

PROOF VERSION ONLY

LAW REFORM COMMITTEE

Inquiry into powers of entry, search, seizure and questioning by authorised officers

Melbourne – 12 December 2001

Members

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Witnesses

Mr P. L'Estrange, Legal Officer, Legislation Branch; and

Mr S. Devlin, Manager, Manager Legal Services, Consumer and Business Affairs Victoria,
Department of Justice.

**Necessary corrections to be notified to
executive officer of committee**

The CHAIRMAN — On behalf of the Victorian Law Reform Committee I welcome Mr L'Estrange and Mr Devlin to the public hearing today. I take the opportunity of giving some background information in relation to the taking of evidence. Submissions have the benefit of parliamentary privilege under the Parliamentary Committees Act. You will receive a copy of the Hansard transcript of your evidence; feel free to amend it as appropriate and return it to the committee. It is possible for you to raise any issues in camera, and no Hansard transcript would be made of that. I invite you to speak to your submission in general, and we will ask questions en route.

Mr STENSHOLT — Mr Chairman, I should note that at the request of the Minister for Consumer Affairs I am heading a working group that is reviewing the Fair Trading Act. I thought that fact should be on the record.

Mr L'ESTRANGE — I add that I am working with Mr Stensholt on the review of the act.

Thank you, Mr Chairman. Mr Devlin and I represent Consumer and Business Affairs Victoria, an agency of the Department of Justice. Consumer and Business Affairs Victoria administers the portfolio of legislation of the Minister for Consumer Affairs. We had hoped to supply a written submission to you which we could speak to, but unfortunately that has not been possible. Internal movements and arrangements have prevented that, but we intend to follow up our oral submission here with a written submission in due course. One of the benefits of doing it in that way is that in our written submission we can include and address any matters the committee raises with us.

I am a legislation officer at Consumer and Business Affairs Victoria. As such I have been responsible for the legislative reorganisation of our inspectors powers over the past couple of years. Mr Devlin is in the operations area and will address you on some practical matters.

By way of a potted history, before 1999 Consumer and Business Affairs Victoria, like consumer affairs bodies in New South Wales and Queensland, had a fairly simple set of inspectors powers. Essentially inspectors could enter any premises and require documents and information from any person in order to monitor compliance with the legislation administered by the then Minister for Fair Trading.

In 1999 the former Minister for Fair Trading reorganised the powers of Consumer and Business Affairs Victoria and essentially divided them between licensing acts and non-licensing acts. Consumer and Business Affairs Victoria administers several business licensing schemes, the most prominent being the motor car traders licensing scheme, but it also administers the licensing schemes for credit providers, estate agents, travel agents and brothel operators. Now we are endorsing second-hand dealers.

Because it was considered that these industries were problematic, which is why they were licensed in the first place, the previous minister provided that the licensing schemes for the legislation would contain inspectors powers roughly similar to what had prevailed on a broad basis before 1999. The inspectors powers before then applied to the whole of the legislation administered by the Minister for Fair Trading. They were codified, and whereas previously the inspectors powers took up perhaps a page of an act, the licensing powers now take up about 15 pages. Safeguards were spelt out in terms of self-incrimination — or at least that was regulated precisely — and other safeguards were inserted.

The other acts administered by the minister were classified as non-licensing, the principal act being the Fair Trading Act. Those acts applied to the community at large rather than to specific licensees. Those powers were considerably reduced. Whereas the licensing legislation powers are predicated on monitoring compliance with the act, the powers of the Fair Trading Act and other non-licensing acts have, since 1999, been predicated on the basis of a reasonable belief that the legislation has been breached.

In one case, under the licensing legislation, proactive administration or enforcement was possible, whereas under the non-licensing acts inspectors powers have to be used reactively once a reasonable belief of a breach is formed. In some senses the licensing legislation powers exceed the powers that police enjoy under the Crimes Act, in that there are powers to enter licensed premises and to require documents from the licensees and people who have documents in relation to a licensed business without recourse to a court. A search warrant is not required nor is an order to produce documents.

In relation to the non-licensing acts, an order from the court is required for the production of documents, and a search warrant is required to enter premises. The powers for our non-licensing acts are either the same as the police

have or somewhat less, considering that the inspectors do not have the power to arrest.

Mr DEVLIN — They also can stop cars and take samples, including DNA, fingerprints and those sorts of things.

Mr L'ESTRANGE — In that sense the powers for our non-licensing acts are principally in the Fair Trading Act but cover other acts including the Domestic Building Contracts Act, the Funerals (Pre-paid Money) Act, and the disposal of Uncollected Goods Act.

The Residential Tenancies Act is one of our non-licensing acts; also, responsibility for the Retirement Villages Act is shared by us with another department. Since 1999 the powers under those acts are either the same as police hold or somewhat less. In relation to the non-licensing acts, an inspector requires the directors written consent to proceed to a court for an order.

I understand other agencies of the Department of Justice, particularly the legal policy unit of the Attorney-General's area, will make submissions to the committee. I understand they are submitting to the committee on the basis of what they call a parsimonious approach to inspectors powers, with an obligation on those seeking more than police powers to justify them.

Our submission to the committee is that in respect of our non-licensing acts, since 1999 we have been severely prejudiced in terms of the proactive enforcement of those acts. Mr Devlin will give the committee examples of how that has occurred in practice, but we come under pressure from various sectors to be proactive about enforcement of our legislation and not to have us just wait around until somebody commits a breach. However, since 1999 we have found in relation to our non-licensing acts that that has not been possible.

It is important to emphasise that under the pre-1999 regime there were, so far as I have ascertained, no complaints about the exercise of the broad inspectors powers that we held, and those powers are still currently enjoyed in New South Wales and Queensland especially.

If there are no questions for me at this stage I will ask Mr Devlin to speak from an operational point of view about the exercise of our inspectors powers.

Mr KATSAMBANIS — Could you define what you mean by proactive enforcement?

Mr L'ESTRANGE — Proactive enforcement is encapsulated in the phrase on which our licensing powers are predicated — that is, to monitor compliance. If we want to do a sweep, for instance, to see what is happening out there and whether people are complying with the act, we can have spot checks and say, 'Let's look at your books and see how you are going. Do you have the relevant material out the front and notices posted on the wall?', and so on. Because the non-licensing act powers have to be exercised only where there is a reasonable belief that there has been a breach, obviously that is a reactive power. We would be reacting to evidence of a breach. Then we cannot do sweeps and spot checks.

Mr DEVLIN — To flesh out that question from Mr Katsambanis, section 82AA of the Motor Car Traders Act and the following sections pre-predicated for the purpose of monitoring compliance, are to be compared with section 122 of the Fair Trading Act, where the warrant powers are dependent on the reasonable belief of an inspector that there has been a breach of or non-compliance with the Fair Trading Act.

That is probably the dilemma we raise with the committee. It is probably the \$64 000 question that the committee will need grapple with, that in relation to matters of consumer affairs in particular, it is a balance between our role in monitoring and ensuring compliance with acts, especially the licensing acts, and proactive enforcement.

Although I will move shortly to concluding comments, perhaps an example may assist the committee. Under the Funerals (Pre-paid Money) Act 1993, prior to the operation of the Fair Trading Act, which came into operation on 1 September 1999, the office had, I submit, a proper and very good compliance program where inspectors went out and proactively visited those businesses providing prepaid funerals. They inspected, from memory, between 20 and 30 businesses.

They went in, inspected and sorted out problems that were discovered. Prepaid funerals are very important but services. There are specific requirements in relation to the banking of funds and having documents in order. We suspected that there was not a great deal of compliance with the Act. That was confirmed by that proactive program.

Arising from the program, two specific prosecutions were launched, where it was found that people had taken money from often elderly persons and not placed the money as required. The breaches were blatant and significant. The two prosecutions led to substantial fines and a proper exposure in the public about some of the risks. Other businesses were found to be more technical or paperwork deficient, in that their contracts were not quite up to date or they may have been a little late — perhaps a few days — in banking moneys.

In writing the inspectors basically warned the non-compliant traders, saying, 'You are deficient in this-and-that area. We will be back to have a visit, or you may want to submit documents to us and we will settle the documents with you'.

The net result was that those non-compliant traders were brought into line. It was not done with a heavy hand but with a velvet glove — but just as efficiently. Since September 1999, when the revised Fair Trading Act came into operation, other programs in other industries or such programs are not permitted, because while we may have a suspicion that the act is not being complied with or there are not good consumer business practices taking place, we must have a reasonable belief before acting. 'Reasonable belief' covers both the consent entry, which is allowed under the inspection powers, and our obtaining a warrant.

Again I do not want to overstate it; it is not an impossible task, but it has changed the work practices of Consumer and Business Affairs Victoria to the extent that now we have to approach a magistrate and satisfy the magistrate that there is a reasonable belief. You do not do that flippantly, so where we could probably act on trends and verbal complaints before, our practices are now more that we get written complaints and usually a statement from a complainant. Therefore we can have confidence in going before a magistrate and satisfying him or her that there is a reasonable belief, before taking the step of going into somebody's premises, which of course has to be respected on all occasions.

It is an interesting philosophical debate. I have only been with the office 18 months, so I did not act under the old notice powers. I am going on comments I have received from inspectors who have worked under the old notice powers and now work under warrant provisions. Where a complaint had been received and it was thought action should take place, the notice provisions allowed for the notice to be served on the suspect trader, if I can use that term, to provide documents or preliminary answers, and it may have been that the case could be either proven or disproven at that stage. It may have been a case of letters to take non-enforcement action at that stage, and all this was done with the advantage of not going onto a person's property. Now to act on such a complaint requires us to get a warrant and go onto a person's property and seize documents. Many cases in the past have been solved or mediated or disproved under the notice provisions, whereas now we are forced to take the step. If we want to investigate this, as we are obliged to do in many cases, we are forced to get a warrant, then go in and grab documents. At that stage you are in a position of offering a record of interview, which may or may not take place, and based on that material you decide whether the enforcement action is founded and should proceed in one of the many ways we can act, whether it is by prosecution, injunction undertaken or even a warning.

One of the wishes of the office is to be not only seen to act in an efficient and responsive manner to consumer complaints but to in fact do so. Certainly I am not here to criticise the new powers in the Fair Trading Act, but it formalises the process and takes further time and resources to investigate similar complaints. That is a factor, and of course it is the case that we do not seek warrants and do not wish to go onto a person's property flippantly. We have to satisfy ourselves that there is a need to do it.

I did some research this morning before coming here, and there have been only 15 occasions since 1 September 1999 on which we have issued warrants. That does not mean we have only received 15 complaints of substance, but we only apply for warrants in cases now where we feel justified in taking that action.

I will expand on a few comments that Patrick made: it has been suggested in preliminary papers we have seen that Consumer and Business Affairs Victoria has more powers than the police. I would ask the committee to consider those statements, if they are made, very carefully.

Clearly in the licensing regimes we do have some more powers than police, and those are the powers to demand documents for the purpose of monitoring compliance. I take you to section 82AA of the Motor Car Traders Act as an example of that. It is restricted to only the licensing act. When I joined the office I came from a criminal background and had to turn my mind to the powers. They are limited to the licensing act obviously because when a person applies for a licence they are taking on a privilege because the industries where licences are required have been so designated for a reason.

In relation to the Motor Car Traders Act, where these extended investigation powers exist, I noted that the

second-reading speech for the Motor Car Traders Bill, on 9 October 1986, commences:

Before the commencement of the Motor Car Traders Act in 1973, unethical and dishonest practices were rampant in the retail motor vehicle industry, especially in the used car sector.

The point I am struck with is that it was a starting point, and there was a reason for the Act and a reason for these licensing powers. I had a look at some of the other acts, and I will not bore you with all of them, but on the Estate Agents Bill on 1 May 1980 the Honourable Haddon Storey commenced:

The most important and in many cases the largest single transaction that most members of our community enter into on their own behalf is the purchase of their home.

Then later:

Thus the real estate industry is one that impinges very vitally on the lives of a great number of people in our community, and estate agents play a most important role in one of the biggest and most far-reaching decisions that most of us make.

For these reasons it is most important that the law of this state relating to estate agents and subagents should be sound law, ensuring that the highest standards are observed in the real estate industry.

It is from that basis that I submit we have these licensing acts, and that is why we have extended powers limited to the licensing act.

In relation to the Fair Trading Act and our powers, I support what Patrick suggested to the committee — that our powers are the same as and no more than the police, and there are a number of checks and balances that you all know about, such as the fact that before we apply for a warrant under section 122(1) of the Act the director must approve in writing. We have already discussed the reasonable belief factor and that we have to go before a magistrate.

We also only have 28 days to act. Under section 127 we have to provide copies of documents that we seize to the person who had the warrant executed, and we can only keep the documents for three months without going back to court. Under section 137 we must report to the director as to the entry, and under section 138 there must be a register kept of the entries. Therefore in relation to our powers there are already existing checks and balances on the use of warrants, and quite appropriately so. Any further erosion of that power would, in my respectful submission, severely hamper the way we operate.

To sum up, we did have wider powers, and there are some benefits in reviewing the wider powers. It is interesting to note that New South Wales and Queensland both have the power to enter without warrant, and there is a limit on self-incrimination. South Australia has the power to enter without a warrant, albeit the privilege of self-incrimination is retained, and this is in relation to consumer matters.

In relation to other states, we are limited, but the position we have reached in relation to the Fair Trading Act is that that limits our proactive and monitoring role in the non-licensing sense, but in the licensing matters it is imperative that we maintain the monitoring and compliance role, otherwise those licences probably become devalued.

Where we probably need greater powers is around the fact that all of our powers in relation to the Motor Car Traders Act, referring to a licence, and in particular section 82AA — —

It says:

For the purpose of monitoring compliance with this Act or the regulations, an inspector may require a licensed motor car trader ...

And that is consistent in the following sections.

The difficulty we have — and it is a real difficulty for Consumer and Business Affairs Victoria — is that we have good powers in relation to monitoring the licensed industries, but there is a real problem with the unlicensed section of all of these industries. It applies to all our licences, but unlicensed motor car trading, for example, is a real concern to our Office and the Minister, and we are very much limited in investigating the unlicensed side of the industry. That, in some real ways, devalues what the act sets out to do, which is to protect consumers by having a licensed industry. Those in the licensed industry are monitored adequately by the powers we have, yet we have some real problems in investigating and stomping out the unlicensed industry, which not only affects consumers directly — they are not subject to the protection of the Act — but causes real angst among the licensed industry, which pays its fees and does the best it can and is subject to our surveillance and monitoring. We have limited powers in attacking the unlicensed, and it will be a real challenge for not only our Office but this committee to

balance those needs.

Mr L'ESTRANGE — If I could add one more general comment in what is an important area of the committee's concern — namely, the powers that inspectors have being greater than those of the police — we believe it is important that the committee recognise that police powers are exercised in a very different context than inspectors exercise their powers in. Police exercise their powers usually in the context of serious criminal offences where jail may be the result. They are often armed, have the power of arrest and operate free of executive control to a great extent. Inspectors such as those at Consumer and Business Affairs Victoria are ordinary public servants. They are unarmed, with no power of arrest, and they exercise their powers in the context of relatively minor offences where the likely result may be a moderate pecuniary penalty or the cancellation or suspension of a business licence. The director, who is responsible to the minister, supervises them, so there is a chain of command right up to the cabinet.

Again I emphasise that in the exercise of these broad powers, both under the licensing act now and all our acts before 1999, there was no serious complaint. So far as I know there was no complaint about these powers being excessive or being abused. Thank you.

Mr BOWDEN — On the subject of fair trading, inspections and so forth, without disclosing his name, I received a rather impassioned request for help from a constituent who was very unhappy about the amount of prawns in a kilo of frozen prawns. It raised an interesting question, because he ran a restaurant that purchased frozen prawns in bulk, and he was saying there was far too much ice, and that they were paying for kilos and not getting the prawns they were paying for. I could not get any help on that issue in the long run, but the bottom line is that I get the feeling the 1999 act was something of a sea change. There seems to be much more caution required now, or a far more complex process in the inspectors deciding to either investigate or do spot checks.

My concern if that is so — and I may be wrong — is centred around the layers of complexity in getting approval to go and do those checks. And secondly, looking at the list of the types of industries that you have responsibility to work with and supervise, some of the people involved are really quite well educated and informed, therefore the people you have to investigate, have to check and work with in their industries — the real estate and fair trading people — are often well educated and are involved in concerns about the retail industry and motor vehicles.

I would like your views in the broad term as to whether you feel you have enough flexibility and immediacy in actioning spot checks, and I am concerned at what I hear — that there is a limitation on spot checks, because in dealing with the well-educated and aware constituency that you have to supervise, if there were any unnecessary impediment or caution, then that is not in the community's interests.

Mr DEVLIN — It is one of those things. It is not only my duty to be honest and fair to the committee, but hopefully we bring objectivity in our views and the way we operate. I do not suggest to the committee that the requirement of the Fair Trading Act 1999 to form a reasonable belief and seek out a warrant is an impossible task; however, I can say it was a sea change.

Previously it was quite easy to draft up a notice, and there were procedures in place. My understanding was that it was not simply a case that an inspector arbitrarily formed a view and put out a notice. There were procedures where notices were settled by the internal solicitors that I am in charge of, and then the notice was produced. It was simpler then.

However, it is now more labour intensive. The inspector gets the complaint. Usually that complaint is verified to the extent of a written complaint and a statement being obtained. The inspector seeks the approval of the director to apply for a warrant; a warrant is issued on affidavit material; the inspector drafts up an affidavit; it is submitted to my branch to vet, to ensure that it is acceptable; the affidavit is sworn; and the inspector will attend, sometimes with legal assistance, more often not, in the Magistrates Court.

The Magistrates Court tries to be obliging with warrants, but it is a case where inspectors attend and have to wait around. Magistrates, quite reasonably, have questions. Sometimes on the material submitted the magistrate is satisfied and it is signed off. If not, the magistrate will have inquiries made. On occasions evidence is given, either informally in chambers or in open court, and the magistrate will or will not grant the warrant.

The steps thereafter are these. My experience with all the warrants is that, apart from one or maybe two, we contacted the police to have a police presence just to make sure there is no breach of the peace. With all our warrants we have been able to gain access without damage to property, but with several of our warrants we have had a locksmith on stand-by in case we could not get in. It is certainly not a case of wanting to kick down doors.

The act requires a knock and a reasonable opportunity to open doors. We try to plan the execution of the warrant in such a way that it is more likely than not that people are there. We certainly do not turn up at a business at 5 o'clock in the morning or something like that, knowing that nobody will be there.

The practical experience is that on average we would have four inspectors attend a warrant. That is not for any draconian purpose; that is a case of being practical. We will have one person with the suspect trader so that that person is monitored, and properly informed as well. It is not a case of being aggressive about it; they are certainly informed while we are there. They are also kept under supervision to make sure that things that could disappear do not. We have one person monitoring a log, so that we have a formal record so that any item seized will be returned to that person, and a minimum of two people searching, usually together. Again that has a practical and self-protection purpose, which is so that people can identify where certain things were found, and it gives corroboration to finding them. So the execution of a warrant is labour intensive. It is a requirement of the Magistrates Court Act to return it to the magistrate, and the magistrate directs that either they be returned or returned to our custody.

That was a very longwinded first bit, but what takes place is a step-by-step process. It is certainly not impossible. Our experience with the 15 warrants we have executed is that it has not caused huge practical problems. But they are labour intensive. Probably our major concern is that they just take a little bit away from our response time and our effectiveness time.

In answer to your initial question, probably the thing that causes the most angst is that we are concerned that we justify our preliminary view of the suspect conduct to such an extent that we have no difficulty in going to a magistrate and being able to show that we have a reasonable belief that it is happening. So, yes, there has been a sea change. But again I do not want to bluff the committee by saying it is an impossible task — we do do it.

As to the second part, which goes to the informed recipient of a warrant procedure, certainly in the licensed industries we are largely dealing with educated and articulate people. Of course there are levels. There are very large motor car traders with very expensive premises and turnovers, and then there are small, one-man operations. There is a difference there.

I am not so sure I can make the same comment in relation to fair trading issues generally. Without being evasive, we investigate some pretty bright people and some pretty slick people. But equally there are some people who get themselves into trouble because they are either ignorant or less informed — whether that is deliberately less informed or it is because they do not have an educational background that lends them to preparing themselves for fair trading matters. But those people can cause just as much trouble as the slick operators.

Mr KATSAMBANIS — I have a series of questions that cascade into each other. You talked about your having sought 15 warrants. Have any of those warrants been rejected?

Mr DEVLIN — No.

Mr KATSAMBANIS — Or denied? Sorry, that is the right word.

Mr DEVLIN — Not finally. There have been some warrants that have come back where a magistrate has said, 'Look a bit more here', or whatever, or 'Dot that i', but no warrant has been rejected.

Mr KATSAMBANIS — Sure. You talked fairly expansively about warrant procedure, but the Fair Trading Act in particular gives you right of entry to search with consent under section 119.

Mr DEVLIN — Yes.

Mr KATSAMBANIS — Do you have the statistics about the use of consent entry powers for the period since these provisions came into place in September 1999?

Mr DEVLIN — Okay. I believe they have been used, but more so really to protect a person who is more of a witness than a suspect, who may be involved in an allegation — an employee, if I can use that — and where that person has been a bit reluctant and said, 'I do not want to simply hand over a document because I might be sued'. They are looking for some comfort in saying, 'Well, I handed over a document' or 'I gave some information, but it was because of a search conducted by fair trading', albeit a consent search.

The consent provisions have rarely been used or have not been used in relation to a true suspect, to the extent that if you have enough information and the conduct you are concerned about is serious enough to be seeking to go

onto somebody's premises, you do not want to risk knocking on the door saying, 'Look, we are here, we have got a concern, we want to come in and we want to grab documents', because that is where — and we have had experience of this — people will say, 'Well, no, I am not going to consent'. Then you have to go back and get your warrant, and that will cost you at least half a day, if not a day. When you go back the next day probably the documents that you were seeking are not there. So we are not going to use consent — and again this might be a criticism of me, but I would never advise an investigator to use consent in those circumstances, because it really defeats the purpose of the raid. You are not going to get — —

Mr KATSAMBANIS — You used the words 'the raid'. You are really dealing here in an adversarial process? You view the investigation process that you undertake under this sort of regime, be it in licensed premises or unlicensed premises, as a completely adversarial process?

Mr DEVLIN — No. I did use the word 'raid', but what I am trying to paint the picture of here is that there is no doubt that going into somebody's business premises or somebody's home is invasive. If there were ways that we could get a similar return without being so invasive, we would do so. That was the example I gave. If we got a complaint and gave out a notice saying, 'Produce this, this and this document', and by the producing of this, this and this document we either established that the complaint was ill founded or that the complaint was founded and there was a breach, we could act, and in that fashion we would not have been invasive and gone onto somebody's premises and grabbed documents.

I think you used the word 'adversarial'. They are not pleasant; it is never pleasant. In fact our investigators do not like executing warrants, because it is not pleasant. You knock on somebody's door and say, 'I'm coming in'. They do not like doing that; there is always an element of risk to them, and it is just not pleasant. It is not a thing that we enjoy doing. However, we have a duty to monitor compliance and investigate consumer breaches to the best of our ability.

Mr KATSAMBANIS — But I submit to you, and I do not necessarily expect you to answer this if you do not want to, that it is not the execution of the warrant that is invasive; it is the entry and subsequent search and possible seizure that is seen as the invasive process from the point of view of the suspect, as you put it, being investigated.

Mr DEVLIN — I am not sure — —

Mr KATSAMBANIS — On levels of invasiveness, the execution of the warrant is pretty low compared to the process that follows on and the process that I take it you are submitting you would prefer to undertake without the use of a warrant?

Mr DEVLIN — If we could guarantee a similar result, we would do things without a warrant. Again, that is the way we operate. We do not issue a warrant on every complaint we get. We write to people and ask them to come in for a record of interview. In fact even before something gets to my section of the office, attempts are made to conciliate and mediate. But again, it is a real world out there. Sometimes we get such a serious complaint — for instance, a complaint of deficiency in an estate agent's trust account — that it is not one that we can react to slowly or ignore.

Mr KATSAMBANIS — Respectfully, you do not need a warrant for that.

Mr DEVLIN — Sorry?

Mr KATSAMBANIS — You do not need a warrant for that.

Mr DEVLIN — We have powers under section 70.

Mr KATSAMBANIS — Correct.

Mr DEVLIN — That is an example of a licensing power which is a good licensing power.

Mr KATSAMBANIS — That leads me to my next question. You have used the unlicensed motor car traders as an example of a lack of power. I do not have the complete act in front of me, but I am fully aware that in the act there are very direct provisions that essentially, prima facie, deem an individual or an organisation to be a motor car trader.

Mr DEVLIN — Yes.

Mr KATSAMBANIS — On totally objective grounds. You can deem someone to be a motor car trader and then you can have all sorts of powers to investigate that person. I wonder why you used the example of unlicensed dealing in motor vehicles as somewhere you do not have powers to investigate.

Mr DEVLIN — Well, the section you refer to is section 7. You are quite right, if somebody sells four cars in a year, they are deemed; but while somebody is deemed, we still have to have proof to mount a prosecution.

Mr L'ESTRANGE — Sorry, can I cut across to make sure there is no misunderstanding here, Mr Katsambanis. I think the act does deem some people to be motor car traders, but the licensing act powers that we are talking to are only referable to licensees — people who actually have a licence — or referable to a licensed business, not someone who is deemed to be a motor car trader. I do not know — —

Mr KATSAMBANIS — I understand the distinction. It is just that you submitted that that was a real deficiency in your powers of investigation, yet it is one area where you have some objective tests that may not exist in other areas of unlicensed trading.

Mr DEVLIN — Yes, I see the point, but I refer to our powers with licensed traders. Under section 82AA we could write to them saying, 'Answer the following questions or produce the contracts for the following cars'. That would prove whether they had committed any offence under the licensing regime. For the unlicensed trader, even though we suspect, we have ways — and I do not want to say too much — of monitoring who is likely to be selling four or more cars, but we could not then go to that person and say under section 82AA or any other section, 'Please explain 1, 2, 3 and 4, or provide copies of the following sales that we have picked up that you have made'. In that case we would still have to take out a warrant, go to the person's home and hope that the person had paperwork in relation to that or follow other investigative methods of getting proof via advertisements or other ways of proving our case. Section 7 is an assistance and is there for a purpose, but it does not prove our case.

Mr KATSAMBANIS — It gives you prima facie evidence which is strong?

Mr DEVLIN — Yes, but we need more than that to satisfy a court.

The CHAIRMAN — Thank you very much, Mr Devlin. We have just a short time left. I want to enable my colleagues to get another couple of questions on the record. If Peter would like to raise any other issues, he can feel free to do so via Kristin.

Mr KATSAMBANIS — No, I have finished, thank you.

Ms HADDEN — Are your authorised officers provided with manuals or training, given that you have described them as ordinary public servants and the fact that you have police attend when warrants are issued?

Mr DEVLIN — Yes.

Ms HADDEN — Or are activated?

Mr DEVLIN — Yes.

Ms HADDEN — And given the powers under section 464 of the Crimes Act, which involves ordinary public servants, because under section 565(2) an investigating official covers all inspectors and investigators?

Mr DEVLIN — No.

Ms HADDEN — My question is: are your investigators provided with specific manuals or accredited training courses, or do you link in with the civil investigators course run by Victoria Police three or four times a year?

Mr DEVLIN — What we did prior to the operation of the Fair Trading Act and prior to 1 September a group of senior staff, including myself, came up with an investigators manual — of which I am quite happy to provide a copy to the committee if that will assist. As part of the regulations certain forms — for instance, consent entry forms — had to be prescribed or approved. By the director?

Mr L'ESTRANGE — I think so.

Mr DEVLIN — That manual was basically a step-by-step guide on what you should do. From memory, it had a preamble on the responsibility of executing warrants. That is specifically on investigations under the Fair Trading Act.

The staff who are largely public servants are also provided from time to time with police training courses. A number of staff have attended detective training school. In fact, at least one solicitor has also attended detective training school. I was happy to note that she came dux of the class, but that is a personal aside. There are also investigator training courses from time to time. So we try — —

Ms HADDEN — Conducted internally or outsourced?

Mr DEVLIN — These are largely outsourced. I could not tell you that every investigator has been on a course — I would have to come back with the figures — but a large number of them have. It is a case of it being a proactive campaign to keep on educating staff.

In relation to section 464, again I will have to look at the books, but I think 464 applies only to indictable offences, and all our offences are summary offences. For that reason, while we have our own internal system where a suspect is always offered a record of interview, if they attend for a record of interview we follow police procedures of using a triple deck and we caution the same as under section 464, but that is because we have raised our standard rather than it being foisted upon us by the act.

Ms HADDEN — Which acts were the 15 warrants in relation to? The Fair Trading Act or — —

Mr DEVLIN — They were largely under fair trading — albeit we often get situations where the warrant will cross over. For instance, recently we raided a certain travel club. The allegations there were that there were fair trading issues about whether they could provide service and whether there had been misrepresentation. There was also another arm of the investigation that considered whether they were breaching the Travel Agents Act. Generally it is under fair trading, but often it may be a crossover.

Mr STENSHOLT — Just a few quick questions. When you do not need to seek a warrant, you obviously seek it because the court regards it as of higher value?

Mr DEVLIN — Sorry?

Mr STENSHOLT — Under the act you do not need a warrant — the section of the act says you can go in and enter.

Mr DEVLIN — The licensing act?

Mr STENSHOLT — Yes.

Mr DEVLIN — We would only execute a warrant if we had tried the other steps. For instance, if we used the equivalent of demanding documents and we felt that the request had been either ignored or not met properly or as a result of that request other things had developed, we could then consider using a warrant.

Mr STENSHOLT — I was fascinated by your saying there had been no complaints. Just before I pursue that, under the Fair Trading Act you have the ability to make an emergency entrance. How many times have you done that since September 1999? You can tell us in your submission.

Mr L'ESTRANGE — That is a separate area.

Mr STENSHOLT — I guess you could give us a picture of what you have been doing under the various acts in terms of using emergency entry. I assume that you enter for the regular inspections under the licensing act on a regular basis. If your annual report has that sort of detail, it would be useful if you could provide that to us. It is fascinating that you have no history of complaints. I am surprised that people have not complained about people knocking the door down. What is your complaints mechanism? I assume you have one, even though there have been no complaints.

Mr L'ESTRANGE — I did make inquiries about the complaints, and as far as I can ascertain there has been no complaint that the powers that we have or had were, if you like, abused in any way. Obviously people do not like being investigated, but in terms of allegations that they have been used improperly — —

Mr STENSHOLT — So there have been no referrals to the Ombudsman or the ATT?

Mr L'ESTRANGE — Not as far as I can ascertain.

Mr STENSHOLT — If you can do a little bit of checking of that, that would be good. We would also be interested to know exactly what complaints mechanism you have, even though there have been no complaints.

Mr L'ESTRANGE — Since 1999 the complaints mechanism has been formalised. All entries, whether by warrant, consent or under the non-court powers, must be entered into a register. There is a formal complaints process set out in the Fair Trading Act. A person may complain, and a director must investigate and provide a written report to the complainant.

Mr DEVLIN — Just so we do not mislead the committee, I am aware of one complaint that was directed to a number of members of Parliament after the execution of a warrant. I do not think that fell into the category of a complaint directed to the director. The complaint was directed to other members of Parliament to say, 'I had a warrant executed on me, and I am not happy'. That complaint was addressed by the minister to the respective members who had written on behalf of the constituent. I will add that.

The CHAIRMAN — I have one other question — it may be appropriate to respond by way of follow-up letter if you are able to — in the last paragraph of your submission you referred to higher costs being the product of a different arrangement between the obligations of inspectors being responsible to the department as opposed to a court. I was wondering if you could elaborate on that.

Mr L'ESTRANGE — We do not want to overstate that. In the licensing context, if the powers that we had were reduced so that we had only the powers that we enjoy in the non-licensing context, there may be extra money spent in obtaining warrants and court orders and that may be passed on in terms of licensing fees. It is not something we can quantify or want to overemphasise, but I think it is something that does need to be taken account of to some degree at least. If agencies such as Consumer and Business Affairs Victoria are given more and more responsibility in terms of legislation and higher expectations in terms of enforcement but are not given appropriate powers that can be exercised easily, then there may be some fiscal consequence which may have to be passed on in the licensing context to licensees.

The CHAIRMAN — Many thanks for your contributions and for taking the time to prepare for today's hearing. We look forward to any follow-up submissions you are able to forward to Merrin and Kristin. Thank you.

Witnesses withdrew.