failure to provide landscaping; and
- failure to reimburse consumers for payments to independent contractors to complete works.

Consumer Protection investigated the details supplied in the residents' complaints and could not identify breaches of the *Fair Trading Act 1987*. The investigation concluded that an argument could not be sustained that the developer had deliberately misled clients in regards to their intention to supply the contracted goods, particularly when the majority of consumers received their entitlements, albeit slowly. As such, Ironbridge did not appear to have breached consumer protection legislation.

Conciliation of the complaints

A major role of Consumer Protection is to assist consumers to get a fair result by offering a conciliation service as a first step where there is a disagreement between a consumer and trader.

Consumer Protection generally engages in communication with the consumer and the business separately, and aims to guide both parties to a mutually agreeable position determined by their rights and responsibilities. Unlike the courts, Consumer Protection cannot order a trader to follow a particular course of action.

As no breach of the legislation could be identified in respect to Ironbridge's conduct, Consumer Protection commenced conciliation in an attempt to resolve the disputes between the residents and Ironbridge.

There were three complaints received in 2009. Following communication between Consumer Protection officers and Ironbridge, Ironbridge advised that fencing would be delayed approximately three weeks. Ultimately all three complaints were successfully conciliated in that the complainants were satisfied with the timetable outlined by Ironbridge to complete works or the previously agreed upon works were undertaken and completed.

From 19 January 2010 to 24 March 2010, 11 complaints were received by Consumer Protection. Some complainants had waited nearly a year by this time for Ironbridge to complete the promised works, and some had arranged for independent contractors to complete the works and were now seeking reimbursement from Ironbridge.

It was decided that all complaints should be allocated to one Consumer Protection officer, in order to ensure that complainants received consistent information and advice as to the Ironbridge situation. Attempts were made to resolve these complaints through regular, ongoing contact via email and phone with various staff at Ironbridge during this time.

Communication from Ironbridge, to both Consumer Protection and directly to affected consumers, acknowledged the lengthy delays in installing fences, but stated that the timing of the installation was dependent on funds being made available from the settlement of other lots at other Ironbridge projects.

Finally, as this funding did not eventuate, senior officers from Consumer Protection met with Mr Ian Wallace, one of the two directors of Ironbridge on 19 March 2011. The officers expressed concern about the number and nature of the complaints and were given assurances that the complaints would be resolved as funds became available.

Mr Wallace advised that:

- Fencing work would recommence on 6 April 2010, and the backlog would be resolved within 3 months.
- Landscaping would be underway from late March.
- Fence painting would recommence after the fencing backlog was cleared.
- The option was available for residents to proceed with their own works, to Ironbridge's specifications and seek reimbursement.

Despite the previous assurances, complainants were again frustrated by Ironbridge's failure to meet its deadlines as well as its failure to communicate information about the delays. On 22 April 2010, Ironbridge advised Consumer Protection that they were still waiting for funds to be released from a number of projects before the works could be commenced.

Date should read 19 March 2010. Confirmed by Department of Commerce at hearing 17 October 2011 (transcript p.1).

With the confirmation from Ironbridge that works would be delayed again, the Department informed Ironbridge that complainants would now be advised they had three options – wait, take legal action through the Magistrates Court or proceed with the works and seek reimbursement. In response, Ironbridge advised that they would not have funds available to reimburse people who contracted other businesses to complete works.

Ironbridge wrote to residents on 7 May 2010, apologising for the delay and stating that “they were working to ensure fencing ... and landscaping was bought (sic) up to date within the next few months or earlier.”

The Department continued to communicate regularly with Ironbridge over the next two months. During this time, Ironbridge reiterated that they intended to complete works when funds became available.

Nine more complaints were received between 24 March and 16 July 2010. Of the 23 complaints received up to that point in 2010, three were conciliated successfully and three more were closed because the residents advised that they were not prepared to wait for Ironbridge to complete the works and decided to instigate their own legal action.

The first public record of a judgement awarded against Ironbridge to a Tuarts estate resident was recorded on 16 June 2010. \$18,871.25 was awarded to the complainant. Ironbridge had not appeared to defend the action.

On 10 August 2010, fencing work was recommenced. Senior officers from the Department visited Dalyellup in August 2010 and photographed the homes of the complainants to determine the progress of landscaping and fencing work. Twenty-one fencing jobs were completed over a three-week period, but after this time the work again stopped.

Over the following months, Ironbridge regularly advised the Department that works would be recommencing soon, but these works did not eventuate.

According to a Dun and Bradstreet financial report on Ironbridge, a number of residents took civil action during this time, and were awarded judgements, as Ironbridge failed to appear. The exact numbers are not known, as the details of Magistrates' civil decisions are only made available to parties to the proceedings.

During the course of conciliation, Ironbridge broke numerous undertakings to both Consumer Protection and residents as to when works would commence. When works did commence they were sporadic and short-lived. Eventually, it became obvious that conciliation efforts would continue to be frustrated, so the Department resolved in early October that the most efficient way of forcing the developer to meet its financial obligations to the residents was to cease conciliation and assist the residents to take civil action. Civil action in this case was seen as a cost-effective option, with residents able to file a claim with the Bunbury Magistrates Court for a cost of \$76.50.

With many consumers unsure about the legal process, Consumer Protection officers prepared a pro forma package to assist claimants to fill out their court forms and proceed with legal action. Senior Officers from the Department met with complainants at the Department's Bunbury office on Thursday 21 October 2010. Twenty-five people were provided with information and materials at individual face to face meetings. A further two complainants telephoned to speak to the officers while they were in Bunbury and were sent the pro forma package.

Subsequently twelve complainants chose to proceed to the Magistrate's Court. The remainder of complainants were prepared to wait for Ironbridge to make good on their commitment.

On 17 November 2010, Ironbridge issued letters to the residents of The Tuarts promising to recommence fencing work on 1 December 2010. The fencing contractor advised the Department they could complete 5-6 fences per week and would complete the outstanding fencing jobs by March 2011, later than the eight weeks specified by Ironbridge.

Fencing work did commence in early December 2010. Complainants were advised that should the works not be done, their next option was to proceed with legal action. Unfortunately, all fencing work stopped approximately two weeks later. Whilst this was said to be for the Christmas break, works did not recommence again until July 2011.

One further complaint was received in September 2011 and the complainant was provided with the pro forma court pack and advised to proceed with legal action.

During the conciliation process undertaken between June 2009 and October 2010 Consumer Protection spoke with Ironbridge on at least 34 separate occasions. On each occasion Ironbridge gave reasons as to why works were yet to commence and provided assurances as to when the fencing or landscaping would begin. Often there was subsequent evidence of works commencing, however these were discontinued shortly after.

Table 2: Outcome of complaints against Ironbridge laid with Consumer Protection

Ironbridge proceeding with works/reimbursement and if not file can be re-opened	2
Fencing done or reimbursed	2
Landscaping done or reimbursed	2
Fencing and landscaping done/reimbursed	3
Fencing done or reimbursed but not landscaping	3
Proceeding with court action	13
Ironbridge will be proceeding with works and if not C advised to take legal action	8

Other Actions

There is a history of people initiating court action against Ironbridge to recover payment, with over 50 actions listed in the Dun and Bradstreet report since March 2009. Petitions to wind up Ironbridge because of non-payment have continually resulted in settlement. It appears that Ironbridge has a history of delaying payment until court action is taken. An example of their apparent stalling tactics is provided below.

A Public Notice appeared in *The West Australian* on 23 June 2010, stating that on 15 June 2010, Tasman Civil Pty Ltd, a contractor who worked on Ironbridge's Exmouth's project, had made an application in the Supreme Court to wind up Ironbridge and that the matter would be heard on 27 July 2010. The hearing was delayed until September 2010.

Tasman Civil Pty Ltd's motion to "wind-up" Ironbridge was listed for 21 September 2010, but was delayed to 12 October 2010. It did not proceed on this date as the matter was settled.

On 3 March 2011, representatives of law firm Slater and Gordon met with about 40 people representing 20 homeowners with a view to taking instructions to commence action against Ironbridge to force a remedy. The Department maintains contact with Slater and Gordon in order to offer assistance if needed.

More people joined the Slater and Gordon action. On 15 April 2011, Slater and Gordon sent a letter of Statutory Demand on behalf of 30 homeowners to Ironbridge, who had 21 days to respond (6 May 2011). In the event that a Statutory Demand is pursued, it can pave the way for a receiver manager or liquidator to be appointed. This requires agreement from all clients in a class action and a statutory declaration from each.

Slater and Gordon received a response from Ironbridge that committed to commencing work by 27 June 2011. Sporadic works have proceeded from late July 2011, however Slater and Gordon have advised they are now waiting for the results of a claim filed by the Australian Taxation Office before proceeding further.

On 7 June 2011, the Australian Taxation Office (ATO) lodged a petition to wind up Ironbridge in the Federal Court in Perth, linked to unpaid bills.

On 12 July 2011 the ATO action against the company was heard in the Federal Court of Australia. The Plaintiff argued the company owed \$3.4 million and had recently paid \$500,000 of the debt. The Plaintiff argued it "was concerned with the solvency of the company" saying it had had ample time to deal with the matter. The company indicated it was solvent and that it needed time to secure finance to pay the debt. The Court required the company to submit an affidavit with respect to the company's solvency and adjourned the matter to 30 August 2011.

At the directions hearing on 30 August 2011, another firm that was owed money asked to be joined as a party to ATO's action. Ironbridge advised that the debt had been paid electronically to that firm overnight, so the application was put on hold.

Additionally, Ironbridge advised the Court that finance had been approved to pay the ATO debt and that if an adjournment was provided it would allow Ironbridge enough time to release the funds to the ATO. At 30 August 2011 the debt owed to the ATO was \$3,355,000, and this had been outstanding since 2009.

The Registrar allowed an adjournment to 13 September 2011 (on the basis of Ironbridge's claim that refinancing had occurred but some procedural issues meant money couldn't be released for about 10 days) but warned that any applications for further adjournments would have to be made through affidavit and would have to show very specific grounds.

On 13 September 2011, Ironbridge requested, and was granted, an adjournment until 18 October 2011. The ATO did not oppose the request. The adjournment was to "allow refinancing to come to fruition".

Current situation

There was no substantial progress on the supply of landscaping and/or fencing from January 2011 to 18 July 2011. A resident of The Tuarts created a Facebook page, "People in Dalyellup WA, waiting for a fence", on 29 October 2010, in order to share information about people's endeavours to have landscaping/fencing work completed or to receive reimbursement. In July 2011, an update on the Facebook page from one resident advised that they had been informed fencing works would commence within the week. This was confirmed by other residents in later updates. No landscaping work was commenced.

Work has proceeded sporadically since this time, with residents updating the Facebook page as they receive fencing or a cheque for reimbursement. On 20 September 2011, the daughter of the Directors of Ironbridge, who claims she has power of attorney while the Directors are on leave, advised Consumer Protection that all fencing had now been installed, and they are now planning on painting fences where required and completing landscaping, or reimbursing people who have arranged their own work. This completion of the installation of fencing is largely supported by the residents' Facebook page, except for front fencing for the cottage lots, which has been reported as still not installed.

Dongara Downs

A complaint was made to the Real Estate and Business Agents Supervisory Board (REBA) on 24 June 2010, about the real estate agent who was responsible for selling lots at this location on behalf of Ironbridge.

A number of lots have been purchased that do not have access to constructed roads and the Shire of Irwin (the Shire) will not approve applications for building licences for those lots without such access. As a consequence, the purchasers of the lots are required to pay for the construction of road access or require 'legal arrangements' for road access before the Shire will grant the necessary approvals.

This is not technically a property development, as Ironbridge did not sub-divide the land. The Dongara land is a farm that was originally held as a collective number of land titles. When the farm was sold, the individually titled lots were put up for sale and marketed as Dongara Downs. The land area of the lots ranges from 50 acres up to 1500 acres.

The complaint was initially closed by REBA as there was insufficient evidence to support a conclusion that the real estate agent had misled the complainant. The matter was re-opened in March 2011, following the receipt of further information from the complainant. The matter is subject to an ongoing investigation.

2a. The incidence of late or non-delivery of items offered by residential land and property developers under “incentive packages”.

There is no record of any complaints to the Department about these types of matters prior to the first Ironbridge complaint being received on 29 June 2009.

Since that time, there have been two other sets of complaints against developers for not completing landscaping and/or fencing works as specified in sales contracts. Both sets of complaints relate to contracts signed prior to 1 January 2011, and fall under the provisions of the *Fair Trading Act (1987)*.

Recreation Drive Pty Ltd, Eaton

The Department received four complaints against Recreation Drive Pty Ltd, (Recreation Drive), the developer of an estate in Eaton, from 22 July to 1 December 2010. The complaints related to Recreation Drive's failure to provide fencing and landscaping in accordance with the terms of the sale of land contracts.

These complaint files were closed following unsuccessful attempts at conciliation conducted by the Department. Recreation Drive Director, Mr Peter James, was unwilling to settle complaints with residents due to the financial difficulties faced by his company. Complainants were provided with information about their rights and remedies and advised to seek action in the Magistrate's Court.

During the conciliation process, a company search indicated that Recreation Drive went in to receivership from the 20 August 2010 to 29 October 2010. Additionally, an Australian Securities and Investments Commission (ASIC) search indicated that Recreation Drive is in the process of being struck off the Register of Companies.

The Department wrote to ASIC to request that the pending deregistration of Recreation Drive be deferred due to the pending legal action by several residents. ASIC granted a 180 day extension to 11 August 2011. Following further application from Consumer Protection, ASIC has granted another 180 day deferment of the deregistration of Recreation Drive, which expires on 22 January 2012.

Olympic Holdings Pty Ltd / Olympic Property Group, Gosnells

The Department has received five complaints against Olympic Holdings Pty Ltd / Olympic Property Group (Olympic), the developer of an estate in Gosnells. The first complaint was made on 17 June 2011. The complaints relate to Olympic's failure to provide fencing, landscaping and or white goods packages in accordance with the terms of the sale of land contracts.

A senior officer met with the Director of Olympic, Mr Peter Bacich on 8 August 2011. Mr Bacich advised that of the 39 blocks in his development, 27 have been sold to consumers and 12 sold to Seacrest Home Builders. All lots were to have fencing provided, but some purchasers were also eligible for landscaping and/or whitegoods/entertainment packages depending on the sales agency.

Mr Bacich provided the Department with a list of 16 purchasers that have received neither landscaping, nor whitegoods or fencing. The Department has also conducted a Landgate title search to identify all purchasers who may be affected.

It appears that nine residents have now had their fencing installed, with one currently awaiting installation. Of the 11 eligible for the white goods/entertainment package, none have received it.

On 17 August 2011, Mr Peter Bacich, wrote to affected land owners to advise that he could not complete the balance of the contract with regard to the supply of the landscaping, fencing and white goods packages due to the effect of the Global Financial Crisis on the property development market. As a result he advised that it is likely that Olympic Property Group Pty Ltd would enter into liquidation. Olympic's accountant has not confirmed if this proposal is proceeding.

As a result of this letter, a number of residents are considering proceeding with court action. One claim was heard on 30 August 2011. The outcome of that hearing is unknown as only parties to proceedings are privy to that information.

Given Olympic's reluctance to negotiate, the Department sent a letter to all purchasers of the lots in the development and invited them to attend a meeting at the Department of Commerce on 21 September 2011.

Fifteen people attended the meeting. Information was provided to them about their legal rights and avenues that may be taken by the Department against the company on their behalf. It was agreed by the attendees that they would like consideration to be given to the Commissioner 'stepping into their shoes' and pursuing civil remedies on their behalf in the Magistrates Court.

To enable this action to commence, consent forms must be signed by the proprietors of a property. Seven consent forms were signed at the meeting whilst other attendees took consent forms away to be signed by their partners.

The department is writing to all affected buyers who did not attend the meeting to seek their consent in joining the group action. All residents have been given until 19 October 2011 to advise of their intentions. After receiving the consent forms, and prior to commencing the proposed legal action, the Commissioner must seek Ministerial consent to take this action on behalf of the complainants.

Should any purchaser not wish to join the group claim they will be provided with pro forma applications forms so they can seek their own remedies in the Magistrates Court.

2b. The redress available for buyers for late or non delivery of such items.

The regulatory framework applying to developers in Western Australia.

Consumer Protection administers the Australian Consumer Law in Western Australia. The Australian Consumer Law is a nationally uniform consumer law that replaced a wide range of existing national and State and Territory consumer laws. The Australian Consumer Law was implemented on 1 January 2011.

In Western Australia, the Australian Consumer Law was implemented by way of the *Fair Trading Act 2010*. The *Fair Trading Act 2010* also replaced the:

- *Consumer Affairs Act 1971*,
- *Fair Trading Act 1987* and
- *Door to Door Trading Act 1987*.

General provisions of the Australian Consumer Law (WA) prohibit businesses from engaging in misleading or deceptive conduct (s.18), accepting money without an intent to supply (s.36) and from making false or misleading representations about the sale etc of land (s.30). Additionally, a business making representations in respect to a future matter, where the party does not have reasonable grounds for making the representations, is taken to be misleading behaviour (s.4).

The Australian Consumer Law also includes a new provision at section 62, which is a statutory guarantee that services will be provided within a reasonable time in cases where no date is specified for the supply of that service. If a business fails to comply with a statutory guarantee a range of civil actions are available to the consumer, with the appropriate remedy dependent on whether the failure to comply is major or minor.

If the failure to comply with the guarantee can be remedied and is not a major failure the consumer may require the supplier to remedy the failure within a reasonable time. If the supplier refuses or fails to comply within a reasonable time, the consumer may otherwise have the failure remedied and recover all reasonable costs incurred by the consumer from the supplier.

With the consent of the consumer, the Commissioner for Consumer Protection can also take civil action on behalf of the consumer to enforce the remedies available against a business who fails to comply with a statutory guarantee.

Whilst Western Australian property developers are not required to be licensed, the *Real Estate and Business Agents Act 1978* requires them to:

- have their principal place of business registered with the Commissioner (s.57(1));
- give written notice to the Commissioner of any changes in the situation of the principal place of business (s.58(1));
- keep records of real estate transactions (s.59);
- supply copies of signed documents to the other party (s.63); and
- abide by advertising requirements (s.62).

The Australian Securities and Investments Commission (ASIC) has responsibility for regulating financial advice and financial products (including managed investment schemes).

Managed investment schemes may include property trusts and unlisted property schemes. Generally in a managed investment scheme:

- people are brought together to contribute money to get an interest in the scheme ('interests' in a scheme are a type of 'financial product' and are regulated by the *Corporations Act 2001*);
- money is pooled together with other investors (often many hundreds or thousands of investors) or used in a common enterprise; and
- a 'responsible entity' operates the scheme. Investors do not have day to day control over the operation of the scheme.

Using the Consumer Protection conciliation service to rectify the late or non-delivery of contracted goods or services

Where there is a breach of contract, affected parties may seek redress from the other party. Consumer Protection offers a conciliation service, to help facilitate outcomes for aggrieved parties.

The Australian Consumer Law (WA) provides that the functions of the Commissioner of Consumer Protection includes, *inter alia*, to receive and conciliate complaints from consumers. This gives Consumer Protection the authority to conciliate disputes between developers and consumers who have purchased land or 'off-the-plan' property.

Generally, and consistent with the Department's compliance model, it will seek to negotiate an appropriate outcome, through education and conciliation. This is particularly so in cases where there is a contractual dispute rather than evidence of an offence.

Consumer Protection cannot compel a trader to provide restitution through the conciliation process – but engaging in the conciliation process can generally bring about an outcome acceptable to both parties. Neither can Consumer Protection compel a trader to follow a particular course of action or close down a business. These are decisions that only courts and certain regulatory bodies can make.

Depending on the nature of the complaint about a developer, Consumer Protection can:

- conciliate disputes between residents and a developer;
- advise the parties about their rights to take a matter to the Magistrate's Court for a formal determination;
- gather sufficient evidence of a breach of the legislation to institute legal proceedings in the Magistrate's Court; and/or
- initiate civil proceedings on behalf of the resident.

Entering into conciliation does not prevent either party from taking legal action to remedy the wrong, if agreement between the parties can not be reached.

Making a claim in the Magistrates Court

The residents of The Tuarts estate have a civil claim potentially arising from a breach of the contract with Ironbridge. Residents have the option of lodging a claim in the Magistrates Court. The Magistrates Court deals with disputes between consumers and traders with claims of up to \$50,000 in the Small Disputes Division. There is also access to a less formal, more private, process without the need for lawyers if the claim is less than \$7,500. For claims over \$7,500, the matter is dealt with in a court (with or without lawyers).

Civil action in this case was a cost-effective option, with residents able to file a claim for \$76.50 in the Bunbury Magistrates Court, presumably close to their home.

In order to aid residents exercise their legal rights, Consumer Protection prepared a pro forma package for claimants to assist them to fill out their court forms and proceed with legal action.

While legal representation is not generally required in the Magistrates Court, Consumer Protection recommends that applicants seek independent legal advice before taking such a step, and provides contact information for services such as the Citizens Advice Bureau, who can provide legal advice to the public for a nominal fee of \$30 for a 20 minute appointment.

It appears that most residents who have lodged a claim against Ironbridge in the Magistrates Court have been awarded judgements, as Ironbridge failed to appear. Consumer Protection can also provide consumers with advice and information on how to enforce their rights through the Courts if judgement payments are not made.

Most Court judgments require a judgment debtor to pay money to a judgment creditor. The judgment creditor may request any of the following orders to enforce a judgment to recover money that has not been paid:

- time for payment order;
- debt appropriation order;
- instalment order;
- property (seizure & sale) order;
- earnings appropriation order; and
- appointment of a receiver.

Consumer Protection powers other than conciliation

Consumer Protection has a range of options in dealing with trader non-compliance with the Australian Consumer Law.

It is also relevant to note that the *Fair Trading Act 2010* and the Australian Consumer Law provide for different actions to be taken depending on the relevant provision. While breaches of some provisions carry criminal sanctions, a failure to comply with other provisions provide only for actions for damages. However, where a person suffers a loss through a breach of the Australian Consumer Law by a business and that breach carries a criminal penalty, they are also entitled to take a civil action against that business to recover their loss.

Consumer Protection can prosecute traders for breaches of the Australian Consumer Law. Depending on the circumstances, monetary penalties for contraventions of the unfair practices provisions and of Chapters 2 & 3 of the Australian Consumer Law are up to \$220,000 for individuals and up to \$1.1 million for companies. There are a range of enforcement actions and remedies open to Consumer Protection to use to achieve the successful achievement of a consumer's rights or compensation where there is a breach.

Table 3: Provisions of the Australian Consumer Law and the Fair Trading Act (1987) that have/had particular application to developers

CURRENT LEGISLATION Provisions of the Australian Consumer law (WA)	Section	Offences, penalties, enforcement and remedies
Chapter 2 – General protections Part 2-1 – Misleading or deceptive conduct		
Misleading or deceptive conduct A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.	s.18	The following enforcement powers and remedies apply to section 18 of the ACL: <ul style="list-style-type: none"> • undertakings; [Chapter 5, Part 5-1, Division 1] • substantiation notices; [Chapter 5, Part 5-1, Division 2] • public warning notices; Chapter 5, Part 5-1, Division 3] • injunctions; [Chapter 5, Part 5-2, Division 2] • damages; [Chapter 5, Part 5-2, Division 3] • compensatory orders; [Chapter 5, Part 5-2, Division 4, Subdivision A] • redress for non-parties; and [Chapter 5, Part 5-2, Division 4, Subdivision B] • non-punitive orders[Chapter 5, Part 5-2, Division 5, section 246]
Chapter 3 – specific protections Part 3-2 – consumer guarantees, Subdivision B – guarantees relating to the supply of services		
Guarantee as to reasonable time for supply If: <ul style="list-style-type: none"> (a) a person (the supplier) supplies, in trade or commerce, services to a consumer; and (b) the time within which the services are to be supplied: <ul style="list-style-type: none"> (i) is not fixed by the contract for the supply of the services; or (ii) is not to be determined in a manner agreed to by the consumer and supplier; there is a guarantee that the services will be supplied within a reasonable time. 	s.62	A breach of the Statutory Guarantee gives rise to various civil actions outlined in sections 267-270. The remedies available depends on whether the failure to supply is considered major or minor. Where the supplier refuses to remedy the failure to supply within a reasonable time, the consumer can otherwise have the failure remedied and recover reasonable costs for doing so from the supplier. Alternatively, the consumer may be able to recover compensation from the supplier for the reduction in value of services below that paid.

Please note, that s.4, **Misleading representations with respect to future matters** sets out what will be taken to be 'misleading'.

CURRENT LEGISLATION Provisions of the Australian Consumer law (WA)	Section	Offences, penalties, enforcement and remedies
Chapter 3 – Specific protections Part 3-1 – unfair practices		
<p>False or misleading representations about sale etc. of land</p> <p>(1) A person must not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land:</p> <p>(a) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or</p> <p>(b) make a false or misleading representation concerning the nature of the interest in the land; or</p> <p>(c) make a false or misleading representation concerning the price payable for the land; or</p> <p>(d) make a false or misleading representation concerning the location of the land; or</p> <p>(e) make a false or misleading representation concerning the characteristics of the land; or</p> <p>(f) make a false or misleading representation concerning the use to which the land is capable of being put or may lawfully be put; or</p> <p>(g) make a false or misleading representation concerning the existence or availability of facilities associated with the land.</p>	s.30	<p>A person contravening section 30 of the ACL commits an offence (s152) and is liable to a maximum penalty of:</p> <ul style="list-style-type: none"> • \$1.1 million for a body corporate; • \$220,000 for other persons. <p>A person contravening section 30 may also be liable for a civil pecuniary penalty up to these same amounts [Chapter 5, Part 5-2, Division 1, section 224]</p> <p>The following enforcement powers and remedies apply to section 30 of the ACL:</p> <ul style="list-style-type: none"> • undertakings; [Chapter 5, Part 5-1, Division 1] • substantiation notices; [Chapter 5, Part 5-1, Division 2] • public warning notices; Chapter 5, Part 5-1, Division 3] • injunctions; [Chapter 5, Part 5-2, Division 2] • damages; [Chapter 5, Part 5-2, Division 3] • compensatory orders; [Chapter 5, Part 5-2, Division 4, Subdivision A] • redress for non-parties; and [Chapter 5, Part 5-2, Division 4, Subdivision B] • non-punitive orders[Chapter 5, Part 5-2, Division 5, section 246]

CURRENT LEGISLATION Provisions of the Australian Consumer law (WA)	Section	Offences, penalties, enforcement and remedies
Chapter 3 – Specific protections Part 3-1 – unfair practices		
<p>Wrongly accepting payment</p> <p>(1) A person must not, in trade or commerce, accept payment or other consideration for goods or services if, at the time of the acceptance, the person intends not to supply the goods or services.</p> <p>(2) A person must not, in trade or commerce, accept payment or other consideration for goods or services if, at the time of the acceptance, the person intends to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted.</p> <p>(3) A person must not, in trade or commerce, accept payment or other consideration for goods or services if, at the time of the acceptance:</p> <p>(a) there are reasonable grounds for believing that the person will not be able to supply the goods or services:</p> <p>(i) within the period specified by or on behalf of the person at or before the time the payment or other consideration was accepted; or</p> <p>(ii) if no period is specified at or before that time — within a reasonable time; and</p> <p>(b) the person is aware or ought reasonably to be aware of those grounds.</p> <p>(4) A person who, in trade or commerce, accepts payment or goods or services:</p> <p>(a) within the period specified by or on behalf of the person at or before the time the payment or other consideration was accepted; or (b) if no period is specified at or before that time — within a reasonable time.</p>	s.36	<p>A person contravening section 30 of the ACL commits an offence (s152) and is liable to a maximum penalty of:</p> <ul style="list-style-type: none"> • \$1.1 million for a body corporate; • \$220,000 for other persons. <p>A person contravening section 30 may also be liable for a civil pecuniary penalty up to these same amounts [Chapter 5, Part 5-2, Division 1, section 224]</p> <p>The following enforcement powers and remedies apply to section 30 of the ACL:</p> <ul style="list-style-type: none"> • undertakings; [Chapter 5, Part 5-1, Division 1] • substantiation notices; [Chapter 5, Part 5-1, Division 2] • public warning notices; Chapter 5, Part 5-1, Division 3] • injunctions; [Chapter 5, Part 5-2, Division 2] • damages; [Chapter 5, Part 5-2, Division 3] • compensatory orders; [Chapter 5, Part 5-2, Division 4, Subdivision A] • redress for non-parties; and [Chapter 5, Part 5-2, Division 4, Subdivision B] • non-punitive orders[Chapter 5, Part 5-2, Division 5, section 246]

FORMER LEGISLATION Provisions of the <i>Fair Trading Act (1987)</i>	Section	Offences, penalties, enforcement and remedies
Part II - Unfair practices Division 1 – Misleading conduct and false representations		
<i>Misleading or deceptive conduct</i> A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.	s.10	The following enforcement powers and remedies apply to section 10 of the FTA 1987: <ul style="list-style-type: none"> • injunction in restrain of conduct; [Part VII, s74]; • compensation order; [Part VII, s77]; and • damages; [Part VII, s79].
<i>False representations and other misleading or offensive conduct</i> (2) A person shall not, in trade or commerce, in connection with the disposal, or the possible disposal, of an interest in land or in connection with the promotion by any means of the disposal of an interest in land — (c) offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered; or	s.12	The following enforcement powers and remedies apply to section 12 of the FTA 1987: <ul style="list-style-type: none"> • criminal offence, with summary conviction fine of \$6 000 or maximum fine of \$20,000 for a person and \$100,000 for a body corporate; [Part VII, s69]; • injunction in restrain of conduct; [Part VII, s74]; • compensation order; [Part VII, s77]; • damages; [Part VII, s79]; and • modified penalty of \$2,000 for making a false representation in connection with supply of goods or services; [FTA Regs, Schedule 1].

FORMER LEGISLATION Provisions of the <i>Fair Trading Act (1987)</i>	Section	Offences, penalties, enforcement and remedies
<p><i>Accepting payment without intending or being able to supply as ordered</i></p> <p>A person shall not, in trade or commerce, accept payment or other consideration for goods or services where, at the time of the acceptance —</p> <p>(a) the person intends —</p> <p>(i) not to supply the goods or services; or</p> <p>(ii) to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted; or</p> <p>(b) there are reasonable grounds, of which the person is aware, or ought reasonably to be aware, for believing that the person will not be able to supply the goods or services within the period specified by the person or, if no period is specified, within a reasonable time.</p>	<p>s.21</p>	<p>The following enforcement powers and remedies apply to section 21 of the FTA 1987:</p> <ul style="list-style-type: none"> • criminal offence, with summary conviction fine of \$6 000 or maximum fine of \$20,000 for a person and \$100,000 for a body corporate; [Part VII, s69] • damages; [Part VII, s79] • injunction in restrain of conduct; [Part VII, s74]

Addendum: Application of a 'bond payment' to hold funds to be set aside to pay for 'incentive packages'.

During the course of investigating the matters at Dalyellup, the Department made enquiries with a shire planning manager and the Western Australian Planning Commission (WAPC) to determine whether there were any statutory requirements to retain funds for specified purposes, such as the provision of fencing after moving in.

Under the *Planning and Development Act 2005*, the WAPC put infrastructure conditions (e.g. road, sewerage) on development applications. On large development blocks, uniform fencing conditions can be included, however a large block to be subdivided is considered to be one well beyond a normal residential size block and uniform fencing conditions are not normally imposed under this process. The local council monitors the WAPC conditions and approves building licences for individual blocks.

There are no current laws that require a security or bonding process to cover the installation of fences or landscaping. Fencing and landscaping are not considered to be an essential service to the development of the land and is therefore not part of the approval process.