LEGAL AFFAIRS, POLICE, CORRECTIVE SERVICES AND EMERGENCY SERVICES COMMITTEE

Members present:

Mr J-P. H. Langbroek MP (Acting Chair)
Mr J.P. Bleijie MP
Mr C.J. Foley MP
Mrs B.M. Kiernan MP
Hon. D.M. Wells MP

Staff present:

Ms A. Powell (Research Director)
Ms A. Honeyman (Principal Research Officer)

PUBLIC HEARING - EXAMINATION OF REFERRED BILLS

TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, 3 AUGUST 2011

Brisbane

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Committee met at 10.38 am

ACTING CHAIR: Good morning, everyone. I declare this public hearing of the examination of bills open. Thank you for your interest and your attendance here today. The Legal Affairs, Police, Corrective Services and Emergency Services Committee is a statutory committee of the Queensland parliament and, as such, represents the parliament. It is an all-party committee that adopts a non-partisan approach to its inquiries. Before proceeding further, I would like to introduce the members of the committee present today: Mr Jarrod Bleijie, the member for Kawana; Mr Chris Foley, the member for Maryborough; Mrs Betty Kiernan, the member for Mount Isa; and the Hon. Dean Wells, the member for Murrumba. My name is John-Paul Langbroek. I am the member for Surfers Paradise and the deputy chair of the committee. The chair of the committee and member for Springwood, Ms Barbara Stone, is unfortunately unable to attend today.

I would like to give you an overview of the committee's inquiry. On 17 June 2011, the parliament referred the following four bills to the committee for examination and report to the House: the Property Agents Bill 2010; the Motor Dealers and Chattel Auctioneers Bill 2010; the Commercial Agents Bill 2010; and the Agents Financial Administration Bill 2010. If passed, the bills propose to split the current Property Agents and Motor Dealers Act 2000 into industry specific acts, along with an act covering the administration of trust accounts. The committee is required to report to the House by 19 December 2011.

The committee has advised the public of the examination by releasing an information paper and by advertising in the print media, on the committee's website and also by writing directly to a number of individuals and organisations. I stress that the committee is undertaking an examination process on behalf of the parliament and has as yet made no recommendations nor put forward any proposals. The committee is being assisted in its examination of the bills by advisers from the Department of Justice and Attorney-General. For members or visitors in the gallery, they are seated in the seats on the government side of the House beyond our stakeholders from the Law Society.

The committee's proceedings are lawful proceedings and are subject to the standing rules and orders of the Queensland parliament. I ask all people present to turn off mobile phones or to put them on silent mode. In the unlikely event of the need to evacuate, please follow staff directions. Members of the public are reminded that they are here to observe the hearing and may not interrupt the hearing. In accordance with standing order 208, any person admitted to this hearing may be excluded at the discretion of the chair or by order of the committee. Representatives of the media may attend and may record the hearing.

Although the committee is not swearing in witnesses, I remind all witnesses that these hearings are a formal process of the parliament and should be respected as such. I also remind witnesses that Hansard will be making a transcript of the proceedings. I welcome the Hansard staff who are here today. Therefore, I ask you to please identify yourself when you first speak and to speak clearly and at a reasonable pace.

Today we will hear from the Queensland Law Society, Professor Bill Duncan, the Real Estate Institute of Queensland and the Property Sales Association of Queensland. We will now begin the public hearing with our first witnesses. I welcome representatives from the Queensland Law Society. Good morning and thank you for coming along today. Could you please introduce yourselves, speaking clearly for Hansard, and then please make an opening statement if you wish. The committee will then have some questions for you.

DUNN, Mr Matthew, Principal Policy Solicitor, Queensland Law Society

L'ESTRANGE, Ms Noela, Chief Executive Officer, Queensland Law Society

RAVEN, Mr Matthew, Chair, Property and Development Law Committee, Queensland Law Society

Ms L'Estrange: Thank you, Mr Acting Chair. Initially I would like to thank the committee for the opportunity to attend this session. I would also like to take the opportunity to congratulate the Queensland parliament on its initiative in creating the portfolio review committees. We consider this to be an excellent new approach to legislative review in this state, as it gives parliament and parliamentarians the opportunity to hear the views of the community affected by proposed legislation.

ACTING CHAIR: Welcome. Can I ask each of you to confirm that you do not object to being filmed or recorded by Hansard and the media? Can you also confirm if you have read the instructions to committees regarding witnesses?

Ms L'Estrange: I have.

Mr Raven: Yes.

ACTING CHAIR: Would you like to make a brief opening statement and then we will follow with questions. I am happy to hear from you, Mr Raven.

Mr Raven: Thank you, Acting Chair. Generally in our submission the society has been supportive of the division of PAMDA into the three or four new pieces of legislation. Our submission areas focus mainly on part 6 of the bill, which reproduces chapter 11 of PAMDA, pretty much as is. I do not think anybody would have any objection to the underlying principles behind the chapter. It is simply to give consumers or buyers a warning statement prior to entering into a contract to tell them to get legal advice to make sure the property is worth what they are paying for it by getting a valuation and also to tell them that they have a five day cooling-off period in which they can terminate the contract.

However, chapter 11 has had a somewhat troubled history since it was introduced in 2000. I do not know whether anyone keeps statistics on these things, but it is probably one of the most litigated pieces of legislation in Queensland. The society's view is that this is probably because it is unnecessarily complex and technical and there have been a lot of difficulties in complying with it out in the coalface where agents are usually responsible for preparing the contracts. I think the complexity of it is illustrated by the checklist that the Law Society's insurer, Lexon, hands out to all lawyers, which is 4½ pages long. It is a very detailed and complex thing to make sure someone has complied with PAMDA.

The sections were completely rewritten in 2005 and following that—in around 2008—there was a review by the Service Delivery and Performance Commission. The society put in a number of submissions to that commission in an endeavour to simplify some of the processes and a number of those were taken up when the act was amended in 2010. However, in our view it did not quite go far enough. A number of the commission's recommendations were not followed.

The submission that the society has put in today is really just focusing on four fundamental areas. We would still like overall to see the process simplified but we think there are three or four areas in these provisions which could be amended just to clarify things and simplify the process. The first of those is, given the consumer protection object of the legislation, we think we can make life easier for ourselves as lawyers and real estate agents preparing contracts by eliminating a number of transactions which really do not require the protection of this type of legislation, or warning statements, or cooling-off periods. We have suggested some things in our submission, for example, sale to government entities, sale to public companies, developer to developer sales are invariably negotiated by parties who have lawyers acting for them and they do not really need to be told to get legal advice, get a valuation and they do not need a cooling-off period.

The second issue that we have raised is a little anomaly in the drafting of the legislation in relation to the commencement of the cooling-off period. Basically, a contract is formed usually when the seller notifies the buyer that their offer has been accepted and that can be done over the telephone—the seller has signed your contract. The problem with the legislation is that the cooling-off period does not start until the buyer receives its copy of the contract. That can be after the contract is formed. The problem that could lead to potentially is that the seller never gives the buyer a copy of the contract. So they do not ever get a cooling-off period. We raised that in our submissions but that was not corrected. Whilst we are not aware of any instances of rogue sellers utilising that, we think that it is something that needs to be corrected.

The next issue we have raised is the uncertainty surrounding options to purchase. There have been several cases in relation to whether an option is, in fact, subject to PAMDA, because it just talks about relevant contracts. The Court of Appeal very recently in a case called Vale v Delorain seems to have established now that it is quite clear that PAMDA does apply when you enter into an option. So I think we are satisfied that that issue has been resolved. However, what leads on from that is what happens when a party exercises an option and the contract itself is entered into? Is there another cooling-off period? Do the warning statements have to be given again and so on? We think that the only way to clear that up is by legislation.

The final thing we have raised in our submission is the definition of 'residential property', which is now in section 14 of the bill. Essentially, a residential property is described as a single parcel of land on which a place of residence is constructed or being constructed, or a single parcel of vacant land in a residential area. So obviously what we are trying to attract is someone who is buying a house or somebody buying a piece of land to build a house on. There are also some exclusions, including land use ostensibly for industry, commerce or primary production. So if you are buying a large farming property with a homestead on it, that would be a commercial purpose and outside of PAMDA.

There are a number of cases about whether something is or is not residential property. Some of the uncertainties in there is what is a single parcel of land? Does it mean a single lot or does it mean two lots that are together so that they look like a piece of land? There were some conflicting cases on exactly whether PAMDA applies to someone buying two lots or three lots. We can understand that perhaps someone out in the suburbs might be buying two lots next to each other, and that probably should be something to which PAMDA applies, but if someone is buying 150 lots, that is clearly a developer doing some development work and that should be excluded. So our suggestion is that, if you are buying three lots or more, that should be outside of PAMDA—or the new property agents act.

The next issue is the exclusion for land use substantially for industry, commerce or primary production. The uncertainty there is that, when you actually apply that test, it is looking at the actual use. That test is probably applied at the time the contract is entered into. So you can get this strange situation that if you are selling a farm with a house on it but the farmer has moved out and the farming purpose is temporarily halted, then PAMDA is going to apply, even though the buyer is some international cattle farming company. That seems a little silly. The other difficulty is in mixed-use developments, which are now very common. Typically, at the time the contract is entered into you will have a single parcel of land. It will have multiple approvals. It might include residential apartments and commercial shops. If I am buying a proposed commercial shop, it is vacant land. It is in a residential area, because there is a development approval for residential uses over that land, and I have to comply with PAMDA even though I am a commercial buyer buying a shop. So we think that needs to be fixed. The way we think that should be fixed is focusing on what the purpose of the contract is. So clearly, if I am selling a proposed shop, the contract will set out that I am going to have a shopfront and it will be quite clear on the face of it that I am buying a shop and not a residence.

Finally, the definition of 'residential area'—which is important where you are buying vacant land—has been the subject of quite a bit of litigation. It is overly simplistic. It probably harks back to the day when we had residential A and residential B zones. If you look at the Gold Coast City Council's planning scheme now, it has all sorts of wonderful things like tourism and all sorts of things. The courts have been struggling over exactly what a residential area is. In the case of Arc Holdings v Riana, which was decided last year, a test was adopted, which is basically where houses or units for residential purposes are a predominant use, or a preferred use. We think, just for the sake of clarity, if that is a single judge decision that definition could be adopted in this legislation. That was really the gist of our submissions. So thank you.

ACTING CHAIR: Thank you, Mr Raven. That was very comprehensive. Do members have any questions about particular matters raised?

Mr FOLEY: Matthew, you talked about call-and-put options. I was just confused. That would seem to be in the realm of a sophisticated investor versus a mum-and-dad purchaser. Do you see that falling into that area of the sophisticated buyer?

Mr Raven: Most of the time, but there are some mum-and-dad buyers who would still want to do that. It is a common mechanism where, for example, you still have to go and see your accountant about who you want the buyer to be. It lets you nominate another buyer. You only pay stamp duty on the option fee, which is typically a dollar. So you can then go off and see your accountant, set up your super fund as the buyer without incurring double stamp duty.

Mr FOLEY: So in that situation it is almost more an expression of interest in buying a property. You are not obligated legally to buy it?

Mr Raven: It depends on the type of option it is. Typically in that case it would be a put-and-call option. So a call option is just where the buyer has the right to call on the seller to sell. A put-and-call option allows the seller, if the buyer does not buy, to put it to the buyer and then the buyer has to enter a contract.

ACTING CHAIR: Thank you, any other questions?

Mr BLEIJIE: Yes. I just wanted to turn your attention to these warning statements. I was in practice when these warning statements came into effect—faxing it, and attached is the top sheet, which I know the Law Society was also involved in at the time. We have had legislative change now. It used to be that buyers could get out of contracts. I know I did it often when clients wanted to get out of contracts because either the fax machine had sent it in the wrong order or for whatever reason. That to some extent has been fixed now. The separation of these bills still require this warning statement which, correct me if I am wrong, is 32a?

Mr Raven: 30c.

Mr BLEIJIE: So the warning statement, as an item of consumer protection, gets attached to the contract. There were then requirements to draw the attention of the buyer to the warning statement. I always found difficulty in understanding that we have a warning statement, which has 'warning' at the top and then the seller's agent had to, in fact, draw the attention of that statement to the buyer. Is it the Law Society's view in terms of these warning statements—and I am going to be very broad here—one where you would even consider a proposal that they just go? You have a contract. People enter into contracts once they read the contracts. Or would you still apply the warning statement but with the relevant provision of drawing the attention to the buyer?

I am just after some guidance from the Law Society in terms of these warning statements. You mentioned that these particular parts have been heavily litigated. That is simply because a lot of the time—and I can recall an incident where it was an off-the-plan contract. The seller's lawyer at the time had not given notice of the warning. You used to have to send the contract back and then draw their attention again to it once it is all signed. Anyway, it was a year later and the buyer said, 'The market has changed. Can we get out of the contract?' It was an unconditional contract, but I managed to trace back the lawyer just not putting that one paragraph directing my attention to it and we got out of the contract. That has been legislatively changed slightly. As a general view, should we be even putting these warning statements on? Does the Law Society support that view—to have some sort of warning statement—or is it just that a contract is a contract?

Mr Raven: I think it is fair to say that the members of the society would still be supportive of the concept of having a warning statement. I have not polled all the members, but I guess my personal view—and I would dare say the view of the majority of lawyers—would be, and I think you may have been alluding to it, if you hand someone that with a big word 'warning' across it and get them to sign it, it does not really need to be attached if you give it to them as part of the contract. You are right: the changes in 2010 have fixed a lot of the difficulties, but not entirely. The members of this committee will probably be sitting here thinking, 'Why is it so hard to attach a piece of paper to a contract? How can that lead to problems?' But in practice it does. Lawyers will receive the contract after it has been signed and then you are supposed to look at it and tell the buyer if they have a right to get out of the contract. Quite often you will get it and there will be little holes in it, but no staple and you are there going, 'It looks like it was stapled at some stage, but I do not know when.' So you have to tell your client, 'You might be able to get out of it, but I am not sure. Can you remember if it was stapled when you signed it or the second time you saw it when it came back with the initials on it?'

In practice, it is very, very difficult to tell whether something was attached at the time it had to be attached and I think that is the problem. As I say, I think the society's view would be if you give them that and they have to sign it before they enter into a contract, that is probably as much as you can do to help them. Attaching it really is not adding anything to the process other than making it complicated and leading to litigation.

Mr BLEIJIE: But in respect to the new provisions under this bill that we are considering now, from the time the seller or the seller's agent gives the buyer a copy of the contract, do you see the provisions that flow to that warning statement, the warning statement and so forth better or do you think we should still be looking at some sort of change there? Obviously, this committee is considering this and will be putting recommendations to the minister.

Mr Raven: I would have thought we definitely support something much simpler than what is in there now, even with the four changes that we have proposed.

Mr Dunn: I think it is fair to say that from the anecdotal evidence and what little research there is into the effectiveness of the form 30c warning statement there is not a great degree of retention from buyers after having signed the form of what was actually in the form or what it was directing the buyer to do or bringing to their attention. So from that point of view I think its application can be a little hit and miss in terms of people retaining it. It probably has a place for those people who do actually take the time to read it and actually get the benefit from it, because the information in the form is still very important information.

Mr Raven: The other thing that you need to bear in mind is that when you give someone a contract the agent is also giving them a form 27c, which is another three- or four-page form declaring that they do not have any arrangements with other people involved in the transaction. The buyer's lawyer has to give them an independent certificate. If it is a unit, they are getting a unit disclosure statement with a copy of the community management statement attached to it which explains how their levies are calculated. That is about 70 or 80 pages. If they are buying a unit at the Gold Coast off the plan to put in a holiday rental pool, they get a product disclosure statement under the Corporations Act, which is usually another 100 pages or so. They have something about this big to sign. The warning statement actually might be better handed to them as a single sheet, because it would stand out a bit and they might actually read that one.

ACTING CHAIR: Thank you for that feedback. By the way, Hansard cannot put gestures into *Hansard*. For the benefit of the *Hansard*, 60 centimetres high is how big the documentation is. Member for Murrumba, I think you have a question and then we have to move on to our next witness.

Mr WELLS: Is it all right if I ask a line of questions?

ACTING CHAIR: Certainly.

Mr WELLS: I will ask you about your four points later. But one of the things that the parliament is trying to achieve with this rewrite is simplification and a reduction in the amount of red tape. Do you think that the drafts that you have seen go any distance in that direction, your four points aside?

Mr Raven: It has just reproduced the provisions in PAMDA and put them in a new act. So, no, it will not change anything practically, I do not think.

Mr WELLS: Is the rewriting of those provisions into multiple pieces of legislation going to add to the facility of somebody's daily life when they are working in one of those areas?

Mr Raven: That is probably fairly unlikely I would say.

Mr WELLS: Okay. I turn to your four points. First of all, there is the anomaly with respect to the cooling-off period. The contract comes into being when acceptance occurs, but the cooling-off period does not start until the buyer is given a copy of the contract. I suppose—no, let me not suppose. When do you think is the correct time for the cooling-off period to begin?

Mr Raven: It is a difficult question to answer. This is one of the provisions that is changed each time the act has been changed because obviously you want some certainty around when the cooling-off period starts. The previous solution which was quite problematic was to say that the cooling-off period starts when the buyer receives a copy of the contract but it also said that the buyer is not bound until they receive a

copy of the contract. So the problem was trying to prove that the buyer had actually received a copy of the contract, especially an off-the-plan sale. Perhaps two years or even longer after it was signed the buyer would say, 'I'm not bound because I never received a copy.' I think at the very least you could leave it as is but put an obligation on the seller to give the buyer a copy of the contract.

Mr WELLS: Could you say that last sentence again please?

Mr Raven: Put a section in that says the seller has to give the buyer a copy of the contract. That is the simple solution.

Mr WELLS: If the seller does not give the buyer a copy of the contract then there is no contract.

Mr Raven: No, that is going back to how it was before.

Mr WELLS: So what are you suggesting then? What is the sanction if the seller does not give the buyer a copy of the contract?

Mr Raven: A penalty probably.

Mr WELLS: Okay. Your fourth point was in relation to what is going to constitute a residential property for the purposes of these provisions. Just for the benefit of those of us who do not practise in this area of law, can you explain what the difference is between the quality of life in the day of a person who has to comply with these provisions and a person who does not have to comply with these provisions because they are not dealing with a residential property? What is the work that has to be done by somebody who has to comply with the provisions?

Mr Raven: It is not so much about the work that has to be done. Stapling a two-page form to a document and doing a letter drawing someone's attention to it is not a big deal. The big deal is when one of the parties, or the buyer particularly, wants to get out of the contract. There is a lot of time spent sitting here going through these provisions working out if PAMDA applied or not. It is also quite common for an agent because he just thinks he is selling something commercial in nature not to even think about PAMDA and not to put the warning statements on it when because of some strange anomaly PAMDA does apply. For example, I keep getting told by clients—I have been acting for some banks selling development sites on the Gold Coast which are vacant land to developers—'Why do we need to put a warning statement on this? We are selling it. It has a DA to put a 100-storey unit development on it. Why do we need to have warning statements and why can the buyer get out of the contract if we don't draw their attention to it et cetera?' I guess it is not so much the work that is involved in preparing the contract; it is the fact that it does not click for some people that they need to comply with PAMDA because it does not seem to be a sale of a residential property, but issues can arise later down the track when the parties are reconsidering their positions.

Mr WELLS: So you are saying that the requirement to comply with these provisions provides a pretext for somebody to conduct litigation to get out of something and it is entirely gratuitous because the person who is conducting that litigation is somebody who we deem ought to have known anyway.

Mr Raven: I will not say a majority but a lot of the cases are developers—when the market turned a few years ago—relying on technical non-compliance issues to get out of contracts.

Mr WELLS: I see. So you are suggesting effectively a purposive test as to whether something is residential property or not. You are saying that, if it is not residential property, if it does not satisfy that purposive test, then it should not be deemed to be residential property for the purposes of the application of those provisions.

Mr Raven: To some extent. You would need to be very careful how you worded it because a party's intent is just as difficult to prove sometimes. You would not want a developer selling something to a buyer and then turning around and alleging the buyer wanted to put a shop on it and the buyer saying, 'No. I'm going to put a house on it.' It is too hard to prove. If I had a contract where I agree to sell you a residential property—I agree that I am going to build it, then get title and transfer it to you—when it is clear on the face of the contract that I am selling a residential property, then it should apply. Similarly, if it is clear on the face of the contract I am selling something that is going to become a shop, it should not apply. So it is not just intent of the parties because that is too hard to prove.

Mr WELLS: So it should not just be intent. It should be a question of evidence of what the—

Mr Raven: The subject matter on the face of the contract.

Mr WELLS: How often would that appear in a contract? Say, a developer or the government wants to buy a block of land that has a farm on it. How often would it appear on the face of the contract that that block of land was going to become a multiple subdivision or a federal government munitions factory or whatever?

Mr Raven: In terms of the first part of the question, what we suggested is that if there is a development approval for the subdivision in place or the contract is conditional upon the local authority giving the reconfiguration approval. But in either case it would be clear on the face of the contract.

Mr WELLS: I see. You said that sales to government entities should not have to satisfy the PAMDA test. Is there evidence of gratuitous litigation being brought about by government agencies seeking to get out of the contract that they have signed up for?

Mr Raven: Not at all. My experience is that the government agencies sit there and say, 'Why are we wasting all this time with these warning statements and so on going back and forth?' It might be a minor annoyance rather than trying to take advantage.

Mr WELLS: Right. I have never read Vale and Delorain—the issue about when time begins to run and whether time ought to run on multiple occasions. Is there any public policy reason why time ought not to run on multiple occasions?

Mr Raven: I am not quite understanding your question there.

Mr WELLS: In the context of the discussion of Vale and Delorain, you were talking about cooling-off periods and whether there would be multiple cooling-off periods if the thing started and stopped.

Mr Raven: I understand. I was talking about an option to purchase. Vale and Delorain establishes that when you grant somebody an option you have to comply with PAMDA upfront before the option is entered into. An option period may last for a number of years for whatever reason. So when the seller has a put-and-call option and wants a binding contract, the cooling-off period expires and two years later the buyer exercises the option and then says, 'Okay, I'm cooling off. See you later,' that is contrary to the commercial deal, if you like. They would only do that to take advantage of the legislation. Our suggestion would be that in that case, if you have complied with PAMDA and given them their warning statement upfront and they have signed a put-and-call option, again for whatever reason they do not get another bite at the cherry two years later when the option is exercised or when it is put to them.

Mr WELLS: Would I be correct in saying that you have more evidence of unscrupulous purchasers than you have of unscrupulous sellers?

Mr Raven: I do not act for unscrupulous sellers, I guess. I hope so. I would like to think so anyway.

Mr WELLS: Thank you very much.

ACTING CHAIR: I thank members of the Queensland Law Society. I thank Noela L'Estrange, the Chief Executive Officer of the Law Society, Mr Raven and Mr Dunn, for coming along. Is it okay for the secretariat to contact you for further advice about technical aspects as we continue our inquiry? I look forward to hearing the department and the minister's response to your advice given to us today. Thank you for your very practical statements that you have given us that I think will really aid both the minister and, of course, this committee in its considerations. Thank you for appearing as our first witnesses to our first inquiry.

Ms L'Estrange: Thank you.

ACTING CHAIR: I would now like to call our second witness who has made a submission, and that is Professor Bill Duncan. I understand that Professor Duncan has another appointment at quarter to 12. I invite Professor Duncan to the table.

DUNCAN, Professor Bill, Law Faculty, Queensland University of Technology

ACTING CHAIR: Welcome, Professor Duncan. Can I thank you for attending. Can I confirm you do not object to being filmed or recorded by Hansard and the media?

Prof. Duncan: No.

ACTING CHAIR: Can you confirm that you have read the instructions regarding witnesses?

Prof. Duncan: Yes.

ACTING CHAIR: We invite you to make a brief opening statement. We will follow with questions.

Prof. Duncan: Thank you. I made my submission, which I assume you have in front of you. I have taken an interest in the auctioneers and agents legislation for some time. I had a fair bit to do with the insertion of chapter 6 of the bill and chapter 11 of the existing act, which the Law Society spoke about. I would strongly support the split of the bills. I sat in the chamber to listen to the Law Society deliberately. I think in answer to a question from Mr Wells, there was a cross-purposes answer. You asked Mr Raven whether or not a split of the bills would assist in the operability of the act. I think he was thinking about the particular change that the Law Society wanted. It would assist enormously in dealing with the act.

The act is, I think, one of the worst presented acts out of the parliament. It deals with too many things and it is hard to find a way around. I think this initiative of Minister Lawlor is an excellent initiative. I also compliment Minister Lawlor on the changes that he made to the act that came into force on 1 October 2010, because it greatly simplified dealing with the act. I will not reprise the Law Society's statements. I do agree with most of the things they have said, but I would add one thing, if this is to go back to the department. There is a problem dealing with nominee contracts as well. They are a little bit in the same position as options. Options are more common and more frequent now than you would think.

The problems with this act have dealt largely with long-term contracts of sale of units off the plan. It affects, at the moment, the Gold Coast in particular, where they have a lot of stock. You know all about that. There are sales of Gold Coast units, where they have five or seven years of supply, where there are purchasers overseas. It is not uncommon. I have seen contracts just recently. I am a consultant to a law firm, Allens Arthur Robinson. I deal with these things on a weekly basis. The last half a dozen contracts I have seen for some units that presently have been sold by receivers are from Hong Kong and Singapore. You have buyers all over the world coming in. I do not think the warning statements are translated into Chinese or whatever; I am not sure. You are always going to have a problem where there is a long lag time between signing a contract and the construction of a building full stop. I know that financiers now are very wary about lending, even on precommitments of 75 or 80 per cent because of what they have seen recently. The banks do not want to manage units and pay levies and all that type of thing for five to seven years. You are always going to have that problem.

When I drafted recommendations to Minister Spence in July 1999, the report of which was tabled in parliament prior to the enactment of the current legislation, I decided that it was best to introduce warning statements and cooling-off periods as they have in other states, because we were dealing with a particular phenomenon. It was the phenomenon, mainly on the Gold Coast but also on the Sunshine Coast and in North Queensland, of two-tier marketing. I am sure you are all familiar with it. It was an extremely difficult problem. This bill was waiting to go, in fact. I think Denver Beanland drew it up when he was Attorney-General, because I spoke to him about it before this. When the Beattie government came to power, there was a lot of publicity about this two-tier marketing. It was out of control. I had a number of discussions with Minister Spence. I went to some public meetings. The only thing that I saw that we did not have which fitted into our conveyancing practice was a warning to purchasers and a cooling-off period. The two-tier marketing was a high pressure sales thing and you needed to give people a bit of cooling-off time so that they could just get out of it for any reason when they had second thoughts.

One of the problems that Mr Raven raised, and I think it is an interesting problem, is when the cooling-off period starts. I think Mr Wells also asked a question about this with multiple buyers. It is terribly difficult and when I did the report I was struggling with this myself. You have to have a definite time. If the cooling-off is five days, you have to have a definite time which marks that occasion when the contract starts, it comes into force, and then five days from there. I think with the earlier legislation, section 365 of PAMDA, which was repealed on 1 October 2010, the contract did not come into effect until buyers had received a copy of it. So that would be the last buyer received a copy of it or, if it was multiple buyers with a solicitor when their solicitors received a copy of it, their agents. I think this was probably as best as you are going to get it.

That was repealed and, at the moment, we have a common law commencement of a contract—I think you raised that—and the cooling-off period might start at a different time. It is a problem with multiple buyers. I would probably go back to section 365 of the act that was repealed. I compliment the minister on removing a lot of things from the act which made compliance very difficult. In fact, in December 2005 Minister Keech, if I remember correctly, introduced changes to the act to do with electronic transactions. In doing so, she made things very complex for transactions, 95 per cent of which are not electronic, but that has been fixed.

I would support the retention of a warning statement. Mr Raven talked about someone buying a unit in a letting pool down at the Gold Coast, for example, and them getting a lot of paper. I did up a warning statement in my report. It was a simple half-page thing that was to be part of the contract and it was to be

printed as the first page of the contract, rather than attached or anything like that. I might have suggested that, but it came out of Fair Trading as being attached. There was a service delivery commission that investigated this. It has now been terminated, the reference to that. I spoke to the gentleman who came around to there. I said, 'One way around this attachment thing is to say that on the printed contracts it must be the first page. It is printed. It would just be part of the contract.' I think that would get away from all the attachments and things that the Law Society was complaining about.

It is true that purchasers of units off the plan where there is three, four or five years before they have to settle have not thought about their financial position. Their financial position changes, their health changes. I have seen people saying, 'We cannot settle our contract' and they have attached their x-rays and medical reports from their doctors to say, 'I'm out of a job now and I can't possibly settle this thing.' That is what it is coming to. You have other people who I think were just plain greedy and stupid, who raced into some of these big developments and bought up three units on the hope that they could sell them before the settlement came, and now they are looking for loopholes in the act. I think in the current act as it stands, post 1 October 2010, they are going to have a lot of trouble getting out of it. If they sign a warning statement before they sign the contract, they waive their rights to complain about these things later.

The current act, subject to what I have said and subject to what they said about options, is probably as good as you are going to get it. Whether or not it has any effect on the consumer, I do not know. I have a general rule since I have been a lawyer that you cannot legislate against folly. Fools are going to fall into folly as it is. You can only do so much with legislation. If people do not read the warning statement, that is their problem. If people are about to make a $1 million investment, they know they are going to need $1 million in four years time. If you were going to buy something and wanted $1 million in four years time, I think you would give some thought as to how you are going to marshall the funds. I have no sympathy for those people at all.

I still believe in warning statements. I would say that because I suggested their introduction, but I still believe in the warning statements. I still believe the policy is correct. However, the warning statement might be better if it were part of the printed contract. That is just a matter of legislating. In New South Wales the warning statement is printed into the contract, so you have not got all of the attachments and directions and that type of thing. You do not need them. That is the first page anyone sees when they look at a contract.

By and large I am here to say, split the bills. I think it is a very good idea. I think it is much simpler. It is good policy to have the financial part of it in a separate act, because it deals with other commercial agents, real estate agents et cetera. I think that is a good idea. I agree with the policy of the government in having that financial administration, which applies to a number of different agents or a number of different people in the one act—the same processes apply. It is good for QCAT. QCAT has the one document to look at when dealing with all sorts of issues that arise from those acts. QCAT now has responsibility for certain aspects of the oversight of financial management of those acts. Thank you, Mr Acting Chair.

ACTING CHAIR: Thank you, Professor Duncan. I think your statements about the warning statements are interesting, in the sense that I remember the legislation we debated in 2005. It involved a property in my electorate of Surfers Paradise, where I think your original suggestion, when it was legislated, that something be part of a contract simply was changed with the word 'attached'. That then became the subject of a court case. I remember reading that the judges literally looked at what the definition of 'attached' was.

Prof. Duncan: They did.

ACTING CHAIR: That then gets away from the principle of what we are trying to do about the warning statement, which is making sure that people understand the significance of what they are doing, but we came to a literal definition in that case that led to a sale being aborted.

Prof. Duncan: Yes. Those two words made a lot of barristers very wealthy. That can happen. My suggestion, and I maintain it here and now, is that you should just make it form part of the contract. It is an REIQ contract. I hear they are giving evidence later and you can ask them that. It is an REIQ contract approved by the Law Society. I think that would be a very simple way out. They do it in New South Wales, not that that is a reason to do anything, but it tends to work. It gets away from all this nonsense, frankly, about attachment and nonattachment and first pages and what have we.

I think the legislation is as good as it is going to get, except for some of these things. The options thing must be looked at. Residential land must be looked at. Matthew Raven has given you evidence about that. Along with that, nominee contracts have to be looked at. I think options have to be excluded. I think they are excluded from cooling-off periods in New South Wales, because people have a long lead-on period. They can exercise the option or not. They do not have to exercise it. They have a long lead-on period and they can get advice. Perhaps a warning statement should be attached to the option document and not the contract later, which does not make sense. But people are doing it out of an abundance of caution.

ACTING CHAIR: Member for Kawana?

Mr BLEIJIE: Thank you, Professor Duncan, for your advice today. If my memory serves me correctly, the previous section 365 that you talked about with the cooling-off period, prior to the amendments in 2010, talked about when the cooling-off period started. This is where I hope my memory serves me correctly. It said it will start at 5 pm the day after the buyer is bound by the contract. So then the terminology of when is a buyer bound by the contract ran into the problem.

Prof. Duncan: Correct.

Mr BLEIJIE: So what you are saying today is that that sort of definition, when the buyer becomes bound by the contract, and it was 5 pm the day after—

Prof. Duncan: No. The cooling-off period started when the buyer or buyers received a copy of the contract—physically received it or received it by email or whatever—and then it ran until 5 pm on the fifth day. That is when it stopped. The physical receipt of something is something that can often be proven rather than simply some point in time. It is difficult with multiple buyers—I can tell you that—and one buyer might be in London and one might be in San Francisco. How does that work? With great difficulty, I am afraid. You are not going to be able to refine the act. I think it is silly to be looking at filigree work when you should be looking at the broad canvas. You are looking at one per cent of transactions. You have the London/San Francisco tail wagging the Queensland dog. As you must know, you can only legislate so far and then you start affecting 99 per cent of the other transactions. I think at the moment you just have to take a deep breath on that one. You might not know when someone in San Francisco gets a contract. There are quite a few overseas buyers, but you have to live with it.

Mr BLEIJIE: Thank you. With the warning statement, I think where I was going with the Law Society as well was we know what the warning statement is. The Law Society has made a submission this morning that you could in fact have it not attached to the contract to get out of the issues that we had. Clause 175 of the separated bill talks about this clear statement being given which I think presented half the problem with the liability issue. When one sent a contract back or the seller or the seller's agent gave a contract back, not only did they have to have the warning statement attached to the contract, which the buyer had already signed, but they had to have a paragraph saying, 'Your attention is drawn to the warning statement.' Under the new bill as well if that clear statement is not given it gives the buyer a right to terminate. In terms of the litigation that is revolving around this and as for the example I gave when you were in here before, a year later we could just rely on that paragraph not being given. If we went down the road of actually having the warning statement in the contract in that it forms a part of the contract, am I correct in saying that you would then not worry about the clear statement—that is, you would get rid of those provisions, you would have it as part of the contract, they sign the warning statement, they sign the contract, done?

Prof. Duncan: Correct. It would have to be embedded in the first page. The clear statement business appeared mysteriously because the Law Society and people like myself did not know about it and it appeared in the legislation in 2005. The reason it was there I think was because when the first iteration of documents were sent electronically you had to send them in a certain order. I think that it just drew people's attention, particularly in electronic transactions, to the order of documents and what was incorporated in the electronic transmission. So I do not think it is needed now and I have suggested my solution to the problem. I do not think a clear statement is necessary. In fact, lawyers are scratching their heads to the point of alopecia really. When you had to give a clear warning statement when the contract went back to the purchasers, there were two clear warning statements.

I am involved in my capacity as a consultant with a $10 million Gold Coast transaction which people are trying to get out of. It is before the courts at the moment, so I will not say any more. Two warning statements were sent by mistake: a first warning statement and a second one were sent by mistake, a secretarial mistake. This could mean that a $10 million transaction falls over. It was just ludicrous. It might not happen now because there is only one direction needed, but you do not need it if you embed it in the contract. You just have too much paper.

Mr WELLS: If you embed it in the contract, then I suppose that has an effect on when time begins to run, does it not? If it is embedded in the contract, then I suppose time would begin to run for the cooling-off period on acceptance.

Prof. Duncan: Time should run from the cooling-off period. Acceptance can be given orally. The problem is if you are starting a cooling-off period you must mark the occasion by some event and you mark the occasion by, I think, the time of receipt of the contract back by the purchaser, and I say that for another reason. The whole idea of the warning statement is to get legal advice because you have the cooling-off period to follow. The purchaser should have the contract to go and get the legal advice to give the cooling-off period some meaning. It is no good a cooling-off period starting before they have a contract back. This was my thinking when I did up the report years ago. They have to have the contract for the cooling-off period to go and get legal advice, otherwise it is just pointless. It is just some time in the air when an agent rings up and says, 'Your offer's been accepted,' as they do all of the time. It should not start then. I go back to the old 'it does not start till they are bound by the contract' and they are not bound until they actually receive a copy, and that was perfectly all right.

Mr WELLS: It makes an awful lot of sense to me. Can I just take the opportunity to thank you for your contribution to the development of policy in this area over the years.

Prof. Duncan: Thank you very much, Mr Wells. I hope to do so in the future if I can. Thank you.

ACTING CHAIR: Thank you, Professor Duncan. I note from your submission that you helped former Attorney-General Denver Beanland and then the Hon. Judy Spence, who subsequently brought in that first act. I read your submission with interest, as I know other members of the committee did. So thank you as well on behalf of the committee for your submission and for your appearing this morning as a witness. We look forward to having more contact with you in the future. Thank you very much.

Prof. Duncan: Thank you for the opportunity.

MOLLOY, Mr Dan, Chief Executive Officer and Managing Director, Real Estate Institute of Queensland

ACTING CHAIR: I call our next witness from the Real Estate Institute of Queensland. Welcome, Mr Dan Molloy. Thank you for attending. Can I confirm that you do not object to being filmed or recorded by Hansard and the media.

Mr Molloy: No objection.

ACTING CHAIR: Can I confirm that you have read the instructions to committees regarding witnesses.

Mr Molloy: I have indeed.

ACTING CHAIR: I invite you now to make a brief opening statement and then members may have questions for you. Thank you for attending this morning.

Mr Molloy: Thank you very much. Mr Acting Chairman and members of the committee, it is a pleasure for the institute to have the opportunity to meet with you today and I wish the committee in this new model all of the best in its work. Some of the statements that I will make have been touched on by both the Law Society and Professor Duncan, so I will be brief in respect of those.

Quite clearly back in 2007 the REIQ welcomed the decision to have the Service Delivery and Performance Commission review the operation of Fair Trading and then drill down to the existing Property Agents and Motor Dealers Act. Obviously the reforms to chapter 11 that commenced in October of last year were extremely welcome. Can I say that the split of legislation is something that we have been quite passionate about since the introduction of PAMDA, as it is known, particularly given the cumbersome nature of the legislation. The previous Auctioneers and Agents Act was less than 200 pages long. The current edition of the property agents and motor dealers legislation is almost 550 pages. I would endorse the comments made by Professor Duncan in relation to the fact that for real estate agents on the ground, for consumers and for people such as ourselves and the roles that we play the segregation of the legislation into occupational specific groups is most welcome, because the existing legislation really jumps from section to section—between motor dealers, commercial agents, real estate agents, auctioneers et cetera—and that has not been assisted by the number of amendments that there have been over many years, albeit to correct some fairly ingrained problems.

We are pleased that after the initial draft of the bill was presented to us this time last year a couple of issues were addressed in terms of just anomalies that arose between the mechanical separation of the particular occupations. The separation of auctioneers caused a short-term issue where potentially auctioneers and real estate agents may need two licences and be subject to two pieces of legislation to undertake typical duties. That has been addressed in the bill that is before the House at the moment. The issue of independent contractors was one that was causing us some concerns. So in addition to the mechanical separation of the existing legislation addressing some of those keys issues that provide for independent contractors out there selling real estate to be fully licensed real estate agents was certainly a welcome change.

There are a few outstanding issues from our point of view, and certainly we have some concerns in relation to specific areas of the bill relating to continuing appointments. There has been an issue—and this is clause 76 of the proposed bill—where continuing appointments are typically used in the areas of property management and real estate agency which are long-term relationships. The provisions in the current legislation provide for those to have a fixed term of one form or another and additionally though are subject to termination within a 90-day time frame but no less than a 30-day time frame. That has some problems on the ground I think for both real estate agents and their clients where in a sense there may be an agreement between a real estate agent and a client to part company but, regardless of what they would like to do in terms of perhaps terminating an arrangement today or within seven days technically, they are prohibited to do so by the existing provision, and that is replicated in the bill.

I think the REIQ through its discussions with ministers and previous ministers and Fair Trading is well on record as saying that we have always been troubled by the usability of the approved forms, both in design but also in terms of limiting agents' ability to comply efficiently with the requirements of not only the principal act but also regulations such as the codes of conduct. There are a number of obligations that arise from the codes of conduct that agents need to be conscious of when they are dealing with their clients, particularly at the point of engagement, which mean that there is a lot more paperwork involved because the approved forms, which are effectively prescribed forms, do not allow much flexibility in terms of bringing all of that information into the one document. So instead of having a consolidated document, you end up with the approved form plus a lot of schedules and you obtain no economies of scale from that. We have always been of the view that the legislation should prescribe those matters that need to be included in the documentation, such as an appointment form, but leave the design and layout and the content of the form, other than what is prescribed, to industry. That has been our position.

There has been some discussion already about cooling-off periods, and again this is an area that has evolved over the last few years. My point is probably more in relation to cooling-off periods as they relate to auctions. We welcomed Minister Keech's initiative a few years ago to introduce the registration of bidders at auction, but we think that there is a problem that the ability for a buyer to enjoy a cooling-off

period immediately after an auction should be limited. The registration of bidders and the keeping of a bidders' register gives the seller and their agent and their auctioneer a clear indication of who is willing, able and ready to buy on the day of the auction under the auction terms and conditions. If the property is subsequently passed in but sold even 15 minutes later to a person who is registered to bid at the auction, it does seem an anomaly to us that that person should be able to then take advantage of a cooling-off period.

Our proposal consistently to government has been that the cooling-off period should not be available to a person who is a registered bidder at the auction but buys the property on the day of the auction, and that happens quite regularly. It is not necessarily the highest bidder, because no special rights accrue to a highest bidder, but somebody who bid at the auction or was registered to bid at the auction quite often ends up the buyer by close of business on the Saturday afternoon. It does not seem particularly fair to the seller and probably does not really advance the objects of the legislation for that buyer to enjoy a five day cooling-off period.

Clauses 239 and 242 of the bill replicate identical sections in the existing legislation to do with representations about price and reserve price to buy or inquire at open houses leading up to an auction or indeed relating to a private sale. In our view the legislation is ambiguous in this regard in terms of what agents and auctioneers can talk to prospective buyers about in terms of price. In our interpretation the legislation does not even allow an agent or an auctioneer to indicate to a prospective buyer or bidder at an auctioned property whether on the day of the auction the property will actually be subject to a reserve price or not. With regard to the average person who goes along to an open house on a Saturday two weeks before an auction and asks the agent or the salesperson the usual question, 'What's the reserve?', obviously that is not on. With regard to the agent being in a position to say, 'I can't even tell you whether there'll be a reserve or not,' I do not think that does the credibility of anybody any good, agents as well as sellers.

So I guess in a nutshell they are the main things. We see that the split of the legislation is a very important initiative. It will give a great foundation for further work to improve this legislation over time. But we also think that there are some longstanding problems with the existing legislation that the opportunity presents itself now to have those things addressed.

Finally, if I could just recap on the comments that were made by the Law Society and Professor Duncan in relation to the warning statement. We have on occasions put to various ministers the utility of not having a separate warning statement. Obviously, there are real estate agents who perhaps find the size of the word 'warning' on the form 30c somewhat offensive, but, having said that, we have on occasions promoted the concept of having a warning statement incorporated into the contract document itself, particularly when we have this issue of attachment as a problem.

Finally, the form 27c, which is covered under section 84 of the proposed bill, which is the disclosure to the buyer of any connections et cetera that the agent or the licensee may have, we have always struggled with why, in typical mum-and-dad residential transactions, the amount of commission that the real estate agent is earning from that transaction should be disclosed to the buyer. At the end of the day, it is the client/seller who is paying the commission and it is effectively a private contractual arrangement between the agent and their client/seller. To be frank, the vast majority of transactions only involve that disclosure. What we would see as doing the right thing in terms of respecting the privacy of the arrangements between the agents and the seller and, to put it bluntly, to cut down on a little bit of paperwork, that form 27c could be reduced to only those circumstances where it is a non-standard arrangement. Thank you.

ACTING CHAIR: Thank you, Mr Molloy. Any questions from members?

Mr FOLEY: Mr Molloy, over the years there has been a lot of discussion about whether the settlements of contracts should be the sole province of lawyers. I know going back many years ago in Western Australia they would have settlement agents who would specialise just in doing that. Have there been any more discussions between your organisation and the Law Society along those lines?

Mr Molloy: In a word, no. I can recall 12 or 13 years ago there was the proposed intrusion by conveyancers into Queensland. Our longstanding policy position has been that conveyancing that is being undertaken as a fee-for-service activity should be reserved to lawyers.

Mr BLEIJIE: You heard some of the discussion we had with the professor and the Law Society in terms of those warning statements. I have a particular interest in that, because I have always found it a challenge in terms of the bureaucracy that estate agents and lawyers had to go through for contracts, particularly for mum-and-dad—general—residential conveyancing. I have a couple of things. You mentioned the cooling-off period for auctions. Were you saying that, if an auction takes place on a Saturday, the buyer signs and it is signed sealed delivered on Saturday—and as we know auctions are unconditional, you usually have to have the money, it is not subject to finance and the other provisions that generally take place in a normal residential sale—there is just no cooling-off period. Is that what the submission is?

Mr Molloy: That is right. Obviously, if it is sold under the hammer there is no cooling-off period now.

Mr BLEIJIE: Yes.

Mr Molloy: Yes, but our position is that if the property was sold to a person who was registered to bid at the auction on the day—either does not bid or does not bid to cause the hammer to fall—that that person who potentially may sign the contract to buy the property 15 minutes after the auction property is passed in, we do not see why that person should be entitled to then have the benefit of the five business day cooling-off period.

Mr BLEIJIE: So if an auction takes place at 10 o'clock in the morning, it does not sell but at three o'clock they come back and you negotiate it with the seller, then you are saying that if they were a registered bidder for the 10 o'clock auction but they subsequently negotiate a deal, then a cooling-off period should not apply.

Mr Molloy: That is our position.

Mr BLEIJIE: Because under the situation now, they would enter a normal contract without the auction provisions.

Mr Molloy: That is correct.

Mr BLEIJIE: The professor mentioned, when I was quizzing him on the warning statement but then also the clear statement that you have to give directing people to the big 'warning', that with the standard contracts that we have in Queensland that it could, in fact, be incorporated into the contract itself. Have you looked at that option or made that representation?

Mr Molloy: The clear direction or the warning statement itself?

Mr BLEIJIE: The warning statement itself.

Mr Molloy: We have. In fact, some years ago we did some mock-ups of what an REIQ contract would look like with that done and presented that to Fair Trading at that time as an example of how relatively easy it was to incorporate it because of this attachment problem. The issue has been simplified somewhat since October last year, but if there is to be a warning statement then incorporation into the contract, I think, would still achieve the legislative objective.

Mr BLEIJIE: The issue is still under new clause 75, where they have to give a clear direction directing people to the big thing that says 'warning'—the 30c. That statement can be given both in writing and verbally. When you are talking about you having a right to terminate a contract if the statement was not given, if you end up in a bad relationship with the seller, or the seller's relation or the seller's agent, then it is their word against mine and the agent or the lawyer says, 'We told you about it.' 'When was that conversation?' So I think there is still some room to move here. The REIQ has made mock-up versions of the standard contract. For the members' benefit, obviously as you are in practice in this area, the REIQ contract is generally by far the predominant general conveyance contract in Queensland.

Mr Molloy: Yes.

Mr BLEIJIE: That is still the case, I would assume. What advice did you get back once you had done those mock versions?

Mr Molloy: We are probably talking five or six years ago, I would have to say. To be honest, it was part of our campaign of saying, 'There are real problems with the plethora of forms and the unfriendly nature of the forms.' That was complicated by the late 2005 amendments that arose from that case that Professor Duncan spoke of, because this definition of 'attach' and 'attachment' was really problematic. That gave further weight, we thought, to the need for it to be built in. That has been simplified a bit because of what happened in October last year, but it is still a separate piece of paper. The comments that Professor Duncan made about—I think he said filigreeing—the way it is done, obviously, the vast majority of contracts can be simplified by that process, although at the Gold Coast with the off-the-plan holiday accommodation it might be only one sheet out of 600. But for the normal residential transaction, it is appropriate, we think.

Mr BLEIJIE: But I would envisage that if it formed part of the standard contract that we would have fewer terminations, fewer disputes in the courts.

Mr Molloy: Absolutely, yes. I think there is actually a better chance that it might be studied more by the buyers as part of the contract rather than a separate piece of paper. The key document that an average buyer is interested in is the contract. Disclosures and other forms around it are not germane to what their purchase decision is all about.

Mr BLEIJIE: Professor Duncan mentioned in his testimony that he would be of the view to get rid of the clear statement provision—have the warning statement incorporated into the contract but get rid of the clear statement provision. Would you be supportive of that?

Mr Molloy: Absolutely, because in the previous regime where the clear statement had to be given multiple times that was the greatest area of technical breach. But with the way it is structured even now, the advice that we received from our members is that the vast majority of purchasers sign the acknowledgement at the bottom of the form, which obviates the need to have that clear statement in any event, because that is sufficient in terms of compliance.

Mr BLEIJIE: My final question is probably more some homework for the REIQ for the benefit of members. We have a period of time to continue these public inquiries. I would be very interested—and I am keen to hear the views of the other members of the committee—if we distribute to committee

members the current warning statement and also if the REIQ can work on, for the committee's benefit, if we were to look at incorporating this or making recommendation to incorporate it into your contract, a new mock-up version. Would the REIQ be keen to do that for the committee?

Mr Molloy: We would be happy to give you that undertaking to provide you with such a mock-up.

Mr BLEIJIE: Certainly, for my benefit I would be certainly interested to see that.

ACTING CHAIR: Thanks, member for Kawana, because I think that fits in with the suggestions of the member for Murrumba, which he has been prosecuting all morning, and that is about making legislation more relevant for all Queenslanders. The department and the minister may well take that on board as part of our report, of course, on listening to the witnesses' statements. So thank you, Mr Molloy. Thank you for coming along to provide information to our inquiry.

Mr Molloy: Thank you, Mr Acting Chair and the committee. Thank you.

FRENCH, Mr Tom, Vice President/Acting Secretary, National Field Services Manger, Property Sales Association of Queensland

ACTING CHAIR: Welcome, Mr French.

Mr French: Thank you.

ACTING CHAIR: Thank you for attending. Can I ask you a couple of questions? Do you object to being filmed or recorded by Hansard and the media?

Mr French: No, I do not object.

ACTING CHAIR: Can I ask you to confirm that you have read the instructions to committees regarding witnesses?

Mr French: I have.

ACTING CHAIR: Thank you. We invite you to make an opening statement. I see from your submission, it is to do with union arrangements to do with employment arrangements that you have concerns about. So I invite you to make an opening statement and then members may well have questions for you.

Mr French: Thank you. We will certainly leave the technical stuff to the experts. I was impressed by the approach of the Law Society and the professor and, of course, our colleague Dan Molloy. We support all of their submissions. Thank you for the opportunity to address your committee. Just to fill you in, the Property Sales Association of Queensland is a federally registered union of employees in the real estate industry. Its members are active salespeople or property managers and its committee of management is comprised elected past or currently active industry employees. So we are an industry body. We represent our members not from an ideological viewpoint but from a practical, operational viewpoint with a deep concern for fair play in the industry and for the consumer.

We congratulate the work done in the migration of the Property Agents and Motor Dealers Act 2000 to the Property Agents Bill, which is before us now. In our submission of 18 July to this committee we applauded the efforts made to address the practice of agents using independent contractors as salespeople and in some identified cases property managers as independent contractors.

I now wish to amplify the concerns that my association holds for the proliferation of this practice through another name, particularly when it involves novice employees. As stated in our submission, an element of employers in the industry has been hell-bent on subverting the requirements of legislation, particularly in our vision, in relation to industrial legislation and awards. Legislation and awards are drafted and enacted to blend the social, commercial, industrial and consumer requirements of a particular sector. In the case of real estate, an award was introduced into the Queensland industry in 1997 for the first time. Since that date, various legal avenues have been utilised by an element of employers to avoid fair play, particularly the award, so as to avoid the commercial responsibility of employment. With that avoidance, the other components that formulate the balanced legislation/award are thrown out of balance and, importantly, the consumer is then put at a much higher risk.

Initially, Queensland workplace agreements were utilised, then Australian workplace agreements, then independent contractors and on-hire labour as supplied by various commercially based companies—and I can name them if required. As each avenue was closed or confined, another was devised and promoted again by commercial forces, thus perpetuating the imbalance.

I return to the current Property Agents Bill and the then minister's introductory speech to parliament as recorded in *Hansard*. The Hon. Peter Lawlor made it very clear that the sham employment arrangements needed to be addressed and that the proposed bill does just that. The explanatory notes to the bill on page 3 also address this matter. With my submission I have supplied copies of the *Hansard* excerpts and also the explanatory notes.

We as an industry body are aware of and concerned by the upsurge of the five-day wonder real estate licences being issued by the Office of Fair Trading to salespersons and property managers who have 'completed' 20-plus modules of competency through any one of a number of training organisations and therefore satisfy the requirements of the PAMDA regulations. We acknowledge that experienced salespeople may well be competent in those modules and recognition of prior learning is valid and genuine. We have no objection to this practice. We are, however, concerned about the emerging practice of an agent indicating to a prospective employee, a novice employee, 'Go and get your full licence and we'll put you on into our pool of conjuncting agents.' This person may then approach one of three training organisations—again which I can identify and we are aware of—rip through the modules in a very short time, apply to the OFT for a full licence and be out operating as a real estate agent under the banner of a recognised agency with no real understanding of the practicality of real estate practice. The huge risk here is that the person involved has little chance of making commissions sufficient to maintain themselves, are not sufficiently supervised and place the public at risk of bungled transactions through their lack of experience. They may even band together with others in the class with the same inexperience and form an agency.

You may be aware of the current campaign by the Fair Work Ombudsman's office, the federal Fair Work Ombudsman, in checking agencies' compliance with award requirements. We are aware of circumstances where responsible agents have complained that they are being commercially

disadvantaged by their competitors using the avoidance practices and therefore avoiding the requirement to pay a fair wage to their employees who they call 'independent contractors'. This is recognised as a severe penalty for those who are attempting to comply with the requirements. Payroll tax, taxation and superannuation responsibilities are also avoided by this practice. We have received complaints from persons acting as salespersons who have been engaged as again 'independent contractors' and have not been paid $1 in wages or commissions in up to a six-month period. One such instance at Bribie Island was referred to the Fair Work Ombudsman's office and we understand is currently the subject of a prosecution by that government body. Another such instance involving a Gold Coast agency is currently before QCAT awaiting a decision.

In summary, we believe that the bill addresses the independent contractor issue partially, and we ask that measures addressed in the bill for restriction of this type of engagement be strengthened. We believe that the surge of training organisations offering the five-day wonder licences is a progression of avoidance tactics and that the bill should contain an experience requirement, together with academic requirements, for the issue of a full real estate agent's licence. I guess this is a regulation matter rather than a matter for the bill, but I still would like to voice it here, and I would be very keen to have some input into the regulation process on this aspect.

It is interesting to note that the new modern award—new federal award which we are all subject to—was generated by a group called the real estate industry group, which we formed voluntarily with employer and employee associations in three states of Australia. That group drafted an award and presented it to the AIRC which they accepted, and it is now the current award. In that award for a person to be entitled to be paid as a commission-only person they must have experience—they can have held a real estate agent's full licence, but they must have operated with a full real estate licence for at least 12 months before they are entitled to be paid on a commission-only basis. This is the basis on which a small number of agencies avoid their responsibilities by saying, 'We have a full licence in Queensland and you can be a conjuncting agent and we don't have to follow the award at all. You are independent.' This is a major matter that we would like addressed, and I thank you for listening.

ACTING CHAIR: Thanks, Mr French. Are there any questions from members?

Mr FOLEY: Mr French, you talked about conjuncting agents. I am not sure what that means. Can you give me an example of that?

Mr French: Yes. A full licence agent may conjunct—it is a sharing of the commission, a sharing of the deal between licensed agents. I will give you an example where one agency has a property listed under a form 22a for sale. On the form 22a the vendor must give approval for a conjunctional arrangement that may be entered into with another agent. Another agent comes along to the listing agent and says, 'Hey, I have a buyer for that. Will you do a conjunction with me?' and they will say, 'Yes, we'll share the commission fifty-fifty.'

Mr FOLEY: You describe the five-day wonder. Was that for a salesperson's licence?

Mr French: It takes five days for a training organisation to put through a salesperson's registration—no licence involved. But a full licence is now being offered in that same time period.

Mr FOLEY: Five days.

Mr French: Some 20 modules covered in five days, where it takes five days to cover five modules for a salesperson's registration by most responsible training organisations.

Mr FOLEY: Does one transition into the other? Is the salesperson's five-day registration a precursor for doing the full licence?

Mr French: No. You can go straight into, as I understand it, a full agent's licence, but normally a person going into a full agent's licence probably has those five modules credited. I think there are 23 modules in the certificate IV for an agent's licence. Let's say they will be taking 18 modules in that week.

Mr FOLEY: From your industry experience, what you are saying is that basically dealer principals are using that so they do not have to fiddle around with all of the paperwork for workers compensation, superannuation, sick leave and all of that.

Mr French: I wish it was as simple as that, but I think they are using that avenue to avoid paying anyone anything. But, yes, you are quite right about the superannuation-taxation angle. I can recall a circumstance probably five years ago when the Office of State Revenue got involved in a major real estate agency where they reckon they had 103 contractors. That was quickly resolved.

Mr FOLEY: In that situation, if you got a person with a real estate sales licence as opposed to a full licence, aren't they still on a split of commission anyway?

Mr French: Not necessarily. Under the award, they may be on a wage, a wage plus commission, a wage offset against commission or, if they have the relevant experience and can jump through the hoops, they may be on commission only.

Mr FOLEY: Right.

ACTING CHAIR: Are there any other questions, members? No. Thank you, Mr French.

Mr French: I got off lightly. Thank you very much.

ACTING CHAIR: You were the last of our witnesses this morning. The committee has exhausted its deliberations. Thank you very much for attending this morning. Thank you for your evidence. I am going to close the hearing in just a few moments. But I want to make mention for the benefit of the committee and the department that we are going to have another public hearing on Wednesday, 24 August—our next sitting week—from all other submitters and interested parties. The secretariat will be making contact to make those arrangements.

I would also like to note for the benefit of members that the times and venues of the hearings are notified on the parliament website. We did have a submitter who was not yet scheduled who turned up to listen this morning. It is important that with these new committees we ask for people to understand that there are going to be some teething issues with the department, members of the committee and witnesses as well.

Thank you, Mr French. Is there anything that anyone from the committee or the department would like to advise, given that we resolved this morning that we would like to have most of our deliberations in public if possible? The important thing is that I know that the department will not be able to make detailed responses to the submissions they have heard this morning but, if they or any members of the committee would like to make any points about what we have heard so far, please do so. Otherwise we will wait until our subsequent meetings. No-one from the department? No members? Thank you.

Committee adjourned at 12.10 pm