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Productivity Commission

PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

DR WARREN MUNDY, Presiding Commissioner
MS ANGELA MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON TUESDAY, 3 JUNE 2014, AT 10.16 AM

Continued from 2/6/14 in Canberra

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DR MUNDY: Good morning, ladies and gentlemen. My name is Dr Warren Mundy and I am the presiding Commissioner on this Access to Civil Justice inquiry and with me is my fellow Commissioner, Angela MacRae. Before starting, I'd like to pay my respects to the elders past and present of the Gadigal people, on whose ancestral lands we meet today, and to the elders past and present of all other indigenous peoples who have continuously inhabited this continent for over 40,000 years. The purpose of this round of hearings is to facilitate public scrutiny of the Commission's work, to get comments and feedbacks on the findings and recommendations we have made at this stage, and to gather further evidence to inform our final report.

Following this hearing, there will be further hearings in every capital city in the country. Hearings in Canberra have already been completed. We expect to provide a formal report to government in September of this year and according to the Productivity Commission Act, following the delivery of our report the government can take up to 25 parliamentary siting days to release it by way of tabling it in both houses of the Commonwealth Parliament. We like to conduct these hearings in a reasonably informal manner but I do remind participants that there is a full transcript being taken, so we do not take comments from the floor as they actually won't be recorded effectively. But at the end of the day's proceeding there will be an opportunity for those people who wish to make a brief statement and obviously people can submit further evidence and advice to us if they choose to do so as a result of what might be said here today or, indeed, if they have other information they wish to draw to our attention.

Whilst our preference to run these hearings informally I would just like to note that under Part 7 of the Productivity Commission Act, the Commission has certain powers to act in the case of false information or a refusal to provide such information. The Commission, since the Act was passed, has not had occasion to use these powers and we certainly do not expect to have to call upon them today. Participants are not required to take an oath but should, of course, be truthful in their remarks and participants are welcome to comment on issues raised by others in submissions or, indeed, in evidence given to us. The transcript will be made available and published on the Commission's website along with the submissions to the inquiry that have been made to date, and will be made in the future.

I'm advised that I'm obliged to tell you under Commonwealth Health and Safety Legislation that in the event that there is an emergency requiring evacuation from the building, you should follow the green exit signs to the nearest stairwell, don't use the lifts and follow instructions of the floor wardens. The emergency evacuation point is at the Westpac building on the corner of Clarence and Market Street, which - I am totally disoriented, so it's out there somewhere. That's the formalities dealt with.

The first participant in these hearings today is Alastair McEwin from the Community Legal Centres New South Wales. For the record could you provide your name and your affiliation, and if you'd like to start with a brief opening statement of seven or eight minutes or so, and then we'll move to discussion.

MR McEWIN: Thank you, Commissioners, for the opportunity to give an oral statement in support of our submission. I'm Alastair McEwin, the director of Community Legal Centres New South Wales. With me is Kerry Nettle, Advocacy and Human Rights Officer, also of Community Legal Centres New South Wales and thank you again for the opportunity. You will also note that I'm working with an Australian sign language interpreter to assist in my communication needs. So without further ado, congratulations to the Commission for your draft report. We welcome it. We appreciate that it is a complex and difficult issue in terms of access to justice. Firstly, I acknowledge that we are meeting on the lands of the Gadigal people of your nation and I, too, pay my respects to the elders past and present.

Community Legal Centres New South Wales play an integral role in access to justice and they also play a vital role in the community. They provide information, advice, representation, play a role in community education and development, and a large role in systemic advocacy and law reform. All those activities contribute to access to justice and often those activities are not seen and can't be quantified many times. The issues that we deal with every day, and every day that Community Legal Centres deal with, are complex and they are across all areas of life; housing, employment, education, welfare and access to community services.

They might be helping someone who is homeless, they might be helping someone who has been dismissed from employment due to unfair work practices, they might be assisting parents who have been told that their child with a disability cannot go to their local primary school, they might be helping someone who can't access their local community services. So the matters that Community Legal Centres assist people with are broad and across all areas of life.

The role that we play in the community is unique. We are community based, we are independent from government and we are a voice for the voiceless and disadvantaged. We listen carefully to our community and their needs, and we articulate their need in working with government. So we were working with other community organisations and with our colleagues in the justice sector. Often these people have been marginalised and disadvantaged for many, many years and are not able to articulate not only their legal needs but their other needs as well, and that's where Community Legal Centres play a role.

In your report you've talked about the efficiency of Community Legal Centres and we'd like to make some brief comments on that, and again I would go back to my

earlier comment; often efficiency cannot always be seen on paper, and cannot always be measured in dollars and cents. Community Legal Centres are - the funding, when you look at the bigger picture - is low. When you look at the funding for Community Legal Centres compared to other legal services provided and, indeed, other community organisations, it's very low and is itself actually also decreasing. We have been told, both in state and federal, that our funding for next financial year will be decreasing and also in further years, so it's a very bleak picture that we are facing for the next two to four years and beyond that, a very uncertain future. So across New South Wales and across Australia CLCs are very much tightening their belts.

Having said that, CLCs have always been very efficient at using scarce resources and that also goes for the peak body, and also for the national body as well, the National Association of CLC. We use pro bono support, we're working in partnership with other organisations, we make sure that we don't duplicate services and I should note that our funding requires us not to the duplicate services of, for example, Legal Aid. So we strive to that. We make sure that we collaborate with Legal Aid and other service providers to make sure that we are not doubling up or duplicating.

If, for example, you compare our figures with other service providers, they may appear to be small, but then again when you look at our funding, of course it can be correlated. I should also emphasise that our clients have very complex needs. It's not always just a legal issue. They may present with - and they often do - they may have a mental health issue, they may be escaping domestic violence, have no home, have three children who may have a disability. They present with incredibly complex life issues so our CLC needs to spend time - they want to spend time with them to make sure they can hear their story. So I urge the Commission to approach measuring efficiency very carefully when you look at CLCs and how you measure them versus or against other legal service providers in terms of the quality and the quantity of our output.

We also note that you've talked about guidelines in terms of what guidelines should be in place for when we take on case work or when we provide legal assistance to people in the community. We wholeheartedly agree that there should be a framework in terms of providing access to justice to those who need it the most - those who are most disadvantaged. Funding should be targeted to those who most need it and that's what CLCs do, and Legal Aid Commission, and Aboriginal Legal Services, and other justice providers. We all do that and we agree that in principle there should be an overarching framework to guide that.

Most CLCs, if not all, have guidelines in place. They also have flexibility and that flexibility is based around predominantly wanting to respond quickly to emerging need. For example, in Redfern a few years ago Redfern Legal Centre

noted a small but growing number of Russian-speaking migrants, so they tailored their services to addressing some of their urgent legal needs. That was something where we've seen a legal need, met that need then and there, and then they evolved over time. So that was something that was seen as responding in a flexible way to a disadvantaged pocket of that community; other centres might include Marrickville and Inner City Legal Centre, which are situated in what may appear to be affluent suburbs but are actually servicing pockets of significant disadvantage in those suburbs.

So we believe that having exactly the same guideline for CLCs and Legal Aid Commissions would lead to a situation that would be exclusionary, not inclusive. We also note in your draft report you've suggested that competitive tendering may be a solution or a process that may address some of the funding issues or the way that we deliver services. We view that with great concern and we also note that your Commission produced a Not For Profit report in 2010 and you also noted the pitfall - perhaps for want of a better word - around competitive tendering for the Not For Profit, so I draw upon those comments in that report.

Our sector works in a very collaborative way and I earlier mentioned that we collaborate with Legal Aid Commission and our national body, and with the Aboriginal Legal Services and Family Violence - we collaborate to make sure that we're not duplicating services, so competitive tendering would be a threat in one way to that and could possibly destroy that collaborative manner. We also can illustrate through many examples and a big one is the work development orders which we've mentioned in our submission, and that is a significant achievement for Community Legal Centres and Legal Aid New South Wales where we've worked together to remove - I think we've already removed something around about a minimum of $2 million plus worth of debt in New South Wales and it's rising.

A few other quick issues before I bring my opening statement to a close. Community Legal Centres New South Wales is not an expert in identifying and statistical modelling around legal needs. What we have done in the last three years is we've developed, working with an independent consultancy, a tool kit for CLCs to try and understand the environment around them. So CLC New South Wales in 2008, 2009, working with a steering committee which included Legal Aid New South Wales, developed a toolkit which ended up being called the LNAF - Legal Needs Assessment Framework - and it's now a national tool kit. It was taken up by the national association and rolled out to all legal centres around Australia, and that was developed as a toolkit to assist Community Legal Centres.

So to be frank, we've waited for many years for the government to come up with a sophisticated model and for them to come up with a way to assist us but we couldn’t always wait so we came up with our own mechanism and whilst I'm not

saying it's foolproof, I'm saying that it's helped our Community Legal Centres to understand the environment better. So we're not experts in identifying legal need and we agree with the fact that there are pockets of - there are areas in New South Wales that do not have legal services and there are gaps in legal services. We agree with that.

We would be concerned, however, that to see the development of a model that, for example, excluded community education, community development and systemic law reform work. So we would ask the Commission to look holistically at a model that includes those two factors. In conclusion, we thank the Commission again for your work and we appreciate the opportunity to come here today, as we do also your engagement with the sector. Thank you very much.

DR MUNDY (CLCNSW): Can I start on the question of law reform. We understand that in the recent funding reductions a view has been expressed that the Commonwealth now wishes to focus its funding of CLCs on frontline service delivery, and we heard yesterday from the EDO in ACT that the consequence of that decision is likely to lead to the closure of the EDO in the ACT, and potentially other smaller EDOs in places like Darwin and elsewhere. There was no view expressed that would lead one to the view that the EDO in New South Wales might close, but its operations may be impacted. Beyond the EDOs are you able to give us a sense of how that decision to remove funding from what we might call broad areas of law reform is going impact CLCs in New South Wales — if you've got any dollar amounts, but if not, in a practical operational sense?

MR McEWIN (CLCNSW): I'll answer that in several ways. I'll answer that by saying what I know. So what's happened at the moment is that we don't know yet what the New South Wales government will do. We are waiting for them to advise us on - so as a work that the Commonwealth and state, as you know, fund jointly. So the Commonwealth has advised us that they will no longer fund us for law reform work, from their part. We don't know yet in New South Wales whether they will allow us to continue to do law reform, and by way of example the Victorian government has said, "You can continue to do law reform, we have no issue with that."

We don't know yet in New South Wales so it's difficult for me to say. To quantify, what I believe will happen in New South Wales is that our centres will continue to do law reform on state money if we are allowed to do that and what that will mean is that they will report to the government using state money to do law reform activity. However, we don't know whether that will take place yet. We are hoping that the state government will allow us to do law reform, so I can't answer the question and I'll probably defer to my colleague, Kerry, in a minute.

But the other thing to say is that if the state government does say, "You can't do law reform under our money," many centres will probably continue to do law reform but using other money such as member fees and pro bono support. Our members at their meeting two weeks ago resolved that law reform is an essential part of the work that we do, and they will continue to do it.

MS NETTLE (CLCNSW): Kerry Nettle from CLC New South Wales, for the record. Last week in the senate estimates process there was a question which was put to the attorney general about the restriction on doing law reform work through the funding of Community Legal Centres and an example that he gave around law reform work that would be impacted by the funding decision was submissions that Community Legal Centres write to government inquiries or inquiries such as this one. So there are Community Legal Centres who, when being given that restriction - that they cannot use Commonwealth funding for inquiries - are currently having discussions about whether or not they will be in a position to be able to make submissions to Federal inquiries.

So there was a real potential that the voice that Community Legal Centres represent in that forum will be lost if, indeed, those Community Legal Centres determine that they are not able to put staff resources into doing that activity. Some discussion has occurred around whether they may be able to use volunteers for that process, but whenever you use volunteers you need staff involved in assessing and overseeing the activities that they're involved in. So in terms of the Commonwealth funding and that impact, that is one very practical and I would say quite substantial impact. If there were to be no more submissions to Federal inquiries from Community Legal Centres across the country I'd suggest that would have quite an impact on the voices of the vulnerable clients that we service being heard.

MR McEWIN (CLCNSW): One last thing. We are finalising a report on the efficiency, on the value of law reform activities by New South Wales CLC. We expect that report to be finished in the next four to six weeks and we are happy to provide the Commission with a copy of that report if that would be useful to you.

DR MUNDY: That would be very helpful.

MS MacRAE: Can I just ask specifically - you mentioned about pockets of disadvantage within well-off suburbs and I just wonder if you could say a little bit more about that. I guess if I can preface it a little bit, we are also struggling with how do you easily define efficiency in these cases and I take many of your points very seriously. I think you're quite right, you've raised a lot of issues that it is very hard to measure some of these issues and when you're dealing with very disadvantaged people, sometimes working out what the pluses and minuses are can be very hard.

So we are, though, trying to get a handle on it as best we can and as you'll see from our report one of the issues that has come out was CLCs - and it's probably less of an issue in New South Wales than elsewhere, but nevertheless there does seem to be - because of historical precedent as much as anything - sometimes the location of CLCs does seem to be problematic in terms of very scarce resources needing to be really very carefully targeted to those most disadvantaged. So could you say a little bit more about that for me?

MR McEWIN (CLCNSW): I'll answer that in two ways. Firstly, yes, pockets of disadvantage still do exist. So using, for example, Redfern and Inner City Legal Centre and Marrickville Legal Centre, are prime examples in Sydney, an immediate high profile example. So even though Redfern has become quite gentrified and even with Inner City Legal Centre - Inner City Legal Centre for example is based in Kings Cross and Kings Cross has a number of - as you might appreciate - boarding houses and refuges where there are a significant amount of people who experience issues with police and with drug and alcohol. So there are a significant number of issues that Inner City Legal deal with, with those clients.

There's also a high population of gay and lesbian people who also experience a significant amount of same-sex violence and family violence which is very hidden. So even though that's not seen generally in the general population widespread across Sydney, it's concentrated in the inner city. So they're examples of where they target their services to particular needs. And the second part I would answer is those Inner City Legal Centres have also started specialising across the state by getting out of bricks and mortar, and by doing outreach. So Redfern, for example, now has a statewide international student legal service which they provide face to face as well as by video-link and Inner City Legal Centre also provides, again, lesbian service advice across the state.

So even though those CLCs still seem to be based in affluent suburbs, they are also trained in the way they provide services to disadvantaged people across the state even though they're a generalist centre and still funded as a generalist centre, they've also obtained funding to provide specialist centres to ensure that they meet those who continue to be disadvantaged. That's two ways of answering your question. I'm not sure it answered specifically, but the two ways are - - -

MS MacRAE: No, that was good. Thank you. That was what I was looking for.

DR MUNDY: I guess the concern in this space that I - I mean, on the one hand there are particularly regional areas around metropolitan areas or in the outlying suburbs - you know, if you can conceive Newcastle having suburbs - there is unmet need. I guess the challenge for us, thinking through this and for me is that we

recognise that community bases upon which these organisations have grown up and some of us have read a bit of Marx and understand historical determinism but we're trying to grapple with the idea of how can we make recommendations that we'll get the sort of physical presence of the CLC into these communities where there is clearly need, and is it efficient or is it effective to be trying to deliver services of a properly community nature rather than a thematic statewide basis at such large distances, and how might that be better facilitated even if you've put aside the strictures and the current funding envelope? It's not that we're profoundly unhappy about where things are, we're more concerned about where things aren't.

MR McEWIN (CLCNSW): Absolutely. The challenges for delivering services in remote areas are enormous. This is not a position but rather more an observation. Where there's been money just literally provided to an area in a remote area and by, say, the government and said, "Here's money for a legal centre. Here you go, set up a legal centre and start providing services," there have sometimes been issues with getting that legal centre up and running. Whereas on the converse where there's been community ready for a legal centre or where the community has come together and worked together and said, "We need a legal centre or we need a legal service of some sort," worked together and then asked for funding and obtained funding, and the community's been ready for it, that centre has been successful.

So you also need to look at whether the community - there's community support and I think that's been a measure of success, so that's not our - our position per se is not so much whether you can say, "Yes, that area needs a legal service," but our observation has been there needs to be some sort of community support behind it and we would want to see some sort of model that allows a community to also support the development of or engagement of legal services for that area. I might also ask Kerry if she wants to add anything.

MS NETTLE (CLCNSW): There are large areas of the state in New South Wales where there's not a community legal service and we take the phone calls from those people, and we're not able to direct them to somewhere. What some of the regional community legal centres in New South Wales spend a lot of time doing is the outreach services where they will go into another nearby local area and they operate then in conjunction with a community organisation that exists in that area to be able to provide services. So that means they already have some connections to that area by working with a community legal centre.

So unfortunately with some of the recent cuts that have happened to funding for community legal centres in New South Wales, those CLCs are not going to be able to continue those outreach services but that has proven to be quite an effective way to spread the geographic area of community legal service programs, is where there's funding for outreach services then it enables a relationship to develop with a

community that then may be able to lead to a Community Legal Centre being developed in that new area.

DR MUNDY: So basically I think what you're both saying is that - and it comes in the name almost - is that there needs to be some community express demand. It's a bit like the Bendigo Bank model, in a sense - is that there's this community desire for the service to be provided and then on the other hand nearly located or I think somewhat possibly not so nearly located CLCs will reach out into other communities and funding restrictions mean, probably quite naturally, that the first thing that you get, you just stay closer to home. Travelling's expensive, you're not attending to your own community's needs, so you haven't got the resources to extend. So that's the basic development picture.

MR McEWIN (CLCNSW): Absolutely. We've found with our Aboriginal Legal Access program by Aboriginal workers in the Community Legal Centres going out to literally where the communities meet under trees, for example, on a regular basis, you know, whether it be weekly, fortnightly, and that gradual building of trust and then they will bring the solicitor from the legal centre to those meetings after a period - not on the first or second, or third visit - and then the community get used to meeting with the solicitors. So absolutely, building that community trust has been fundamental and, I mean, you take that away, the hidden costs are very hard to quantify.

So yes, we agree with your position or your suggestion around building community trust, takes a long time and is particularly telling, and important for people in remote areas, and we've found in our visit to our centres around New South Wales those who are particularly remote appreciate the personal contact and whilst technology is developing rapidly it still takes a lot to build that one-on-one relationship and you can only do that through personal contact.

DR MUNDY: We might move off that topic.

MS MacRAE: I just wonder if you could give us a little bit more of a flavour of how you work with other organisations. As you said, there's a lot of people that come to you that have legal issues, but that's just one part of the problem and certainly we're aware of that in the research we've looked at. You've talked a little bit about outreach and working with some other organisations. How were you finding that and are some of those other organisations similarly stressed for funding? Is that networking being able to work as effectively as it has in the past?

MR McEWIN (CLCNSW): There are many ways and I'll just give you a few examples. Firstly, CLC New South Wales itself convened a quarterly meeting, so every quarter, as the name implies, our members get together. So we have 40

members and they get together in Sydney over one or two days, and we have network meetings, working group meetings and we also provide training opportunities because we also recognise that for rural and remote solicitors and other staff the only time they can get training opportunities other than online is face to face in Sydney. So it's two to three days of opportunities for them to meet, share information, network. It's a very powerful opportunity for everyone to get together and hear about what's going on. So that's one example and it's been described by many in the sector as the life blood of the sector. So we work very hard at the state office to provide those opportunities to the sector.

In the community we were in remote CLC work with their local community organisation to do, for example, the cooperative legal services delivery model which is convened by Legal Aid New South Wales, and I'm sure that later when they appear this afternoon, they may speak towards that as an example of how they bring together legal and non-legal organisations to collaborate on projects that benefit their local communities, and CLC play a leading role in that because CLCs are independent community organisations who have a very good relationship with their partner organisations. I should also emphasise that many of our Community Legal Centres work well with pro bono law firms, large law firms and medium law firms, and there are many examples of small law firms that provide a solicitor to go and help with evening advice clinic.

An excellent example of large law firms providing a secondee. Secondees are highly prized as, as you know, a secondee of a senior associate or a senior lawyer going to work for a Community Legal Centre for six months is not only a great resource but also a good opportunity for lawyers in the Community Legal Centre to learn from the private lawyer and vice versa, and that relationship helps the legal centre to become even more efficient at providing services. So there's just some of the tip of the iceberg and I would also want to emphasise that if competitive tendering were to be introduced to our sector, many volunteers will probably leave the sector because they value being able to work for an organisation that has a particular connection to the area of law that they're interested in or in the community that they are working for.

DR MUNDY: Can I just come to the competitive tendering question? We didn't actually recommend it, we said it was an option. We probably thought the response we got was the response we were going to get, but it begs the question how governments might act to distribute resources that are scarce across competing needs within jurisdictions but, indeed, also between jurisdictions because the pattern and nature of legal need, the extent and the types of legal needs between Australian jurisdictions are very different; Hobart's different to Perth.

So what sort of models in any sort of budgetary environment do you think

work better? Because to be frank, we've had a bit of a look at the history of CLC funding and it seems to be often on the whim of the attorney general of the day and certainly some point in the month of June, before the end of the financial year and I think, you know, we're trying to find a more systemic way and a predictable way that addresses funds across jurisdictions and nationally.

MR McEWIN (CLCNSW): I mean, in terms of a perfect model, I think there is no such thing as a perfect model in terms of the - when you look at all the variables including how we collaborate and work together as a sector, and also the difficulties around measuring outputs and outcomes for the individual client at the end of the day, we would suggest that a model that - for example, in New South Wales where the New South Wales attorney general, for example, administered the funding on behalf of Commonwealth and state would be beneficial in the sense that they would be closer to the issues around the legal issues of the state, noting of course there are many federal issues that Community Legal Centres deal with and that we would expect to have funding for, and also they would also have the resources closer to the ground to be able to be more well informed about issues that are happening for Community Legal Centres and we have a good working relationship with policy officers in the department, and we have a good working relationship with them, and we work on issues that are very important to our centre. So having that in mind, we will probably see a model that had that - the state attorney general as the administrator, administering the funds - - -

DR MUNDY: So a model whereby the Commonwealth would look to distribute funds between the states and territories on some sort of high-level assessed need - and possibly not the Grants Commission model because then no-one would understand it - but some sort of needs based outcome and then effectively leave it to the states to add their resources and then distribute that money, which would presumably see a breakdown in this notion of money for Commonwealth matters and money for state matters, which probably is not useful in your context because the person experiencing disadvantage almost certainly had state and Commonwealth matters wrapped up together.

MR McEWIN (CLCNSW): Yes, and the other thing to note is we have a very close working relationship with Legal Aid New South Wales as our funding body and we appreciate that. We also have to acknowledge that we also, for want of a better word, compete for the same pool of money ultimately at the end of the day, both through Commonwealth and through the public purpose fund, and not so much through state at the moment because the state allocation is a very defined, and it's pretty well much the case also for the public purpose fund. But with the declining pool of money for the public purpose fund it means that ultimately we will all be competing for a smaller piece of the shrinking pool.

So ultimately, we will all be seen as competing. I mean, but that's not just for us, it's for the law society, it's - I would say almost every single justice organisation in New South Wales relies to some degree on the public purpose fund so ultimately there is a sense of competing for limited resources from the public purpose fund, so a model that allows the state attorney general's department to administer that funding for CLCs might be a fairer and equitable way if we were allowed to collaborate with our partners on a more equitable basis. I might also ask Kerry if she wants to add anything.

MS NETTLE (CLCNSW): Yes, I think what Alastair was saying about competition between the various legal service providers, if we all had the same eligibility test that would obviously heighten issues that we've raised around competitiveness because currently we are specifically funded not to duplicate the Legal Aid service that is provided. So I'm not aware of how many people there are that meet the Legal Aid test but are not able to be serviced, you know, but we do have the figures for the number of people that we service that don't meet the Legal Aid test.

One of the things that Community Legal Centres in New South Wales also do is assist people to articulate their legal need who can't do that because of the disadvantage they experience. So they may actually meet the Legal Aid test and the Community Legal Centre end up helping them, assisting them to explain that they do meet the Legal Aid test. So I suppose that's one of the disadvantages that we see if we had the same eligibility test operating as for Legal Aid.

DR MUNDY: Just coming back to this model that we've been talking about, presumably in such a circumstance if an arrangement could be reached at a high level where the Commonwealth could be satisfied that its objectives were being met, that would have the potential to reduce the compliance burden on CLCs if an arrangement could be met where the supervisory relationship or the compliance relationship existed solely with the state, and then the state could be accountable for the outcomes of its use of Commonwealth money. Would that have a significant impact on the current compliance burden and compliance costs that your members experience?

MR McEWIN (CLCNSW): What we would do is, noting and going back to - our focus has always been on the most disadvantaged and being a safety net for those who can't get services elsewhere. So that would always be our core aim, irrespective of funding or arrangements. So yes, we would aim toward an arrangement with the - I mean, that would be lobbying. If that was to take place, we would lobby for that to make sure that the safety net would capture all clients and the client burden would fall to us, that we would deal with the most complex clients.

DR MUNDY: I'm more focused on - I mean, we've heard from some CLCs from various places that they face significance, compliance burdens and reporting, and things like that and I guess what I'm trying to explore is whether, if the arrangement which you described where the state attorney general's department is essentially distributing resources, that the reporting relationships which now we understand occur both at a state level for various arrangements and then onto the Commonwealth, perhaps the state could then become the compliance agency for meeting the Commonwealth policy objectives and your members could be freed of some administrative reporting burden and duplication to the Commonwealth. I'm just trying to get a sense of how big that burden would be, because that would presumably yield up some resources to actually do what you're there to do.

MR McEWIN (CLCNSW): I should probably start off by saying in New South Wales we've been very fortunate with the way Legal Aid manage our funding through an extremely rigorous approach, but they've also allowed us a great freedom to achieve the highest aim, so I think our experience has been different across Australia. So I'll state that at the opening in that I've been very pleased to observe that CLCs in New South Wales have always had that freedom to achieve the very best for their client. So our outcomes have been very good, so I would like to see that continue in terms of reporting and our reporting requirements have been very much focussed on outcomes, so we would like to see that continue, particularly around a holistic approach. Not just so much always about the legal issue and again I would emphasise our close working relationship with our partners to achieve non-duplication of services as well as a collaborative approach. So in terms of reporting we would like to see that continue if that was a model for New South Wales. I'm conscious of time.

DR MUNDY: Just bear with us for a moment. One of the propositions that we've brought forward is this apparent issue within Legal Aid that criminal matters get preference because of Dietrich and all sorts of things. One of the propositions we've put forward is, in our view, that civil matters are the poor cousin within the legal assistance system more generally. Do you see any benefits in governments when the consider their legal assistance broadly; just not Legal Aid but the both primary sources and the indigenous areas in actually trying to assess what an appropriate funding base for civil matters is, bearing in mind there's a lot of people who experience significant disadvantage are often tied up in the civil and criminal justice systems.

MR McEWIN (CLCNSW): We've seen first-hand the problems that escalate when somebody presents with many civil law issues, for example they've got a young person with a mobile phone bill that they can't pay and then they get fined, and you know, speeding fines and parking fines, and then it escalates into a short time in gaol, and then they have lack of educational opportunities. So we've seen first-hand how a

lack of opportunity to address all those civil law issues escalates into, unfortunately, a lifetime or a cycle of poverty and crime. So our position is that investment in both civil and criminal law is necessary.

As I said earlier, we're not experts in quantifying a legal need but what we have seen is that investment in civil law will reduce the need for criminal law, investing more in criminal law and one of the things that we've been working on for the last three to four years is a justice investment campaign which you may have come across through other submissions. If you haven't, I'm happy to provide you with more information on the justice reinvestment campaign.

DR MUNDY: That would be helpful, thank you. I'm mindful of having to stay on time. I know Kerry will, from a former life, know that sometimes the witness list gets very long. Thank you very much for your time here today and we do appreciate the assistance you've provided the Commission.

MR McEWIN (CLCNSW): Thank you, both of you.

MS NETTLE (CLCNSW): Thank you.

DR MUNDY: Sorry for that slight delay. Could you please state your name and affiliation for the record and then make a brief opening statement, if you'd like to.

MR MOSES (NSWBA): Yes, thank you, Commissioner. My name is Arthur Moses. I'm the junior vice president for the New South Wales Bar Association and with me is my colleague Dominique Hogan-Doran who has sat on the working party which has dealt with the Productivity Commission's draft report.

DR MUNDY: Thank you.

MR MOSES (NSWBA): Yes, thank you, Commissioner. The Bar Association thanks the Productivity Commission for the opportunity to provide it submissions on the important issues raised in its draft report which has been released as part of its reference on access to justice arrangements. The Bar Association regards the work that this Commission is doing as very important and it is hoped that its legacy will be to develop initiatives which have a focus on promoting access to justice and equality before the law.

I have noted from a lecture that the Presiding Commissioner Dr Mundy gave last week at the Australian National University that the intention of the Commission is to provide a whole of government approach to this issue as it straddles both economic and legal issues, and we embrace that. It is important to recognise at the outset that enormous strain is currently placed upon on an already under-resourced judiciary, registry staff and the legal assistance sector by the chronic under-funding of Legal Aid in Australia.

As you would have noted from both the submissions of the association and other interested parties, unrepresented litigants through no fault of their own increase the demand on time, costs and resources in the court system as well as increased costs for their opponents. This is at a time when courts are having their allocation of resources reduced.

The Bar Association accepts that there must be a limit to the level of legal aid funding. However, there needs to be serious consideration by government as to whether it should. I can't remember funding to Legal Aid that could enable the proper representation of individuals in civil proceedings. This may in fact, as we've noted in our paper, lead to savings for the court system. We are not aware of any cost benefit analysis that has been done which quantifies the increased time and costs associated with unrepresented litigants as opposed to when similar cases are subject to Legal Aid funding.

What we have seen is that by reducing the amount of legal aid, the cost of conducting unrepresented litigant matters shifts to the court’s budget and increases

legal fees for opposing parties. Again, as the Presiding Commissioner noted correctly in his lecture at the Australian National University last week, pro bono assistance alone will not cure the issue of a lack of Legal Aid funding or the problems associated with unrepresented litigants, and pro bono work of course should not be compulsory, nor is it a panacea.

Pro bono work of course undertaken by legal practitioners, we all accept cannot be relied upon to remedy major deficiencies in our legal aid system. It can be safely said, we think, that no other profession undertakes a similar level of pro bono work that the legal profession engages in, both barristers and solicitors. It is the one area that government depends upon for a profession to provide voluntary contributions in order to facilitate our justice system operating.

Having said that, the Bar Association is committed to contributing to various court legal assistance schemes under which barristers as sole practitioners give their time in providing day in, day out through pro bono and other legal assistance work. This is in addition to the many cases in which practitioners take on work on a no-win, no-pay basis in order to progress matters to hearing which would otherwise fall by the wayside.

In that respect the only issue that I take issue with the Presiding Commissioner's comments at his lecture last week was the reference to the amount of pro bono work that is undertaken by the large firms. It should not be forgotten that the New South Wales Bar Association contributes the lion's share of pro bono work that is undertaken in our courts. Unlike practitioners within firms, they do not draw a salary or earnings from other revenue sources within a firm. When barristers appear pro bono, they are literally not receiving an income for each and every day they are in court. They do it without complaint and without any fanfare.

The other issue that I wanted to touch on very briefly was the issue of the missing model or the unfunded model. We accept that the Commission in looking at matters such as case management, cost budgets and alternate forms of funding such as litigation funding models, these are matters that need to be looked at to ensure that the unfunded model can support litigation. We are very grateful for the initiatives that this Commission is exploring on those matters because things that need to have a light shone on them are being shone on them and we are grateful for that.

The only concern that we have is to ensure that nothing comes out of the inquiry that would fetter or purport to fetter the discretion of the judiciary in dealing with case management. Judges have an oath of office that they must take and which they must comply with. They are a third arm of government and they should not be perceived as being a service provider. They are not. To regard them as that would be mistake and would foist upon them a title which they cannot comply with because

of their oath.

The other final issue that I want to touch upon was a suggestion, I think it was in chapter 10, that there be restrictions on legal representatives before tribunals. The Bar Association takes the view, and we also think tribunal members take the view in most tribunals, that lawyers actually assist members of the tribunal in dealing with matters before them. We think there should not be artificial fetters being placed on representation before tribunals as a blanket measure. There have been decisions which we've referred to where tribunals have welcomed assistance and it has ensured that tribunals get their job done quickly and correctly.

So with those opening remarks, I thank both Commissioners for your patience; my colleague and I are here to attempt to assist you in whatever way we can. I thank you for your patience.

DR MUNDY: I'm pleased that someone has paid attention to what was meant to be a lunchtime chat.

MR MOSES (NSWBA): Yes, there's a good podcast I think, Commissioner.

DR MUNDY: Yes, I presume so. We'll start with the question of tribunals. I'm not sure it's your submission but it has been suggested that there is no evidentiary basis of our concern. We've treated certain comments made to us by judicial and non-judicial members of tribunals as 'in confidence', but the concern we reflect is their concern. It has been put to us that that is the case.

MR MOSES (NSWBA): I understand.

DR MUNDY: I think part of the challenge here in these very large tribunals such as VCAT, which I have more experience with, there are clearly matters in VCAT in which people must be represented, guardianship probably being the most outstanding, but when you look at very large planning matters which in the first instance are almost exclusively dealt with there, where the amounts of money involved are very substantial - but it has been put to us in those smaller jurisdictions, particularly where there are parties of relatively equal capacity — be they financial or legal or whatever — representation can slow the process down. That is where we are coming from on that.

I guess the solution that has been suggested to us - and I think the solution has been made in public by Justice Kerr - is that those who appear in tribunals should have an obligation to assist the business of the tribunal, not just a moral one but a statutory one. Is that something the New South Wales Bar would object to?

MR MOSES (NSWBA): Not for our part, Commissioner, because it would model itself no doubt on provisions of our Civil Procedure Act that mandate our obligations to do that, so we would embrace that, Commissioner.

DR MUNDY: Presumably you wouldn't be uncomfortable if any person appearing on behalf of another in a tribunal was subject to that obligation, because in places like VCAT there are occasions when non-legally qualified people appear on behalf of others, or their employers, more often.

MS HOGAN-DORAN (NSWBA): Section 56 of the Civil Procedure Act imposes obligations not only on party representatives but parties themselves and the court itself, so if something modelled on section 56 was to be put in a tribunal context I think then it would tend to capture those issues like a landlord's agent being the representative. Insurance companies have an in-house counsel, being the representative. It also has the advantage of appreciating that the obligations should be on all actors in that system, not just on the legal representatives but each of those with a role to play within it.

MR MOSES (NSWBA): Commissioner, I think that point that you have raised - and I agree with my colleague's comments on that - the Fair Work Commission has been grappling with this issue for some time. What they have are industrial agents who appear who are not bound by the same obligations as lawyers in the conduct of matters and there have been quite a few critical decisions and I can have them sent to you of agents who have behaved in a manner that has either led to increased costs or let the person down who they had been representing and they have been handcuffed - that is, the members of the Commission - because they have had nothing that they can do in respect of that issue once the person is through the front door and they have granted them representation, so having a statutory obligation would be I think a very important way forward for these tribunals because if a person breaches it, it would be on notice down the track that when they come to seek leave again to appear, the fact that they have breached their obligation previously could be a ground to refuse them permission to appear for a person, so we think that is a good idea, Commissioner.

MS HOGAN-DORAN (NSWBA): Could I say two additional matters? The first is in relation to section 56 the High Court gave judgment at the end of last year on the construction of that provision which it had not previously considered. I don't think it is canvassed in the draft report, the decision of the expense reduction analyst group which is probably a rather ironic case because it is a case that counsels against the satellite litigation by parties because of the costs that are involved. The court does consider and expose the importance of the obligations being on parties but also on their counsel and representatives and on the court itself.

The second thing I wanted to mention was that I think the difficulty we had,

and others may have had in relation to draft recommendation 10.1, is perhaps in the broad-brush way it deals with - restrictions should be more rigorously applied. I think were it to be subject to or qualified by having regard to the nature of the matter before - - -

DR MUNDY: To be fair to the person who would have drafted that, there are certainly in VCAT a range of matters where representation is the norm. That is expected. There are no restrictions to be applied.

MS HOGAN-DORAN (NSWBA): And the new tribunal in New South Wales, the new mega tribunal NCAT which has just commenced, has a leave requirement in respect of most of its divisions but in some divisions, the one that we identified in our submission - the occupational and regulatory division - it has an automatic one and we say that is an appropriate division and a good model perhaps for states other than Victoria.

DR MUNDY: I don't think we are actually very - - -

MR MOSES (NSWBA): No. I'm attracted to your wording, Commissioner, in terms of looking at the complexity of the matter and the parties being the test. What we might do is send you a decision of the full bench of the Fair Work Commission that the Bar Association was a party in where a barrister was refused permission to appear but on appeal the full bench had something to say about errors of law made where they set out criteria as to relevancy when lawyers should appear in matters and the like. We might send that to you if you would like that as part of a bundle of papers, together with the High Court decision, that my colleague - - -

DR MUNDY: That would be helpful.

MR MOSES (NSWBA): Thank you.

MS HOGAN-DORAN (NSWBA): More to read.

MR MOSES (NSWBA): Sorry, Commissioner.

DR MUNDY: Sorry. The colleague who is attending to these matters is sitting up the back and she is looking forward to it.

MR MOSES (NSWBA): I apologise to her directly.

MS MacRAE: One very small issue. You made some comments about pro bono and what we had said about it.

MR MOSES (NSWBA): Yes.

MS MacRAE: I understand you are doing a survey of your members on this. Is that right?

MR MOSES (NSWBA): We are, Commissioner.

MS MacRAE: Is that likely to be available before our final report?

MS HOGAN-DORAN (NSWBA): It is with the practising certificate renewals which are ongoing now and must all be completed by 30 June, so we will receive the survey results - they are being received already but they won't be completed until that process of renewal is completed, so it will be in July some time. I don't know if that is still within your time frame.

DR MUNDY: If we could have your permission to also - - -

MS HOGAN-DORAN (NSWBA): It is well within your time frame?

MS MacRAE: Yes. That would be great.

DR MUNDY: Thank you.

MS MacRAE: That would be terrific. What we do say in the report about pro bono is based on as much information as we could get but we knew it was inadequate.

MS HOGAN-DORAN (NSWBA): The data is very limited because the law firms of course have reasons other than reporting obligations that are reasons why they wish to report. It also obviously has perhaps some marketing aspect to it.

DR MUNDY: I think my reflection on the pro bono services of major firms was to point out that not all of their activities were directed at access to the courts.

MR MOSES (NSWBA): I understand, yes.

MS HOGAN-DORAN (NSWBA): I think your comment was in relation to transactional - - -

DR MUNDY: Yes. Even your suburban solicitor or country town solicitor probably does pro bono work for the local bowls club.

MR MOSES (NSWBA): Yes.

DR MUNDY: There's nothing wrong with that. I was merely making an observation about the amount of work - and the material that has been put to us is that the pro bono activities of law firms seems to be predominated by transactional matters, rather than representational matters. That was the only point I ought to make.

MS MacRAE: Something that you didn't mention but was mentioned in your submission was the supporting accreditation and standards for ADR providers. The national Legal Aid submission to us has said that they are concerned that that might end up being quite expensive and restrict the supply of ADR practitioners. I just wondered if you had a view about that or if you had anything to say about what you think the cost might be and if that would be a barrier.

MR MOSES (NSWBA): Is this the concern, Commissioner MacRae, that by supporting the development of - - -

MS MacRAE: Of accreditation and standards for all ADR practitioners; that there would be a cost in that that might then restrict the supply of those people and become a problem. It's just an issue that national Legal Aid has raised with us that in principle sounds like a good idea and in practice would create another barrier.

MR MOSES (NSWBA): We would like to reflect on that. Our understanding is that having a standard system whereby a person can become accredited should not have, as it were, an extra layer on the accreditation process if we adopt a model accreditation process across the Commonwealth. Then we should just have one feeder system into that so that people know that what they are getting is a mediator, for instance, or a practitioner in ADR who had been accredited through the same program in order to facilitate that being done, but at the moment there is no barrier, for instance, for a barrister such as myself to be approached to mediate in a matter, even though I have done no ADR accredited course. I do mediations where I preside as a mediator and so do others who are far more qualified than I such as former High Court judges who sit and do mediations without having, as it were, an accreditation to do it. I think standard accreditation would give comfort to individuals out there that what they are getting is somebody who has been through a process and it is standardised.

MS HOGAN-DORAN (NSWBA): That was the reason for that.

DR MUNDY: Can I ask you two questions on that front? The first is: do you think admission as a barrister or solicitor should be taken as a de facto qualification for being a mediator?

MR MOSES (NSWBA): No, Commissioner, because I think some solicitors or

barristers may not have the necessary skill set or temperament to do it, so to answer your question directly - - -

DR MUNDY: So some sort of training and accreditation is appropriate?

MS HOGAN-DORAN (NSWBA): Perhaps I might add, I recently became a nationally-accredited mediator under the mediator accreditation system that's currently in place, and I did it through the Institute of Arbitrators and Mediators.

DR MUNDY: Yes.

MS HOGAN-DORAN (NSWBA): I think, from my own personal experience of that, I was struck by how much I didn't know and learnt through that process of training and then accreditation, which is part of that - - -

DR MUNDY: This is the sort of issue the Commission has dealt with in the past, particularly with respect to migration agencies, legal practice - - -

MS HOGAN-DORAN (NSWBA): Right.

DR MUNDY: I think the issues are different in this case.

MS HOGAN-DORAN (NSWBA): And I think also the great value of that kind of training system and accreditation system, and I'm speaking separately to the notion of who should be the accreditators, but is the emphasis on interpersonal skills and skills of communication and empathy and things that we would like to think all of us, as legal practitioners, have, but it's helpful to have it pointed out if you don't, and to find ways in which to deal with that. I think that, per se, qualification as a lawyer or solicitor is not necessary, but what I think we are directing our minds to is that the accreditation should recognise that you may be a mediator who has that qualification in addition, or prior qualification.

MR MOSES (NSWBA): There have been some Supreme Court judges who have retired and come back to be mediators, and you soon work out within the first 15 minutes, this is not for them.

DR MUNDY: No. My second question is in relation to accreditation. There's a model that says, if there is an accreditation body, it is then able to accredit processes rather than organisation. For example, you might have the Institute of Arbitrators, the LEADR people. That's the sort of model where, basically, organisations holding themselves out to provide training and accreditation have to basically get the tick from some overarching body. Is that the model that you have in mind, rather than there being a monopoly provider?

MR MOSES (NSWBA): I think the model of having a body that will accredit the trading bodies is the best way to go, and there will be no suggestion then that there is a monopoly as you have referred to.

DR MUNDY: Okay.

MS MacRAE: I was just interested in your comments in your submission about costs awards, so this is where settlement offers are made, and a concern that you had that at the moment plaintiffs are disproportionately punished if they reject settlement offers, and that there is insufficient punishment for defendants that reject offers, and you have adopted, I think, the suggestion that we use the Wolff arrangements where there's a 10 per cent uplift on damages.

MR MOSES (NSWBA): Yes.

MS MacRAE: You will see that we have suggested something somewhat different, so I just wanted to explore a little bit what you saw as the purpose of having these arrangements in place anyway across the board. Predominantly, I would say our purpose was to try and enhance the possibility that reasonable settlement offers would be taken up. So as a starter I guess I'd say our proposal was that, and I'm going to recommendation 13.1 here.

MR MOSES (NSWBA): Thank you.

MS MacRAE: Our proposal was that where a judgment is made that is more favourable than has been - - -

MR MOSES (NSWBA): The subject of a settlement?

MS MacRAE: Yes, sorry, then there would be costs paid on an indemnity basis.

MR MOSES (NSWBA): Yes.

MS MacRAE: Your proposal is, as I say, the UK one. That looks at more the 10 per cent uplift on damages as an additional sort of cost that the defendant would pay, but that the plaintiff wouldn't have the same kind of negative consequences of not accepting a more positive settlement on claim. So the first question, I suppose, is we deliberately linked our arrangements to the costs involved, and I was interested to know why you saw it as more appropriate to link the penalties, if you can call it that, to the damages involved, because we are really talking about costs here. We have taken the view that it was more appropriate to link it to the costs situation rather than the size of the damages.

MR MOSES (NSWBA): I don't think necessarily that we're at odds with that, Commissioner. In our submission, I think it was at paragraph 25, you quite correctly observed that we did refer to the Jackson review of the conduct of civil litigation - - -

MS MacRAE: Sorry, Jackson, not Wolff.

MR MOSES (NSWBA): No, it's okay, Commissioner, and we made reference to the recommendation, I suppose more as a thought bubble, in respect of the matter, but we don't disagree with the position that the Commission is exploring in respect of this issue. Our concern was to try and balance, as it were, the punishment that would flow to a plaintiff as well as a defendant if offers were not accepted. That was the main concern coming from some of the lawyers that we had on our working group, who regularly appear for plaintiffs. We need to ensure that the system is fair, and we wholly accept that there should be a punishment factor when it comes to costs if matters are not settled in a timely fashion, because otherwise people are on the road to a very lengthy and costly piece of litigation that nobody wins.

MS MacRAE: Is the feeling then that, if you like, the punishment for defendants must be sort of harsher or bigger because they have generally got deeper pockets and the financial incentive won't affect them in the same way, or - - -

MS HOGAN-DORAN (NSWBA): I think it's important to distinguish between jurisdictions, between types and cases. The particular recommendation about the 10 per cent damages aspect is for a particular kind of litigations, particularly personal injury insurance kind of claims; so they have their own incentives and disincentives in that, so I think that recommendation was particularly directed to those circumstances, but in terms of more general commercial litigation or just general civil claims, there's a couple of levels. The first is the recommendation that creates an incentive towards settlement must be right and must be something that ought to be enshrined in court practice and in court rules.

The second is, it's important to distinguish between whether or not costs will follow the event, as is the position in most Australian jurisdictions, and then what is the level of the costs that ought to be assessed, such an order having been made. What the recommendation does is conflate it to - what is says is an order should be made and it should be on an indemnity basis; so they are not necessarily the same thing. Having an order made may well get you 60 per cent of the costs, because it would ordinarily be assessed on a party-party basis, and because it would be assessed on a party-party basis, it will still be subject to reasonableness tests, or some sort of proportionality test, but not quite the UK proportionality test. The indemnity aspect is that additional element in a sense of punishment or some comment on conduct.

The failure alone to accept a compromise offer is, I think, the way the Commission is proposing, but generally indemnity costs orders are assessed on not just that one factor. Indemnity costs orders might be made in order that it be assessed on an indemnity basis, heading to that sort of 70, 80 per cent of recoverable costs, is on the basis of the conduct of the litigation, whether there has been any improper conduct, not just being a refusal of a reasonable offer of compromise that has been - - -

DR MUNDY: Because presumably someone can reject a reasonable offer and just have got it wrong.

MS HOGAN-DORAN (NSWBA): That's right, and just because you might beat the number at the end of the day that was offered six months - doesn't necessarily take into account that there may have been subsequent developments in the case, there may have been new information that came to light, the case law may have changed, and all of those matters go to what ultimately is a discretionary decision by the presiding judge, put to one side tribunals of course, but presiding judge, and so an automatic rule of indemnity I think fails to take into account those legitimate issues that are referable to the exercise of discretion; so fair to say, I think, that we agree in principle.

MR MOSES (NSWBA): We do.

MS HOGAN-DORAN (NSWBA): And in practice, we are looking at something that might be more flexible than what we have proposed.

MS MacRAE: That's right, and I guess potentially, on this reading of your submission you're really saying the example we have looked at is something particular to a case, but we are not saying that this would be something we would generalise necessarily, but the principle is still one that we need to - - -

MR MOSES (NSWBA): No, and it would be inappropriate, for instance, in smaller cases where you have, for instance, litigation going on involving small commercial disputes, mums and dads type litigation. It would not be appropriate to those types of matters at all; in fact, it could be, I would have thought, a devastating consequence for an individual.

MS HOGAN-DORAN (NSWBA): Because hardship is a relevant matter.

MR MOSES (NSWBA): In terms of the 10 per cent upward point, yes. I think it's a thought bubble that we put there from the Jackson report for consideration.

MS MacRAE: Yes, sure.

MR MOSES (NSWBA): And I apologise if it didn't come across very - - -

MS MacRAE: No, it's fine. I think that sometimes it's just we have been swamped with hundreds of pages in the last couple of weeks, so we try and sort things as well as we can in the time we've got.

MR MOSES (NSWBA): I honestly don't know how you're doing this. It's a massive task.

DR MUNDY: Gives us a call in two and half months' time and see how we're going.

MR MOSES (NSWBA): Yes.

MS MacRAE: This might be an unreasonable question as well and maybe it's just too much 'horses for courses' but what's your experience of settlement offers? How often are they accepted and rejected, and is it plaintiffs or defendants that are making them, or does it just vary too much by - - -

MR MOSES (NSWBA): It will depend on various matters. The settlement offers are made on a very regular basis in litigation, in all types of litigation. What will come down to the resolution of a matter ultimately will be whether the parties both recognise that there is risk in the conduct of litigation; that there is a price to pay by actually conducting the litigation even if you are successful. It relates to the emotional investment, the costs issues, reputational loss - things of that nature. They all bear on a client when considering a settlement offer. I think it's fair to say that the majority of litigation that goes through our court system ultimately is the subject of resolution in one way or another without a judgment being delivered.

MS HOGAN-DORAN (NSWBA): May I also add true settlement negotiation often doesn't occur in writing. It's happening between practitioners discussing and debating the merits of each side's case. Most written settlement offers, in my experience, are directed towards winning the costs argument at the end of the case that won't settle.

MS MacRAE: Right.

MS HOGAN-DORAN (NSWBA): So from my practice area, which is primarily commercial litigation, most cases will settle. They may settle prior to hearing, in the middle of the hearing or before judgment, but the great majority, by which I mean 90 per cent, will settle, but they will ordinarily settle because the parties either through a mediation process or some other alternative dispute resolution process or

by direct negotiation between their legal representatives or indeed the parties themselves work towards an outcome because they appreciate the issues that my colleague just adverted to and they're willing to pay perhaps some element of a price to achieve a certainty, to achieve a certain outcome at an earlier date that they wouldn't otherwise be able to obtain through the court system.

MR MOSES (NSWBA): Most settlement discussions at the Bar take place with full and frank discussions amongst the barristers as to the weaknesses and strengths in each other's case, and issues. We often are the ones who are dragging the parties together as a result of those discussions.

MS MacRAE: Just in relation to that certainty in relation to costs, we've talked about costs budgeting and one of the measures that the UK is involved. I just wonder if you could give me a bit of a view about your feelings about that. As I read it, you were talking about costs budgeting being most appropriate in sort of bigger civil cases and that in other cases it may be less attractive because of the problems of establishing a costs budget.

MS HOGAN-DORAN (NSWBA): The costs budgeting regime in the UK has only been in operation since April last year.

MS MacRAE: Yes. A very short time, sure.

MS HOGAN-DORAN (NSWBA): I've been tracking the decisions and the appeals from the interlocutory decisions on costs budgeting because they're tied very closely to the costs sanctions regime that has also been imposed and case management sanctions that have been imposed. So two things to take from that: the first is I think the Commission should be reticent to cherrypick elements of the UK reforms without necessarily appreciating that they are a holistic reform.

To the extent obligations are being imposed on parties to provide costs budgets and to be subject to costs sanctions and to be subjected to strict timetables, that's the stick, but then the carrot is the changes to damages, awards and uplifts and cost shifting regimes and the wider availability of after-event insurance. So there's a whole range of changes that have been done in the UK, and bringing in one aspect to the Australian system may suffer the law of unintended consequences.

MS MacRAE: Sure.

MS HOGAN-DORAN (NSWBA): The second is that in respect of costs budgeting: in our submission, it ought to be court led. Its take-up ought to be court led. There are some courts in some jurisdictions, particularly the Supreme Court of New South Wales in some of its commercial divisions, that have very active case

management by judicial officers and it's structured and, more importantly, funded in that manner.

Now, if there's going to be costs budgeting regimes, there's going to have to be a number of registrars who are going to have to hear and determine these sorts of disputes because they aren't always going to be agreed. They're going to have to be the subject of disputes which means they need to have costs capacity to adjudicate those kinds of disputes, and by an large those decisions aren't presently in the hands of registrars any more. If a costs assessment has to be done, they tend to be sent out for costs assessment by people outside the court system. There'll be practitioners who do it. So you'd have to have a whole range of resourcing and education issues that would come into the implementation of a recommendation of that kind, which is why I think it will be best to be judge led, in the sense of court led, that it says, "Within our budget, what can we actually impose and is there some availability to it?"

DR MUNDY: Is there a sense in which if you have active judicial management of the matter that costs budgeting may actually in some sense become redundant?

MR MOSES (NSWBA): It does - sorry.

MS HOGAN-DORAN (NSWBA): I was going to say, indeed in the really big cases in the UK they're excluded from the costs budgeting requirements, so the case where the claims of over 2 million pounds in business related divisions aren't subject to those costs budgeting because the parties are sophisticated litigants, it's assumed, and they're going to be case managed in any event.

The costs budget is again directed, as we say in our submission, we think, where there's more sophisticated clients who understand how to deal with that kind of information and they can be subject to the outcome because the importance of the costs budget is not just to signal to each other how much you're proposing to spend on the case, it's to stand as a sanction as to, "This is the most that you can hope to recover and you're to take that into account in any settlement or whether you've received this litigation."

MR MOSES (NSWBA): I agree with my colleague's comments about that. I think the exemplar for judicial case management is the Federal Court where you have the docket system. So you have the judge travelling with the matter from the start. That does provide certainty as to what the issues are and how the case will be conducted.

As we've said in paragraph 30 to 32 of our submission, on this issue we agree in principle that it's a good idea but we have to pick the targets for these cases and there has to be consistency because in order to know what a costs budget will look

like, you need to know what the issues are in the case. If we have pleadings being abolished in matters, which I think is one of the issues touched upon by the report, once that falls away then it becomes less certain as to what will be the issues to be adjudicated upon in the matter, so there's a bit of a tension there. We accept the sentiment that is in the Commission's report about this but we just think it needs to be targeted for particular cases that we've alluded to.

MS HOGAN-DORAN (NSWBA): Could I say something in relation to the abolition of pleadings recommendation. The abolition of formal pleadings in the fast-track list in the Federal Court and similar in the commercial list in the Supreme Court of New South Wales are in the context of there being active judicial case management where a judge is saying, "I understand these to be the issues," and asking the practitioners who are participating in that process, "What do you say are the issues?"

That's a very sophisticated environment. To then say in other jurisdictions you should abolish formal pleadings where there isn't going to be active judicial case management, because it just isn't going to be funded at that level, is a recipe we fear for increased costs because of less certainty as to "What's actually in dispute?" and "What are we actually having to put evidence about? What are we actually going to make submissions about? How long should the trial be?"

That's why there's such a long, long history in civil litigation of pleadings. They have a purpose there to help refine the issues in the absence of the court doing it until it gets to the hearing itself. So we would caution against that recommendation outside the more sophisticated commercial environments. Could I mention one other thing. In a High Court decision that I referred to earlier, the Expense Reduction case, the court was having regard to the changes in the UK, in England and Wales, and noted that whatever be the position in England the courts of New South Wales should actively engage in case management in order to achieve the purposes of the Civil Procedure Act.

So the High Court has already indicated to all courts in New South Wales, and it no doubt will do the same in respect of other states, that judicial officers must actively engage in case management. One aspect might be costs budgeting, if that's what they regard as being an appropriate practice direction to give to the cases that they hear, but I think the High Court is on to this issue and is making it very firm to the practitioners we should sort the system out ourselves.

DR MUNDY: So you'd have no problem with a recommendation along the lines of 'jurisdictions should ensure that costs budgeting is available to judicial officers if they chose to use it in any given matter' rather than make it a compulsion or some sort of mechanistic application.

MR MOSES (NSWBA): There would be no difficulty if that was part of the matters that the presiding judge could implement as part of their armoury of case management as their exercise of their discretion, so it is a matter that they would have a power to do, that we provide them with the power so they can exercise that discretion in cases.

DR MUNDY: Yes. It's another choice for effectively managing cases.

MR MOSES (NSWBA): Yes, I agree with that, Commissioner.

DR MUNDY: Okay. I'm just mindful of time and I'm reflecting on your comments before about some concern that we may have misunderstood the role of judges and it was something that was put to us by the Chief Justice of Western Australia not too long ago and - - -

MR MOSES (NSWBA): Chief Justice Martin is never backwards when he's - - -

DR MUNDY: In a public place, and I think, with the greatest respect to his Honour, I think he misread what we were saying.

MR MOSES (NSWBA): Yes.

DR MUNDY: But we do see that - and we make the point that the courts and the superior courts are places where public and private benefits are generated.

MR MOSES (NSWBA): Yes.

DR MUNDY: And our profession suggests that people should pay for their private benefits and the state should scratch its head about the public ones, and sometimes you get the public ones for free, and I guess what our concern is - and I do think we do share your concern about the resources available to the courts - and in the current budgetary environment, which even extends to our Commission - we're mindful of having to find resources.

MR MOSES (NSWBA): Yes.

DR MUNDY: You'll all be invited to make a gold coin donation when you leave. But what we're trying to get at is a regime where the private benefits generated by litigation are recovered from parties who are able to pay for the private benefits. Now, we're not talking about migration appeal matters.

MR MOSES (NSWBA): I understand.

DR MUNDY: We're talking about - and I think his Honour, Justice Martin, is on the record observing that the Bell case cost the Supreme Court of Western Australia 15 million bucks and they didn't recover a fifteenth of it.

MR MOSES (NSWBA): That's true. It tied up a judge for a very long time.

DR MUNDY: Well, and - - -

MR MOSES (NSWBA): Resources and - - -

DR MUNDY: And all that sort of stuff, and it's part of the incentives for parties to settle.

MR MOSES (NSWBA): Yes.

DR MUNDY: It works in an incentive way in the same way that costs orders should. I guess the question I want to ask you is not so much about how we should perhaps think about setting court fees, but how should we - well, it is about that. How should we think about major litigation where there are substantial economic benefits involved but there is no monetary outcome. So I'm thinking perhaps of major environmental matters or major planning matters where, if you think about a major commercial split where there's ultimately a monetary settlement, then you can say, well, the fees should be a basis of that, or something hangs off that. But in a matter which is essentially an economic matter but has no monetary outcome, do you have any views on how we might think about that?

MS HOGAN-DORAN (NSWBA): I think it's happened in other cases, but I was very involved in it. Some years ago the James Hardie litigation by ASIC against 11 defendants was one of the first fully computerised courtrooms. The parties were required by the court to contribute to the cost of that litigation. I can't remember the numbers now but the numbers are available because I know there were decisions about it because there was a dispute about what the apportionment should be and effectively the parties did pay for the cost of at least that service that was being provided to them. We could try and track down that information and provide it to you.

The second thing is that I think there's a distinction which we're both concerned about - and I think Mr Moses will second this - is that there's a distinction between the actual services that are delivered by the court system, that is, courtrooms and technology and registry services, and the notion that judges are delivering a service. Judges are exercising the judicial power of government and I think where we don't see that distinction is when one would start to see criticisms being raised by the

courts of an absence of that acknowledgment.

So the obligation to fund the exercise of judicial power is, we would say, an obligation of the state in the sense of all members of the community through our tax contribution should be funding it, but where there's particular services - for example, use of technology - that may be a helpful way of accepting the distinctions of judicial power but also dealing with your concern about cost recovery.

DR MUNDY: Okay.

MR MOSES (NSWBA): Commissioner, in our submission what we said is that we accept that there should be a flexible approach to court fees and, to use your example, what we would say there is you look at the nature of the dispute and the type of relief sought and then you go to the characteristics of the parties who are before the court.

Now, if they are a large mining company and the like then one would not think twice about putting some form of [indistinct] on that type of litigation, but you've got to look to the nature of the parties. For instance, in a classic Land and Environment Court dispute you may have a large mining corporation and a small community group. You have to be very careful, of course, how one applies the fees to that circumstance and there may be difficulties, for instance, in putting a weighting on the mining company and nothing on the individuals and one would have to look at what the mechanisms would be for waving certain fees in those cases involving one party and not the other and we'd need to consider how that would then impact upon the way in which the litigation is to be conducted and perceived by the parties before the court.

DR MUNDY: I mean, I don't want to belabour this point, but if there was any exemplas of determinations of that sort of nature we'd find those useful.

MR MOSES (NSWBA): I'll add that to the list, Commissioner, and we'll draw it to your attention.

DR MUNDY: Just one final question because it's a matter of some public discussion.

MR MOSES (NSWBA): Yes.

DR MUNDY: Does the New South Wales Bar have any views it would like to express with respect to litigation funding or with respect to contingency fees?

MS HOGAN-DORAN (NSWBA): Well, we support the proposed

recommendation for licensing of litigation funders. The Australian Financial Service licence regime is a well-developed regime and there's obviously very sensible reasons for there being a regulation of that. Also, for our practitioners, it's helpful for us because it would assist in the distinguishing between the obligations that are had to the clients and the separate obligations that are had when there's a contractual relationship with a litigation funder.

So I think that's touching on those issues and we also - I think we've suggested in our submission that there ought to be more litigation funding arrangements generally and more complex proceedings to be more to be done to investigate that, but I don't think we've said more than that, partly because I think the industry's still quite immature in Australia.

MR MOSES (NSWBA): But we do accept a role for litigation funding and it's the question of its licence and regulation which you're looking at.

DR MUNDY: And contingency fees.

MR MOSES (NSWBA): That is an issue which is the subject of much debate in the community.

DR MUNDY: Yes, I know.

MR MOSES (NSWBA): I think it can be said that there is a place for contingency fees in the legal system in order to assist the conduct of litigation for the - if I can call it the missing middle.

DR MUNDY: That's where we're looking.

MR MOSES (NSWBA): Yes, and that, I think, is something that is a very useful thing that the Commission is examining and something which we think is an area that can be examined in order to ensure that justice can be provided to those individuals who otherwise would not be in that position and it would assist the legal profession to ensure delivery of services.

MS HOGAN-DORAN (NSWBA): But if there is such an arrangement and if there's going to be funding of such contingent practices you then have to look at issues like capital adequacy and things like that.

DR MUNDY: Yes. I mean, I guess our view is that from an economic perspective we look at these things and they sort of look a lot the same, so why shouldn't the prudential requirements of litigation funders.

MS HOGAN-DORAN (NSWBA): The prudential requirements that would be imposed under the AFSL and are imposed under AFSL arrangements are obviously the kind of things you would have to look at because it needs to determine whether or not they'd be able to bear any adverse costs order, and I think that's why the issue's so difficult in that middle - for the unfunded middle. It's obviously easier in the aggregated class action arrangements but when you start to deal into individual circumstances which may all turn on the credit of a witness you've never seen give evidence before as to the likely prospects of the success of the litigation it becomes much harder.

DR MUNDY: Speaking of which, I've got a series of witnesses I've got to cross-examine shortly.

MS HOGAN-DORAN (NSWBA): That's right.

DR MUNDY: Thank you very much for your time.

MS MacRAE: Thank you.

MS HOGAN-DORAN (NSWBA): Thank you.

MR MOSES (NSWBA): Commissioners, thank you very much for your time.

MS HOGAN-DORAN (NSWBA): Thank you.

MR MOSES (NSWBA): And we will undertake to provide that material. Thank you.

DR MUNDY: Thank you.

DR MUNDY: Our next participant is Law Society New South Wales. I'm sorry we're running a little bit late, but we had a technology hitch. Could you please state your name, position and affiliation for the record and then if you would like to make a brief - and that means single-digit minutes - opening statement?

MS EVERETT (LSNSW): Yes, certainly. Good morning, Commissioners, my name is Ros Everett. I'm the president of the Law Society of New South Wales.

MR TIDBALL (LSNSW): Michael Tidball. I'm the chief executive officer of the Law Society of New South Wales.

DR MUNDY: Off you go, we are in your hands.

MS EVERETT (LSNSW): Well, thank you for inviting the Law Society to give evidence at this hearing. The CEO, Michael Tidball, and I both welcome the opportunity to present some further information to you. We represent around 25,000 solicitors in New South Wales and we play an active role in the regulation of the legal profession in New South Wales. We have statutory obligations to maintain and improve the professional standards of the legal profession and also protect the public from inadequate advice and representation and we fulfil these obligations in various ways. We have a large education program, investigation of members and complaints and intervention and support.

We work closely with the Law Council of Australia and obviously we have worked with them in providing the submissions in response to the Productivity Commission's issues paper and draft report. We've also provided the Productivity Commission with a separate submission in response to the draft report which covers the New South Wales specific issues. In summary, these issues are the distribution of the New South Wales public purpose fund, the provision of professional indemnity insurance, the administration of practising certificates and the regulation of the legal profession.

I hope we'll be able to assist you today and answer any further questions you may have in relation to these issues. Thank you.

MR TIDBALL (LSNSW): Just very briefly, Commissioners, the province of our evidence today is specific, as Ms Everett has indicated, to the material which is specific to the Law Society of New South Wales' structure and funding arrangements and specifically professional indemnity insurance, public purpose funds, administration of practising certificates and the rest of the substantial material that the Commission has hitherto considered will be covered via the Law Council which will separately submit and I would add, finally, that there is a brief separate

submission provided by our alternate dispute resolution committee which was attached to our submission and as regards to that submission I note that one of the main authors of that material, Mr Lancken, is giving evidence later.

DR MUNDY: Thank you. Do you want to start?

MS MacRAE: Well, you have mentioned a couple of times about the professional indemnity insurance and you will know that we made a recommendation saying that we thought that there was a layer of regulation not required there, so could you just be more specific for me about what you see - what does the additional approval for the legal profession to the existing regulation by APRA?

MS EVERETT (LSNSW): If I could just give some background, Commissioner. You may recall in 2002 HIH Insurance Company collapsed and the legal profession were covered by HIH Insurance, so out of the ashes of that rose Law Cover and we capitated Law Cover about 2003. Now Law Cover has come into its own. It's regulated by APRA. It's doing very well. The funding ratio, as I said, over the years it's become fully capitalised and we're in a very strong position now offering really good premium pricing to the members of the profession. We're concerned if it's open to the insurance market as has happened in England and Wales and also in Europe - I've just come back from a conference, the International Bar Association, in Brussels, and, unfortunately, there are a number of members of the profession in those countries that it's deregulated that the smaller members of the profession can't get cover.

It's limiting the practice in a lot of areas, so people where, for example, if you have a country area, country town, where you've got a solicitor who is providing really good legal services in his or her community and the way the insurance market operates, they're quite happy to cover the top end of the market, the large legal firms, but forget the little shopfront lawyer who, again, is providing a really good community service, but the premium could be just so high that it means that that solicitor can't continue to practice or, indeed, they can't get cover. I was speaking with the Law Society president - Nick Fluck is the president of England and Wales and he was saying they have a lot of solicitors who can't get cover which means they can't practice.

It means that end of the market, the little shopfront lawyers, and even in my practice in Penrith where I'm a sort of small/medium size firm and I pay quite a reasonable premium through Law Cover and it allows me to practice and I do a lot of pro bono work, which is another subject we want to speak to you about, but that allows me to operate and also be there to provide the pro bono services for people in my community who otherwise could not afford legal advice. We think the current system is working really well and Law Cover is in a very strong financial position

and we think the fees really in the open market would be considered very, very competitive as well, so I think Mr Tidball is probably more on top of that than I am so he may wish to add to my comments.

MR TIDBALL (LSNSW): I'm not more top of it but can I add some things? Can I take, note and reinforce what Ms Everett has said about the history. The HIH collapsed and there was a view taken in New South Wales that the collapse HIH was an event that should never happen again. To deal with that ultimately and the post-HIH years were precarious years both in terms of ensuring that there was availability of insurance for all solicitors, availability of cover that they could procure, but, secondly, we were concerned about the public and consumers.

To that end a decision was made to obtain an APRA licence and the capital requirements of APRA are such and we hold the only APRA licence of any of the compulsory PII providers in the country is to ensure that we have pretty much a bomb-proof level of capital. That's the first point. The second point is in terms of foundation principles the reality of a statutory scheme is that everybody is in and we've done well with risk management but with everyone in you're not going to be providing the cheapest cover that's out there, but unlike the UK, which has had to revert to the assigned risk pool where a significant percentage of the profession ultimately can't practice after they've fulfilled or sat in the assigned risk pool for as long as they're able because it's time-limited. Our task is to ensure that the profession is entirely covered and ultimately that all consumers are covered.

Can I finally add in terms of the destiny of Law Cover, what we have done since obtaining the licence has been to build capital and if you work on the basis that APRA requires a prescribed capital ration of a hundred per cent, Law Cover current sits at 324 per cent. Our task has been to build capital strength with a view that as capital strength is at a point of optimisation that that capital ratio can to be used in the out years to lower premiums and that will be, having built that complete, as I term it, bomb-proof safety in the out years will now be to look at ensuring that we can take the pressure off premiums and that is where New South Wales will be headed.

DR MUNDY: Are these anti-competitive arrangements in place in all other jurisdictions in Australia?

MR TIDBALL (LSNSW): I believe that statutory insurance arrangement are in place in Victoria. I'm not a spokesperson for those jurisdictions but, effectively, I know definitely Queensland and I know definitely Victoria and I believe WA, but I can't give a comprehensive response, Commissioner.

DR MUNDY: I mean I am interested in your observations about HIH because that

was a general failure of prudential regulation. It was nothing specific to legal insurance, was it?

MS EVERETT (LSNSW): I don't know we're in a position really to comment.

MR TIDBALL (LSNSW): I mean I remember there being a rule, Commissioner, I remember a scheme for personal injury, so it clearly wasn't just about legal insurance.

MS EVERETT (LSNSW): Oh, no. No.

DR MUNDY: So it was a general failure - - -

MS EVERETT (LSNSW): The general insurer.

DR MUNDY: - - - and my recollection is the then chairman of APRA essentially lost his job over it.

MR TIDBALL (LSNSW): Correct.

DR MUNDY: There were dislocations in insurance markets after September 11, I remember them vividly. Construction of the Australian reinsurance led to the existence of the Australian reinsurance agency. The commonwealth provided all aviation insurance at the time. It now provides none. So insurance markets can recover from these events and there's examples even more recently with the collapse of AIG and on line insurance for the bond market, so the fact that a response was put in place to a prudential event or a capital event does not necessarily, of itself, lead to an argument for a competitive restraint to ensure a market functions, whatever that market is.

I mean, similar issues occur in directors' and officers' insurance and occurs in medical insurance as well, but I guess what we're trying to get at - and I am interested in what the decision making around this is, because presumably if you are building up capital in excess of the APRA requirement, then to meet the APRA requirement you would need to charge lower premiums. It follows, the money must come from somewhere if the capital is being built up. Then if the capital was less than the demand on the insurers' policies would be left and those costs could be passed on to consumers today who may not benefit from the premium reductions you are contemplating in the future.

MS EVERETT (LSNSW): We've had to capitalise and get to the strong position, which we are now in, and it means that we are able to - from my knowledge - we're able to avoid the very expensive reinsurance market and we're in a position now that

we can really start passing on those savings to our members.

DR MUNDY: Because these costs are really - these insurance costs are, ultimately, borne by the consumers of legal services and effectively they have no say in this matter, do they?

MR TIDBALL (LSNSW): They do not have a say in it, Commissioner. If I may respond. One of the costs is attached to the fact that if you moved to an open market the view taken has been that there may be, as the president indicated - - -

DR MUNDY: Sorry, the view taken by who?

MR TIDBALL (LSNSW): My president; by Ros Everett in her evidence. There may be parts of the profession that can't get insurance - - -

DR MUNDY: Yes.

MR TIDBALL (LSNSW): - - - if it's an open market. So that's a risk and that's a risk which I think policy makers, as in government policy makers, in partnership in the profession have considered to be a very undesirable outcome in New South Wales. There is a cost associated with that. Secondly, though, during the establishment years there has been a need to have a high degree of reinsurance in place and that has - that has - led to premiums which are higher, but always with the recognition that having, in a sense, obtained the APRA licence and built that capital strength that ultimately there would be benefit that would flow down the track with lower premiums.

DR MUNDY: Okay. Anything else on that?

MS MacRAE: No.

DR MUNDY: What do you want to move on to?

MS MacRAE: I was thinking we could talk about pro bono.

DR MUNDY: Yes.

MS MacRAE: You also mentioned in your opening statements about pro bono and I think you were keen to tell us a bit more about that.

MS EVERETT (LSNSW): Yes. Every solicitor I know does a lot of pro bono work and does it willingly, and we don't talk about it. It's something that we just do and it's something that I think is innate in the profession. I talk about it from my own

experience being out in Penrith and I come from country New South Wales, so I know the great need for the provision of local legal services in the country because the distance we travelled to access legal services in the country, especially if you've got people in the lower socio-economic markets who perhaps do not have a car and there is no public transport, so to speak. So it's important that local solicitors do provide that pro bono service and I certainly know that happens.

There was some discussion about people who are practising only in pro bono areas are not to pay practising certificate fees, licensing fees, but that then does bring in the problem of insurance, professional indemnity insurance, payments to the fidelity fund and also ongoing legal training, the CPD requirements. So what I find happens is - and I have done a lot of time in community legal centres myself and I know we do provide some funding for that - but it's something we're not really opposed to but we just don't know whether it is necessary and is something which, you know, we're open to discussions about.

DR MUNDY: We have had a large number of submissions saying it is necessary.

MS EVERETT (LSNSW): It's necessary.

DR MUNDY: Coming from CLCs in the main. That is where the issue came from. We did not cook this up on a Saturday afternoon. It came to us in discussions with particularly their peak bodies, not so much the individual ones, but their peak bodies. I think in some jurisdictions it is available. South Australia springs to mind but I might be wrong.

MS MacRAE: Yes, that's right.

DR MUNDY: Probably a South Australian sort of thing.

MS EVERETT (LSNSW): Well, look, as I said, I think it's working well now. I think the experience of some of the centres is that they probably don't see that there's so much pro bono work happening - as I said, we don't talk about it. It happens. We don't have a community legal centre in Penrith where I am, but I know all my colleagues there and we do an awful lot of pro bono work.

DR MUNDY: I think one of the things that is being - I mean we do understand the issues around insurance and those questions - - -

MS EVERETT (LSNSW): Yes.

DR MUNDY: - - - and that is obviously something that does need to be dealt with and properly dealt with. I think the concern has been around people who genuinely -

who are suitable - who are in career breaks or they have retired who are willing and able to do the work, essentially, getting around. Now it may well be for some that it is sufficient to get around even if they or the CLC had to pull on the insurance cost.

MS EVERETT (LSNSW): Yes.

DR MUNDY: The additional cost of the practising certificate may be at the margin the thing that discourages them doing the pro bono work. Now there may well be others for whom the - if they had to privately fund the insurance that might be the trigger, so that is essentially - we are not suggesting that they should be exempt from those things.

MS EVERETT (LSNSW): No. No, well, we think the coverage is absolutely necessary because, obviously, you can't have people practising uncovered.

DR MUNDY: Oh, no, we would not suggest otherwise.

MS EVERETT (LSNSW): My other concern is, you know, we have solicitors who have retired. Now, if they're recently retired that probably is acceptable, but if we have someone who is out of practice for five years and not doing ongoing legal education, they can very easily get out of touch. Now, I don't think the users of pro bono services in community legal centres are well served by having people who aren't up to date and who aren't providing proper legal services, so I don't think we would be really helping them by not keeping the level - - -

DR MUNDY: I don't know if that's what was suggested.

MS EVERETT (LSNSW): No, probably not.

DR MUNDY: I mean, they could be provided with a limited form of practising certificate which to hold that practising certificate they had to meet the normal CPD requirement. Again that would come at a cost to them, but we're not suggesting that - or there may well be charitable firms who wish to set up a fund to set up CPD funding for people in that position.

MS EVERETT (LSNSW): Yes. I don't know. There's obviously lots of ways that it can be dealt with but obviously acknowledge that we really need to keep our services up to date, obviously. If that's acknowledged and recognised and there's some way to provide that then certainly that would be a good thing.

MR TIDBALL (LSNSW): Commissioners, if I may just comment briefly on insurance. The Lawcover board, several years ago determined to develop a pro bono product which is offered, and I'm not sure whether you've learned about this from

elsewhere but I'm happy to forward you the details of it, but it's a loss leader. It's a very low-priced policy to make sure that lack of insurance is never the reason for a solicitor to not be under-funded to be able to undertake pro bono work and it's offered through the National Pro Bono Resource Centre.

DR MUNDY: Okay. We've had other examples, particularly where people are on career breaks, typically, whose firms will say, "If you want to do pro bono work, that's fine. We'll keep you under policy" - but the cost of paying for their practices doesn't get - there's a range of circumstances. We're not trying to create a second class of solicitor.

MS EVERETT (LSNSW): Of course, thank you.

MS MacRAE: One of the things that we've recommended - because we're somewhat concerned about the information that's available for consumers and how easy it is for them to shop around, given the nature of legal services - is to have an online resource that would report on ranges of legal fees for particular matters. I'm wondering if you have a view about whether you would resource that and support it, do you think it's a reasonable proposition and do you think it would help to have a better informed consumer market in terms of choice and range of legal services that might be available?

MS EVERETT (LSNSW): The Internet is a powerful tool and I know, certainly, consumers do ring around in the conveyancing market which is very competitive. People ring my firm - and I'm just quoting from my experience, of course, which is the best way to do it. We have phone calls daily from people wanting to know what it's going to cost for a sale or a purchase or a conveyancing matter. It is very, very difficult to predict what sort of fees are going to be applicable to, say, a litigation matter where someone will come in, they have a litigation matter they want to pursue, and it is very difficulty to say, "Okay, it is going to cost you X amount of dollars," because you don't know whether it's going to be a couple of letters backwards and forwards to the other person, whether it is going to be litigated, whether it's going to settle or go through an alternative dispute resolution - a mediation, conciliation point - or whether it's going to go to a full hearing, which could take a day in the court or it could take two weeks or two months.

So it's incredibly hard to give an estimate, especially when you haven't taken instructions, it would be impossible. If someone rang up and said, "Well, my car has been damaged in an accident and I'd like you to act for me. How much is that going to cost me?" Well, it would be impossible to say how much that would cost. But on the other side of the coin, in the Family Court we are required to serve on the other party an estimate of our fees, and we could do that event based. "If it goes to this point, if it settles at the first mediation conference, our estimate fees will be this

amount.. If it settles before hearing it would be this amount." We're required to provide the court with an estimate of our fees, and also the other parties'. That does turn our minds to it but in that sort of environment it is probably less difficult to do, because we all know what the requirements of the court are, we know what we have to do to get to that point and we know what evidence we have to gather.

Even though it's not an exact science we can give an estimate, but with some other matters it can be very difficult to be able to give an estimate of what our fees would be. The only way would be, I suppose, if a potential client asked what the hourly fee is, we could tell them that, and certainly our cost disclosures are very stringent and the Legal Profession Act, of course, we have to give a very lengthy cost disclosure which runs to some 10 pages and that is a very powerful document that we go through with our client and even though we can estimate what it's going to cost them you can't be very precise because you just don't know what the future holds.

MS MacRAE: I guess just taking that a little further, if you were able to take a type of cost and if you were able to say, if it reached this stage - as you do with Family matters - that it makes sense for other civil matters to be able to give a range - because, really, I think Joe Blow off the street, if you asked them how much would a lawyer cost, most of them - they've never dealt with one. They generally say, "I'm sure they would be very expensive." You'd say, "But how much do you think?" "I don't know, probably more than I could afford." That would be as broad an answer as you would get. We're just trying to find a way of getting the market a little bit more informed than that and trying to make it a bit easier than having to ring around 10 different people and then finding that maybe you're explaining all your circumstances to everybody to try and get an estimate and then you're not really quite sure at the end of the day whether that's helped you or not.

At least to be able to go somewhere to say, "Well, if I've got a personal injury and you can tell me if it goes to this stage or if I've got some idea in my head about the figure I think it might be, sure I'm not going to be able to come back to anybody and say, 'Well, that misguided me.' It's only an estimate, it's a range but at least I've got something in the ballpark that gives me somewhere to start when I then might want to choose to ring around and see if I can refine those costs a bit better." Is that too wild a proposition to be able to do something of that sort?

MS EVERETT (LSNSW): It's extremely difficult because litigation is very complex, as we know, and I frequently see people and I explain to them what the process would be and give them an idea of what are the standard costs within a range and that's something we do and something we are required to do under our costs disclosure, but to have a web site it would be very problematic, I would think, because you have, for example, some solicitors who may be more experienced in an area of law, and what may take them two hours to do could take another solicitor

10 hours to do. When you specialise, obviously - my practice is a general practice but I have solicitors, and myself, who are experienced in different areas.

It would be very problematic to be able to put - in litigation matters - an estimate of fees. Conveyancing would be easier and some areas would be easier, obviously, because you know it pretty well, but with litigation it would be very difficult, I would imagine, to be able to do that but it may be something we could look at and come back.

MR TIDBALL (LSNSW): Yes. It's certainly an issue though that we are covering, along with the other law societies and bars in our submission to the Law Council. It's a matter that has been, I believe, covered in that submission and our comments.

DR MUNDY: It does seem possible for a range of medical professions in the United States - and surgery, I suggest, is as complex as running litigation - to do this. They even have quality feedback which in a litigious country like the United States where defamation is almost king it's quite interesting. I guess what we're trying to get a sense of is whether it's possible to give people some - we're not seeking to identify individual solicitors, we're trying to give people some sense that if you're in a matter that looks something like this, you're looking down the throat of something in this range. That's what we're trying to get at, in part because people just suffer from sticker shock.

MS EVERETT (LSNSW): Yes.

DR MUNDY: They have no expectation. There's no experience of this and if the range was even quite wide and the number fell in the range, at least they would have some sense of it. I'm just mindful of the time. I just was wanting to see if you had any reflections in relation to the Legal Profession Reform Law Act or Bill, wherever it's up to. Not so much about its content. I mean, we think it's a good thing. I'm just interested whether you have any reflections on (a) the reason why it hasn't ended up being quite as uniform as we would have liked it to be, and (b) those particular areas where work is needed perhaps where alignment with those jurisdictions that aren't participating might be important from a public policy perspective, that we might be able to say, "Well, okay, you're not going to take on the whole bill, but for heaven's sake line these bits up for us."

MS EVERETT (LSNSW): Doctor, we have New South Wales and Victoria on board, which is 70 per cent of the national profession, and we're getting really positive feedback from the other states that they're coming on board.

DR MUNDY: Even Western Australia?

MS EVERETT (LSNSW): Perhaps not Western Australia, but they're renowned to stand alone. Even with the Family Law Act they stand alone, so they're out of the Commonwealth Act. Every other state and territory is guided by the Commonwealth Act, but Western Australia not. Even so, we have had discussions with Western Australia and we are hopeful. We're talking to them and we think now that we have got the enabling legislation in place, those discussions are continuing, especially in COAG, and the New South Wales Attorney-General has - well, I don't want to misquote him but I know he's keen to speak to his counterpart attorneys-general in other states and - - -

DR MUNDY: This is the new one?

MS EVERETT (LSNSW): Yes, Mr Hazzard - to promote that, and also the federal Attorney-General we believe is keen to promote it as well. Again I don't want to verbal them but that's my understanding. We're quietly confident that the other states and territories will come on board because the ACT, being surrounded by New South Wales and Victoria, we think it's in their interest and we think they understand that and they will come on board. As I said, I'm quietly confident, but Mr Tidball will probably perhaps add to that.

MR TIDBALL (LSNSW): Very quickly, Commissioners. As I understand it, although I am not an expert on it, applied law schemes very often see other jurisdictions come in later in the day and I think as this was always very much an east coast push to have a large market, it stands to all commonsense that Victoria and New South Wales would be there first. It is up to us to expound the benefits of the scheme and that is what we're doing. My view is that as we do that, the others will come in.

I think, Commissioner, the main deal breaker for the smaller jurisdictions is that - and I use the ACT as an example - it has not had a co-regulator. The issues of cost and the issues of cost escalation in terms of infrastructure are always going to be smaller in a small jurisdiction where you have to add a function. Effectively now with the start-up costs covered, which the Law Society of New South Wales has covered, as well as the recurrent costs being covered, there is a very constructive conversation that we can have but we will need to explain the benefits, but I think over time you will see other jurisdictions come in.

DR MUNDY: Okay. Thanks very much for your time today.

MS EVERETT (LSNSW): Thank you very much for the opportunity.

DR MUNDY: We will now have a short break and reconvene at 11 am. Thank

you.

MR TIDBALL (LSNSW): Thank you.

MS EVERETT (LSNSW): Thank you, Commissioners.

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DR MUNDY: We are ready to recommence these proceedings. For the record, could you state your name, position and affiliation and then if you wish to make a brief statement, that would be most appreciated.

MR BOWMAN (BIMF): Clive Bowman; I'm a director and the organisation is Bentham IMF.

MR ATTRILL (BIMF): Wayne Attrill, investment manager at Bentham IMF.

DR MUNDY: If you would like to make an opening statement briefly.

MR ATTRILL (BIMF): Well, the Commission has our two submissions and I suppose just in sort of very general terms, if I could summarise our response to the draft report, in relation to the Commission's recommendation that a ban on lawyers charging contingency fees be lifted, I guess our position is perhaps somewhat agnostic, in the sense that we think that the current arrangements whereby there is a separation between litigation funders who fund on a contingency basis and the lawyers who conduct the litigation is a superior model, we think it's better in terms of managing conflicts of interest and transparency. However, if the Commission is minded to convert its draft recommendation into a final recommendation, the submission we would make is that there should be a level playing field between litigation funders and lawyers acting under a damages based agreement in relation to adverse costs and it's interesting that the submissions that have been made to the Commission so far don't seem to deal with this question of lawyers being liable for adverse costs. It's an issue they have dodged in England and we submit that it's one that the Commission should take on board here and we are happy to go through the reasons for our recommendation, if you would like.

In relation to the other draft recommendation, which is the regulation of litigation funders, we support that. We strongly support that. That's been a position that we have held for a long time and again, our submission is that if lawyers are to engage in contingency funding, then the financial aspects of their funding should also be subject to the same regulatory regime for the sake of competitive neutrality. In terms of what would be the appropriate regulatory regime, the Commission has suggested that that be subject to consultation between Treasury, the Australian Securities & Investments Commission and the stakeholders and we agree with that and we would be happy to participate enthusiastically in that exercise.

There was one other recommendation that the Commission made and that was in relation to court oversight of funders' ethical and professional conduct. The

Commission drew parallels between, or perhaps drew some support from, the UK code of conduct for litigation funders, which is a voluntary code that is in place over there. Our view on the funders' interface with the courts is that we think that it would be preferable for the courts to develop practice notes or rules in consultation with the stakeholders, rather than a voluntary code. The code in the UK really arose in a particular set of circumstances and it's really the precursor to full financial regulation. I think that was the way that Lord Justice Jackson saw it and the Civil Justice Council encouraged the development of the code, because it was seen as being important to the implementation of the Jackson reforms. But I think this country has moved on and the Commission is recommending full financial regulation, so it seems to us that you might as well cut to the chase and the most appropriate way to regulate the funders' interaction with the courts is directly with the courts themselves.

DR MUNDY: Could we perhaps start by asking if you have any reflections on the recent public debate in the media with respect to what some see as an outbreak, avalanche, torrent, tidal wave of particularly class actions and particularly in relation to security matters. We are aware of it and I am sure others will put these issues to us during the course of these proceedings. I guess we are interested in the view that yourselves may have from that. We are particularly interested in trying to understand, and this is some that you will be able to answer, but one of the issues that struck is there is an awful lot of debate about funded class actions in security matters, as opposed to funded class actions anywhere else, so if there any reflections that you might like to offer us, given others will no doubt put their views to us.

MR BOWMAN (BIMF): I think we can both comment. I will start. I think that when you view comments, you need to look at where it's coming from, understand the vested interests that those people may have, so there have been some comments made by law firms who typically represent defendants and in particular, a law firm has been engaged by the American Institute for Regulatory Reform and they have a particular agenda and so I do think comments need to be put in a proper context. I think anecdotally if you look at the number of Shareholder cases that have been started as class actions, it's not a particularly large number. I think that Shareholder cases receive media attention because they are interesting and because the company is listed. Large numbers of people are affected and usually the class action follows on from a fall in the share price and that has already taken the media's attention, so the first response is look at the statistics closely and try and discard some of the nuances associated with the commentary and I don't think that there is really a large number of Shareholder cases. Then the second response is that the number is really irrelevant if they're being properly brought and if they are properly based because that is access to justice.

So even if there are large numbers, we would say that's really irrelevant if these are proper circumstances where people are having an opportunity to receive compensation. So we say there's nothing inappropriate about that; in fact that's a demonstration of funding achieving the aims which the Court has recognised are beneficial to access to justice; thirdly, I think there's some concern about litigation funders beating up cases, fomenting disputes where otherwise there wouldn't be one.

I think that that also has to be put in context. Many people are unaware of their rights and so when they do become aware of them through a process of publicising the opportunity, then they do become very concerned about seeking redress and it's a redress that's not possible, really not possible by individuals taking action because usually in these Shareholder cases the claim size is small, or for a number of people who are participants in the group the claim size is small, and the cost is great. So what might be seen to be by some defendants as beating up an action is actually an information process informing people about the opportunity and about their rights.

From our perspective we are not going to fund a case unless we think the conduct is serious because - and I know we have said this a lot but this idea about funding - you know, funders are going to fund spurious cases is ridiculous because we have a solid reputation and we don't want to sully that reputation and we don't want to go out of business, so we only want to fund cases where people are supportive.

So the cases that we fund, the Shareholder cases, are circumstances where people are aggrieved, brokers have written reports that say, "We're surprised by this information and we're concerned about it," and people are upset about it.

MR ATTRILL (BIMF): It's pretty hard to follow on from that comprehensive response - I have written down some points and they were all getting ticked off! I would reinforce what Clive has said, you need to have a look at the data and there is objective data available in this area and that's particularly the work done by Prof Morabito at Monash University. You can even have a look at some of the publications which have been published by the major defendant law firms, and in fact I think I referred to one in the initial submission where the lawyers were candid enough to say there has been no explosion in claims.

Another important point is that the regulators themselves have expressed publicly their support for funded class actions as a means of enhancing private enforcement of our securities laws, and that's an important factor to keep in mind. Finally, as far as IMF is concerned, we impose very strict criteria on ourselves as to when we're deciding whether to fund a class action, a securities class action, or not and we are not going to fund one unless we are absolutely satisfied that there are very strong claims, that there's likely to be a sense of outrage in the community, such that there will be strong demand for the class action. We have to be prepared to see it through to the end. So I think those are all points that we would make in response.

DR MUNDY: Okay. I just wanted to give you that opportunity to put that on the record because I'm sure others will put a contrary view on the record in the coming days.

MR BOWMAN (BIMF): Could I say one thing? I would be interested to hear from any defendant who comes along and says, "There was no case against us," who genuinely would be willing to provide the sort of evidence needed to support a statement, "No case against us but we just have to settle," because we are constrained by confidentiality obligations, so we can't disclose information that we have received in the course of these cases, but if that evidence were to come out, it would be interesting.

DR MUNDY: The difficulty we have in conducting this inquiry is exactly that. We can point to those matters which have been run and have been successful, indeed have failed. The concern to some extent seems to be the matters that never see the light of day but are settled privately which we can't get - we could in principle probably get access to but we would be in court defending the statute. So that's the challenge that we have but that's an issue we have regularly.

MS MacRAE: Just to come back to the point that we hear a lot about, fomenting this public concern that wasn't there originally, in relation to the cases that you vet, if I can call it that - so you have a much longer list than you would ever proceed with. So of those you proceed with and even those that you don't, how do you identify those initially? How do those issues come to mind? Would it be you being approached by a broker or an individual or - - -

MR BOWMAN (BIMF): Are you speaking specifically about securities class actions or more generally?

MS MacRAE: Any actually. I would be interested generally.

MR BOWMAN (BIMF): The majority of cases will come to us through a lawyer or from the plaintiff, the aggrieved party themselves, sometimes through a broker, and then other cases we identify through reading the press. So securities cases tend to be cases where the company is listed and there's an announcement and the share price falls and that will be publicised. So initially we would see that this has occurred and we might do some investigation but often it's also by brokers who then say, "I'm concerned about it," or our shareholders refer matters to us. So it's a combination of people coming to us and us just looking in the newspaper and seeing a potential circumstance.

MS MacRAE: I was just going to say there is a variety of views about whether or not in relation to the percentage of damages that you might take - whether there should be a cap and if that would be a percentage and then what should that percentage be. Can you just outline for us your views about that?

MR BOWMAN (BIMF): We think that would be an unfortunate intrusion into the party's freedom of contract, to set the price and I don't think that a regulator is most appropriately placed to evaluate the various commercial considerations that apply to determining the price in each particular circumstance.

A price is influenced by a number of things; risk is important, risk is very important, and I think that the parties should be left to negotiate, taking into account things like risk. Where you have other protections in place like the ones that we were talking about which we endorse, like capital adequacy and where you have a backdrop of other laws which also apply, like unconscionability, unfair contracts, I think that they are sufficient to protect against excesses and beyond that, within the normalcy of commercial negotiations, that should be left to the parties.

MR ATTRILL (BIMF): There's also a competitive market operating too. We are not the only litigation funder and nor is litigation funding the only way in which litigation can be funded.

DR MUNDY: I guess the concern and rightly stated is that you're in the business of assessing risk in relation to bringing large actions. That's what you get paid for. The

people who seek funding are not in that position and the information asymmetry between yourselves and your clients and lawyers and their clients which we've made observations about at some length in the report on face seem to be pretty similar, so I guess the concern is that whilst I accept there are laws of unconscionability of an unfair contract, for an ordinary citizen they are difficult to enforce.

It would be a very, very unlikely outcome that a person who felt aggrieved with an arrangement and a contract that was unconscionable or unfair could have the resources to bring that action against yourselves unless another funder was perhaps prepared to assist them or perhaps sensible governments had formed contingency fees and that's the reason why this issue comes because we could in principle do away with almost the entirety of the Australian consumer law and rely upon contract, the common law notions of contract, but we choose not to do that for public policy reasons, because we acknowledge the transactions cost.

How would you feel about - and this is one of these situations, where there is a concern in the community beyond those who are opposed to litigation funding for their own reasons, which we understand, but people are uneasy about this; judges are uneasy about this and they've expressed those views to us - an arrangement whereby a cap might be put in place for a period of time and then subject to some sort of review to see that the framework was working alongside reforms that might come with contingency fees, or alternatively, what alternative model of consumer protection beyond taking you to court might be appropriate, because that's what the concern is: the ability of individuals to bring those contract based actions is very difficult.

MR BOWMAN (BIMF): They do have the benefit of independent advice.

MR ATTRILL (BIMF): Yes, legal advice.

MR BOWMAN (BIMF): So if the legal advice is, "This contract is unconscionable," then they can decide not to enter into it.

DR MUNDY: Yes, that's true and they mightn't but the history of unfair contract is precisely in the contrary circumstance, where they have entered into it or the terms are unconscionable and they - - -

MR ATTRILL (BIMF): But it's usually a different situation. In most of the cases of unfair contract, the parties weren't legally represented at the time. In the

circumstances of funded litigation there is a lawyer retained whose obligation is to act on behalf of the parties.

DR MUNDY: Yes, okay. You might like to think about that because it does seem to me just to be a small - not that we're profoundly opposed to litigation funding because I think it's obvious we're not, but it strikes me as an issue that may be at large.

MR BOWMAN (BIMF): I'm not sure we fully answered your question. For the reasons that we've mentioned about the difficulty in somebody else determining an appropriate price, I think a temporary measure would be equally unsatisfactory and with semipermanent measures or temporary measures, you've always got this concern that they ultimately are really going to become a permanent measure. I don't know what would happen. Possibly all contracts would be just set at the cap.

DR MUNDY: That is the risk; that they'd all be priced up to the cap. It's an issue around consumer protection. It's not unusual for governments when they're reforming arrangements to put in temporary consumer protection arrangements. We had caps on airport prices for five years and then they went away, so I think there's some scope. I don't want to belabour the point but I think it would be something we - - -

MR ATTRILL (BIMF): It's what's motivating the proposals in relation to damages based agreements, is that where it's - - -

DR MUNDY: We're keen to ensure a level playing field.

MR ATTRILL (BIMF): Yes.

DR MUNDY: So if the cap was to be placed on damages based agreements, a cap should therefore - I mean, on the basis of your own reason, we would like them to be as - I think the Bar Association of New South Wales suggested to us that it might even be appropriate for the licence to be held by a firm who was - there should be a requirement for prudential supervision of a law firm providing funding in a damages based billing arrangement because it is essentially the same as what you do. So we're trying to get our heads around what this consistent framework might look like.

MR BOWMAN (BIMF): Including the position in relation to adverse costs

because our percentage also reflects the fact that we're taking on an adverse costs exposure.

DR MUNDY: Yes.

MS MacRAE: They did recognise that actually. The New South Wales Bar did talk about the necessity for them to be able to bear adverse costs and to be able to demonstrate they could.

DR MUNDY: Given your reflections about freedom of contract, given that there will be a licence set up, would you have a problem that a feature of that licence must be the acceptance of any adverse cost orders because the argument that says Australia is different to the US is adverse costs orders. The litigation funds pick it up.

MR ATTRILL (BIMF): Yes.

DR MUNDY: You pick them up at the moment as a matter of contract and business model, not as a matter of law or regulatory obligation.

MR ATTRILL (BIMF): Not as a matter of compulsory regulatory obligation but we're still exposed to the possibility of an order being made.

DR MUNDY: Yes.

MR ATTRILL (BIMF): Yes.

MR BOWMAN (BIMF): I think we wouldn't be opposed so long as it was limited to the period in which we were funding. So we would be opposed if it extended beyond that period.

DR MUNDY: I understand, yes. I think that's a question of regulatory design rather than not - - -

MR BOWMAN (BIMF): Yes.

DR MUNDY: Once you've exited the field.

MR BOWMAN (BIMF): Or before we come into - we don't normally take on adverse costs order exposure in relation to a case that we haven't been funding to date and then it comes to us. We only accept it from the time we start funding.

DR MUNDY: That's understood and that could then be a requirement of firms providing contingency based fees.

MR ATTRILL (BIMF): It would have this consequence: if there was a client, say, a large company that simply wanted to lay off its own costs of funding litigation from its balance sheet, it couldn't enter into a contract with us presumably to do so but retain the adverse costs risk to itself for a lower percentage?

DR MUNDY: Yes. I guess part of the issue here is thinking through the big company versus those sorts of matters. It's a design question. Okay, I think I know what I need to know.

MS MacRAE: I guess just coming back to the caps thing. I think the other reason that it's in people's minds is that we do have these caps currently where there's conditional billing, so I think people, "No, we've got a cap there," and so we think about this other kind of arrangement, "Maybe we should have a cap." So I think that's the other reason that it's in people's minds but conditional billing is - - -

MR BOWMAN (BIMF): That doesn't work very well, those caps.

MS MacRAE: On the conditional billing?

MR BOWMAN (BIMF): No. For a start they differ according to which state you're in but if the purpose of contingency fees is to increase access to justice then I think many law firms take the view that the cap, depending on what state you're in, is too low.

MS MacRAE: So they can take the - - -

MR BOWMAN (BIMF): So if you're in Victoria, there is a 25 per cent uplift on your fees. For risking all your fees, I think the view of many is, "That's just not worth us doing it."

MS MacRAE: Again you'd say there are sufficient protections elsewhere and you wouldn't see a need for a cap on contingency fees either?

MR BOWMAN (BIMF): That's right. I agree with the point about our stance is a level playing field and so consistently with that, we don't advocate that there be a cap on damages based agreements.

DR MUNDY: In your submission you note that courts are taking different points about adverse costs orders against litigation funders and lawyers charging on a no-win, no-fee basis. Would you expect that behaviour to extend to circumstances where lawyers were allowed to charge on a contingency fee basis? Is it something, if we went down this level playing field that the statutory framework that sets this up would need to draw judges' attention to, without wanting to fetter judges unreasonably?

MR ATTRILL (BIMF): Yes. I mean, we drafted a suggested rule in our submission actually to deal with that. I think the issue is really just clarifying the law. There is dicta in some of the reported cases under conditional fee agreements where judges speculate about at what limit would an uplift fee convert the solicitor into effectively a real party to the litigation like a funder, but they don't need to take that very far because of the current restrictions. It is possible that over time the courts would develop their own principles that would be equivalent to the approach that they take to litigation funders; but our view is that to make the position quite clear, it would be better to either have it in rules or regulations or legislation so that it is clear that the courts do have that power.

DR MUNDY: Your view presumably would be that that approach would be more likely to facilitate the development of the market than waiting for the courts to have developed a body of precedent.

MR ATTRILL (BIMF): Yes, because what will happen is that you will get satellite litigation which is the bane of any regulatory reform and to the extent that the policy-makers can make everything clear and neat and tight, then it reduces that risk of quite frankly just wasteful satellite litigation.

MR BOWMAN (BIMF): Clarity is important for consumer protection.

MR ATTRILL (BIMF): I agree.

DR MUNDY: The issue about disclosure - and you talk about an obligation upon lawyers to be suggesting that there should be an obligation to disclose how litigation might be funded. I guess the question we have there, particularly if you go down the path of damages if you are allowed contingency fee based arrangements, is how we are actually going to enforce this. I mean, are we going to wait for a complaint to a legal services Commission or - - -

MR ATTRILL (BIMF): What happens in the UK now - and I'm aware that this obligation has been in place since at least 2007 and possibly even earlier - is that basically the regulator takes a deep interest in it. I have seen bulletins issued by the Solicitors Regulatory Authority reminding lawyers of their obligations to advise their clients in relation to funding options. I suspect that what happens is that the regulator in their normal sort of oversight of law firms - it is just one of the things that they check up on periodically.

DR MUNDY: You would expect that this advice would be tailored to the nature of the matter.

MR ATTRILL (BIMF): Yes.

DR MUNDY: In a relatively small matter, a conditional fees basis might be appropriate.

MR ATTRILL (BIMF): Exactly.

DR MUNDY: But in a much larger matter obviously - - -

MR ATTRILL (BIMF): And it also turns the lawyers' attention towards whether there is any insurance that might respond to the claim and it focuses both the lawyer's and the client's mind more directly on what it is going to cost, what the liabilities are including adverse costs and how the client is going to actually finance those.

MS MacRAE: We had a little bit of a discussion about settlement offers with the New South Wales Bar. There has been concern that the current rules regarding rejection of favourable settlement offers disproportionately punish plaintiffs who reject the offers and insufficiently penalise defendants. Would you have a view

about that? Would you say that they need any kind of reform?

MR BOWMAN (BIMF): Are you talking about things like Calderbank offers, the cost consequence?

MS MacRAE: Yes. Someone makes an offer and you say, "I don't like that offer" and it turns out that the judgment is more favourable.

MR ATTRILL (BIMF): Or less favourable than the offer?

MS MacRAE: Less favourable, yes.

MR BOWMAN (BIMF): And you have got to pay indemnity costs.

MS MacRAE: Yes - whether those arrangements are appropriate or not.

MR BOWMAN (BIMF): I think they probably are. I think it does encourage people to think seriously about settlement offers and think seriously about making them. There is litigation around whether an offer made was genuine, because some people seek to perhaps use the system when they make very low offers which they know won't be accepted because they want to get the cost protection and so maybe there is some scope for looking at it. I think generally it is a mechanism that does encourage people to look at early resolution.

I don't know whether this is part of your ambit, but other things which encourage early settlement I think are also beneficial, like the Federal Court Rules which now require pre-proceedings discussion. We are seeking to embrace those procedures and we are actively encouraging people we fund to seek to resolve proceedings before taking them. There is some evidence that that is working. I think also security for costs needs to be looked at because you also have a lot of litigation around that and it is in defendants' interests to come up with some massive figure so that the plaintiff is incapable of putting it up and so stifling the litigation. We see some circumstances where the defendant has caused the plaintiff to be in an impecunious position and then seeks to exploit that position by asking for a large amount of security. There is always a balancing exercise but I think sometimes it can be out of whack. That is a much longer answer to your question than you probably wanted.

MS MacRAE: No, not at all.

DR MUNDY: Sorry. Were you about to say something?

MR ATTRILL (BIMF): No.

MR BOWMAN (BIMF): I just asked him whether he agreed.

DR MUNDY: One of the issues that we have been bringing our mind to in respect to costs orders and also recovery of court fees has been this idea that costs broadly defined and fees should in some sense reflect the scale of the matter, to put some brake on people in a sense trying to exploit the other side by running up fee bills on relatively small matters. We can get our heads around that. I guess one of the issues that interests us though is where you have matters where the outcome is not of a monetary nature but it may well be an environmental case where interlocutory orders are sought. Now, I suspect they are not the sort of things that you would naturally want to fund but do you have any views about how we might think about that?

MR BOWMAN (BIMF): I just need to understand the context of your question. It is where you're seeking to require the plaintiff and the lawyers to put up a budget or something?

DR MUNDY: A community comes to you, a pile of residents concerned about the development of a mine. The orders that they seek are to overturn a decision to approve the mine. Obviously that is a significant economic value to the miner, a significant economic value and amenity value to the people who have come to you and the government might have an interest in there as well. I guess what we are interested in is how costs in those matters and fees in those matters should be thought about where the economic value is very high but there mightn't be a monetary settlement or not a particularly large monetary settlement in the matter.

MR BOWMAN (BIMF): The costs you are talking about are adverse costs?

DR MUNDY: Adverse costs and court fees, because the matter could go on for a while.

MR ATTRILL (BIMF): You have got a proposal for protected costs orders, haven't you, in that setting - - -

DR MUNDY: Yes.

MR ATTRILL (BIMF): - - - which is designed to protect public interest litigation.

DR MUNDY: Yes.

MR ATTRILL (BIMF): And I would think that would be essential because I can't see anybody wanting to be prepared to take on a mining company and risk losing everything.

MR BOWMAN (BIMF): I think it's important to maybe give the court greater discretion.

MR ATTRILL (BIMF): I'm thinking case management too.

MR BOWMAN (BIMF): There's an argument that the rule that the loser pays is currently a presumptive - or there's a prima facie position the loser pays, so maybe there needs to be some greater discretion in the courts so that isn't seen to be the default position, so the court can exercise - - -

MR ATTRILL (BIMF): Isn't the question how do you stop the mining company investing millions to defeat - - -

DR MUNDY: The question is more how do you think about a costs order in a significant economic case where there is - you know, if it's a claim over a million dollars, we can think about a million dollars because one party is going to get the million dollars or not. It's not a big issue.

MR BOWMAN (BIMF): It's an interesting thing to think about though.

MR ATTRILL (BIMF): Well, this brings us back to the absence of data, but perhaps there's data that's collected by the Land and Environment Court where they engage in this sort of litigation all the time. That's one of the points that we would like to support in the Commission's report outside of the area that we're primarily concerned with and that's your recommendations in relation to collecting data. There is a real problem with understanding the functioning of the civil justice system because it's so hard to get data. I don't have any suggestions as to who is going to do that. There will have to be some sort of powers presumably to collect - even on a de-identified basis you're wanting to collect confidential information, but I think that's really very important.

DR MUNDY: I'm mindful of the time so thank you very much for your time here

today and the submissions you have made to us.

MR ATTRILL (BIMF): Thank you.

DR MUNDY: The next participant is the National Pro Bono Resource Centre. Could you for the record state your name, position and affiliation, and then perhaps make a short opening statement.

MR CORKER (NPBRC): My name is John Corker. I'm the director of the National Pro Bono Resource Centre based at the University of New South Wales.

MS HO (NPBRC): I'm Leanne Ho. I'm the senior policy officer at the National Pro Bono Resource Centre.

DR MUNDY: Off you go.

MR CORKER (NPBRC): I wasn't sure how you want to proceed, whether it's questions or - - -

DR MUNDY: If there's anything you feel you need to get off your chest, we're more than happy to hear from you and then we will move on to questions.

MR CORKER (NPBRC): Okay. We have made two written submissions to the submission in November 2013 and just recently again on 21 May. Thank you for the opportunity to come and talk to you. We sort of note from the draft report that the Commission expressed a sort of strong understanding of the pro bono sector in its draft report and we thought that was good.

What I thought I would do is maybe just talk a little about the pro bono sector globally, put things in context, make some short comments in relation to the sort of barriers and constraints that were identified in the draft report in terms of freeing up lawyers to do more pro bono legal work. A couple of comments about broader policy issues that the draft report raised: one was the idea of a sort of single pro bono target in relation to government tender schemes. The other was really in relation to measurement and evaluation comments that the Commission has made. Then maybe finally how the centre can help address some of the issues identified by the Commission. I would say feel free to ask questions or interrupt at any time because that's the value of getting together to talk about these things.

The centre is an independent expert body that maintains a sort of national perspective across the entire legal profession and we have been in existence for about 12 years. Our main objective is, you know, we have a view to grow the capacity of the Australian legal profession to provide pro bono legal services that are focused on increasing access to justice for socially disadvantaged and/or marginalised persons and furthering the public interest.

A lot of our work is with firms and particularly with the larger firms, those

above 50 lawyers, and I suppose the reason for that really is that the Australian pro bono movement has very much been firm-led in Australia. You know, we're talking about the structured and coordinated part of the pro bono sector. That's where we mainly work. Those firms have become increasingly strategic in the type of work they do and the way in which they work. That ideology, or we often call it a pro bono movement, has sort of filtered down from the larger firms to more of the mid-tier firms and the mid-size firms. We tend to be doing more work there than in past years.

Australia has a number of strong pro bono clearing houses. It in fact has some form of pro bono clearing house in each state and territory now, so that's a unique aspect of the Australian pro bono sector. Australian barristers seem quite keen to support public interest litigation in appropriate cases. That's an important aspect of pro bono in Australia and an important aspect of democracy in terms of the judicial or the legal sector working effectively.

The other thing is that the Australian sector has created clever partnership models and a diversity in the way that it helps, so there's the Homeless Persons' Legal Clinic, there's the self-represented litigation services, there's the Justice Connect not for profit law service. These things have expanded the range of legal services that law firms can provide and in a sense play to their strengths as well as being involved in clinics where large firm lawyers often have to do training to provide that type of service, but nevertheless a sort of diversity of offerings and models.

Having said all that, pro bono is a limited resource. It's limited in expertise. Sometimes in areas where there's great legal need, such as criminal and family law, large firm lawyers don't have those skills. They don't have the knowledge. As the Commission laid out in its draft report, our research around - you know, which we loosely called Why Not Family Law - illustrated that point well, I think.

They're limited in capacity as well from time to time and subject to industry pressures, particularly mergers and more recently globalisation, which has really changed the face of the Australian legal sector quite considerably, so there's cultural issues about how much pro bono will be done when a firm mergers with a London-based or a Shanghai-based firm. It's one of those issues that may not be at the top of the scale.

In that sense it's a service that can't be necessarily relied on. It's voluntary in nature. Nevertheless, it's strategic in the sense that it does make a difference where it can and I think can be compared favourably particularly to the UK pro bono sector where they have probably spent a lot more time working more in the sort of law centre area and so they're more substitutable with government-funded legal services,

which is sort of the main issue that I wanted to make initially, is that it's not a substitutable product in that way in the economic sense of being within a market.

The pro bono legal services are sort of quite unique and diverse and have unique characteristics, whereas government-funded legal services - primarily into Legal Aid which covers criminal law and family law, a little bit of money for civil particularly in New South Wales, probably better than other states, and then the rest of the money goes into community legal centres - you know, so the main other bucket - and the Aboriginal and Torres Strait Islander Legal Service, the family violence protection units. And that broad government-funded legal assistance sector tends to be focused on crime, family, certainly community education from the CLC sector and some discrimination cases I suppose. One of the great strengths of the Australian pro bono sector is that it has really carefully picked up bits of work that others were not going to do or not likely to do.

Other reasons why pro bono is not a substitute for adequately resourced, publicly-funded services is the mismatch of expertise and need. 65 per cent of the work done by firms above 50 lawyers was done for organisations, not for individuals. That in a sense is quite an important statistic to show you that they are using more their corporate law skills to assist organisations who are then assisting people, individuals who are in need; but it is more at that level that a lot of the work is done.

Turning to the barriers to increased pro bono which the draft report identified, there was this idea of costs recovery and we have argued for some legislative enforcement to make clear that in a matter where a party is acted for pro bono, the only way to really get a level playing field, particularly in terms of settlement prior to hearing, is for there to be a clear right for that party to get a costs order in their favour, should the judgment go in their favour.

DR MUNDY: My sense of your submission on that was that - and I am not wanting to put words in your mouth - almost that the award of costs should be blind to the financial arrangements between the lawyer and their client, but then there is a question of where the award of costs should go.

MR CORKER (NPBRC): That's right, so if in your recommendations you suggest it should be clarified - and we say it should be, particularly to distinguish it from no win, no fee type matters or contingency arrangements. The UK arrangement has been, as you know, is that there is an Access to Justice Foundation and there is a legislative right to make pro bono costs orders. All the feedback we have had in Australia is that that wouldn't suit the Australian system. There's a number of reasons for that. One, there are not that many costs orders; two, I think the large firms feel that barristers should be paid in the first instance. That is a legitimate disbursement, particularly for a junior barrister who is a self-employed person, if

they can get their costs back. They don't expect to but if they can or if it can be offered to them, it is much more likely that they will take on another pro bono case, so that feeds the system.

DR MUNDY: And presumably disbursements, experts and all those sorts of things, you would expect, would be paid. The question then really comes back to I think the only place where there is some dispute. The question is: what happens to the solicitors and barristers? Perhaps silk will cop it on a pro bono basis, so if there is an understanding up-front that junior barristers are acting effectively on a no win, no fee basis - - -

MR CORKER (NPBRC): Yes.

DR MUNDY: But the solicitor is not acting on that. The solicitor is on a properly understood pro bono basis. The question then I guess goes to: where does the money go?

MR CORKER (NPBRC): What we are suggesting in our recent submission - and this is in consultation with a number of firms - is that there be some sort of self-regulatory protocol so it doesn't need direct regulatory intervention and lawyers agree. They sign up to this and they say, "Okay". The money will either go first of all to disbursements and to pay barristers if they want to be paid; second, back into our pro bono practice to facilitate further pro bono work or, thirdly, to a charity of choice, to make clear that it is true pro bono work.

DR MUNDY: If the pro bono work was being organised, for example, through a community legal centre, would it not be unreasonable perhaps that the money could go there? It would be analogous to the situation that the money went to the firm's pro bono scheme.

MR CORKER (NPBRC): Indeed, and that was another aspect of this sort of draft idea: either to the community legal centre or the community organisation that had been the subject of the litigation or in fact to the community organisation that had referred the matter. All of those would be options open to the plaintiff I suppose or the applicant who is the benefactor of the favourable costs order.

DR MUNDY: We have sort of moved on to the issue of barriers. The draft recommendation 23.1 talked about volunteer practising certificates. We had the Law Society of New South Wales before us earlier on. They weren't so keen on the idea, either because they didn't think it was necessary or there were issues around continued professional development and insurance and the important contributions to the fidelity fund. Do you have a view on those sorts of issues and how those issues may be dealt with if you are of a mind that they were legitimate to be dealt with?

MR CORKER (NPBRC): Our experience is that there is demand for those certificates, particularly from retired and career-break lawyers essentially. What they say to us is they want to have that continued professional development. Even they will say that is a necessary part of them continuing to practice. That is one aspect of it.

DR MUNDY: Who would pay for that? Presumably them out of their own pocket.

MR CORKER (NPBRC): Out of their own pocket, or there is quite a lot of free CPD available. There's lots of way that you can get your CPD points without having to spend that much money. You can write an article for a magazine. Even that will give you CPD points. The aspect of the fidelity fund I think is a more difficult one because that is a direct payment of money. What we would probably say is for the benefit of the profession as a whole, that is just something that won't - for those few lawyers who are willing to provide their time free of charge, we don't think it is appropriate that they pay into a fidelity fund.

In terms of insurance, we at the moment provide a PI insurance scheme for in-house counsel without charge to them which was set up actually through Lawcover in New South Wales. We pay the excess if there is any claim. It's to facilitate pro bono work. In the same way we would see that model working. In fact we have had one case recently in Queensland where they have a slightly better system or project for a lawyer to do who is on a sort of career break, to do a piece of litigation, and provided the insurance, so we have covered off on it that way.

DR MUNDY: In these limited licences, the expectation could reasonably be that they are insured and from what I think you are saying, the insurance will happen somehow.

MR CORKER (NPBRC): The insurance will happen somehow. I mean, the other issue - I don't know whether they raised it with you - is really the supervision; you know, whether a person has - - -

DR MUNDY: No, they didn't raise that.

MR CORKER (NPBRC): That's the other issue I think that we touch on in our submission. It's important that these lawyers are capable and are acting in a professional manner, so there needs to be some regulation and presumably under the new Legal Practice Act, the board would have the power to sort this out, but it may be that if they haven't practised for three years, then they need a supervising solicitor who has got an unrestricted practising certificate to whom they are working. Those sort of issues need to be in place as well.

DR MUNDY: I can imagine circumstances with former senior lawyers who are minded to be involved with this. It's a bit like when very senior air force officers go and get supervised by flight lieutenants to keep their ratings up. Is that something that should be mandatory or discretionary when the licence is applied for? I suspect you would get a lot of cases where that is just not going to be necessary.

MR CORKER (NPBRC): I think mandatory in terms of CPD, yes.

DR MUNDY: Yes, but this supervision question.

MR CORKER (NPBRC): I think judgment has got to be exercised in terms of the person's background and experience and capability.

DR MUNDY: But that judgment could be exercised at the time of the licence being granted, rather than as of - "You will need to be supervised".

MR CORKER (NPBRC): That would be our view, yes.

DR MUNDY: So it would be a discretionary thing on who was issuing it.

MR CORKER (NPBRC): Yes. For example, there is a retired judge in New South Wales who has been doing a lot of work for the Aboriginal Legal Service and appears on behalf of clients. He is still paying full fees, full insurance. He has been doing it for five or six years. He rings me every year and he says, "Is this ever going to change? This is really pretty unrealistic." He drives all over the state at his own expense. If only he could just get a reduced fee certificate and insurance, he'd be happy.

DR MUNDY: He gets a judicial pension though.

MR CORKER (NPBRC): He does; he does.

DR MUNDY: You mentioned before issues about targets.

MR CORKER (NPBRC): Yes. In the draft report you raised the idea of a single target in terms of efficiency. At the moment there's the target that we run, the national pro bono aspirational target which is tied into the Commonwealth government Legal Services Multi-Use List arrangements and then there's the Victorian government scheme which started earlier which has the condition of being on the panel that you spent 15 per cent of your money on pro bono. Slightly different tests. Slightly different reporting mechanisms.

DR MUNDY: Do you have any insights I guess with respect to those jurisdictions that don't have targets and why they don't have targets or are they going to move to targets?

MR CORKER (NPBRC): My understanding is that particularly in New South Wales and Queensland which are the two largest ones in terms of lawyers, they have for quite some time been trying to work out their legal panel arrangements in terms of the broader issue of what mechanism they put in place to control their agencies and the way that their legal spend is carried out in relation to private firms.

There are different models around panel arrangements. In fact the idea of the Legal Services Multi-Use List as compared to the Victorian panel are two broad examples of different approaches to that. One is just a list which you apply to be on. The other is a proper tender contractual arrangement, so I think some of it is tied up in them working out what they do in that space. We've certainly suggested to both those governments on a couple of occasions that it's a good opportunity to leverage from your purchasing power and include some pro bono conditions in whatever arrangements you come up with. We get differing responses from time to time, so we support the draft recommendation in the report that all governments should adopt. In American terms, it's a no-brainer in terms of leveraging off your purchasing power. The evidence in Victoria and the Commonwealth is that it has been very successful.

DR MUNDY: Beyond the broad, given the different nature of purchasing range which can be legitimately chosen, we shouldn't be going too hard on specificity but rather just dealing with the principle in general?

MR CORKER (NPBRC): I think so, although there is clearly an efficiency point that if the target is standardised and the measurements are standardised, it's much more efficient for law firms to comply with that. It's much more efficient to government to comply with that as well. Law firms really don't like the bureaucratic stuff that's associated with complying in pro bono space. It does annoy them, so the simpler that can be and the more uniform that can be, the better the system is likely to be overall.

DR MUNDY: Was there anything else? We're just about done. Was there anything else you wanted to raise with us?

MR CORKER (NPBRC): Look, one thing I would like to raise is why we think a time based rather than a financial based measure is better for these systems and for pro bono work generally. Our target is based on hours per lawyer per year. It's a fixed constant an hour, as we know, and it takes into account firm size, so an hour is

an hour is an hour, as I'm heard to say often enough - - -

DR MUNDY: Yes.

MR CORKER (NPBRC): - - - whereas the financial measurements which some firms prefer to get into and in various contexts, it can be misleading and it creates problems in comparisons between providers. That's an issue within firms even, where the financial side say, "Look at all the money we're spending on pro bono," and the other people say, "No, a lot of it is actually below the line cost. It's busy people that are doing the pro bono work," or "It's not a realistic measure."

The other factor is that pro bono work by its nature just doesn't relate to commercial rates in law firms. It's the nature of the work to say that a partner charges out at $550 an hour and he has done an hour's work on it. A Legal Aid lawyer may well have done a lot more work in a similar role and are obviously paid a lot less. So those costs measures really do create some problems.

DR MUNDY: And did it need a senior partner to do the work?

MR CORKER (NPBRC): That's right, so what we push for is the time based measurement. We try and push that right across the sector, for various reasons, so we encourage the Commission to look at it that was as well.

DR MUNDY: Thank you. That has been very helpful.

MR CORKER (NPBRC): Thank you.

DR MUNDY: Thanks for both your submissions. You have been very helpful.

MS HO (NPBRS): Yes, thank you.

MR CORKER (NPBRC): Thanks very much.

DR MUNDY: I think the next participant is Melanie Schwartz. Could you state your name and your affiliation for the record, please?

MS SCHWARTZ (ILNP): My name is Melanie Schwartz. I'm a senior lecturer at the University of New South Wales and a chief investigator on the Indigenous Legal Needs Project.

DR MUNDY: Melanie, would you like to make a brief opening statement before we grill you?

MS SCHWARTZ (ILNP): Sure, thank you. I On behalf of my colleagues at the national Indigenous Legal Needs Project thank you for the opportunity to make oral submissions. Our project is an ARC funded grant that has been running for the last three years with the aim of assessing the extent of civil and family law needs of indigenous people in Australia. The full project will take us to 40 communities in Australia with significant indigenous populations, ranging from metropolitan to remote communities across five jurisdictions. At the moment we are three communities shy of completion of our work.

The research is affording a truly national picture of need for indigenous people in civil and family law, going a long way, we feel, to answering some of the policy questions posed in table B.1 of the draft report. The research also provides an important evidence base for understanding what the current obstacles to access to justice are for indigenous people in civil and family law and how they might be overcome.

I'd like to speak briefly to our written submission in the light of the draft report. Obviously my comments will centre on indigenous specific issues. As our submission indicates there are high levels of civil and family law need among indigenous people in Australia. If we examine for a moment just one area of sustained need, housing: across our four completed jurisdictions, the picture is quite telling.

In Victoria 42 per cent of indigenous people we talked to said that they'd had a legal need around housing in the last two years and only 22 per cent of those people had sought or been able to access legal advice. In the Northern Territory 54 per cent of our focus group participants have legal needs around housing and of these, only 34 per cent of respondents had accessed legal help.

In Queensland 44 per cent had had a housing issue in the last two yeas and less than 21 per cent of people had accessed any legal advice. In New South Wales 41 per cent of indigenous people that we spoke to had had a legal need around housing and only a quarter had accessed legal advice in relation to it. This is only

one area of legal need that we looked at. Although it was a very high area of need, the picture here is very clearly one of acute legal need coupled with low current levels of access to legal advice.

Moving now briefly to access to legal advice, it's important to note that the overwhelming observation of both the community members that we spoke to and service providers was that Aboriginal people preferred to go to Aboriginal Legal Services for help. On numerous occasions we've heard from people who attempted to find help for civil or family law issues with ATSILS and when they needed to be referred on, they failed to pursue advice from non-indigenous specific services. Aboriginal legal services are the go-to organisations for indigenous people facing legal problems and because ATSILS are not adequately resourced for the most part to provide civil and family law services, indigenous people with often high levels of complex legal need are being lost to legal service provision, either being they don't want to access non-indigenous legal services or because they didn't receive an adequate response in the moment that they were reaching out for help for the issue that they were facing and when the moment passed, it was too difficult for them to start again at a new or unfamiliar service provider.

There is evidence that ATSILS practitioners work harder with clients in more complex legal needs for less money even than their Legal Aid counterparts. In order to better service indigenous civil and family law needs, ATSILS should receive more funding and that funding should be specified for civil and family law matters. Having said that, there is undoubtedly, as the Commission's draft report identifies, an ongoing role for non-indigenous legal services in addressing these high levels of civil and family law needs in the indigenous population and I wanted to bring to the Commission's attention the pilot program that Legal Aid New South Wales currently has in employing Aboriginal field officers specifically for civil and family law.

Prof Chris Cunneen and I have just completed an evaluation of the pilot and that evaluation shows that this role has been instrumental in increasing both the quality of legal service to indigenous people and the quantity of that service in civil and family law. The pilot has involved the employment of local indigenous people in the three areas that are being piloted to undertake client care, CLC to establish outreach services and cultivate partnerships with other organisations, as well as providing a consistent indigenous presence in communities around these issues. The initiative works particularly well when the field officer is housed within an Aboriginal Legal Service office to capture clients who present at the ALS with multiple legal issues or who attend the ALS as a preferred service provider and can then be dealt with there and then by the field officer.

The field officer typically provides referrals to Legal Aid or private practitioners and then continues to support the client through to the resolution of the

matter. I commend this model to the Commission not as an alternative to adequate funding as Aboriginal and Torres Strait Islander Legal Services but as an additional necessary measure, and in closing, can I reiterate the importance of addressing the high levels of civil and family law needs, particularly in our indigenous population. Whilst the astronomical levels in Aboriginal criminal law needs tends to eclipse the issue, the truth is that it's only by addressing these underlying issues which are often also precursors to criminal matters, that strong individuals and communities with capacity for social and economic growth will ultimately be built. Thank you.

DR MUNDY: You will appreciate this better than we do. We have relied quite heavily on the Law Foundation survey because that's what is available to us and it certainly identifies indigenous people as a group with incredible and profound legal need. We are just wondering, just briefly, given the differences in methodology between your work and the way the Law Foundation works, particularly given it's a telephone based survey, what would your view be about the relative outcomes? It has been suggested to us by others that when it comes to groups with more profound complex needs, because of the basis of the survey methodology, that it's probably understating the extent of need for disadvantaged groups. Have you tried to marry them up and have a look at them?

MS SCHWARTZ (ILNP): We haven't married up them specifically but I agree with that assessment. I think that when you look specifically at indigenous people, telephone interviews need to take in a range of considerations: the fact that people may not have telephones, that English might be their third, fourth, fifth or sixth language and speaking over the phone may not be something that they can easily do, and that it's much more productive in getting information from indigenous people when you are sitting face to face with them. That's why we used the methodology that we did, going and sitting with people, and I think that's certainly more productive of research outcomes than you would get over the telephone.

DR MUNDY: In a longitudinal sense, do you have any observations to make about the level of legal need within indigenous communities broadly and whether the level of unmet needs has been growing over time?

MS SCHWARTZ (ILNP): Our current research obviously doesn't take a longitudinal approach. My observation really would be that it's a demographic with a high level of need, whatever way you cut it, so whether that's been growing over time; it may be that in certain jurisdictions, because of law and policy changes, that the needs will have increased. We have seen that even in the three years that we have been conducting this research in the Northern Territory, for example. Talking to people about their experiences in housing is a good example, since the Northern Territory emergency response of the interventions showing that those types of policy contexts really do make a big difference in terms of legal needs and even in the

criminal justice sphere, as we have moved towards a more punitive approach in criminal justice, which disappropriately affects indigenous people, that then has a knock on effect in terms of civil and family law needs, particularly in prison affected indigenous people, so I would expect to find that the level of legal needs over a long period of time will have been consistently high and in jurisdictions where there have been more punitive approaches that impact disproportionately on indigenous people in the criminal justice sphere and elsewhere, that that would serve to increase the level of need as well.

MS MacRAE: One of the questions initially: your current research is subject to a grant. Is it going to be a one-off or are you likely to be able to do a repeat at some point to get a longitudinal picture or - - -

MS SCHWARTZ (ILNP): At the moment it's a one-off.

MS MacRAE: Right.

MS SCHWARTZ (ILNP): So that the funding will finish within the next 12 months. Whether or not we will be able at a future date to do some update to that or whether the legal services themselves will be in a better position to assess the need in the future because of the foundations that this work lays I don't know. It may be something that we return to and we are interested in exploring legal need, continuing to explore legal need.

MS MacRAE: You said that your work is covering five jurisdictions and I know you are not quite finished yet but it sounds like you are nearly there. Is there anything emerging from your data that gives you lessons that are learnt between jurisdictions about things that work and things that don't? You mentioned the Aboriginal field officers trialing in New South Wales appearing to be very successful. Are there any things that you have learnt between jurisdictions about things that work and that might be transferable?

MS SCHWARTZ (ILNP): Yes. In terms of access to justice, what is consistent across jurisdictions is that legal service provision that takes place within the community rather than within a legal service provider context is more likely to be successful for indigenous people, so partnership with community controlled organisations, anything from Aboriginal corporations to women's or men's shelters, just depending where the hubs are for the community, where there's outreach services that take place in the community context where people already are and can be captured seem to have higher levels of engagement with communities. In communities that have access to community legal education initiative, the level of understanding around legal needs is much higher and therefore access to remedies is higher. So certainly an emphasis on engaging community so that they can better

understand what is a legal issue, that was one of the things that arose in our research; that people may not identify things as legal needs as such, even in things like housing that I mentioned and certainly in areas like discrimination where people might see it as a fact of life rather than a legal issue that has a legal remedy. So education about what civil law is. You know, even people working in the area sometimes in communities didn't really know, you know, people working in community support roles. So Outreach services into community and community legal education would be two of the things that really stood out as being really important for increasing access to justice.

DR MUNDY: We had a discussion with the Disability Advocates Network yesterday in Canberra and there was this idea that - the idea of a almost a legal health check, which community based workers could be trained, skilled up to do. Would a similar piece of work be useful, do you think, for people who are working in assisting indigenous people with issues?

MS SCHWARTZ (ILNP): I think so, and I know that there are some organisations who are trying those types of approaches. Aboriginal Medical Services, for example, while their clients are there, they're sort of screening them for referrals.

DR MUNDY: So this will be consistent with your idea about trying to deliver information and services through existing community rather than putting a "Here's the legal shop," sort of thing.

MS SCHWARTZ (ILNP): Yes, I think so. So that would be a good way to identify legal need. The question then arises about servicing the legal need which is another question altogether.

DR MUNDY: Yes.

MS SCHWARTZ (ILNP): So it's all very well to identify it but then people have to have an effective way of addressing it, also in a way that is appropriate to whatever their circumstances and geographic realities and that kind of thing are. Yes.

MS MacRAE: Just in relation to housing being such a big issue - - -

MS SCHWARTZ (ILNP): Yes.

MS MacRAE: Do you have a feel for how much of that would be government housing and how much would be private?

MS SCHWARTZ (ILNP): Mostly Department of Housing.

MS MacRAE: Yes. Okay.

MS SCHWARTZ (ILNP): Or indigenous housing.

MS MacRAE: So is there a place for better management through - I mean, we can try and deal with the Aboriginal people that are having the problem or is there something more systemic in the way that the departments are working that might give you a better - you know, is there something more - a source you could do to try and prevent some of those problems before they arise?

MS SCHWARTZ (ILNP): Absolutely. Yes. I think so. Many of the issues that arise specifically with housing are things like maintenance, so really quite major things that need to be repaired that are not being repaired in a timely way and then, you know, in many cases go on to be an actual hazard in the house. And it's a difficult one because when you're a tenant of public housing you're walking this fine line with the housing authority of not wanting to get on their bad side.

MS MacRAE: Yes, push it aside in case you get thrown out.

MS SCHWARTZ (ILNP): Exactly. There is a - you know, people don't want to lose their housing. And because the avenue of redress is first and foremost with, you know, the housing authority it's not always a successful avenue for tenants. Yes, so it would be certainly sensible for there to be things put in place within those authorities to deal with the issues that arise at an early stage and in a way that actually resolves it for the tenant satisfactorily before it progresses to it being an actual dispute that needs to go to the tribunal or the - or because people don't understand the nature of their obligations they then stop paying rent because the repairs aren't being done and then they have an eviction issue and then it goes to the tribunal. So it can really escalate to become a legal issue.

DR MUNDY: We make the point more generally that government agencies, particularly at a state level, not so much Commonwealth, should put in place dispute resolution frameworks — which Commonwealth agencies do as a matter of policy, but state agencies don't — and I guess the idea of that is to chop these matters off before they end up in court or some sort of formal judicial or quasi-judicial process in a tribunal. Do you have any observations about the extent to which these non-court based mechanisms are currently being used and perhaps also the sense of why they aren't being used by government agencies? Because it seems what you're saying is that these things escalate, they get out of hand and it seems that with a bit more care and attention upfront by government officials that they could have been nipped in the bud.

MS SCHWARTZ (ILNP): So why they're not being used from a government perspective rather than from a community perspective?

DR MUNDY: Yes.

MS SCHWARTZ (ILNP): I don't really know the answer to that. I mean, I know that, you know, staying with housing, the tenants are not always model tenants.

DR MUNDY: Yes.

MS SCHWARTZ (ILNP): Usually, you know, there's a complex of issues that arise with the tenancy anyway. I don't know why it's not something that - I don't - I just don't really know from the government perspective. I know that from the community perspective even if there were non-legal mechanisms or non-escalated mechanisms that they could access there would still be a need for people in support roles to assist people to get along to those forums and to represent their issues and their needs. Yes.

DR MUNDY: Okay.

MS MacRAE: I was just interested with the Aboriginal field officers project we've been working on, one of the major barriers that we've identified in our report and I'm sure that you're well aware of it, is the problem that you have with the multiplicity of languages and the lack of interpreters in courts, but I would imagine for field officers they would often have a similar issue, wouldn't they, if they're going into a community and they've got to service a relatively broad area. How do they cope with those language issues?

MS SCHWARTZ (ILNP): Well, the field officer pilot program for legal aid is only a New South Wales based program, so you don't get the languages issues arising as much as you would in other jurisdictions.

MS MacRAE: Okay.

MS SCHWARTZ (ILNP): So that may be a question that's better for Aboriginal Legal Services and Family Violence Prevention Legal Services in the Northern Territory, for example.

MS MacRAE: Okay.

MS SCHWARTZ (ILNP): But as a sort of a framework question, I think that the idea is that the field officers come from the community of need.

MS MacRAE: Yes.

MS SCHWARTZ (ILNP): Assuming that that field officer was able to straddle English and the traditional languages well, that that might go some way to providing some bridge.

MS MacRAE: Yes.

MS SCHWARTZ (ILNP): A linguistic bridge as well as a bridge in many other senses between the community and legal service provision. That's the value of having someone who's local to the community, that they can bridge the range of issues that prevent the community from effectively accessing services.

MS MacRAE: And was it difficult to source individuals to take on that role, do you know?

MS SCHWARTZ (ILNP): There have been now four individuals over those three roles in the life of the pilot and it's fair to say that each of them are extraordinary. They - - -

MS MacRAE: That's what I'm figuring.

MS SCHWARTZ (ILNP): Yes.

MS MacRAE: I can imagine they would have to be pretty extraordinary people to do that, yes.

MS SCHWARTZ (ILNP): They really are. They really are, and Legal Aid has been fortunate to be in the position of getting that right really first off. But there are a number of extraordinary people, community workers who are working in their communities. It may be that they need some orientation towards legal service provision but [indistinct] has a course that can do that, a - you know, a legal support skills course.

There are a number of extraordinary individuals that are working in their communities so, yes, it does need to be someone who has a great deal of initiative and who can deal with the lawyers as well as dealing holistically with the community, but luckily that's something that many indigenous people have in spades, so - - -

MS MacRAE: And I'm assuming it being a trial there's sort of been a limited funding budget or something for that. If the trial looks successful is there guaranteed money for something like that going forward, or is it something that Legal Aid - I

might ask Legal Aid later, but, yes, whether they have funding in the budget?

MS SCHWARTZ (ILNP): I'm sure Legal Aid will speak to that. I am hopeful that there'll be funding for it in the future. Given that the evaluation has shown it to be such a successful initiative it would be great if it could be extended. It's only in three small areas.

DR MUNDY: Where are they?

MS SCHWARTZ: One is in Campbelltown.

DR MUNDY: Yes.

MS SCHWARTZ (ILNP): But that positions services Wollongong and Nowra as well - - -

DR MUNDY: Yes. Okay.

MS SCHWARTZ (ILNP): - - - all the way down the south. One is in Coffs Harbour, Grafton.

DR MUNDY: Yes.

MS SCHWARTZ (ILNP): And the third is in Walgett. Yes. So it will be - ultimately, I think it will be a decision for Legal Aid about how they divvy up their budget.

MS MacRAE: Sure.

MS SCHWARTZ (ILNP): But they're certainly - you know, they're very committed to being at the moment the major service provider for indigenous people in civil and family law. They're taking that responsibility very seriously.

DR MUNDY: I'm done.

MS MacRAE: Me, too, I think.

DR MUNDY: All right.

MS MacRAE: Thank you very much.

MS SCHWARTZ (ILNP): Thank you.

DR MUNDY: Thank you very much for your time and coming to us.

MS SCHWARTZ (ILNP): Thank you.

DR MUNDY: These hearings are adjourned till half past 1.

(Luncheon adjournment)

DR MUNDY: Okay, we will recommence these proceedings and now hear from New South Wales Legal Aid. Could you each please state your name and the capacity in which you appear today for the record and then perhaps, Bill, you can make a brief, that's less than 10 minutes, opening statement.

MR GRANT (LANSW): Thanks, Commissioner. Bill Grant, CEO of Legal Aid, New South Wales.

MS BECKHOUSE (LANSW): Kylie Beckhouse, executive director, family law, Legal Aid, New South Wales.

MS HITTER (LANSW): Monique Hitter, executive director, civil law, Legal Aid, New South Wales.

MS PRITCHARD (LANSW): Jane Pritchard, manger, review and strategy, Legal Aid, New South Wales.

DR MUNDY: Bill?

MR GRANT (LANSW): Commissioner, thank you. Can I begin first by, without in any way wanting to appear condescending, congratulating the Commission on an excellent draft report.

DR MUNDY: We take congratulations whenever we can get them.

MR GRANT (LANSW): It was so easy to read, it obviously wasn't drafted by lawyers.

DR MUNDY: We will bear that one in mind if we set out some initial thoughts.

MR GRANT (LANSW): As you are aware, New South Wales is the largest legal aid agency in Australia with the most comprehensive civil law practice, but the expenditure on our civil law practice is still only 13 per cent of our overall legal expenditure, so it's still, notwithstanding its work, very small in the scheme of things.

We have provided submissions, of course, in response to the issues paper and draft report, but if I can just make a few preliminary comments before I turn to some of the issues in those. The legal assistance sector in New South Wales operates in a way which makes maximum use of our scarce resources. We share our resources in terms of the provision of legal services. We share our training resources, our community legal education resources, and we do engage in joint planning to maximise the use of our joint resources.

While things can always be done better, and there's always room for improvement, I think we maximise our scarce dollars in a way that serves the interests of the socially and economically disadvantaged people of New South Wales. For example, we established a highly functional legal assistance forum. We have in Legal Aid developed the cooperative legal service delivery project, which operates in 11 regions throughout New South Wales, and we otherwise work together on joint projects to meet client needs.

Can I say that I think I would speak on behalf of all the legal assistance sector in New South Wales when I say we wish to continue to build on that strong relationship and work together to serve our common client base. Any changes which would detrimentally affect our partnership and relationships may be harmful to the overall delivery of our legal services as a sector.

We have had major cuts to Legal Aid funding coming from the Commonwealth government's budgetary decision way back in 1996, and in New South Wales in 1996 we received $41 million from the Commonwealth, and the next year, 1997, it went down to $31 million. That was repeated across the country. The government share in percentage terms went from over 50 per cent, and again that was true nationally, to in New South Wales we are expecting, subject to the delivery of the New South Wales state budget, that the Commonwealth contribution will be down around 27, 28 per cent.

Just prior to Christmas, of course, the legal assistance sector received funding cuts which, after the Commonwealth budget, now total somewhere around $58 million. It's disappointing that these cuts fly in the face of the evidence of that unmet need with Legal Aid Commissions and the other members of the legal assistance sector providing excellent services to the community. So it's not too difficult to read into this that, whatever the proven need for legal assistance services, however good the legal assistance sector is providing services to our client base, the realities of life in the sometimes difficult economic circumstances in which governments are operating, mean that cuts will still come our way.

In these circumstances, we would request the Commission to make it particularly clear in its report that there are insufficient resources available through all levels of government, including through sources like the public purpose fund, to provide the services the community needs to have access to justice, not just in New South Wales and in this country. The Commission is also requested to make it clear that there is insufficient resources available, particularly in family law and civil law, to enable persons to access services and for us to have an appropriate range of services available to meet our clients' needs right across our jurisdiction, whether it's city based, rural or regional and particularly remote. So any assistance the Commission could give to quantify the sort of funding necessary to support

appropriate service delivery in the areas of civil law in the general sense would be most welcome.

Can I just turn to a few of the issues arising out of chapter 21. We strongly agree with the Productivity Commission's assessment about the lack of joint commitment between the Commonwealth and the state in the continuation of the Commonwealth-state divide and the National Partnership Agreement, as it is in its current form. A true national agreement to address legal need requires job commitment from the Commonwealth and the state on priority areas of law, priority clients, in establishing eligibility criteria for assistance.

To be truly effective as a national agreement, it must jointly have agreed service priorities which respond to legal need, the capacity of the client and the impact of the legal problem on the client's life. We also need consistent and appropriate eligibility principles, including a new realistic means test that looks at indicators of disadvantage and extends assistance to the working poor. In addition, the agreement must include a commitment to additional and appropriate Commonwealth state funding, increasing over time to an agreed acceptable level. This means sufficient funding to address unmet legal need amongst disadvantaged people, provide appropriate fee scales for private practitioners, and provide a measure of permanency in service delivery, which the current form of national partnership agreement simply does not deliver.

The agreement must also include an understanding and support of unbundled services, including advice, community legal education, alternative dispute resolution and duty law services. Finally, there must be agreed appropriate data definitions and accounting rules to enable effective evaluation of service delivery.

Can I just make a couple of other comments. In relation to our submission, we have made it clear that we would work collaboratively with our legal assistance colleague to ensure resources are used efficiently and cost effectively to address gaps; so whatever form of funding distribution model is perhaps preferred ultimately by the Commission and, of course, by government, we will work within that. Whether the money is allocated to the most appropriate level of government to ensure that services are delivered, which some would argue would be the state, or whether it comes directly to Legal Aid to work with our partners in a collaborative way, we could work under either of those models.

In relation to demarcation of funds, we welcome draft recommendation 21.1 that the civil law, including family law, funding be divided from the enormous amount the Commissions across the country pay in criminal law, but it certainly couldn't happen under current budgetary arrangements; there is simply not enough funding there, and there are all sorts of problems with being a down-stream agency

when you are looking at criminal law activity whether it's governments introducing mandatory minimum sentences or whether it's new forms of criminal offences we have from time to time. Those demands simply have to be met, and government would expect that they be met; but we are very supportive, in principle, of having dedicated funds, as long as there is some mechanism to ensure that any criminal law over-expenditure doesn't then impact on the family and civil law.

The reduction in expenditure of the Commonwealth government's expensive cases fund is going to bring that problem into stark relief at some stage by cutting those funds, not just in the pre-Christmas statement, but also because there was built into the forward estimates a reduction of that fund in any event. We figure that it will probably lead in the next year or so to a reduction of about $2 million in expensive cases. So if we have got those funds allocated, as we would at the moment, to family and civil law, if a truly large expensive case comes up, we will simply not be able to meet it out of that fund; so it raises all the Dietrich-style issues in a very stark way.

In relation to Commonwealth funding, we would ask the Commission to look at perhaps starting its analysis of Commonwealth funding impacts on the 1996-97 year, which was prior to the substantial cuts that was introduced by the then government. When we did our calculation based on the wage price index, starting at that 96-97 year, leaving out state and public purpose funding, we actually came up with a funding decrease in real terms of 14.7 per cent.

Can I come to the means test and just make a couple of comments in relation to that. The Productivity Commission in its draft report makes the point that, on their initial assessment of the material that was seen, just over 8 per cent of households in New South Wales would qualify for a grant of aid, and less than 5 per cent would be eligible without a contribution. I think that, in itself, tells the story of that unmet need and the tidal wave of demand that comes through liability.

Legal Aid Commissions do not collect the data that will enable us to assist you with trying to quantify that unmet need. A lot of clients, a lot of solicitors that will apply for legal aid on behalf of a client, select out of the system, because they know they can't meet our means test. We have on our web site the means test indicator. Although we have all of the usual warnings about, "Don't take this as final", it does give people a reasonably accurate understanding of whether they qualify. So I think we would welcome any assistance the Commission could give in relation to appropriate eligibility tests.

Private practitioner fees, the Commission in its draft report raised that issue of where it should be. We have made some comments in our material. It's complicated, because there are not appropriate scales that operate across the country. It's not easy

to say something like 80 per cent of scale fees. Some jurisdictions, like New South Wales, move right away from scales and do it by cost assessment. There's all sorts of factors, which the Commission is well aware of, and I won't dwell on any longer.

Can I conclude, Commissioners, by saying that anything Legal Aid New South Wales can do to assist with the finalisation of your report in terms of data or in terms of anything, we would be more than happy to do what we can. Thank you.

DR MUNDY: Thanks for that, Bill. We do appreciate the ongoing assistance your organisation is providing to us. Just so I'm clear, our assessment of the percentage of households likely to qualify for a grant of aid, you're not disputing that?

MR GRANT (LANSW): No, we're not.

DR MUNDY: It's the best we can do on what we've got, and we appreciate the data limitations. Just to perhaps start on topical matters, and this is a question I asked ACT Legal Aid yesterday, and if you're speaking to your colleagues you might suggest they'll have an answer to this. ACT Legal Aid was able to outline to us quite specifically impacts of the funding cuts that have occurred in the budget in December. Are you able, other than the issue that you raised in relation to the large cases issue, to identify what the outcome in a service delivery sense these cuts are going to have on yourselves? The ACT tools were quite specific. I suspect that might be because they are so little. You may have more sophisticated financial management tools but we would be interested if you could identify those for us.

MR GRANT (LANSW): I might make a few comments and then hand over to my colleague to talk about their areas. It is more difficult for us. The Commonwealth wanted very specific proposals. They did not say to us, "Here is money over two years. Use it as wisely as you can." That would have been greatly appreciated - a little bit of trust. Let us use it. However, we did. They wanted specific projects and we came up with something like seven projects in civil law and six I think in family law. They can be corrected in a moment.

What we did with the loss of funding - because that happened so very quickly and because a lot of those services are delivered by staff, usually temporary staff, there has been an under-spend this year and the Commonwealth has agreed that we can carry that into next year. That is part of the 4.6 that we got for the first year. The 4.6 second year has gone. Some of our projects will continue to run on that.

We then weighed up the projects that we have against projects we were running under the NPA funding and we have tried to do an assessment of what is providing the most value for our client base. We will continue some of - I will call it the Dreyfus money proposals until the end of the next financial year. Some of them

we have had to discontinue and some we are continuing because we have had to discontinue NPA funding which we thought was lower in value for us.

With that general statement, having muddied the waters, I will ask Monique and Kylie to clear it up for you.

MS BECKHOUSE (LANSW): There are a few specific impacts on family law services. Probably the most significant one was the loss of staff to a project that was aimed at improving family law services for Aboriginal people. We have had to reduce our staffing on that. The direct impact of that will therefore be a reduction in family law services, particularly to rural and remote areas, because that was one of the big focuses of that group. I will come back to that because unfortunately there is a combined effect because the community legal centres were also funded in that area and there are services in that area that they have lost.

Also rural and regional - we have had to reduce our expenditure on our early intervention unit who were playing a role, an information referral role, so specifically for clients in remote and rural areas who were having difficulty accessing case representation services. We have had to reduce our resources in that area. We haven't wound it back completely but we have reduced those resources.

The third area where we have had to reduce resources is in the area of, I suppose, the quality of representation for children and young people. Over the last 12 months we have focused on improving the practitioner standards of private practitioners particularly who are independent children's lawyers, so we have run quite an amount of training this year to try and improve those skills but regrettably there won't be funding this year to provide those trading programs.

MS HITTER (LANSW): The additional funding that funding was allocated to - in civil law we focused it on three central areas. One are issues that we think impact on the community by the cost to the community, where we can respond to market failure and where we can do things in a really cost effective way. We have used that funding to do things like provide employment law services where they weren't being provided, early intervention in social security matters and working with children who have complex needs. While we are able to continue to do that work for another 12 months, that funding would then come to an end and we will no longer be able to do that work, so for us that represents a very substantial amount of work that we are now doing that will not be able to be done in 12 months' time.

The immediate impact is that services like - we had a service for people who are being trialled in the National Disability Insurance Scheme. We had a position targeting those people with legal needs and that position is no longer going to be funded, so there are some immediate consequences like that but the more concerning

aspect is that in 12 months' time there will be a large amount of services that will just be simply withdrawn because that funding is no longer available. It will be in very basic services like employment law and long-term hardship and mortgage hardship and those sorts of things.

DR MUNDY: So it is fair to say that the impacts are predominantly on frontline service delivery as opposed to what might be described as law reform and advocacy.

MR GRANT (LANSW): Yes, absolutely. None of that money went to law reform advocacy. In fact we don't do advocacy other than law reform in the Legal Aid Commission. The law reform we do is always, almost without exception, at the request of government. If I looked, as I did - in the previous year we did 33 state requests for assistance. 28 of those either came from our attorney-general or from our Attorney-General's Department as it then was. The other five, from memory, were parliamentary inquiries. We respond to things. Our opinion is sought because we are providing an opinion on behalf of the other side of the market, if you like, particularly with Monique's work in relation to working in things like debt reduction and various forms of consumer law, working with the ombudsman et cetera. We partner up a lot with ASIC, with the ombudsman, to try to find systemic solutions to problems.

MS MacRAE: The first thing I should say is that we have been very, very grateful for all the assistance you have given us. I know there is a lot of behind the scenes work between our staff and your staff and it really is very much appreciated, so thank you for that. We are grappling with: what can we do with the data we have got? I am hoping from your opening comments that you think we have done quite well with what we have got but it is, I think, apparent; I think it would be fair to say you would like us to caveat a bit more heavily some of the conclusions we have drawn out of the law survey, in particular the methodology that is required.

Are you able to express that in any further detail in terms of how you would see - because you do make some comments about the data collection; whether there are other alternative ways of collecting data that might be helpful to supplement what we have got that maybe we haven't looked at that you would see as beneficial, or whether in fact the best we can do is caveat more heavily what we do have.

MR GRANT (LANSW): I will invite comments from my colleagues, but I suspect your latter comment is the accurate one. There is simply no better data. We collect data at the moment in consultation with our funders. That doesn't give you a good view, but our data will never really give you unmet need. It will only give you indications of where it might be, what is coming at us. It will give you an idea of the people who fail our means test but it will never tell you who didn't apply because we thought they would fail our means test. I really don't know that there are any mines

of data out there that you can attack. I would love to be able to identify that for you. We will give that some thought and if we can come up with anything, we will - - -

MS MacRAE: I think you probably already have. I just want to make sure that there is nothing that we have missed.

MR GRANT (LANSW): No, sadly.

DR MUNDY: But your view would be - observation has been made about the methodology that underlines the Law Society. Your view would be that it systematically underestimates need because it would seem on its face to miss those who might be most disadvantaged and therefore constitute the greatest unmet need.

MR GRANT (LANSW): We most certainly made that point in our submission because the Law and Justice Foundation, a great first step as it was, did not deal with anything other than telephone interviews. A large number of our clients of course - - -

DR MUNDY: I think we accept the nature of the bias. I guess the question is: is speculating on whether it is 17 or 18 or 25 the best use of the limited resources of the Commission - - -

MR GRANT (LANSW): Indeed.

DR MUNDY: - - - as opposed to bringing our minds to other matters as we go forward.

MR GRANT (LANSW): I don't think you will be able to pin it down with any greater degree of accuracy.

MS MacRAE: You did talk a little bit about the mixed model of provision and the difficulties that you have of not paying enough. I would just be interested in your comments about whether you felt - because we did raise this in Canberra yesterday - about the extent to which you feel that there is a sort of juniorisation happening and what the consequences might be in terms of equitable access to justice.

MR GRANT (LANSW): Look, I'll let my frontline colleagues talk about it in a second but just my introductory remarks would be most certainly a generalisation, but I think in terms of a solicitor branch of the profession and the bar I don't think there's any doubt about that and I think that would apply across the country. Our rates across the country are significantly below market rates. We know that some people do, for example, particularly practices in rural Australia will do some legal aid work because that benefits their community and they've probably done it for 30

years. Whether that will continue when those baby boomers go out of the profession and new people come in, I don't know, but just one little sort of anecdote in relation to that. I probably go back to about 2003 or so when the firm, the collective firms in Dubbo that were doing legal aid, came to us and said, "We don't want to do legal aid any more. Why don't you open an office?"

That was quite extraordinary because previous experience of us trying to open an office it was like the end of civilisation as you know it, we'd be taking work away. But these firms said, "We have more than enough private clients out here. We really don't want to do your work for what you can pay us, so open an office and solve it that way." We did with their help. A lot of those firms still do some legal aid but they've bundled for them and they can be quite selective rather than having to man the duty lawyer schedule every Monday to Friday and do whatever. I think a lot of that will happen particularly in regional Australia where there aren't enough practitioners, where they have enough private clients as the older practitioners start to leave the firms, we will have that problem of keeping that commitment of the firm to do some legal aid work.

Because there are some parts of this country, parts of New South Wales where we have no legal aid offices at all. We rely on the private profession. Big centres like Goulburn, Armidale, the south coast, there is no legal aid presence in those areas at all so we rely on the profession to do that. Sorry, can I invite any other?

MS BECKHOUSE (LANSW): Look, I probably don't have much more to add except for this: in previous years [indistinct] what was the impact of that reduced funding and one of the examples I gave was training to private practitioners and the reality for us is that we'll never know how much is enough and we are faced with that sort of generalisation but if it at least we have ways that we can engage the profession, particularly the senior people in the profession, that assists us. When we're stuck in situations where there is no-one in a regional town to do any of the work, it is incredibly problematic and we do grind to a halt or it is incredibly expensive because there are cases right now where we will - towns where we need to fly professionals in. Broken Hill is an example of where we spend quite an amount of money flying practitioners in to undertake the work.

So sometimes it's not just - there's an incentive and the incentives sometimes can be a bit more creative than necessarily a whole scale increase in fees.

MS HITTER (LANSW): The only thing I would add to that is that in the kind of civil law that we practice in our brand of civil law, we find that private practitioners don't practice in that area on a commercial basis so even if the fees were perhaps a little bit more attractive we'd unlikely be attracting them to our work because they don't really do that kind of work.

DR MUNDY: There's not much work for private firms in social security.

MS HITTER (LANSW): Exactly, and even in employment law now there's been a massive reduction in the amount of private practitioners doing that work even on a commercial basis, because it's, essentially, a no cost jurisdiction, so in the kind of areas that we practice in we're not likely to get private practitioners involved even if the fees were a bit more generous.

MR GRANT (LANSW): And we see it in other ways too. We have the occasional complaint from judicial officers about some practitioner doing legal aid work and why are you funding babies to do this sort of work? They don't know what they're doing, et cetera, and, you know, in a sense that's a result of juniorisation.

MS MacRAE: And one of the things that Legal Aid Commissions seem to do very well is to be able to unbundle things and do parts of service for people and make services available and people will come in and out and assist and get help when they need to and then be able to do certain parts of the process themselves, but there does seem to be quite some barriers for the private sector in being able to do some of those things and we have talked to them a little bit about some of the barriers they face. If we were able to make unbundling somewhat easier for the profession do you think that would help ease the pressure on your resources if there was a - if some of that middle ground of, I suppose the people that still might not meet your means test that you can't help but they might be able to get a bit more selective help rather than having a whole of service from a lawyer. Do you see benefits in us pursuing those things?

MR GRANT (LANSW): Look, I've never quite understood the opposition to unbundling services. I know there are circumstances where it's inappropriate. I know often circumstances when it's difficult, but we do it, we are practitioners. We don't come up against ethical difficulties in relation to how we do it. It assists them, it assists the courts. Our duty lawyer services are basically unbundled services, so I'm not all that sympathetic to opposition to that. It's a way of conducting your business to meet your clients' needs with the resources you have. I think some firms are actually starting to provide those unbundled services.

We actually have, we call it, ROCP - the explanation I can't remember - and what that is we pay private lawyers in remote areas, regional areas, rural areas to do the same sort of work that we do, so they will provide the advice and the minor assistance that traditionally their lawyers won't really want to specialise in and they will do that and we will pay them to do that. We do that in about 15 regions where we have firms that do that.

DR MUNDY: So the points that are put to us about, in the first instances, judicial officers dragging in solicitors who have unbundled services in an effort to try and do the right thing and castigating them is not something that, in the experience of New South Wales Legal Aid, happens with any regularity?

MR GRANT (LANSW): To us it doesn't happen at all, I don't think.

DR MUNDY: And I guess the second issue that is raised with us is the question around insurance for negligence and I presume you insure yourselves and your lawyers with credible and reputable insurers. They have not raised this as an issue with you?

MR GRANT (LANSW): We are government insured.

DR MUNDY: I see, you are insured by the government.

MR GRANT (LANSW): So we're provided with that, so I wouldn't be unfair to the profession and say that's not an issue. It probably for them is, but I fail to see how it's not one that can't be overcome. Can Kylie - - -

MS BECKHOUSE (LANSW): Sorry, it's just in relation to court procedures. There probably are some changes that could be made to court procedures to better assist in unbundling the services and what I mean by that is if somebody, for example, wanted assistance drafting an affidavit, which is something that happens in family law, you would be reliant on the client providing you with all of the documents they had and an easier thing would be to get access to the court file to see the documents that were filed, but you would need to actually go on the record to do that and going on the record actually does really change the nature of the service and your relationship with the client, so there are just small things like that.

DR MUNDY: Does it change the nature of your relationship in form or in practice?

MS BECKHOUSE (LANSW): I think both because of that example that you - that suggestion about the judicial officer calling in the legal practitioner and expecting a level of service or expecting a type of representation would flow from the filing of a document that says, "I'm acting for this person," so in a way our court practices haven't quite adapted to the notion.

DR MUNDY: Is it an intractable problem or is it something that is soluble if sound minds of good will and good intent were brought to it?

MS BECKHOUSE (LANSW): Yes, soluble.

DR MUNDY: Okay. Talking about courts we have come under a little bit of criticism about some views we expressed about court fees, most recently from Justice Rares in the Federal Court I have discovered at lunch today. I guess what we are trying to get at is an equitable way of putting aside the issue before cost recovery, but an equitable way of dealing with the benefits that people gain from legal action in the event that they are of means to pay as a way of providing resources to the courts, but also as a way of providing resources to the courts but also as a way of dealing with incentives in the same way people talk about incentive structures across the board.

You mention that you support a sliding fee scale which is fair and provides more accessible systems, more uses the court. We just wanted to clarify: by that, did you mean that the fees should reflect both the value of the matter involved and the character of the litigants, and the second question, which is something of particular interest to me, is how would you think about that in the context of where the outcome of the litigation is not a monetary settlement but perhaps some interlocutory type order or some administrative rule matter, perhaps a planning or environment matter which may involved significant economic value but no monetary settlement?

MR GRANT (LANSW): I will start, if you like. For us, we are at the wrong end of all of that, because our clients generally can't afford to pay anything. Most courts, not all courts and tribunals but most courts, will accept that. The trouble is, we have to work far too much for that. It could be simplified and I think there are some comments in the draft report along that line. In terms of the sliding scale, I think I would agree. We would say both in terms of what is at stake but also in terms of capacity to pay, what you don't want to do is discourage people from pursuing their rights by simply having fee scales that aren't flexible enough to do that, particularly as it is a no cost jurisdiction. The majority of what we do is no cost jurisdictions, whether it's family law or whether it is a lot of civil law tribunals that we appear in, and it's very difficult I think to start making people pay something that might resemble the full cost recovery for the proceedings. Then again, we are the wrong end of things. They are the comments.

MS HITTER (LANSW): I have got nothing further to add.

DR MUNDY: You have raised tribunals, Mr Grant. We have made some recommendations about representation in tribunals and I guess what we are trying to get at here is a framework which maybe identifies matters. There is a reasonable expectation that citizens who don't suffer some particular form of impairment or disability in conducting things can actually go and resolve these matters on their own but also how do we deal with it where representation may be appropriate from one side or the other or one party is de facto represented; they are sufficiently large or they are a council and arguing a planning dispute and the council planning officer is probably as good as having a junior solicitor argue it anyway, possibly better.

MR GRANT (LANSW): Yes.

DR MUNDY: In those sorts of matters, it's an issue where we are trying to find ways to facilitate tribunal processes and make them cheaper and more accessible but not denying people representation when they are [indistinct] and it seems to have become quite a thorny issue both with the bar and the law societies. I won't speculate why. I am sure it's a concern for justice. Do you have any views on this, because it does seem people can seem to agree in the principle but we're struggling to get traction on the practicality.

MR GRANT (LANSW): We sort of made some positive comments in our submission about 'horses for courses'. There are tribunals and circumstances where people can represent themselves. You are quite right. A lot of our clients simply could and so we are not allowed to send our lawyers in to assist them and to assist the tribunal, can I say. I think that's a little bit crazy, so a hard and fast rule is never going to satisfy every circumstance. You are also absolutely correct when you say there are perhaps industry people, whether it's real estate or whether it is some sort of planning or whether it is some form of professional circumstance, where the people would not really be qualified but they are as good an advocate as you are ever going to get and even consumers who have some ability to advocate their own cause will have difficulty matching that level of expertise. However, I think from my perspective, it would be not having absolutes at all. There are many circumstances where it's not appropriate to have, not necessary to have lawyers.

DR MUNDY: So would you in the conduct of your business if somebody came along with a matter that on its face could be self-represented in a tribunal context, have a look at the individual and the matter and say, "No, you can do this yourself," or, "No, because of some particular characteristic, you need us to do it"? Is that essentially - - -

MR GRANT (LANSW): We do that now.

MS HITTER (LANSW): Absolutely; that is one of the first things that we would do, is assess the person's capacity to represent themselves or advocate for themselves in the context of the jurisdiction that they are in and how complex the problem was that they had got and the role the tribunal is going to take in dealing with the issue. Some tribunals take on a more inquisitorial role than others and we find that where they are taking a bit of an inquisitorial role, it is often a lot easier for a self-represented person to participate in the proceedings, but where it is purely adversarial and the tribunal is just there to listen to both people make their arguments and then make a decision, well, then the person with the least power in that situation is going to have more difficulty in putting their case forward.

DR MUNDY: Because I know that in a lot of other areas, the report has been in the process more generally. The fact that someone is legally aided is relevant to giving consideration to waiving the fees or whatever. How would you see or could you see any problems with the notion that says, well, if a person turns up with Legal Aid representation in a tribunal which normally you would expect to be self-representing, should the judicial officer or the tribunal member looking after this matter place some weight on the fact that Legal Aid has made an assessment that they actually need to be here to assist this person? Is that something that would place a responsibility upon you that you would think was onerous?

MR GRANT (LANSW): No. I would think we would welcome that sort of rational discussion about why you were there and what we thought we could do to assist both the client and the tribunal itself. In fact that does happen now but two further comments, if I may. We actually had, and I think still have, some advocates in the veterans area that aren't lawyers. They are just advocates and they assist people and there was a move from the tribunal certainly at one stage not to allow lawyers into the tribunal. It was lay, so we had lay advocates. We adjusted to that and deal with our clients that way but in terms of the assistance that lawyers are providing things like the Social Security Tribunal and various other tribunals, you are providing unbundled services on occasion to these people. You are also appearing before the tribunal and maybe for some things but not for everything and assisting them to get their arguments together, et cetera, so there is a role for lawyers apart from just standing on their feet, in advocating in assisting that person to be able to do it and maybe making the balance a little bit more even.

DR MUNDY: Thanks for that.

MS MacRAE: Just as a general proposition, we have reflected in our report on some comments that we have heard that were made in confidence that we weren't attributing to individuals and other evidence that we did get on the record, but in relation to the way the tribunals have evolved, and you will see that we made the observation that it would appear that some of them have become more court like than was originally intended, would you agree with that assessment, that maybe in some instances, tribunals have become more adversarial and more court like than maybe is desirable in the best interests of access to justice?

MS HITTER (LANSW): I think it's certainly true that some of the tribunals are much more formal in the way they approach the resolution of disputes than other tribunals. For example, the Administrative Appeals Tribunal is quite a formal jurisdiction and very often, you really do need a lawyer to represent you in that tribunal, whereas the Social Security Appeals Tribunal is at the complete other end of that spectrum, where you probably don't need a lawyer to actually represent you,

although it is often good to have some advice before you go in as to how you present your matter, so it is true that the way they have evolved, some have evolved in a much more formal sense and some have kept a very low key way of dealing with their matters.

DR MUNDY: Is that a reflection of the matters that they deal with and, secondly, do you see any risks or do you have any concerns about the amalgamation of the Social Security Appeals Tribunal with the AAT, and I guess also you probably have occasional engagement with the Refugee and Migration Review Tribunals.

MS HITTER (LANSW): I think our submission flags some concerns that we have with the consolidation of the Commonwealth tribunals. In the social security jurisdiction it is very good to have that two-tiered approach. Well, it's actually three-tiered when you take into account it has an internal dispute resolution process as well. To have those three tiers is a lot more user friendly than going straight from a refusal up to the AAT or a consolidated tribunal. That is probably going to have a much more formal approach because it is at that higher level than the Society Security Appeals Tribunal, so that would be a concern if the two were merged together for our clients.

MR GRANT (LANSW): In many of those matters traditionally we have argued - because of the way certain Commonwealth priorities and guidelines were framed in previous agreements before the NPA, we have argued, "Let us get in earlier. Let us get in when the department is either reviewing the decision internally or just making the principal decision." I'm trying to remember the actual circumstances but it was either veterans, I think, or immigration where we had something like a two-thirds success rate before the tribunal.

We kept saying, "That's crazy. Let us get in and advise our clients," but we were precluded actually from the agreement, from actually providing that form of early assistance. Hopefully those days have gone, but I think the principle is true that the quicker you can provide advice and assistance to those people, it benefits the primary decision-maker and any perhaps review. We would certainly encourage in all departmental areas - just about all - an internal review mechanism.

DR MUNDY: It helps them because it supports meritorious applicants but it also presumably knocks on the head a few unmeritorious applicants.

MR GRANT (LANSW): We have our own merit tests, et cetera. If we don't think there's an argument there, we won't be running it. You don't get aid just because you ask for it. You have to have merit on your side. We won't be wasting our resources.

DR MUNDY: Eligibility tests I think is probably something we - just bearing in

mind time. I think it's fair to say that we share the view that means tests generally - whilst we note there are differences, it's probably not the big issue, but I guess the question that we would probably appreciate your thoughts on is what would a realistic means test actually look like? Not one that's constrained but where - and I guess, how would you think about - I think we have made an observation that there are probably better definitions of measurement of a disadvantage. The Commission has done work on the other respects, but I guess just perhaps to finish up, if we were in a position to make the means test less mean, what would it look like?

MR GRANT (LANSW): That is a really good question and one that we would love to see an answer to. Obviously things like Henderson poverty lines and things are probably old-fashioned and there's better ways of doing it. In terms of a monetary limit, whether it's 80 per cent of a minimum wage or some factor like that that keeps increasing with changing times, I'm sure you're much better than us at trying to find that appropriate economic line in the sand, as it were.

We would warmly embrace your second idea that that doesn't begin to cover all the eligibility requirements. There are people who have all sorts of other indicators of disadvantage who may or may not pass that means test but who are always going to need help of one form or another, whether it's an unbundled service or whether it's a full service, right up through litigation.

DR MUNDY: I presume in the family law areas, given short-term access available to resources within the family may be an issue, that there should always remain some discretion - for cases, for example, like a woman who doesn't have access to the resources of the household, who might look particularly well resourced. Is that one of those cases which you would want carved out?

MS BECKHOUSE (LANSW): I think our guidelines do try and make provision for that except that there is a cap on equity.

DR MUNDY: Are you able to put in place arrangements whereby you effectively bring the matter on the basis that once it's settled, you will be able to cover - this is a cash flow issue rather than a means issue, if that makes sense.

MS BECKHOUSE (LANSW): Only to a limited extent. The answer is yes, but we don't charge at a commercial rate so there would have to be some measure of disadvantage, I suppose, that we would be looking at in our merit test in order to afford that courtesy, I suppose.

MR GRANT (LANSW): Some commissions do that more than we do at the moment. Victoria does that more than we do, where they take a contribution. They know there's assets there so they will impose a $10,000 contribution. If it can't be

settled out of the family law settlement, it will end up being a charge on the property, so you wait for it but you will recover it at some stage. We have such demand on our services that we really can't provide that service. We would like to and we think it makes sense, so if people are just outside your means test but still need help but have an ability to make a contribution, that's a halfway house to help - - -

DR MUNDY: They can make it when they're able to.

MR GRANT (LANSW): Yes, indeed, and maybe just when the property is sold or what have you. You wait for it. Those sort of factors can come into play depending upon the resources you have available to enable you to do that.

DR MUNDY: Okay. Thank you very much for that. I'm sorry we don't have more time but we have 12 witnesses today and 12 tomorrow. Thank you very much for your time.

MR GRANT (LANSW): Thank you.

DR MUNDY: Now if we could have LEADR and Negocio Resolutions. I understand that you're happy to appear together. Can I just ask you to state your names and the capacity in which you appear.

MS HOLLIER (LEADR): Yes, hello. My name is Fiona Hollier and I'm the chief executive officer of LEADR.

MR LANCKEN: My name is Steve Lancken and I appear in my personal capacity as a consultant and private practitioner.

DR MUNDY: Okay. I don't know how you wish to deal with this but we're fairly flexible. We have got about 35, 40 minutes for this discussion so if you would like to make an opening statement and then we can perhaps put some questions to you.

MS HOLLIER (LEADR): Yes, thank you. Steve is one of LEADR's members and so in consultation with each other we thought that there may be some aspects of what we would want to say which were very much in parallel and so it would make sense if you were hearing those together. In reading our submissions you will notice that we place some different emphases and put some different points more strongly or less strongly, and yet I think you would also see that there was a lot in common in what we were saying, so it just seemed to make sense that we would come along and speak to you in that light. Is that how you see it, Steve?

MR LANCKEN: Yes.

MS HOLLIER (LEADR): Anything to add?

MR LANCKEN: No.

MS HOLLIER (LEADR): Okay. From LEADR's point of view, we wanted to come along so that we could answer any questions that you might have about our submission and also, I guess, to put the context around the submission that we have made to say that we think there are some very good reasons why we should be looking to encourage people to engage in ADR whenever they can and we think that the purposes and outcomes of ADR are very much about self-determination and encouraging individuals and businesses to take personal responsibility and accountability for the actions that they take. We think that that kind of emphasis helps to ensure that we get the best use of resources. From a business point of view, whenever businesses are locked in an adversarial engagement, then they are using up their own resources and the state's resources and not focusing on producing value. So from our perspective it makes really good sense that wherever possible and appropriate people are provided with the sort of systems and structures and so on to

use ADR.

So within that sort of context we think that we need to be looking as a society to recognise that most disputes are actually resolved informally and even those where proceedings are begun in court, most frequently they're resolved before a point of determination. So in that sense what have formerly been seen as the alternative forms of dispute resolution are actually the mainstream forms of dispute resolution, and we would like to see that reflected more strongly in the report.

You have certainly noted the percentages of matters that are dealt with by courts, so you have noted in fact that this is very much the dispute resolution landscape and we think to move to actually say, "Well, we're really talking about, you know, what has previously been alternative dispute resolution, is in fact the mainstream and litigation needs to be there but it should be the sort of second resort, not the first one."

So that's the first point. The second is that we think that the genuine steps that has been part of the federal legislation has been a really good introduction. We are somewhat concerned that with its current review that legislation might be repealed and LEADR had been hoping that, if anything, it would move in the direction of making it even more robust, what might be meant by genuine steps towards something like, you know, an assessment for suitability for ADR.

Much has happened very effectively in family dispute resolution and family dispute resolution, I think, that has paved the way and has been a very good example of what's possible. There are some areas - and I'm sure if we were actually looking at FDR, where we could look at refinements, but broadly speaking, it has moved in a very positive direction.

The third area is that we would like the government to be setting the example. You have noted in the report, the need for the dispute management plans, that they have been on the agenda now for many years and yet there are many departments which haven't moved in the direction of creating those plans. We commented that as part of seeing ADR as the mainstream, we would actually rather be thinking in terms of model dispute resolver guidelines rather than model litigant guidelines.

I think where we would like to see that going is that government departments need to become accountable for when they are choosing litigation instead of ADR. So ADR should be seen again as the default, as what they do as first resort and that they need to present a good reason, a good case for why they have chosen to use litigation.

The final sort of point I guess is that we think accreditation is very important.

We have made huge strides in Australia in recent times with the introduction of the family dispute resolution practitioners but also national accreditation within the mediation field. The feedback we get from overseas bodies is that they look to Australia as something as a model in this, and I think we really should be building on that. Where there aren't those kind of national guidelines for other forms of ADR, there certainly are reputable organisations which are accrediting ADR practitioners and we would like to see that that becomes something that in particular the government must only use people who are accredited. So I think that's a good kick-off point, Steve.

MR LANCKEN: It sure is, yes. I guess my interest was listening to what the Legal Aid people were saying in discussion about less adversarial ways of resolving disputes. The question I ask, because that's the business I'm in, is: what are the barriers to people accessing those sorts of services, why don't they come directly to me as a mediator or my colleagues or why are there not more services available in the places where they're needed? So I ask the question as to what might be the barriers.

I think there are a couple of misconceptions that I think your report so far has avoided but I think we could more strongly put the pin in those balloons of misconceptions. The first is of course that litigation is the normal way people do business and that's not the case and your report makes that very clear, but lawyers would have us think that it is the normal and it's the default position, as Fiona said.

The second I think is something that my profession is as guilty of engaging in as others and that is this discussion as to whether litigation beats mediation or mediation beats litigation or what's better than the other, and the reality is they are different ways of making decisions. While we're engaged in the debate of what's better or worse, then we're involved in an adversarial debate and discussion rather than helping people to choose what's the best method of resolving their dispute. And it comes through clearly in your draft report that that's a really important thing, where you talk about triage, you know, appropriate process.

While we're in that debate, that one is better than the other, I know where the money is because the courthouse is the biggest building in town and it has got the biggest advertising and the judges and the lawyers have the loudest voice. So that's where people are going to be attracted. So I think that debate is somewhat of a barrier to people because they think, "If I'm going to mediation, I'm not going to the biggest building in town. I'm not going to the lawyers. I must be getting something that’s not as good," which is absolutely untrue.

The third thing, I see from some of the submissions, and perhaps not from the draft report, that is an educative thing for our profession I think, is the idea that you

approach a mediator because you want to settle and that's all it's about; indeed I see that sort of process as good decision-making and businesses don't make decisions without having a discussion, they don't make decisions with people who are in their workplace. They talk about it first.

When I was listening to the Legal Aid people saying, "We want to get into the departments earlier and work out how we can have discussions to avoid making decisions that are wrong 60 per cent of the time," I say, "That's my business." It's about the exchange of information. It's about the conversation. It's not necessarily about the outcome and I think that's another thing that my profession is guilty of saying, "Well, we will help you settle your case." I say, "We help you have the discussion and decide whether you settle the case or decide what an outcome might be."

There's an educative piece in this I think and you have identified in your draft report the need for those who access legal and other services to understand how to use these processes, and that's certainly the benefit of triage and education. The last one that Fiona has already touched on that goes back to - I think the easiest place to point to is the government but I think it applies to businesses and it applies to individuals and it seems that the thought, "I need to have a reason why I want to go and see a mediator or what I want to negotiate," where in fact that's the wrong way around, "I want to have a reason to go to court. I want to be able to justify it."

I think courts are precious resources and they're very valuable and I don't think they should be wasted. That's clear and everybody agrees on that. That means that we all should be able to justify why we can't resolve this dispute in some other way. I think the government has got to take the lead and the lead comes in only a couple of words of the legal services direction which are in the model; litigant rules which is in rule 2(2)(d) where they say, "The government has to consider ADR before" - and I say the government should have to justify why it litigates.

Some businesses - NCR, is one of them - changed their policy and said, "If you want to litigate or defend a case in litigation, you have to be able to justify it, so the auditors are going to look at your justification and tell us whether that was a worthwhile decision," and it changed the mindset of the way they were doing business because then they were focused on, "How can we resolve this dispute?" I think that's the challenge for the government.

I understand the difficulty that our civil servants have in being accountable and I understand that sometimes it's less risk to have the judge make a decision than not to make a decision and risk being criticised, and our political system doesn't necessarily support that. I think that it's fundamental to the way we do business that our government be given the authority and the mandate to make decisions based on

fairness and the legislation, and be able to do that in the way that makes most sense rather than have the judge make that decision.

DR MUNDY: Yes. Risk is something that our Commission regularly brings its mind to in the context of public policy. We walk away scratching our heads without an answer. Can we talk about accreditation first? We had a discussion this morning with the Bar Association and, perhaps surprisingly, they conceded that perhaps all lawyers, solicitors, and barristers weren't per se set up to be mediators and arbitrators, and they indicated they felt that some additional training and certification was appropriate before they just went out and hung out their shingles, which we thought was quite interesting, and I guess this question of accreditation is interesting for us because we are often concerned about accreditation for good purposes being used as effective in any competitive market control device and we've made observations in the past about the medical profession specialists.

How would the ideal national accreditation process work? Would there be a body to which other bodies such as yourself and the Institute of Arbitrators would come along and say this is what we do, accredit this, or would you see it - so it's effectively an open accreditation framework. There's no limit to it. It's standards based. Is that the sort of thing that you have in mind?

MS HOLLIER (LEADR): Yes. Well, with the national mediator accreditation I don't know to what extent you know the history of that, but it was actually a coming together of sort of most of the bodies who were involved in mediation, so before 2008 organisations like Leader, like LEADR, like IAMA, had their own accreditation processes and through from, I think, probably the discussion sort of were starting from sort of about 2002 and then through till, you know, 2008 when we actually, after some robust discussions, I think, where we - - -

MR LANCKEN: Lengthy. Lengthy and robust.

MS HOLLIER (LEADR): Robust and lengthy discussions where Bar Associations, Law Societies, IAMA, LEADR, and many other players came together in a room and together we hammered out what we thought was a threshold accreditation level, and then the next two years we set about, again robust and lengthy discussions, to come up with the Mediator Standards Board who would be responsible for overseeing the implementation of the accreditation scheme.

I think what we've seen is that we had a lot of, as I said, a lot of dissent about it, a lot of productive discussion, and now in 2014, so six years down the track, we've got around about 2000 nationally accredited mediators, and we've got those mediators being accredited through a devolved system, so organisations like LEADR are responsible for training people, for assessing them and for accrediting them. At

times there will be other organisations who provide the training and then we'll do the assessment and accreditation, and the system works in that sort of flexible way.

It's likely an honour system at this stage, but I think the fact that it's grown at that pace to have around about 2000 nationally accredited mediators is very significant and says it's something that the industry itself felt was needed, and you know, there was a large amount of collaboration by the various organisations to produce that.

I think looking forward we know that there's conversation now, interest in, say, conciliation, developing a separate conciliation accreditation, and those people engaged in conciliation. There are pockets - I couldn't say universally - but there is certainly some momentum towards saying we actually want a National standard that's going to cover conciliation as a separate process to mediation, but the point is we want a national standard. So I think working as, you know, the industry coming together to produce something and to voluntarily adhere to it is actually a pretty powerful model.

MS MacRAE: Can I just be clear there? Does everybody come through LEADR for their - - -

MS HOLLIER (LEADR): No.

MS MacRAE: No. No. Okay.

MS HOLLIER (LEADR): No, no, no, sorry.

MS MacRAE: Just when you said other people come back to you, I thought that's not what always happened. You've got a range of organisations that are accredited that can - - -

MR LANCKEN: There's about 30 or 40 providers.

MS MacRAE: Yes.

MS HOLLIER (LEADR): Yes.

MS MacRAE: I thought that was the case. I just wanted to make sure I hadn't mistaken your - - -

MS HOLLIER (LEADR): No, no, it's more that you can actually do bits of the process.

MS MacRAE: Yes. Okay. Sure.

MS HOLLIER (LEADR): So that there are more training providers than there are accrediting organisations.

MS MacRAE: Sure.

MS HOLLIER (LEADR): So some of those training organisations would send their graduates along to one of the accrediting bodies such as LEADR or IAMA or AMA or someone.

MS MacRAE: Yes. Okay.

MR LANCKEN: I think in answer to part of your question, Commissioner, I think the profession or the industry wants an open access.

MS MacRAE: Sure. Sure. Yes.

MR LANCKEN: I don't think accreditation standards are set to exclude people.

MS HOLLIER (LEADR): No.

MR LANCKEN: The struggle we always I have, I think, as Fiona just started to talk about, is how do we include people and ensure that the standards are high and it's quite hard to accredit people on skills. It's not like you can do an exam and write it on a piece of paper, so that's our challenge and we're struggling with making it more relevant. Relevant's not the right word. More appropriate for the sort of work that we do.

MS MacRAE: Okay.

MR LANCKEN: I think the other challenge that we have is in the market place is people recognising what these products and services are and what they should expect because if that matches with your accreditation standards then you have safety for consumers as well.

MS MacRAE: And would you have an estimate about what sort of costs would be involved in becoming accredited?

MS HOLLIER (LEADR): I think it varies, but probably I'd say it's in round figures around about $4000. Would you say that's - - -

MR LANCKEN: Depends what you - the standards require you to do a five-day

training course and that can cost you anywhere between nothing if you do it through a community justice centre to three and a half or four or five thousand dollars.

MS MacRAE: Okay.

MR LANCKEN: There is the cost of being tested. There's a cost of maintaining your accreditation, so you have to engage in continuing education, supervision in some places, so there is a fairly high cost or barrier to enter it. It's probably closer to - by the time you put everybody's time into it, it's probably up even around the 15 or 20 thousand dollars it's going to cost you. That being said, there's no shortage of people who want to be accredited because they see it as being valuable skills and tools.

MS MacRAE: Yes.

MR LANCKEN: I think that was what - may have been what was behind what the Bar Association and the Law Society said. They see that there's a benefit to their members in having these sorts of skills.

MS MacRAE: Absolutely.

DR MUNDY: It was only the Bar.

MR LANCKEN: Only the Bar. I'm surprised at my colleagues of the Law Society who are accrediting their members as mediators.

DR MUNDY: To be fair, we didn't put the question - - -

MS MacRAE: We didn't raise that with them, did we?

DR MUNDY: Didn't put that question to them.

MS MacRAE: Yes.

DR MUNDY: In your submission you raise a report from the European Parliament on ADR. I guess the two things that interested me are there similar studies that you're aware of that we mightn't have stumbled across relating to the Australian jurisdiction, and one thing that pricked our imaginations was this notion in that report from the European Parliament - and I think it was Italy - that indicated that mandatory mediation actually encourages voluntary mediation.

Have you got any views about why - (a) on the factual question are there studies, Australian-based studies available you could steer us to, but also why do you think

that mandatory leads to voluntary mediation?

MR LANCKEN: We'd like to think it's because when people experience good service they want to get some more of it. I would hope that was the case.

MS HOLLIER (LEADR): And I think it's because it's - I think that's part of it, that in fact people start to see the benefits and, you know, word of mouth, but if someone's experiencing value then someone else will say, well, it's worth a go, and I think it also helps to normalise it. You know, the fact that it's become part of what we do makes it much more - much easier to actually access, so you know, Steve talked about one of the barriers.

I think at the moment one of our barriers is that people just kind of don't know that it's an appropriate alternative, and they do think in terms of the courthouse as being the way that legal problems are solved and so if you can get a sort of a groundswell of usage which is what some form of referral to ADR or, you know, pre-action protocols does, then it helps to normalise that and just increase - gets that sense of usage. In terms of similar Australian studies, I think we've got a dearth of studies in that area.

MR LANCKEN: You won't have to ask very far for any of our practitioners to say this. There is no study in Australia. There is the Ontario study but that was 10 or 15 years ago where they mandated mediation 20 days after an offence. That was a very thorough study but it is quite old now.

I think the interesting thing is that where mediation has become quasi mandatory is in the legal profession. I came from the legal profession. I was a commercial litigant. When I speak to my former colleagues and colleagues now, they know that they really can't get to see a judge without coming to see me or one of my colleagues because judges will insist that they go to mediation at least once and sometimes two or three times in Western Australia.

DR MUNDY: We've heard from the chief justice in Western Australia on this quite loud and strong. I guess that begs the question: why is that? Is that because judges are sensibly saying, "Look, I've got to work out and apply the law and I want to know before this matter comes to me that the things that these guys can sort out themselves have been sorted out." Is that - - -

MR LANCKEN: I wish I could be as positive as that. I think partly judges do this because they see it as a case management tool which I think is quite dangerous. However, the other side of that is that it means that people are experiencing the opportunity to solve their own problems much earlier in the case.

There are some judges who actually get the difference between having a decision made on the rights and having a decision made by the parties themselves, in terms of their interests. There are some judges - but of course we shouldn't expect all of them to because they've been lawyers all of their life and their frame of reference is a rights-based system.

MS HOLLIER (LEADR): And what's more, we think that's appropriate.

MR LANCKEN: Yes, it should be too.

MS HOLLIER (LEADR): We don't want an alternative to that. What we want is that people can access an interest based process in which they get the opportunity to determine the outcome. I think the fact that so many judges do refer to mediation is positive. From our point of view, it's still not the best use of resources. To actually have to file to go through numerous steps and then to get referred to mediation has made the case much lengthier than it needs to be and costlier and using what should be seen as a very precious and costly resource of court time to do that.

DR MUNDY: It does raise the whole question, given the amazingly low rates of matters that actually go to trial, how the court is something much more grandiose than the dispute resolution framework is.

MS HOLLIER (LEADR): Yes.

DR MUNDY: I think the statistic begs the question.

MR LANCKEN: Sorry, I don't want to interrupt but what's interesting in the way some of the lawyers frame this, especially judges, they say, "Yes, we think mediation is very good once things get into our system but don't mandate it beforehand, before it gets into our system, because that's dangerous because it limits people's access to justice." That's a discussion that's really worthwhile having, if only for educative purposes because if it's worthwhile to engage in a discussion at this point, why is it not worthwhile engage to in a discussion at this point earlier? I just can't understand the difficulty. Sorry, I interrupted.

DR MUNDY: Or what is the court doing? What is the court doing that the parties couldn't have - - -

MR LANCKEN: Couldn't have done themselves, that's right.

MS HOLLIER (LEADR): Yes, that's right.

MR LANCKEN: That's right, and is there a benefit? This is where the dearth of

information in statistics is worth [worst?]. What would be the benefit if people were able to resolve their disputes before they filed the piece of paper in the court?

DR MUNDY: Yes.

MS HOLLIER (LEADR): In fact we do know that that happens. You acknowledge that in your report; that there's a lot of people who just get on and - - -

DR MUNDY: Do it.

MS HOLLIER (LEADR): - - - get things sort out and the court's lawyers don't hear about it.

DR MUNDY: One of the things, well, there have been a number of observations made about when ADR, however you might want to describe it, is not appropriate: you know, suppression of rights. There have been arguments put to us that some fora are much easier to get a positive outcome; that when you get it if you had a meritorious case you would have got a better outcome in court. You might have got it later. You might have got it at a greater risk of failure.

MS HOLLIER (LEADR): Yes.

MR LANCKEN: Then there are questions of the public interest in establishing precedents at law and so on.

DR MUNDY: Do you have a view on when ADR isn't appropriate and the matter should just go to court?

MS HOLLIER (LEADR): I was just going to say - - -

MR LANCKEN: You can go first.

MS HOLLIER (LEADR): Yes. I think what we need to be doing is to be providing the process whereby the participants themselves can be making those kinds of decisions. They need to be well-informed decisions. I'm always interested in the argument that says you would have got a better outcome from court because very often "better" is only measured on one dimension. It might well be that I might have been able to get more money, a larger settlement of money and the cost might have been that I would have been involved in the process for two years longer and would have dealt with a whole lot of stress.

From the individual's point of view, the better outcome might have been to take the lesser amount and be able to move on, and of course better if you're thinking

about "What did I actually get in the final settlement?" hasn't been considered, say, from a business point of view of "How many hours have I spent in that process, so how much have I lost?" I guess understanding the nature of outcomes of course is really important and we need to know that there's many dimensions to those outcomes and they can't be measured simply on the basis of that single - - -

DR MUNDY: I am interested in this point because I have a personal view. Interlocutory proceedings, restraining orders, mining companies about to drive through a piece of pristine wilderness, presumably that's a matter where the courts are more suited?

MR LANCKEN: By definition, if you need urgent relief, you need urgent relief because the only thing that's going to stop that mining company is a court order.

DR MUNDY: Yes.

MS HOLLIER (LEADR): Yes.

MR LANCKEN: But what we know is that then the court will say, "Stop doing that now and go away and talk." So there's a difference between the act of wanting to hold something up for the time being - - -

DR MUNDY: And resolving it.

MR LANCKEN: - - - and then talking about it or resolving it later on. So it's absolutely true. People shouldn't be prevented from seeking urgent relief from courts, if they're concerned that their health, their rights or damage is going to be done that is irreparable. That's obvious. The only other place where ADR is obviously inappropriate is where there's a risk that somebody will be hurt. The number 1 rule is do no harm, so if there's a risk of mental or physical damage it doesn't happen.

DR MUNDY: I think most people will generally accept that that's - - -

MR LANCKEN: But otherwise I think Roger Fisher was asked, "Would you negotiate with terrorists?" and he said, "At least I'd go along and listen to them." I think there's no harm ever in listening and talking because the information gets exchanged and we can find that 60 per cent of cases where the decision was wrong because the wrong information was given or - - -

DR MUNDY: What about those circumstances where there are real and legitimate issues of law that are of such a profound nature that there is a public interest in them being dealt with. If you had a triage system in a court and the registrar was alive to

that, would that be a circumstance where you think it would be appropriate to say, "No, this really does need to go to court even though it mightn't be in the interests necessarily of the parties"?

MR LANCKEN: The parties can choose because the parties can choose to mediate any time but if we have the default system that I suggested, that is that you need a justification, one of the justifications that you would make is, "No, this case affects 3000 other cases and we need to have a decision here so that these other 3000 cases can be settled." I think that those sorts of cases in fact not only should be going to trial quickly but they should be given priority, so the other 3000 can sit down and talk about things.

MS HOLLIER (LEADR): I don't have anything to add other than to say that's exactly LEADR's view too. Actually I do have, I guess, that point of emphasis that we don't want to be finding ourselves in an argument of ADR is better than litigation. It's very much about saying, "What's the most appropriate here?" and very often ADR is going to be the most appropriate and there are going to be circumstances such as urgent relief, such as public interest matters, such as risk of damage or harm.

DR MUNDY: One other circumstance has been raised with us and it's really in the context of an ADR based arrangement, say, in a tribunal, relatively minor matters, and dealing with the matter, say, with an ombudsman where the concern is raised that the privately mediated ADR process doesn't bring forward systemic problems. It might be as simple as water bills or low scale commercial disputes, whereas in a framework where outcomes are publicly reported or at least captured by some sort of industry or public agency, and it goes to your point, Steve, the systemic problem gets captured and can be dealt with, whereas the privately resolved matters I guess the question is: in those circumstances, if we had a framework where they were privately resolved, are we reliant upon the ADR practitioners who mightn't be organised in any systemic way to somehow get together and say, "Look, we've dealt with 48 of these things in the last six months and the problem is X. Will someone just hop into the parliament and fix it because we are sure there's another 500 of them out there." Whereas reporting of cases and the public airing of these matters is important.

MR LANCKEN: I think the fear is expressed but nobody can point to the reality. That is the difficulty.

DR MUNDY: Welcome to our world.

MR LANCKEN: There are plenty of lawyers who want to run cases on a public interest basis and we have legal aid systems. I just can't imagine a situation where that hasn't occurred.

DR MUNDY: How do we learn about the outcomes of these mediated matters so we as public policy practitioners can actually - or as people who are interested in law reform; you know, a simple change to the law. It might be that the law is crap. How do we bring this information to light so we can deal with it?

MR LANCKEN: I think there are some examples that I can give - - -

DR MUNDY: That would be very helpful, if you could.

MR LANCKEN: - - - where there may be a need. People in the native title area, especially in relation to future use compensation and those sorts of things, where most cases are mediated, in fact it is very hard to get a determinative decision. They have trouble pointing to standards of what is fair compensation. I think that is the best example I could give you. I think that's because that legislation has got it back to front. It says that everything has to be mediated and there is no way you can get a trial.

I think while ever we have robust courts, and nobody is suggesting we shouldn't have them, people are going to take those sort of issues to trial and we should support that. That's the best example I can give. I think we do need objective criteria and standards by which people make decisions. I think there is very little evidence that additional use of people talking to each other prevents us from getting those standards through the courts. There are still plenty of cases being tried and plenty of decisions being made.

DR MUNDY: How do we find the problems? The great thing about industry ombudsmen of course is that they find the problems.

MR LANCKEN: They find the problems.

MS HOLLIER (LEADR): Absolutely.

DR MUNDY: Then if there is enough of it, they go "eee" and put up the flag.

MR LANCKEN: It may be that it is possible - I don't know how. Legislating per se for mediators is problematic but if there was an opportunity where a mediator could make a report on a confidential basis and say, "Hey, I think there might be a systemic problem here. I sign a confidentiality agreement with my clients. If I did that, I might be breaching their confidentiality" - my morality would say that if I discovered, for instance, in an area of banking and finance where banks were ripping off farmers, and that is not happening but let's assume there was a systemic drive by banks to rip off farmers, I would want to say something about it; but the experience of the Farm Debt Mediation Act is not that that is going to occur because there are

lots of farmers who are prepared to take their cases to court, notwithstanding the fact that they have got to mediate first.

MS HOLLIER (LEADR): I think broadly we are saying that wherever there is a public interest, then that needs to be pursued. I think ombudsmen themselves serve a really valuable process and they actually do deliver a particular form of ADR so we would see them as continuing to perform a valuable service. I think what Steve was alluding to is - perhaps the business about reporting is something we need to think about further. We haven't had to address that as an issue in the past. Moving forward, it might be something that we want to actually consider. Would there be some way that we could do that while we keep faith with the notion of the confidential mediation process.

DR MUNDY: We have gone about our work in this inquiry. We can get limited information about litigation but we don't know what goes on between lawyers and their clients before or after the matter. I mean, it is part of a broader problem about the statistical and evidentiary underpinning of understanding the problem.

MR LANCKEN: That's right. There's a broader issue as well though. The challenge for me is - and I hear what you say. We want to make sure we have standards by which people can make their decisions. Courts provide us with standards but if we say that mediators, for instance, have to report and people don't want to report, then they are just going to go somewhere else to resolve their disputes without a mediator and we have got one less independent person helping people have the conversation. Anybody can negotiate a settlement. They don't need a mediator.

MS HOLLIER (LEADR): I actually think too that you don't actually need to get to the resolution point to start identifying that there is a problem. I mean, if there is an issue that has come up between an individual and a government agency, even if the outcome is confidential and the proceedings of mediation were confidential, the government agency knows what the issue is. There is already information out there about what are the matters that are causing us concern from particular industry areas, whatever area of business you would think about. Those industry associations know what are the problems that our newsagents are facing or our telcos are facing.

MR LANCKEN: You have probably spoken to the AAT. Their registrars deal with the government. They have an outreach program for government. They go to government departments and say, "Hey, we have had 15 of these similar complaints and it seems you are losing them all. What is going on?" That's a really valuable part of the, inverted commas, services of the AAT.

MS HOLLIER (LEADR): It makes me actually wonder whether there is a question here. If we have been relying on the outgoings from litigation to come up

with - what is it that we need to change? Again I'm confident that that information is already there available and you are not going to need to know what the mediated outcome was to know that there is an issue here, because businesses and government agencies are able to tell you what their time has been taken up on and what problems they are having to solve.

MS MacRAE: Can I just ask two questions on a pretty different tack? We have heard in a number of submissions that ADR for indigenous communities can be quite different and the style of mediation that suits them is different. We had the Small Business Commissioner tell us that small businesses would much rather enter into something they call facilitation. I think it is the same thing but they like the word because it doesn't sound as confrontational.

We have also heard from the disability sector that for a lot of people with disabilities having an advocate there and being able to have them effectively as a sort of go-between when there is mediation happening can be very helpful.

In the training and the accreditation sort of process, do you look at some of those specific issues for the groups that might have particular problems accessing mediation and finding it a suitable forum to attend?

MS HOLLIER (LEADR): I guess to talk about it just as an outcome from training would be not to grasp the full sense of it. The training is pitched at sort of threshold levels. What we would be saying is that we are looking for practitioners who are accredited. It means that they have got a certain skill level and then they should be able to design the process that is going to be appropriate to the particular people, so who do you need there to be providing the support to those who are engaging? Do they need legal support? Do they need someone providing financial support or some kind of other advice, business advice or family advice? All of those things can certainly be brought into the room, as well as adapting the mediation process; you know, where do we hold it, over what time frames do we hold it? All of those things are potentially able to be done by a skilled practitioner.

MS MacRAE: Are there enough practitioners who can maybe get to those niches? I mean, from what we have heard and we haven't heard a lot yet from people from the disability sector, there does seem to be a real barrier for them in terms of being able to access any form of justice that a person with a disability is able to really participate in. Mediation would potentially be something that, being less adversarial, is more accessible to them.

MR LANCKEN: I think part of this comes back to - we don't have enough information or data. We don't have information or data about the needs of those people to assist us, although we are starting to get it. We know, for instance, in the

small business area that there is a type of process that works quite well in the small business area for lessees and franchisees.

The disability sector is another issue for us. I have a friend who works as a Guardianship Board member and they are experimenting with some sort of facilitated - or they are about to; I think they are thinking about some sort of facilitated process there. There you do have people with profound disabilities obviously. I must say, you having asked the question, I don't think we have addressed that as a profession well enough. What are the special needs and how do we address them? Fiona and I have done some work trying to create some pro bono processes of ADR to put in with pro bono legal services. You will probably [indistinct] disability and of course we have done a lot of work in the family area. That is obvious. We can see the benefits of having specialist family law practitioners. I think the question you have raised is a really good one.

MS HOLLIER (LEADR): Yes, and I think there is a preparedness within the sort of body of ADR practitioners to be looking at extending their skills, extending their understanding and knowledge, and partly at the moment what we need to do is to see how an investment of more time and energy in skills development converts to getting work, so there's a bit of a chicken and egg situation.

I think if we can be looking at reducing the barriers and increasing the incentives to use ADR, then we are also going to be able to look at what we need to do in terms of further skilling people to respond to particular needs that groups have.

MR LANCKEN: In terms of indigenous people, it would be worthwhile - do you know Ippei's surname?

MS HOLLIER (LEADR): I'm sorry? Ippei?

MR LANCKEN: Ippei.

MS HOLLIER (LEADR): Ippei Okazaki.

MR LANCKEN: He works in the Northern Territory with a specialist indigenous dispute resolution process.

DR MUNDY: I have met him.

MR LANCKEN: He runs around the Territory and he sees ADR very broadly. In fact he sees one of his roles as training people in communities to help solve problems.

DR MUNDY: He operates out of the Magistrates Court.

MR LANCKEN: Yes. They have got a community justice - - -

MS HOLLIER (LEADR): It's a community justice centre.

MR LANCKEN: He is galloping around the Territory all the time.

DR MUNDY: We met with him when we were in Darwin, whenever that was - six or nine months ago. That's probably where we need to draw this discussion to a close. Thank you very much for your time and the submissions that you have made.

MR LANCKEN: Thank you.

MS HOLLIER (LEADR): Thank you.

DR MUNDY: Just before we adjourn for afternoon tea, can I ask if Adam Johnston is here? I was just thinking - to bring matters on - if we perhaps had 10 minutes for afternoon tea. We might start at 10 past, rather than quarter past, if that is not a problem for you, Mr Johnston. Thanks very much. We will just adjourn for 10 minutes.

DR MUNDY: We might recommence these proceedings. For the record, could you state your name and provide an opening statement.

MR JOHNSTON: Of course. My name is Adam Johnston. I appear here as a private citizen, and am also the proprietor of a consultancy business, ADJ Consultancy Services. I am also a solicitor. I happen to be a member of the Law Society, but again I am not appearing for them or any other agency. I have also had prior experience in various ombudsman's officers, but again I'm only appearing in my own capacity, not in their capacities.

I guess my opening gambit would be, having considered your draft report, there's not a lot in there that surprises me. We seem fairly agreed on the issues and problems. Again, from my own perspective, and you would have seen a lot of that from my submission, I think an important way of moving this whole debate forward about access to justice is looking actually at the legal system and legal providers, and having a conversation that particularly some in the legal profession don't like to have, and that's the reality of their monopoly of service provision.

Again, from my own experience, there are any number of services I could provide, given my experience, but because of both a legislative structure and a historic structure, which relates back to a craft and an association model which really doesn't reflect legal need or commercial reality, or even basic human working realities, of the modern day. We are sort of stuck in a system which is lucky to come out of the 19th century, and here we are in the 21st. I mean, I think, in many respects, if anything, your final report needs to be far bolder and confront a lot of the vested interests, including the providers and governments and the court system, about how restrictive and rigid many of them are, and how many of the structures that remain still come out of bygone eras which are centuries old.

DR MUNDY: Thank you. Do you want to expand a bit on that? I mean, what services in particular do you have in mind, and what sort of recommendations do you think we could make that would deal with those?

MR JOHNSTON: Certainly, from my perspective, I'm aware of many lawyers, because I have worked with them in my various capacities as a complaints handler for both the New South Wales ombudsman, the energy and water ombudsman, various bodies like that, that there are many lawyers or law students working in paralegal positions. They develop a series of skills around dealing with problems, analysing problems, dealing with administrative matters. One of the things I've discovered through my learning and the law is that, unfortunately, none of that experience will be officially acknowledged by the Law Society registry, for example, when seeking credit for the attainment of a unrestricted practicing certificate,

because they require, partly due to the Legal Services Act and the Legal Admissions Board, that all work be done under the supervision of a senior solicitor who has an unrestricted practising certificate.

The reality of employment, I would put it, these days is many people, or most people, couldn't walk into any office, any agency, be it government or private, and insist that a term of their employment be that they be supervised by a person who is also a solicitor with an unrestricted practising certificate. What I would, firstly, be suggesting is that there be more flexibility put into the types of work that can be recognised towards professional competence. Equally, I think the Law Society and the Law Society registry, again because they have a privileged, legislatively enshrined position to dispense practising certificates and deem you qualified and competent or not, they tend to not want to consider or look at on a reasonable basis other comparable qualifications.

I can give an example there, in that I have, throughout my working life, been on a series of temporary contracts. This seems to be the nature of modern employment. You go on a temporary contract, you're above establishment, so that when the business cycle comes around again, you are the temp, so the money runs out and you go off; so it's difficult to maintain ongoing employment in that way. So in between times you go out and you try to find other qualifications to make yourself more employable. I had an employment agent who recommended that I undertake a small business course.

They assured me, as did the provider, that they were recognised and funded by the Commonwealth, that they offered a nationally-recognised qualification in Certificate IV in Small Business, that I wouldn't have difficulty getting it recognised anywhere. When I did that and then went back to the Law Society and said, "Will you recognise this for the purposes of your practice management course?" They said, "No, because it's not recognised or approved by us." So I then presented them with all the documentation I could find from the department on its web site about how the federal government officially recognised this. They said it was a formal, official qualification. The law registry and their committee processes still said, "No, you will still be required to do the full practice management course, regardless of the fact that you have already clearly done a unit on running a business and business processes."

What I can say is that there were elements of the practice management course that were specific to running a legal business, but there were also elements that were clearly generic and that would clearly have fitted under the certificate in small business. So in fact it's arguable that - there was really no reason for the law registry not to recognise at least some of that other course.

DR MUNDY: So if they had have come back to you and said, "Yes, we will let you off that, that and that, but you've got to do that and that", that would have been a reasonable outcome?

MR JOHNSTON: Yes.

DR MUNDY: I guess, just a related question, we have had a look at an initiative that's being undertaken in Washington State in the US, where they are accrediting or whether they have a framework to provide limited licences to practice in family law is the case in point. I was just wondering whether you had any observations to make that if the industry - and I use that word deliberately, because I think it is an industry, provides goods or provides services to people. We should see it as that but if the industry was to progress on a basis where people would have a licence to practice within a range of matters, let's say family law - you could think of industrial matters or perhaps planning, for example - whether that might facilitate this broader recognition. Do you think the issue about an unlimited practising licence might be resolvable at least in those areas where the expertise is more specific?

MR JOHNSTON: Certainly, and I think it would actually talk to a more general situation, where it's certainly my observation and certainly my experience that many lawyers end up in situations where they become specialists in one or two specific areas and you will see this from the advertising that many do, that they say they are a specialist in criminal law or they put out ads, "Have you been charged by the police? Come and see me or ring me." Equally, others will be specialists in family law or specialists when it comes to wills or estates, so I think there's a possibility there to not only stop there in Washington State but to literally break open every aspect of what a lawyer might do and break it down into comprehensible sort of parts because again, I think it's fair to say that each one of those parts potentially represents a speciality in the real sort of modern legal world.

I think it's very hard to make a case these days that there really is a generalist lawyer. That might still be the case for some suburban lawyers but even on your own statistics that I noted in your report, they seem to be a declining number. Most or a sizeable number of the lawyers seem to be in larger firms in metropolitan Sydney or in the city and again, there what you are seeing is specialised business units or sub-units in large city firms and again, I think that's the way a lot of work is going. I don't see a lot of generalists anywhere and you can put that towards questions of other professions like medicine and science and virtually any other thing.

DR MUNDY: You can say it of economists as well. I guess following on from that, we would make some observations about the nature of legal training and legal education and whether the Priestley 11 is fit for purpose in the 21st century. Do you

have any views on that and more generally, and I think it's true of a lot of professions, you start out as a generalist - - -

MR JOHNSTON: And then you specialise.

DR MUNDY: And then you narrow it but I guess there are circumstances where people may come from other backgrounds or forms of training which may then converge upon certain parts of the law.

MR JOHNSTON: Certainly, and my response to that would be that I still believe there is a place, at least in initial education, for the Priestley 11, because what that laid down is the foundation and you can go on and build your house and build your specialty in whatever you like, so long as you have got the good foundation. For example, when I was faced with various questions at the ombudsman's office; people would ring up and say, "What sort of problem is this?" It was important to be able first of all to identify it as a government or public problem and if not, if it was sort of a private dispute between people, to be able to suggest a body or an agency or even, more generally, something like law access but also, if you could suggest the kind of issue this was and the questions you might consider asking, so you need to have some level of general knowledge.

I think the problem or at least the problem as I have perceived it, I would not be surprised for many sort of new lawyers or lawyers just trying to make their way is that the monopoly - and I will call it a monopoly because I think in many ways that's what it is - because it's a monopoly, it can then place prices and put additional regulatory barriers in the way of people who for all intents and purposes can argue their competence but simply because of running out of financial resources, may not eventually get to where they would like to go and from that, probably there are many lawyers and barristers or people who would be very competent there who never actually get to the point of practising because they simply can't afford it. I perhaps naively believed that when I completed law school, I would be able to call myself a lawyer. I very quickly learned that there were many other steps down the road and almost 20 years later, I am still making them. That's partly due to my own disability and physical limitations, I might add, but I still think there is some validity to the argument that again the modern world is very different from the craft or Inns of Court world that the law came out of.

MS MacRAE: I guess looking again at what our report has to say about legal training, we do make some recommendations about possibly making some changes to the undergraduate arrangements, but from what I hear you say, you say you are broadly happy with that, but it's the post-degree requirements that you feel are getting in your way here.

MR JOHNSTON: Yes, I would say that and additionally, I would add that one of the issues there is that generally, there is only one provider and it's almost like the fox being in charge of the hen house scenario, where the regulator is also the provider, sort of the provider, and the same body does just about everything, so it's a very in-house sort of arrangement and I think that limits competition on prices and that means that some perhaps questionable arguments can be made about, "We have got the control of the profession. This is a quality measure." No, it isn't. What it is, it's a price fixing measure and I'm quite sure that there are a number of other models and a number of other scenarios that could be far more competitive, far most cost sensitive than having the legal profession monitor, oversee and train its own but make that a financial income for itself.

For example, while I can claim a dispensation because I am currently unemployed, an understandable requirement of continuing legal practice is that you continue to undergo mandatory continuing legal education. An important point about that is the cost of gaining those points. This is fully fledged conferences of several hundred dollars at least, more like three to four hundred dollars, and for someone on a limited income like me, and possibly many other lawyers who are trying to run businesses, and running a business is always tight, that's a lot of money and that doesn't add in things like transport costs of getting to and from, other costs that might be involved as well, so I think there is a question there as to who provides it, at what cost, and just because there's a cost and just because it has been provided by the legislated association is not necessarily a guarantee that it's always going to be right or the best quality or that it couldn't do with some outside scrutiny.

DR MUNDY: I didn't have anything else.

MS MacRAE: No.

DR MUNDY: I certainly am quite interested in the observation. Is a solution to this problem that you raise with the Law Society in that really it's of - taking what you have said together is that you don't see any problem with the way, you know, the path that people can take. It's the absence of a forbearance or alternative paths.

MR JOHNSTON: Certainly, and it's the absence of obvious open competitive pressures on the Law Society and its related bodies, even the courts, as to the costs of those requirements, because I think you could end up with a far more competitive structure if that was allowed open.

If I might just add and go back to the point of sort of splitting up the specialities, one of the objectives of my consultancy business was to prepare for the oncoming National Disability Insurance Scheme. I know that the Commission has a certain degree of responsibility in this and I know that Commissioners at the time

obviously believed that they were doing the right and proper thing. I have already stated my concerns about it to the Commission and in a submission to the senate about the bill.

The point I would make that actually relates to the evidence I heard on arrival is that you express some concern about mediators and other ADR for being out of the view of public scrutiny in public courts. I would also sort of send up the same red flag at the executive and public administrative acts like the National Disability Insurance Agency. It not only has regulations but it also has under its legislation something called rules.

The regulations, as we all know, will be tabled and approved or disallowed by the parliament. The rules, on the other hand, are listed differently and I'm assuming, because no-one else has told me differently, that they're a different creature and my concern is that they will not be tabled or scrutinised by the parliament or anyone else necessarily.

My concern there is that you're already dealing with a potentially very vulnerable population, many of whom won't be either legally trained or necessarily have a good understanding of administrative things. They will have to deal with a range of sort of care bodies and other interests who will be sort of giving them advice, some good, some bad and then they will be presented with a body of rules or a body of guidelines. I have in the past which was the purpose of my initial submission to the Commission on the NDIS.

In a lot of situations it would be preferable - and I have certainly heard from some of these people and other vulnerable people on the ombudsman's advice line or complaints line - for these people to get formal legal advice or some form of formal advice but many of them, if not most of them, won't ever be able to afford it. I note that you make comments in your draft report of a lawyer who said to you, "I couldn't even afford my own services." That tells you something very important.

What I would be offering, if I'm allowed to do it, would be a lower cost service which dealt specifically with the problems of people that I would understand most, that I have had to deal with similar sorts of problems. Of course I have had the advantage of the training and the education but nonetheless the legislative set-up prohibits me from doing that at this moment.

If I take on clients and if I give out any advice, I have to be very clear that it is purely advice and if we get to the point of, "We would like you to draw up a legal document for us," or, "We would like you to write a legal letter for us," or, "We would like you to become our formal representative in a tribunal or a court," that's where I have to stop and say, "No, I can't actually do that. I'm going to have to refer

you to a lawyer who is probably going to cost you 10 times more and you're probably already a pensioner or a low-income person, so you can't afford that, but I can't do it for you."

I know that part of the answer might be things like Legal Aid and community legal centres but I have also worked previously for a community legal centre. They are fine as far as they go but I must admit to having certain concerns about public interest litigation, because what that can do is divert a lot of resources and a lot of time of another party who might be running a large business on litigation that they either weren't prepared for or they were trying to run a business or some sort of major enterprise and then they suddenly get advised of some group being subsidised by the government, their task is to object to their proposal, whatever it is, be it a mine or a colliery, something like that.

I would tend to argue that in many respects public interest should be the focus of the parliament, so those questions should be dealt with by the parliament, not the courts and that if we want to do something for civil process and procedure and individuals and businesses versus businesses, individuals and individuals in the courts, then we need to take Public Interest Advocacy out of the courts and we need to take it back to where it should be, in the people's representatives in the parliament.

DR MUNDY: All right. Did you have anything to add?

MS MacRAE: No.

DR MUNDY: Thank you very much for your submission and your time.

MR JOHNSTON: Certainly. Thank you very much.

MS MacRAE: Thank you.

DR MUNDY: Mr Orme, if we could please. If you could please state your name and the capacity in which you appear?

MR ORME: Bill Orme. I'm a retired solicitor and have particular interest in affordable justice and accessibility.

DR MUNDY: Thank you, Mr Orme. Just before I ask you to give an opening statement, you raised with us earlier the question of the publication of certain correspondence. I have subsequently checked with our office in Canberra and the Commission's policy is not to publish correspondence unless both parties to the correspondence consent to it.

So if we are able to acquire the - we have no objection to the publication but our policy is generally that parties to the correspondence need to consent and this is our general rule. So if the other party consents to the publication of - I think it was the Supreme Court of New South Wales but also other individuals which I won't name for the purposes of the record as they are now private individuals and not public office holders.

MR ORME: I have aimed to get their consent.

DR MUNDY: If you are able to procure such consents, then we will have no objection to publishing them. They pass all our other tests. They just don't quite go to the consent.

MR ORME: Thank you for clarifying that because I was disappointed - - -

DR MUNDY: You will understand that we have received an inquiry - - -

MR ORME: 220 submissions.

DR MUNDY: Indeed we have received raft of documents which purported to be submissions but have turned out not to be and they have been put to one side for a range of reasons, not only including that the comments were defamatory. So you will understand our caution in this regard.

MR ORME: I do.

DR MUNDY: With that formality over, could we ask you to make an opening statement.

MR ORME: I would like to make a statement and having listened to Mr Johnston, he has already made many points that are very dear to my heart and how eloquently

and directly he made them.

DR MUNDY: Yes, indeed.

MR ORME: And why a person with his ability is limited in his capacity to serve the community amazes me. In opening, I am in a slightly unusual position. My wife and I are long-distance walkers. We walk for six months a year and for sometimes two months at a time, we don't have access to the Internet, as we are in very remote places and while we were walking in April, May in France, I first heard about the Commission. I wasn't aware that you had an interest in probate and administering it until I had access to the report and as soon as I came back, I read it and quickly made a submission. If I could make two corrections in it: I didn't clearly say that I am proposing - I said under three and four that I would consider the Consumer Claims Tribunal as a possible body to take this over. I was more referring to the Fair Trading Division and its licensing division and conveyance division and things of that nature, if I can correct it, and I wasn't aware of your comments on cost recovery. I probably would have adopted that if I had read it before I ran the report.

The other thing by way of introduction, I might say that my original career was on a Defence Department scholarship to do a doctorate in the three dimensional geometry of space in combination with master in the British government and I have a deep interest in mathematics and things of that nature. I then moved to law and was lucky enough to be made a partner in a national firm, now DLA Piper, at the age of 22. I realised at that stage, going back to 1952, that my law degree and science was inadequate, because the law in those days didn't do much commercial, economics and mathematics, so I also qualified as an accountant, while my wife was having four children, and as a result of that, at the age of 24, I was made managing partner as well as being senior commercial partner and for 15 years, I set about putting many of the things I learnt in engineering to look at running an efficient, effective law firm, in particular critical path analysis, where I found that I could do things in half the time more effectively and in particular, make more effective use of senior lawyers and partners. In doing it, I'm very conscious of the cost of running an efficient practice and providing service to the community.

Coming to the particular issue here, in reading the submissions, I would like to concentrate on the issues of elderly people and particularly elderly women, as I have for the last 25 years been doing a regular Meals On Wheels run covering seven different deliveries and I hear continually the condescending attitude of particularly accountants and lawyers; 80 per cent of the people we deal with are widows and not only that, the unreasonable costs that are being imposed upon them in accessing the services not only of law and accountancy but other services. My particular interest in this started when I happened to be in the Probate Court to see the rudeness and lack of help by the court. The woman had received a requisition to comply with rule 42

and she asked what the rule was and she was told, "I'm not allowed to tell you." She then asked for a copy of the rule and she was told, "I'm not allowed to show it to you." I was so horrified by that, I presumed it was an aberration. I went back a week later and found the same sort of thing happened.

I took it up with the chief justice, who to my delight went in and pretended to be a member of the public and watched what happened and confirmed the same problem but rang me to say that they had been threatened with being sued so many times that the Crown Solicitor had directed the court not to help the public. I questioned that and asked could I be given a copy of the Crown Solicitor's opinion, because I disagreed with it, and secondly, I would like the statistics of how many times they had been threatened with being sued in the last five years. He rang back a week later to say it was embarrassing, that firstly, they had gone back 22 years, which is as far as the records allowed, and they had never been threatened with being sued as far as he could find out and secondly, even worse, the Crown Solicitor's opinion didn't exist. It was a furphy the court was using to refuse to help the public.

I have taken some time in explaining that but it's in that background that I then offered, he said, though not particularly good at helping the public, that a daughter and I, a lawyer, would do a do-it-yourself guide for the court "because if you do that, we will publish it and support it." We did it and produced it and as a result, it was then published. It was important to me that it wasn't a private document. It was the Supreme Court offering the service and deputy registrars were rostered daily to help the public. Very quickly, it got a lot of publicity in the media. It was very popular. My daughter came up with the idea that we created Mary: "And here is Mary's handwriting, how Mary did it, and here are the blank forms. Copy what Mary did." We worked with the pensioners association and the older women's network. It went through 18 drafts as they pointed out we didn't answer their questions. They couldn’t understand how we did. As I say, it was very popular.

The court, coming to this question of costs, refused and at first, the court gave us - because they arbitrated in glorious fees what the average solicitor charged. I put that in the draft. They insisted we take it out of the draft because they believed a widow should get three quotes and compare it, which is ludicrous. As a result of that, I said, well, I've heard of the Law Consumers Association and they are experienced in conveyancing and law and they were enormously helpful in developing the guide, working with the people we did, so I said to the court, "Let them produce a document identical to what you did with this further information in it." A Manchester health fund offered to fund it and it was produced on that basis with quite a bit of extra information.

In about a year, I started to get rung by people to say that they had heard me on television or read about it and the court was no longer handing it out. I put in the

submission, I went and pretended to be a member of the public and was told that, no, they no longer handed it out because it was so full of errors, they couldn't vouch for it, even though of course they had approved it. When I wrote to them, asked them could they tell me what the errors were, being the Law Consumers were reprinting theirs, they told me very bluntly that it was not their policy to help non-government bodies. I then offered to send the correspondence to the Sydney Morning Herald. Then they reluctantly told me that they had changed it, a minor change in one of the forms and they had increased the filing fee and they were the serious errors on which this service has been suspended.

The court now tells me it's been trying to getting it updated. I might say I have updated it and it's ready for publication but they are not prepared to do it any more and their words are, "It is no longer in our business plan to help the public. We only want to deal with solicitors and trustee companies."

Lawyers, equally, have now taken action. The Law Consumers Association, in our work with the pensioners and the older women's network, we found they fell into three categories, those people that wanted to use lawyers and accountants, and that's fine. The second group wanted to do everything themselves. They said, "We have been under the thumbs of men all our lives. We want to be independent. The lawyers pat us on the head and say, 'Go home, dear, leave it to us. We'll fix it.' We want to do it ourselves." They want a bit of help like this, but they want to do it themselves. The third group said, "Look, we want to learn to do things ourselves, but we don't like dealing with government departments, so the law consumers, for a fee of $45, said, "We will help you fill in the forms. We will lodge them for you, we will help you answer requisitions, and that will be a service we provide to you."

The Law Society employed a private investigator to investigate this service, and this is coming to what Mr Johnston was saying, and took legal action against the Law Consumers Association for helping them fill in the forms, as a result of which they had an injunction to stop them doing this, and had to pay $21,000 for the Law Society's costs.

It's in this atmosphere that I add to the submission I have put, and the final thing there is that the Supreme Court of New South Wales virtually has no statistical information of what sort of applications, who they are lodged by. I have on a number of occasions found in the widows in the Meals on Wheels service that accountants are charging them $400 to lodge a tax return which they are no longer required to lodge, they can be exempted from lodging it, but they don't tell them and they continue to do it. So we are having services like the law consumers restricted by the Legal Practitioners Act that make it impossible for a person to assist people.

In addition, we have got the fact that by protecting themselves, as I put in the

submission, lawyers tell me, "It is out last remaining area of fat." Not only is it an area of fat, and that is true, but it is on a very vulnerable section of our community. These widows who have paid the medical fees, funeral fees and that of their deceased husbands, have no cash; so the lawyers are maintaining this monopoly, restricted monopoly, I think, and to say in our sophisticated society, we are applying for a credit card, trading shares on the Internet, doing things that - filling in one form, and that's all it is, there's no legal advice needed, that on a default basis the form is lodged; if there's no objection, probate is granted - that women are incapable of doing that is not only denying access to their justice in this area, but it is insulting to them.

The final thing, as I say, if I annex to that my exchange. I have for seven years after I left law initially, was the first Privacy Commissioner with very large - we produced 59 reports in my seven years, right across the society. We dealt with some 20,000 complaints. I then went on to head one of the royal consultancy agencies, conducting surveys as well as all sorts of issues. I offered the court, with their lack of information, because I believe, like tax returns are being lodged where they're not necessary, that many probate applications are being lodged where it's not necessary to obtain probate, to ensure that thousands of dollars are charged for fees, that the forms could be greatly simplified and procedures greatly improved so that we could have a much more efficient service.

I offered for a dollar to do a month's sample for the court, because agents don't collect any of this information, and as you have access to that correspondence, you can see what the result is; so I would be looking for two things. One is that the Supreme Court in its costs structures and procedures and attitudes are such that it is not the appropriate body for dealing with these, it should only be dealing with disputes, and probably even not generally disputes as there are many cheaper and more efficient lower courts who deal with the vast majority.

You put in your report, which I don't have, that there are 66,000 applications a year. I have the New South Wales figures, only in the rawest form, there are 22,000, and it's amazing how consistent it is year by year, but only 150 of them are disputed. Virtually all of these 22,000 are just straightforward clerical procedures, and we have an average fee of about $1800 to do this. So I say in summary of all this, one is I don't have the statistics, I wish I had, which I had as Privacy Commissioner, royal commission powers to do it, but I'd certainly offer my services, because I believe my background and my privacy experience means that I do have the skills to do a study if the Productivity Commission wished the study to be done and was interested, I would offer my services to do it for the dollar, and I think the reason the for dollar is that so you would be contractually bound and there would be the normal protections of confidentiality and that nature and, secondly, I believe these sort of procedures should be looked at as being dealt with by much lower courts, where they can be more efficiently and economically done.

Thank you very much for all your time, and I apologise for the looseness of the original submission.

DR MUNDY: Of the 150 matters that are disputed, do you have any sense of - I mean, one would have thought that a number of these disputes would be relative low grade, relatively simple and could be resolved. Probably, they would be no more complex than matters which are typically resolved by tribunal members in all sorts of places or maybe, on a bad day, by a magistrate. I mean, how many of these matters of the 150 would you think really need the attention of a Supreme Court judge? Are we talking about - - -

MR ORME: I, unfortunately, I tried to get his information, but it has been denied to me, the letters that I would like to table, but until I get consent, written by leading judicial figures. The comment in one of them, I was delighted to see, I said, "The trouble is, every time I deal with a bureaucracy, I get a bureaucratic reply." The letter said, "He thinks that if he continues to deal with the bureaucracy, he will only get bureaucratic replies. I am inclined to agree with him."

This is the problem, and this is one of ways the profession and the courts defend themselves. When I was Privacy Commissioner, there was a comment that you didn't have teeth. I didn't want teeth; I had two powers. One is I had enormously and too broad, because one of my functions was to try and define privacy, and therefore you have to go beyond the boundaries to say you have done too far, so virtually I had unfettered royal commission powers, but secondly, and most importantly, while I had to report to parliament once a year, I had the right to report to the public whenever I wanted and the right to find the facts and the right to inform the public unfettered is far more important than the right to enforce, because I used to take the view on the very rare occasions that it had happened that if your recommendation at first wasn't accepted, that was a plus to me, because it made me say, "Maybe I'm wrong."

So I would go back and re-think and re-study and secondly, maybe I didn't argue it well enough. It meant you performed better. The court hides behind the fact, I think, it doesn't want the study done because it doesn't like it, the same as the spurious Crown Solicitor's opinion. It doesn't want the facts known and I am convinced that if the facts are known, the problems will be pretty quickly rectified because they couldn't stand the scrutiny. In the Law Society, the definition of "legal work" should be far more restricted because in this sophisticated society, there are many people who are more suited than lawyers to deal with many of the problems that they are now restrictively considering.

DR MUNDY: The issue of processing of wills, as I said, is on the boundary of our

terms of reference.

MR ORME: I didn't think at first it was within the terms.

DR MUNDY: We will give it some thought and see if we can shine some light on it with a creative reading of section 89. Thanks very much for your time, Mr Orme.

MR ORME: Thank you.

MS MacRAE: Thank you.

DR MUNDY: Can we now have the Australian Lawyers Alliance, please. Could you please state your name and affiliation for the record, please, and then if you would like to make a brief opening statement

MR STONE (ALA): Certainly. I am Andrew Stone. I am a barrister in New South Wales. I am the president elect of the Australian Lawyers Alliance.

MR SCARCELLA (ALA): I am Anthony Scarcella. I am here in my capacity as New South Wales director of the Australian Lawyers Alliance. I am a solicitor of 38 years' standing, former Local Court and District Court arbitrator, one of the 2000 nationally accredited mediators you heard about before and I am happy to able to give some evidence today.

DR MUNDY: Thank you; if you would like to make a brief statement.

MR STONE (ALA): Thank you. In short terms, our members are the people who act for the injured. We represent plaintiffs in personal injury actions around the country. In that respect, we are quite possibly the single largest facilitator of access to justice amongst the legal profession in terms of the capacity to claim for personal injury would shut down overnight if our membership wasn't willing to act on a speculative basis and carry the costs of running those cases to a conclusion. No-one anywhere in this country pays up front to bring a personal injury action. The risk is borne entirely by the legal profession. The costs and disbursements are by and large borne by the legal profession and if we stopped doing that, people stop getting to sue for being injured and we take considerable pride in our willingness to do that, including taking on difficult cases. That means from time to time, we don't get paid. It's just part of our process of doing business.

You have our submissions and it might help if I focused on what we saw as being two important points that we summarise at paragraph 49 in the conclusions. The first is that by and large, we and our clients deal with institutional defendants. It's either government insurers or private insurers and that's in part because where there is no insurance, we don't sue. We tend not to pursue private individuals except in fairly rare cases. Because they are institutional defendants, without us, our clients don't do as well and the statistics clearly bear that out. Part of what you look at within, for example, the New South Wales motor accident scheme is they say, "Well, introducing lawyers means that costs go up," and when the motor accident authority complains about that, they are not complaining about legal costs so much going up. It's about the actual claims costs going up and we say when we meet with them, "Well, yes, because we make sure our clients know about the heads of damage they are entitled to recover. We make sure they get what they are properly entitled to."

Strip us out and people have no idea what they are entitled to. They have no

idea they can negotiate with the insurer. They have no idea of the relevant criteria to apply to determine the value of their claim. I am very keenly aware that from an economist's perspective, a phrase I heard years ago, that the plural of anecdote is not data, but having expressed that awareness, let me nonetheless give you an anecdote of a short story. I was called upon by a mate of a mate to look at somebody who had been dealing with their own personal injury claim, knocked off their motorbike, fractured wrist, had gone back to work but had some difficulties. I met them for breakfast at my regular hang out up in the Phillip Street where I sit and do some work before everyone else gets in. They came in and met me.

We looked over the paperwork for their claim that consisted of about half a dozen pages of paper, including the insurer made the offer for 90,000 odd to settle the case. I applied my knowledge and learning to it. They wanted to take it, said, "Look, you know, it's not much but I want out." By the end of the day and after three phone calls, there was a negotiated settlement and I think it was just over $200,000, because that's what we can do. Most cases are a lot more involved. Most cases, it's not done in a day because you are involved in preparing things from a lot earlier on and getting it prepared and that was a case that might well have been worth more if you are prepared to bear with it but the short answer is, the injured unrepresented get ripped off, full stop. Strip lawyers out of that process against institutional defendants, all of whom have vast hordes of in-house lawyers themselves, and that is nowhere a level fight.

The second point we make is out of some concern about the Commission's comments about tribunal systems. We think and we know from the experience of our own members acting within tribunals that we facilitate the smooth passage of matters through tribunals. Again, my area of expertise, motor accidents in New South Wales, is dealt with by a tribunal, the Claims Assessment and Resolution Service, and our members act as CARS assessors, the abbreviation, and their universal experience is they hate cases involving unrepresented litigants, because they are not organised, they have unrealistic expectations, they don't appreciate the way the systems work and those cases take twice as long and twice as much effort.

Given that our members act on a speculative basis, we have no interest whatsoever in unnecessarily dragging out cases. We want them done, so that we get paid. We want them done because from my perspective, I want to maximise the amount my client gets out of it and I want to minimise the amount I have got to take out of my client's money for the client's costs to get it done. I don't act for the injured so that I can take their money. I act for the injured so that I can get them money and that's exactly the view of our membership, so we think we do have a real value to add to the system and we also that we help enormously in getting an awful lot of cases out of the system that wouldn’t be there. We are the preliminary filter.

Almost invariably, our members will give people a free first consultation to discuss. They will then quite often continue to explore the options before six or 12 months later, having done a very thorough investigation of the claim, saying, "Look, you can't win this case" or "You can and it's not worth it because the damage is limited to this." We are a very effective filter in actually getting cases out of the system where people unadvised would tend to proceed ahead. We are also very helpful at reshaping people's expectations out of the system within the system.

One of the ways in which that happens is that you have in effect got three parts to the claim: can you prove liability; did someone do something wrong that caused you injury; is there any contributory negligence, and then what are the damages. The one where we do quite a bit of work with people that is tough is people are very poor at understanding the concept of contributory negligence, that you are partly responsible for your own misfortune. It's a fundamental aspect human nature called cognitive dissonance that in order to maintain our own self-image, we don't like to be partly to blame for the things that happen to us. You find that amongst children, and a lot of us never grow up, so an awful lot of what we have to do is explained to people why this is partly your fault.

That's a lot more difficult without us taking that educative role over a period of time and attuning people to the idea of, "Look, you have got to compromise the damages in this case, because you're partly to blame. You should have been looking where you were going. You should have exercised more care. There were things you could have done that could have avoided this accident, as well as the other party." So that's where we also think we have an important role to play in shaping expectations and then negotiating settlements.

Within my practice, I view it as almost a failure if I get to court, because that means that I haven't been able to negotiate a deal that satisfies both sides and gets us out of there. I do a lot more settlement conferences that I do court appearances. I know Anthony has got one or two things he wanted to say. The only other thing is, I won't say it now, but I invite you to ask me a question about offers of compromise, because that's a particular bugbear of mine over a number of years in the unfairness of the offer of compromise regime, but we'll perhaps come back to that and let Anthony have a word.

MR SCARCELLA (ALA): I just want to come to a couple of matters in relation to self representation. I can speak with some little authority, having been a Local Court and District Court arbitrator for some years, and that is that I'm certain that the overwhelming majority of judicial officers or quasi judicial officers have a real struggle with self-represented litigants. There's a real dilemma, because you are faced with wanting to make sure that the unrepresented litigant has an opportunity to get their case out, but on the other hand you don't want to disadvantage the other

party who is prepared and who is represented by showing too much leeway on the other side.

I can understand the reasons between preparing some sort of a protocol for self-represented litigants as a last resort, but that would be as a last resort. The whole idea would be to avoid that scenario happening in the first place, and there are a number of factors that have been taken into account in that regard, and that's the diminishing availability of legal aid, what can be done to do that. I myself am a volunteer of Salvo's legal humanitarian, and we do a lot of filtering at our advice bureaux. We see people coming in off the street in all sorts of matters - criminal, matrimonial, police, traffic, those sorts of things - and a lot of the time I suppose really the inquiry is really a general guidance; it doesn't require so much legal advice as to pointing someone in the right direction.

We do need filters. The Australian Lawyers Alliance members, as Andrew has said, form a filtering work in the system, and we add value to the system. Our concern is that we really have no great issue with the majority of the Commission's draft report. Obviously, we have something to say about concept of what the value of our services are, and that goes back to, if you consider it carefully, those who continue to use our services, and you will really find, I think the statistics will show, not that I know where you get to find them, except in the Supreme Court and the District Court themselves, if they keep those records, that most personal injury clients are represented, because we do provide the service and we provide the value.

DR MUNDY: I think, just on this question of representation, I mean I think, and maybe we weren't as clear as we might have otherwise been, but I'm pretty certain there were words around "where appropriate", and there are tribunals, and there are jurisdictions which have been set up for the purpose so parties can self represent. What has been put to us by a range of people is that there are a significant, perhaps a majority, but a significant number of matters within those fora where the presence of legal representatives doesn't help.

All we are saying is that those fora usually have rules where appearance by representatives is allowed by leave, and I think we canvassed some of those before where in the former there might be a normally self-representing fora, but someone might, say, have experienced some form of disadvantage. I think all we are suggesting in that space is that those rules, which were constructed for the purposes of those foras, are perhaps not being enforced with the rigour that the architects of those foras had intended. I think we also make very clear there are places where we think absolutely people must be represented, for example, guardianship matters is by far - - -

MR SCARCELLA (ALA): Yes.

DR MUNDY: So I think that's - it has been put to us by presiding magistrates that their courts should be places where well-informed, capable citizens should be able to come unrepresented and get matters, certain types of matters, resolved. I guess where I would like to start is that we have attracted some notoriety about our propositions about contingency fees, and given that you are probably on the boundary of people who may be able to benefit, or at least participate in such reforms, whether you have any views on - - -

MR STONE (ALA): I don't think we're at the boundary, I think we are at the very core of it.

DR MUNDY: I was trying to protect myself.

MR STONE (ALA): What in the United States would be called the ambulance chasers. I know the Law Council has done some fairly detailed research work on this, and I was given to understand that they were going to be sharing that with you.

DR MUNDY: They hadn't as of lunchtime that the staff were aware.

MR STONE (ALA): Right, okay. You have heard rumours of their work on the subject?

DR MUNDY: I understand it's coming.

MR STONE (ALA): Right. I have seen that in draft as part of the consultative process. The ALA were consulted by the Law Council in doing it, and they have done some detailed work. I can see arguments for and against. Before we even start down this track, it's going to be over the dead bodies almost of every state government, as far as I can see, on a political level.

DR MUNDY: So was tariff reform.

MR STONE (ALA): I'm not saying, you know, you shouldn't recommend as part of the groundwork of what might in the long term lead to changes of thinking. At a personal level, and this is purely personal and not organisational, I have a reservation about taking a part of my client's money that is intended to cover, in effect make good the damage done to them. If there's 100,000 plus treatment expenses that have to be paid back to somebody else, to doctors and so forth, well, I struggle to think that I should get a third of that, or 25 per cent of that, or any part of that.

I think there is something to be said for a system that reimburses people as they properly ought to be reimbursed, and then takes care of the costs of having to get that

reimbursement on top of it. A lot of the American jurisdictions, were that to allow the contingency fee, that then becomes the costs and, at a personal level, I've got an issue with taking the money out of my client's pocket, rather than having the insurer behind the person who caused the injury pay them their proper compensation, and the Lord know, we have long since abandoned the concept of proper compensation in this country; with the caps and thresholds, it's nowhere near proper. At a personal level, I don't want to be a further impost on that. That's my reservation, but there are arguments for it.

DR MUNDY: Yes. Let me perhaps ask a more specific question. I mean, one of the concerns that are expressed is this will lead to an outbreak of unmeritorious litigation, and the courts will be full of unmeritorious claims or there will be various forms of black and greenmail perpetrated on defendants. That's perhaps an extreme characterisation, particularly of the case in the US. Our observation, at least initially, would be, "Yes, but we have this thing called adverse costs orders in this country." Would it be your view that, whatever the volume of litigation issues that may bedevil the United States would be significant, are significantly mitigated by the presence of adverse costs orders, or is our concern really you don't think there would be this rush of litigation?

MR STONE (ALA): I would be surprised if there was a rush. I think, given that people are willing to act on spec currently, if there's a viable claim with a reasonable prospect of you getting paid, and subject to the client being willing, you run the case, subject of course, not now that negotiated settlements - you start the case, you pursue the case - better than saying run the case. I must say, there is probably in our minds some small degree of sliding scale in that I'm more likely to advise the client to run a fifty-fifty case if there's a million dollars at stake, rather than if there's $20,000 at stake. I'm more likely to run it if they have no assets and therefore have nothing to lose personally.

I have a risk of personal liability if it's entirely unmeritorious but provided there's a viable argument, I'm protected as against adverse cost orders in New South Wales currently. It's purely the client. I'm more likely to run the fifty-fifty hundred thousand dollar case for someone who has no assets compared to someone who has a mortgage, a house and puts assets at risk. So difficult cases are more often run by the impecunious or at least on their behalf because they take less of a risk in the system.

Having said that, even for those with assets - you know, if it's an arguable case, you're on it, you lose it. It's very rare that you see an insurer pursuing costs because usually the threat of, "Well, let's go to the Court of Appeal" - at that point they offer to walk away and pay their own costs. I don't see a floodgate because to be frank I think, you know, the cases that are winnable are run at the moment. I don't think there's some large pool of marginal cases that people will run, where you invest your

own time and effort, because - - -

DR MUNDY: Because the incentives for people like yourselves in that environment to do the filtering you describe are essentially the same.

MR STONE (ALA): Yes. There's no change.

DR MUNDY: There's no different trigger?

MR STONE (ALA): No, there's no different trigger.

MR SCARCELLA (ALA): It's not as if with a different system of costs the courts change their approach to whether you win or lose. I mean, I do some commercial litigation on a smaller scale, not the big end of town, but it's the same principle there. You assess the prospects of success and then you give your advice and it's the same with - perhaps it's the impression that has been laid and we say unjustifiably. Litigation is the absolute last resort.

In differing tribunals and courts we have a dispute resolution process running somewhere in there or alongside there. Some of them are better than others but most experienced lawyers, or even younger lawyers who know what they're doing, will look at various stages, when the information is available, to try to resolve it, whether it be by - Andrew tends to do it by a lot of settlement conferences. My preference is mediations; acting for a party, not just as a mediator. So we factor all that into account through our filter system and I just don't see any different trigger for suddenly there being a flood of cases.

DR MUNDY: Okay. Interesting perspective about the ethical issue about remuneration which isn't something that has been raised with us before. I accept it's not the view of your organisation but I suspect it's a view you don't hold solely and by yourself.

MR SCARCELLA (ALA): That was purely a personal view I was expressing. It's my reservation.

DR MUNDY: Yes, I can see that. It goes beyond the notion of a fee for services.

MR STONE (ALA): Yes. I mean, I feel bad about solicitor-client costs.

MR SCARCELLA (ALA): Most practitioners in this area for a child will not charge solicitor-client costs. They would be party-party costs.

MR STONE (ALA): Yes, that's very much so. You know, I never take money out

of a kid's pocket because I just believe, you know, there are boundaries you set and I think the case with most of our members is that, you know, in effect, we just act for the recoverable party-party in kid's cases because the money is going off to the trustee to be guarded until they're aged 18 and you just don't go taking money off kid's. Adults, all right, that's the price of their doing business, that there's a solicitor-client gap, but we just tend to treat kids as special and different and don't do it.

DR MUNDY: Okay. You indicated you had some views you wanted to express about cost orders?

MR STONE (ALA): Yes, and I might say I had some input in the New South Wales Bar Association submissions on the same topic.

DR MUNDY: We had a discussion with the Bar Association this morning and I think at the end of the day we mightn't be that far apart. Where we're coming from is essentially and we may have got - our intent is to try and explore ways in which appropriate incentives are provided for behaviour and they're symmetric.

MR STONE (ALA): They are in no way symmetric at the moment. They are disproportionate to the tune of 5:1. Institutional defendants have no fear whatsoever of the offer of compromised regime. I encourage you to search up and down the length of the institutional defendants around this country and find a single individual to put their hand on a Bible and make an affirmation and say, "Yeah. We settled the case because we were afraid that the plaintiff would beat their offer."

All they're up for is the solicitor-client gap which is - if you view that you're recovering the total solicitor-client costs, if you feel that you return, say, two-thirds on a party-party basis, indemnity costs might be - it isn't usually - at worst the remaining one-third. On the other hand, plaintiffs live in absolute terror of offers of compromise and indeed it is usually when settlement negotiations have broken down or about to run a case, I will often have a solicitor say to me, "Shall we make an offer of compromise?" and I say, "No," and they say, "Why?" and I will say, "Because we don't want to put the idea in the defendant's head."

We get almost no benefit out of beating an offer. We get a marginal amount of extra costs. We come into their offer and we get no costs from the date of their offer, that's our full recoverable party-party, two-thirds of a set of costs, and we pay theirs on a party-party basis, two-thirds of a set of costs. That's a 4:1 ratio. If the solicitor-client gets 25 per cent, then it becomes a 6:1 ratio. So the current offer of compromise regime is broken. I have tried to interest people on that subject for the last three years and have got absolutely nowhere with it.

Someone asked me, "What do you do to fix it?" and I said, "Well, if you

actually wanted to make it a proportionate system, then it would be that the unsuccessful defendant pays the plaintiff's costs twice. That would be the equivalent penalty, because a plaintiff pays their own out of their own pocket and pays the defendants. If you want an equivalent penalty for a defendant, make them pay the plaintiff's party-party costs twice as a windfall for the plaintiff.

People argue that that contravenes issues of indemnity but we're not here talking indemnity. We're talking penalty now for behaviour, but that is the commensurate penalty. The 10 per cent that they suggested in the UK is a disproportionate penalty in large cases and is not enough penalty in small cases. The real solution, if you want it to be dead even, dead equal, level playing field, pay me two sets of costs and then you would find some defendants paying some attention, because at the moment they could not care less.

I'm not sure if you have received any submissions from the insurance industry. We invite you to call them in and ask them when did they last accept an offer of compromise from a plaintiff because they were concerned about the cost consequences.

MS MacRAE: Sorry, I'm still trying to get my head around it. Is that partly because the defendants you're dealing with are always so large that having to pay an indemnity amount from the date of an offer that - - -

MR STONE (ALA): It's just not very much money.

MS MacRAE: - - - the cost points - that it doesn't matter?

MR STONE (ALA): Exactly.

MS MacRAE: Yes, but if it was a smaller - if you had parties of equal power - what we were trying to do - - -

MR STONE (ALA): We never do.

MS MacRAE: - - - was to make something symmetrical with our recommendation and I appreciate now that we haven't quite got that right, but what you're suggesting from your submission is going the other way. If you were doubling the amount of party-party - - -

MR STONE (ALA): Let's assume an action worth a million dollars in which each party is going to spend a hundred thousand by the end of it and let's assume a two-thirds recovery on a party-party basis. If on the date of commencement of proceedings the plaintiff had made an offer of compromise and beats it, then their

financial reward out of those proceedings is effectively $33,000. They get their one-third.

Let's imagine the defendant makes the offer on the day of commencement of proceedings and the plaintiff doesn't beat it, by a dollar, then the penalty to the plaintiff is that they no longer recover the 66,000 out of their hundred thousand in costs and they pay 66,000 to the defendant for the defendant's costs. So the plaintiff beating an offer of compromise got $33,000 for it. The defendant beating an offer of compromise got 66 plus 66, $132,000 out of it, a 4:1 ratio.

The equivalent penalty would be - if you wanted to make it even for both sides, if you want to up the defendant's penalty so that it too is $132,000, you have to make them pay the plaintiff's costs twice. That is perfectly symmetrical but everybody blanches the moment I say it because it's just, "We don't do that to defendants." Trust me, you do it to plaintiffs. You do it to my clients, and that's why they live in fear of offer of compromise. They are very effective against plaintiffs, especially made early in the proceedings. They're dynamite against plaintiffs.

When we view a settlement, we look at a range. There's no pretending in personal injury that you can precisely quantify what a case is worth. There are just too many impressionistic elements in it. There's a range and basically an offer of compromise at the bottom end of the range, within the scope of available results from the mean judge on a bad day, with your witnesses doing badly and their witnesses doing well, it becomes gutsy at the moment you pass on something that's within the range because of just its risk minimisation. It is catastrophic if you miss their offer of compromise by a dollar. It is a real behaviour modifier on plaintiffs on the other hand, in part because their institutional defendants, and in part because there is such a small penalty by comparison. The insurance industry just doesn't care.

DR MUNDY: And it has probably reinsured some of the risk anyway.

MR STONE (ALA): Not at the lower levels, yes at the higher levels, but in fairness, probably not an issue in relation to costs. It's mainly the damages that blow out beyond a million, two million, is where the reinsurance really kicks in. Most of them aren't reinsured on the vast majority of claims; it doesn't get near the reinsurance.

DR MUNDY: Particularly the sort of matters you are doing.

MR STONE (ALA): Yes.

MS MacRAE: Just in relation to then to, if you are looking at this, and we are interested, as you know, because have got a recommendation on it, the Jackson

reforms had the penalty relating to damages, but that does seem a bit odd when we are really worried about costs, but would you see the benefit of having it related to damages because, if you are against the big defender and they've got deep pockets, that you might have more of an effect on them, or - in principle, it would seem to me you would be better off working out a symmetrical system, even if it was pay the costs twice, to say, "Let's relate it to the costs incurred. Let's not relate it to the damages paid."

MR STONE (ALA): If what you're trying to do is apply an equal penalty to both parties and provide an incentive to get out of the court system, then a 10 per cent uplift again in a $100,000 case is of marginal interest to an insurer who has a chance to win outright on liability. In fact, it's probably less of a penalty than the solicitor-client costs gap. On the other hand, on a $10 million case, to hit them up for a million dollars for not accepting an offer of compromise is probably disproportionate, so I'm actually not a fan of the Jackson solution, because I don't think it gives that degree of proportionality. In fairness, misbehaviour ought to not depend upon the size of the case, if you're viewing failure of - - -

MS MacRAE: No. That's exactly my point.

MR STONE (ALA): - - - compromise is misbehaviour.

MS MacRAE: So what would you use then?

MR STONE (ALA): I'd double their costs.

MS MacRAE: You would? Okay, good. I'm not saying that's what we would necessarily go for, but I think we're agreed, we are looking for incentives and I think we're agreed - - -

MR STONE (ALA): I would tell you if you were on a level playing field that, with a flick of the pen, gives you your answer, but it's what it takes to actually even it out.

DR MUNDY: And you will get a reaction, because it does even it out.

MR STONE (ALA): The insurance industry would hate that idea with a passion.

MS MacRAE: I think we can be pretty sure of that.

MR STONE (ALA): And given that government is also an institutional defendant, I suspect government will hate that idea as well.

DR MUNDY: Yes. Can we talk about this institutional defendant issue. We have

made some observations about what are litigant rules. Putting aside whether they're observed or not and the redress that people may have in the event that they are not is a different issue, but I mean one of the questions that we have posited is, we have model litigant rules for the state for two reasons. One is it's the innate character of the state that makes it powerful, but the state also is possessed of, arguably, unlimited resources for all intents and purposes, so there's an economic character to this.

We observe that there are large institutional defendants called the banks, perhaps more interested than insurers, who, and indeed in some sense the government is the insurer. Do you have any views on the benefits of requiring large institutional defendants who may have to hold a licence from government, at least we could pull out the Corporations Act power if we really needed to, to place upon them the same requirements as model litigants as the Commonwealth takes to its own agencies?

MR STONE (ALA): Can I answer that in two parts, which is to say, first of all, there are such obligations in some instances.

DR MUNDY: Can I just stop you there and ask you what those instances are.

MR STONE (ALA): For example, in New South Wales, look at the Motor Accidents Authority issues claims handling guidelines, and it's a condition of an insurer's licence that they comply with those guidelines in terms of - they have to give notices at certain points in time, they have to - there's a variety of obligations on them in their claims handling.

DR MUNDY: So these are, in effect, third party compulsory insurers who - - -

MR STONE (ALA): Yes.

DR MUNDY: Can I just stop there and just ask a historical question. Is that because - did that come with the privatisation of third party insurance?

MR STONE (ALA): Yes.

DR MUNDY: So it was to keep those obligations consistent?

MR STONE (ALA): It's a mandatory product and they're regulated, both as to the price they can charge and they're regulated as to their handling of claims, and extensively regulated.

DR MUNDY: Okay.

MR STONE (ALA): There are examples of that occurring, it does happen, and it happens in a variety of other states, and in some states you've got private insurers in that space, in other states you've got government insurers such as TAC.

DR MUNDY: Is that something that your organisation could come back to us on with an identification of who they might be, because that would be helpful to us, or at least some more examples?

MR STONE (ALA): Yes, I know, for example in Victoria there has been agreements between TAC and the legal industry as to codes of conduct and so forth. So yes, we can - - -

MR SCARCELLA (ALA): It's called the model litigant rules.

DR MUNDY: Okay.

MR STONE (ALA): Having said that, and having at various times litigated against the state of New South Wales, I'm far from certain that I can ever actually point to a single instance where the model litigant provisions have made a jot of difference to anything anyone has ever done against me in terms of, "Yes, they only did that because they're model litigants." It's difficult to identify what exactly is the benefit in that everybody should give you proper pleadings that identify the issues, that's a court-imposed obligation on every defendant. It doesn't happen half the time and across a variety of defendants irrespective of their obligations. People should engage in early resolutions of claims, and some do and some don't, and again that doesn't seem to depend on whether they're a model litigant or not.

Even within the context of the heavily regulated, as they would say, CTP industry, where I can complain to an industry regulator who goes and investigates. The regulation certainly makes a difference, makes an enormous difference, but it's a much more heavy-handed regulation than model litigant. You know, they get measured on KPIs, the timeliness of doing things and it really is, they would say, very heavily regulated in terms of their conduct, and you have still got plenty of people giving us a hard time. Institutional defendants don't like parting with their money.

MR SCARCELLA (ALA): And with claims handling guidelines, et cetera, you often find in the case that there's no consequence. The guidelines are there, but if someone puts up their hand and says, "Well, look, this is the procedure that should have been followed." It wasn't followed, and at best you will get a slap on the wrist, and that's the end of it. There are no consequences to it.

MR STONE (ALA): Given that the only penalty that the Motor Accidents

Authority ultimately has is to withdraw their licence, and that's so catastrophic as to be unthinkable: they are not as well advanced in intermediate penalty.

DR MUNDY: Yes, and you can see that perhaps others might suffer as a result in that sort of action.

MR STONE (ALA): It's a nuclear button, for the obvious reason they have never taken it.

DR MUNDY: Fair enough.

MS MacRAE: I was just interested, given that you do act on a no win, no fee basis a lot of the time, do you see a necessity for a legislated cap on that? Is there one in New South Wales? I'm sorry that I don't know the answer to that question.

DR MUNDY: On the uplift.

MS MacRAE: On the uplift?

MR STONE (ALA): There is no uplift.

MR SCARCELLA (ALA): There is no uplift in New South Wales.

MS MacRAE: There's none at all?

MR STONE (ALA): No, and I'm not sure of anywhere else that's got an uplift left either.

MR SCARCELLA (ALA): In commercial matters in Queensland there's still an uplift.

MR STONE (ALA): Okay.

DR MUNDY: Yes, and I think there are cases where there is no uplift in personal injury matters, but there are uplifts available - - -

MR STONE (ALA): Commercially.

MS MacRAE: Right.

DR MUNDY: So I guess the question, more broadly I think, is do you see any benefit, either from an access to justice perspective or whatever else, from there being an uplift, if one was available and, if so, should it be regulated in some way?

Should it be capped, effectively?

MR STONE (ALA): The return question from perspective would first of all be is that an uplift that is in effect an extra cost recoverable from the unsuccessful defendant as a penalty for not admitting liability in cases that I win, or is it me again taking it out of my client's pocket. I'm allowed to charge them extra for the risk that I took.

MR SCARCELLA (ALA): For the former, that would be a yes.

MR STONE (ALA): If the former, yes. If the latter, I've got a great reluctance about it. There is something to be said - I'm against any form of uplift in what's effectively a non-speculative case, because you get an admission of liability. If truly there were an uplift to cover the speculative risk, then it should only apply where liability is not admitted, and that should act as an economic incentive for defendants to admit liability to escape that penalty, but for that to be the case they've got to be the ones paying the penalty rather than just giving me permission to charge my clients more in high-risk cases. I mean, we would be kidding if we didn't say that overall we price our services, taking into account the fact that we lose some, so in effect the risk of the loses is spread amongst everybody rather than being borne by the ones we can't - you know, who we don't charge when we lose. You know, we're still in business so quite obviously we've spread the risk across the portfolio.

MS MacRAE: Yes. Yes.

DR MUNDY: Like the banks set more rates on the basis of they're not going to recover 3 per cent of it.

MR STONE (ALA): Yes.

DR MUNDY: It just becomes part - so in a business model sense you just - - -

MR STONE (ALA): It's factored into the price.

DR MUNDY: Yes.

MR STONE (ALA): If I'm using the appropriate economic jargon.

DR MUNDY: Okay.

MS MacRAE: Okay.

DR MUNDY: So the threshold issue for you would be whether it's allowed or not

and if it's allowed then - - -

MR STONE (ALA): Well, who's paying it.

DR MUNDY: Yes.

MR STONE (ALA): And I'm not in favour of giving us more reason to take money out of our client's pocket.

DR MUNDY: No.

MR STONE (ALA): I mean, you know, I start from the position of principle that the whole point of having a system of compensation is to the best extent that money can to put people that would have been in the position they would have been in but for the tortfeasor's negligence. That's the old common law principle, and I don't like that costs in part chew away at that and I don't want systems that further encourage costs to chew away at that because government's already done by far enough to chew away at it.

You know, if you want just one example of the way governments chew away at it, all future losses in almost all jurisdictions in Australia, with the sole exception I think of the ACT, are calculated using a 5 per cent discount rate. That's the assumption you make as to what will be the return on the lump sum spread over time. Some places it's 6 and a few outlaying - I think in Tasmania it's 8 per cent. Now, to be frank, that's just government mandated bullying of the injured because the real rate of return on money is in the order of 2 per cent in terms of what you can invest for, clear of inflation and tax.

DR MUNDY: That's what it currently is in England, I think.

MR STONE (ALA): Yes, and I think the UK's acknowledged that and brought theirs down. A 5 per cent discount rate to work out your future loss of earnings if, you know, the two of you are injured in a taxi going back to the airport you can - you know, that 5 per cent will cost you, depending on what you make, anywhere between hundreds of thousands and more. Now, there's enough things already government does to beat up on our clients. We don't want to join the parade.

DR MUNDY: Thank you very much.

MS MacRAE: Thank you.

MR STONE (ALA): Thank you

MR SCARCELLA (ALA): Thank you for the opportunity.

MR STONE (ALA): If there's further things that come up in the course of your inquiries that we can address we're happy to take questions that you have.

MR SCARCELLA (ALA): You would like us to come back to you on the model litigant rules.

MS MacRAE: Yes, if you would.

MR SCARCELLA (ALA): Yes. That would be - - -

MR STONE (ALA): Or really sort of alternate versions thereof.

DR MUNDY: Yes.

MS MacRAE: Yes.

DR MUNDY: I guess the issue is how might the behaviour of well-resourced litigants - probably most cases they'll be defendants - be manipulate - you know, be encouraged, I guess is probably what we're looking at.

MR STONE (ALA): But having said that, even with those highly prescriptive claims handling guidelines - now, I should say 50 per cent of motor car cases in New South Wales resolved without any legal representation, mostly because people, you know, the majority of people are not badly injured. A few weeks off work, a few thousand dollars in treatment expenses.

DR MUNDY: Insurer pays up.

MR STONE (ALA): Insurer pays up and they move on their way and, indeed, one of the things that has really facilitated that occurring in New South Wales is that they've introduced a scheme whereby, you know, the first five thousand dollars in treatment expenses paid on a no-fault basis.

DR MUNDY: Yes.

MR STONE (ALA): And that helps get the small cases out of the system. We're delighted about that.

DR MUNDY: Yes.

MR STONE (ALA): Where you get more serious cases and arguments over the

nature and extent of injury, prior injuries, causation, the self-employed are always difficult in terms of their economic loss. It's never easy to calculate because it tends to waiver up and down and for all of those variety of reasons they get more complex. And that's where we come in to assist people, and no matter how good a set of guidelines you put in place, very few people on their own are capable of working out "What is my future loss of earnings?" to know that you should inflation-adjust your past loss, you shouldn't be held at the wage rate you were on two years earlier but you're entitled to claim that your wages might have gone up in the last two years. They can't apply a 5 per cent discount rate to a future loss. They don't know that the courts will take off 15 per cent for vicissitudes. They've got no idea what the going rate is for, you know, an amputated leg above the knee for pain and suffering.

DR MUNDY: They don't know.

MR STONE (ALA): Yes. I mean, I suppose to me the truly telling point is that the people best trained in this system would be the in-house claims staff of the New South Wales CTP insurers. You know, they do nothing else. They live and breathe this for a living, and I've acted for three of them or their family and friends over the last decade and there's a reason that the most experienced people in doing this still come and retain lawyers, which is they know that we value add for the outcome they will obtain when having to deal with an insurer, because even they fear the complexity of the system that they are supposedly the experts in running. I mean, that's the true test of why do people who have a choice not to, utilise a system is because they see value in it.

DR MUNDY: Yes.

MR SCARCELLA (ALA): And you can have guidelines that are completely incomprehensible. One of my hobby horses is the workers compensation where they've as recently as 2012 taken away the ability in reality of the worker to access legal advice, and if you're talking about a denial of access to justice here you've got government saying worker capacity decisions are made by the insurer, reviewable by the insurer, reviewable by the nominal insurer, the Workcover Authority on its merits, and then you have an administrative review by the Workcover independent review officer.

Workcover sitting next to the word "independent" sort of doesn't sit safely, but you've got guidelines there for workers who have to represent themselves in making applications for review that are almost incomprehensible to lawyers and they've been re-done a couple of times, and that's a case where you've got guidelines, claims handling guidelines for the forcibly self-represented litigant, that he has or she has no hope of coping with, and the experience I've had where I've tried to pro bono and

tried to steer the in the right direction is, "I give up. This is just too hard," and that's a denial of access to justice. Yet on the scoreboard it's a safe return to work.

MS MacRAE: Yes.

MR STONE (ALA): And that perhaps leads into a dilemma that we didn't expand upon at length in our submissions but might be worth your while considering is that, for example, the CARS system was meant to be a quick, cheap, easy tribunal to try and move things along. Now, you end up with this pile of paper to put it into a CARS assessment because the CARS assessor wants written submissions from everybody. He wants a schedule of damages, wants detailed written statements as evidence-in-chief. There's actually more work to prepare a CARS assessment than it is to prepare for a court case because this so-called doing it on the papers and then having a hearing to determine - and none of them want to give a decision on the spot and in part that's all driven by - and in order to help the tribunal define, or they remove the power of the insurer to re-hear the CARS determination in court. It's final for the insurer. So a claimant who doesn't like the result trots off to the District Court not lightly or readily because if you don't improve by 20 per cent in front of the District Court you don't get any costs. Now, in 10 years I think I've taken one case out of the CARS system to a re-hearing, so you know, almost unused by some plaintiffs whereas for the insurers, because they don't have that right of review in the District Court, they're only out is administrative appeal of the Supreme Court and they bring quite a lot of them, and because the assessors hate being the one who got carted off to the Supreme Court for an admin appeal, the system bureaucratises up.

DR MUNDY: Decision makers become risk averse on reputation, effectively.

MR STONE (ALA): That's very neatly put, but I'm loathe to say that the solution to that is to give them power of God and remove all review from them, and at that point you've, in effect, removed an access to justice and you've got an arbitrary decision-maker - sorry - unreviewable decision-maker - and that runs very contrary to the grain of our system of justice.

DR MUNDY: We've, for good public policy reasons, always been in favour of sensible review processes, so - - -

MR SCARCELLA (ALA): And none of those complexities were created by lawyers working in the system.

DR MUNDY: No.

MR SCARCELLA (ALA): The bureaucrats created them.

MS MacRAE: Yes.

MR SCARCELLA (ALA): We'll tidy this up and now we'll add something extra. This will make it better and it becomes so much more complex.

MR STONE (ALA): But it's the decision-makers themselves who've set up, you know, we want this help and we want this help and we want this help to make the decision, and they in effect up the ante on the amount of assistance they want us to give them because they want to avoid and, you know, they want to be extending procedural fairness to everybody and it just gets harder.

MR SCARCELLA (ALA): Yet in the District Court not that long ago as an arbitrator your case would come in, people were laid back. It was actually very informal and casual, sort of rules were observed, but a decision was then dished out, sometimes on the day, sometimes a couple of weeks later without all the fanfare and hoo-ha and people went away, and at one stage most of them weren't re-heard by a judge. Then it became an opportunity again for the big defendants, institutional defendants, including insurers, to go to the arbitrations and roll their arm over. Not call a witness. Let you do all the work as the plaintiff. See how the case goes. Then go away and get some more information. Strap up their case and come back and re-hear it in front of a judge. So that system was working quite well. They were knocking over case after case, you know, I would have anything up to 20 cases in the list amongst six arbitrators and we'd get through most of them, or start them, and most of them would resolve - a lot of them would resolve, but now the technicality and the complications we've got to go through it just - - -

MR STONE (ALA): But those were the - yeah, I was going to say you'd get the occasional one page decision handed down on the day saying, "All right, you've got this - here are the six line items you're entitled to; this much, this much, this much, this much. I'm not giving you detailed reasons. If you don't like it re-hear it" and an awful lot of people would live with it, but within the CARS system we've now got them producing lengthy written decisions after waiting a couple of weeks after massive submissions from each side. It's finding decision makers prepared to give cheap, quick opinions but when they're then beaten over the head by the Supreme Court - - -

DR MUNDY: Quality control.

MR STONE (ALA): - - - not administrative review for not giving detailed reasons and analysis and failure to give proper reasons as a ground of administrative appeal.

DR MUNDY: All right. Well, we probably should end there.

MR STONE (ALA): Yeah, sorry, we've taken - run you late.

DR MUNDY: Thanks very much for that.

MR SCARCELLA (ALA): Thank you.

MR STONE (ALA): Thank you.

DR MUNDY: Could we now have Law Consumers Association, Max Burgess? Could you state your name and your affiliation for the record, please, and then perhaps make a brief opening statement?

MR BURGESS (LCA): I'm Max Burgess from the Law Consumers Association. I've been with the association for probably over 40 years on and off. I'm now acting as a volunteer and my only claim to fame is that I, under the transitional provisions of the Conveyances Licensing Act 1992 I became a licensed conveyancer and that was, again, renewed as another licence after the 95 Act came in. I've been a member of the Property Services Council when it was operating, so I had a close up look at the regulation of real agents in New South Wales. I was a consumer member on that council, not that we did much in the way of regulation. It was more oversight than anything else, I think.

That has since been moved to the Department of Fair Trading, do it entirely themselves within house rather than have a board or any other representation there at all. The interests of the association have generally been in non-litigious matters, mostly in administrative things where we believe that processes can be handled by people personally without the intervention of a lawyer and to that extent we've developed, in the first instance, we started as the Divorce Law Reform Association of New South Wales and we produced a DIY divorce kit, which was adopted, finally, by the Family Court and it may or may not have helped with the reform of the old Matrimonial Causes Act but at least we ended up with the Family Law Act which is universal in Australia.

I think it's only Western Australian which undertook to administer the act within the state system. Every other state does it with the Federal Court. Then we developed mostly as a form of producing some income to pay the rent our DIY kits, do it yourself divorce kit and people paid for that. Somebody made some notes up. That became the conveyancing kit and then it broadened. Probate and conveyancing are the two major issues; will kits, powers of attorney, guardianship, you know, all the other little things that hang off those activities we've covered.

It's quite amazing we've managed survived for nearly over 40 years so it's - I'm not sure whether we're doing some things right or not. We've had litigation with the Law Society which is always quite interesting. That was - they commenced proceedings against us when we started the first conveyancing company in New South Wales and that's - - -

MS MacRAE: Was this the Law Society of New South Wales?

MR BURGESS (LCA): Law Society of New South Wales, yes. We started the company in 1980, I think, 1979 or 80. They commenced proceedings in the Supreme

Court in 1980. We responded with a counter proceedings seeking a declaration as to the methods that we adopted in doing conveyancing. We were not in breach of the Legal Professions Act and we acted on the advice of David Bennett QC and Peter Strasser, another barrister. David Bennett, you may recall, was a crown solicitor for the commonwealth and his advice has never really been tested in court, which was basically divisibility of a conveyance into a legal component and a non-legal component and we had this so-called system of panel solicitors whereby we had a solicitor that was paid a relatively small amount and then we did the administration for which we got paid a relatively large amount.

It's of interest, I think, particularly to the Productivity Commission, perhaps, that - like I find it ironic the Productivity Commissions investigating an industry which has little or no production, in my view. The point that I really wanted to make in relation to conveyancing was the effect that we had on the market and that the licensing was the first time the legal profession, in Australia, at least, ever took a step backwards. It always, you know, accumulated power rather than lost power and the costs associated with conveyancing would be astronomical today but for the licensing of conveyancers.

Should the Commission want a loan of my three volumes of costs, which go back - I looked at it this afternoon in the fly leaf - it's 1991 and you can do your own sums on inflation costs, average house, all that sort of thing and the price of conveyancing today is really not that much higher than what it was then. It's quite amazing that those costs have been kept down, yet if you get into probate they still retain a scale and it's the icing on the cake for the profession. It doesn't require any skill. It can be done very quickly. If your client comes in with a death certificate, knows what the estate comprises of, I've actually done one in 20 minutes and filed it because we have an office here in the city, walked down to the court, filed it and asked for expedition and we got it back in about a week.

It requires none of the legal skills that the lawyers might wish to impress with you, but it can certainly be done by lay people. We've developed a kit. We've also started a company which runs in direct competition with the lawyers. Again, we've had litigation over that, which we've lost, but we're still going. The conveyancing exercise, I say, there's a lot to be learnt in that on breaking the monopoly can produce good results for consumers. They must have save hundreds of millions of dollars since 1992 on fees in New South Wales along, probably billions.

It would be an exercise, if you had the resources, it could be interesting to do. That is really, you know, like the probate question is the one that's relevant to me at the moment from one of those scores I'd like to settle. We just recently - and I mean only just recently - started to assist people who are litigants in person and I've been sitting on that Litigants in Persons Act for probably 10 or 15 years waiting for an

opportunity to bring it out from the closet because there's no way that the Law Society is going to let it be known that this act exists in England and is being actively used.

If anything else that's to their benefit we trot out old English law, it's wonderful, it's this and it's that, but that Litigants in Person Costs and Fees Act is a real gem both as to its brevity and to its effect. That's about all I really have to say.

MS MacRAE: How are you managing to continue to do your probate work if you have had a - - -

MR BURGESS (LCA): A run in?

MS MacRAE: Yes. What was the - - -

MR BURGESS (LCA): It was settled out of court because I don't think the Law Society really wanted to argue it. We lost, you know, we conceded. In one of the previous Legal Profession Act of New South Wales, in the section about unqualified persons, what you can do and what you can't do, there are two groups of people that were relevant to what I was interested in and that was the old Land Agents Act, which said that any act which came under the administration of the minister for lands was exempted from the effects of the Legal Profession Act.

At that time the current premier, who was Neville Wran, had consolidated the Lands Department, he'd taken it out of the Attorney-Generals Department and put the administration of the Conveyancing Act and the Real Property Act under the minister for lands, so here was this link that I couldn't get how barristers and I wasn't experienced enough at the time to force the issue to take up the point so it lapsed and since it's been repealed from the act.

MS MacRAE: Right.

MR BURGESS (LCA): They didn't consult me. I rang them up when I found out about it and said, "You know, like what about me, I'm a registered land - I became a registered land agent because I could see the invitation there and I went through unopposed. The second one to apply was opposed by the Law Society and the judge said, "Okay, you can become a land agent but in future everybody's got to become a lawyer virtually before you could become registered as a land agent," so they shut the door on it. But the other one was that there's this word "engrossment".

I can't fill up a document for you or I can't draft a document for you. This is all legal work, you know, covered by the monopoly, but there was an exception for persons who could engross documents, which my understanding of the word and

generally accepted, I believe, is that if I could sit in front of a typewriter and I could have a standard prescribed form, so either set up on my computer or typewriter as it was back then and you could sit there and I could ask you questions. I couldn't tell you anything. I could ask you a question, "What is your name?" I could type in your name. Then I could go to the next line, "What is your address?"

I could go through this form which asked all the questions and I only relayed the questions, you gave me the answers and I engrossed the form and that wasn't in breach of the Legal Professions Act. So I've made the argument with the Law Society and they've begrudgingly admitted that - but don't test my luck was their words more or less - that engrossment was a defence but has now been taken out of the act.

DR MUNDY: When was that done?

MR BURGESS (LCA): Pardon?

DR MUNDY: When was that done?

MR BURGESS (LCA): Oh, it must have been done four or five years ago, yes.

DR MUNDY: In the recent past, not back in the 80s?

MR BURGESS (LCA): Oh, no, no. No. There's been a number of minor changes to the Legal Professions Act to just tighten it up a bit and to bring it a little more into the - into this century.

DR MUNDY: So presumably that might not necessarily, on its face, be a bad thing. That might not necessarily be a bad thing.

MR BURGESS (LCA): No.

DR MUNDY: Just on this point of engrossment, presumably that means that if those provisions had not have been, those provisions which facilitated you assisting someone with a document in that way, would have facilitated you assisting someone - - -

MR BURGESS (LCA): Fill out a probate application.

DR MUNDY: Probate application or any other sort of - - -

MR BURGESS (LCA): Yes, a summons - - -

DR MUNDY: - - - a court document.

MR BURGESS (LCA): - - - in the Supreme Court, anything, yes.

DR MUNDY: So as long as you were not advising them on the merit of what was going into the form - - -

MR BURGESS (LCA): Yes.

DR MUNDY: - - - or presumably not prompting.

MR BURGESS (LCA): So long as it didn't come from my mind as to what goes into the document it was acceptable.

DR MUNDY: So that presumably could have facilitated the support of self-represented litigants at least in relation to court documents.

MR BURGESS (LCA): Well, we do that today. You know, if we've got three or four people that are litigants in person and it all - the system runs on forms which are all defined by regulation, so the questions are all there. It's only when you come to affidavits where there's a story, a personal story that has to be said that they - you've got to be a little bit more - you can't really tell them what to say, but you can say that there's always, you know, the pedantic argument, so you can say, "Well, so and so said this in a similar situation" and, you know, it's the way the law works.

MS MacRAE: So even without the word "engrossment" though you are still able to do that?

MR BURGESS (LCA): Nobody - I haven't been challenged.

MS MacRAE: You have not been challenged. Okay. Would you see a case for a wholesale look at the Professions Act, not just New South Wales, but more generally around Australia?

MR BURGESS (LCA): The Legal Professions Act?

MS MacRAE: Just to try and open it up.

MR BURGESS (LCA): Oh, yes. There should be a national one for a start and, of course, I can't see the benefit of the monopoly nowadays. Perhaps, you know, 50 years ago there may have been a case, but today the monopoly has degenerated into just a straight out commercial business and they don't have to abide by the rules that any other business has to abide by. They make up their own rules. They sit in

judgement on themselves. I think as I said in my submission, you know, like there's not a judge in Australia that's been trained to be a judge. They're all lawyers.

The view, I can understand the view that - because my view is quite biased because I only hear the worst cases, I never hear the good cases. They don't have much of a chance in the system really and just listening to the previous submissions to you where we're talking about a million dollar case and a hundred thousand for costs on one side and a hundred thousand dollars costs on the other, why not $10,000 costs, was my thought. A hundred thousand dollars just seems a lot of costs.

DR MUNDY: I am mindful of the time and people probably have families to go home to - - -

MR BURGESS (LCA): Sure.

DR MUNDY: - - - but just perhaps to wrap up, just back on the probate issue.

MR BURGESS (LCA): Yes.

DR MUNDY: You presumably would not have any objection to people, probably a bit like registered conveyancers - the people who were going to offer these probate services, around wills and probate and those matters, would have to in some - could be subject to some sort of licensing arrangements.

MR BURGESS (LCA): I think it's already provided for.

DR MUNDY: So they could be licensed.

MR BURGESS (LCA): Well, if you - without letting the cat out of the bag too much - but the Conveyancers Licensing Act 1995 implies the licence conveyancer can do probate work. Just you have a good look at it and you will see that it is there. It's explicit in the act that they can't draw up a will and because they - it's been limited, if they wanted to cut out doing probate work they would have said - they would have broadened that. Instead of using the very narrow definition of a will, they would have used a broader definition to cut out probate work.

I think that the Conveyancers Licensing Act - I'd like to go back and read the Hansard - but I would think that it was the expectation of the legislators that conveyancers become a corner store operation, low cost corner store operation for non-litigious, repetitive (indistinct) engrossing work.

DR MUNDY: Yes.

MR BURGESS (LCA): Right. As a service to consumers. But it hasn't been taken up, but it will be my defence. Like I've held a licence twice and I think that it is entirely possible that licensed conveyances, if they were to become aware. Their big problem is though because they have such low cost income and their overheads are still there, they have to run very efficient, slick operations to make money and they don't make a lot of money, then they're generally cottage industry type things, you know. They find some resistance to increasing their fees and I don't know what the reason is, but the lawyers would love to increase the fees, but there again the lawyers are employing a lot of licensed conveyancers whilst they get on to making more money on other things.

DR MUNDY: We might draw a close there. Thank you very much for your submission - - -

MS MacRAE: Thank you.

DR MUNDY: - - - and coming in and speaking with us, I am not sure whether it is this afternoon or this evening.

MR BURGESS (LCA): The sun's gone down.

DR MUNDY: I will adjourn these proceedings until 9 o'clock in the morning.

MR BURGESS (LCA): Okay.

DR MUNDY: Thank you.

MS MacRAE: Thank you.

AT 5.15 PM THE INQUIRY WAS ADJOURNED UNTIL
WEDNESDAY, 4 JUNE 2014