STANDING COMMITTEE ON PUBLIC ADMINISTRATION

INQUIRY INTO WESTERN AUSTRALIAN STRATA MANAGERS

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 23 MARCH 2011

SESSION ONE

Members

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

Hearing commenced at 10.01 am

RAYMOND, MR CLIVE
Senior Member, State Administrative Tribunal of Western Australia, sworn and examined:

The CHAIRMAN: Welcome, Mr Raymond. There is a procedure we need to go through so just follow the cues. Have you sighted a document titled "Information for Witnesses"?

Mr Raymond: Yes, I have.

The CHAIRMAN: Have you read it and understood it?

Mr Raymond: I read and understood it, yes.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of the evidence will be provided to you. To assist the committee and Hansard, if you are quoting from some documents—I see you have brought some documentation—please quote the full title of the document so Hansard can source it. I remind you your transcript will become a matter of public record and if for some reason you wish to make a confidential statement during today's proceedings, you should request that evidence be taken in closed session. If the committee grants your request, any public or media in attendance will be excluded from the hearing. Please note until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you the publication and disclosure of the uncorrected transcript of evidence may constitute contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. We have got through that.

The main thing is what we have you here for. You have been supplied with a range of questions that we have an interest in. Would you like to make any opening comment about the operation of SAT and the whole question of strata title?

Mr Raymond: Yes, I thought it might be useful to make a short opening statement to set the context, I think, for some of the answers that I know will be given to the questions of which we have been given notice. By way of preparation I prepared a briefing note for myself, but it may well be useful if I were to hand that up because I will be speaking to that.

The CHAIRMAN: Yes, it would be.

Mr Raymond: If I can commence with a short opening statement. From the inception of the tribunal in 2005 the then president, Justice Barker, pressed on members a mantra that we are a tribunal, we are not a court. That was an important first step in the development of an ethos that has led members to adopt an approach that none of our rules are set in stone and that while we have practice directions and standard forms of direction orders and the like, they are there as a guide only to be adapted to suit the circumstances of each particular case. The basis for that approach is to be found in the tribunal's objectives, which are set out in section 9 of the act. While I will not take you through some of the other sections I have referred to, it might be useful to just emphasise those objectives, which are —

(a) to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;

(b) to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and

(c) to make appropriate use of the knowledge and experience of Tribunal members.

Those objects are reinforced by particular sections of the act, which I have referred to—namely, section 32(6)(a) and (b) and 32(7)(a), which, in effect, require that the tribunal must: ensure that the parties understand the effect of the assertions that they make; if requested, explain any rulings that it gives and its procedures; and ensure that all relevant information is put before the tribunal. Those are extremely important provisions because their practical effect is that when a non-represented person appears before the tribunal, it really means there has to be a discourse between the tribunal and that person. That discourse occurs at a directions hearing, which is held within two weeks of the application being lodged. Its purpose is to put the party on the right track if they have commenced proceedings under the wrong section of legislation. The Strata Titles Act is a very good illustration of that; it is a complex piece of legislation. There are specific remedies given under particular sections of the legislation and if someone proceeds on the wrong basis, they are just not going to get what they expect out of the proceedings.

We allocate half an hour to every strata title matter in the directions process and some of those hearings will go for as long as an hour because of the discourse that takes place. Members during the directions hearing will do a number of things. They employ facilitative dispute resolution or alternative dispute resolution techniques. One of the most important things is that we get people talking together, sometimes for the first time sensibly, about what the issue is. That has had several consequences. We have found, for instance, that we are settling more matters during directions hearings as we have become more expert ourselves than, say, in our first year of operation. Consequently we are referring fewer matters to mediation because of the high level of settlement through the directions process.

I have referred in my opening paragraph there to our current benchmark statistics. These were benchmarks that were set by the tribunal after our first year of operation. We endeavoured to standardise them across each particular stream and so in the commercial and civil stream we adopted a benchmark that we hoped to complete 30 per cent of all matters within 10 weeks of an application being lodged. We aimed to resolve 50 per cent within 16 weeks and 80 per cent within 28 weeks. Obviously there will be complicated matters. There will be matters that will have all sorts of reasons to be delayed; they will fall into that final 20 per cent. But in terms of measuring performance, we thought that those particular percentiles would be a good way of measuring performance from year to year in order to assess whether we were improving or whether there was a problem in any particular area.

I will hand up copies of a report titled “State Administrative Tribunal: Weeks to Finalise for the 12 months to February 2011”. This document sets out the benchmark in our core categories of jurisdiction. There may be an extra copy in there. You will see from this form that it refers to a number of pieces of legislation. We have, I think, 60 or 70 different acts under which the commercial and civil stream has jurisdiction. These are the areas where by volume we have the most work and therefore the most useful test of performance. Relevantly we are looking at strata titles and you will see there that in the 12 months to February 2011 we completed 30 per cent of matters within four weeks. Now, given that two weeks is taken up before the first directions hearing, what that really means is that 30 per cent of matters were settling at the first directions hearing or very shortly afterwards. You will then see that we resolved 50 per cent of matters within eight weeks. That is within a further six weeks of the directions hearing. That ties in very closely with the sort of time period that would lapse if a matter is referred to mediation. So between the facilitative dispute resolution methods and mediation, one can see that we are effectively resolving 50 per cent of all matters within eight weeks of the date on which the application is lodged and we are also ahead of the benchmark in terms of resolving 80 per cent of matters within 24 weeks. They will be matters most of which will have gone to some form of hearing. That is an indication of our current performance; I will be referring later to performance in previous years to give a picture of how we have gone, but it is perhaps an indication that while there maybe some people who have had difficulty with our processes—that, I suppose, is inevitable—it would tend to suggest that in the

main, I would like to suggest in the vast majority of cases, people appearing before the tribunal have not had difficulty and in fact their matters have been resolved very quickly.

What all of this means is that there is an essential difference between the tribunal and the courts; if a matter proceeds in a court, a party needs to prepare their own case without any assistance and their case is assessed on the evidence that they put before the court. I am sure unrepresented parties will get a degree of assistance in the courts, but because of the provisions to which I have referred it cannot possibly be anywhere near the sort of assistance that is given in the tribunal. That is my opening statement.

[10.13 am]

The CHAIRMAN: Thank you, Mr Raymond. Can I just ask you a couple of questions about that?

Mr Raymond: Certainly.

The CHAIRMAN: Is a further breakdown of statistics available into the types of areas that you tend to be able to resolve in these time frames?

Mr Raymond: Yes.

The CHAIRMAN: Do you keep a record of the type of complaint?

Mr Raymond: Under each section—in other words, of the act—yes, there is a record of what applications are brought under each section—but it is not really taken any further than that—so that we know how many applications were made under section 83, the general dispute resolution provision.

The CHAIRMAN: Mr Raymond, can we just hold that in abeyance, because, really, what we want to talk to you about are the ones that fall between the cracks. So we are not arguing with you, I would suggest, that what you have given to us is correct, but there are still people coming to us with grievances about how do you get information out of strata managers and those sorts of things.

Mr Raymond: Yes.

The CHAIRMAN: So I think we may not need that information I have just asked for, but perhaps if we continue on with the questions.

Mr Raymond: Yes. If I can just point it out to you, though—and this will be apparent from other statistics that are referred to in my briefing note—as I pointed out, the benchmark shows each of our core areas, so the performance is there for each core area, and we do have a breakdown section by section.

The CHAIRMAN: I was just wondering whether they are financial matters or disputes on boundaries or that type of area, but we may not need that. So let us just go on to the questions we have given you. I will not ask the questions because you have got them in front of you, so if you could just deal with the first question.

Mr Raymond: Yes. The first question, to set it out fully, is —

> The Committee notes the recommendation of the SAT that section 83 of the *Strata Titles Act 1985* … be amended to include strata managers as persons against whom an order could be made. Please provide the Committee with the background to that recommendation.

As I have set out in the briefing note, at the stage at which that recommendation was made, SAT had received a number of applications against strata managers. They fell generally under two categories: either commenced by a lot proprietor alleging failure on the part of the strata manager to perform satisfactorily some task for which it was alleged that the strata manager had been engaged by the strata company, or, secondly, commenced by a strata company seeking an order that the strata manager deliver the books of account and records. If I can just go back to the first category, I am aware through the role that I have played on the Community Titles Advisory Committee as the

Attorney General's representative on that committee and also through correspondence received at the tribunal that there have been individual complaints, which have been outside proceedings in the tribunal, in which people have raised complaints about the tribunal not having jurisdiction in relation to strata managers because individuals have felt without any remedy, and that correspondence will have been referred to the appropriate ministers in all cases. Subsequent to making that recommendation, which I think was in 2006, if I remember correctly, CTAC made its recommendations in a slightly different way, and that was to the effect that SAT be given jurisdiction in respect of strata managers, but only in relation to disputes between the strata company and the strata manager. The object of that, as I understand it, is to avoid petty or frivolous complaints being made by a proprietor who is dissatisfied with the service being provided by the strata manager; and if I can say that we have seen a number of cases in which applications are commenced initially against a strata manager because there is a complaint that the strata manager is not doing something correctly, and at that first directions hearing we will steer the matter towards amending the application to cite the strata council or the strata company because we do not have jurisdiction over the strata manager, and, in any event, in most of those instances, the strata manager is only acting as an agent for the council, and the real complaint is, therefore, against the council.

As I have indicated in the briefing note, as it is the strata company that engages the strata manager and is in a contractual relationship with the manager, it may well cause practical difficulties if an individual proprietor can embroil a strata manager, and indirectly the strata company, in a dispute. If the strata company through its agent, the strata manager, is not performing its obligations under the Strata Titles Act, the proprietor has a remedy against the strata company. The CTAC recommendation is therefore supported. I can say from my experience in hearings dealing with strata matters that it is a cause of some angst for strata companies when complaints are made against strata managers, because it adds considerably to the cost of the management of the company to deal with those matters.

The CHAIRMAN: Mr Raymond, can we just talk about this bit for a moment? We have amongst our evidence a fair bit of grievance about—this will not affect SAT, but it is a part of the evidence to us—the way proxies are handled. There is often a fair amount of dispute between the owner and the strata company, because we hear of cases where proxies are collected and just dropped on a meeting, so people cannot get the information they require. Even though there might be, say, a number of them wishing to get the information, often the proxies are greater than the people in attendance at the meeting. So that is a matter for us, because there still is a requirement for people to get basic information about the operation of the strata manager, and often that gets cut off—I should not say "often". We have evidence that there are times when that gets headed off at the pass by the use of proxies. I would think that we have got enough evidence to say that we should be concerned about how an owner actually gets access to the correct information.

Mr Raymond: It is not a matter that I think has gone often, or at all, to a hearing in the tribunal of which I am aware. It is certainly an issue that has become apparent as part of a dispute, but generally those matters become resolved in one way or another, often prior to a hearing. I can understand, however, that in practical terms it can be a real difficulty. It may be that if there was an obligation to keep records of proxies, for instance, that might be a step towards solving the problem. I do not think we have had any great experience of having to resolve that sort of dispute. If it went to a hearing, of course, and there was a dispute about whatever went on in a general meeting, we would have to decide that based on the best evidence that we can get during the hearing.

[10.20 am]

The CHAIRMAN: It is a democratic vote, is it not? Proxy or no proxy, it is a democratic vote. If there are 30 proxies and 15 people at the meeting, it is a democratic vote and the proxies win.

Mr Raymond: Yes, but if there are disputes about whether the proxies were properly given and so on, those are all matters that would be canvassed in the hearing.

The CHAIRMAN: The act is pretty open about that, as you are probably aware. Your original decision has been altered because you believe there might be significant numbers of frivolous claims, or not; or just frivolous claims?

Mr Raymond: It is very difficult to say that there would be a significant number, but it is fair to say that we do see a reasonable number of frivolous and vexatious—perhaps that is too strong a label. We see a number of claims being brought forward by people who genuinely believe they have complaints, but which were really not well founded. They are persistent litigants who will continue litigating because they believe that they are actually right, and that something is wrong in the way the organisation is being run. We certainly experience people who keep coming back. As far as I am aware, we have only once—no, I retract that. I was thinking of a particular case, and I thought that we had declared that that person, or dismissed the proceeding on the basis that it was vexatious. That was not correct—it was dismissed on the basis that it was an abuse of process, but it was a person who had litigated on many, many occasions.

Under our section 48, when a matter has been dismissed on various grounds—vexatious, frivolous or an abuse of process—similar proceedings can then not be commenced without the leave of a judicial officer. I am aware in that particular case that a further attempt was made to litigate, which was heard by a judicial officer, and barred. It is difficult to put a number on it, but it happens often enough for it to be a concern. I should also say that the processes of the tribunal do require an investment from the parties, that once it has gone past an attempt to settle it at a directions hearing or in mediation, for it to be properly determined requires an investment by the parties. I think that that has lowered the number of "frivolous" claims which otherwise might have been made. If I consider some of the legacy claims that we took over from the former Strata Titles Referee, I think there was evidence of more frivolous claims in those days because one could simply write into the Strata Titles Referee, lodge the application and leave it to the Strata Titles Referee to call for submissions and do all the work.

The CHAIRMAN: There is a call around the nation, basically, for changes to strata title. You are probably aware of federal moves to licence and so forth.

Mr Raymond: Yes.

The CHAIRMAN: Do you feel that a stronger legislative process would reduce the numbers coming to SAT?

Mr Raymond: Could you explain "a stronger legislative process"?

The CHAIRMAN: Issues like disclosure of information, on our records, better keeping of books of account, those sorts of issues of a more open process—will they reduce the numbers?

Mr Raymond: In relation to strata management?

The CHAIRMAN: Yes.

Mr Raymond: I have little doubt that any additional control of strata managers would be beneficial. The Strata Titles Institute has taken a deliberate approach of inviting—usually myself as the senior member—to various training programs which they conduct. I see the sort of work they do. I can say—I have made this comment to the Strata Titles Institute—that very often one can see the difference between a case being run by a strata manger who is a member of the institute and one who is not, as a result of that input and training.

The CHAIRMAN: You have already basically said that a lifting of training in strata managers would be beneficial not only to the individuals involved in the industry but to SAT itself.

Mr Raymond: Yes.

The CHAIRMAN: Can we move on to question 2 then?

Mr Raymond: Yes, certainly. The question is —

> The Committee also notes the recommendation that section 83 of the Act be amended to include persons in possession of or control of records as persons against whom an order could be made. Please provide the Committee with the background to that recommendation. Who currently imposes the $400 penalty for non compliance with section 48 of the Act?

I note that the question has as its source a discussion in the tribunal's annual report of 2005–06 at page 24. The annual report did not specifically refer to any particular section of the Strata Titles Act in dealing with this question, but it followed the discussion about section 83 and therefore may have been understood as suggesting that the amendment be to section 83. In the actual recommendation made by the tribunal to the honourable Attorney General, it was recommended that a new section 90A be inserted for this purpose. That seemed to be a logical home for it because section 90 deals with an order to supply information or documents. The recommendation was made because applications were being made by strata companies for orders that strata managers deliver up records after the termination of the manager's engagement. Section 48 of the Strata Titles Act provides for a penalty of up to $400, or it simply says "penalty $400", but that is the effect of it. That may be imposed as a result of the failure of a person to deliver up the described records within seven days after service of a resolution of the strata council requiring the person to do so. The effect of section 72 of the Interpretation Act is that the provision of a penalty in this way, unless the contrary is expressly provided, makes contravention of the section an offence. It is therefore necessary for a criminal prosecution of the offending person, and SAT has no jurisdiction at all insofar as the penalty is concerned. That, it seems to me, is a real hiatus in terms of trying to solve the problem because it is no real remedy to say, "Well, go off and make a complaint at the local police station."

The CHAIRMAN: We have a letter from police, who are pretty perturbed about the act. They find the act a problem. Many of our inquiries are in that attempt to get information. Much of the committee's evidence is in that area of attempting to get information out of the strata manager. Clearly you still support that argument?

Mr Raymond: Yes. It would make sense for the tribunal to have the power to order someone in that position, whatever the requirements are, when the requirements have been complied with, the person should be handing over records and is not doing so, it is likely that they would comply with an order of the tribunal to do so.

The CHAIRMAN: If it remained in its current format of seven days, how long would it take, do you think, for that to be dealt with if you had the jurisdiction?

[10.30 am]

Mr Raymond: Well, it really would depend on the reason for withholding it. If there was some proper basis for withholding it, if I remember correctly, the act makes some reference to a lien. Yes, section 48(2) states —

> Nothing in subsection (1) shall be construed so as to take away or affect any just claim or lien which a person may have against or upon any records, accounts or property of a strata company.

So there may be a genuine dispute. If there is, that would take whatever amount of time it would properly take to resolve the dispute. It is not well understood that the tribunal does not have jurisdiction, so we have had applications brought for the delivery of orders, and while we do not have jurisdiction, we will encourage the parties to talk to each other at the directions hearing. Certainly, in every one of those matters that came before me, the strata manager, once he had been brought before the tribunal, made arrangements to hand over the books.

The CHAIRMAN: I am not surprised to hear that. Moving to question 3.

Mr Raymond: Question 3 deals with enforcement, and asks us to discuss SAT's current powers in relation to enforcement of its orders. I have brought a pamphlet prepared by the tribunal, because this was a matter in relation to which we often received questions over the counter. This pamphlet

explains fully every aspect of enforcement of the orders. It might be useful if I gave you a few minutes to read that, and then I am happy to expand further. There is a summarised answer, I suppose, in my briefing note, but I can then expand as required.

The CHAIRMAN: I think the committee pretty much understands this, so perhaps if you just continue on. Members can read it, but we have been over this.

Mr Raymond: All right; thank you for that indication. The mechanisms are there for enforcement. In relation to a monetary order under section 85, it would be enforced through the Supreme Court. We have not had any feedback to suggest that that has presented any difficulty to the parties. I am not sure whether the committee may have received evidence to that effect.

The CHAIRMAN: Well, it becomes a judgement then on costs; what you are pursuing and what it is going to cost you.

Mr Raymond: As I understand it under the act, there is no filing fee payable, so it would be whatever the Supreme Court would charge for the issue of a warrant of execution if it was for payment of money. I am not aware of whether there is any difference between the fee level charged in the Supreme Court as opposed to elsewhere.

The CHAIRMAN: Often it is not just a matter of paying fees; people get wary and many of these people are elderly, and it is a question of getting legal representation—those sorts of issues.

Mr Raymond: Yes. Well, there should not be a need for legal representation because all that is required is to lodge a copy of the order, certified by the tribunal. That is lodged with the Supreme Court, and the Supreme Court would enforce that in the same way as an order of the Supreme Court. That does not require any hearing; it is simply the issue of a warrant of execution. I can understand that people may have some reticence about going down to the Supreme Court as opposed to the Magistrates Court, and I am not aware of how often this may have arisen as a difficulty, if at all. But I have to say, based on my experience as a young lawyer, that it is a lot easier to go to a superior court than to an inferior court.

The CHAIRMAN: Because matters are sharper there?

Mr Raymond: Yes, and I suppose it is a factor of the volume of matters that they deal with.

The CHAIRMAN: I just wonder about the perception of the individual. I think there is a perception amongst people that if they go to SAT, that is the start and the end of the process, which we all know here that it is not.

Mr Raymond: Yes. One of the sensitivities or reasons for this sort of mechanism, of course, is that one of the important distinctions between a court and a tribunal is the ability to enforce its own processes. I suspect that parliamentary counsel, in drafting the act, would have designed something along these ways for that sort of reason.

The CHAIRMAN: We visited VCAT some months ago, and they are looking at this question and currently having a review. Members might refresh my memory, but there are two areas to which VCAT were paying particular interest: the ramping-up of mediation—they do a lot of mediation, like yourself, but they are looking at making that a more formalised process—and the other one is looking to see if they should have jurisdiction to actually enforce compliance.

Mr Raymond: Enforce the orders. At the end of the day that is a policy matter that Parliament, at the end of the day, needs to make a decision about. There would obviously be some resistance in some areas, on the basis that it confuses the status of the tribunal and the status of a court, which may have impact on a range of issues.

The CHAIRMAN: I understand all that, but from where I sit some of the problem is that people have an expectation that if they go to SAT, it is going to be resolved, and for many it is not. We

have had complaints. I do not know whether people understand the system. Does your pamphlet tell them what they need to do?

Hon ED DERMER: It might just be worth adding that we have had witnesses come to us to say that they have been to SAT and SAT has found in their favour, but the strata manager that they were concerned about in the first place has ignored SAT's finding.

Mr Raymond: Ignored the order.

Hon ED DERMER: They probably do not see themselves in a financial position to go to the Supreme Court or to go to a court. The witnesses concerned said they wanted to see a licensing regime set up for strata managers, in the hope that the jeopardy of potentially losing their licence would be enough motivation for managers, once they have a direction from SAT, to obey it.

Mr Raymond: I know that the tribunal has always supported the concept of the licensing of strata managers for the sort of reasons I referred to earlier, that licensing, education and training can only be beneficial, so I would support your observations. There are, of course, other remedies that can be followed in that situation. That person would be entitled to come back to SAT and seek an order under section 95, which would then make it a criminal offence not to comply with the order for which a penalty of up to $10 000 could be imposed. One of the difficulties, of course, is that we make these orders, but we do not know what happens with them.

The CHAIRMAN: Is it not reasonable that you should know?

Mr Raymond: We have regular public forums in all of our areas of jurisdiction where we seek feedback on any matter of concern. That is not a matter that has been raised with us, and it may be because it is a particular individual rather than some of the main players in the industry.

Hon ED DERMER: I spoke in the plural; it may be that I only recollect one witness. This option of coming back to SAT to seek compliance, with a penalty entailed for anyone who does not comply, is that explained at each tribunal hearing or at the conclusion?

[10.40 am]

Mr Raymond: Unless one had a sense that there was some risk of non-compliance, it is probably not something that would be explained. If I understand there is a need for it to be explained, it is an easy matter for us to remedy. To date, I do not think it has been explained. One normally gets an indication, by the nature of the case, whether there is a risk of non-compliance with the order. Where a complaint is brought against, to give a simple example, a proprietor who is failing to keep his lot in an orderly condition and maintain it properly, and who has ignored all initiatives from the strata company to do so, and an application is made to SAT and the party then does not appear, it is pretty clear that you need an order under section 95; that there is the need for some compulsion. And therefore an order would be made in that sort of case.

Hon ED DERMER: It may be self-evident to you that the order has not been complied with. I recollect a witness raising a concern about SAT orders not being followed and being completely unaware of the option to go back to SAT to seek further action to sort out the complaint.

Mr Raymond: One of the reasons that we have regular public forums is to get feedback in order to adapt our processes. I will be talking later about how we have introduced a short form of direction because of that sort of feedback. I will take what I have learnt today back to the tribunal and we will make it our practice to advise people of that if there is non-compliance. In fact, I think we should probably make sure that we provide a copy of this pamphlet to the parties at that stage.

Hon ED DERMER: When you speak about regular public forums to which you invite people, I imagine those forums might be of interest to those in the community who have just participated in a process whereby they have gone to SAT for a decision. I imagine that at that time in their life they will be most interested to learn what their options are. It probably would not do any harm for both

the person who has raised the complaint and the subject of the complaint to be aware of that capacity to return to SAT to seek enforcement.

Mr Raymond: Yes. I have made a note of this issue. We will adapt our processes to ensure that parties are given information specifically about enforcement, and I think that that can be reinforced by providing a copy of the pamphlet at the same time.

Hon ED DERMER: Good.

The CHAIRMAN: There are three agencies concerned with strata titles; they tend to bounce around the three of you. There is no lead agency. There is no one place you can go to nail down a problem. I think part of your problem is that there is no lead agency for people to go to talk about the problem and start to get some direction for the grievance between them and whoever else it may be. We have heard a fair bit of evidence about just that: "Where do I go when I am seeking someone to talk to about a grievance?" We have heard quite strong evidence that people are told to go to one of the other agencies—be that you or someone else telling them that—and they keep going round in circles.

Mr Raymond: Our response to that specific question—which no doubt we will come to later—is to support the thrust of that question: there is no doubt that there is a real need for citizens to have somewhere to go to for advice. Frankly, that goes beyond just strata titles.

The CHAIRMAN: Yes.

Mr Raymond: But certainly with strata titles there is a need for somebody to provide advice.

The CHAIRMAN: It is interesting to hear your information, and that of Victoria, about the success of mediation.

Mr Raymond: Yes.

The CHAIRMAN: Is mediation a key plank? Is it a plank that you —

Mr Raymond: Absolutely. You will see in our response that in the last reporting year we achieved an 80 per cent settlement of matters that were referred to mediation. We tend to talk now about facilitative dispute resolution because of the way we use directions hearings; that is, we tend to combine mediation and directions hearings and we resolved 61 per cent of opposed matters. This is beyond strata titles; it includes all of the opposed matters dealt with by the stream. Sixty-one per cent of matters were resolved by facilitative measures, either through the directions hearing process or through mediation.

The CHAIRMAN: Do you have rules on that? If it does not fit the general parameters of your ambit, do you still do mediation?

Mr Raymond: All of our members are trained in mediation. They are all very experienced in assessing cases as a result of that, so it comes down to a professional assessment: what is the right way to deal with this case? Many of these cases start through misunderstandings or people not appreciating the legal position. A significant number of matters are withdrawn after the initial, or even a subsequent, directions hearing, because it sets up a channel of communication between the parties. There is no need to refer it to mediation—they have started talking, they are cooperative; it is a case of the parties reaching an understanding of their respective positions. Someone then realises they have been barking up the wrong tree and will withdraw their claim.

The CHAIRMAN: In the Victorian process, the equivalent of the consumer affairs department does some of that work. Would it be useful for that to happen before it arrives at SAT?

Mr Raymond: In my response to this question about why we have supported strongly the concept of having an advisory body, I have pointed out that I think there would be problems in providing a mediation service. There are a number of reasons for that. I think that the skills reside in the tribunal. There are very few mediators, and I should say I am a former chairman of the Institute of

Arbitrators and Mediators WA chapter and a former vice president of the national body. I have been involved in mediation and alternative dispute resolution since the late 1980s—much earlier than when it became popular in Australia. There are very few people who have the skills to mediate in strata titles. It is a very specialised area. It is no good —

The CHAIRMAN: What about simple disputes? I am not arguing with you; I think you make a fair point. As you say, many of these issues are small in financial terms and high in grievance with individuals refusing to talk to each other. Some of it is not really mediation; some of it is just getting the parties together.

Mr Raymond: I could not possibly criticise anything that gets people talking to each other. However, if a model for disputes says you have to go through another organisation first, I would have to express some reservation about that.

The CHAIRMAN: No. What I am trying to say is that we are mulling over the idea of a lead agency approach—that is, somewhere parties on either side of the dispute can go to get the primary information about their dispute. In Victoria, they do some getting together of individuals at that level. I should not perhaps call it mediation because it is not at the professional level you describe. But that agency still has success at that level. One of the committee's concerns is how much we throw at SAT. We are aware that you are pretty overwhelmed already. Our job is not to add another 20 per cent to your workload, or whatever the figure is. I just put it in that context.

Mr Raymond: Yes. I can see that a lead body, which is there to provide advice, would be extremely beneficial. Apart from anything else, it would be a body to which we can refer parties. Although we can go to a certain point, we cannot advise parties. We can reality test quite strongly in mediation for instance, but there are certainly limits in the direction process that we can go because the person conducting the direction will ultimately be hearing it; the mediator will not be hearing the case. So there comes a time, sometimes, when, because of the particular complexity of the matter, that we really cannot take it any further in a directions hearing. We will then adjourn the directions to a later date and we will recommend that the party go to the Law Society or to the Strata Titles Institute in order to be referred to an appropriate lawyer or professional in the strata industry in order to get that advice. So the existence of a lead organisation to which we could refer people would be extremely useful. We actually took the initiative of trying to set up a voluntary advisory scheme in about 2006 by inviting the Law Society, the Bar Association, and neighbourhood organisations and so on to set up a voluntary advice scheme. There was not a great deal of interest in it.

The CHAIRMAN: I thank you. What you have just talked about is quite useful. We had better keep moving on, to question 4.

[10.50 am]

Mr Raymond: Yes, the current power to award costs. Is it necessary for me to repeat the question?

The CHAIRMAN: No. Hansard has all the information, so just get into the detail.

Mr Raymond: There are only three circumstances currently in which the tribunal can award costs. Two of them are related to the application under which a party can seek an adjustment to unit entitlements. I am not sure why those particular types of applications were dealt with separately. The other is in the circumstance in which someone amends an application, and that effectively results in wasted costs. In no other circumstance can we award costs in strata matters and, therefore, it falls outside our normal regime in the tribunal. The tribunal's normal regime is that we are a no-costs jurisdiction: each party bears their own costs. But because we have a discretion to award costs, our starting point is each party bears their own costs. It means that when you have someone behaving in some aberrant way or advancing an unjustified claim, that there is a means by which to deal with it; similarly if vexatious or frivolous claims are being advanced. I should say that the philosophy that has been inculcated in members is that we are a no-costs jurisdiction, so it takes

something out of the ordinary for costs to be awarded. But where you have someone acting vexatiously—and I use those terms not necessarily at the same level as a declaration that one is a vexatious litigant, but certainly proceeding with claims which should not be advanced—my approach is not after the event to say, "Well, you should not have proceeded with that claim". Unless it has become readily apparent to that person through the directions process or through points made by the opposing party that at some point it should have been clear that they should not have proceeded with that claim, costs would not be awarded. The number of occasions in which costs are awarded in the tribunal are few, but there is no doubt that members feel that a useful arrow in our quiver is missing in relation to strata titles, because it would prevent persistent claims by people who really have been shown time and again to have brought claims that are not justified.

The CHAIRMAN: That is fine. Can we move on to question 5, which is just statistics, and you have supplied them?

Mr Raymond: Yes, I have set out there the number of applications made in each of those years and the number of matters resolved. The question was actually on the number of matters heard, and I have simply made the point that there might be a number of hearings in any one matter. So, I have concentrated on what is lodged and what is resolved.

The CHAIRMAN: Very consistent, though.

Mr Raymond: Yes.

The CHAIRMAN: So, we move on to 6.

Mr Raymond: Yes, the anticipated increase in workload, if we are given jurisdiction over strata managers, is very difficult to assess. I do not know whether organisations like the Strata Titles Institute of Western Australia or their peak body, the National Community Titles Institute, might be able to give better guidance on what their experience is in other states; and therefore what the likely flow-on might be here. The assessment is also made difficult because of other recommendations that have been made. For instance, we have recommended that section 84 be amended. At the moment we have a maximum monetary limit of $1 000, which is clearly wholly inadequate. In fact, it is very rare that anyone brings a money claim before the tribunal because it is just not worth it; you might as well go to the court.

The CHAIRMAN: Yes.

Mr Raymond: Our recommendation is that that level should be increased to the equivalent of the Magistrates Court and be framed in a way that there is an automatic uplift whenever the Magistrates Court jurisdiction increases. That jurisdiction is currently $75 000. If that amendment is granted, for instance, then there might be a whole raft of new claims that we have not seen to date. I have made the point that you could have claims against strata managers where they have breached their duties in some way and that has resulted in loss. Conversely, depending on how the legislation is framed, you might also have claims by strata managers for payment of fees.

The CHAIRMAN: I just put to you a matter that the committee is considering. When strata management started, basically the default situation was that someone in the building would do all the work and it would all be friendly and everyone would live happily together. But we are now talking about tens of millions of dollars and many tens of thousands of units, so, we are no longer talking about a small process. And we are talking about a state government and other states looking at infill and a whole range of other planning issues where strata title is just going to keep on growing.

Mr Raymond: Yes.

The CHAIRMAN: So, it is important that SAT actually thinks about this, because if we recommend to throw it your way, or somebody else recommends to throw it your way, it could be very significant for you.

Mr Raymond: Yes. This has been a problem in the tribunal in that we have what we refer to as incremental increases in existing jurisdiction, which are very difficult to measure. I know that a lot of work has been done on a funding model, which will have to work, obviously, retrospectively. But based on the number of applications that are received by the tribunal, it will result in adjustments to the next year's budget. But it is very difficult to deal with and different when we have got a completely new jurisdiction given to us where we can do work to try to effectively price what that will cost and what resources we need to deal with them.

The CHAIRMAN: I can inform you—if you take it back and think about it, you might want to get back in touch with us, though we are getting close to the end of our inquiry—that we are quite interested in the social aspects of this. We see this as a steep increase in activity. Also people are looking for the things you talk about: a low-cost reasonable form of justice but with an outcome. People are coming to us saying, "with an outcome". Even though what you quite rightly describe under the Supreme Court process, there are people saying, "Well, we shouldn't have to do that. We should just have to go to SAT." We have talked to VCAT about that and they are under review, that is reasonable to say. They are reviewing their situation, and they did say that you are regularly over there as an organisation.

Mr Raymond: Yes.

The CHAIRMAN: So, perhaps that is something you should have a chat about.

Mr Raymond: Yes, I will take that back to Justice Chaney. In fact I have come back from spending last week with the Queensland Civil and Administrative Tribunal at which members of VCAT were also invited. We are working closely together and we can work together on that.

The CHAIRMAN: In forthcoming weeks, if you thought about things and wanted to talk to us, we would be very pleased to hear from you. But basically it would be good to know the view about the structural argument, which we understand, as against what we see as a social demand for a single place to go to get information and a quick resolution of problems.

Mr Raymond: Yes. I can see also that there are a number of practical considerations in terms of having bailiffs and the like able to enforce these processes in parallel with the court system. Yes, I will make a note of that.

The CHAIRMAN: So, could we move on to question 7 then?

Mr Raymond: Mediation of strata title disputes: some of this I have already covered. I have mentioned that all of our members are trained; that is, in the standard Institute of Arbitrators and Mediators Australia and LEADR models. Those models are adapted as necessary to suit the particular case, and it is fair to say that the direction of mediation is clearly becoming more proactive so that more input is being sought from the mediator than might have been the case in past years. And I have made the point that the fact that our mediators are all members who are accustomed to deciding this type of case gives added weight and effectiveness to their mediation. I have mentioned that alternative dispute resolution techniques are employed at the initial directions hearing, and that while there are no separate statistics kept for strata matters, 61 per cent of the total number of disputed matters were resolved by facilitative measures. And of the matters that were assessed as needing a formal mediation, 80 per cent of those matters were resolved in the last financial year through mediation. We often conduct mediations on site. This is particularly in circumstances where there is some physical attributable feature of the building that is going to come into the decision-making process.

[11.00 am]

Hon ED DERMER: That is the best way to explain it, to see it on site.

Mr Raymond: Yes. It also means that although the mediator is not going to be deciding that dispute, the mediator is able to strongly influence the parties through reality testing, having

observed the subject matter of the dispute. We find that very effective. The mediation, as I think I indicated earlier, will usually occur within that eight-week period of our benchmarking, which means that most of them are heard between one and four weeks of the date of the initial mediation. That will depend on the urgency of the matter and the availability of the parties. I recall one case in which, because of urgency—there was a person leaving for overseas—mediation was held within a matter of days of the directions hearing. The matter did not fail, and a final hearing was heard again within a week or so of that date. So the process inter-gloves very well. Also, under our procedures, one of the advantages is that if an agreement is reached in mediation, it is usually reflected in the order of the tribunal, which not only gives it added weight, but also opens the door to enforcement possibilities. Unless there is anything further?

The CHAIRMAN: We have run out of time, so I will jump to question 11, because you have given detailed answers to these questions. Can we just run through 11?

Mr Raymond: Yes. Under the old strata title regime, all matters were decided on the documents, which meant that even if an urgent application was made, the Strata Titles Referee would get out a short decision dealing with the matter and the order would go out at the same time as the decision. So I think this section as it stands is a carryover from the old regime. We will deal with that matter far more quickly than the Strata Titles Referee would ever have dealt with it, because an urgent application will come in and as soon as it is lodged, it will be brought to me for assessment. I will assess the urgency and, if it is urgent, it will be heard the same day—if it is really urgent. The difficulty then is while we can get an order out that day and we give oral reasons for our decision, we cannot produce the written reasons for a decision, which the act requires. I have had to devise a template in the form of an order that incorporates very truncated reasons for a decision. None of them has been appealed, but I have to hope it would stand if it was appealed.

The CHAIRMAN: So it would be useful to have some change in the act?

Mr Raymond: It is a real practical problem.

The CHAIRMAN: Okay. I have just a couple of final questions. You have given some strong indication of time lines. The committee members were just interested: if you are the average person—I know there is no such animal—and you make an application, what are the expected time lines?

Mr Raymond: I suppose if I was the average person, I would have a directions hearing within two weeks. If it does not settle in the directions hearing process, depending on availability, I would have mediation within four weeks. If the mediation is not resolved, how long it would then take to get to a hearing depends on the nature of the case. I mentioned that we have two sets of strata title standard directions. One is a short form in which we truncate the process. We are able to do that and use this process where there are circumstances that indicate to us that the strata company has overwhelming support for the position that it is taking in the process. For instance, they may file minutes of a series of general meetings that show that the issue has been debated and the overwhelming majority of owners support whatever the outcome is. We will use a truncated directions process there, which enables the respondent to file a response, usually within seven to 14 days. The strata company then sends a notice to—there may be 100 lot owners—100 lot owners, saying that its application, the response to it and the orders made by the tribunal are available for inspection at the stated place and within a certain time frame. We then require what we refer to as notified persons under section 79 of the act to either make an election to apply to be joined formally as a party in the process, if they wish to play a full role in it, or otherwise just to file a submission on the basis that they will play no further part in the process. Our directions then enable the applicant and respondent to inspect the tribunal file, because you will never get 100 people to send their submissions to everyone else. They have an opportunity to inspect the file and file further responsive statements. So that is the truncated version, and that might come to a hearing within 20 weeks or so.

The CHAIRMAN: I was going to say it has to be within that 24 weeks that you talked about.

Mr Raymond: Yes, that is right.

The CHAIRMAN: Finally, would you feel comfortable to talk about just strata titles and jurisdiction generally? Do you have any view about what we are looking at? We talk about your jurisdiction and also outside your area.

Mr Raymond: It is a difficult question to answer. I agree with the comments you made in terms of the social issues. It is clear from all of the indications, from town planning aspects as well, that there is going to be a vast increase in strata title schemes, and the nature of the schemes will change significantly. I know about the proposals that have been put up for modules with different management rules and the like. I know how large strata schemes are in eastern states and elsewhere in the world where they effectively have become almost mini cities. It is a developing area of jurisdiction and it is one we have just got to continue to grow with and keep on top of as it develops.

Could I perhaps just hand up—I was going to refer to it in terms of the nature of our processes—a typical application form to demonstrate how simple the process is?

The CHAIRMAN: Most definitely, yes.

Mr Raymond: I have also a paper that, particularly as I have not had a chance to talk to the question about some people perceiving that our processes are difficult, I gave to a Law Society seminar in 2009. From page 12 onwards of that paper I address specifically in some detail the tribunal's procedures. It is specifically in relation to strata matters.

The CHAIRMAN: That would be excellent; thank you. That is very useful, Mr Raymond. In fact, your evidence has been very useful, because it is clear that we have been pondering some of this. Your evidence has given us some direction definitely, so we really appreciate it. I repeat that if something does come of your discussions and you can be reasonably expeditious, we would be interested to hear from you.

Mr Raymond: Yes. I have a made a note of that and I am sure that we will get something to you within a short time frame.

The CHAIRMAN: Are you happy for this information on the role of the State Administrative Tribunal to be a public document?

Mr Raymond: Yes; it was a public forum.

The CHAIRMAN: Thanks for your time, Mr Raymond; it is most useful.

Mr Raymond: Thank you to the committee for the hearing.

Hearing concluded at 11.09 am