



Economics and Industry Standing Committee

Inquiry into Ironbridge Holdings Pty Ltd and other matters regarding residential land and property developments

Report No. 11
March 2012

Legislative Assembly
Parliament of Western Australia

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Report No. 11

Presented by

Dr M.D. Nahan, MLA

Laid on the Table of the Legislative Assembly on 1 March 2012

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Executive Summary

In the long run, behaving ethically is probably good business sense and will lead to long-term success.¹

Land and sales in residential subdivisions in Western Australia regularly include fencing and landscaping packages to attract prospective homebuyers. Developers offer these “incentive packages” to control the overall amenity of an estate and to demonstrate the quality of their products and services in the hope of generating further sales. It is in the developer’s commercial self-interest to ensure these packages are delivered promptly.

Many of the more than 10,000 blocks of land sold each year in Western Australia include some form of incentive package and the overwhelming majority of these transactions appear to be completed without incident. While the Global Financial Crisis (GFC) has impacted cash flows across the residential property development sector, only a small number of second and third-tier developers have delayed, or defaulted on, the delivery of incentive package items included in their contracts.

Arguably the most prominent of these troubled developers is Ironbridge Holdings Pty Ltd (Ironbridge), developer of The Tuarts Estate (The Tuarts) in Dalyellup, south of Bunbury. At least 33 formal complaints against Ironbridge have been lodged with Consumer Protection since 2009. Complainants cite Ironbridge’s failure to deliver on incentive package obligations at The Tuarts either in a timely manner or at all.

On 18 August 2011, after an earlier request from the Legislative Assembly to provide terms of reference for an Inquiry into the reported problems in The Tuarts, the Committee confirmed that it would examine the conduct of Ironbridge in meeting the contractual obligations on its residential developments in Western Australia. The Committee would also consider whether the problem of late or non-delivery of incentive package items was widespread across the industry and what redress options were currently available to aggrieved residents.

The Committee has found that Ironbridge’s cash flow was, like many of its competitors, reduced by factors attributable to the GFC. However, the Committee has serious concerns about the probity and legality of certain actions taken by the company’s directors in the ensuing period.

As problems beset the company, Ironbridge failed to provide its contracted services in a reasonable time, handled complaints from customers poorly, and frequently failed to

¹ B. Pentony, S. Graw, J. Lennard and D. Parker., *Understanding Business Law* (4th Ed), LexisNexis Butterworths, Chatswood, 2009, p. 382.

honour commitments it made to complete its work. This has left a significant number of residents in a state of frustration and despair.

Most troubling for the Committee is that while contractual obligations remained unfulfilled, payments exceeding \$1.8 million were made from the company throughout the 2009 and 2010 financial years to satisfy the personal tax liabilities of the directors and their daughter. Compounding this was the fact that the directors declared a dividend to cover these payments at a time that they were not prepared to sign a statement vouching for the ongoing solvency of the company.

The Committee believes that this particular matter warrants further investigation and has recommended that Consumer Protection consider the appropriateness of referring the declaration of these dividends to ASIC for possible breaches of the *Corporations Act 2001*.

Other recommendations are included which aim to hold Ironbridge to the undertakings one of its directors, Mr Ian Wallace, made to the Committee. On 31 January 2012, Mr Wallace advised that all outstanding reimbursements owed to residents would be paid 'within a week and a half' and that all remaining fencing and landscaping works would be completed within six months.

Beyond Ironbridge, it appears that the incidence of late or non-delivery of incentive package items has been restricted to a handful of developers. While not a definitive measure of the problem, Consumer Protection advised that it had received a total of 19 similar complaints regarding five other developers since May 2008.

The second half of the report examines the redress options that have been available to affected residents throughout this period. Consumer Protection is empowered to act as an independent mediator between parties who have a commercial dispute. It is acknowledged that Consumer Protection has been limited in its ability to conspire positive outcomes for residents during these conciliation attempts with problem developers.

However, the introduction of the Australian Consumer Law, which applies to contracts signed after 1 January 2012, has expanded the capacities of Consumer Protection in several key areas. This should lead to more positive outcomes in the future. Significantly, the Commissioner for Consumer Protection can now apply to have undertakings given by developers during conciliation enforced by the courts. Moreover, developers who fail to provide contracted services 'within a reasonable time' are now in breach of the new *Fair Trading Act 2010* and may be pursued for damages that result from the failure.

For clients of Ironbridge and several other troubled developers, Consumer Protection recommended the pursuit of actions in the small claims division of the Magistrates

Court for breach of contract. While undoubtedly the most affordable legal option for these residents, the process has not been as effective or straightforward as they had assumed it would be. Consequently, the Committee has recommended that Consumer Protection revise the information it provides in this area to ensure that consumers have a greater awareness of the options available, and the intricacies involved, in seeking redress via the Magistrates Court.

The Committee explored several other recent changes to consumer protection laws and concluded that with the significant majority of developers honouring their contractual obligations, any further regulation of the sector should not be overly prescriptive.

In this respect, the Committee supports consideration being given to the implementation of a mandatory industry code of conduct and calls for some amendments to the manner in which developers' details are collected under the *Real Estate and Business Agents Act 1978*.

The Committee would like to thank all who contributed directly to the Inquiry and others who provided ongoing assistance to the research process. Among the latter special thanks go to the Perth and Bunbury Magistrates Court; the Water Corporation; and the Consumer Protection Division of the Department of Commerce.

Ministerial Response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Economics and Industry Standing Committee directs that the Minister for Transport; Housing; and Emergency Services (representing the Minister for Commerce in the Legislative Assembly) report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Findings and Recommendations

Finding 1

Page 5

The cash flow of land and property developers was impacted by falling land values and increasingly restrictive financial conditions imposed by lenders in the period during and after the Global Financial Crisis. Ironbridge was affected by both of these factors.

Finding 2

Page 8

During the Global Financial Crisis, Ironbridge became reliant on generating cash flow from future sales and settlements in The Tuarts Estate to fund outstanding incentive package obligations.

Finding 3

Page 13

It was inappropriate for Mr Wallace to advise the Committee that the cash flow problems caused by the construction of the Waste Water Pumping Station at The Tuarts Estate were unforeseen and brought about in part by the Water Corporation.

Finding 4

Page 16

At a time when Ironbridge was experiencing cash flow difficulties, the directors declared a dividend of \$1,641,000 on 30 June 2009 and \$180,000 on 30 June 2010. These dividends were declared in order to cover payments already made from the company's accounts to the Australian Taxation Office to cover the personal tax liabilities of the directors, their family members and related entities.

Finding 5

Page 16

Mr Wallace stated that these payments were made to the ATO in order to ensure the solvency of individuals and entities who had provided guarantees to Ironbridge's financing arrangements. Mr Wallace later confirmed that his daughter Rachel Wallace was a recipient of payments over the two years totalling \$28,140 and that she was not a shareholder or a guarantor to Ironbridge's financing arrangements.

Finding 6

Page 16

The use of company funds to pay the personal tax liabilities of shareholders, their relatives and related entities is unacceptable, particularly given the apparently substantial personal asset base of Ironbridge's directors.

Finding 7

Page 17

Ironbridge declared another dividend of \$51,000 on 30 June 2011 which Mr Wallace advised was used to pay some of the living costs of the directors, who were not drawing a salary.

Finding 8**Page 20**

The Committee has concerns that the declaration of dividends by Ironbridge in the financial years 2009 and 2010 may have been in breach of sections 588G and 254T of the *Corporations Act 2001*.

Recommendation 1**Page 20**

The Consumer Protection Division of the Department of Commerce consider the appropriateness of referring the dividend declarations of Ironbridge Holdings Pty Ltd for financial years 2009 and 2010 to the Australian Securities and Investments Commission (ASIC) to investigate for possible breaches of sections 588G and s254T of the *Corporations Act 2001*.

Finding 9**Page 25**

Ironbridge's failure to meet its fencing and landscaping obligations in a timely manner has resulted in damage to homes from sand; caused anxiety regarding the security of unfenced yards; and created friction between residents over the general amenity of the estate and a potential decline in property values.

Finding 10**Page 27**

Ironbridge's outstanding fencing and landscaping obligations in The Tuarts are significant.

Finding 11**Page 29**

By Mr Wallace's own admission, Ironbridge has not provided contracted services within a reasonable time.

Finding 12**Page 30**

Ironbridge's conduct has been characterised by poor handling of complaints. Ironbridge's continuing failure to provide an open and timely account of the reasons for the delay in delivering the incentive packages has generated further unnecessary angst for residents of The Tuarts Estate.

Finding 13**Page 31**

Ironbridge's poor communication and handling of complaints has been compounded by the company's unfulfilled commitments to residents and Consumer Protection as to when works would be completed.

Finding 14**Page 40**

A second developer, Recreation Drive Pty Ltd, has been the subject of formal complaints to Consumer Protection over its failure to provide fencing and landscaping works as part of an incentive package offered to consumers.

An accurate assessment of the outstanding works could not be ascertained due to the apparent disarray of the company's financial records and the small number of submissions to the Inquiry from residents. It was estimated by the company's director, Mr Peter James, that 40 lots required landscaping and some form of fencing valued at approximately \$250,000 in total.

As the company has now been declared insolvent, residents have little or no recourse to reimbursement or fulfilment of outstanding obligations.

Finding 15

Page 40

Despite Mr James' personal circumstances, he made several gross errors in judgement with the operations of Recreation Drive Pty Ltd that have left affected residents with little or no recourse. Additionally, Mr James handled complaints poorly and did not communicate effectively with residents.

Finding 16

Page 44

In addition to complaints about Ironbridge Holdings Pty Ltd and Recreation Drive Pty Ltd, Consumer Protection has received thirteen complaints about four other developers since May 2008.

Finding 17

Page 44

Based on the evidence received, it is the Committee's view that the late or non-delivery of incentive packages by land developers is not a systemic issue in Western Australia.

Finding 18

Page 49

Conciliation should not be seen as the panacea to all consumer-to-business disputes. Even so, the success rate for conciliation with troubled property developers has been particularly low.

Finding 19

Page 52

Residents of The Tuarts and Recreation Estate have felt let down by what they saw as the impotence of Consumer Protection in achieving satisfactory outcomes through conciliation.

Finding 20

Page 52

Under the provisions of the Australian Consumer Law, which came into effect on 1 January 2011, Consumer Protection will be able to seek to have undertakings made at conciliation enforceable by the court. This should lead to improved outcomes in future interventions.

Finding 21

Page 52

Under section 62 of the Australian Consumer Law, which came into effect on 1 January 2011, developers who refuse to enter conciliation will still be legally bound to supply

contracted services within a reasonable time. This should lead to improved outcomes in future interventions.

Recommendation 2

Page 53

The Consumer Protection Division of the Department of Commerce should actively monitor the ongoing operations of Ironbridge Holdings Pty Ltd. Should similar complaints emerge against the company for contracts signed after 1 January 2011, the Commissioner for Consumer Protection should act swiftly using her expanded powers to either seek and enforce undertakings from Ironbridge, or to instigate a group action for failing to supply contracted items within a reasonable time.

Finding 22

Page 61

Mr Wallace failed to give due recognition to the fact that default judgements from the Magistrates Court require immediate payment.

Finding 23

Page 62

Now that Recreation Drive Pty Ltd has entered into liquidation, the company is unlikely to satisfy any outstanding judgement debts that were awarded against it by the Magistrates Court.

Finding 24

Page 65

Residents of The Tuarts and Recreation Estate expressed frustration with the costs, delays, and complexities involved in seeking reimbursement for breach of contract in the Magistrates Court.

Finding 25

Page 65

With the issue of land developers failing to provide incentive packages being relatively rare, and with the Australian Consumer Law providing greater powers to improve conciliation outcomes, the Committee does not believe changes to the small claims process are required at this time.

Recommendation 3

Page 65

The Consumer Protection Division of the Department of Commerce revise the information it provides to consumers about making claims in the Magistrates Court to ensure that consumers are aware of all the steps involved and options available to enforce a judgement.

Finding 26

Page 67

While the Commissioner for Consumer Protection has the power to initiate a civil action on behalf of residents for breach of contract in the Magistrates Court, the Committee understands the Commissioner's decision not to proceed against Ironbridge Holdings Pty Ltd in 2010.

Finding 27**Page 71**

At the hearing of 31 January 2012, Mr Wallace gave an undertaking that Ironbridge Holdings Pty Ltd will pay all outstanding reimbursements within ‘a week and a half’, and will complete all outstanding fence installation, painting, and landscaping obligations within six months.

Recommendation 4**Page 71**

If there is evidence by the end of March 2012, that Ironbridge Holdings Pty Ltd is failing to meet the undertakings given to the Committee on 31 January 2012 or has failed to pay outstanding judgements from the Magistrates Court, the Consumer Protection Division of the Department of Commerce should consider pursuing a civil action for breach of contract on behalf of all affected residents.

Finding 28**Page 78**

While the Commissioner for Consumer Protection has the power to instigate a group action on behalf of residents for breaches of the *Fair Trading Act 1987*, the Committee understands the Commissioner’s decision at the time not to proceed against Ironbridge Holdings Pty Ltd or Recreation Drive Pty Ltd.

Finding 29**Page 79**

Given the evidence that has come to light during this Inquiry, the Committee has concerns that Ironbridge Holdings Pty Ltd’s failure to disclose potential delays to residents who entered into or settled on contracts at The Tuarts in the first half 2009 may represent a breach of section 21(b) of the *Fair Trading Act 1987*.

The Committee has refrained from recommending the Commissioner for Consumer Protection consider a prosecution as the offence, under the *Fair Trading Act 1987*, only provides for fines and offers no direct redress to residents.

Finding 30**Page 79**

Under the Australian Consumer Law, applicable to land sales conducted from 1 January 2011, the former provisions of section 21 of the *Fair Trading Act 1987* have been carried over into the *Fair Trading Act 2010*. Contraventions now provide for steep civil pecuniary penalties, which allow damages to be sought as an alternative or in addition to fines.

Finding 31**Page 84**

Any move to bond funds intended for the provision of incentive packages at this time would be a disproportionate policy response to an issue involving only a small number of developers.

Finding 32**Page 86**

A mandatory code of practice for land and property developers should improve the level of protection for consumers without impeding the operations of reliable developers.

Recommendation 5**Page 86**

The Minister for Commerce consider the implementation of a code of conduct for the land and property development industry under the *Fair Trading Act 2010*.

Finding 33**Page 87**

The *Real Estate and Business Agents Act 1978* does not compel land and property development companies to lodge the names of their owners or directors with the Commissioner for Consumer Protection. This provides a loophole whereby failed developers can re-enter the market under a different business name without detection.

Recommendation 6**Page 87**

The Department of Commerce propose an amendment to the *Real Estate and Business Agents Act 1978* to ensure that the identities of the owners and directors of land and property development companies are lodged with the Commissioner for Consumer Protection.

Following this, the Consumer Protection Division of the Department of Commerce should conduct bi-annual searches of its registers to determine whether any former failed developers have re-entered the market under a different business name.

Chapter 1

Introduction

Background to the Inquiry

- 1.1 On 15 June 2011, the Legislative Assembly requested the Committee to determine terms of reference for an inquiry into reported problems in The Tuarts Estate (The Tuarts), Dalyellup, and the wider impact of these types of problems in Western Australia.² The Committee was to report to the house in August 2011 those terms of reference and the date on which the Committee would report. The Legislative Assembly's referral resulted from a motion by Mr Mick Murray, MLA, a member of the Committee.³ Mr Murray had expressed his concerns to the Legislative Assembly regarding Ironbridge Holdings Pty Ltd and The Tuarts several times since October 2010.⁴
- 1.2 Mr Murray had received complaints from 35 constituents regarding Ironbridge's failure to provide fencing and landscaping packages included in the contract for the sale of residential lots in The Tuarts.⁵ Mr Murray became concerned about this issue and sent letters out to each home in the estate. He received responses from around 70 people who stated they were in the same situation.⁶ Additionally, Mr Murray had received a small number of similar complaints concerning Recreation Estate in Eaton, developed by Recreation Drive Pty Limited.⁷
- 1.3 To assist in determining the terms of reference, the Committee received a briefing from the Commissioner for Consumer Protection, who had by this time received formal complaints about the conduct of both developers. This briefing suggested that the majority of complaints had been in relation to Ironbridge Holdings Pty Ltd and The Tuarts. Accordingly, the Committee chose to focus its inquiry on Ironbridge and The

2 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 June 2011, pp. 4293-4294.

3 Mr MP Murray, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 May 2011, pp. 3995-4002.

4 See: Mr MP Murray and Mr Bill Marmion, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 2010, pp. 8174-8176; Mr MP Murray and Mr Bill Marmion, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 November 2010, pp. 9189-9190; Mr MP Murray, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 February 2011, pp. 671-672; Mr MP Murray and Mr Christian Porter, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 April 2011, pp. 2695-2696.

5 Mr MP Murray, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 2010, p. 8174.

6 Mr MP Murray, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 May 2011, p. 3995.

7 *ibid.*

Chapter 1

Tuarts, but also sought to determine whether this is a systemic issue in Western Australia and to examine the redress options available to consumers.

- 1.4 On 18 August 2011, the Committee advised the Legislative Assembly that it had determined the following terms of reference:

The Economics and Industry Standing Committee is to inquire into and report on:

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.*

And would report on these matters by 1 December 2011.⁸

- 1.5 On 21 November 2011, an article was published in the *Australian Financial Review* regarding Ironbridge Holdings Pty Ltd and the Committee determined that further information was required from the company. As a result, on 29 November 2011 a motion was put and passed in the Legislative Assembly to extend the tabling date for the report until 1 March 2012.
- 1.6 The Committee advertised the Inquiry in the *Bunbury South Western Times* on Thursday, 25 August 2011 and the *West Australian* and *Hills Gazette*⁹ on Saturday, 27 August 2011. The Committee held nine public hearings and visited The Tuarts and Recreation Estate on 6 October 2011. A total of 13 submissions were received, including seven from affected residents.

8 Dr MD Nahan, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 August 2011, p. 6222.

9 The *Hills Gazette* was included as Ironbridge has also had development interests in Toodyay.

Chapter 2

Ironbridge Holdings Pty Ltd

Ian Wallace acknowledges that his company has failed to deliver its fencing and landscaping packages to residents of The Tuarts within a reasonable time. However, Mr Wallace has stressed that this outcome was attributable to unforeseen matters that restricted his company's cash flow. Before examining the impact that Ironbridge's failings have had on residents, this chapter explores the arguments that Mr Wallace used in his company's defence.

Background

- 2.1 Ironbridge Holdings Pty Ltd ("Ironbridge") is a Perth-based residential property development company. The company's directors are Mr Ian Wallace and Mrs Carolyn Margaret de Freyne Wallace. Ironbridge has been operating for 30 years and has developed residential estates in Canberra, Victoria, and Western Australia.
- 2.2 The Tuarts is an Ironbridge development located at Dalyellup, south of Bunbury. Ironbridge purchased the land in around 2004 and began selling lots in the estate in 2007.¹⁰ Residential lots in this estate were sold with an incentive package that entitled the buyer to fencing and landscaping provided they completed construction of their dwelling within 20 months.
- 2.3 Ironbridge has been experiencing financial difficulty since at least February 2009 and has been unable to fulfil its contractual obligations in relation to the fencing and landscaping packages. At the hearing on 26 October 2011 and in responses to questions on notice from that hearing, Mr Wallace attributed Ironbridge's difficulties to cash flow problems that resulted from changes to financing conditions and issues related to the Waste Water Pumping Station (WWPS) at The Tuarts.¹¹
- 2.4 The Committee has questioned Ironbridge extensively about the cause of its cash flow problems, particularly in light of an article published by the *Australian Financial Review* on 21 November 2011, which claimed that Ironbridge had paid a \$1.64 million dividend to shareholders in June 2009.

¹⁰ Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 17; Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 11.

¹¹ Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, pp. 5-8.

Chapter 2

- 2.5 Mr Wallace's failure to disclose this matter at his initial appearance led to him being called back before the Committee on two subsequent occasions.

Financial Difficulties

Changes to financing terms

- 2.6 Ironbridge's cash flow was significantly reduced by a change in terms from its financier (Suncorp) which affected The Tuarts and other Ironbridge developments. Ironbridge's cash flow was further impeded by a reduction in average lot prices during the Global Financial Crisis (mid-2008 onwards) from around \$170,000 to \$139,000.¹² Other developers in Western Australia experienced similar sharp falls in the value of their landholdings.¹³
- 2.7 Lots in a development are encumbered by a mortgage to the financier. The mortgage is discharged by the financier once agreement is reached on how the settlement proceeds from each lot will be distributed. The financier usually retains the majority of the settlement proceeds to repay the loan, with the balance being distributed to make payments associated with the settlement, including taxes to the ATO. From the balance Ironbridge would also be paid a variable amount to fund its ongoing business, including the provision of fencing and landscaping packages.¹⁴
- 2.8 At some point during the Global Financial Crisis, Suncorp, which is a lender to a number of Ironbridge developments, 'demanded more equity' from Ironbridge.¹⁵ Essentially, this means that Suncorp retained a greater portion of the settlement proceeds in order to reduce the amount of Ironbridge's loan. The variable amount Ironbridge needed to fund its ongoing business was effectively eliminated as Suncorp only released funds for the payment of tax.¹⁶
- 2.9 Mr Wallace advised the Committee that Ironbridge 'constantly applied to its financiers for funding to pay for outstanding fencing and landscaping packages in previous stages, and was consistently refused' being told that Ironbridge was expected to fund the outstanding packages from its own cash flow.¹⁷
- 2.10 Mr Wallace notes that while residents may have seen Ironbridge developing further stages of The Tuarts or other developments, the company would not be permitted to

12 Mr Nicholas Wallace, Land Salesman, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 6.

13 Submission No. 11 from Department of Commerce, 26 September 2011, p. 2.

14 Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 7.

15 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 23.

16 Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 7.

17 *ibid.*

spend this money anywhere else, including on the outstanding fencing and landscaping packages.¹⁸ Finance is lent to Ironbridge under very specific conditions, with funds being released in accordance with these conditions and overseen by the lender.¹⁹ For example, a loan given for the development of a particular stage in a subdivision can only be used for developing that particular stage.²⁰ This is enforced to the point where costs associated with the development of another stage in the same subdivision cannot be paid from that loan, even if there is funding left over.²¹

- 2.11 The increasingly restrictive financial conditions were confirmed by other contributors to the Inquiry²², and this is accepted by the Committee as a valid factor impacting Ironbridge's cash flow.

Finding 1

The cash flow of land and property developers was impacted by falling land values and increasingly restrictive financial conditions imposed by lenders in the period during and after the Global Financial Crisis. Ironbridge was affected by both of these factors.

Waste Water Pumping Station at The Tuarts

- 2.12 Throughout the course of the Inquiry, Mr Wallace repeatedly stated that problems with the Water Corporation regarding the construction of a Waste Water Pumping Station (WWPS) have impacted Ironbridge's cash flow and prevented the completion of fencing and landscaping obligations in The Tuarts. Mr Wallace placed a great deal of significance on the impact of these problems and consequently the Committee has expended considerable effort in understanding the issue.
- 2.13 When developing land, certain criteria need to be met before the Western Australian Planning Commission (WAPC) will release titles for the individual lots in a subdivision. These criteria may include the construction of roads, provision of public open space and the installation of water and sewerage facilities. The relevant authority (eg. local council and Water Corporation) will provide clearances when the obligation is fulfilled.
- 2.14 The WAPC required Ironbridge to provide a reticulated wastewater service to all lots proposed by the subdivision and the Water Corporation identified that a wastewater pumping station was required before the services could be provided.²³ The Water

18 Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 7.

19 *ibid.*, p. 6.

20 *ibid.*

21 *ibid.*, pp. 6-7.

22 Mr Peter James, Director, Recreation Drive Pty Ltd, *Transcript of Evidence*, 17 October 2011, pp. 3-5; Mr Nick Perrignon, Chief Operating Officer, Satterley Property Group, *Transcript of Evidence*, 17 October 2011, p. 3.

23 Water Corporation, Letter, 6 December 2011, p. 1.

Chapter 2

Corporation advised that ‘the need for a pump station was identified before Ironbridge made an application to the WAPC to subdivide the land’.²⁴

- 2.15 Pump stations are classified as a headworks asset and are built, owned and operated by the Water Corporation. However, given the number of developments occurring at any one time and the capacity of the Water Corporation, ‘the situation arises where it is both practical and efficient for land developers to construct headworks assets on behalf of the Corporation’.²⁵ In most circumstances a prefunding arrangement will be entered into whereby the developer will design and construct the asset and the Water Corporation will reimburse the developer.²⁶
- 2.16 At its discretion, the Water Corporation can allow the developer to gain the ‘clearance of subdivision conditions in advance of the completion of all necessary works by lodging a cash or financial guarantee to secure the outstanding obligations’.²⁷ This provides the developer the opportunity to gain the release of titles and begin selling lots before works are completed.
- 2.17 Throughout the Inquiry, Mr Wallace often referred to the “first stages” and the “next stages” of The Tuarts. From evidence provided by Ironbridge and the Water Corporation, the Committee understands that the “first stages” of The Tuarts are Stages 1 and 2 and comprise 253 lots. These 253 lots are the lots that are the subject of this Inquiry. The “next stages” of The Tuarts are Stages 3 and 4 and comprise approximately 55 lots.
- 2.18 Ironbridge originally proposed to construct a temporary WWPS and provided a bank guarantee of \$460,000 against the construction.²⁸ The Water Corporation provided clearance for 166 lots in the “first stages” of The Tuarts on 27 November 2007.²⁹

24 Water Corporation, Letter, 6 December 2011, p. 2.

25 Water Corporation, Developer Information Pack – Developer Constructed Headworks Assets. Available at:
http://watercorporation.com.au/_files/PublicationsRegister/1/Developers_Information_Pack.pdf
Accessed on 16 February 2012.

26 Water Corporation, Developer Information Pack – Developer Constructed Headworks Assets. Available at:
http://watercorporation.com.au/_files/PublicationsRegister/1/Developers_Information_Pack.pdf
Accessed on 16 February 2012; Water Corporation, Development Services Information sheet 33 Prefunding arrangements. Available at
http://www.watercorporation.com.au/_files/PublicationsRegister/1/IS_33.pdf. Accessed on 16 February 2012.

27 Water Corporation, Development Services Information Sheet 6 – How the Water Corporation facilitates land servicing. Available at:
http://www.watercorporation.com.au/_files/PublicationsRegister/1/IS_06.pdf. Accessed on 16 February 2012.

28 Water Corporation, Electronic Mail, 13 February 2012, p. 1.

29 *ibid.*

Further clearances for all but 3 of the 253 lots in the “first stages” were given between 9 January 2009 and 8 June 2009.³⁰

- 2.19 Between late 2007 and July 2008 the Water Corporation gathered the development and timing plans from Ironbridge and Satterley Property Group (which has an estate neighbouring The Tuarts) to feed into its infrastructure planning work.³¹ The conclusion was that ‘a temporary pump station in this area would have a very short life expectancy based on the forecast lot release programs of both Ironbridge and Satterley’ and that a permanent pump station would be required.³²
- 2.20 The Water Corporation advised that ‘[b]etween July and November of 2008 there were various exchanges of information between the Corporation and Ironbridge centred around the timing and scope of the works’.³³ In earlier correspondence to the Committee, the Water Corporation stated that:

*As the Corporation’s proposed delivery timeframe for this infrastructure did not suit Ironbridge’s lot release timeframe, Ironbridge chose to design, construct and prefund the asset under a Customer Constructed Works Agreement (CCWA) with the Corporation.*³⁴

Then,

*[h]aving entered into the CCWA, Ironbridge sought the early clearance of the WAPC’s wastewater condition by lodging with the Corporation two Bank Guarantees. Early clearance of this condition enabled Ironbridge to obtain Land Titles and sell the lots ahead of completing the necessary works.*³⁵

- 2.21 Ironbridge entered into the CCWA with the Water Corporation on 28 May 2009, and provided the two bank guarantees on 1 July 2009.³⁶ The first of the bank guarantees was for \$1,395,707 and was held by the Water Corporation as security against Ironbridge defaulting on the construction of the WWPS.³⁷ The second bank guarantee was for \$200,200 and was held as security that Ironbridge would fund the cartage of wastewater from the subdivision until the WWPS was operational.³⁸ At this time, the

30 Water Corporation, Electronic Mail, 16 February 2012, p. 1.

31 *ibid.*

32 *ibid.*

33 *ibid.*

34 Water Corporation, Letter, 6 December 2011, p. 1.

35 *ibid.*

36 Water Corporation, Telephone Conversation, 7 December 2011; Water Corporation, Letter, 6 December 2011, p. 2.

37 Water Corporation, Letter, 6 December 2011, p. 2.

38 *ibid.*

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Water Corporation returned the bank guarantee of \$460,000 for the temporary WWPS.³⁹

- 2.22 Mr Wallace first raised the subject of the WWPS at the hearing on 26 October 2011 and explained that the associated costs and delays in construction had reduced the company's cash flow and held up the release of titles in the next stages of the estate.⁴⁰ He told the Committee that:

*... this pump station has cost about \$1.2 million. We have to provide bank guarantees in excess of that figure, and we have to construct it, so we actually have \$2.5 million outstanding until the Water Corporation ticks off the commission of the station.*⁴¹

- 2.23 Mr Wallace advised that the completion of the pump station had been held up by around a year due to changes that had to be made to the way the pump station was to be constructed.⁴² When asked whether, if it had proceeded as expected, the money that was used to fund the WWPS would have been used to complete the fencing and landscaping obligations, Mr Wallace replied:

*It has really held up the production of the next 50 titles, and we have cash flow coming from that, so the whole thing is compounded...*⁴³

- 2.24 Further questioning from the Committee elicited the explanation that, due to the tightening of financing arrangements and the funds tied up in the WWPS, Ironbridge required the cash flow that would be generated by the sale and settlement of the 50 lots in the next stages of The Tuarts.⁴⁴ The Committee understands the situation, but is concerned about Ironbridge's reliance on the sale of future lots to meet obligations in the current stages, particularly as the residents of The Tuarts paid for the fencing and landscaping packages when they purchased their lots.

Finding 2

During the Global Financial Crisis, Ironbridge became reliant on generating cash flow from future sales and settlements in The Tuarts Estate to fund outstanding incentive package obligations.

- 2.25 In supplementary information provided to the Committee after this first hearing, Mr Wallace advised that one of the conditions for subdivision of the next two stages of The

39 Water Corporation, Electronic Mail, 13 February 2012, p. 1.

40 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 5.

41 *ibid.*

42 *ibid.*

43 *ibid.*

44 *ibid.*, pp. 5-6.

Tuarts is that Ironbridge either constructs, or enters into arrangements suitable to the Water Corporation to secure the construction of a WWPS to a specified capacity.⁴⁵ Further, he stated that the Water Corporation usually accepts a 'bank-issued bond equal to the estimated value of construction plus a nominal loading amount, instead of requiring a developer to construct the entire WWPS up front'.⁴⁶ Mr Wallace stated that the 'Water Corporation currently holds a bond that covers the entire estimated sum of construction of the WWPS, but determined that they will also require that Ironbridge construct the WWPS...'.⁴⁷

2.26 The Committee cannot agree with Mr Wallace's account. Firstly, the construction of the WWPS does not relate solely to the "next stages" of The Tuarts. As noted in paragraph 2.14 above, Ironbridge was aware that a WWPS was required for that area from the outset of The Tuarts project and proposed to build a temporary one. The Water Corporation made the decision that a permanent WWPS was required based on Ironbridge (and Satterley's) planned development and lot release timeframe. Had Ironbridge not wished to proceed to the "next stages" of The Tuarts so quickly, a permanent pump station may not have been required until a later time.

2.27 Secondly, as noted in paragraph 2.20 above, it was Ironbridge's decision to construct the WWPS under a CCWA and provide the bank guarantees in order to expedite the release of titles; the Water Corporation did not require this.

2.28 The Committee questioned Mr Wallace about the discrepancy between his account and the Water Corporation's at a second hearing on 8 December 2011. Mr Wallace maintained his account of the events, stating:

*The sequence was Water Corp entered into what they call a CCWA with us, whereby they agreed to bond the construction of the pump station—you are asking me to recall facts from a way back—and we agreed to do that. We provided the bonds and then the Water Corp said, "No, we are not going to accept those; we want you to go ahead and construct the pump station."*⁴⁸

2.29 At the hearing and in a subsequent Question on Notice, Mr Wallace was requested to provide correspondence between Ironbridge and the Water Corporation which confirmed his account of the events.

2.30 Mr Wallace's response to this Question on Notice differs from his earlier accounts and more closely accords with the information provided by the Water Corporation, but is

45 Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 9.

46 *ibid.*

47 *ibid.*

48 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 11.

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still not an accurate account. He stated that '[i]t is correct that Ironbridge chose to design and construct the WWPS under a Customer Constructed Works Agreement to expedite the release of the titles in stages 1 and 2 (the first 250 lots)'.⁴⁹ Mr Wallace also confirmed that Ironbridge further chose to bond the works in order to get early clearance of the titles in these stages and was required to provide a guarantee for the cartage of waste prior to the completion of the WWPS.⁵⁰ He advised that clearance was given in relation to the titles in these stages.⁵¹

- 2.31 The Committee is confused by these statements. All but 12 of the 253 lots in the "first stages" of The Tuarts were released before Ironbridge entered into the CCWA all but three had been released by the time the bank guarantees were given. Therefore, the Committee cannot understand how the CCWA and the bank guarantees expedited the release of the titles in the "first stages". The Committee considered the possibility that Mr Wallace was referring to the proposal for construction and bank guarantee for the temporary WWPS, but, taken in its entirety, Mr Wallace's response clearly related to the permanent WWPS.
- 2.32 Mr Wallace advised that Ironbridge subsequently applied for early clearance in relation to the next stages of The Tuarts, comprising 55 lots. At this time, Ironbridge was behind in the construction of the WWPS and in paying the cartage contractors. The Water Corporation advised Ironbridge that although it was entitled to call upon the bank guarantee for the WWPS construction, it would not, but it would not give clearance on the next stages until the WWPS was complete and commissioned.⁵²
- 2.33 Of the impact of this decision, Mr Wallace stated:
- This had a negative effect on our cash flow. Though part of the construction costs were to be funded by our financiers, we were also required to fund a significant amount ourselves. Had the Water Corporation been prepared to issue early clearances of the 55 lots in the next stage we would have been able to settle on those lots and this would have had a positive effect on our cash flow, by reducing our liability to our financiers and hence our interest costs.*⁵³
- 2.34 Mr Wallace has given the Committee the impression that Ironbridge's failure to provide the fencing and landscaping packages in The Tuarts would have been mitigated if the company had been able to generate cash flow from the "next stages" of the estate. However, Ironbridge did not apply for early release of the "next stages" of The Tuarts

49 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 10.

50 *ibid.*

51 *ibid.*, p. 11.

52 *ibid.*

53 *ibid.*

until October 2011, and applied for clearance of 22 lots, not 55,⁵⁴ so the Committee fails to see how, even if the Water Corporation had granted the request, this would have assisted the company to meet its obligations when they fell due in 2009 and 2010.

- 2.35 Mr Wallace has also argued that the issues with the WWPS discussed above were unforeseen.⁵⁵ The Committee cannot see how the issues were unforeseen. Ironbridge was aware that a WWPS would be required at the outset of The Tuarts project. While it is correct that Ironbridge initially thought it would be constructing a temporary WWPS (which the Committee assumes would have been less expensive) this changed as a result of Ironbridge's own development and lot release plans and it was made aware of the Water Corporation's decision in July 2008.
- 2.36 Mr Wallace was never specific as to the timing of the bank's changes to its financing conditions, but the Committee assumes that this would have occurred in late 2008 or early 2009. However, Ironbridge was having difficulty making payments to its contractors prior to the impact of the Global Financial Crisis. On 20 January 2012, APH Contractors Pty Ltd lodged a winding-up application against Ironbridge in the Supreme Court of WA. The company is claiming an amount in excess of \$2.7 million for unpaid invoices and interest on unpaid invoices dating as far back as 1 November 2007.⁵⁶ Additionally another company, Croker Construction (WA) Pty Ltd made a winding-up application against Ironbridge in February 2009, which was withdrawn two months later.⁵⁷
- 2.37 As noted in paragraph 2.8 above, Mr Wallace advised the Committee that the bank began retaining more of the funds from settlement of the lots, decreasing the variable amount from which Ironbridge had intended to fund the fencing and landscaping packages. The Committee asked Mr Wallace why he did not put the funds for the incentives packages aside, and Mr Wallace responded: 'I guess we never anticipated not having access'.⁵⁸ The Committee finds this answer surprising for a 30-year veteran of the property development industry.
- 2.38 Information provided by Ironbridge indicates that some residents who had built in the "first stages" of The Tuarts were becoming eligible for their fencing and landscaping packages in the first half of 2009.⁵⁹ The Committee assumes that with Ironbridge

54 Water Corporation, Letter, 10 February 2012, p. 1.

55 Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 3.

56 Creditor's Statutory Demand for Payment of Debt from APH Contractors Pty Ltd to Ironbridge Holdings Pty Ltd, 20 December 2011.

57 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, pp. 3-4.

58 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 7.

59 Supplementary Information (Item J), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, pp. 10-13.

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experiencing financial difficulty and with the additional change in financing terms, the company needed to generate cash flow in order to meet its obligations to contractors and the residents. Ironbridge needed to sell and settle on lots in the “next stages” of The Tuarts in order to generate cash flow, and in order to settle on the lots the company needed the titles to be created, which required it to satisfy the WAPC’s wastewater service condition.

- 2.39 The Committee understands that difficult business decisions sometimes have to be made in order to ensure the continued operation of a company. The residents of The Tuarts are essentially unsecured creditors, and in the event of Ironbridge becoming bankrupt or being wound-up, would be unlikely to receive any money. Mr Wallace advised the Committee that he was aware of this possibility and stated:

The “best outcome” (although still far from desirable) would be for the company to stay afloat and further develop our existing properties, so that our secured debt could be reduced, which would free up more funds from later settlements, which could be used to pay for the outstanding fencing and landscaping. In order to keep the company afloat, any spare cash that we did manage to obtain was used to pay essential bills that were not covered by our existing funding. This was only done with the goal of keeping the company operating so as to preserve the best interests of the residents in the long haul.⁶⁰

- 2.40 The Committee acknowledges what Mr Wallace is saying, but is concerned that Ironbridge was effectively taking money that residents had paid in the purchase price of their lots for fencing and landscaping, and using it to pay for other liabilities.
- 2.41 It is the Committee’s view that it was inappropriate for Ironbridge to claim that the cash flow problems caused by the construction of the permanent WWPS were unforeseen and brought about in part by the Water Corporation. Ironbridge was already experiencing financial difficulty when the effects of the Global Financial Crisis were beginning to be felt in late 2008, early 2009. The company was also aware of the requirement for the permanent WWPS by this time, and this requirement was a result of Ironbridge’s own development and lot release plans. The decisions to both construct and provide a guarantee for the WWPS were entirely Ironbridge’s and were made in full knowledge of its difficult financial position and its imminent obligations to residents. Additionally, it was the company’s own failure to meet its obligations in relation to the construction of the permanent WWPS that prevented early clearance of the titles in the next stages of The Tuarts.

⁶⁰ Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 8.

Finding 3

It was inappropriate for Mr Wallace to advise the Committee that the cash flow problems caused by the construction of the Waste Water Pumping Station at The Tuarts Estate were unforeseen and brought about in part by the Water Corporation.

Payment of dividends

- 2.42 As noted in paragraph 2.39 above, Mr Wallace stated that any spare funds available were used to pay essential bills to keep Ironbridge operating. These 'essential bills' included the tax liabilities of Mr Wallace, his family members and related entities. The Committee's attention was drawn to these payments by way of an article published in the *Australian Financial Review* on 21 November 2011. The article stated that Ironbridge had paid a dividend of \$1.64 million to shareholders in 2009, leaving the company in deficit.⁶¹
- 2.43 Notably, Mr Wallace did not refer to this matter when discussing factors that impacted the company's cash flow at his first appearance. Given the timing of this payment, the Committee considered this a significant oversight that warranted further investigation.
- 2.44 The Committee obtained Ironbridge's 2009 and 2010 financial statements from the Australian Securities and Investments Commission (ASIC) and held two hearings with Mr Wallace to discuss the dividend payments and related issues. Ironbridge's financial statements show that dividends of \$1,641,000 and \$180,000 were paid in 2009 and 2010 respectively.
- 2.45 At the first of these follow-up hearings, on 8 December 2011, Mr Wallace stated that:
- The entire sum of the dividend was distributed to me and my associate entities for the specific purpose of paying ATO tax liabilities.*⁶²
- 2.46 Mr Wallace then confirmed that the tax liabilities were both personal and belonging to Ironbridge, but after further questioning stated that the liabilities were accruing to him, his wife and associated family interests for purposes related to Ironbridge.⁶³ Subsequently, Mr Wallace advised the Committee that this answer was not correct and stated that the 'dividends declared by Ironbridge ... were not used to pay liabilities incurred by Ironbridge'.⁶⁴

61 J Barrett, 'Resident fury at Ironbridge', *Australian Financial Review*, 21 November 2011, p. 7.

62 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 1.

63 *ibid.*, pp. 1-2.

64 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 1.

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- 2.47 At the hearing on 8 December 2011, Mr Wallace explained that payments were made to the ATO to prevent it from taking any action against him or his wife, or winding up related entities which would have had a knock-on effect on Ironbridge.⁶⁵
- 2.48 Ironbridge's financing arrangements for The Tuarts are guaranteed and indemnified by:
- I Wallace
 - CMD Wallace
 - I Wallace & Associates Pty Ltd in its own right
 - I Wallace and Associates Pty Ltd as trustee for the Ian Wallace Family Trust⁶⁶
- 2.49 Mr Wallace confirmed to the Committee that the ATO payments were made in order to ensure the solvency of those entities, which in turn ensured the solvency of Ironbridge.⁶⁷ He provided the details of these payments in supplementary information after the hearing, which showed that the payments were not made from the dividends, rather the payments were made throughout the year and a dividend declared in respect of the total of these payments at the end of the financial year.⁶⁸
- 2.50 While the Committee cannot confirm whether these payments are unlawful, it has concerns with the legality of the dividend declarations, given the financial situation of the company at the time the declarations were made (see 2.58-2.71 below).
- 2.51 Mr Wallace advised the Committee that throughout FY2008/2009 and FY2009/2010, payments totalling the following amounts were made to the ATO on behalf of these individuals and entities:

65 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 2.

66 Special Purpose Financial Report for the Year Ended 30 June 2009, Ironbridge Holdings Pty Ltd, lodged at the Australian Securities and Investments Commission Service Centre, Perth, on 22 September 2011, p. 17; Special Purpose Financial Report for the Year Ended 30 June 2010, Ironbridge Holdings Pty Ltd, lodged at the Australian Securities and Investments Commission Service Centre, Perth, on 22 September 2011, p. 17.

67 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 2.

68 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, pp. 3-4, 5.

Table 1 Payments made to Wallace family and associated entities, 2008-09 and 2009-10⁶⁹

	2008/2009	2009/2010
I & CMD Wallace	\$1,578,557.09	\$70,641.60
I & CMD Wallace Partnership		\$15,000
Rachel Wallace	\$6,135.00	\$22,005.00
I Wallace & Associates Trust	\$32,220.00	
Ian Wallace Family Trust	\$1,762.00	\$1,338.00
I Wallace Family Trust	\$20,971.28	\$11,979.73

2.52 Mr Wallace stated that these payments were made to the ATO in order to ensure the solvency of individuals and entities which provide guarantees to Ironbridge's financing arrangements. The Committee cannot confirm the relevance of the I Wallace and Associates Trust and the I Wallace Family Trust to the operation of Ironbridge. However, it was made clear that Rachel Wallace (Mr Wallace's daughter) is not a guarantor to Ironbridge's financing arrangements⁷⁰ or in any way related to the financial operations of the company, nor is she a shareholder of Ironbridge.

2.53 The payments to Ms Wallace are reflected as a distribution from a dividend from Ironbridge credited to the Ian Wallace Family Trust.⁷¹ At the hearing on 31 January 2012, Mr Wallace was asked how the payments made on behalf of Ms Wallace were relevant to the operations of Ironbridge. Mr Wallace replied:

*All I can say is that they were paid and I cannot do anything about it.*⁷²

2.54 The Committee asked Mr Wallace why he would make a distribution to Ms Wallace rather than make payments to Ironbridge's creditors. Mr Wallace replied:

*It was a decision made at the time, and that is all we can say.*⁷³

2.55 Throughout 2008-09 and 2009-10, Mr Wallace and the other director of Ironbridge, his wife, made decisions which prioritised the personal tax debts of family members and related entities over the company's liabilities to its creditors, and these liabilities over Ironbridge's obligations to its clients. The Committee acknowledges that many of these decisions were made in order to keep Ironbridge operating through a difficult financial period. However, it is the Committee's view that the use of Ironbridge funds to pay the

69 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, Attachment 1(a), Attachment 1(b).

70 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, p. 6.

71 Mrs Denise Young, Director, Charters Chartered Accountants, *Transcript of Evidence*, 31 January 2012, pp. 5-6.

72 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, p. 5.

73 *ibid.*, p. 6.

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personal tax liabilities of Ms Rachel Wallace is unacceptable, particularly given Ironbridge's outstanding obligations to its creditors and clients.

- 2.56 The Committee is unconvinced that the directors of Ironbridge did not have the means to meet their personal tax liabilities. Given these liabilities, it would appear that the directors have a substantial personal asset base. Indeed, Mr Wallace has recently confirmed that he has secured a substantial amount of funding against his personal assets to meet all outstanding obligations to residents of The Tuarts.⁷⁴ Rather than withdrawing money from Ironbridge to meet the ATO liabilities referred to above, this asset base should have been drawn upon to meet the company's outstanding liabilities and complete the fencing and landscaping packages.

Finding 4

At a time when Ironbridge was experiencing cash flow difficulties, the directors declared a dividend of \$1,641,000 on 30 June 2009 and \$180,000 on 30 June 2010. These dividends were declared in order to cover payments already made from the company's accounts to the Australian Taxation Office to cover the personal tax liabilities of the directors, their family members and related entities.

Finding 5

Mr Wallace stated that these payments were made to the ATO in order to ensure the solvency of individuals and entities who had provided guarantees to Ironbridge's financing arrangements. Mr Wallace later confirmed that his daughter Rachel Wallace was a recipient of payments over the two years totalling \$28,140 and that she was not a shareholder or a guarantor to Ironbridge's financing arrangements.

Finding 6

The use of company funds to pay the personal tax liabilities of shareholders, their relatives and related entities is unacceptable, particularly given the apparently substantial personal asset base of Ironbridge's directors.

- 2.57 The Committee also notes that in 2010, there was a surplus of the dividends declared compared to payments to the ATO of \$59,036.⁷⁵ This is contrary to Mr Wallace's assertion at the 8 December 2011 hearing that the entire sum of the dividend was distributed to him and his associate entities for the specific purpose of paying ATO tax liabilities. Additionally, Ironbridge declared a dividend of \$51,000 at 30 June 2011,

⁷⁴ Paragraph 6.62.

⁷⁵ Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, Attachment 1(b).

about which Mr Wallace advised that they (the directors) were not drawing a salary and he believed it was used to pay some of their living costs.⁷⁶

Finding 7

Ironbridge declared another dividend of \$51,000 on 30 June 2011 which Mr Wallace advised was used to pay some of the living costs of the directors, who were not drawing a salary.

- 2.58 Section 254T of the *Corporations Act 2001* (that applied at 30 June 2009 and 2010) specifies that a dividend may only be paid out of profits of the company. Mr Wallace advised the Committee that the dividends were credited against the retained earnings/profits of Ironbridge.⁷⁷
- 2.59 Section 588G of that same Act prohibits a director of a company from incurring a debt (such as paying a dividend) if the company is insolvent at that time, or becomes insolvent by incurring that debt and at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent. Therefore, it was incumbent on the directors of Ironbridge to consider the solvency of the company when determining whether to declare a dividend.
- 2.60 In respect of the dividends declared on 30 June 2009 and 30 June 2010, Mr Wallace advised that the 'directors did assess the solvency of Ironbridge to determine whether it would be able to meet its current and future debts as and when they fell due prior to the declaration of the dividend'.⁷⁸ Further, in respect of both assessments, Mr Wallace stated that Ironbridge prepared and forwarded a cash flow statement to the relevant financier which showed there would be positive net income for the end of the next financial year.⁷⁹
- 2.61 While this may be the case, the Committee considers this assessment to be moot as the payments had already been made throughout the year. At the hearing on 31 January 2012, the Committee asked Mr Wallace what considerations were made to the cash flow and solvency of Ironbridge when each of the payments were made. Mr Wallace replied:

76 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, p. 11.

77 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 3.

78 *ibid.*, pp. 4, 5.

79 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, pp. 4, 5.

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*I think you have had a submission from us in relation to cash flow. We always kept our eye on that and we always kept our eye on the solvency position right throughout.*⁸⁰

- 2.62 The Committee has concerns that this process may not have been followed, particularly in light of Mr Wallace's own concerns about cash flow.
- 2.63 Ironbridge is required under the *Corporations Act 2001* to lodge its financial statements with ASIC by 31 October each year.⁸¹ Ironbridge's 2009 and 2010 financial statements were not lodged until 22 September 2011, after ASIC issued a demand for their lodgement.⁸² At the hearing on 8 December 2011, Mr Wallace was asked if this delay resulted from the directors' inability to make the required solvency declarations for those two years and he denied that was the case, however Mr Wallace agreed to take further advice about the question.⁸³ His subsequent written response was markedly different than the one given at the hearing.

*Yes, the delay was in part related to my ability as a director to sign a declaration of solvency as at the date the accounts were to be lodged with the ASIC. I did not have a concern with respect to the solvency of the company from a net asset perspective. In my opinion, supported by the accounts, the company has a surplus of assets over liabilities. My concerns related to short term cash flow.*⁸⁴

- 2.64 The Committee does not know how Mr Wallace could be so concerned about the short-term cash flow of Ironbridge that he would hesitate to sign a declaration of solvency to ASIC, and yet have no qualms about removing over \$1.82 million of this cash flow to satisfy the personal tax debts of himself, his family and their related entities.
- 2.65 The Committee has concerns as to whether the declaration of the dividends by the directors of Ironbridge to cover these outgoing cash flows in 2009 and 2010 was compliant with the *Corporations Act 2001*. Two issues underpin this concern.
- 2.66 Firstly, Mr Wallace confirmed that the dividends were credited against the retained earnings of Ironbridge. This practice was permissible under the *Corporations Act 2001* as long as there were sufficient retained earnings from previous years to cover the

80 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, p. 4.

81 Section 319, *Corporations Act 2001* (Cth).

82 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 2.

83 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 12.

84 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 2.

amount of the dividend. This allowed Mr Wallace to declare a dividend in the 2009 financial year even though the company reported a loss.

- 2.67 However, the Committee is troubled by the accounting practices of Ironbridge in regards to the valuation of its inventory in 2009 and 2010 and the impact this may have had on overstating retained earnings.
- 2.68 Ironbridge's landholdings represent over 98 per cent of the company's inventory.⁸⁵ Under Australian Accountings Standards Board (AASB) accounting standards, inventories are to be measured at the lower of cost or net realisable value as assessed by the directors of a company. If the directors determine that the net realisable value is below cost, this difference is recognised as an impairment expense which reduces profits.⁸⁶
- 2.69 The Committee acquired the services of an independent accounting consultant who examined the 2009 and 2010 accounts of nine ASX-listed property development companies. In 2009, as property prices fell during the Global Financial Crisis, eight of these nine companies registered impairments for inventory write downs. Some of these expenses were considered significant.⁸⁷ When questioned on the practice of other developers, Mr Wallace said that although Ironbridge had considered impairments, '[w]e do not believe that such impairments were common in the industry at the time'.⁸⁸
- 2.70 Ironbridge does not appear to have registered an impairment expense in 2009 and 2010 to reflect a revaluation of its landholdings after property prices had fallen from 2007-2008 levels. It is noteworthy that had a revaluation been registered, a large enough impairment may have reduced retained earnings/profits to the extent that Ironbridge would not have been able to declare a dividend in 2009—the year the company reported a loss.
- 2.71 The primary concern of the Committee, however, relates to the overall financial position of the company when these dividends were declared. Under the *Corporations Act 2001*, a company must be solvent to declare a dividend, and yet Ironbridge declared a dividend in 2009 and 2010 when Mr Wallace had sufficient concern as to be unable to sign a declaration of solvency for lodgement with ASIC. At the hearing on 31 January 2012, Mr Wallace argued that during the 2008-09 financial year when the

85 Special Purpose Financial Report for the Year Ended 30 June 2009, Ironbridge Holdings Pty Ltd, lodged at the Australian Securities and Investments Commission Service Centre, Perth, on 22 September 2011, p. 5; Special Purpose Financial Report for the Year Ended 30 June 2010, Ironbridge Holdings Pty Ltd, lodged at the Australian Securities and Investments Commission Service Centre, Perth, on 22 September 2011, p. 4.

86 BDO Corporate Finance (WA) Pty Ltd, Letter, 7 December 2011 (Closed Evidence).

87 *ibid.*

88 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 8.

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payments were made there ‘was not any great problem’, however there was a lapse of time between when the dividend was declared on 30 June 2009 and when the auditor’s report was required to be signed four months later.⁸⁹ The Committee cannot accept Mr Wallace’s argument, as the declaration of solvency is made in respect of the date of the end of the financial year in question, which in the case of both 2009 and 2010, was the same date as the dividend was declared.

Finding 8

The Committee has concerns that the declaration of dividends by Ironbridge in the financial years 2009 and 2010 may have been in breach of sections 588G and 254T of the *Corporations Act 2001*.

Recommendation 1

The Consumer Protection Division of the Department of Commerce consider the appropriateness of referring the dividend declarations of Ironbridge Holdings Pty Ltd for financial years 2009 and 2010 to the Australian Securities and Investments Commission (ASIC) to investigate for possible breaches of sections 588G and s254T of the *Corporations Act 2001*.

- 2.72 The Committee found Mr Wallace to be a very reticent witness. An example of this was his failure to disclose the declaration of the dividends during his first appearance. When later asked why he had neglected to mention this issue when discussing factors that impacted the company’s cash flow, Mr Wallace replied:

*There was no particular reason. I do not think I was asked and I am not sure that I would have remembered at the time anyway.*⁹⁰

- 2.73 Mr Wallace came to the hearings ill-prepared and apparently unable to answer questions about the operations of his company and his decisions as director. At the second hearing, which focused on the dividend payments in 2009 and 2010, Mr Wallace was unable to answer the majority of the questions and had to take them on notice. The Committee notes that on numerous occasions, Mr Wallace’s answers during the hearing differed from his responses to questions on notice.
- 2.74 Mr Wallace displayed a seeming reluctance to communicate openly and honestly with the Committee. This same attitude has been experienced by residents of The Tuarts, who advised the Committee that Mr Wallace, and other employees of Ironbridge, had communicated poorly with them and broken promises to complete the fencing and landscaping obligations.

89 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, pp. 16-17.

90 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 5.

Chapter 3

Conduct of Ironbridge in The Tuarts Estate

This chapter examines the conduct of Ironbridge in its dealings with residents in The Tuarts, the impact of this conduct, and the outstanding obligations.

- 3.1 Ironbridge has sold 253 lots in the first stages of The Tuarts. There are two categories of lots; Traditional, and Cottage. Each lot was sold with a fencing and landscaping package, with buyers becoming entitled to the packages if their house was completed within 20 months of settlement.

Contractual obligations

- 3.2 The terms of the incentive package were contained in an Annexure to the contract:

Special Condition 1 – Landscaping Package

*If the Buyer completed construction of a dwelling on the Property within 20 months of the Settlement Date, the Seller will, at its expense, provide landscaping (including reticulation) to the value of **\$3150** (inclusive of GST) to the front of the Property. The landscaping will be carried out by a contractor nominated by the Seller. The Buyer must notify the Seller when the dwelling on the Property has been completed.*

Special Condition 2 – Fencing Package

If the Buyer completed construction of the dwelling within 20 months from the Settlement Date, the Seller will arrange for a contractor (nominated by the Seller) to install a wheat coloured HardiFence fibrocement fence to the side and rear at the Sellers expense. The side boundary fencing will not encroach forward of the building line, and will have a nominal height of 1,800mm.⁹¹

- 3.3 The Special Conditions Annexure in contracts for a cottage lot included the following after the above paragraph:

⁹¹ Submission No. 7 from Ms Lisa Dichiera, 26 September 2011, Attachment B, p. 1. The value of the landscaping package was \$3,000 or \$3,150 depending on the size/aspect of the block, and this was reflected in the individual contract.

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At the completion of the construction of the buyer's residence the seller will install visually permeable front fencing to the lot and visually permeable side fencing to corner lots. This fencing will be at the seller's expense and the shape and form will be at the sole discretion of the seller. The fencing will be constructed in accordance with the Shire of Capel's Requirements as notes in the Detailed Area Plan for Lots 523-527. The seller reserves the right to install the fencing subsequent to the sale of the lot and at any time prior to the completion of the residence.⁹²

3.4 The landscaping packages included:

- A section of lawn
- Mulched garden beds, containing a specific set of plants (residents are given a number of 'plant themes' from which they choose one);
- A water-wise irrigation system to service the lawn and garden beds; and
- 1 x feature "Peppermint" tree
- The value of the landscaping packages was either \$3,000 (inc GST) or \$3,150 (inc GST) depending on the specific contract of sale.⁹³

3.5 The contract did not stipulate any date by which the Seller (Ironbridge) was required to have these works completed. When questioned about this at a hearing, Mr Wallace advised that this was not deliberate, because at the time Ironbridge did not anticipate having trouble delivering them.⁹⁴ The Committee does not believe that this omission by Ironbridge was intended to disadvantage buyers.⁹⁵

3.6 Although not stipulated in the contract, buyers were required to complete and lodge application forms for the installation of fencing and landscaping. It appears that this requirement was not always communicated upon settlement, with residents

92 Supplementary Information (Item F), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 1.

93 The following details of the fencing and landscaping packages were taken from Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, pp. 5-6.

94 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 2.

95 Mr Nick Perrignon, Chief Operating Officer for Satterley Property Group, advised the Committee that Satterley's contracts do not provide a required completion date.

sometimes being informed only when they contacted Ironbridge to advise that their dwellings were near completion.⁹⁶

- 3.7 Ironbridge has offered reimbursement to people who wish to make their own arrangements to have the fencing and landscaping completed, however this has also proven problematic, with Ironbridge failing to provide the reimbursement in a timely manner or at all. A number of residents have filed claims with the Magistrates Court in Bunbury and had judgements awarded in their favour, but again, Ironbridge's compliance with these judgements has been poor (see 6.30-6.32 below).

Effect on residents

- 3.8 Ironbridge's failure to provide the contracted services has placed a financial burden on residents who completed the fencing and landscaping themselves in the hope of reimbursement, and on those who have sought to enforce the contract through court action. Additionally, residents of The Tuarts advised the Committee that Ironbridge's failure to fulfil its contractual obligations has resulted in damage to, and a decreased enjoyment of, their homes, as well as a lack of security and safety for their property, children and pets.⁹⁷
- 3.9 The lack of fencing has resulted in safety and security concerns, particularly for those with small children and pets. Residents have also reported incidences of theft from unfenced yards. Without fences to secure back yards and provide protection from erosion, residents were unable to undertake any works on their back yards, effectively leaving them with sandpits both there and in the front yard, where landscaping was supposed to be completed by Ironbridge. This has resulted in damage to the home, particularly flooring, and decreased enjoyment of the property as a whole.

We have two young girls. We moved in there because we were sold the dream, as it were, but in reality when you are living without a fence or any garden, the amount of sand in your house is unbelievable. It is another full-time job cleaning up the sand. You do get stressed—the number of arguments that happen over sand coming in! When it rains the sand becomes some kind of sticky mud, which also gets dragged into the house. Our carpets are ruined. We have sand in every crevice

96 Ms Ciara Lyons, Resident, The Tuarts Estate, Dalyellup, *Transcript of Evidence*, 6 October 2011, p. 9.

97 Submission No. 6 from Ms Victoria Meyer, 21 September 2011, p. 1; Submission No. 10 from Names Withheld, 3 October 2011, pp. 2-3; Mr Douglas Steele, Resident, The Tuarts Estate, *Transcript of Evidence*, p. 3; Mr Michael Taylor, Resident, The Tuarts Estate, *Transcript of Evidence*, p. 6; Mr Jason Schuttloffel, Resident, The Tuarts Estate, *Transcript of Evidence*, p. 10.

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*in the house. It is not just that you do not have a landscape; it is the damage that is also done to the house.*⁹⁸

- 3.10 Residents are also concerned about the decrease in the value of their property because of the lack of fencing and front landscaping, the general unkempt look of the estate and Ironbridge's failure to provide four recreation areas that were advertised.⁹⁹ In their submission, Ms Ciara Lyons and Mr Jason Schuttloffel referred to an advertising brochure put out by Ironbridge which they quoted as stating:

*Within the estate there are over 7 hectares of public open spaces made up of 4 recreational areas.*¹⁰⁰

- 3.11 Ms Lyons and Mr Schuttloffel advised that only one recreation area had been provided to date; a park on Murtin Road which did not include a children's play area or any other facilities. At the hearing on 6 October 2011, Mr Michael Taylor told the Committee that there was meant to be a park opposite his home, but it has not been finished and is used frequently by dirt bike riders who, Ms Lyons added, also ride on the footpaths in the estate.¹⁰¹
- 3.12 On its visit to the estate, the Committee observed that an area on Lewana Approach that was intended to be developed as a recreation area is currently a swamp, which raises concerns about mosquitos and children's safety.
- 3.13 At the hearing on 26 October 2011, Mr Murray asked Mr Wallace whether Ironbridge had met all its obligations to the Shire of Capel, particularly in relation to parks and gardens. Mr Wallace responded: 'Absolutely; every one of them. You do not get title unless you do, with local authority (sic)'.¹⁰² Mr Wallace also advised that there are parklands due to be developed in the next stage of The Tuarts. This may mean that the advertised four recreational areas are for the estate as a whole, not just the first stage.
- 3.14 The Committee also noted that little streetscaping had been completed, and that little maintenance was being performed on that which had. Of particular note was the median strip on Parade Road, the main access road to the estate. During the tour of the estate, Ms Carolynn Hill indicated that someone had recently trimmed the weeds growing in the median strip with a whipper snipper and that prior to the Committee's visit, the weeds had been around a metre high.

98 Mr Michael Taylor, Resident, The Tuarts Estate, *Transcript of Evidence*, 6 October 2011, p. 6.

99 Submission No. 10 from Names Withheld, 3 October 2011, p. 1; Ms Ciara Lyons, Resident, The Tuarts Estate, *Transcript of Evidence*, 6 October 2011, p. 10.

100 Submission No. 2 from Ms Ciara Lyons and Mr Jason Schuttloffel, 29 September 2011, p. 2.

101 Mr Michael Taylor, Ms Ciara Lyons, Residents, The Tuarts Estate, *Transcript of Evidence*, 6 October 2011, p. 7.

102 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 17.

- 3.15 At the hearing on 26 October 2011, Mr Wallace discussed the median strips but did not give a clear answer as to who is now responsible for their maintenance, Ironbridge or the Shire of Capel.¹⁰³ With respect to the median strip on Parade Road, the Committee was given the impression that Ironbridge remains responsible for its maintenance at this stage.
- 3.16 As it is not directly applicable to the Inquiry, the Committee has not sought to make any specific finding or recommendation on the issue of public spaces. However, the Committee is concerned that the failure of Ironbridge to provide advertised facilities and its lack of attention to maintenance of the estate may be indicative of the company's conduct in general.
- 3.17 The Committee has witnessed an increase in concern about the decline in property value during the course of the Inquiry. On 2 February 2012, a resident of The Tuarts posted on the Facebook page *People in Dalyellup, WA waiting for a fence*, that she had received an anonymous letter in her mail box which urged residents to begin taking responsibility for their own front landscaping. The letter requested residents make arrangements to complete their own landscaping in order to lift the appearance of the estate and increase property values.
- 3.18 The response on the Facebook page has been hostile, with one resident imploring the anonymous author to 'go f*** yourself'¹⁰⁴. Residents are outraged and don't believe they should have to spend more of their own money when they have already paid for the landscaping in the purchase price of the lot. Even some residents who have chosen to do their own landscaping were annoyed by this request. In addition to financial and security concerns, Ironbridge's failure to provide the contracted services is now causing conflicts between residents of The Tuarts.

Finding 9

Ironbridge's failure to meet its fencing and landscaping obligations in a timely manner has resulted in damage to homes from sand; caused anxiety regarding the security of unfenced yards; and created friction between residents over the general amenity of the estate and a potential decline in property values.

- 3.19 Table 2 below provides Mr Wallace's estimate of Ironbridge's outstanding obligations as at 11 November 2011.

103 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 18.

104 Facebook, *People in Dalyellup, WA waiting for a fence*, Posted 2 February 2012. Available at: <http://www.facebook.com/pages/People-in-Dalyellup-WA-waiting-for-a-fence/125272460862662>. Accessed on 2 February 2012.

Table 2 Completions and reimbursements of fencing and landscaping as at 11 November 2011¹⁰⁵

Item	Total Eligible	Completed by Ironbridge	Awaiting Completion	Reimbursed (voluntary/court ordered)	Awaiting reimbursement
Fence installation	207				
Cottage lot	11				
Side and rear		8	0	3 (1/2)	0
Front		0	9	0	2
Traditional lot	196	172	2	12 (10/2)	10
Fence Painting¹⁰⁶	207				
Cottage lot	11	0	11	1 (0/1) ¹⁰⁷	
Traditional lot	196	29	156	4 (0/4)	7
Landscaping	207	81	90	20 (16/4)	16

¹⁰⁵ Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, pp. 1, 5-6; Supplementary Information (Item E), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, pp. 1-2; Supplementary Information (Item H), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 1

¹⁰⁶ Mr Wallace advised (Supplementary Information (Item E), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 1) that the company's records for fence painting were not up to date. Mr Wallace added that in addition to the 29 traditional lots with fully painted fences, another 27 are partially painted. No data is provided on cottage lots, so the assumption is made that all 11 are awaiting completion.

¹⁰⁷ Ironbridge advised that at least one cottage lot resident took the matter to court and has been reimbursed for fence painting, however the painting was not completed at the time of the judgement.

Finding 10

Ironbridge's outstanding fencing and landscaping obligations in The Tuarts are significant.

Conduct

- 3.20 The Department of Commerce provided the following assessment of Ironbridge's conduct:

*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 and frequent unfulfilled promises to see work completed.*¹⁰⁸

- 3.21 The Committee agrees with this assessment, which was borne out by the evidence provided by residents of The Tuarts.

Failure to provide contracted services

- 3.22 Ironbridge has failed to provide the contracted services within a reasonable time. This has led residents to pursue a variety of solutions to have their obligations met.
- 3.23 Ms Lisa Dichiera and another couple who requested anonymity, have been unable to bear the cost of completing the works themselves. Ironbridge installed Ms Dichiera's fencing in December 2010, 12 months after she had occupied her home.¹⁰⁹ Ms Dichiera made Ironbridge a final offer to reconcile the matter of fence painting and landscaping out of court, but this was ignored, and in February 2011 she lodged a claim in the Bunbury Magistrates Court and was awarded a default judgement in her favour.¹¹⁰ Despite placing a Property Seizure and Sale Order (PSSO) on a block of land owned by Ironbridge, the company had failed to comply with the judgement by the time she provided a submission to the Inquiry.¹¹¹
- 3.24 The couple who provided evidence anonymously had their fencing installed by Ironbridge 18 months after they put in their application. The fences have not yet been painted and they are still waiting for their landscaping.¹¹²
- 3.25 Other witnesses have done some or all of the work themselves and are waiting reimbursement by Ironbridge either voluntarily or through court action.

108 Submission No. 11 from Department of Commerce, 26 September 2011, p. 6.

109 Submission No. 7 from Ms Lisa Dichiera, 26 September 2011, p. 1.

110 *ibid.*

111 *ibid.*

112 Submission No. 10 from Names Withheld, 3 October 2011, p. 1.

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- 3.26 Mr Schuttloffel and Ms Lyons took possession of their home in February 2010.¹¹³ Their fencing was not completed until February 2011 and they are still waiting for their landscaping and for the fences to be painted.¹¹⁴ Mr Schuttloffel and Ms Lyons made a claim in the Bunbury Magistrates Court for the cost to complete the fence painting and landscaping and were awarded a default judgement in their favour.¹¹⁵ However, despite paying the bailiff to recover their payment in April 2011, Ironbridge had failed to honour the judgement by the time they made a submission to the Inquiry.¹¹⁶
- 3.27 Mr Douglas Steele occupied his home in March 2010 and has completed all the fencing and landscaping works on his property himself.¹¹⁷ Ironbridge advised Mr Steele that he would be reimbursed for the fencing by 30 April 2011, but that has not occurred.¹¹⁸ Similarly, Ms Victoria Meyer elected to complete her own fencing and be reimbursed by Ironbridge. Ms Meyer had the fencing completed one year after she had occupied her home and was reimbursed by Ironbridge one month later.¹¹⁹ Ms Meyer is still waiting for Ironbridge to complete her landscaping.¹²⁰
- 3.28 Ms Carolynn Hill occupied her home in April 2010 and between May and September of that year arranged for contractors to complete the majority of her fencing and landscaping as she was concerned about the safety of her pets and the potential damage to her wood flooring from the sand.¹²¹ Ms Hill was aware of the delays in the provision of these packages and had been attempting to negotiate a completion date with Ironbridge since November 2009.¹²² Despite several letters of demand for reimbursement, Ironbridge did not respond and in November 2010, Ms Hill lodged a claim in the Bunbury Magistrates Court and was awarded a default judgement in her favour.¹²³ Ms Hill placed a PSSO on property owned by Ironbridge and had the bailiff enforce the order, receiving her payment in July 2011.¹²⁴
- 3.29 Ironbridge have failed to complete the contracted fencing and landscaping works in a reasonable timeframe. Ironbridge have also failed to reimburse in a timely manner those residents who chose to make their own arrangements for fencing and landscaping installation. Finally, Ironbridge has also failed to comply promptly with judgements made against it by the Magistrates Court.

113 Ms Ciara Lyons, Resident, The Tuarts Estate, *Transcript of Evidence*, 6 October 2011, p. 2.

114 *ibid.*

115 Submission No. 2 from Ms Ciara Lyons and Mr Jason Schuttloffel, 29 September 2011, p. 1.

116 *ibid.*

117 Submission No. 1 from Mr Douglas and Mrs Thelma Steele, 29 August 2011 p. 1.

118 Mr Douglas Steele, Resident, The Tuarts Estate, *Transcript of Evidence*, 6 October 2011, p. 3.

119 Submission No. 6 from Ms Victoria Meyer, 21 September 2011, p. 2.

120 *ibid.*

121 Submission No. 4 from Ms Carolynn Hill, 16 September 2011, pp. 3, 4, 5.

122 *ibid.*, pp. 2-4.

123 *ibid.*, pp. 4-5.

124 *Ibid.*, p. 5.

3.30 At a hearing on 26 October 2011, Mr Ian Wallace agreed that Ironbridge had failed to provide the contracted services in a reasonable time.¹²⁵ Ironbridge's latest plans to complete the outstanding works are detailed at 6.60-6.61 below.

Finding 11

By Mr Wallace's own admission, Ironbridge has not provided contracted services within a reasonable time.

Poor handling of complaints

3.31 Ironbridge has handled the complaints of residents poorly. The majority of residents of The Tuarts who provided evidence to the Committee commented specifically on this issue. From this evidence, it appears that the main day-to-day contacts for The Tuarts were Mr Nick Wallace, Land Salesman, and Mr Tom O'Rourke, Assistant Project Manager, with Mr Ian Wallace being contacted when inquiries with these gentlemen failed to resolve the issue.

3.32 The residents advised of the following communication problems:

- failure to respond to written or verbal requests;¹²⁶
- failure to provide regular updates to residents on the progress of fencing and landscaping installation;¹²⁷ and
- failure to provide a reason for the delays or providing reasons that were vague or false.¹²⁸

3.33 Mr Ian Wallace does not believe Ironbridge handled complaints poorly, explaining that:

*At times we have had over 100 fences outstanding. The people that have criticised us heavily are no more than 15 or 20 of that. So the majority of people that we have spoken to in the process accept the position that we are in, and they have been dealt with in the course of events.*¹²⁹

125 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 21.

126 Submission No. 2 from Ms Ciara Lyons and Mr Jason Schuttloffel, 29 September 2011, p. 1; Submission No. 6 from Ms Victoria Meyer, 21 September 2011, p. 2.

127 Submission No. 6 from Ms Victoria Meyer, 21 September 2011, p. 2; Submission No. 10 from Names Withheld, 3 October 2011, p. 2.

128 Submission No. 4 from MsCarolynn Hill, 16 September 2011, pp. 3-4; Submission No. 6 from Ms Victoria Meyer, 21 September 2011, p. 2; Submission No. 7 from Ms Lisa Dichiera, 26 September 2011, p. 2; Submission No. 10 from Names Withheld, 3 October 2011, p. 2.

129 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 21.

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- 3.34 Mr Wallace's response does not address the issue of complaint management. Whether 80 per cent of effected residents did not complain is not the point, the point is how Ironbridge handled the 20 per cent that did make complaints. The Committee did not receive any positive account from residents in relation to Ironbridge's handling of complaints. All accounts were similar to that of Ms Meyer, who stated:

Phone calls were not returned & emails were not replied to. The communication was shocking. I was never given an explanation of why there was a delay or an accurate timeframe of when the contract would be fulfilled. To this date we only received 2 official letters from Ironbridge Holdings. At one point in mid January 2011, my frustration & anger had reached a final point and all I wanted was an honest explanation of what the cause of the delay was and an accurate timeframe of when the fencing would be installed. I requested this in an email to Ian Wallace. I still did not receive any explanation, instead was told that "it was fruitless explaining the delays & that no matter what explanation he offered, I would not receive it with an open mind."¹³⁰

- 3.35 As the Inquiry neared its conclusion, the Committee continued to receive correspondence from residents that demonstrated little improvement in Ironbridge's handling of complaints.¹³¹

Finding 12

Ironbridge's conduct has been characterised by poor handling of complaints. Ironbridge's continuing failure to provide an open and timely account of the reasons for the delay in delivering the incentive packages has generated further unnecessary angst for residents of The Tuarts Estate.

Broken promises and undertakings

- 3.36 Poor communication and complaint handling was compounded by broken promises to residents as to when works would be completed. This issue was raised by every resident of The Tuarts who provided a submission or appeared before the Committee.¹³² From the evidence provided by the residents and Consumer Protection,

130 Submission No. 7 from Ms Lisa Dichiera, 26 September 2011, p. 2.

131 Supplementary Information (Item C), Mr Michael Taylor, *Transcript of Evidence*, 6 October 2011; Submission No. 10(A), Names Withheld, 22 January 2012.

132 Submission No. 2 from Ms Ciara Lyons and Mr Jason Schuttloffel, 29 September 2011, p. 1; Submission No. 4 from Ms Carolyn Hill, 16 September 2011, pp. 3-4; Submission No. 6 from Ms Victoria Meyer, 21 September 2011, p. 1; Submission No. 7 from Ms Lisa Dichiera, 26 September 2011, p. 1; Submission No. 10 from Names Withheld, 3 October 2011, p. 2; Mr Douglas Steele, Resident, The Tuarts Estate, Dalyellup, *Transcript of Evidence*, 6 October 2011, p. 3; Mr Michael Taylor, Resident, The Tuarts Estate, Dalyellup, *Transcript of Evidence*, 6 October 2011, p. 5.

which received 33 formal complaints on the issue, the Committee understands that Ironbridge continually provided dates for the completion of fencing and landscaping works, or reimbursement for these works, and failed to adhere to them.

- 3.37 Between June 2009 and October 2010, Consumer Protection undertook a conciliation process with residents and Ironbridge that involved ‘regular, ongoing contact via email and phone with various staff at Ironbridge’ and one meeting with Mr Wallace.¹³³ Of this process, Consumer Protection noted that:

*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.*¹³⁴

- 3.38 Several residents expressed to the Committee their feelings that Ironbridge was being disingenuous with the promised dates, including Mr Michael Taylor, who stated it was a tactic of Ironbridge to provide a date to keep residents quiet.¹³⁵
- 3.39 While this issue was addressed during the hearing with Ironbridge on 26 October 2011, Mr Wallace also chose to provide a detailed response in a supplementary submission. He acknowledged the frustration of residents and explained that it was difficult both to obtain cash and be certain about when it would come in.¹³⁶ Mr Wallace advised that under these circumstances and dealing with understandably angry residents, Ironbridge ‘tried to give specific deadlines to put their minds at ease’ and reiterated that ‘[e]very time a date was quoted to a resident, it was honestly made in the belief it would be met’.¹³⁷

Finding 13

Ironbridge’s poor communication and handling of complaints has been compounded by the company’s unfulfilled commitments to residents and Consumer Protection as to when works would be completed.

133 Submission No. 11 from Department of Commerce, 26 September 2011, pp. 8, 10.

134 *ibid.*, p. 10.

135 Submission No. 2 from Ms Ciara Lyons and Mr Jason Schuttloffel, 29 September 2011, p. 1; Submission No. 10 from Names Withheld, 3 October 2011, p. 2; Mr Michael Taylor, Resident, The Tuarts Estate, *Transcript of Evidence*, 6 October 2011, p. 5.

136 Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 11.

137 *ibid.*

Chapter 4

Incidence in the industry

The Inquiry's terms of reference invited comment on the extent to which the problems experienced by customers of Ironbridge were evident across the wider industry. This chapter reports on other developers who have been the subject of similar complaints.

Recreation Drive Pty Ltd

- 4.1 Apart from The Tuarts, the Committee received complaints from residents of only one other development; Recreation Estate, which is located in Eaton, north of Bunbury, and was developed by Recreation Drive Pty Ltd.
- 4.2 Recreation Drive Pty Ltd (Recreation Drive) was a Perth-based property development company. The company's director, Mr Peter James, described it as a medium-sized second or third-tier developer.¹³⁸ Recreation Drive purchased a parcel of land at Eaton in 2005 for the purpose of subdividing and creating a residential estate.¹³⁹ The lots were released in July 2007, with the purchase price including a fencing and landscaping package to be provided by Recreation Drive.¹⁴⁰
- 4.3 For a number of reasons, which are discussed in detail in paragraphs 4.17 through 4.21 below, Recreation Drive experienced severe financial difficulty and was unable to fulfil all its obligations to residents in relation to the fencing and landscaping package. Recreation Drive went into receivership from 20 August 2010 to 29 October 2010.¹⁴¹ It was due to be struck off ASIC's Register of Companies but the Department of Commerce, intervening on behalf of residents, secured two deferments, the last of which expired on 22 January 2012.¹⁴² The Department of Commerce later advised that a further extension to 8 September 2012 was successfully sought by another party.¹⁴³
- 4.4 The Committee visited Recreation Estate on 6 October 2011 and noted that a large number of the lots were without fences and only a very small number of lots had front landscaping. The estate looks unkempt and many residents do not have privacy from their neighbours. Of the effects that the lack of fencing and landscaping has had on the residents, Ms Jane Ryan-Barnard stated:

138 Mr Peter James, Director, Recreation Drive Pty Ltd, *Transcript of Evidence*, 17 October 2011, p. 4.

139 *ibid*, p. 1.

140 *ibid*, pp. 2, 6-7.

141 Submission No. 11 from Department of Commerce, 26 September 2011, p. 16.

142 *ibid*.

143 Consumer Protection, Department of Commerce, Electronic Mail, 3 February 2012.

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*It is very unpleasant with the weeds but we have to keep them there to keep the sand down. Children are playing in that. It is dangerous without fences for people with kids, pets and that sort of thing. The dogs get picked up by the pounds, they have no way to keep them in.*¹⁴⁴

- 4.5 As with The Tuarts, the residents of Recreation Estate reported to the Committee financial difficulties caused by having to pay for the installation of fencing themselves, as well as a loss of enjoyment of their property and damage to their homes from the sand.¹⁴⁵
- 4.6 Recreation Drive's contract for sale of land or strata by offer and acceptance in Recreation Estate contained a special condition at Annexure C for the provision of a fencing and waterwise landscaping package. The details of the package are as follows:

1. Fencing Package

1.1 Supply and erect "Neetascreen" fencing to the boundary of the Property, except to areas forward of the building line.

1.2 Supply an erect "Neetascreen Plus" fencing instead of the "Neetascreen" that would have normally been constructed under clause 2.1(sic) where the side boundaries of the Buyer's lot are adjoining a road reserve.

1.3 The designated colour for the fence is to be 'teatree', however this may be altered at the absolute discretion of the Seller.

2. Landscaping Package

2.1 "Winter Green" or "Greenless Park" instant roll on turf up to 50% to the front garden forward of the building line but within the lot boundaries.

2.2 "Winter Green" or Greenless Park" instant roll on verge area between the road reserve boundary and the back of the road kerb or at the Seller's absolute discretion an alternative landscape treatment.

2.3 Black jungle mulch or similar to garden bed areas.

144 Ms Jane Ryan-Barnard, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 3.

145 Submission No. 8 from Mr Paul Cain, 21 September 2011, p. 2; Ms Jane Ryan-Barnard, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, pp. 3, 7; Mr Paul Cain, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 7.

2.4 An irrigation system limited to service the front garden and verge area forward of the building set back line, supplied from the main water supply.

*2.5 An assortment of shrubs.*¹⁴⁶

- 4.7 In order to be eligible to receive the package, the buyer was required to complete construction of and occupy the dwelling within 24 months of the settlement date and request commencement of the works within two months of occupation of the dwelling. For the fencing package specifically, the buyer was required to contact the seller's nominated fencing contractor three weeks prior to completion of construction. The Buyer was also required to prepare the lot to specifications set out in the Annexure.

Results

- 4.8 Mr James advised the Committee that Recreation Estate consists of fifty lots plus one large lot.¹⁴⁷ All lots except the large lot have been sold but Mr James did not advise the Committee how many lots had fulfilled the criteria of the contract and were eligible for the fencing and landscaping packages.¹⁴⁸ Mr James stated that approximately 30 per cent of the lots sold received their packages and approximately 10 per cent of those who arranged for completion of the works themselves have been reimbursed, although about three are still to be reimbursed in full.¹⁴⁹
- 4.9 Given the apparent disarray of Mr James' finances and the status of Recreation Drive, the Committee was unable to obtain a definitive assessment of the outstanding works at Recreation Estate.

Conduct of Recreation Drive

- 4.10 The Committee took evidence from two residents of Recreation Estate and the Department of Commerce, Consumer Protection Division. One of the residents, Mr Paul Cain, stated that the behaviour of Mr James and Recreation Drive was characterised by a lack of respect in not responding to phone calls or letters, failing to keep promises and giving false hope to residents that something would be done to address the issue.¹⁵⁰
- 4.11 The construction of Mr Cain's home was completed by May 2010 and he notified the fencing and landscaping contractor according to the terms of the contract.¹⁵¹ Mr Cain

146 Supplementary Information, Mr Paul Cain, 6 October 2011, p. 14.

147 Mr Peter James, Director, Recreation Drive Pty Ltd, *Transcript of Evidence*, 17 October 2011, p. 6.

148 *ibid.*, pp. 1, 9.

149 Supplementary Information (Item A), Recreation Drive Pty Ltd, *Transcript of Evidence*, 17 October 2011, p. 1.

150 Submission No. 8 from Mr Paul Cain, 21 September 2011, p. 2.

151 *ibid.*, p. 1.

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was advised by the subcontractors that the works had been put on hold.¹⁵² Mr Cain also received a letter from Mr James that explained the financial difficulties that the company was experiencing but noted that he was to receive additional funds from a significant settlement at the end of May or in early June.¹⁵³ However, works did not recommence and when Mr Cain attempted to contact Mr James by phone and letter he did not receive a reply.¹⁵⁴

- 4.12 The first response Mr Cain received was to a notice of default sent by his solicitor, but the response came from James Corp Investments Pty Ltd (James Corp), not Recreation Drive.¹⁵⁵ Mr James is also a director of this company. James Corp advised that Recreation Drive 'had been placed in receivership and that the directors of James Corp Investments felt a moral obligation to complete the commitments made by Recreation Drive and would fulfil these obligations when its financial situation allowed'.¹⁵⁶ Ms Ryan-Barnard told the Committee that after May none of the residents saw that letter and that she wasn't aware there was a problem until she and others started sending emails and making phone calls to find out the reason for the delay.¹⁵⁷
- 4.13 Mr Cain had not had any communication from James Corp since that time, but Mr James visited the estate to speak to residents in March 2011.¹⁵⁸ At this meeting, Mr James led residents to believe that reimbursements and installation of fencing and landscaping would happen soon. Mr James told residents he hoped to achieve this within six months.¹⁵⁹ While there are indications that a small number of residents received reimbursements or fencing within this period, the majority of works, particularly landscaping, remain outstanding.
- 4.14 Mr Cain eventually arranged for the installation of his boundary fences at his own expense. He sent receipts to Mr James for reimbursement in May 2010 and Mr James responded that he would deposit funds into Mr Cain's account by the end of the month, however this did not occur.¹⁶⁰ Mr Cain pursued the matter through the Magistrates Court and had a Property Seizure and Sale Order (PSSO) placed on property owned by Recreation Drive, but this order was not successful.¹⁶¹

152 Mr Paul Cain, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 1.

153 *ibid.*, p. 5.

154 *ibid.*, p. 1.

155 *ibid.*, pp. 1-2.

156 *ibid.*

157 Ms Jane Ryan-Barnard, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 5.

158 Mr Paul Cain, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 2.

159 Supplementary Information (Item A), Ms Jane Ryan-Barnard, *Transcript of Evidence*, 6 October 2011, p. 3.

160 Mr Paul Cain, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 2.

161 *ibid.*

- 4.15 Ms Ryan-Barnard took a different tactic, stating that she was ‘just noisy’ and ‘harassed Peter James’.¹⁶² Ms Ryan-Barnard provided a number of emails to the Committee which indicate that over a period of at least two months up until the end of May 2011 she emailed Mr James at least once a week to check on his progress and attempt to ascertain a date for hers and other’s fencing.¹⁶³ She was successful in that three houses, including hers, received their fences, but Ms Ryan-Barnard said that ‘[f]rom then on, he has gone silent and not continued with the fences’.¹⁶⁴ Additionally, Ms Ryan-Barnard had to follow up with Mr James about a month after her fences were installed because he had failed to pay the contractor.¹⁶⁵ As of 13 October 2011, the contractor had still not received payment.¹⁶⁶
- 4.16 The Department of Commerce advised that it had received five complaints against Recreation Drive from 22 July 2010 to 25 July 2011 relating to the company’s failure to provide the contracted fencing and landscaping package.¹⁶⁷ The Department attempted conciliation, however Mr James was unwilling to settle the complaints due to Recreation Drive’s financial difficulties and the complaint files were closed.¹⁶⁸

Extenuating factors

- 4.17 Mr James appeared before the Committee at a hearing on 17 November 2011 and was asked to explain Recreation Drive’s financial difficulties and the reasons why it had not been able to meet its obligations to residents.
- 4.18 Mr James advised that there were significant delays in the planning approvals process during 2006. The senior planner from Dardanup Shire Council left, causing a three to four week delay.¹⁶⁹ When the development application was received by the WA Planning Commission, the Minister noted that it had not been properly advertised by the Dardanup Shire Council and Recreation Drive had to restart the process.¹⁷⁰ Mr James stated that this resulted in a delay of eight to ten months which stretched to 12 months because of the Christmas break.¹⁷¹ The market was still strong when Recreation Drive released the lots in July 2007 but Mr James stated that three interest rate increases and a federal election before Christmas of that year really turned the

162 Ms Jane Ryan-Barnard, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 4.

163 Supplementary Information, Ms Jane Ryan-Barnard, 6 October 2011.

164 Ms Jane Ryan-Barnard, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 3.

165 Supplementary Information, Ms Jane Ryan-Barnard, *Transcript of Evidence*, 6 October 2011, pp. 2-3.

166 *ibid.*, pp. 1.

Submission No. 11 from Department of Commerce, 26 September 2011, p. 16; Supplementary Information (Item A), Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 1.

168 Submission No. 11 from Department of Commerce, 26 September 2011, p. 16.

169 Mr Peter James, Director, Recreation Drive Pty Ltd, *Transcript of Evidence*, 17 October 2011, pp. 1, 6.

170 *ibid.*

171 Mr Peter James, Director, Recreation Drive Pty Ltd, *Transcript of Evidence*, 17 October 2011, pp. 1-2.

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project and they lost every sale but about eight, and did not sell another lot for 18 months.¹⁷²

4.19 Mr James lost his brother to suicide in early 2009.¹⁷³ His brother had been a director of Recreation Drive and a 'very integral part' of the business, and Mr James told the Committee that this loss caused him to lose focus and take his eye off the business for 6-9 months.¹⁷⁴

4.20 In 2009 the First Home Owners Grant was boosted to \$21,000 which brought more buyers into the market, but a first home buyer often took three to four months to get loan approval. Mr James advised the Committee that some first home buyers did not get their approvals, and Recreation Drive had to sell the lot again.¹⁷⁵ This process meant that settlements for the first home buyers' market did not start to come through until late 2009 or early 2010.¹⁷⁶ Additionally, Recreation Drive was now selling the lots for \$125,000-\$135,000, compared to the original price of \$165,000-\$175,000.¹⁷⁷ This drop in sale price of approximately 25 per cent, was also experienced by Ironbridge.

4.21 Mr James told the Committee that because of the long period without sales, interest rates became an issue and Recreation Drive went into penalty rates.¹⁷⁸ As with Ironbridge, Recreation Drive's financier began to hold more of the settlement funds to meet the loan. Mr James stated that the bank would not allow them to settle with any excess and were charging significant rollover fees.¹⁷⁹ This left Recreation Drive without funds to complete fencing and landscaping works or make other necessary repayments.

172 Mr Peter James, Director, Recreation Drive Pty Ltd, *Transcript of Evidence*, 17 October 2011, p. 2.

173 *ibid.*

174 *ibid.*, pp. 2, 4.

175 *ibid.*, p. 2.

176 *ibid.*, p. 5.

177 *ibid.*, p. 2.

178 *ibid.*

179 *ibid.*, pp. 3, 4.

Status report

4.22 From the Committee's tour of the estate on 6 October 2011 and from the information provided by Mr James, the Committee assesses that there is a significant amount of fencing and landscaping outstanding at Recreation Estate. Mr James advised that there are still around 40 lots that require landscaping and some level of fencing and estimated that this would cost approximately \$250,000.¹⁸⁰

4.23 Unfortunately, when Mr James appeared before the Committee, his company was effectively insolvent. Mr James advised the Committee that he had lost many of his personal assets, including a house and a farm and that he was starting again.¹⁸¹ Mr James stated:

'...I am not sure where or how long I can continue to pretend that I can pay for the fences and landscaping at Rec Estate. I think there is somewhere along the line you draw a line in the sand and go, "Well, I'm sorry, but that's it; the cupboard's bare."¹⁸²

4.24 The Committee acknowledges the personal circumstances that contributed to Mr James' failure to provide the contracted services at Recreation Estate. However, the Committee feels that Mr James left little margin for error in his financial arrangements. Additionally, the Committee believes that when Recreation Drive was forced to cut the prices of lots in 2009/10, it should have removed the fencing and landscaping package, an assessment Mr James agrees with.¹⁸³ Failure to do so represented a gross error in judgement by Mr James, which has left his customers with what appears to be a plausible case for breach of contract.

4.25 Regrettably for residents, the ATO commenced winding-up proceedings against Recreation Drive on 15 December 2011 claiming unpaid debts of \$1,048,961.57 plus costs. On 21 February 2012, the Federal Court consented to the ATO's application and a liquidator was appointed. Recreation Estate residents now have little or no recourse to reimbursement or fulfilment of their contracts.

180 Mr Peter James, Director, Recreation Drive Pty Ltd, *Transcript of Evidence*, 17 October 2011, pp. 8-9.

181 *ibid.*, p. 7.

182 *ibid.*

183 *ibid.*, pp. 2, 9.

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Finding 14

A second developer, Recreation Drive Pty Ltd, has been the subject of formal complaints to Consumer Protection over its failure to provide fencing and landscaping works as part of an incentive package offered to consumers.

An accurate assessment of the outstanding works could not be ascertained due to the apparent disarray of the company's financial records and the small number of submissions to the Inquiry from residents. It was estimated by the company's director, Mr Peter James, that 40 lots required landscaping and some form of fencing valued at approximately \$250,000 in total.

As the company has now been declared insolvent, residents have little or no recourse to reimbursement or fulfilment of outstanding obligations.

Finding 15

Despite Mr James' personal circumstances, he made several gross errors in judgement with the operations of Recreation Drive Pty Ltd that have left affected residents with little or no recourse. Additionally, Mr James handled complaints poorly and did not communicate effectively with residents.

Olympic Holdings Pty Ltd

- 4.26 Since 17 June 2011, the Department of Commerce had received five complaints against Olympic Holdings Pty Ltd/Olympic Property Group regarding this company's 'failure to provide fencing, landscaping and/or white goods packages in accordance with the terms of the sale of land contracts'.¹⁸⁴ Olympic was the developer of a 39-lot estate in Gosnells and all lots were entitled to fencing, with some others also eligible for landscaping and/or whitegoods/entertainment packages.¹⁸⁵ The Committee did not receive any submissions from residents of this estate.
- 4.27 Consumer Protection liaised with Olympic's Director, Mr Peter Bacich, on this matter. Mr Bacich provided the Department with a list of 16 lots that had not received their fencing, landscaping or whitegoods packages.¹⁸⁶ In its submission the Department said it believed that around 10 had now had their fencing installed, but none of the 11 entitled to the whitegoods package had received it.¹⁸⁷
- 4.28 Mr Bacich has advised affected residents that, due to the effect of the Global Financial Crisis, he would be unable to 'complete the balance of the contract with regard to the supply of the landscaping, fencing and white goods packages'.¹⁸⁸ As discussed in

¹⁸⁴ Submission No. 11 from Department of Commerce, 26 September 2011, p. 17.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

paragraphs 6.50 to 6.56 below, Consumer Protection decided to make an attempt to pursue remedies on behalf of residents in the Magistrates Court. Unfortunately, the ATO lodged a wind-up application before Consumer Protection could present its case. On 15 February 2012, the Federal Court consented to the ATO's application and Olympic was declared insolvent, leaving affected residents with little recourse.

Other developments

- 4.29 The Department Commerce and its Consumer Protection Division indicate that a total of eight complaints of a similar nature have been made against three other developers not related to Ironbridge, Recreation Drive, or Olympic since May 2008: Hocking Land Company Pty Ltd (five complaints); Mammoth Nominees Pty Ltd (two); and A & S Nominees WA Pty Ltd (one). Only the complaint against A & S Nominees WA Pty Ltd failed at conciliation and the company has since been deregistered.¹⁸⁹
- 4.30 Of the remaining complaints, three of those against Hocking Land Company Pty Ltd (also known as HL Pty Ltd) have emerged since 1 January 2012. The latest advice from Consumer Protection is that HL Pty Ltd is under administration. However, Mammoth Nominees Pty Ltd—which has the same director—has made an undertaking to complete HL Pty Ltd's outstanding work. One complainant has confirmed that work had been scheduled for the end of February.¹⁹⁰

Is this a systemic issue?

*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.*¹⁹¹

- 4.31 The Department of Commerce advised that the 'history of complaints to Consumer Protection about developers tends to reflect the wider economic climate'.¹⁹² Consumer Protection received its first complaint about a developer failing to deliver contractually agreed works in June 2009, which coincided with a softening of the real estate market in Western Australia.¹⁹³ Conversely, when the market was strong in 2005/06, Consumer

189 Supplementary Information (Item A), Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 1; Consumer Protection, Department of Commerce, Electronic Mail, 8 February 2012.

190 Consumer Protection, Department of Commerce, Electronic Mail, 8 February 2012.

191 Submission No. 11 from Department of Commerce, 26 September 2011, p. 1.

192 *ibid.*

193 *ibid.*, p. 3.

Chapter 4

Protection received complaints about developers rescinding sales contracts for blocks of land or 'off-the-plan' properties and then offering them for resale at a higher price.¹⁹⁴

- 4.32 The Department of Commerce told the Committee that more than 10,000 blocks of land are sold in Western Australia each year and the number of complaints received by Consumer Protection about property developers was relatively small by comparison.¹⁹⁵ This was confirmed by Satterley Property Group and the Urban Development Institute of Australia (WA) (UDIA).
- 4.33 Satterley, who offer fencing and landscaping packages with the majority of the 2,000-odd new lots they settle every year, informed the Committee that they had received 'zero complaints about non delivery of items offered under incentive packages'.¹⁹⁶ Further, Satterley stated that their Chief Operating Officer, Mr Nick Perrignon, had seen a very low incidence of complaint or difficulty with the supply or completion of fencing and landscaping packages in his 24 years in the industry.¹⁹⁷
- 4.34 UDIA conducted a survey of the major Western Australian development companies that offer incentive packages. The survey results indicate that the delivery of incentive packages has been without incident or complaint over many years, with one company having delivered them without issue on over 10,000 lots over a 16 year period.¹⁹⁸ The Committee recognises that this survey is not independent, however it received no contrary evidence to suggest this is not a reasonably accurate assessment.
- 4.35 It appears that the successful delivery of incentive packages in Western Australia is at least partly attributable to the benefits they provide to both developer and resident. Satterley told the Committee that developers have a strong interest in ensuring the satisfaction of buyers because they will refer their family, friends and peers.¹⁹⁹ UDIA agrees, stating that:

The rationale behind incentives is based on a sound market principle where a seller demonstrates the quality of his product. The quality and timing of fencing and landscaping impact on the appearance of an estate and property values. ... Market forces almost demand the early

194 Submission No. 11 from Department of Commerce, 26 September 2011, p. 1.

195 *ibid.*

196 Submission No. 3 from Satterley Property Group Pty Ltd, 8 September 2011, p. 2.

197 *ibid.*, p. 2.

198 Submission No. 5 from Urban Development Institute of Australia (WA), 21 September 2011, p. 2.

199 Submission No. 3 from Satterley Property Group Pty Ltd, 8 September 2011, p. 1;

Mr Nick Perrignon, Chief Operating Officer, Satterley Property Group Pty Ltd, *Transcript of Evidence*, 17 October 2011, p. 2.

*delivery of incentives and, in a competitive market, word of non-compliance would quickly spread and negatively impact on sales.*²⁰⁰

- 4.36 The buying power of a developer allows them to contract professional fencing and landscaping for a reasonable price.²⁰¹ Even though this is included in the purchase price of the lot, it is likely to be more cost effective to the buyer than contracting the services themselves. The provision of these services by the developer may also reduce the potential for conflict between neighbours over fencing arrangements.
- 4.37 During the Satterley/UDIA hearing, Ms Debra Goostrey, Chief Executive Officer of UDIA, expressed her view that some of the smaller developers who do one-off developments may be less concerned about sales in future stages of a development, but that these developers were unlikely to offer incentives packages.²⁰²
- 4.38 For medium-sized developers the issue might not be so clear cut. Mr Wallace advised the Committee that he felt he had no option but to offer the incentives package at The Tuarts because a similar package offered by the neighbouring Satterley development created buyer expectation.²⁰³ While the Committee understands that this might cause pressure for developers like Ironbridge, it is of the view that each individual company must take into account its financial circumstances and make a responsible choice regarding the provision of incentives packages.
- 4.39 Ms Goostrey and Mr Perrignon also discussed with the Committee the effect of a change of policy by the Australian Prudential Regulation Authority (APRA). APRA has directed the major banks to reduce their exposure to land development, which has reduced opportunities for small-medium developers.²⁰⁴ These developers previously supplied a significant proportion of the lots in the Perth metropolitan market. It may be that the inability of these developers to participate in the market will effect supply, but as Ms Goostrey pointed out, the large developers are able to ‘turn on additional stages and meet the market demands’.²⁰⁵
- 4.40 The Committee remains concerned about the failure of Ironbridge and Recreation Drive to provide the contracted services and is disappointed in the conduct of these two companies towards effected residents. However, the evidence presented to the

200 Submission No. 5 from Urban Development Institute of Australia (WA), 21 September 2011, p. 3.

201 Mr Nick Perrignon, Chief Operating Officer, Satterley Property Group Pty Ltd, *Transcript of Evidence*, 17 October 2011, p. 2.

202 Ms Debra Goostrey, Chief Executive Officer, Urban Development Institute of Australia (WA), *Transcript of Evidence*, 17 October 2011, pp. 9-10.

203 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, pp. 3-4.

204 Mr Nick Perrignon, Chief Operating Officer, Satterley Property Group Pty Ltd, *Transcript of Evidence*, 17 October 2011, pp. 2-3.

205 Ms Debra Goostrey, Chief Executive Officer, Urban Development Institute of Australia (WA), *Transcript of Evidence*, 17 October 2011, p. 4.

Chapter 4

Committee indicates that the issue is confined to the actions of a very small number of small to medium-sized developers. Therefore, it is the Committee's view that the late or non-delivery of incentives packages by property developers is not a systemic issue in Western Australia.

Finding 16

In addition to complaints about Ironbridge Holdings Pty Ltd and Recreation Drive Pty Ltd, Consumer Protection has received thirteen complaints about four other developers since May 2008.

Finding 17

Based on the evidence received, it is the Committee's view that the late or non-delivery of incentive packages by land developers is not a systemic issue in Western Australia.

Chapter 5

Redress options for buyers - conciliation

The next three chapters consider the redress options that have been available to residents who have experienced late or non-delivery of fencing and landscaping items from problem developers. These chapters consider whether changes are required to improve the access to justice for affected homeowners.

The conciliation process

- 5.1 When contractual disputes emerge between consumers and business, it is usually the case that the parties will try to settle disputes independently via direct negotiation. If these negotiations reach an impasse, formal complaints can be lodged with the Consumer Protection Division (Consumer Protection) of the Department of Commerce (DoC), which can then act as an informal mediator.
- 5.2 The department, or more explicitly the Commissioner for Consumer Protection (the Commissioner), was originally granted this authority under the *Consumer Affairs Act 1971*.²⁰⁶ This authority now exists under the *Fair Trading Act 2010*,²⁰⁷ which came into effect on 1 January 2011, to apply the Australian Consumer Law as a law of Western Australia.
- 5.3 Consumer Protection attempts conciliation in the first instance 'because it is the most effective and least costly way to handle the many and varied complaints we receive from consumers'.²⁰⁸ Conciliation is commonly used 'in cases where there is a contractual dispute rather than evidence of an offence'.²⁰⁹ During the process, Consumer Protection negotiates separately with each party. The objective is to guide parties to an agreed position reflecting their respective rights and responsibilities. Consumer Protection advises parties that 'we negotiate for what you are entitled to receive by law. We also aim to stop any unfair or illegal conduct'.²¹⁰

206 Section 16(1)(c) *Consumer Affairs Act 1971* (Western Australia).

207 Section 56(1)(c) *Fair Trading Act 2010* (Western Australia).

208 Department of Commerce, 'Complaints and conciliation: a guide for consumers', February 2010, p. 1. Available at: http://www.commerce.wa.gov.au/consumerprotection/PDF/Publications/Complaints_and_conciliation.pdf. Accessed on 18 November 2011.

209 Submission No. 11 from Department of Commerce, 26 September 2011, p. 20.

210 Department of Commerce, 'Complaints and conciliation: a guide for consumers', February 2010, p. 2. Available at: http://www.commerce.wa.gov.au/consumerprotection/PDF/Publications/Complaints_and_conciliation.pdf. Accessed on 18 November 2011.

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- 5.4 It is important to note that conciliation does not guarantee a successful outcome for aggrieved consumers. Unlike the court system, Consumer Protection cannot order or direct parties during the course of conciliation.²¹¹
- 5.5 In the event that agreement is not reached during conciliation, complainants can still pursue remedies through legal action.²¹² Moreover, the Commissioner is empowered to further investigate the dispute and may, in certain circumstances, institute legal proceedings on behalf of a complainant.
- 5.6 Residents of affected estates who contributed to this Inquiry generally felt let down by what they saw as the impotence of Consumer Protection when attempting to resolve complaints against developers through conciliation:

*[T]hey gave me the impression ... they felt there was not anything they could really do and they encouraged me to proceed through the legal pathway.*²¹³

*While they were sympathetic to our issue of lacking fencing around our home, they were unable to resolve our complaint against Ironbridge Holdings Pty Ltd.*²¹⁴

*Despite every effort ... to ensure that outstanding contractual entitlements were honoured by Ironbridge it became evident that Consumer Protection could not achieve a successful outcome for us...*²¹⁵

- 5.7 While some residents acknowledged the efforts made, there was a recurring view that, 'additional power needs to be given to Consumer Protection to protect customers like us and be able to help us better'.²¹⁶ Equally disconcerting was the sentiment that residents 'did not see them as ... a body that could help us achieve the outcome we wanted'.²¹⁷
- 5.8 Consumer Protection's testimony to the Committee lends weight to these arguments.

211 Submission No. 11 from Department of Commerce, 26 September 2011, p. 7.

212 *ibid.*, pp. 20-21.

213 Mr Paul Cain, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 3.

214 Submission No. 2 from Ms Ciara Lyons and Mr Jason Schuttloffel, 29 September 2011, p. 1.

215 Submission No. 4 from Mr Ian Butcher and Ms Carolynn Hill, 16 September 2011, p. 5.

216 Submission No. 10 from Names Withheld, 3 October 2011, p. 5. Others saying Consumer Protection lacked adequate power include: Submission No. 2 from Ms Ciara Lyons and Mr Jason Schuttloffel, 29 September 2011, p. 1; Submission No. 4 from Mr Ian Butcher and Ms Carolynn Hill, 16 September 2011, p. 5.

217 Ms Ciara Lyons, Resident, The Tuarts, *Transcript of Evidence*, 6 October 2011, p. 5.

Track record with conciliation

- 5.9 As problems started to emerge in The Tuarts, Consumer Protection opted to pursue conciliation as it could not identify any breaches of relevant consumer protection legislation.²¹⁸ Consumer Protection advised that the first three complaints against Ironbridge, lodged in 2009, were successfully conciliated. Between 19 January and 24 March 2010, a further 11 complaints were received and a Consumer Protection Officer was assigned to the issue to ensure a consistent complaints handling process was adopted. By this time, some complainants had been waiting over a year to receive their completed incentive package items from Ironbridge.²¹⁹
- 5.10 On 19 March 2010, senior officers from Consumer Protection met with Mr Ian Wallace who provided assurances that work would commence within the next two weeks and that all complaints would be resolved as funds became available.²²⁰
- 5.11 Over the next eight months, Ironbridge broke several undertakings given to Consumer Protection and The Tuarts' residents, as the number of complaints against the company rose sharply. Any work the company took in response to the complaints was 'sporadic and short-lived'.²²¹
- 5.12 By October 2010, Consumer Protection resolved to cease conciliation and to start helping residents prepare civil actions against Ironbridge for breach of contract in the Magistrates Court. This was now seen as 'the most efficient way of forcing the developer to meet its financial obligations'.²²² On 21 October 2010, senior Consumer Protection officers met with 26 complainants from The Tuarts and took them through a pro-forma package for lodging claims with the Magistrates Court. (The Magistrates Court process will be examined in the next chapter of the Report.)
- 5.13 Between June 2009 and October 2010, at least 33 complaints were lodged with Consumer Protection against Ironbridge. Table 3 below shows that only seven complainants had their issues fully resolved via conciliation (see shaded rows)—an unflattering record of the effectiveness of the process as it then stood.

218 Submission No. 11 from Department of Commerce, 26 September 2011, p. 7. The Committee understands the assessment made by Consumer Protection at this time. The issue will be explored in more detail in Chapter Seven.

219 Submission No. 11 from Department of Commerce, 26 September 2011, pp. 7-8.

220 *ibid.*, p. 8.

221 *ibid.*, p. 10.

222 *ibid.*

Chapter 5

Table 3 Outcome of complaints against Ironbridge (June 2009 – October 2010): Consumer Protection²²³

OUTCOME OF COMPLAINT	TOTAL
Ironbridge to proceed with works/reimbursement and if not file can be re-opened	2
Fencing done/reimbursed	2
Landscaping done/reimbursed	2
Fencing and landscaping done/reimbursed	3
Fencing done/reimbursed but not landscaping	3
Proceeding with court action	13
Ironbridge to proceed with work, otherwise complainant advised to take legal action	8

- 5.14 Conciliation with some of the other developers identified in this Inquiry had even lower success rates. Despite a number of promises made by Mr Peter James to expedite stalled works in Recreation Estate, Consumer Protection confirmed that a total of six attempts at conciliation against Mr James' companies were ultimately unsuccessful.²²⁴ As Mr James was unwilling to settle complaints because of the financial difficulties his main company, Recreation Drive Pty Ltd, was facing, complainants were again given advice on how to seek remedies through the Magistrates Court.²²⁵
- 5.15 Most recently, the director of Olympic Holdings Pty Ltd demonstrated a similar reluctance to negotiate. Mr Peter Bacich wrote to affected owners in his development nine days after meeting with Consumer Protection in August 2011 to advise that his company would likely be entering liquidation and outstanding incentive package commitments could not be honoured.²²⁶ Given the recalcitrance of this director, and the imminent collapse of the company, Consumer Protection decided to contact all affected residents with a view to conducting a Magistrates Court action on their behalf.²²⁷
- 5.16 Based on the data provided, the Committee understands the frustrations endured by customers of Ironbridge and Recreation Drive regarding the effectiveness of the conciliation process. However, it is important to acknowledge that conciliation—while undoubtedly cost-effective when successful—is not cited as a panacea to all consumer

²²³ Submission No. 11 from Department of Commerce, 26 September 2011, p. 11.

²²⁴ Of the six complaints five were against Recreation Drive Pty Ltd, while one was against Altai Investments Pty Ltd, another company directed by Mr James. See: Supplementary Information (Item A), Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 1; Mr David Hillyard, Director of Retail and Services, Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 8.

²²⁵ Submission No. 11 from Department of Commerce, 26 September 2011, p. 16; Supplementary Information (Item A), Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 1.

²²⁶ Submission No. 11 from Department of Commerce, 26 September 2011, pp. 17-18.

²²⁷ *ibid.*, p. 18.

disputes. Consumer Protection does advise that civil remedies through the courts may need to be pursued when conciliation is unsuccessful.²²⁸

Finding 18

Conciliation should not be seen as the panacea to all consumer-to-business disputes. Even so, the success rate for conciliation with troubled property developers has been particularly low.

5.17 The Committee has considered whether the department acted swiftly enough in the case of Ironbridge in abandoning conciliation attempts and advising consumers to seek legal action. Consumer Protection argued that it had to weigh the consideration of recommending the pursuit of civil remedies against ‘the constant demonstrations of some will’²²⁹ that were being offered to senior officers at regular intervals. Given the costs and timing involved with pursuing civil actions in the Magistrates Court (to be explored in the next chapter), the department’s approach at the time appears reasonable.

5.18 In hindsight, with the lack of credibility associated with Mr Wallace’s undertakings now clearly evident, the decision to persist with conciliation looks much more questionable.

Improvements to the conciliation process

5.19 The effectiveness of conciliation with the developers in question was hamstrung by the inability of Consumer Protection to ensure that the undertakings made by Ironbridge (and Recreation Drive in its earlier discussions) were enforceable.

5.20 This shortcoming allowed both developers to break undertakings with impunity. Ultimately, Recreation Drive chose to walk away from conciliation while Ironbridge met only some of its commitments in a manner rightly described by Consumer Protection as ‘tortuously’ slow.²³⁰

5.21 Fortunately, under the new Australian Consumer Law (ACL), which came into effect on 1 January 2011 (see 5.2 above), Consumer Protection now has expanded capacities when negotiating customer complaints.²³¹

228 Department of Commerce, ‘Complaints and conciliation: a guide for consumers’, February 2010, p. 2. Available at: http://www.commerce.wa.gov.au/consumerprotection/PDF/Publications/Complaints_and_conciliation.pdf. Accessed on 18 November 2011.

229 Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 16 October 2011, p. 6. See also, pp. 5 and 11.

230 Mr Stephen Meagher, Director of Property Industries, Department of Commerce, *Transcript of Evidence*, 16 October 2011, p. 4.

231 Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 16 October 2011, p. 6.

Chapter 5

- 5.22 While undertakings made during conciliation are still not automatically enforceable, the Commissioner can now accept a written undertaking and apply to the court for an order if the Commissioner deems that a breach of that undertaking has occurred.²³² If satisfied of the breach, the court can make any or all of the following orders:
- a) an order directing the person to comply with that term of the undertaking;
 - b) an order directing the person to pay to the Commonwealth, or to a State or Territory, an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
 - d) any other order that the court considers appropriate.²³³
- 5.23 The Commissioner confirmed that under the ACL, Consumer Protection now has the option of seeking an agreement to a timeline for completing works that could become 'formalised and enforceable'.²³⁴ Under the provisions listed in parts (b) and (c) above, Consumer Protection is empowered to seek compensation from a developer who has reneged on commitments made during conciliation.
- 5.24 Any concern that this new provision will result in developers simply refusing to make undertakings or enter conciliation should be mitigated by another new provision in the ACL. Under section 62, any person engaging in trade or commerce must guarantee to supply goods or services 'in a reasonable time; where no timeline is stipulated on a contract'.²³⁵
- 5.25 This section now provides a statutory guarantee,²³⁶ which creates a range of civil actions under other sections of the ACL.²³⁷ Under section 267 a consumer can take court action requiring the supplier to remedy the failure within a reasonable time and recover damages if there is non-compliance.

232 Section 218(1) and (3), Australian Consumer Law (WA) *Fair Trading Act 2010* (Western Australia).

233 *ibid.*, Section 218(4).

234 Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 16 October 2011, p. 6.

235 Section 62 Australian Consumer Law (WA) *Fair Trading Act 2010* (Western Australia).

236 Statutory guarantees are directly enforceable as a breach of the Australian Consumer Law. See, Commonwealth of Australia, "The Australian Consumer Law: A guide to provisions", November 2010. Available at: http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_guide_to_provisions_November_2010.pdf. Accessed 18 January 2012.

237 Sections 267-270. See Submission No. 11 from Department of Commerce, 26 September 2011, p. 23.

- 5.26 A breach of section 62 also appears to allow the Commissioner to apply to the court on behalf of a group of injured parties to seek compensation orders,²³⁸ including ‘an order directing the respondent to pay the injured person[s] the amount of the loss or damage’.²³⁹
- 5.27 Under the ACL, parties subject to complaints similar to that of Ironbridge who refuse conciliation will still be legally bound to supply goods in a reasonable time. While the definition of “reasonable” will depend on the nature of the services provided,²⁴⁰ the industry standards provided by competitors are likely to be taken into account.
- 5.28 Having already admitted that it has previously failed to deliver its incentive package commitments within a reasonable time,²⁴¹ it will be particularly incumbent on Ironbridge (and others) to ensure obligations on new projects are honoured in a manner consistent with that of its competitors in neighbouring estates.

The conciliation process in the future

- 5.29 For those seeking greater powers for Consumer Protection in the conciliation process, these legislative changes should prove to be a welcome development. The Committee is satisfied that the loopholes that had previously existed, and had worked to the benefit of the abovementioned developers, appear to have been significantly diminished.
- 5.30 If parties refuse to enter conciliation, or break undertakings given during conciliation, consumers and the Commissioner now have more effective options for directly seeking redress through the courts in an expeditious manner; although it is important to note that these powers are not retrospective and only apply to contracts signed after 1 January 2011.
- 5.31 Of all the developers that have been subject to earlier complaints with Consumer Protection, only Ironbridge (and Mammoth Nominees) intend continuing to trade. Mr Wallace has indicated that his company will still offer fencing and landscaping packages on lots it is now pre-selling in the next stage of The Tuarts.²⁴²

238 Section 237(1)(b), Australian Consumer Law (WA) *Fair Trading Act 2010* (Western Australia).

239 *ibid.*, Section 243(e).

240 Commonwealth of Australia, “Consumer guarantees: A guide for consumers and legal practitioners”, Australian Consumer Law, 2010, p.19. Available at: http://www.consumerlaw.gov.au/content/the_acl/downloads/consumer_guarantees_guide.pdf. Accessed on 18 January 2012.

241 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 21.

242 *ibid.*, p. 4.

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5.32 Meanwhile, Consumer Protection has endorsed the Australian government's guidelines for enforcing the ACL.²⁴³ These guidelines state that regulators 'will give enforcement priority to matters that demonstrate one or more' of a range of factors including:

- a) conduct that suggests a pattern of non-compliance by the trader or is indicative of a risk of future misconduct;
- b) conduct of public interest or concern; and
- c) a significant impact on market integrity.

5.33 The earlier conduct of Ironbridge, which has led to this Inquiry, satisfies the first two of these criteria. While the issue of non-compliance with incentive packages remains isolated, further incidences may also start to impinge on the integrity of the broader market.

5.34 Given these circumstances, the ongoing operations of Ironbridge should be actively monitored by Consumer Protection. Should similar complaints emerge on contracts signed after 1 January 2011, the Commissioner should act swiftly using her expanded powers to either seek and enforce undertakings from Ironbridge, or to instigate a group action for failing to supply contracted items in a reasonable time.

Finding 19

Residents of The Tuarts and Recreation Estate have felt let down by what they saw as the impotence of Consumer Protection in achieving satisfactory outcomes through conciliation.

Finding 20

Under the provisions of the Australian Consumer Law, which came into effect on 1 January 2011, Consumer Protection will be able to seek to have undertakings made at conciliation enforceable by the court. This should lead to improved outcomes in future interventions.

Finding 21

Under section 62 of the Australian Consumer Law, which came into effect on 1 January 2011, developers who refuse to enter conciliation will still be legally bound to supply contracted services within a reasonable time. This should lead to improved outcomes in future interventions.

²⁴³ Commonwealth of Australia, "Compliance and enforcement: How regulators enforce the Australian Consumer Law", Australian Consumer Law, 2010, p. 5. Available at: http://www.consumerlaw.gov.au/content/the_acl/downloads/compliance_enforcement_guide.pdf Accessed on 18 January 2012.

Recommendation 2

The Consumer Protection Division of the Department of Commerce should actively monitor the ongoing operations of Ironbridge Holdings Pty Ltd. Should similar complaints emerge against the company for contracts signed after 1 January 2011, the Commissioner for Consumer Protection should act swiftly using her expanded powers to either seek and enforce undertakings from Ironbridge, or to instigate a group action for failing to supply contracted items within a reasonable time.

Chapter 6

Legal remedies – breach of contract

Background

- 6.1 As stated at 5.5 above, complainants in business/consumer transactions still have the option of seeking remedy through the legal system should conciliation fail to provide a satisfactory outcome. If the terms of a contract appear to have been breached, remedies are available under contract law. Actions for breach of contract can proceed in a variety of jurisdictions from the Magistrates Court through to the Federal Court depending on the size of the claim and the applicable law.²⁴⁴
- 6.2 For smaller claims, one of the most common remedies is to sue for breach of contract in the Magistrates Court. The purpose of such civil actions²⁴⁵ is to seek monetary damages to compensate the claimant for the sum lost as a result of the breach.²⁴⁶ The introduction of small claims jurisdictions in Magistrates Courts in the 1970s was an implicit acknowledgement by governments that the cost of litigation through the formal legal system deterred many individuals from seeking justice for contract breaches involving smaller amounts.²⁴⁷
- 6.3 Consumer Protection recommended the option of pursuing small claims through the Magistrates Court to customers of Ironbridge and Recreation Drive in 2010 when it became apparent that conciliation was failing.²⁴⁸

Magistrates Court claims – process

Lodgement of a claim

- 6.4 A Small Disputes Division within the Magistrates Court of Western Australia deals with breach of contract claims within a set jurisdictional limit. The process varies according to the amount being sought. Minor Case Claims can be lodged where the value of debt

244 The Law Handbook. 'Court or Tribunal Help', 1 July 2010. Available at:

<http://www.lawhandbook.org.au/handbook/ch12s04s03.php>. Accessed on 15 November 2011.

245 Civil law aims to protect the rights of individuals in private matters, whereas criminal law deals with breaches of law against individuals and society as a whole. Civil actions often result in fines or financial restitution, as opposed to criminal penalties, which can include convictions, steeper fines and custodial sentences. Civil actions require a lower burden of proof, that being proof on the balance of probabilities. By contrast, successful criminal actions require the prosecution to demonstrate proof beyond reasonable doubt.

246 The Law Handbook, 'Court Remedies', 1 July 2010. Available at:

<http://www.lawhandbook.org.au/handbook/ch12s04s05.php>. Accessed on 15 November 2011.

247 B. Pentony, S. Graw, J. Lennard and D. Parker., *Understanding Business Law*(4th Ed), LexisNexis Butterworths, Chatswood, 2009, p. 276.

248 Submission No. 11 from Department of Commerce, 26 September 2011, pp. 9-10, 16.

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or damages does not exceed \$10,000. General Procedure Claims can be lodged for amounts up to \$75,000.²⁴⁹ Legal representation is usually not permitted with Minor Case Claims and is not compulsory for General Procedure Claims. Still, Consumer Protection recommends claimants seek independent legal advice before pursuing either process.²⁵⁰

- 6.5 Applications for these claims can be lodged in person at the local Magistrates Court (including Bunbury) or submitted electronically via the Magistrates Court website. A lodgement fee applies and the amount varies according to the size of the claim: \$78.70 for claims not exceeding \$10,000; \$200.20 for amounts over \$10,000 and not exceeding \$50,000; and \$319.20 for amounts over \$50,000.²⁵¹
- 6.6 The defendant has 14 days from the date they are served with the claim to respond. Defendants can choose to admit to the claim, provide a notice of intention to defend the claim, or ignore the claim. If the claim is ignored, the complainant can apply to have a “default judgement” awarded against the defendant. Once a default judgement is awarded, an order is made against the defendant requiring the immediate payment of the judgement debt.²⁵²

Enforcing a judgement

- 6.7 If payment of the judgement debt is not forthcoming, the successful claimant—now referred to as the “judgement creditor”—can request to have the payment order enforced. The most direct form of enforcement is a Property (Seizure and Sale) Order (PSSO). A PSSO authorises the bailiff to enter the premises of a “judgement debtor” to seize and sell as much real or personal property as is necessary to satisfy the judgement debt.
- 6.8 Certain personal items are exempt from being seized, including: essential medical items; clothing; kitchen appliances; bedroom furnishings; tools and professional equipment each up to a value of \$1,250. Real estate can be seized, but can only be sold if the bailiff determines that the sale of personal items will not be sufficient to recover the amount owed.²⁵³

249 Sections 3-4 *Magistrates Court (Civil Proceedings) Act 2004* (Western Australia).

250 Submission No. 11 from Department of Commerce, 26 September 2011, p. 21.

251 Magistrates Court of Western Australia, ‘Court Fees’, 18 January 2012. Available at: http://www.magistratescourt.wa.gov.au/_files/Magistrates_Court_Fees.pdf. Accessed on 3 February 2012.

252 The judgement debt can comprise the claim amount, plus costs and interest. See, Magistrates Court of Western Australia, ‘Fact Sheet 2 – How to Commence a General Procedure Claim’, 20 April 2010; ‘Fact Sheet 3 – How to Commence a Minor Case Claim’, 20 April 2010; and ‘Fact Sheet 10 – When Served With a Claim’, 20 April 2010. Available at: http://www.magistratescourt.wa.gov.au/C/civil_matters.aspx. Accessed on 14 November 2011.

253 Unless otherwise stated, information on PSSOs has been sourced from Magistrates Court of Western Australia, ‘Fact Sheet 23 – Enforcing a Judgement’ and ‘Fact Sheet 27 – Property

- 6.9 Significantly, a judgement debtor can retain possession of the seized items until they are sold and can apply to the court to have a PSSO suspended (including for an indefinite period).²⁵⁴
- 6.10 A PSSO is effective for 12 months but can be extended by application to the Magistrates Court before the original order expires. It costs \$66.00 to apply to have a judgement enforced and \$117.70 to have the bailiff serve a PSSO for judgement debts up to \$75,000.
- 6.11 Other methods of enforcement are available to judgement creditors beyond a PSSO. A creditor can apply to have a Means Inquiry conducted where the Court determines whether the judgement debtor has the means to pay the judgement debt. If a judgement debtor fails to attend a Means Inquiry, a warrant will be issued for their arrest to appear before the Court. Conversely, a judgement creditor who fails to attend a Means Inquiry can have the costs awarded against them.²⁵⁵
- 6.12 Once a Means Inquiry has been conducted, the Court may issue a Time for Payment Order or an Instalment Order to enforce the judgement. A Time for Payment Order again commits the judgement debtor to pay the debt in full immediately, or on a date set by the Court. Alternatively, an Instalment Order compels the debtor to pay the debt via instalments determined by the Court.²⁵⁶
- 6.13 If the judgement debtor disobeys a Time for Payment Order, or does not meet two or more payments of an Instalment Order, the judgement creditor can apply to have a Default Inquiry initiated. A Default Inquiry can lead to a judgement debtor being imprisoned for up to 40 days if the Court determines that the defendant had the means to pay the debt and had no reasonable excuse for not doing so. Importantly, the custodial sentence does not extinguish the debt.²⁵⁷
- 6.14 The fee structures for pursuing an enforcement option using PSSOs or a Means Inquiry are included in Table 4 and Table 5 below.

(Seizure and Sale) Order: Information for the Judgement Creditor', 3 June 2010 and 13 May 2011. Available at: http://www.magistratescourt.wa.gov.au/C/civil_matters.aspx. Accessed on 14 November 2011.

254 Sections 15(1)-(4) and 78(2), *Civil Judgements Enforcement Act 2004* (Western Australia).

255 Magistrates Court of Western Australia, 'Fact Sheet 24 – Means Inquiry: Information for the Judgement Creditor', 3 June 2010. Available at: http://www.magistratescourt.wa.gov.au/C/civil_matters.aspx. Accessed on 19 November 2011.

256 Magistrates Court of Western Australia, 'Fact Sheet 23 – Enforcing a Judgement', 3 June 2010. Available at: http://www.magistratescourt.wa.gov.au/_files/Civil_factsheet_24.pdf. Accessed on 2 February 2012.

257 Sections 88-90 *Civil Judgements Enforcement Act 2004* (Western Australia).

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Magistrates Court claims – applied

Consumer-initiated claims

- 6.15 The pros and cons of seeking claims in the Magistrates Court are reflected in the contrasting experiences of the complainants pursuing Ironbridge and Recreation Drive.
- 6.16 From 2010, Consumer Protection advised affected residents of both estates to lodge claims with the Magistrates Court after conciliation efforts repeatedly stalled (Ironbridge), or failed outright (Recreation Drive). To enable residents of Recreation Estate to pursue their claims, Consumer Protection twice succeeded in having the Australian Securities and Investments Commission (ASIC) defer its plans to strike Recreation Drive off ASIC's Register of Companies. The last of these deferments was due to expire on 22 January 2012, but a further extension to 8 September 2012 was successfully sought by another party.²⁵⁸
- 6.17 When discussing the Ironbridge case, DoC has argued that the Magistrates Court process was 'a cost-effective' option, particularly given the general size of the claims, the relatively small lodgement cost and the ability to lodge the claims in Bunbury.²⁵⁹ It appears that a large number of residents, and some contractors, took this option.
- 6.18 The Committee can confirm that at least 49 small claims have been lodged against Ironbridge since 2009. Twenty-eight claims were lodged in the Magistrates Court in Bunbury and 16 in Perth.²⁶⁰ None of the claims in the Perth Magistrates Court were from residents of The Tuarts. Of the 28 claims lodged in Bunbury, 21 were awarded default judgements, two were discontinued, four had no indication that the claim had proceeded to a judgement, and for one Ironbridge has partially admitted to the claim.²⁶¹
- 6.19 Of the 21 default judgements, all but one was awarded to a resident of The Tuarts. The claim to which Ironbridge has partially admitted was also lodged by a Tuarts resident. This makes a total of 21 Tuarts residents awaiting payment of a judgement debt.
- 6.20 The Bunbury Magistrates Court records indicate that by the time Mr Wallace appeared before the Committee on 26 October 2011, nine out of these 21 residents had received payment. The amounts settled ranged from \$3,875.50 through to \$19,095.05, while the time taken to receive payments ranged from 45 days in one instance through to an

258 Submission No. 11 from Department of Commerce, 26 September 2011, p. 16; Consumer Protection, Department of Commerce. Electronic Mail, 3 February 2012.

259 Submission No. 11 from Department of Commerce, 26 September 2011, p. 21.

260 There were a further three claims lodged at Joondalup, and one each at Midland and Northam. EISC Secretariat inspection of Magistrates Court records: Perth, 17 January 2012; Bunbury, 27 January 2012.

261 EISC Secretariat inspection of Magistrates Court records: Bunbury, 27 January 2012. EISC Secretariat inspection of Magistrates Court records: Bunbury, 27 January 2012.

average of seven months from the judgement date for the majority. On each occasion, the claimants had obtained a PSSO.²⁶² The recipient of one of these payments, Ms Carolyn Hill, advised the Committee that:

*Going through Consumer Protection and then the legal process, although that is stressful, removed the immediate stress of liaising with someone who was lying to me all the time.*²⁶³

- 6.21 However, Ms Hill qualifies these benefits by warning that even if you are awarded a successful judgement, it can still be a protracted exercise recovering the money. Ms Hill and her partner, Mr Ian Butcher—who completed their fencing and landscaping independently before seeking reimbursement—received their full claim amount plus costs on 29 July 2011. This was nearly eight months after their default judgement was awarded.²⁶⁴
- 6.22 In the early stages of this Inquiry, the Committee received testimonies about the protracted nature of the Magistrates Courts claims process from two of the 12 Tuarts residents who were still awaiting payment of their default judgement sums.
- 6.23 Ms Lisa Dichiera had not received her \$7,500 judgement debt from Ironbridge to cover fence painting and landscaping seven months after lodging a PSSO against a block of land owned by the company in February 2011.²⁶⁵ Ms Ciara Lyons and Mr Jason Schuttloffel had been waiting a similar period of time when they appeared before the Committee.²⁶⁶
- 6.24 Mr Wallace was questioned about his failure to pay Ironbridge’s outstanding court orders repeatedly throughout the Inquiry. He confirmed that he had not sought a suspension order,²⁶⁷ but that he had been negotiating ‘payment extensions and alternative arrangements’²⁶⁸ for these outstanding judgements with the Bailiff’s office.
- 6.25 Unfortunately for Ms Dichiera, Ms Lyons and Mr Schuttloffel, they were part of a list of judgement creditors, many of whom had placed a PSSO²⁶⁹ over a similar range of

262 EISC Secretariat inspection of Magistrates Court records: Bunbury, 27 January 2012.

263 Ms Carolyn Hill, Resident, The Tuarts, *Transcript of Evidence*, 6 October 2011, p. 9.

264 Submission No. 4 from Mr Ian Butcher and Ms Carolyn Hill, 16 September 2011, pp. 4-5.

265 Submission No. 7 from Ms Lisa Dichiera, 21 September 2011, p. 1.

266 Submission No. 2 from Ms Ciara Lyons and Mr Jason Schuttloffel, 29 September 2011, p. 1; Mr Jason Schuttloffel, Resident, The Tuarts, *Transcript of Evidence*, 6 October 2011, p. 9.

267 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 11.

268 Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 10.

269 The Committee was later able to confirm that by the time these residents received that advice from Baycorp, there were seven other Tuarts Estate residents who had also lodged PSSOs. Other PSSOs may have been lodged against the company in Perth and other jurisdictions, but these

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Ironbridge's assets. Anytime Ironbridge made a payment against these PSSOs, funds were distributed according to the order in which the original judgements were made.²⁷⁰ Earlier in 2011, when the list of outstanding judgement creditors was longer, Baycorp advised Ms Dichiera that she was 3rd in line for payment, while Ms Lyons and Mr Schuttloffel were then 19th.²⁷¹ Had the Bailiff sold the seized assets at this time, it is unlikely that all enforcement orders could have been settled, as the total of the claims being sought may have exceeded the value of the seized assets.

- 6.26 This order of payment process used by Baycorp is consistent with the relevant provisions of the *Civil Judgements Enforcements Act 2004*, which regulates the use of PSSOs.²⁷²
- 6.27 Clearly, a contributing factor to the delayed payments—and outstanding payments—has been the number and nature of concurrent claims being lodged against Ironbridge. As noted at 6.18 above, Ironbridge has had nearly 50 small claims lodged against it since 2009. These claims are in addition to two wind-up applications that Ironbridge has faced in the Federal Court in 2010 and 2011.²⁷³ The latter of these two applications was lodged by the Australian Tax Office, which was seeking \$3,355,000 in unpaid taxes. The wind-up proceedings have since been settled by consent of the parties²⁷⁴ and it is quite feasible that Mr Wallace gave priority to resolving these matters. Failure to achieve settlement in both cases would likely have led to the company being placed in liquidation.
- 6.28 On 20 January 2012, a new wind-up application was lodged against Ironbridge in the Supreme Court of Western Australia. The Plaintiff on this occasion is APH Contractors Pty Ltd, an earth and civil works company that undertook work on The Tuarts subdivision. APH are seeking unpaid debts of \$2,745,544.54 and the matter is still before the Court.
- 6.29 What remains unfathomable is that the directors of Ironbridge paid money out of the company to meet their personal tax liabilities and those of their family members, rather than meet their contractual obligations to the residents of The Tuarts and other creditors. It is likely that the backlog of Magistrates Court claims would not have

could not be confirmed. EISC Secretariat inspection of Magistrates Court records: Bunbury, 27 January 2012.

270 Submission No. 7 from Ms Lisa Dichiera, (Supplementary Material – Closed Evidence), 21 September 2011.

271 Submission No. 7 from Ms Lisa Dichiera, (Supplementary Material – Closed Evidence), 21 September 2011; Ms Ciara Lyons, Resident, The Tuarts, *Transcript of Evidence*, 6 October 2011, p. 4.

272 Section 73 *Civil Judgement Enforcement Act 2004* (Western Australia).

273 Submission No. 11 from Department of Commerce, 26 September 2011, pp. 12-13.

274 Submission No. 11 from Department of Commerce, 26 September 2011, p. 12; Supplementary Information (Item B), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 1.

eventuated had the obligations to these customers and creditors been given appropriate priority.

- 6.30 Throughout the Inquiry Mr Wallace did not give due acknowledgement to the fact that default judgements require immediate payment. When pressed by the Committee on 26 October 2011 about the outstanding Magistrates Court orders against his company, Mr Wallace said they would be settled ‘within a couple of weeks’ after the Waste Water Pumping Station was completed and commissioned.²⁷⁵
- 6.31 At his next appearance, on 8 December 2011, Mr Wallace said that the commissioning had been slightly delayed and that the Court orders would all be settled by Christmas.²⁷⁶ On 24 January 2012, Mr Wallace wrote to the Committee advising that all outstanding judgements against Ironbridge had finally been settled on 18 January, almost four weeks later than planned. Documentary evidence was tendered to confirm this claim on 10 February 2012.
- 6.32 The Committee sought to independently verify these payments. It can confirm that a further nine outstanding residents’ claims have now been settled by Mr Wallace. These include Ms Dicheria’s and the claim lodged by Ms Lyons and Mr Shuttloffel (see 6.23 above). All of these claims were enforced with a PSSO.²⁷⁷ It appears that three judgement debts remain outstanding. One relates to the partial admission where proceedings appear to be continuing. However, the other two appear to relate to default judgements that may not have been enforced using a PSSO.²⁷⁸ While the Committee acknowledges that Mr Wallace has settled most of the outstanding judgements, it, like the residents of The Tuarts, is extremely frustrated by Mr Wallace’s inability to honour his own deadlines. Mr Wallace is urged to check his records to confirm the status of these remaining claims (as included in Appendix Eight), and ensure that any outstanding default judgements are promptly paid.

Finding 22

Mr Wallace failed to give due recognition to the fact that default judgements from the Magistrates Court require immediate payment.

- 6.33 Without detracting from the frustrations endured by Ironbridge’s customers, the circumstances for residents seeking judgment debts from companies like Recreation

275 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 12. Mr Wallace confirmed after the hearing that the total number of outstanding orders was 15 (13 at Bunbury and two at Perth). Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, Supplementary Information (Item D), (Closed Evidence), *Transcript of Evidence*, 26 October 2011.

276 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 10.

277 EISC Secretariat inspection of Magistrates Court records: Bunbury, 27 January 2012; Bunbury Magistrates Court, Electronic Mail, 23 February 2012.

278 EISC Secretariat inspection of Magistrates Court records: Bunbury, 27 January 2012.

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Drive are much bleaker. Before his company was declared insolvent, Mr James confirmed that there were six Magistrates Court orders out against his company, which 'is basically insolvent'.²⁷⁹ There is one lot of land left in the company's name and it is mortgaged. The mortgagee is a secured creditor who will rank in front of any outstanding Magistrates Court claims.

Finding 23

Now that Recreation Drive Pty Ltd has entered into liquidation, the company is unlikely to satisfy any outstanding judgement debts that were awarded against it by the Magistrates Court.

- 6.34 Frustration with the delays in enforcing Magistrates Court judgements was compounded for several residents by the expense and complexity of the process.²⁸⁰ Notwithstanding their eventual receipt of payment, Ms Hill and Mr Butcher said:

*This has the potential to be a very expensive and protracted experience for a consumer who may not have the financial resources or business acumen to take the necessary legal action.*²⁸¹

- 6.35 Ms Lyons and Mr Schuttloffel, both school teachers, added that 'for us middle-income first home buyers it was almost too expensive to get our own money back'.²⁸² Ms Lyons and Mr Schuttloffel opted against placing a PSSO against Ironbridge's landholdings. They were deterred by the added expense of having to conduct a title search to find the relevant properties from which to lay claim and then having to register their PSSO with Landgate.²⁸³
- 6.36 While the \$78.70 initial lodgement cost of a Minor Case or General Procedure Claim is relatively inexpensive, costs can mount depending on whether, and to what extent, an applicant wishes to enforce the judgement (see Table 4 and Table 5 below).

279 Mr Peter James, Director, Recreation Drive Pty Ltd, *Transcript of Evidence*, 17 October 2011, pp. 1, 9.

280 See Mr Paul Cain, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 2; Submission No. 10 from Names Withheld, 3 October 2011, p. 3.

281 Submission No. 4 from Mr Ian Butcher and Ms Carolynn Hill, 16 September 2011, p. 6.

282 Ms Ciara Lyons, Resident, The Tuarts, *Transcript of Evidence*, 6 October 2011, p. 6.

283 *ibid.*

Table 4 Estimated Costs – Minor Case Claim (Scenario One)²⁸⁴

Minor Case Claim (not exceeding \$10,000) – enforced with PSSO – Individual claimant		
Item	Item Cost	Cumulative Cost
Filing Fee - Minor Case Claim	\$78.70	\$78.70
Bailiff Service Fee (optional - can be served by claimant)	\$51.59	\$130.29
Enforcement - PSSO Application	\$66.00	\$196.29
PSSO Bailiff Service Fee	\$117.70	\$313.99
Title Search for, and Registration of, PSSO against landholdings - (Landgate)	\$184.00	\$497.99

Table 5 Estimated Costs – Minor Case Claim (Scenario Two)

Minor Case Claim (not exceeding \$10,000) enforced via Instalment or Time for Payment Order → Default Inquiry – Individual Claimant		
Item	Item Cost	Cumulative Cost
Filing Fee – Minor Case Claim	\$78.70	\$78.70
Bailiff Service Fee (optional - can be served by claimant)	\$51.59	\$130.29
Enforcement – Means Inquiry Application	\$66.00	\$196.29
Means Inquiry Summons – Bailiff Service Fee (optional – can be served by claimant)	\$51.59	\$247.88
Warrant for Arrest (if debtor fails to attend)	\$182.60	\$430.48
Time for Payment / Instalment Order application	\$0	\$430.48
Bailiff Service Fee	\$0	\$430.48
Default Inquiry Application	\$0	\$430.48
Default Inquiry Summons – Bailiff Service Fee (optional – can be served by claimant)	\$51.59	\$482.07
Warrant for Arrest (if debtor fails to attend)	\$188.10	\$670.17

6.37 Some residents of The Tuarts speculated that Ironbridge was relying on the inability of people to commit extra funds to these processes to avoid meeting its contractual responsibilities.²⁸⁵ While the Committee cannot verify this claim, it nonetheless recognises that some people may be unable to commit extra funds to pursuing Ironbridge through the Magistrates Court, or be unwilling to persist with a process that, in the case of Recreation Drive, is not guaranteed to recoup their monies owed.

²⁸⁴ Data in Tables 4 and 5 was confirmed with the Perth Magistrates Court via email correspondence on 3 February 2012.

²⁸⁵ Submission No. 10 from Names Withheld, 3 October 2011, p. 3.

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- 6.38 The Committee acknowledges that there are limitations surrounding the Magistrates Court claims process, particularly its protracted nature and the difficulty of recovering payment promptly from a judgement debtor. However, with the issue of land developers failing to provide incentive packages being relatively rare, and with the Australian Consumer Law now providing greater powers to improve conciliation outcomes (see 5.19 to 5.28 above), the Committee does not believe changes to the small claims process are warranted at this time.
- 6.39 As it stands, the Magistrates Court offers an alternative path for consumers—a Means Inquiry—where an assessment of the problem developer’s capacity to pay the debt could have been determined by the Court. Had this path been pursued, and the Court issued a Time for Payment or Instalment Order, Mr Wallace (and indeed Mr James) might have acted more promptly to meet their contractual obligations. Under these orders, the tardiness exhibited by both gentlemen in complying with their PSSOs, might ultimately have been ruled as a contempt of the Court. In these circumstances, the Court has the power to imprison guilty parties for up to 40 days.²⁸⁶ Despite the potential merit of this process, the Committee could not find any evidence to indicate that it had been pursued.
- 6.40 With this in mind it is important that DoC reviews the information it provides about the Magistrates Court process and how that information is communicated to consumers. The department confirmed that once the complaints with Ironbridge began to mount throughout 2010 it prepared an information package to assist residents in making applications to proceed with legal action. This material included the DoC publication *Buying land or property off-the-plan*, relevant Fact Sheets from the Magistrates Court, and a pro-forma application form outlining the basic details required to lodge a claim.²⁸⁷
- 6.41 While the information provided in these packages was quite detailed, it dealt mainly with the application and lodgement process. There was little indication as to the complexity of the further steps involved should the debtor not immediately comply with the court order.
- 6.42 DoC has stated that Consumer Protection can ‘provide consumers with advice and information on how to enforce their rights through the courts if judgement payments are not made’.²⁸⁸ Yet the frustration expressed by The Tuarts and Recreation Estate

²⁸⁶ Section 90 *Civil Judgement Enforcement Act 2004* (Western Australia).

²⁸⁷ Department of Commerce, *Briefing with Committee*, 3 August 2011.

²⁸⁸ Submission No. 11 from Department of Commerce, 26 September 2011, p. 22.

residents²⁸⁹ suggests that they were not adequately informed of the complexities involved and the various options available if immediate payment is not forthcoming.

- 6.43 DoC is now urged to revise the information it provides in this respect to reflect experiences faced by residents of The Tuarts and Recreation Estate. This will allow consumers to make a more informed decision as to whether, in what way, and to what extent, they might pursue the Magistrates Court process.

Finding 24

Residents of The Tuarts and Recreation Estate expressed frustration with the costs, delays, and complexities involved in seeking reimbursement for breach of contract in the Magistrates Court.

Finding 25

With the issue of land developers failing to provide incentive packages being relatively rare, and with the Australian Consumer Law providing greater powers to improve conciliation outcomes, the Committee does not believe changes to the small claims process are required at this time.

Recommendation 3

The Consumer Protection Division of the Department of Commerce revise the information it provides to consumers about making claims in the Magistrates Court to ensure that consumers are aware of all the steps involved and options available to enforce a judgement.

Claims initiated by Consumer Protection

- 6.44 DoC confirmed that the Commissioner can, subject to Ministerial approval, initiate civil proceedings such as a Magistrates Court claim for breach of contract on behalf of residents. DoC added that the residents of The Tuarts had a potential civil action for breach of contract, hence the department's decision in October 2010 to assist in the preparation of claims.²⁹⁰
- 6.45 The Committee questioned the department as to why it did not choose to institute proceedings on behalf of residents after it grew frustrated with Ironbridge's approach to conciliation. The Commissioner explained the rationale of the department, which considered the lengthy periods of conciliation that some residents had already endured:

289 See, for example, Mr Douglas Steele, Resident, The Tuarts Estate, *Transcript of Evidence*, 6 October 2011, p. 5; Mr Paul Cain, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 2.

290 Submission No. 11 from Department of Commerce, 26 September 2011, p. 21.

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[G]iven 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 ... \$76 involved in a Magistrates Court claim,²⁹¹ 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 [dollar] threshold that we would then be applying. So it just appeared to be the most effective way.²⁹²

6.46 The Commissioner added:

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.²⁹³

6.47 The Committee accepts this explanation, especially given that the decision to use public funds to act on behalf of groups of consumers had to satisfy public interest criteria. These included: whether the conduct of a trader had been 'unreasonable on a number of occasions'; whether affected consumers faced immediate financial loss; and whether the problem was indicative of a market trend.²⁹⁴

6.48 Certainly the conduct of Mr Wallace had been unreasonable. Yet it is arguable that the other public interest criteria had not been satisfied. Ironbridge customers were not facing immediate financial loss, but were confronted with delays in having works completed or receiving prompt financial reimbursement. More significantly, the complaints against Ironbridge (and later Recreation Drive), while increasing in number, were not indicative of a systemic problem in the property development industry. Importantly, the manipulation of Ironbridge's accounts by Mr Wallace using questionable dividend payments had also not come to light at this time.

6.49 While the decision of the Commissioner was reasonable under these circumstances, it did, in hindsight, enable Ironbridge to delay addressing the lower-profile smaller individual claims, while the company attended to the wind-up proceedings it faced in

291 The Magistrates Court have raised this fee to \$78.70 since the Commissioner appeared before the Committee.

292 Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 16 October 2011, p. 11.

293 *ibid.*, p. 4.

294 Department of Commerce, 'Complaints and conciliation: a guide for consumers', February 2010, p. 3. Available at: http://www.commerce.wa.gov.au/consumerprotection/PDF/Publications/Complaints_and_conciliation.pdf. Accessed on 18 November 2011.

the Federal Court. Perhaps a sizeable group claim conducted by the Commissioner, and the detrimental publicity this would have generated, may have compelled Ironbridge to attend with greater urgency to its responsibilities to residents in The Tuarts.

Finding 26

While the Commissioner for Consumer Protection has the power to initiate a civil action on behalf of residents for breach of contract in the Magistrates Court, the Committee understands the Commissioner's decision not to proceed against Ironbridge Holdings Pty Ltd in 2010.

- 6.50 It is important to note that Consumer Protection took a more pro-active approach when dealing with the complaints that emerged against Olympic Holdings Pty Ltd (Olympic) in Gosnells in the second half of 2011.
- 6.51 Within three months of receiving its first complaint against Olympic, Consumer Protection had conducted a title search with Landgate to identify all residents who may have been affected by the developer. Each resident then received a letter from the department inviting them to a meeting where the attendees were given the option of having the Commissioner "step into their shoes" to 'pursu[e] remedies on their behalf in the Magistrates Court'.²⁹⁵ Those who could not attend received a letter giving them until 19 October 2011 to declare their intention.²⁹⁶ In the end, eighteen residents agreed to the proposal.²⁹⁷
- 6.52 The Commissioner admitted that the approach with Olympic's customers aimed to be 'more engaged and proactive ... to ensure that they are fully enabled and assisted by the department'.²⁹⁸ This changed approach appeared to be partly driven by the realisation from previous experiences that residents are deterred by a lack of familiarity with the Magistrates Court process. As the department's Director of Retail Services, Mr David Hillyard, conceded:

295 Submission No. 11 from Department of Commerce, 26 September 2011, pp. 17-18.

296 *ibid.*, p. 18.

297 Mr Stephen Meagher, Director of Property Industries, Department of Commerce, *Transcript of Evidence*, 26 September 2011, p. 4.

298 Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 4.

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*[A]s 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.*²⁹⁹

- 6.53 However, the primary factor driving the department in this instance may well have been the uncertain state of the company and the recalcitrant attitude of its director:

*[T]he reason 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 not interested. We're going into receivership".*³⁰⁰

- 6.54 The department indicated that it was trying to get Olympic into court before the ATO sought to have the company wound up.³⁰¹ However, before this could be done, Ministerial approval had to be obtained and the applications of all participating residents had to be prepared.
- 6.55 Notwithstanding the urgency shown by Consumer Protection in this instance, it was not able to get the matter to court before the ATO's wind-up application was heard on 29 November 2011. While the \$40,000 claim lodged by the ATO is small (especially in comparison to the amount owed to residents) the Federal Court has approved the application and a liquidator has been appointed.³⁰² Consumer Protection has received consent from eleven residents to present their individual claims to the liquidator as unsecured creditors. The latest report from the liquidator is that these residents are unlikely to receive any payment.³⁰³
- 6.56 The approach with which Consumer Protection pursued Olympic Holdings was appropriate given that the company showed little intention of meeting its obligations to customers. In this instance, the risk of immediate financial loss to the customer was acute and the decision of the department to act on their behalf was warranted.

299 Mr David Hillyard, Director of Retail Services, Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 6.

300 Mr Stephen Meagher, Director of Property Industries, Department of Commerce, *Transcript of Evidence*, 26 September 2011, p. 4.

301 *ibid.*, pp. 5-6.

302 Commonwealth Courts Portal, Deputy Commissioner of Taxation v Olympic Holdings Pty Ltd ACN 009 127 404: File No WAD489/2011, 29 November 2011. Available at: <https://www.comcourts.gov.au/public/esearch>. Accessed on 10 February 2012; Consumer Protection, Property Industries Directorate, Email Correspondence, 6 February 2012.

303 Consumer Protection, Property Industries Directorate, Electronic Mail, 6 February 2012.

- 6.57 The recent experiences with Consumer Protection demonstrate that actions against problem developers in the Magistrates Court have greater probability of success if they are initiated before the company is on the verge of insolvency. That consumers need to be facing immediate financial loss before a group action can be taken, reflects a flaw in the public interest criteria.
- 6.58 Given the history and increasing profile of the Ironbridge case, it is critical that Consumer Protection remain poised to act on behalf of residents with outstanding obligations.
- 6.59 Ironbridge was questioned about its plans to meet its outstanding obligations at the first hearing on 26 October 2011. Mr Wallace gave an undertaking that Ironbridge's liability in relation to fencing and landscaping in The Tuarts would be met within six months.³⁰⁴ However, this commitment was subject to the following:
- The release of titles to the next two stages of The Tuarts, which is contingent upon the WWPS being commissioned by the Water Corporation and clearances being given; and
 - Ironbridge being permitted by its financier to retain sufficient funds from the settlement of the next two stages of The Tuarts to cover these costs.³⁰⁵
- 6.60 At his final appearance before the Committee on 31 January 2012, Mr Wallace provided an unconditional undertaking to pay all outstanding reimbursements 'within the next week and a half'.³⁰⁶ In correspondence provided to the Committee on 10 February 2012, Mr Wallace confirmed there were still 16 such payments outstanding (See Appendix Six).³⁰⁷
- 6.61 Mr Wallace gave another final undertaking that all remaining fence installation, painting, and landscaping obligations would be completed within six months.³⁰⁸ The most recent estimates provided by Mr Wallace indicate that there are 140 fence

304 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 10; Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 15.

305 Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 15.

306 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, p. 15.

307 Supplementary Information (Item J), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, p. 10.

308 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, pp. 6-7; Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, pp. 15-18.

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painting jobs outstanding and 74 landscaping packages to be completed.³⁰⁹ The list of customers awaiting landscaping is attached at Appendix Seven. The landscaper Mr Wallace has contracted advised that he would be able to do '10-15 landscape packages per month'.³¹⁰ Mr Wallace added that as each landscape package is planted, 'we will follow up with the fence painting running parallel'.³¹¹

- 6.62 The Committee can verify the evidence provided by Mr Wallace that he and his wife have obtained financing—secured against their personal assets—that should allow these outstanding obligations to be met.³¹² However, the amount being sought by APH Pty Ltd in the latest winding-up application against Ironbridge (see 6.28 above) exceeds the amount approved under this financing arrangement. Notably, the Statutory Demand that preceded APH's wind-up application was served on Mr Wallace two days before he received the offer from his financier. This application was made 11 days before Mr Wallace's final appearance before the Committee, yet he did not mention it. In the absence of any explanation from Mr Wallace, the Committee can only deduce that the finance he has secured may go towards settling the wind-up application, not to meeting his outstanding obligations to The Tuarts residents.
- 6.63 This issue adds to the concerns the Committee already has about the frequency with which Mr Wallace has failed to meet his undertakings. Therefore, it is recommended that Consumer Protection monitor the progress of the final undertakings to the Committee and the status of the outstanding judgements referred to at 6.31 and 6.32 above. If there is evidence by the end of March 2012, that the reimbursements and court judgements remain outstanding or that the proposed work schedule has stalled, the Commissioner should consider pursuing a civil action for breach of contract on behalf of all affected residents.
- 6.64 The Committee understands that the ability to prepare such a claim will depend on the current wind-up application lodged by APH Contractors Pty Ltd being settled in the interim. This matter is still before the Court with the next hearing due on 27 March 2012.

309 Supplementary Information (Item J), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, pp. 12-13; Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 3.

310 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, p. 7.

311 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, p. 15.

312 Supplementary Information (Item I), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 8 December 2011, pp. 6-7; Supplementary Information (Item J), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, (Closed Evidence).

- 6.65 The Committee also reserves the right to re-open its investigation if the undertakings provided by Mr Wallace in paragraphs 6.60 and 6.61 fail to materialise by the end of March 2012.

Finding 27

At the hearing of 31 January 2012, Mr Wallace gave an undertaking that Ironbridge Holdings Pty Ltd will pay all outstanding reimbursements within ‘a week and a half’, and will complete all outstanding fence installation, painting, and landscaping obligations within six months.

Recommendation 4

If there is evidence by the end of March 2012, that Ironbridge Holdings Pty Ltd is failing to meet the undertakings given to the Committee on 31 January 2012 or has failed to pay outstanding judgements from the Magistrates Court, the Consumer Protection Division of the Department of Commerce should consider pursuing a civil action for breach of contract on behalf of all affected residents.

Chapter 7

Statutory remedies

- 7.1 In addition to contract law, there are a range of legislative provisions under which those failing to deliver on contractual obligations may be pursued. The Committee was made aware of two particular pieces of legislation that had potential application to the circumstances that were the subject of this Inquiry: the *Corporations Act 2001* and the *Fair Trading Act (1987 and 2010)*.

Corporations Act 2001

- 7.2 The *Corporations Act 2001* provides a course of action that has already been used against Ironbridge by several parties. Under section 459 a creditor can serve a statutory demand on a company requiring the payment of debts of \$2,000 and over within 21 days. Failure to comply with a statutory demand then provides an opportunity for the creditor to apply to have the company wound-up and a liquidator appointed.³¹³ Ironbridge has already been subject to three such proceedings in the last three years. As noted at 6.28 above, the most recent application is still before the Court.
- 7.3 These proceedings are more expensive than a Minor Case Claim in the Magistrates Court. Should the process run its full course, applicants must meet all costs in the proceedings up until a liquidator is appointed.³¹⁴ This is in addition to the applicants' lawyer's fees.
- 7.4 This option has recently been commenced by 30 homeowners in The Tuarts, who have opted to share the cost burden as part of a possible group action against Ironbridge. A legal firm issued a statutory demand on behalf of these residents on 15 April 2011. DoC advised that sporadic works commenced in response to this demand in late July and that the law firm was waiting for the results of the ATO's wind-up application 'before proceeding further'.³¹⁵ The Committee did not obtain any evidence to indicate that this matter had proceeded any further.
- 7.5 The pursuit of Ironbridge via wind-up applications in the past has proven to be a successful strategy. The 2010 and 2011 applications against Ironbridge were eventually dismissed by consent of the parties, with costs awarded against the company, indicating some form of financial settlement was reached. Given the desire to keep his

313 Section 459(E)-(G); (Q)-(P) *Corporations Act 2001* (Cth). For the minimum amount applicable to a statutory demand, see section 9.

314 Section 466(1) *Corporations Act 2001* (Cth).

315 Submission No. 11 from Department of Commerce, 26 September 2011, p. 12.

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company solvent, Mr Wallace appears to have given these proceedings greater priority than small claims judgements from the Magistrates Court.

- 7.6 The downside for an individual resident is the much higher costs involved in pursuing this option. While these costs may be recouped if the process is successful, the expenses required throughout may be prohibitive and easily exceed the amount being claimed. Moreover, should the wind-up application proceed, the claimant would be considered as an unsecured creditor and may not rank high enough in the list of outstanding creditors to be guaranteed payment. The risk of such an outcome would, understandably, be enough to deter most residents from taking this path.

Fair Trading Acts (1987 and 2010) and the Australian Consumer Law

- 7.7 The *Fair Trading Act 1987* (FTA 1987) contained a variety of provisions regulating business-to-consumer behaviour applicable to the sale or disposal of land. These laws have now been enhanced through the *Fair Trading Act 2010* (FTA 2010), which applies the nationally uniform Australian Consumer Law as a law of Western Australia.
- 7.8 Under the current and former versions of the FTA, breaches of some provisions have been considered “offences” and therefore open to actions in a criminal court, whereas others created only civil action possibilities. Civil actions require a lower burden of proof, that being proof on the balance of probabilities. By contrast, successful criminal actions require the prosecution to demonstrate proof beyond reasonable doubt.³¹⁶
- 7.9 In the circumstances pertaining to this Inquiry, civil actions are more beneficial to residents as they provide for remedies that directly assist the consumer (e.g. damages or compensation). Offences, or criminal proceedings, have traditionally penalised the offender—often by way of steep fines—without providing any redress to the affected party.³¹⁷
- 7.10 While civil actions have been open to any individual to pursue, authority to commence an action for an offence has been subject to receiving written permission from the Commissioner or a person authorised by the Commissioner.³¹⁸
- 7.11 Options under the FTAs are not likely to have been pursued by individual consumers affected by late or non-delivery of incentive items. Similar to wind-up applications, usually the amount of redress being sought would not justify the cost of preparing and

316 Sections 140-141 *Evidence Act 1995* (Cwth).

317 Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 3.

318 Section 72, *Fair Trading Act 1987* (Western Australia); Section 92, *Fair Trading Act 2010* (Western Australia).

prosecuting a case. This has led some residents to argue that the legal system, due to its expense, conspires against the lesser-resourced consumer.³¹⁹

- 7.12 This argument still retains some validity despite the introduction of small claims jurisdictions in Magistrates Courts throughout Australia in the 1970s³²⁰ to improve the cost-benefit equation of individuals contemplating legal action for breach of contract involving smaller amounts.

The Commissioner as advocate?

- 7.13 Under the FTA 1987, the Commissioner had explicit and exclusive powers to institute prosecutions for offences against the Act, or to grant authority for others to do so. In terms of instituting proceedings for breaches of the Act that were not considered offences, the Commissioner had access to certain remedies other than prosecution. For example, if breaches could be demonstrated, the Commissioner could seek Court-ordered injunctions or compensation.³²¹
- 7.14 With the introduction of the FTA 2010, the Commissioner retains exclusive power to initiate or to authorise prosecutions for offences. However, several former provisions that were termed offences now have civil pecuniary penalties also applicable to them. This allows the Commissioner to seek civil remedies, where previously only fines could be applied.³²²
- 7.15 When considering the adequacy of redress options, the Committee wanted to determine whether the Commissioner's powers to act on behalf of consumers had been appropriately discharged during the period of dispute with Ironbridge and Recreation Drive.
- 7.16 As the contracts around which these disputes arose were signed before 1 January 2011, they were subject to the provisions of the FTA 1987. The most applicable provisions of this legislation are:

s10 – Misleading or deceptive conduct.

s12 – False representations and other misleading or offensive conduct.

s21 – Accepting payment without intending or being able to supply as ordered.

319 Ms Carolynn Hill, Resident, The Tuarts, *Transcript of Evidence*, 6 October 2011, pp. 3, 5;

Mr Douglas Steele, resident, The Tuarts, *Transcript of Evidence*, 6 October 2011, p. 9.

320 B. Pentony, S. Graw, J. Lennard and D. Parker., *Understanding Business Law* (4th Ed), LexisNexis Butterworths, Chatswood, 2009, p. 46.

321 Sections 74 and 77 *Fair Trading Act 1987* (Western Australia). Under s77(2)(b) the authority to seek compensation was subject to receiving the written consent of the consumer.

322 Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 3.

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Misleading or deceptive conduct (s10)

- 7.17 Some residents of The Tuarts argued that Ironbridge's behaviour was potentially misleading and deceptive,³²³ while others urged the Committee to consider referring the matter to the Commissioner if it could identify the slightest evidence of such a breach.³²⁴ Having considered the evidence before it, the Committee understands the Commissioner's decision not to act.
- 7.18 Section 10 of the FTA 1987 stated that a person 'shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.³²⁵ As this provision was not considered an offence under the Act, breaches only attracted civil remedies. These included the possibility of Court-ordered injunctions or compensation.³²⁶
- 7.19 Had the Commissioner attempted an action for a breach of section 10 of the FTA 1987, it may have been difficult to establish the case. In its submission, DoC said that it 'could not identify breaches of the *Fair Trading Act 1987*'³²⁷ after it had investigated the complaints lodged between 29 June 2009 and 31 August 2011. The department added that:
- ...an argument could not be sustained that the developer had deliberately misled clients over its intention to supply the contracted goods, particularly when the majority of consumers received their entitlements, albeit slowly.*³²⁸
- 7.20 It is important to acknowledge that intent does not need to be proven under section 10 of FTA 1987. The behaviour need only be likely to deceive.
- 7.21 Notwithstanding this point, misleading and deceptive conduct cases generally apply to misrepresentations 'as to the price, value or the quality of any goods or services'³²⁹ rather than the ability to provide them in a timely manner. In addition, many of the examples of misleading and deceptive conduct cited by the Australian Competition and Consumer Commission (ACCC) relate to advertising claims about a product that cannot be substantiated.³³⁰

323 Submission No. 10 from Names Withheld, 3 October 2011, p. 1.

324 Submission No. 4 from Mr Ian Butcher and Ms Carolynn Hill, 16 September 2011, p. 1.

325 Section 10, *Fair Trading Act 1987* (Western Australia).

326 Submission No. 11 from Department of Commerce, 26 September 2011, p. 26.

327 *ibid.*, p. 7.

328 *ibid.*

329 Australian Competition and Consumer Commission, "Misleading and Deceptive Conduct", 2012. Available at: http://www.accc.gov.au/content/index.phtml/itemId/815335#h2_49. Accessed on 22 February 2012.

330 *ibid.*

- 7.22 It is arguable that Mr Wallace’s contractual obligations to deliver fencing and landscaping packages do not fall into these categories. While the delays have been unreasonable, and unacceptable given the behaviour relating to dividend payments, Mr Wallace has continued to meet contractual obligations—albeit sporadically. It was inexcusable for Mr Wallace not to have more regularly communicated to residents the problems besetting his business and the delays these were creating. However, the Committee is not convinced that such acts or omissions would lead to a charge of misleading and deceptive conduct being proven.

False representations and other misleading conduct (s12) / Accepting payment without intent or ability to supply as ordered (s21)

- 7.23 Section 12 of the FTA 1987 had a provision relating directly to the disposal, or the possible disposal, of an interest in land. It prohibited persons from offering ‘gifts, prizes or other free items with the intention of not providing them as offered’.³³¹
- 7.24 Section 21(a) had a broader application, prohibiting persons from accepting payment if they intended not to supply the contracted goods or services. Persons were also liable under section 21(b) if there were reasonable grounds for which the person should have been aware that they would not be able to supply the goods within a reasonable time (if no date was specified).³³²
- 7.25 Contraventions of sections 12 and 21 were offences under the Act and carried maximum fines of \$20,000 for a person or \$100,000 for a body corporate.³³³ Given the higher burden of proof applicable to offences, the Commissioner had to consider the provisions that required an absence of intent to be demonstrated beyond reasonable doubt.
- 7.26 Speaking in regards to section 21(a) (Accepting payment without intent to deliver), the Commissioner said ‘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’.³³⁴ A similar argument may have been used to defend an accusation made under section 12.
- 7.27 The directors of Ironbridge and Recreation Drive stressed to the Committee that they always intended to honour their obligations, but were undermined by unforeseen circumstances.³³⁵ This assertion, and the fact that both companies were completing some of their contractual commitments, would make a lack of intent hard to prove.

331 Section 12(2)(c), *Fair Trading Act 1987* (Western Australia).

332 Section 21, *Fair Trading Act 1987* (Western Australia).

333 Submission No. 11 from Department of Commerce, 26 September 2011, pp. 26-27.

334 Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 3.

335 Supplementary Information (Item A), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 11; Mr Peter James, Director, Recreation Drive Pty Ltd, *Transcript of Evidence*, 17 October 2011, p. 11.

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Therefore, with the information available at the time, the Commissioner's rationale for not proceeding against either developer under sections 12 and 21 appears justified.

Finding 28

While the Commissioner for Consumer Protection has the power to instigate a group action on behalf of residents for breaches of the *Fair Trading Act 1987*, the Committee understands the Commissioner's decision at the time not to proceed against Ironbridge Holdings Pty Ltd or Recreation Drive Pty Ltd.

- 7.28 However, in light of evidence that has been obtained during the Inquiry, the Committee has concerns that Ironbridge's conduct throughout the first half of 2009 may have breached section 21(b) of the FTA 1987. This provision states that:

A person shall not, in trade or commerce, accept payment or other consideration for goods or services where, at the time of the acceptance....there are reasonable grounds, of which the person is aware, or ought reasonably 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.

- 7.29 At 2.36 above, the Committee examined the financial difficulties Mr Wallace was already facing by the first half of 2009, during which time clearances appear to have been given by Water Corporation for the release of approximately 80 lots within stages 1 and 2 of The Tuarts.³³⁶ It is arguable that if Ironbridge entered into or settled on contracts during this time, Mr Wallace ought reasonably have known that the company would not be able to meet its incentive package commitments in a reasonable time.

- 7.30 Any failure by the company to disclose potential delays to customers who settled with Ironbridge in the first half of 2009 may represent a breach of section 21(b) of the FTA 1987. What deterred the Committee from recommending the Commissioner consider pursuing a case is the fact that this provision is considered an offence under the former FTA, which requires a higher standard of proof and does not automatically provide redress options to affected residents. In this respect, the earlier recommendation for the Commissioner to prepare a group action in the Magistrates Court if Mr Wallace fails to meet his current undertakings to the Committee was deemed more appropriate.

³³⁶ See also 2.18 above.

Finding 29

Given the evidence that has come to light during this Inquiry, the Committee has concerns that Ironbridge Holdings Pty Ltd's failure to disclose potential delays to residents who entered into or settled on contracts at The Tuarts in the first half 2009 may represent a breach of section 21(b) of the *Fair Trading Act 1987*.

The Committee has refrained from recommending the Commissioner for Consumer Protection consider a prosecution as the offence, under the *Fair Trading Act 1987*, only provides for fines and offers no direct redress to residents.

- 7.31 However, Mr Wallace is strongly urged to be more open about the status of his company and the possibility of any delays in delivering incentive packages on any contracts signed after 1 January 2011. The new ACL has carried over the provisions of section 10 and section 21 into the FTA 2010.³³⁷ Significantly, for both sections, the Commissioner can now seek civil pecuniary penalties against a company of up to \$1.1 million dollars per contravention. Being civil actions, the standard of proof is lower (on the balance of probabilities)³³⁸ and redress options such as compensation can be sought as an alternative or in addition to the fines.³³⁹
- 7.32 In addition, the Commissioner has now acquired the ability to issue a "public warning notice" about the conduct of a person if the Commissioner has 'reasonable grounds to suspect' that the conduct may contravene certain provisions of the FTA 2010.³⁴⁰ Applicable contraventions include accepting payment with the knowledge that services will not be supplied within a reasonable time.³⁴¹ These improvements to the Consumer Protection legislation make it possible that a continuation of the approach taken by Mr Wallace throughout 2009 and 2010 could have dire consequences for his company.

Finding 30

Under the Australian Consumer Law, applicable to land sales conducted from 1 January 2011, the former provisions of section 21 of the *Fair Trading Act 1987* have been carried over into the *Fair Trading Act 2010*. Contraventions now provide for steep civil pecuniary penalties, which allow damages to be sought as an alternative or in addition to fines.

337 Now included as Sections 30 and 36 Australian Consumer Law (WA) *Fair Trading Act 2010* (Western Australia).

338 Commonwealth of Australia, *The Australian Consumer Law: An Introduction*, November 2010, p. 10. Available at: http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_an_introduction_November_2010.pdf. Accessed on 7 February 2012.

339 Under section 237 Australian Consumer Law (WA) *Fair Trading Act 2010* (Western Australia) the Commissioner can seek compensation orders on behalf of a group of injured persons.

340 Section 223(1)(a) Australian Consumer Law (WA) *Fair Trading Act 2010* (Western Australia).

341 The Commissioner would have to be satisfied that it was in the public interest to pursue such a course of action. Section 223(1)(c) Australian Consumer Law (WA) *Fair Trading Act 2010* (Western Australia)

Chapter 8

Other Issues

- 8.1 In addition to examining current redress options, the Committee has considered whether other legislative initiatives were required. The overarching position of the Committee when contemplating this question is consistent with the sentiment expressed by the Commissioner:

*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.*³⁴²

- 8.2 In reaching its conclusions, the Committee has tried to strike a balance that recognises the angst suffered by residents dealing with a handful of problem developers, while acknowledging the need to preserve the vitality of a sector whose operators are generally reliable.
- 8.3 The need for further legislative change also needs to recognise the changes highlighted in the preceding chapters, namely:
- The ability of the Commissioner to now seek enforcement of undertakings made during conciliation (section 218 (ACL) FTA 2010).
 - The new consumer protection provisions that require developers to supply services in a reasonable time (section 62 (ACL) FTA 2010).
 - The introduction of civil pecuniary penalties for actions that were restricted to offence provisions under the former FTA (section 224 (ACL) FTA 2010).
- 8.4 In the end, the Committee gave consideration to two issues: bonding incentive package payments and introducing a mandatory industry code.

Should incentive package funds be bonded?

- 8.5 The issue that generated most debate regarding redress options was whether developers should be mandated to place the value of incentive packages in a bond held in trust until the contracted fencing and landscaping is completed.
- 8.6 This idea was promoted by the majority of the thirteen residents who contributed to the Inquiry.³⁴³ The Shire of Capel, the local government area in which The Tuarts is

³⁴² Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 3.

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located, also offered its endorsement.³⁴⁴ The major opponents to the move were Satterley Property Group (Satterley) and the Urban Development Institute of Australia (WA) (UDIA), a peak body whose diverse membership includes property developers.³⁴⁵

- 8.7 As the system currently stands, the Western Australian Planning Commission (WAPC) does place some broad infrastructural requirements on development applications before titles can be released. These include the delivery of basic road works and sewerage.³⁴⁶ Developers can, and do, voluntarily put bonds down in advance of completing these requirements in order to expedite access to titles so that lots can be sold and settled in order to generate cash flow. Alternatively, developers can complete these works in their own time and then apply for the release of titles.³⁴⁷ DoC confirmed that WAPC does not include fencing and landscaping of individual lots in its subdivision application requirements, as these 'are not considered to be an essential service to the development of the land'.³⁴⁸

- 8.8 The sentiment of The Tuarts and Recreation Estate residents who were calling for incentive package funds to be bonded was captured by Mr Paul Cain, who unsuccessfully pursued reimbursement for fencing from Peter James via a PSSO:

*It is not his [Mr James'] money It is included in the package so it should be sitting somewhere to make sure all of that is completed.*³⁴⁹

- 8.9 Several residents urged that a government-controlled trust should be set up to hold these funds until contracted works were completed.³⁵⁰ DoC had no position on the merit or otherwise of the proposal, but had considered the logistics of how it would operate and thought that a lawyer's trust account may be the most viable option for contracting parties.³⁵¹

343 See, for instance, Submission No. 4 from Mr Ian Butcher and Ms Carolynn Hill, 16 September 2011, p. 6; Submission No. 10 from Names Withheld, 3 October 2011, p. 2; Submission No. 7 from Ms Lisa Dichiera, 21 September 2011, p. 2; Submission No. 6 from Ms Victoria Meyer, 21 September 2011, p. 2; Submission No. 8 from Mr Paul Cain, 21 September 2011, p. 2.

344 Submission No. 13 from Shire of Capel, 5 October 2011, p. 2.

345 Submission No. 5 from Urban Development Institute of Australia (WA), 21 September 2011, p. 3; Submission No. 3 from Mr Nigel Satterley AM, Managing Director, Satterley Property Group, 8 September 2011, pp. 1-2.

346 Submission No. 11 from Department of Commerce, 26 September 2011, p. 28.

347 Mr Nicholas Perrignon, Chief Operating Officer, Satterley Property Group, *Transcript of Evidence*, 17 October 2011, p. 5; Ms Debra Goostrey, Chief Executive Officer, Urban Development Institute of Australia (WA), *Transcript of Evidence*, 17 October 2011, p. 5.

348 Submission No. 11 from Department of Commerce, 26 September 2011, p. 28.

349 Mr Paul Cain, Resident, Recreation Estate, *Transcript of Evidence*, 6 October 2011, p. 7.

350 See, for instance, Submission No. 6 from Ms Victoria Meyer, 21 September 2011, p. 2; Submission No. 2 from Ms Ciara Lyons and Mr Jason Schuttloffel, 29 September 2011, pp. 1-2.

351 Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 9.

- 8.10 Satterley and UDIA argued against the need to bond incentive packages claiming it is in the developer's commercial self-interest to ensure that fencing and landscaping packages are delivered promptly. The majority of developers, they argued, are compliant in this respect. They rely on the quality of the service and the end-product to generate further sales either by referral or through the presentation of the estate.³⁵²
- 8.11 Satterley added that incentive packages are cost-effective for purchasers, as developers are able to source materials in bulk at wholesale prices well below what consumers would pay directly with retailers.³⁵³
- 8.12 If bonding were mandated, Satterley and UDIA argued that this cost-effectiveness would be unwound and land values could actually rise. This would result from developers adjusting their lot prices by the bonded amount in order to maintain the profit ratios demanded by banks to fund the projects.³⁵⁴ The financial impact of any further administrative burden that the bonding process generated for developers would also be passed on to consumers.³⁵⁵
- 8.13 The Committee acknowledges the frustrations endured by residents who have suffered in their dealings with developers like Ironbridge and Recreation Drive. However, the recent changes to consumer protection laws (see 8.3 above) should be given time to take effect before the introduction of compulsory bonding is considered necessary.
- 8.14 The Committee feels that any move to bond incentive package payments at this time would be a disproportionate policy response to an issue involving a small number of developers. As DoC confirmed in its submission, there are more than 10,000 blocks sold every year and the majority of these transactions are completed without incident.³⁵⁶
- 8.15 Mandating a bond would punish the majority of reliable developers by locking up parts of their cash flow. In the case of a company like Satterley—which sells an average of 2,000 new lots per annum³⁵⁷ and have not been the subject of complaint—the sums involved could be substantial. The Committee accepts the argument that land values would increase as developers pass on the costs of any financial or administrative imposition to consumers.

352 See, for instance, Mr Nicholas Perrignon, Chief Operating Officer, Satterley Property Group, *Transcript of Evidence*, 17 October 2011, p. 2; Submission No. 3 from Satterley Property Group, 8 September 2011, p. 1; Submission No. 5 from Urban Development Institute of Australia (WA), 21 September 2011, p. 3.

353 Submission No. 3 from Satterley Property Group, 8 September 2011, p. 2.

354 Mr Nicholas Perrignon, Chief Operating Officer, Satterley Property Group, *Transcript of Evidence*, 17 October 2011, p. 5.

355 Ms Debra Goostrey, Chief Executive Officer, Urban Development Institute of Australia, *Transcript of Evidence*, 17 October 2011, p. 5; Mr Nicholas Perrignon, Chief Operating Officer, Satterley Property Group, *Transcript of Evidence*, 17 October 2011, p. 5.

356 Submission No. 11 from Department of Commerce, 26 September 2011, p. 1.

357 Submission No. 3 from Satterley Property Group, 8 September 2011, p. 1.

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- 8.16 It remains the case that most developers will continue to be driven to honour incentive packages to encourage further sales and to enhance their reputation among householders. As the Ironbridge case shows, failure to deliver has commercial ramifications. A recent query posted on the “People in Dalyellup WA, waiting for a fence” Facebook site was from a prospective buyer asking for comment on the pros and cons of living in Dalyellup. One of the replies complemented one local developer before adding, ‘Beware Ironbridge’.³⁵⁸
- 8.17 When reflecting on his situation, Mr Wallace told the Committee: ‘I don’t think fencing should be provided. I would rather reduce the price of the block to that extent’.³⁵⁹ In order to re-establish his reputation and competitive position, this may be a strategy that Ironbridge has to adopt with future sales. The Committee sees this as a preferred outcome rather than imposing financial restrictions on the industry as a whole.

Finding 31

Any move to bond funds intended for the provision of incentive packages at this time would be a disproportionate policy response to an issue involving only a small number of developers.

A Code of Practice for land and property developers

- 8.18 The Committee is open to the development of a prescribed code of practice for land and property developers in the event that problems of late or non-delivery continue or escalate in the future.
- 8.19 The Commissioner confirmed that there ‘is not a great deal of regulation directed upon developers’,³⁶⁰ beyond the relevant provisions of the ACL and the registration requirements within the *Real Estate and Business Agents Act 1978*. However, the Commissioner has latent power to guide the conduct of participants in the industry.
- 8.20 Part 4 of the FTA 2010, ‘provides for the making of regulations prescribing a code of practice for fair dealing between a particular class of suppliers and consumers’.³⁶¹ Should a person conduct a business in contravention of a prescribed code of practice, the Commissioner can apply to the State Administrative Tribunal (SAT) for an order requiring that person to comply and to rectify the contravention. If a person fails to

358 Facebook, *People in Dalyellup WA, Waiting for a fence*, Posted 30 December 2011. Available at: <http://www.facebook.com/pages/People-in-Dalyellup-WA-waiting-for-a-fence/125272460862662>. Accessed on 4 January 2012.

359 Mr Ian Wallace, Director, Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 26 October 2011, p. 7.

360 Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 17 October 2011, pp. 2-3.

361 Section 42(1) *Fair Trading Act 2010* (Western Australia).

comply with an order made by the SAT, they are guilty of an offence that carries a \$50,000 fine.³⁶²

- 8.21 If a party is subject to an order by the SAT for a contravention of a code of practice, and that contravention is also an offence under the FTA, that party is not liable for punishment under the latter.³⁶³ However, the fact that a Commissioner has made an application to the SAT for an order does not preclude other individuals from taking civil actions for the same matter before a court or the tribunal.³⁶⁴
- 8.22 Section 44 of the FTA 2010 allows the Commissioner, subject to Ministerial approval, to prepare a draft code of practice for the Minister's consideration. During the drafting process, the Commissioner 'must consult, and invite submissions from' principal organisations representing industry suppliers and consumers as well as any other parties the Commissioner considers would have an interest in the proposed code.³⁶⁵ A prescribed code of practice has a maximum term of three years, although this limit can be removed if the Commissioner conducts a review of the code with interested stakeholders before the stipulated expiry date.³⁶⁶
- 8.23 The establishment of a mandatory code of practice would not be an unprecedented move. The fitness and retirement village industries in Western Australia are already subject to codes of practice prescribed under Part 4 of the FTA 2010. Codes of Conduct have also recently been prescribed for real estate and sales representatives, although these were established via the Commissioner's powers under section 101 of the *Real Estate and Business Agents Act 1978*.
- 8.24 Currently, the only code applicable to developers is the Code of Conduct established for members of the UDIA's Western Australian division. This code—which is not legally enforceable—urges UDIA (WA) members to observe a range of principles, including to:
- Demonstrate ethical principles and observe the highest standards of integrity and honesty in all professional and personal dealings;
 - Uphold and promote the reputation of the Urban Development Institute of Australia (WA) and not misuse authority of office for personal gain; and
 - Show respect for the rights of consumers and maintain the public's confidence and trust in the Development Industry.³⁶⁷

362 Section 47 *Fair Trading Act 2010* (Western Australia).

363 *ibid.*, Section 50.

364 *ibid.*, Section 51.

365 *ibid.*, Section 44.

366 *ibid.*, Section 45.

367 Urban Development Institute of Australia (Western Australia), *Code of Conduct*, no date. Available at: <http://www.udiawa.com.au/go/code-of-ethics>. Accessed on 9 February 2012.

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- 8.25 UDIA confirmed that Ironbridge is not a current member of the organisation.³⁶⁸
- 8.26 The Committee acknowledges that the changes to the Australian Consumer Law that have been implemented through the FTA 2010 may suffice in terms of holding land and property developers to account—particularly the statutory guarantee that goods will be supplied within a reasonable time. However, there is undoubted merit in considering the development of a prescribed code of practice in consultation with developers and consumers to ensure the objectives of the UDIA Code of Conduct are binding rather than aspirational.
- 8.27 Unlike bonded incentive package payments, this measure should improve the level of protection for consumers without impeding the operations of reliable developers.

Finding 32

A mandatory code of practice for land and property developers should improve the level of protection for consumers without impeding the operations of reliable developers.

Recommendation 5

The Minister for Commerce consider the implementation of a code of conduct for the land and property development industry under the *Fair Trading Act 2010*.

Registration of land and property developers

- 8.28 A final concern of the Committee relates to the prospect of developers volunteering to enter liquidation only to emerge at the head of another development company without being detected by Consumer Protection.
- 8.29 It appears that a loophole in the *Real Estate and Business Agents Act 1978* (REBA Act) may enable this scenario to unfold. Under the REBA Act, real estate agents are required to be licensed and sales representatives are required to be registered.³⁶⁹ Significantly, the names of the partners or directors of licensed firms or corporations need to be lodged in a register held by the Commissioner.³⁷⁰
- 8.30 By contrast, developers are only required to advise the Commissioner in writing of their principal place of business and in a similar manner provide notice of any change of address.³⁷¹ The Commissioner advised that ‘the purpose of this registration appears to

368 Ms Debra Goostrey, Chief Executive Officer, Urban Development Institute of Australia, *Transcript of Evidence*, 17 October 2011, p. 12.

369 Sections 26 and 44 *Real Estate and Business Agents Act 1978* (Western Australia).

370 Regulation 7(a) *Real Estate and Business Agents (General) Regulations 1979* (Western Australia).

371 Sections 57 and 58 *Real Estate and Business Agents Act 1978* (Western Australia).

be to notify the existence of the developer operation, its place of business'.³⁷² The Commissioner added that transaction records are required to be kept and that the developer:

*...needs to be approving developments and the identification of the developer needs to occur through that process.*³⁷³

- 8.31 The Committee feels that the identification process currently under the REBA Act needs to be more explicit. This will help to ensure that previously failed developers can be quickly identified during registration before launching any future enterprise.
- 8.32 In this respect, the REBA Act should be amended to ensure that the names of individuals or directors that run property development interests are, like real estate agents and sales representatives, lodged with the Commissioner. This would allow Consumer Protection officers to conduct periodic searches of its registers to see if any failed former developers have re-entered the marketplace. The business conduct of such individuals could then be monitored if required under the Commissioner's broad investigative powers under section 68 of the FTA 2010.

Finding 33

The *Real Estate and Business Agents Act 1978* does not compel land and property development companies to lodge the names of their owners or directors with the Commissioner for Consumer Protection. This provides a loophole whereby failed developers can re-enter the market under a different business name without detection.

Recommendation 6

The Department of Commerce propose an amendment to the *Real Estate and Business Agents Act 1978* to ensure that the identities of the owners and directors of land and property development companies are lodged with the Commissioner for Consumer Protection.

Following this, the Consumer Protection Division of the Department of Commerce should conduct bi-annual searches of its registers to determine whether any former failed developers have re-entered the market under a different business name.



DR M.D. NAHAN
CHAIR

³⁷² Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce, *Transcript of Evidence*, 17 October 2011, p. 2.

³⁷³ *ibid.*

Appendix One

Inquiry Terms of Reference

The Economics and Industry Standing Committee is to inquire into and report on:

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.

Appendix Two

Committee's functions and powers

The functions of the Committee are to review and report to the Assembly on:

- a) the outcomes and administration of the departments within the Committee's portfolio responsibilities;
- b) annual reports of government departments laid on the Table of the House
- c) the adequacy of legislation and regulations within its jurisdiction; and
- d) any matters referred to it by the Assembly including a bill, motion, petition, vote or expenditure, other financial matter, report or paper.

At the commencement of each Parliament and as often thereafter as the Speaker considers necessary, the Speaker will determine and table a schedule showing the portfolio responsibilities for each committee. Annual reports of government departments and authorities tabled in the Assembly will stand referred to the relevant committee for any inquiry the committee may make.

Whenever a committee received or determines for itself fresh or amended terms of reference, the committee will forward them to each standing and select committee of the Assembly and Joint Committee of the Assembly and Council. The Speaker will announce them to the Assembly at the next opportunity and arrange for them to be placed on the notice boards of the Assembly.

Appendix Three

Submissions received

Name	Position	Organisation
Mr Douglas and Mrs Thelma Steele	Residents	The Tuarts Estate
Ms Ciara Lyons and Mr Jason Schuttloffel	Residents	The Tuarts Estate
Mr Nigel Satterley AM	Managing Director	Satterley Property Group Pty Ltd
Mr Ian Butcher and Ms Carolynn Hill	Residents	The Tuarts Estate
Ms Debra Goostrey	Chief Executive Officer	Urban Development Institute of Australia (WA)
Ms Victoria Meyer	Resident	The Tuarts Estate
Ms Lisa Dichiera	Resident	The Tuarts Estate
Mr Paul Cain	Resident	Recreation Estate
Names Withheld	Residents	The Tuarts Estate
Ms Anne Driscoll	Acting Director General	Department of Commerce
Mr Andrew Brien	Chief Executive Officer	City of Bunbury
Mr PF Sheedy	Chief Executive Officer	Shire of Capel

Appendix Four

Hearings

Date	Name	Position	Organisation
6 October 2011	Ms Carolynn Hill	Resident	The Tuarts Estate
	Ms Ciara Lyons	Resident	
	Mr Jason Schuttloffel	Resident	
	Mr Douglas Steele	Resident	
	Mr Michael Taylor	Resident	
6 October 2011	Mr Paul Cain	Resident	Recreation Estate
	Ms Jane Ryan-Barnard	Resident	
17 October 2011	Ms Debra Goostrey	Chief Executive Officer	Urban Development Institute of Australia (WA)
	Mr Nicholas Perrignon	Chief Operating Officer	Satterley Property Group
17 October 2011	Ms Anne Driscoll	Commissioner for Consumer Protection	Department of Commerce
	Mr David Hillyard	Director of Retail and Services	
	Mr Stephen Meagher	Director of Property Industries	
17 October 2011	Mr Frank Marra	General Manager, Finance and Strategy	LandCorp
	Mr Carl Curtis	Development Manager	
17 October 2011	Mr Peter James	Director	Recreation Drive Pty Ltd
26 October 2011	Mr Ian Wallace	Director	Ironbridge Holdings Pty Ltd
	Mr Thomas O'Rourke	Assistant Project Manager	
	Mr Nicholas Wallace	Land Salesman	
8 December 2011	Mr Ian Wallace	Director	Ironbridge Holdings Pty Ltd
31 January 2012	Mr Ian Wallace	Director	Ironbridge Holdings Pty Ltd
	Ms Denise Young	Director	Charters Chartered Accountants

Appendix Five

Acronyms

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
CCWA	Customer Constructed Works Agreement
DoC	Department of Commerce
FTA 1987	Fair Trading Act 1987
FTA 2010	Fair Trading Act 2010
PSSO	Property (Seizure and Sale) Order
SAT	State Administrative Tribunal
UDIA	Urban Development Institute of Australia (WA)
WAPC	Western Australian Planning Commission
WWPS	Waste Water Pumping Station

Appendix Six

Outstanding reimbursements - Ironbridge³⁷⁴

Name	Item	Amount
Baars	Fence	\$5,690.00
Salter	Landscaping	\$3,150.00
Steele	Fence	\$3,614.00
Nilan	Landscaping	\$3,000.00
Kruger	Landscaping	\$3,000.00
Cunningham	Landscaping	\$3,000.00
Hotene	Fence/Landscaping	
Mckeon	Fence	
Wainwright	Landscaping	\$3,000.00
Dewitt/Beswick	Landscaping	
Day/Silvestro	Landscaping	\$3,000.00
Marra	Fence/Landscaping	
Yates	Fence/Landscaping	
Jones	Fence/Landscaping	\$5,240.00
Eikelboom	Fence/Landscaping	\$2,880.00
Walton/Stevens	Fence	\$800.00
Clark Brothers	Painting	\$1,090.00
Tarbotton/Weaver	Landscaping	\$3,000.00
Alexander	Landscaping	\$3,000.00
Snelling	Landscaping	
Middleton	Landscaping	
Bell	Landscaping	\$3,150.00
Fitzpatrick	Landscaping	
Gribble	Landscaping	\$3,000.00

³⁷⁴ Table replicates information provided in Supplementary Information (Item J), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, p. 10.

Appendix Seven

Outstanding landscaping packages - Ironbridge³⁷⁵

Name	Application Received	Anticipated Date of Occupancy
Iowich and Hutchinson	12 March 2009	15 April 2009
Harrison	24 March 2009	25 April 2009
Crappsley and Kelly	9 March 2009	31 March 2009
Lanford and Hilder	22 April 2009	1 April 2009
White and Jenkins	21 April 2009	30 May 2009
Cahill	22 April 2009	1 June 2009
Gabiana	5 May 2009	31 Jan 2009
Bowkley	12 May 2009	22 March 2009
Blowers	11 May 2009	9 May 2009
Abbott and Glover	18 May 2009	15 June 2009
Sia	21 May 2009	5 June 2009
Elliott	2 June 2009	15 June 2009
Lloyd	3 June 2009	12 August 2009
Smith	22 June 2009	25 August 2009
Griffin and Stajkowski	3 July 2009	4 June 2009
Pennington	6 August 2009	25 September 2009
Drewett	14 August 2009	25 May 2009
Beswick	15 August 2009	15 October 2009
Hayes	17 August 2009	1 November 2009
Lloyd-Jones and Chenery	19 August 2009	15 September 2009
Napoli	3 September 2009	18 October 2009
Tarbotton	10 September 2009	1 November 2009
Noakes and Sabourne	18 August 2009	31 October 2009
Waters and Schlam	16 September 2009	15 October 2009
Godfrey and Taylor	23 September 2009	10 October 2009
Guy and Greenwood	7 November 2009	20 November 2009
Green and Richards	10 November 2009	1 February 2010
Turner and Dandridge	17 November 2009	1 February 2010
Smythe	18 November 2009	
Anderson and Estermann	18 November 2009	30 November 2009
Brindley	24 November 2009	30 May 2010
Hughes and Cotter	29 November 2009	15 December 2009
Love	1 December 2009	26 November 2009
Byrne	1 December 2009	15 December 2009
Radebe-Hawu	8 December 2009	
Sackmat and Taylor	8 December 2009	18 December 2009

³⁷⁵ Table replicates information provided in Supplementary Information (Item J), Ironbridge Holdings Pty Ltd, *Transcript of Evidence*, 31 January 2012, pp. 12-13.

Hulsmans	10 December 2009	4 December 2009
Steele	21 December 2009	15 February 2010
Pink and Fryer	5 January 2010	28 February 2010
Vazquez and Gonzalez	5 January 2010	6 February 2010
Buratti	8 January 2010	1 March 2010
Curley	10 January 2010	28 February 2010
Godman	14 January 2010	15 February 2010
Hillson	22 January 2010	15 December 2009
Ventris and Spencer	29 January 2010	1 October 2010
Waters	3 February 2010	
Bartels	23 February 2010	1 May 2010
Ritorto	18 March 2010	1 May 2010
Perkins	22 March 2010	25 May 2010
Page	24 March 2010	1 February 2010
Lewis	6 April 2010	22 January 2010
Walton and Stevens	9 April 2010	17 May 2010
Abbott and Taylor	13 April 2010	15 May 2010
Taylor	14 April 2010	10 April 2010
Dunn	9 May 2010	30 June 2010
Martella	12 May 2010	1 July 2010
Master	24 May 2010	12 April 2010
Davis	26 May 2010	1 August 2010
Lines		
Jackson and Ereni		
King		
Armstrong and White	16 July 2010	1 August 2010
Jones	16 July 2010	16 July 2010
Atthowe	20 July 2010	31 August 2010
Scarlett and McMerrin	29 July 2010	30 July 2010
Brayshaw	3 August 2010	30 September 2010
Cunningham	3 August 2010	21 August 2010
Czernowski and Longbottom	5 August 2010	7 September 2009
Fordyce	2 June 2010	25 June 2010
Booth	9 July 2010	1 July 2010
Pratt	15 August 2010	18 August 2010
Trigwell	20 August 2010	19 August 2010
Meighan	9 February 2011	
Peirce	19 May 2011	30 November 2010

Appendix Eight

Outstanding Magistrates Court judgements - Ironbridge³⁷⁶

Judgement Creditor	Case Number	Amount	Status
Cunningham	BUN830/2011	\$13016.26	Admission in part to \$6,960. Intention to defend remainder of claim. Ongoing.
Lilly	BUN786/2010	\$10,045.75	Default Judgement – No PSSO
Salter	BUN409/2011	\$4,126.35	Default Judgement – No PSSO

³⁷⁶ EISC Secretariat inspection of Magistrates Court records: Bunbury, 27 January 2012.