PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

DR WARREN MUNDY, Presiding Commissioner
MS ANGELA MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON WEDNESDAY, 4 JUNE 2014, AT 8.58 AM

Continued from 3/6/14

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DR MUNDY: We will make a start. Good morning, ladies and gentlemen. My name is Dr Warren Mundy and I am the presiding Commissioner in this inquiry into access to civil justice, and with me is my colleague, Commissioner Angela MacRea, who is the other Commissioner exercising the powers of the Commission in this matter. Before starting, I would like to pay my respect to the elders past and present of the Gadigal people, who are the traditional owners of the land on which we meet and, indeed, we also wish to pay our respects to all the elders past and present of all indigenous nations who have occupied this continent continuously for over 40,000 years.

As you are aware, we put out a draft report in April and the purpose of these hearings is to facilitate public scrutiny of the Commission's work, seek comments and feedback on it, to get evidence on the record for those who wish to give it, that we may draw upon in our final report. Following this hearing, Commissioner MacRea and I will conduct hearings in Adelaide, Perth, Melbourne, Hobart, Darwin, and Brisbane. We have already concluded our hearings in Canberra. We expect to provide the final report to the government in September and, as a matter of law, they have 25 parliamentary sitting days in which they must publish it by way of tabling in both houses of the federal parliament.

We do like to conduct these hearings in a formal manner, however, we would note that under part 7 of our Act, the Commission has certain powers to act in the case of false information or a refusal to provide information. As far as we are aware, those powers have not been used by the Commission and I am sure we will not need to use them in relation to proceedings here today. We do like to conduct these hearings in an informal manner, but we would remind participants that we are taking a full transcript of the proceedings and because of that, we do not take comments from the floor as we cannot properly record them.

However, at the end of the day, we will provide an opportunity for anyone who is not on the list to make a brief statement in relation to what they have heard today or, indeed, any other matter they wish to raise with us, but I do stress it needs to be brief. Participants are required to be truthful in their remarks and we do welcome not only their own material being provided to us, but comments made on the material that is put to us by others. I do intend to keep these proceedings pretty close to time (a) out of courtesy to other who take their time to come and give evidence to us, but also because my colleague and I have a plane to catch later on this afternoon to Adelaide and we do not wish to miss it.

Finally, I am obliged under Commonwealth health and safety legislation to advise you that, in the unlikely event of an emergency requiring the evacuation of this building, you should follow the green exit signs to the nearest stairwell, do not use the lifts, and follow the instruction of the floor wardens. The emergency evacuation point is to be found outside the Westpac building on the corner of Market

and Clarence Street. There ends the opening statement. Mr John Emmerig from Jones Day, would you like to come up, please? Could we ask you to state your name and the capacity in which you appear here today, and then perhaps make a brief opening statement. We have got about 25 minutes for your evidence, Mr Emmerig.

MR EMMERIG (JD): Thanks very much. John Emmerig. I'm a partner with the global law firm, Jones Day. I appear in that capacity. I should perhaps indicate that I hold a number of other positions which are relevant to the area I am going to discuss. I am the co-chair of the Class Actions Committee of the Law Council of Australia. I am the Deputy Chair of the Federal Litigation Section of the Law Council of Australia, a member of the Litigation Funding Committee of that body, and at various stages have been the Acting Chair of that committee. I'm on the Federal Court's National Liaison Committee, which I've been on for over 15 years, and a range of other Federal Court-related bodies. I need to indicate that I don't appear in any of those capacities or speak on behalf of any of those organisations, just for the record.

Jones Day is a global law firm, one of the largest in the world, 900 partners, 2500 lawyers, practising across 41 offices in all the major business centres of the world. Half of our firm is litigation and we're particularly noted for our class actions. I've been active in class actions for pretty much the entire time they've been in this country, which is about 20 years. I've been in practice for 26 years. I joined Jones Day in December 2012 and, prior to that, I was the Head of Class Actions at Ashurst, which was Blake Dawson before that time, where I practised for 24, 25 years, and I'm the Australian Head of Class Actions for Jones Day.

My comments are really directed in amplification to a submission Jones Day made prior to the release of the draft report. I don't really propose to go through our earlier submission, I just wanted to really add a few points of emphasis that now arise in our view, having seen the draft report. Really, it's on the very narrow issue that I'm concerned about: the prospect of what you call damages-based fee arrangements, what might loosely be called "contingency fees", but for clarity, I'm talking about arrangements where the lawyers are able to charge a percentage of the settlement or outcome achieved in the case.

I'm certainly very concerned about those entering into the regime in relation to at least class actions and major litigation, and that may beg the question, what about other types of claims, and I'm happy to speak about that. But I thought I might just focus on those two areas because it seems to me they have a particular force at the moment. I'm sorry for having been so extensive with the description of my background, but I've been involved in advising in probably 20 class actions over the last 20 years and I'm really just indicating that we seek to bring to bear a degree of experience in this area.

The concern we have is that we are seeing an increase in certain types of class actions in this market place, in particular, shareholder claims. In the last seven months, we've seen 14 new actions threatened or filed. That's separate from any of the other class actions that are currently being promoted through the courts. There was, for example, a class action alleging, I think, a billion dollars filed last week which is not out of character, but traditionally, the area has been relatively stable, in terms of numbers of claims over the years with the class actions as a whole, but I think a more defined analysis shows that in certain areas, such as shareholder claims and other types of claims, we're starting to see a spike in the number of claims occurring in those areas. That spike is driven by a number of new funders who have come into the marketplace and a number of new plaintiff law firms who want to play in that space.

You will have seen from your research already that there is a concern about a growing number of unmeritorious class actions being filed. The Former Chief Justice of the Federal Court, now a High Court Judge, Chief Justice Keane, as he then was, last year made comments that were reported in The Australian about that concern. Attorney-General Brandis has recently made similar comments. There have been concerns raised in a number of class actions to Centro proceedings by Justice Finkelstein about lawyer-driven litigation. The concern I have in short, essentially, is this: that if contingency fees are introduced for class actions in this country - and I'll extend my comments to certain other forms of large-scale litigation, it will simply magnify a problem that is starting to emerge as a serious issue, which is lawyer-driven litigation.

I wish to acknowledge that I'm not criticising class actions. Class actions provide a very valuable access to justice opportunity for people to bring claims that would otherwise not be available to them, at a practical level, to prosecute because of the inherent value of their claim versus the cost of litigation. Equally, litigation funding can play an important role in access to justice as well. It's about getting the balance right. It works well in certain areas to have large amounts of litigation funding perhaps available, but not in the form of contingency fees and not in these areas. You may say, "Well, why do you hold that view?" and it's based on a few considerations. One is around conflicts of interest. Take the billion dollar class action filed. Litigation law firms running large class actions in this country have been making, on the bigger claims, fees around 10 million up to 25, 30 million dollars, sometimes lower on some of the really big claims which is an enormous amount of money anyway based on hourly rates and so on.

If you started applying our learned lawyers to charge the sort of fee rates that are being charged or contingency rates being charged by litigation funders and they vary between 25 to 45 per cent generally and a lot of the time it's in that 35 to 45 per cent range, you know, it creates a different world of participation for the lawyer. Imagine the prospect of being able to obtain 350 to 450 million dollars as your fee on

a case. It's very difficult for me to see the present conflict of interest laws and regime really providing an adequate protection for class members when the interests are balanced, the interests of the firm and the interests of the class.

It's really, really difficult to see how that will work in practice. The temptation to settle early for a particular sum or guide the class action in a different way or, as was experienced - and I did some research around this. A breast implants class action was an example where you have different subcategories and there might be something good for one subcategory and good for the plaintiff firm, not so good for another subcategory and there is a real tension as to how it is all resolved. There's a conflict of interest issue there of some size.

The system we have was never built to tolerate those sorts of pressures. I'm concerned about risk taking. There'll be, no doubt, a body of evidence that comes forward and says, "Well, look, the funders don't waste their money, they only invest in claims that have, you know, good merits," and there will be some funders out there who, in fact, do that and law firms would act the same if they had the same opportunity, but I don't think that's actually right. I think what we've seen in the marketplace now is as the market starts to mature with the class action litigation we're seeing more and more funders come in to the market and the risk appetite is differing between those funders.

Some are prepared to fund riskier claims. I think the same thing would happen with law firms who, if they had the opportunity, could fund claims. Again, the shareholder space provides a useful example because every shareholder class action in this country to date has settled. A person in the position of thinking, "Well, if I brought a shareholder class action and I know to date every class action has settled, there's a good chance this class action will settle," and all we'll start to see then is a creep in to the risk environment. How risky a claim can I bring before the company says - the target says, "No, we're not prepared to settle on that matter. We're going to fight to the death."

There'll be increased risk takers, I think, coming into the marketplace and court approval of some of the class action settlements won't really be an effective barrier because in some centres it will be easier to get court approval for a less prospective claim for a low sum than it will be for a highly prospective claim for a low sum. The class actions have an impact which is different from other claims and constructed in a different way from other claims. It's, what we call, the multiplier effect, I suppose. You'd come to me with a $10,000 claim, not of much interest, but if you come to me with 10,000 people with a $10,000 claim that $100 million claim obviously has attention straightaway.

Unlike other forms of litigation class actions don't require the consent of all of the members of the class before the class action can be filed. Indeed, they've been

deliberately designed not to require that. You can start a class action with seven people. You only need one substantial issue of fact or law, same, similar or related circumstances but that's generally a pretty straightforward requirement and you can start that class action on behalf of a large group of people without those people knowing and generate an enormous prospective number that the target that you're bringing this claim against has to face.

They're open to a form of use which is not really available in other sorts of cases where the traditional position is that plaintiffs have to sign up, have to agree to be part of the class. They're also open to domination by the class action plaintiff and the people who stand behind that plaintiff. They run the class action.

DR MUNDY: We do have a number of questions we want to ask you, so could I ask you to bring your opening remarks to a bit of a conclusion?

MR EMMERIG (JD): I'm sorry, I probably moved past that in remarks to some detail. So, in short, my concerns around those class action issues is - I can go to some US evidence as well, but they're my initial comments. Large scale litigation suffers from the same concern except it doesn't have court approvals and I'll mention one further thing which you may want to bury into, but it's the concept of what we call the corporate blackmail impact. Because of the scale and size of these claims the mere fact someone says, "I'm going to bring a class action" can impact on share price, it can impact loan covenants, the ability to raise finance, contract arrangements and so on.

Merely announcing that, being able to say that and the more that occurs in the marketplace that has a price to pay and it's one of the ones you've got to balance against access to justice, but there's been a whole range of problems that have been addressed in America or tried to be addressed in America around dealing with this problem that have not been effective. In my final closing comment I'd just say I'd be really concerned about seeing us introduce a concept into the system without major modifications to other areas of the system. It would be like introducing a virus or a beetle or something to deal with one particular problem without understanding the full environmental impact.

DR MUNDY: Okay. Thank you for that. We are approaching this inquiry from an access of justice perspective and our principal concern, not our only concern, but our principal concern is essentially for ordinary citizens, small businesses, that sort of - if you like to characterise that as, you know, the people whose access we are primarily concerned with. What we are trying to bring our minds to and to provide policy recommendations about are how can we facilitate in a financial sense, because financing court actions is difficult, how we can facilitate people who have meritorious claims in being able to bring those actions.

It seems to us in respect to contingency fees, damages based billing, that the only real difference, if you like, between a litigation funding circumstance such as that which was brought against the ANZ, which was won at substantial benefit to the plaintiffs who were the customers of the ANZ, but also I think clarified the law in a way which was of benefit to many other people. The only difference we see between those sorts of actions and perhaps a damages based billing action is who is putting up the capital. I guess the question in that circumstance goes to - and we have had evidence and I think it is fair to say that the draft report could be construed to say we find it somewhat persuasive that the presence of the third party funder actually deals with, to a significant degree, some of the ethical concerns you correctly raise.

I guess what we are interested in and having seen a lot of the debate material from yourself, statements by the Attorney-General and quite thoughtful statements from the Attorney, I thought, is this an issue - the debate seems to be around securities matters, shareholder matters. The concerns seems to be around a particular set of matters and it is not clear in our mind whether - if you accepted all that evidence at its face there is a question to be asked - and I would like you to reflect on this - would we be better to deal with the cause of the action, in other words, is this a problem actually to be solved in the securities law or is it a question that needs to be dealt with in relation to funding and class actions broadly defined and if it is the latter what safeguards do we need to put in place to ensure the sort of class actions, which I think you have indicated, and, indeed, the Attorney has indicated he does not see a problem with, how do we go down this path because it is not clear to us whether the problem that is emerging is just about securities matters and should we deal with those rather than - otherwise, you know, as you would know, there are very few class actions brought in Australia every year and your concern seems to be around this one particular set of them.

MR EMMERIG (JD): There's a lot of concepts bundled up there, I suppose. Just to try and deal with them. First of all I think - I appreciate your perspective on the access to justice and the idea that you're looking to find opportunities, ways to help the mums and dads of the world.

DR MUNDY: Yes.

MR EMMERIG (JD): Small business, others who access justice where they would otherwise have trouble and that's, you know, clearly an important inquiry. I'd probably make the general observation that I guess every policy development in this area has to be, I suppose, weighed. It can't be viewed in isolation. It has to be weighed in a broader context about what is the social impact. There will be some access to justice opportunities that the price of paying is too high and I think this is one of the tricky areas that we get into. There are definitely some class actions that are facilitated by access to justice.

I don't necessarily - I won't speak on the ANZ one in particular other than to perhaps use it as the example of reflecting that there's a clarification of the law. That's an advantage. The real winners in that matter are - in terms of who gets the biggest financial take out of that - I would argue, in fact, that it's the law firm and those who stand behind the funding of the action, the return to individuals will be marginal. In America one of the problems they've had is with what they call these ultimately coupon class actions where the return is so small that, you know, the benefit for the individual is very hard to see, but where the law is clarified there may be some benefits and I acknowledge that.

DR MUNDY: Can I just stop you at that point, that is one of the issues we are trying to bring our mind to, certainly it is with contingency fees, but it is arguable. You might say the same about funded actions, third party funded actions, is the idea of placing some sort of cap on the percentage the lawyer can take. Now would that, to some extent, address that concern, putting aside the issue that any cap, its magnitude to be arbitrary?

MR EMMERIG (JD): Exactly. It's a scaling factor. I was trying to think of a way last night to give you a useful analogy and I'm going to give you one which I hope helps. I think of this a little bit like my attitude towards fishing which I'm generally pretty happy to go along and catch a bream or a flathead, you know, I don't mind going inlet and on the boat and catching that. That's something that I can kind of live with. I'm not a fan of people catching the giant marlins, these huge creatures and killing them, and, yes, I appreciate whales are not fish, to scale it up further I've got no time for people catching whales.

There's a sort of inconsistency in my position in that there's some level of fishing I'm happy with and there's some I'm not and where do you draw this boundary between when it's too small and when it turns into too big? Is it really the case that you should have a consistent principle, either you're for fishing or you're against fishing. I think, well, I can't really define for you with great precision when I get uncomfortable with the size of a fish before it starts to turn me off. There is a transition there that I don't think is uncommon and I think a lot of people could relate to.

I think my wider point is I think damages based for all sorts of actions would be a problem. I know you're not recommending that. It's a question about, well, working out what might it work for if anything and where I'm - despite the fishing example - landing at the moment is the big cases create a real big problem and I'm unpersuaded yet that the smaller cases may not create the same problem. Business securities issue was a question you asked. Yes, I think there is a problem with securities claims. Could it be regulated by changing the laws on the securities area? Yes, that's one solution but what's attractive, I think, about securities class actions, shareholder class actions to the plaintiff camps who generate these classes is that

they are generally - because they're continuous disclosure claims - they're reputationally sensitive for the companies involved and they all settle. They're large, large sums and in these cases take years to run through court and commercially the company has to decide whether it's better to settle these cases or let it run and have the fight.

One of the problems they had in America is this sort of corporate blackmail problem, they call it, and that's a fairly provocative term, but if you just burrow behind the concept, somebody threatens a class action that has - there's some studies out of Stanford where they've shown that it's had an impact on the share price during the life of the class action until the class action settles. The social behaviour that you get is the companies kind of work out is it better to have that share price dip and the class action lingering around or is it just better to pay it out early, quick and dirty settlement, get rid of it.

I think the problem has been that there's been a lot of decisions made to do those early, quick and dirty settlements and what they do is they then fuel more of that behaviour because others then copy that and you get this spiralling effect and there's been a range of reforms that they've tried to bring into place in America to deal with it. Shareholder actions there's no doubt are particularly vulnerable to that. Is it the same for product liability claims or environmental claims or other areas? It's a little hard to say. But I think the thing to bear in mind about the various studies and the general anecdotal evidence about class actions in this country is that this is an evolving market and in the evolving market the past levels of activity don't really reflect what the go forward looks like.

The position pre-2006 before the Fostif case into litigation funding was permitted by the High Court and the position post-2006 is quite dramatically different, so I do see a problem in relation to that area. I would encourage you to not support class actions having contingency fee funding in these larger cases because simply the scale of returns are enormous. If I'm taking a contingency fee on a $10,000 claim, the bream, you know, 30 per cent on that it's a lot to those who are involved, no doubt, but it's not, you know, the temptation levels are different from if I'm facing the prospect of making 300 million of a billion dollar class action.

DR MUNDY: And presumably if it is a 10,000 or 50,000 dollar claim it effectively looks like conditional fees. It has the same economic - ultimately has a very similar economic character.

MR EMMERIG (JD): I would have to say that that's where I'm trending as well and I appreciate the dilemma of devising a regime to draw the lines, but it may be that the way to start is to actually look at areas you can exclude and add to your exclusion list. So scale is incredibly important here in terms of managing the conflict of interest, but at the end of the day ultimately that's got to be a huge part of this

whole issue. You've got to find a way to manage that. The other concern related to that, which is really is in part safeguards. One can certainly raise the issue with safeguards. One concern I have is about just bolting this new mechanism on to the current system. I don't think the current system can cope with that. I think you would need to give some guidance around it and say, "We can see it as a vehicle for access to justice but there would need to in each area in which it operates a substantial reconsideration of the impact and whether any consequential reforms are needed."

I'm not counselling that we should have contingency fees. I'm, I think, on balance against it definitely for the large and I guess the debate in my mind is still open for the smaller end but that's how I see it. I certainly see the temptations and the risks and you see it right now. The level of activity increasing in this market in circumstances where - in the US Stanford put out some research recently. They had 169 federal securities class actions last year against a population of 300-odd in America, and so we need to have basically 12 securities class actions a year to match that. Bear in mind that we don't have contingency fees. We don't have the American rule on costs, so in America you - - -

DR MUNDY: That's what I was going to ask you. One would have thought that our rule on costs would act as some form of - - -

MR EMMERIG (JD): A deterrence, yes.

DR MUNDY: Would that be your view?

MR EMMERIG (JD): Yes.

DR MUNDY: But the question is we don't know how much.

MR EMMERIG (JD): It should act as a deterrence but the point I'm really making is that with the sort of increase in the numbers that we're seeing pro rata by population, yes, in this area but if you have that increase already in circumstances where you do face the adverse costs risk, imagine the impact where you introduce this enormous potential windfall for the lawyers into the marketplace. So people are prepared to run these claims, take these risks now when you've got the adverse costs risk, what's going to happen when you add this extra fuel here. The risk appetite in many ways is almost higher than America in some respects but there is a sort of mechanism that plaintiff firms use to get around the adverse costs risk.

The only person liable in a class action, shareholder or any other kind for adverse costs is in fact the class representative, not the class, so in all the major shareholder class actions it's generally a mum and dad who's put into the class representative's seat.

DR MUNDY: What if we put the plaintiff firm in the gun, in the sights for the adverse cost order?

MR EMMERIG (JD): I think you would see a much different attitude.

DR MUNDY: Because the litigation funders typically accept the risk of the adverse cost orders.

MR EMMERIG (JD): That's absolutely right. You would need to acknowledge that most class actions have some form of litigation funder behind them. I think the issue will be if lawyers get to charge contingency fees, they are also exposed to that risk as well or simply they can just take a contingency fee. I suspect most of the legal profession will be arguing that they should take the fee but not have the risk. That may go to your issue about caps. What I feel happy about caps, caps on small claims which look like the conditional fee arrangement would be a mutual effect.

DR MUNDY: That's why we have a conditional fee arrangement.

MR EMMERIG (JD): That's right, yes.

DR MUNDY: Look, we do appreciate your time. We probably would have liked to have had more time since it's an issue obviously that I think has expressly led us to develop some notoriety with some. Thanks very much for your time and we may want to have another chat with you as we take our thinking forward on some of this stuff.

MR EMMERIG (JD): I'm at your disposal.

DR MUNDY: We certainly are aware that it's ultimately an issue of risks and incentives and weighing them up.

MR EMMERIG (JD): Yes.

DR MUNDY: Thanks very much.

MS MacRAE: Thank you.

MR EMMERIG (JD): Thank you.

DR MUNDY: Could we have the Australian Centre for Disability Law, please?

MS KAYESS (ACDL): Good morning.

DR MUNDY: Good morning. When you're ready, could you please state your name and the capacity in which you appear and then perhaps make a brief opening statement. We've got about 25, 30 minutes.

MS KAYESS (ACDL): My name is Rosemary Kayess. I'm the chairperson of the Australian Centre for Disability Law. I'm joined with colleagues Yael Frisch and Hiranya Perera. We'd like to thank you for the opportunity for appearing before the Commission on this inquiry. We do welcome the inquiry, though I do note we have some concern to the lack of focus that disability has been given in the draft report.

Given the over-representation of people with disability within the justice system, both civil and criminal, we have serious concerns about the ability of people with disability in Australia to be able to effectively access justice. This is also reflected in developments that have happened in international law in the Convention on the Rights of Persons with Disability for the first time in an instrument.

Articulating access to justice is a critical facilitation factor in people with disability being able to exercise their rights and their legal personhood. People with disabilities face significant barriers to being able to access justice and to have equal recognition before the law within the legal system. These barriers can be complex, being twofold, overarching and overlapping complex legal needs, the very nature of access to justice arrangements and the inaccessibility of mainstream legal arrangements.

I would like to ask my colleague Yael Frisch to walk us through some of the issues around the complex legal assistance.

MS FRISCH (ACDL): As Rosemary mentioned, people with disability are more likely, even than other vulnerable groups, to experience substantial legal problems, and multiple legal problems, and this was found by the Law and Justice Foundation in 2012. For example, if you have a disability and any other legal disadvantage (such as discrimination, housing disadvantage, and family law disadvantage) may intersect and, whilst we mentioned this - these severe and aggravated legal disadvantages can be experienced for a range of reasons by people with disabilities, which includes discrimination on the basis of disability, higher level of social surveillance, for example, when child protection, mental health and guardianship schemes survey people with disability more highly than people with - the rest of the population.

The effect of disability and the absence of specialised legal services, which I'll also talk about in a minute, and the disadvantage faced by people - the legal disadvantage faced by people with disability can be bi-directional, which means that the effect of impairments, legal disadvantage and social exclusion all exacerbate one another and they note that, when the NDIS commences, it will actually increase the unmet legal need of people with disability as people participate more in society. Now I'd like to talk about what specialised legal services have reported. Legal services for people with disability need to address the legal and non-legal issues that affect people with disabilities.

For example, as I sit here, I have a slight speech impediment. I am able to express my legal needs, but sometimes this will take more time and more know how. Another example is that it took longer to get up today, so these little things which the legal system should be responsive to. Other things include the need for AUSLAN interpreters for people who are hearing impaired and the need for information in multiple formats and easy English versions. People with disability might need assistance with alternative dispute resolution as well as legal representation because some of these impairments make it harder for people with disability to be self-represented litigants.

The Human Rights Commission and the Law Reform Commission have also addressed access to justice, and they talked about the barriers faced by people with disability, including the barriers in accessing support, adjustments to aid with the need to participate in the legal process. Another barrier is that people with disability were seen to be less reliable witnesses and participants in the legal process. When I read the Law Reform Commission report, the story that hit me hard was how a woman who was giving evidence, admittedly in a legal trial, needed- the Court process wouldn't slow down for her for her cerebral palsy accent and, as someone who has a cerebral palsy accent and is a lawyer, I thought, wow, there does need to be accommodations in the process, and all the way through the process, for disability and specialist legal services to do that.

We argue that the specialist legal services may be direct legal needs and non-legal needs, civil and criminal, and also particular areas of law dealing with mental health as well as discrimination, as well as the whole gamut of legal issues faced. Now I'll hand it back over to Rosemary.

MS KAYESS (ACDL): From what Yael has put forward to us - I mean, Yael and I both speak as lawyers and we also speak as people who experience the lived experience as disability. For us, in our management role within the Australian Centre for Disability Law, it's not just our own personal experience, but the case work load and the advice load that we carry at the centre reflects this complex need of both high levels of interaction with administrative frameworks and institutional

frameworks married with an impairment that has significant barriers to being able to rely on institutions and justice mechanisms being able to provide communication and information which is accessible to them.

On the secondary issue, there is need for reform in the current access to justice arrangements, especially the funding model. The Australian Centre for Disability Law exists as a specialist legal advice service, but it's a specialist legal advice service with a very narrow focus. The historical funding anomalies that happened within the community legal sector are problematic for people with disability being able to access primary right through to tertiary legal assistance that is accessible and specialist. We believe that special disability legal services are an essential part of any restructure of access to justice arrangements in Australia.

There is a necessity for a holistic, articulated, integrated legal service system for people with disabilities. An integrated, articulated service system would have for people a primary source of access and referral that can deal with non-legal needs, but also form as a point of reference for referral into secondary advice and case work provision and also through into specialist, test case and law reform provisions of services through an articulated method. We believe it is important for there to be specialist disability legal services to be able to deal with the complex legal needs experienced by people with disability, but at the moment we currently have very poor funding and - sorry, very poor access to well-funded specialist legal assistance in Australia.

Mainstream services are very inaccessible to people with disability when they ought to be accessible to people with disability. As Yael pointed out, it is a complex mix of attitudes, physical environment, and also the skillset of practitioners within the justice system. This is reflected not only within mainstream community legal services, but also in other mainstream services and the private legal sector. It is also reflected in our judicial system. There is a lack of access and knowledge through the legal system that is able to accommodate people with disability as equally participating in members of the justice system.

We also believe that the framework of funding needs to be able to be adequate to effectively service the legal needs of people with disability and currently anomalies, such as not being able to recover solicitor costs, but only disbursements and funds for counsel, does not recognise the level of intense case work that is required at the solicitor level to be able to provide effective legal services for people with disability. This is picking up some of the highlights of our submission. Our submission goes into more detail and we would like to be able to answer any questions that the Commissioners have of us.

MS MacRAE: First of all, thank you for what we appreciate is an additional effort

that you need to go to, to come and see us today, and we really appreciate that. Thank you for your written submissions as well. I guess funding is the issue across the whole sector and we are very conscious of the fact - and you would have seen from our report that we are conscious that there are specific and additional barriers to people with disabilities. We have talked a little bit about the skill set of the sector itself and I would be interested in your comments about whether you think that has been improving at all over time. Certainly, there seems to be a higher awareness amongst the judiciary and amongst the legal profession itself that there are areas of training that have been lacking. We also heard from the Disability Advocacy Network about the need or the advantages there would be and I think this goes to your point about legal and non-legal issues being married, that funding in that sector and being able to help more with advocates would also be helpful, and I would be interested in your views about the relative values of those things, given that we are always in a sort of cost constrained world here.

MS KAYESS (ACDL): We see that as essential. We think that integration between primary services and generally non-primary legal services, not legal primary services, is a necessary part of the integrated system. Advocates provide a very, very important role in non-legal services but also getting to ADR opportunities as well; also dispute resolution and conciliation can be carried out within the non-legal sector if the advocates are funded to be able to fill into the areas and we believe that would be in fact an important load off the community legal structure and make it more accessible to people with disabilities.

MS MacRAE: You talked about physical barriers being a problem as well and I just wondered the extent to which that is still a problem for you.

MS KAYESS (ACDL): Well, you know, I got under this desk today. It is very rare that I can get under a desk now. I know it sounds really quite silly.

MS MacRAE: Not silly, no.

MS KAYESS (ACDL): But getting under a desk can be quite important. I was going to check with your support person, who is taking obviously the transcript, if my distance from the mike was problematic. It's not, no, but there are many occasions where it is problematic. I have been in situations where I have had to perch on the corner of a desk, just so I can get to the mike, but any supporting documentation I need access to, I can't have in front of me. These things have a compounding impact, so that would affect any quality of representation that I would be able to make of myself or my, you know, client if I was working with a client. Whilst the physical access has improved significantly, there is still significant barriers in people recognising the need for alternative and augmented modes of communication.

MS MacRAE: Right.

MS KAYESS (ACDL): We had a judgment come down in Queensland last week that upholds the precluding of people who use AUSLAN from participating in juries. It's a very narrow black letter reading of the legislation that, you know, denies the ability to have a 13th person, even if that person is a mode of communication for one of the jury.

DR MUNDY: You mentioned ADR and one of the issues that we have tried to bring our minds to broadly is how disputes could be avoided in the first place and particularly by governments, because we probably have more capacity for traction with governments than we do necessarily with the private sector and obviously, NDIS raises a whole pile of administrative law questions and I know the AAT is thinking about how it's going to deal with that and I suspect - - -

MS KAYESS (ACDL): Well, that's just our recruiting process.

DR MUNDY: And how they going to deal with those issues in the context of the amalgamated tribunals issue. I am just wondering: do you have any observations to make upon how government agencies could improve their own processes of dispute resolution before it ends up in a formal appellant sort of arrangement or, you know, in a tribunal or something like that? The Commonwealth has a set of arrangements. The states and local governments don't and we were just wondering the extent to which those issues, if reformed and how reformed, could be undertaken to assist people with disabilities who have those sorts of issues they want to deal with government agencies before they could escalate.

MS KAYESS (ACDL): I mean, with any complaints mechanism, the more access we make from the beginning and that there's problem solving elements along the way; that's always going to be better. With NDIS, it's really quite unclear. Well, I suppose this will come out a little bit more through the launch sites but it can be quite unclear about where authority steps in and who has authority for certain problem solving areas, so if a complaint escalates, where it goes to and if it has solving facilities, because you have got that unknown mix now, because where the funding is going to the individuals, if there is a support mechanism around that individual that's broader for the individual, where does the legal responsibility lie, and a lot of that hasn't been tidied up, I don't think, and it's got I think problematic issues within the construction of the legislation, so whether there will be challenges to that and whether ADR can be built into that, I don't know, whether it will become a conciliation process, if that is the option. If it hasn't got those assets prior to ADT, it goes straight to review.

MS FRISCH (ACDL): And I think it's very important to maintain and continue, important, the availability of information in a non-jargon sort of language. That's very important to avoiding and resolving, so all parties understand what's going on, and jargon is very good at obscuring that.

MS MacRAE: I think that everybody today faces that actually.

DR MUNDY: It's interesting that one issue that the President of the AAT has raised with us on a number of occasions is the problem of language in ordinary citizens being able to access their rights. I know it's something his Honour is quite vociferous on.

MS KAYESS (ACDL): Well, I am a legal academic especially towards students. I mean, I know what little they get in terms of disabilities but just in terms of importing plain English.

DR MUNDY: One thing that we find useful sometimes is to identify agencies that have good practices. It's easier to say "This is good" rather than "You're bad." Are there any agencies, either state or government agencies, that you think are particularly attuned or deal well with people who have disabilities or are they all pretty much of a muchness?

MS KAYESS (ACDL): I don't think I could say that anything stands out. Elements of certain departments have done extremely well on, you know, certain topics but overall, I would say, yes, pretty much of a muchness and I think a lot of that has to do with the monitoring of agencies.

DR MUNDY: What they do.

MS KAYESS (ACDL): What they do. Sometimes it's very hard to even get agencies to recognise, unless they have got some sort of disability within their purview that they have, that people with disability are in any way part of their purview and it's really quite interesting that they don't see disability as part of human diversity and that, you know, whatever any department does is going to have an impact on people with disabilities in some way.

DR MUNDY: Just, I guess, coming back to the point about, you know, essentially dedicated assistance services for people with disability, institutionally, do you have any views about where they might be housed? I am mindful that geography is always a challenge for service delivery. Would that be better in a stand-alone agency or, for administrative purposes, perhaps attached to a Legal Aid Commission in a special division, or a separate, stand-alone CLC-type framework?

MS KAYESS (ACDL): I think the strength of the CLC framework, whilst I have problems with some of the historical funding mechanisms - sorry, we have problems with some of the historical mechanism fundings. I mean, we suffer from being one of the roll-outs of the Disability Discrimination Act. So we're a specialist disability legal centre, but we have a very narrow jurisdictional purview that relates only to discrimination law and people with disability very rarely proceed with one legal problem.

The strength of our centre is our community management because we are able to have that ongoing relationship with the community, which is really important, in terms of primarily your tertiary role, in terms of test case law, and law reform. I think that's a real strength of the CLC model and, I mean, community management has its problems as well, but it does have a certain strength in keeping in touch with your constituency and being able to be involved in what some of the broader issues are and where law reform and test case litigation falls within that.

DR MUNDY: So the recent developments, particularly at the federal level, for funding has been to move the emphasis away from - - -

MS KAYESS (ACDL): Law reform.

DR MUNDY: - - - law reform onto frontline services, whatever that might mean. We had some evidence from the ACT EDO, who basically indicated to us that the outcome of that process was probably that the ACT EDO will no longer be with us and perhaps some of the jurisdictional EDOs will go the same way. So what is the impact on - is your funding brought into question by that general - or are you funded some - - -

MS KAYESS (ACDL): No, the funding principles would have an impact on us. I mean, I think it's really problematic in a common law system to be saying that you can divorce law reform from case work.

DR MUNDY: We would be introduced in further submissions upon that point. We are quite interested - we have made some observations elsewhere about the funding of law reform and the benefits that brings. We are quite interested in exploring that question further.

MS KAYESS (ACDL): We see it as critical because the nature of a lot of our work is disability discrimination law. The nature of disability discrimination is getting structural change. The burden the disability discrimination law places on individuals, because the individual carries the onus to claim their rights, for systemic, structural problems within society that continue to create barriers to people with disability being able to participate. Law reform is a way for us to take that burden

off the individuals and get structural, systemic change. We don't see that as being outside our purview. We find it very hard to reconcile that the funding principles nearly set up a kind of punishment to get systemic change to be able to relieve that individual onus that people with disability carry.

DR MUNDY: It might ultimately be, from the taxpayer's point of view, the cheapest way of fixing the problem.

MS FRISCH (ACDL): Yes, because it would reduce the case work as well.

DR MUNDY: We do appreciate you - - -

MS KAYESS (ACDL): If you would like further submission on that - - -

DR MUNDY: We would, not that we would ever try and solicit evidence, but we would love to get some more material.

MS KAYESS (ACDL): If we can get it in under the guise of evidence, that would - - -

DR MUNDY: We do thank you for coming along today. We do appreciate you participating in our process.

MS KAYESS (ACDL): Thank you very much.

DR MUNDY: Thank you.

MS MacRAE: Thank you.

DR MUNDY: Can we have the National Association of Community Legal Centres, please? Could you please state your names for the record and the capacity in which you appear today?

MR SMITH (NACLC): Sure, I can do that. My name's Michael Smith. I'm the Convenor, or National Chair, of the Association of Community Legal Centres. I've got Amanda Alford with me, the Deputy Director of Policy and Advocacy at NACLC, and Julia Hall, our Executive Director.

DR MUNDY: Could I ask you to make a brief opening statement? Given we are running a little bit behind time, brief would be helpful. We have had the opportunity to read your submissions already.

MR SMITH (NACLC): Thank you. I will try and keep it brief, thank you very much. Thank you very much for the opportunity to be here. I think it is a really important inquiry and the Commission's work to date shows a lot of detail and thought in what is going on, so we really appreciate that. We would like to briefly outline some of the key issues we have found in the Commission's work to date, and we will not go through all the submission, of course. We speak on behalf of the roughly 200 community legal centres right across Australia, including the ones who have just spoken and did a very good job, but both generalist and specialist community legal centres right across Australia.

Firstly, I want to talk a little bit about how special community legal centres. I do not mean in the sense that community legal centres are special because they make people feel better - volunteers, staff, clients and all those things - in a warm and fuzzy kind of sense. I don't mean their specialist because they're community run and managed, although that's important, and therefore, they are professional. We are really proud of how professional, high quality, evidence-based community legal centres are, and their great work. We don't mean it's special just because it's idealistic. We think it's important to say that community legal centres are special because they are different in the way that they work and their approach and their practice, and it's not just like other legal service providers.

We undertake the strategic service delivery model of community engagement, of direct legal work, of looking at community need, and responding in whatever way is most appropriate, whether it is through direct legal services, whether it is through education, and whether it is through some systemic and policy work, and that mix is flexible and adapts to the changing needs of the community. That can occasionally look like community legal centres are doing all sorts of different things, whereas some of the bigger providers look to offer a clear, consistent model, but that flexibility and adaptability is actually the strength that community legal centres bring to the table.

In particular, community legal centres are very adept at reaching hard-to-reach groups, reaching groups that other providers find very hard to reach, whether it is because they have got a disability, or whether it is because they are from a culturally-diverse background, or whether they just want to access the system for a whole range of other reasons. So increasingly, community legal centres are using a very sophisticated, evidence-based approach to inform their target work and approach to service delivery and respond to legal needs in their community. Many community legal centres have changed their organisation, their service, or their service delivery methods to meet the change profile and needs of the changing communities.

The draft report talked a bit about the historic funding model for community legal centres, but community legal centres have not just waited for the model to catch up with what they are doing; they have adapted their own work in accordance with the local needs. There are many, many examples of new approaches being trialed in community legal centres and being piloted there and then taken out more broadly and adapted to a broader audience. NACLC's a very strong active partner with our colleagues in the Legal Aid Commissions, the Aboriginal and Torres Strait Islander Legal Services, the Aboriginal Family Violence Prevention Legal Services, as well as private legal profession and pro bono work. All have a really important role to play and they all complement each other. But it's not quite right to say they are each providing legal services and we can roll them out to different places and we'll talk pretty much the same. Those differences make the comparisons really difficult and we find that when comparisons are made, whether it's using data or assessments of the kind of work they're doing, those comparisons can often miss a lot of the detail and make those comparisons really unhelpful.

While it has not been formally released, we are really concerned that some of the comparison problems in the NPA review report were really problematic and we would really not want the Commission to make those kind of mistakes because we think there are a whole lot of issues they have missed here. In terms of the draft report, in principle, NACLC really supports the Commission's support for a national and consistent approach to legal assistance services, including a national framework or agreement that covers all four legal assistance providers, particularly the Family Violence Prevention Legal Service, that has now been moved out of the department, through high-level national priorities and objectives, national core priorities of legal need, national priority of client groups and common baseline data. Certainly, NACLC has been calling for this kind of review right across the whole legal assistance for many, many years, and we tried to look back and see how long it had been, but it has been a long time.

We certainly support the development of an equitable, consistent and

transparent national framework for legal assistance funding. We can see a national framework working with a national funding model and a national partnership agreement. I think the complainant wrote in your draft report that it's not really a national partnership at the moment, and that's certainly our view. A true national partnership has a lot of potential, rather than the current fragmented and disparate system, and we could talk certainly more about that.

Any funding model has to be based on evidence-based research about legal need, and NACLC has been a leader in developing resources to help centres do this kind of legal needs work, and it's happening more and more and we can talk about that. The legal assistance sector needs to be involved in these kind of decisions about funding allocation through inter-agency forums of all legal assistance providers, but no one legal assistance provider should decide the funding allocation. A collaborative approach to identifying or responding to legal need and allocating funds is the most effective and appropriate approach. We have got really serious concerns about competitive tendering mainly - for a whole range of reasons, but not least because it really reduces the collaboration that's possible. Once you set up agencies to be competitors against each other, a whole lot of good work deserts very quickly.

We think the eligibility tests at a high level are appropriate, high-level principles, and that might be a more appropriate approach to the imposition of eligibility tests across the board between legal assistance providers such as Legal Aid Commissions and CLCs. We know that our evidence shows that CLCs are reaching the most disadvantaged people most of the time, and often when people can't get help from Legal Aid they will go to a community legal centre, so a common eligibility test creates a lot of problems.

We were talking before about systemic work, and certainly, as you would expect, we are very concerned about the current approach of the Attorney-General's Department around funding for CLC work to not include policy and law reform, and we certainly support the Commission's view so far in this area. One of the concerns we have is that there are very narrow assumptions about work in this area. I think my fear is the assumption that community CLC staff sit around with a whiteboard and say, "What law will we change today?" That's not the way it works, but certainly the law reform policy work comes out of the client experience and the community experience that we deal with every day, but also it's a much broader scope than that. It might be about talking to police about their response to family violence, it might be talking to the courts about how their systems are making it really difficult for people. It's not just about changing the law, it's about a whole range of systemic approaches in a really collaborative way.

That saves money, and increasingly the sector has been using a prevention

conversation, a prevention early intervention, and some of that's in the NPA agreement, I'll probably go further than that in some ways, but that notion of prevention that we understand from the health sector is really crucial, and it saves money, particularly long-term savings rather than letting things go.

Finally, we know that quantifying unmet legal demand is very difficult, but centres are turning away clients every day that they can't assist. We know the sector has really high hopes that the Commission might undertake that really challenging work about trying to quantify the level of unmet legal demand and particularly the funding shortfalls in legal assistance. We know that's a challenging task, but we think probably the Commission can't do it, who can? We know the impact it has every day on people with legal problems. So it's probably what we'd start with it, and we'd be really keen to have a conversation about where we go from here.

DR MUNDY: Okay. We had your colleagues from New South Wales before us yesterday and we had a discussion around, I guess, the institutional framework for funding going forward, and I think Alistair has indicated a favourable disposition, I won't say a preference, towards a model whereby the Commonwealth would essentially make allocations of funding and then the distribution within jurisdictions would be a matter for that jurisdiction, the Attorney-General's Department, your organisations and other relevant bodies.

I guess it stands in counterpoint to an arrangement where CLCs have a direct relationship with the Commonwealth. That obviously has some attractions, the general proposition that service delivery is always done better closer to source, and all those sorts of things. Does NACLC have a national view on what the institutional relationships might look like?

MS HALL (NACLC): We do support that idea, but we have said that we think we should be, we think though, an inter-agency forum at the national level, that it's important that the different service providers participate in that decision about allocation down to the state level, so subject to that qualification, then - I think you said the Attorney-General's Department, so we were seeing it again as another state lever inter-agency forum. We think that's really important, to encourage the collaboration, but also to - - -

DR MUNDY: I only say the Attorney-General's Department on the basis that there needs to be, obviously, a government - - -

MS HALL (NACLC): A government, that's right, yes.

DR MUNDY: - - - that's accountable to the Commonwealth.

MS HALL (NACLC): Yes, in broad terms, yes we do, subject to those - - -

DR MUNDY: Do you see that that approach would - one of the things that a number of your members have raised with us, and I think some of the statements, is the administrative burden of clients. Would you see such a model might be able to get rid of some of that, if sensible - if the Commonwealth set up broad performance-based outcomes that were measurable jurisdictionally and then the states could be left to - so you would perhaps be able to get rid of some of the reporting burden?

MS HALL (NACLC): It should, that's the theory, so that's a matter where the government is going to participate in that, if that - we certainly think that it can, so that the Commonwealth money is devolved and then the Commonwealth and the state have the same criteria. We have also said that you know that the states may want to have separate, some particular influences about allocations and so forth, their own priorities, and that's fine, as long as they are not inconsistent with. Subject to that, as long as there's complementary data requirements and so forth and recording requirements, it's quite feasible, I think, in theory.

MR SMITH (NACLC): I think we have touched on this before, and one of the - which you will know by looking at the figures - that some territories and states don't give any funding to community legal centres, and I think there's - in terms of the national partnership work - I think there's an opportunity that has been missed a few times around the Commonwealth leverages and saying, "If we give a dollar, you give a dollar", or "If we give two, you give one", that kind of work, and so there haven't been joint decisions, and I think there are times when the states, whether it's Legal Aid or the state government, might say, "That was a surprising decision", but the Commonwealth might, quite rightly, say the others are the states, so I think there's a conversation that has been missed many times, and certainly, if you look at the funding model, you can see historically, it's hard to say how that funding probably works in an overall kind of basis, we certainly understand that.

DR MUNDY: We have some suspicions about how the funding model might work, and we think most decisions might be taken in the month of June.

MS HALL (NACLC): Yes. What has happened, I should say, that in the CLSP, when the cycle comes around, the service agreement, and the guy runs a renegotiating - not the guys, but just the service agreement, there are conversations there and NACLC is represented there, representing the sector, where the state program managers and the Commonwealth, CLSP section, do talk about those specific - I've seen that it can work, but you need to have, I think, the formal structure that requires everybody to be in that room.

DR MUNDY: No, I think - we are keen - we will make recommendations that will involve some sort of structure. I think the absence of structure is part of the problem, and joining up the bits. In some of the material that you have put to us, you have given us what looks like a model for a base, core, no smaller than this sort of five-person model. I guess, the first question is what drives that, and I think I can probably have a guess but, secondly, is it your view that that should be a basis at which all existing CLCs would be funded, or is this what your view about a sustainable organisation looks like and the notion that some CLCs may need to - if we thought that was the base model, it would be appropriate for some sort of consolidation.

MS HALL (NACLC): That model is - as you know, we call it a sort of effective strategic delivery model, and it is premised on it being a stand-alone organisation, and it's a generalisation, so it's not impossible that there are some CLCs, and particularly, perhaps, if they have got all - or (for instance, they might have access to either administrative support or infrastructure support) could be smaller. We don't rule that out, or that it's not the particular market, or they need to be much bigger. So we are saying, though, that - and it's partly the model that they need to be lawyersbecause of the - it's referred to as historical sort of funding decisions. Sometimes there have been instances where a certain justice statement, the '90s was an example, where funding was given which basically supported one and a half, two people, and then it hasn't been increased and, because of the pressure, sometimes they're lawyers and there's not that recognition to have effective lawyers doing their work and also volunteers, and the support that they require, you need administrative support. So it's just to sort of say that you really need a couple of lawyers, you need an admin person, you know, and because of the type of holistic service, you need somebody who is community development or some other type of support person. So we do say as a generalisation, but not an immutable one, that that is an effective size we think organisationally but also in terms of service delivery.

MR SMITH (NACLC): I suppose what that's meant in practice is that when you have centres of a certain size, then they have the scope - whether a part of the organisation or not - to then go out and perhaps generate additional funds or do other projects and get other kind of funding sources in and do that kind of developmental work. I think the very small ones have struggled to kind of do that kind of development. You know, you see the ones that have grown and developed and have gone very well beyond that. So I think that's certainly the key kind of starting point too. There's some good examples I think in the Victorian submission about centres that are in what appear to be gentrified areas but have actually adjusted their model and very much still focus very much on clients very much in need.

MS MacRAE: Would you say that scale is a widespread problem? We had a submission from some pro bono providers come in just last night, actually, but they

do say quite strongly that they consider the ability of CLCs to be hampered somewhat by the lack of scale and I just wondered if you would agree with that.

MS HALL (NACLC): Yes, there are examples of that. I have one from five years ago back when QPILCH Homelessness Service was then I think something like one and a half FTE lawyers. They had no support. They had a lot of volunteers but all they needed really was a half-time admin person who could have coordinated the volunteers and they were wasting time. The lawyers should have been doing the supervision and the training. They would have had twice as many volunteers. When they got that admin support, it just ballooned, the amount of capacity for the services, so it does absolutely increase capability and capacity.

MS MacRAE: Given the community nature of these things, they're sort of trying to just get increase scale. Is there an alternative to hoping that you might get more money from somewhere that will allow you to flourish, or are there better mechanisms within the sector to sort of consolidate where that might be the most helpful thing to do?

MS HALL (NACLC): There are examples, I think, and there's a couple of examples having - a recent one where two centres in Victoria have looked at merging and sharing infrastructure and so forth. So I think that is going on and it's increasing. You're probably aware that in the CLC sector there's an increasing number that are either auspiced or co-locating and so forth, so I think there is a movement to that. There has always been some but it's probably a little bit more of that, but there's also appropriate occasions where they are separate and that's what is needed.

MS MacRAE: Yes.

MR SMITH (NACLC): I think that geographically if you look across the country, particularly in the rural and regional areas, there are significant gaps where centres need a lot more resources, and particularly rural and regional areas. So there are a couple of spots where centres are relatively close together in the urban areas but it's actually a fairly small issue in the overall scale of what's going on.

I think the other scale question is often the Community Legal Centres are so used to being small, we don't necessarily have the conversation about what would they like if they had a million dollars each or two million dollars each and what kind of impact would it actually have on the legal issues in the community. I think the Commission talked about civil law being the poor cousin in legal assistance and because Community Legal Centres do so much work in the civil law space, I think we might be the poor cousin of the poor cousin in that kind of sense too and I think there's a huge scope for that kind of impact. It would have on a broader kind of scale in the scaling-up kind of sense too. Certainly a lot of centres that for various reasons

have merged or have got a bit bigger are having huge impacts and we're seeing those kind of real achievements.

MS HALL (NACLC): Can I just add a note of caution about - there is a tendency, I think, sometimes for people to come from outside and think, "The idea there is to co-locate. What's the problem with that?" Particularly in rural - triple R areas, we call them - regional areas. Sometimes the whole thing about a legal practice and the professional requirements and our own risk management scheme requirements about, you know, you might have a client who is a victim of family violence, a survivor of family violence, and you don't want a common waiting room with another service where the perpetrator might be there.

There's a whole lot of having to segregate your data systems, which you're required to do in terms of protecting client confidentiality, but also the whole perception of conflict or reality or conflict, and so it requires you to have quite a degree of segregation and that can be one reason why sometimes you see CLCs that you might think are small, "Why are you there?" Well, they need to be because the people need to feel safe in going to that location.

MR SMITH (NACLC): The issue of legal conflict is much more an issue in the civil law space than it might be say in the criminal law space.

DR MUNDY: You remarked on our observation about poor relatives. One of the things we are recommending, or we have suggested we will recommend at the end of the day, is that resources for assistance in civil matters should be in some sense funded separately, trying to get away from the impact that Dietrich has on a fixed aggregate. Is that something that NACLC would support.

MS ALFORD (NACLC): In principle, I think our concern would be to ensure that there's not a redirection of funds simply into civil, but in principle I don't think we're opposed to a demarcation. Of course noting too the different definitions of civil and whether that would include family or not and how that might play into the model that we have articulated with respect to Commonwealth funding decisions and then the state and territories.

DR MUNDY: Given that particularly for a number of sort of classes of disadvantaged people who often present with both civil and criminal needs, or when violence orders suddenly in breach become criminal matters and things like that, would it be beyond the wit of people to work that sort of interaction out without it becoming an incredibly intrusive and overly bureaucratic, "Well, we can't help you because that's a criminal matter and we're not funded to do criminal stuff"? Is that just a bureaucratic shibboleth the sensible people dealing with real issues will deal with?

MS HALL (NACLC): We were talking about funding for CLCs or for that matter for family violence prevention legal services. As you probably know, the FVPLS are funded for particular survivors of family violence but they actually see and deal with all the legal problems and related problems, not just the civil, and I think that is necessary also for CLC-type clients. You have to be able to assist with the different parts. You cannot split them down the road from one little bit. It just doesn't work. So I think there has to be some understanding of that in the way that the civil funding is allocated.

DR MUNDY: Yes, but we can probably just fund family violence prevention centres and say that's funding for family violence prevention centres.

MS HALL (NACLC): Exactly.

DR MUNDY: Okay.

MS ALFORD (NACLC): Which fits with the very unique and holistic service that CLCs provide.

MR SMITH (NACLC): Certainly within the CLC - I mean, we may get on to data but, I mean, within the CLC data system - for example, in Victoria a centre might get funding for family violence work at the court and when you put that data into your system, you have to indicate that that's from the family violence funding, not from other funding, so within the CLC sector there are some systems in place for those kind of things so it wouldn't be particularly burdensome. You want to make it as smooth as you can, but those things can be done.

MS MacRAE: I guess ultimately the reason we thought it might be helpful to split it is to show just what a poor cousin civil is. Would that help?

MS HALL (NACLC): I really think it would. I think it's necessary to do because I think it's massively under-appreciated, just as it how much of the civil budget, if you like, is swallowed up by family and family-related stuff. I think it would be good to - - -

DR MUNDY: Because of the predominance of the Commonwealth in family matters anyway - and it is about all the civil that it funds, quite frankly; the rest are neither here nor there in money terms - would you see merit in actually funding family separately because it's an identified separate - - -

MS HALL (NACLC): I don't have a view about whether it should be funded separately. I think it's incredibly important to demarcate the two so you can track

them, if you like.

DR MUNDY: If you want to think about that and talk to your members, it's something we would be interested in hearing back on because it has been a challenge for us when talking about civil matters because so much of the material we have is actually family related in the Commonwealth civil funding.

MS HALL (NACLC): Government is very attracted to separating them out because of the states wanting to say, "It's mine," or say, "It's the Commonwealth's," and one of the issues with civil is because they're often interwoven, the state and Commonwealth stuff, I would be a little bit concerned that it's not sort of used as an excuse, "No, it's yours." "No, it's mine."

MR SMITH (NACLC): There's a strong interplay between the family violence and family law work. People might say family law when actually what they mean is it's actually family violence work which is quite different to the straight family law kind of work too, so in the conversation they can be really confusing and get lost, I think.

MS HALL (NACLC): And the child protection as well.

MR SMITH (NACLC): Or child protection. There's a whole range of other issues like that too.

DR MUNDY: We put this to your colleagues from the ACT Women's Legal Centre on Monday about whether the jurisdictional separation in that family space with the Commonwealth law and state law is actually a real problem for people and whether there might be merit in trying to find a more institutionally simpler form. We're told there was a trial done in Bendigo where family law matters were being held and heard in the state jurisdiction. Is there a law reform opportunity around that could facilitate better resolution of family matters by trying to deal with the Commonwealth/state jurisdictional issue?

MS HALL (NACLC): I'm not aware of the Bendigo trials.

DR MUNDY: Neither were we until Monday. I'm sure someone's looking into - - -

MS HALL (NACLC): I'll take that on notice. We have some excellent colleagues in Bendigo.

MR SMITH (NACLC): Everything happens in Bendigo, didn't know that as well.

DR MUNDY: It's a great place, Bendigo.

MR SMITH (NACLC): I think when the Commonwealth-state divides an issue at its funding levels - but I don't think it's an issue on the grounds so much of a Community Legal Centres in practice about "we don't do that because it's Commonwealth or its state"? There's things like that, too?

MS HALL: No, it's more Legal Aid.

MR SMITH (NACLC): I mean, there may be an issue, particular for ACT, Tassie and some other places where they've changed the policy around funding, around policy and law reform if they've only got Commonwealth money which some of those places have, it's going to be a huge issue because it means those services won't be able to do that kind of work.

MS HALL (NACLC): There'll be a state divide in the ACT.

MS MacRAE: There's a few places now where we've heard about the collaborative approach used in Western Australia being a good model and I'm just wondering if you could elaborate a bit more about what's different between the way they do things in WA and elsewhere, and what's particularly good about that Western Australian - - -

MS HALL (NACLC): There's a particular example in WA rather than an invariable practice - talk about that particular review.

MS ALFORD: I suppose we drew your attention to the Western Australia model as potentially useful because it really emphasised the collaborative nature of all legal assistance providers being around a single table and being involved in determination of funding allocations. So really drawing on the collaborative service delivery model, to then translate that in determination of an allocation of funds and essentially the inter-agency forums that we've outlined in our submission we think would be useful at both a Commonwealth and at a state and territory level would be sort of an articulation of that in terms of everyone being around the table, applying local knowledge and drawing on service delivery mechanisms and collaborative approaches to translate that into assessing legal need in a particular jurisdiction, and determining funding, and identifying and responding to legal needs accordingly.

MS MacRAE: Would you be able to say you felt that would give them good outcomes as a result of that sort of approach.

MS HALL: At least we know and we understand that if there was more funding - as there was on occasions in WA - that the Legal Aid Commission - so the state pro bono managers, the CLSP and the Commonwealth were talking and they made decisions based on criteria, based on legal needs, the previous review and the

subsequent follow ups of the review, so at least there we had some understanding about why moneys went where they went. They funded wheat belts and various areas that had gaps in it, so that's good in practice.

MS ALFORD (NACLC): And detailed analysis of legal need and then the update of that in 2009, and then the use of that to provide a blueprint for mapping of legal need and then the collaborative approach that you referred to, and our Western Australia colleagues have indicated that was a useful approach.

MS HALL (NACLC): So it was a positive example but because it wasn't required to be done that way, so that's why we harp on about the need for a framework, to make sure that it does happen in that sort of way - consistently.

MR SMITH (NACLC): I think in Western Australia at that time, there wasn't a fear that centres were going to lose existing funding so it was very much about "what can we do about the unmet legal need, where would we go next, what would be most important if we had an opportunity to grow into the future?" I think there's a very different conversation in that kind of collaborative sense.

DR MUNDY: Obviously the Commission's expressed some concerns about the efficiency of allocation, if you sense. Is the money going to the right places? And that's obviously a model that solves that. I guess the question is if we went down this model which was more decentralised, which has some - how do you think we should think about and deal with the question of - how do we allocated money between jurisdictions? I mean, there's a grants commission type model that can look at relativities and stuff, and if you understand the first thing about the grants commission you're probably not human but I've looked at the grants commission model many times and flummoxes me. How would you see that? Would we dole the money out on a per capita basis? How do you think it should work?

MS HALL (NACLC): I guess we'd go back to our legal needs assessment, basically, and that would take into agree - numbers are relevant and numbers of people are relevant there, but legal needs and other factors that go into the term.

DR MUNDY: Should it in any sense reflect the funding commitment that the jurisdictions themselves make? Sort of coming to this grants commission notion about relative capacity as well as relative need, should the rest of the country be helping out jurisdictions where state government won't put in any money, I guess is the crux of that question.

MS HALL (NACLC): Do we want to live in a country that doesn't make sure the people are represented in Tasmania because the states can't afford it?

DR MUNDY: I have no particular jurisdiction in mind.

MS HALL (NACLC): Hypothetically.

DR MUNDY: It could be New South Wales.

MS HALL (NACLC): It could be.

DR MUNDY: But is the performance of the jurisdiction I guess something that should be considered within the funding model or should it be blind to it?

MS HALL (NACLC): NACLC's previously expressed a view that the Commonwealth - if it comes to, sort of, working out allocations - so this is separate to the discussion on this particular model that the Commonwealth should wear a greater burden for a whole lot of reasons. I've articulated our funding principles and I think that would remain our position, that if there is a state, hypothetically, that can't afford it or isn't stepping up, that the Commonwealth should pick it up to a base level.

DR MUNDY: So the Commonwealth should determine what it wants and if the CLC is in a jurisdiction or there's a particularly generous state attorney, good luck to them. Then they've got a bit more and they can do more, but the basic level of outcomes should be funded.

MS HALL (NACLC): I would imagine at that national level if there was - I mean, if I were the Commonwealth I wouldn't do my decisions without knowing what the states might be stepping up to plate. I think there's a market reality about this. I think if you've got bargaining power, why not use it? So I think that should be an informed discussion at that higher level about what the commitment may be coming from below. I think that's important, yes.

MR SMITH (NACLC): But I think the conversation you said before about devolving some of the decision making more to state level, to state government should come with some buy-in and actually bring something to the table. That's what I'd be saying. I wouldn't be saying, "Well, you can get some power to decide," if you're not going to put in any money. I think there's a opportunity there that's probably been missed.

DR MUNDY: It becomes part of the partnership.

MR SMITH (NACLC): Yes, and you were talking before about the lack of civil law emphasis. I think part of that, I suppose from a Community Legal Centres experience, is that because that isn't emphasised generally in legal assistance, people

assume that Legal Aid, as people call it, is all about criminal matters and those kind of issues and therefore there's not a lot of community support for that. They're not thinking about responding to family violence, or people with debt problems, or people with consumer issues. Once that broader understanding is there, there's much more community support for those kind of things, and that actually helps, get some legal assistance funding on the agenda because it's not just about helping criminals that should be helping themselves. We think all those people need to be supported, but that's the kind of community discussion that gets missed.

MS HALL (NACLC): We find that in our research - I mean, it's very clear if you talk to someone about the importance of the services for somebody who's lost their job or at risk of going into homelessness, or you know, with the sort of natural disaster insurance advice - all those things, you know, there's massive support, if you ask them about civil law, I mean nobody know a lot about it. Who cares, you know?

MS MacRAE: What's that?

MS HALL (NACLC): That's right.

DR MUNDY: Thank you very much for taking the time to come in and thanks for your submissions and the other material that you've provided to our guys, and I'm sure we'll - - -

MR SMITH (NACLC): Is there anything else we can be assisting you with in terms of the other kind of work you're doing, or the gaps that are still there, you might need some responses to?

DR MUNDY: The answer to that is probably but we're probably not the right people to ask. But we'll be in touch with the - - -

MS ALFORD (NACLC): You did mention to our colleagues that further submissions with respect to the law reform point might be useful. We did include a point in our substantive submission on that, but if it would assist the Commission we're able to provide further information on that point.

MR SMITH (NACLC): Thank you.

DR MUNDY: We'll now adjourn these proceedings until 5 to 11.

DR MUNDY: Okay. We'll recommence now. Could you please state your name and capacity in which you appear today and if someone would like to make a brief opening statement.

MS MUNRO (RLC): My name is Amy Munro. I'm the chair of Redfern Legal Centre board and I appear with Elizabeth Morley who is our principal solicitor, and Jacqui Swinburne who is our acting in chief executive officer. I would like to make an opening statement and I hope that it is sufficiently brief but you should feel free to ding your water glass at any time.

In March 1997 the scarcity of affordable legal services for disadvantaged and marginalised people led to students, academics, lawyers, law students, and community activists to establish our centre. The first community legal centre in New South Wales and the second in Australia. Redfern's always delivered case work and community legal education and advocated for law reform for its students.

Since its inception the centre has strived to provide holistic assistance to its clients and to build rapport with the community. It's done so through the work of its staff who have built networks with the community and trust with their clients. The path to our centre and, ultimately, access to justice has taken many years to lay.

The establishment of the centre was groundbreaking and the centre has continued to be at the forefront of the delivery of legal services. It does that through innovative models which I'll touch on. We currently specialise in six areas of work. Domestic violence, tenancy, employment, discrimination, complaints against police and other government agencies, and credit and debt, in addition to providing generous legal services to the vulnerable members of our community.

As you've heard many times we're chronically under-funded - and I use the word "teams". But that's perhaps a misnomer because most of those specialist areas are staffed by only one solicitor, and in the case of our employment and discrimination sections one person does both. This Commission has been asked to undertake an inquiry into Australia's system of civil dispute resolution with a view to constraining costs and, importantly, promoting access to justice. We submit that any recommendation which, in effect, reduces the role or independence of our legal centre and any community legal centre does not meet the aim of access to justice and there are four principal reasons why.

First is we have a unique ability to leverage the good will of the wider legal community, so we're effectively really good value for money. The shopfront of our legal centre is open to the public and staffed by volunteers Monday to Friday 9 till 6 pm. We also offer a free night-time advice service four nights a week. It's staffed by volunteer solicitors and barristers. In the 2012 to 2013 financial year Redfern

benefited from the support of 150 volunteers contributing 23,550 hours of work, which we conservatively estimated at $2,066,000.

Additionally, each of our specialist teams is supported by a partner law firm from the big end of town who provide a substantial amount of pro bono advice and assistance and they also engage the New South Wales Bar on a regular and pro bono basis. Should the funding to our centre diminish, likely so will the generous contributions made by the legal community. Without the staff to supervise, manage, or facilitate those volunteers the centre simply cannot accept any more pro bono support.

Furthermore, we expect that the perception of the provision of legal aid that should be or is provided by government will prevent offers of support from being transferred to Legal Aid or another government organisation. We're acutely aware that our geographical position makes us very attractive to volunteers and to pro bono organisations and a geographical shift of our work will likely see that support diminish or vanish. So we're good value for money. For every dollar we stretch it to 18. Such cost effectiveness is unparalleled and unlikely to be replicated.

The second pillar is through adopting flexible intake criteria we assist vulnerable people who would otherwise have no access to justice. As you well know, vulnerability takes many different forms. We've identified indicators to the Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, people with disability, international students, victims of domestic violence, and homeless persons.

Our flexible intake procedures enable us provide an initial in-depth consultation. This is essential for vulnerable clients whose complex and compounding legal issues cannot be dealt with quickly or in a generic form.

The third pillar is our connection with the community. We, like other CLCs, receive a high proportion of referrals from other community organisations. We're open after business hours and we work hard to be accessible to vulnerable members of the community. Our longevity has established us within the community. Our networks can't be easily replaced or the respect we've earned be transferred. Our position has enabled us to meet unmet legal need.

The fourth and final pillar is that through research and innovation we've been able to identify unmet legal need and extend our reach. By way of example, in 2012 we saw an increase in the number of international students seeking assistance. Research carried out by the Human Rights Commission supported our belief that international students were experiencing a high degree of discrimination and exploitation. An evaluation of existing legal services determined that those students

had significant unmet needs. Accordingly, we established a specialist service for this vulnerable group and it's the only legal service in New South Wales that specialises in international students.

At the time of establishing this service we were well aware that international students resided not only in Sydney but in regional areas. Accordingly, we worked with the University of New England to establish the legal assistance with Armidale project. By using video conferencing programs our solicitors provide vulnerable international students at the university with free confidential legal advice. So I reiterate our submission that any recommendation which, in effect, reduces the role or independence of the centre will not promote access to justice and we urge the Commission to give great weight to the unique role of our centre in the local and legal community when making its recommendations.

DR MUNDY: Thanks. It's been suggested to us - and I mean, it's a reasonable proposition from the data that over time, for entirely understandable reasons - there's been a concentration of CLC resources close to the CBD areas. We see it in Sydney, we see it in Melbourne, and it's understandable why that's happened, and I mean, the reasons you cite plus the fact that they've often been sponsored by universities, so you know - but I note that the Kensington Centre actually now sits in the law school at the University of New South Wales which I found a little odd, but anyway, so the charge is that - I guess the suggestion is that, you know, well, what about Mount Druitt or what about Wagga or wherever? You mentioned the initiative with overseas students and the work with Armidale. Would you like to just expand a bit on that and - I mean, I guess your response to the suggestion that, well, we should move some of these - that we should shut some of these CLCs or defund them or whatever and move them out to Mount Druitt or Wagga or whatever.

MS MUNRO (RLC): I might answer the sort of high level question and then hand over to Jacqui to give you a couple of examples of how we have stretched our ability to meet the need in other areas. There are a couple of points to make. I think the first point is that we see a difference between legal need and a centre of disadvantage. So we've got statistics and information that talk about the density of people that live in the areas that we service. For example, in the Sydney region 50 per cent of those people are renters. As I've mentioned, one of our specialist area is housing and that's a huge volume of people that have an identified legal need.

Likewise there are pockets of disadvantaged within otherwise gentrified areas. Again, Redfern, Waterloo, is a perfect example. Waterloo has something like 90 per cent of public housing, so there's obviously a huge amount of legal aid. Legal need as opposed to an area of disadvantaged is the first point. I think the second point that I sought to highlight in the opening is having the geographical centre in the CBD enables us to attract a huge volume of volunteer and pro bono support that simply

wouldn’t be transferred and I think that's important not only from a financial point of view, the one to 18 dollar ration, but also engaging with the wider legal community in terms of delivering access to justice. So I have those concerns.

But we do accept that there is unmet legal need in regional areas, whether it's international students or otherwise, and I might hand over to Jacqui to give a case study of how we identified and met that legal need and used the services that we have.

MS SWINBURNE (RLC): Yes, I think we know that we're very lucky to have all these resources in the city and we've also been quite lucky recently in being able to use video link-up to try and help partner up with our other organisations and get resources out to regional areas and, ideally, the long-term plan is to sort of partner up, say, with far west New South Wales and the smaller community legal centres to help them with some of our volunteer and pro bono resources and we were quite lucky to get some funding through the NBN Regional Legal Assistance Program for the last couple of years which helped us to set up the service in Armidale that Amy just mentioned.

With the next round of funding we partnered up with the neighbourhood centre at Coffs Harbour. That was partly because that's where the funding was based and that's where the NBN was at the time, supposedly. We thought it was going to be there.

DR MUNDY: It was where Rob Oakeshott was at the time.

MS SWINBURNE (RLC): However, also it was a great area to pilot the project because there was no community legal centre in that area and there was a legal aid office, but what they said to us what it was great to also have our service there as well partnered up with the local neighbourhood centre. The main, really, two advantages were one was the use of interpreters because in a regional area you have a very close-knit small community and it's very hard to find an interpreter that doesn't know that client, and it's not the same as just being on the telephone because with the video link-up we can have an interpreter sitting in our office and see all that body language and understand if the client is really understanding the advice they're being given, for example.

The other big advantage was just being able to do some of the areas of law that Legal Aid can't do, and that's because of our pro bono partnership. So, for example, international students have lots of problems with their student visas because it connects with their other legal problems like employment or housing or problems with their university and so with a pro bono partnership with a law firm we're able to provide that integrated advice. So they might then decide not to pursue their unpaid

wages because it will affect their visa, for example, and it's also just a great partnership anyway with a neighbourhood centre because you're really feeding into the networks of people that they already had.

DR MUNDY: Just coming back on your point, Amy, the data you mention about the general area. Is that something you could just share with us because it's an issue that we're quite, you know - and similar observation - I'm adjunct professor at the University of New South Wales - similar observation about the nature of the community out there is very different to what it was when I was a undergraduate there in the early 80s.

MS MUNRO (RLC): Yes.

DR MUNDY: So sort of just a case study of that would be really helpful to us if you could provide it to us.

MS MUNRO (RLC): You mean the data within our area?

MS MacRAE: Yes.

MS MUNRO (RLC): I'll hand over to Elizabeth to talk about that.

DR MUNDY: That'd be just, really - in a nice box.

MS MORLEY (RLC): I'd probably like to do that in further submission in more detail.

DR MUNDY: Yes. No, that's fine.

MS MORLEY (RLC): But I can - we did do an analysis suburb by suburb of the 2011 census against areas of legal need and so we do have a fairly good picture of that and there's been a recent excellent study by the Law and Justice Foundation which is the one that Amy referred to on renters. The city of Sydney has on their website a very good mapping process where you can just easily go in and just pull up issues around the population type and it's really to see from that the mapping of where the renters are and where the public housing is and things like that. It's a very good resource.

DR MUNDY: Okay.

MS MUNRO (RLC): But we will update our submission to put in a section of the geographical services that we do.

DR MUNDY: Okay.

MS MORLEY (RLC): Yes.

MS MacRAE: I'd just be interested in the way that you see the general funding arrangements working now and whether you feel that they're working well and what sort of changes you might like to make. I think you were here for the previous participants and they talked about their preference for a collaborative approach in working out funding is split at the interjurisdictional level and I just wonder if you've got a view on that.

MS MORLEY (RLC): Sorry, I was still thinking about mapping for a moment.

DR MUNDY: We've moved on.

MS MUNRO (RLC): Well, I think we do support the national office submissions on the funding structure that they are proposing.

MS MORLEY (RLC): Yes.

MS MUNRO (RLC): And perhaps we could take that on notice as far as more details. I think the short answer is at the moment we are in a privileged provision that we have a diversification of funding and we're very conscious of that at a board level to make sure that we are not putting all of our eggs in one basket and we're lucky that we're able to do that. There are a couple of reasons why. One is because we have the actual genuine teams we have domestic violence and tenancy they get funded from different sources as opposed to the CLSP funding, and we're able to leverage our admin costs and other costs off the back of those types of streams of funding.

The pool of funding that we haven't probably tapped into as much as we would like is the philanthropic and private sector donations, but that is something that we are increasing to highlight. We've been lucky to receive a couple of significant grants on the philanthropic space recently, but so we are privileged that we diversify. Having said that, I can't recall if I tapped on this in my opening or not.

Because of the way the funding is structured if we lose funding from one source often that means a whole specialist area will be cut. We faced that at the end of last year when we lost funding from the New South Wales state government in relation to, in effect, our credit and debt service. That would have meant that that funding for that solicitor would have gone. Therefore, that whole service falls away, which is why I was - wanted to clarify in my opening that that's - I use the word team but that sort of gives the wrong impression. We were lucky enough that we got a

one-off grant from the former Commonwealth Government to sustain us and we've been able to do a bit of re-juggling to make that continue but as a board we're very conscious of diversification.

DR MUNDY: Can I just ask: how many solicitors do you employ and how many admin staff?

MS MUNRO (RLC): We have 10 solicitors. Sorry, it's difficult. We're all poolers because we have a structure where the people that work in our domestic violence and tenancy team are advocates and not solicitors, so if we break it down - - -

MS MORLEY (RLC): And a number of - - -

DR MUNDY: Let's call them professional client facing staff.

MS MUNRO (RLC): So we have I think four domestic violence staff, four tenancy staff. We have one credit and debt solicitor, one employment and discrimination solicitor, one government agency complaints solicitor and one international student/NBN project solicitor. We have a principal solicitor, a chief executive officer and one admin staff, and we also have one person who coordinates our volunteer program.

DR MUNDY: I just was trying to get a sense of scale.

MS MUNRO (RLC): I should say two branch officers as well, so we have one solicitor that works at the University of Sydney and one solicitor that works at TAFE, so they're out of each offices through - - -

DR MUNDY: Is that TAFE up in Broadway?

MS MUNRO (RLC): That's right.

MS MORLEY (RLC): And they're funded on contracts with those institutions.

DR MUNDY: With those institutions, so they basically pay you to provide the - - -

MS MUNRO (RLC): That's right, exactly.

DR MUNDY: - - - corporate framework and professional guidance and so on.

MS MUNRO (RLC): Correct. That's right but they come within out structure, in the sense that they report to our board and are required to do all those types of things.

MS MORLEY (RLC): We apply the same principles of prioritising service to those who are vulnerable within those services.

MS MacRAE: So what proportion, roughly, of your funding would come from the CLSP?

MS MUNRO (RLC): That is a question that I can answer.

MS MORLEY (RLC): There would be approximately about - - -

MS MacRAE: Just roughly.

MS MORLEY (RLC): A bit over a third really.

DR MUNDY: Are you prepared to show us the funding on the record which we'd be urging - - -

MS MUNRO (RLC): I don't think there's any problem in sharing our funding structure.

DR MUNDY: If you are able to provide us with some broader financial information, that will be really helpful to us. We don't ask you to do it now.

MS MUNRO (RLC): No, no. We'll put that in our submission as well.

DR MUNDY: Go away and make sure it's okay.

MS MUNRO (RLC): Yes, I'll check with our admin officer who's the boss on this kind of stuff but - - -

DR MUNDY: I don't want you to disclose any secrets but it would just be useful for us to see what the funding of a relatively large, for want of a better word, mature CLC looks like.

MS MUNRO (RLC): Yes, that's right and I think in terms of percentage basis, this type of pie graph might be useful as well.

DR MUNDY: That's probably all we need.

MS MORLEY (RLC): Yes.

MS MUNRO (RLC): Yes, perfect. We can do that.

DR MUNDY: Sorry to interrupt.

MS MacRAE: No, that's all right. That's perfectly fine. We talked in our report about the variations that occur in eligibility for people that are coming and we've now heard regularly that we target our assistance and we're looking to ensure that the most vulnerable are the people that we're looking at. In general we would have to say in the main that there has been support for having eligibility principles to work out how you would target your services. Is that something that you're comfortable with and what would you see in terms of how broad those principles would be and what sort of things they would target or how they would phrased, I suppose.

MS SWINBURNE (RLC): I note that the issue of the eligibility principles have been addressed in both the NACLC submission and the CLC NSW's submission. Broadly we support that approach of having high level eligibility criteria. One of the great values of community legal centres has been their ability to look at what is happening in their area and fill the gaps. So I think you want to retain that flexibility because you want to be able to fill those gaps in that area.

We're not duplicating the services provided by either mainstream private profession or by Legal Aid. We're there to look at what might be a priority issue in looking at our - we're constantly monitoring against our demographics about whether or not we've got the right areas to target. You do have to balance everything to everyone because you can spread yourself so thin, you have no expertise in any area to be actually achieving good outcomes for the people. So you do have to prioritise some areas that are going to be the ones that meet that community with a safety net under that which is what we do.

I think that in looking at a picture of our service delivery, that flexibility is important because we're a gateway to people getting into justice, so a lot of conversations happen at reception. Those conversations are not, "Can I have an appointment?" "No." "Okay" - go away. They're conversations about what's the nature of the problem, then characterising that as to whether or not it's a legal problem, characterising about whether we're the best service to deliver that problem - or service to that and where it might go, so we start at that very point of reception, providing legal information resources and skilling up of the people who call us.

From there we move on to advices which do further triage about what the problem might be and where it might go. Again, we're looking at filling the gaps. A lot of what we do is assisting people to achieve outcomes themselves with advice and referral, advice and drafting, and trying to avoid people ending up in litigation. If we can get matters resolved at that stage, before it reaches the point of a court, then that's a court aim for everyone. So again, if we have too tight an eligibility criteria about that, it will never happen. Those people will end up in court and at that point then

we are looking at much larger amounts of money or a costs system to address those things.

I had another point to make there and it has just escaped me for the moment. I might come back to it if I think of it, if I may, in a moment.

MS MacRAE: Sure.

MS MUNRO (RLC): If I could just add one thing on to that? This is something that we, again my position on the board, struggle with at a board level as well and I think the international students is a really good example of why there needs to be some flexibility in us with our eligibility criteria because it's very difficult to assess. For example, a student who has come here from another country that may have a family or some other support network behind them in another jurisdiction but the indicators of vulnerability that we see with those students are not things that are able to be ameliorated by support networks that they have elsewhere, whether that's assets or otherwise.

In some circumstances, sure, but generally as a group we've found that they are being marginalised, discriminated against, exploited particularly in the employment space. As I said, that has been evidenced by research done by the Human Rights Commission but that was a conversation we had at a heated and long conversation at a board level as "Is this a group that fits within our concept of someone that is vulnerable or would fit within our eligibility criteria?" but given that we have that flexibility, it's something that we've been able to do and have found to be incredibly effective for getting outcomes for those people.

MS MORLEY (RLC): If I could go back to the example I was going to give is what do we do with a person who has an income last week of $70,000 a year which he might, say, fall outside an eligibility criteria, but this week has no income because he has been unfairly dismissed? At that point do we list them as a person with no income or do we list them as a person of 70,000?

At the moment we tend to put them on the stats as 70,000 in the hope that they'll be back in to 70,000 again within a matter of a few weeks, but that's not true for everyone, but in fact at that point they've got a lot of debts, a lifestyle and a commitment and mortgages and rent and all other things that are geared to an income of 70,000 but no income. So the flexibility in that eligibility criteria in that sense allows us to look at that. There's a cap on where that's going to go. Our volunteers baulk if we start to provide services to people who are being paid more than they are. So there's a natural cap on how far that's going to go.

DR MUNDY: Presumably you've got similar issues with women who experience

domestic violence and - - -

MS MORLEY (RLC): Absolutely.

MS MUNRO (RLC): Absolutely and that's something you would have heard over and again. Their assets are tied to their partner which they can't access and the same for elderly people which is obviously a discussion that's happening in this country as to if you quantify the asset being the family home, is that something that you would take into account when they have otherwise no cash flow or assets? It's a debate for the ages I think.

DR MUNDY: I think we might even decline as a Commission on that point. We're in different circumstances. I'm interested in coming back to this affluent women experiencing violence. It's an issue that has been raised with us in a number of places. You're in this mixed area and affluent areas around what you might call your catchment.

MS MUNRO (RLC): Yes.

DR MUNDY: Is this 5 per cent of the women who present in general violence issues or is it a number like 50? I am just trying to get a sense of how prevalent within the family violence space that you see is it?

MS MORLEY (RLC): I would be loathe to try and put a figure on it except to say that it's probably - you might see in the Waverley space more woman of eastern suburbs background with financial resources in the family, however the ones that I've become aware because they've come back up to our main office for either credit and debt advice or family law advice, so I then see them coming through that office. They are, at that stage, very traumatised, very lost, with no control really over what's happening. Often away from work at that time trying to manage the domestic violence.

DR MUNDY: I am not - I am just curious to how preponderant is it?

MS MUNRO (RLC): Yes, my CEO is telling me she thinks it's quite low, but I would also be loath to put a figure on it without consulting our - obviously that's something we can - - -

DR MUNDY: I am just curious as to how preponderant within the space it is, that is all. That is fine.

MS SWINBURNE (RLC): I think there really is a proportion of people that come through with their own solicitors and just bypass our domestic violence scene.

DR MUNDY: Oh, yes. No. No, no, I understand.

MS MUNRO (RLC): Yes. So two questions; one is how prevalent is domestic violence in affluent relationships and, two, how many of those people access our service? Which I mean are two different questions that we can attempt to answer further in our submission.

DR MUNDY: That would be helpful.

MS MORLEY (RLC): A number of people do come through our service because they're referred by the police through the, what was, the Yellow Card Project and will be the new safety action meeting arrangements, so they do come through that process.

MS MUNRO (RLC): But we'll respond to that question in due course.

MS MORLEY (RLC): And that's under a separate funding program from legal aid.

DR MUNDY: Okay.

MS MacRAE: Sort of coming away from the court arrangements but looking particularly at tribunals and we have had a bit of a discussion and there has been a bit of a response from parts of the legal profession about the suggestion that we try and get them back to being more informal, cheap, quick and easy kind of mechanisms to deal with civil matters. I see that you are concerned with our recommendations about representation and I think probably that is partly because we did not express our intentions very well there. We are certainly not intending to say that there would be instances where someone that was in need of representation would be denied it and, you know, there would be no possibility of you seeking leave from the tribunal to be represented.

Would you have a view on how relatively formal or informal tribunals have been over time and whether that has created any additional problems for any of your clients who might be self-represented in those forums?

MS MORLEY (RLC): Perhaps I might throw to Jacqui who has experience with tenancy matters in what was the CTTT because you were trained on the tenancy tribunal.

MS SWINBURNE (RLC): I think that over the last 15 or so years from the residential tribunal to the - it keeps changing its name - it has become more and more

formal over time and whilst some matters are still quite straightforward (for example, getting repairs done or a dispute about a bond) there are certainly some very complex matters around whether you fall in or out of the Tenancy Act and the other example has just gone out of my head, but there are a lot of more complex matters about breaking leases and all these sorts of things and often there's an imbalance of power anyway between a tenant and the landlord, like in many of these different legal spaces. I think it's definitely gotten more legal and complex over time.

MS MacRAE: And is that inevitable, do you think, or is there - - -

MS SWINBURNE (RLC): I think that's an age old question about procedural fairness and being quick and cheap and efficient, so I don't have the answer.

MS MORLEY (RLC): I think there's a risk in saying, "Look, these are small matters so let's just get - you know - we'll win some on the swings, lose on the roundabouts, but overall it will be fair." To the person who loses their home, loses the roof over their head, it's a major thing.

DR MUNDY: Yes. If you are one of the five per cent of people who get the wrong outcome that is not much comfort to you.

MS MUNRO (RLC): That's right.

MS MORLEY (RLC): That's correct.

DR MUNDY: I guess just to follow up on that because it is an area that interests - I used to have a lot to do with VCAT in a former life. Is the issue here that not only is the power relationship because of the landlord/tenant arrangement, but is it also a reflection of the fact that the landlord is, in some sense, professional and - even if they appear unrepresented by lawyers, this is what they'll do, they'll often be - the agents, they'll possibly be large strata companies or whatever, so their capacity to self-represent is much greater than some other person who particularly who may be suffering some form of disadvantage as well.

MS SWINBURNE (RLC): I think often that's the case, not always. You do get the mum and dad investors who are in there, but at the same time I would say it is a business and they have the choice of using a real estate agent and most of them do and then that's their profession and they work in that area of law and they represent all the time, so I think that's as well within - - -

DR MUNDY: So it is like someone with a planning dispute coming up against a council planning officer who might not be a lawyer but is competent and knows - does 10 of these a month and that sort of thing.

MS SWINBURNE (RLC): And I think it's the same in employment law in that tribunal and many other of those spaces as well.

DR MUNDY: One of the suggestions that has been made to us is that perhaps - and there are lots of matters, guardianship matters which we would not think people should - well, it would not work if people - at least certainly the person subject to the guardian questions and represented, but - - -

MS MORLEY (RLC): But, in fact, very often - I'm sorry to interrupt - but very often they're not represented in fact.

DR MUNDY: Yes. Would you have any views or objections to a notion that says there should be a duty placed on all participants in the tribunal process to facilitate the objectives of rapid, speedy, all those just - - -

MS MUNRO (RLC): Quick, just and cheap.

DR MUNDY: Yes, quick and cheap. That would not be a problem though necessarily?

MS SWINBURNE (RLC): No. I think you do have to balance it with what the outcome might be, for example, for example being evicted from public housing is a much bigger outcome to getting - - -

DR MUNDY: Because the concern that has been raised with us with tribunal members is that there are occasions where people turn up represented, usually strong parties and they just drag - they frustrate the thing to a cul de sac and justice is effectively denied because the agrieved party walks away.

MS MUNRO (RLC): I can't - I mean that, to my mind, should be a duty or an obligation that is placed on anyone in any type of adversarial process because it doesn't benefit any party to not have just, quick and cheap. I mean each of those things need to be equal. There shouldn't be a diminishment on the justice where we could call it cheap, but I just, senator - sorry, it's not senator - Commissioner, you mentioned in the legal aid hearing when you were talking about this issue that you talked about there being an acceptance that someone that suffered from an impairment at a tribunal should be entitled to representation and to my mind this touches on this issue as to how would you define an impairment.

Is it someone that is suffering from a power imbalance or is it someone that has an additional mental health problem or otherwise and that was something that I think Jacqui sensibly articulated as to an impairment can be something as simple as a

power imbalance?

DR MUNDY: Yes, I know. No, I mean there are tribunal jurisdictions where tribunal members typically, not judicial officers, will exercise judgments to allow representation where there is some sort of - it might be language, it might be the person is old. Yes, there may have been some prior history between the parties. I mean that is - the intent of what we were saying was actually there are forums in which representation is meant to be by leave and special or extenuating circumstances and that perhaps tribunal members in those circumstances need to be a little bit more vigorous around granting leave. That is actually what we were getting at in the first instance.

MS MORLEY (RLC): If I might add to that. The less representation there is I think the more you need a good appeal system.

DR MUNDY: Yes.

MS SWINBURNE (RLC): That deals with matters de novo.

DR MUNDY: Yes. No, that is a fair point. Angela, do you have any more?

MS MacRAE: I do not think I have.

DR MUNDY: Cost awards. We are interested in cost awards from a number of angles, but particularly incentive based, but behavioural characteristics that will flow from that and obviously we have made some recommendations in relation to people who either represent themselves or are represented pro bono because the current cost rules seem to us to provide an incentive to behave poorly. I guess probably more from the pro bonos perspective I guess what we are saying is, well, the nature of the representation should not be a function of costs being awarded against a party, but there is a question of where those costs go. If the person is self represented or, indeed, if they are being represented pro bono, there is a concern about, if it went to the pro bono lawyer, well, is this becoming a no win, no fee arrangement. Do you have any views on that because you obviously use pro bono stuff.

MS MUNRO (RLC): Yes.

DR MUNDY: I mean, just issues around disbursements, counsel, those sorts - it has been suggested that perhaps junior barristers might actually get the dough, but silk might not.

MS MUNRO (RLC): Yes, I should disclose as well that I am also a barrister and do act on a pro bono basis, so - - -

DR MUNDY: We will not hold that against you.

MS MUNRO (RLC): We support the recommendations you have made in both these areas, so first, that parties who are represented on a pro bono basis should be entitled to recover their costs. There is also the question as to the self-represented litigant should be able to recover their costs. We support the formalisation in relation to the first recommendation being, I think, 13.4, that pro bono solicitors should be entitled to recover their costs because, at the moment, it is quite murky and much of it depends on the way in which a costs agreement is drafted. That is often, and unfortunately, something that sometimes happens later in the piece.

There needs to be - as I'm sure I'm repeating things that you're already well aware of, which is that, in order to be entitled to have your costs follow the event, there needs to be a liability to pay those costs. The question is: if I said I am prepared to act for someone for free and then they win their case and they would be entitled to a costs order, then I should get my money back. If I said, "I'm prepared to act for free," do they have a liability to pay me? Arguably, no. That would then mean that my costs agreement with that client would need to be drafted on a speculative basis, which is again quite murky.

We support the Western Australian model, which I think we've picked up in our submissions, which provides that, where a practitioner provides free legal services to a party, the party should be entitled to recover costs in the same manner and to the same extent as if the services were provided for award. We think that is a sensible way of doing business. It also means that, in circumstances where the solicitors agreement is different to the barrister's agreement, which is different between the junior and the silk, there is some equality between who is entitled to recover what. At the moment, it's different practices for different barristers and law firms. We would strongly support that recommendation.

In relation to self-represented litigants, my understanding at the moment is that the cost rules in New South Wales mean that a self-represented litigant is entitled to recover their disbursements, but the High Court said they're not entitled to recover their time. I looked at this morning - there was a case by - comments made by Justice Bryson in the Supreme Court in 2001 that I thought were quite relevant and if I may just indulge to read a little bit? In that case, his Honour made a statement about the unfortunate effect of that High Court decision which said that a self-represented litigant wasn't entitled to be compensated for their time. He commented, then, in that case, "There were no serious prospects against the defendant" - who was self represented - "and that person was of considerably ability and acumen and conducted his defence efficiently and well." However, he commented that the defendant could only be indemnified for witness expenses by reason of the case law,

which was a matter that his Honour regarded as an unfortunate weakness in the law.

In effect, this person had been litigated against. There were never any prospects of success in the case running against him. He had elected to self represent, but wasn't entitled to recover the time that he had spent in that case. I think that is an unfortunate weakness in the law and there perhaps should be given to, in the right circumstances, that a self-represented litigant should be entitled to recover the cost of the time they've thrown away in those proceedings. So we would endorse the comments made by Justice Bryson in that case.

DR MUNDY: Presumably, the best way of achieving this outcome or certainty would be for the parliament to do its work?

MS MUNRO (RLC): That's correct, because at the moment, the High Court has made a pronouncement on the issue so it's not going to change in a hurry unless the law changes.

DR MUNDY: Is that material going to be in your submissions?

MS MUNRO (RLC): I can provide you with that.

DR MUNDY: I am mindful of the time. Thank you for coming all the way in from Redfern today. We do appreciate the material and, if we have got further questions on the written material, we will come back to you.

MS MUNRO (RLC): I have a written copy of the opening, if that would be of assistance to you?

DR MUNDY: That probably would be. Give it to Vashti on the way out. That would be helpful, thank you.

MS MUNRO (RLC): Thank you. I should also comment, my colleague has told me I said the centre opened in 1997. It was 1977, just to correct the record. Thank you.

DR MUNDY: Could we now please have the Consumer Credit Legal Centre? Could you please for the record state your name and the capacity in which you appear?

MS LANE (FRLC): My name is Katherine Lane. I'm the principal solicitor, and this is Julie Davis. She's the policy and communications officer.

DR MUNDY: Would you like to make a brief opening statement and then we can move onto some questions.

MS LANE (FRLC): I promise to keep it brief.

DR MUNDY: We like that.

MS LANE (FRLC): Thank you for inviting us to give evidence today. Before I go into three points I want to make, rather inconveniently, we've just changed our name to the Financial Rights Legal Centre, this week.

DR MUNDY: Excellent.

MS LANE (FRLC): So our submission is one name; this is our new name. I also want to quickly say what we do. We are a specialist community legal centre. We run an advice line for credit debt and we are the only on in New South Wales. We also run insurance advice - free insurance advice - Australia wide and, again, we're the only in Australia.

DR MUNDY: You are those people. I have heard about you.

MS LANE (FRLC): Yes. Good. I'm glad you've heard about us. I just want to make three points. First of all, I want to comment on the importance of systemic advocacy and law reform. As of 30 June, or actually 1 July, we will no longer be funded to appear in hearings like this. The Attorney General has removed this type of activity from our funding agreements and he has made it clear that he believes community legal centre should respond to law reform consultations, or appear at hearings in our own personal volunteer time, even though hearings are usually held during business hours. Obviously, this is nonsensical.

The Commission, itself, has recognised the importance and efficiency of systemic advocacy when resources are limited. That's in your report - thank you - and we strongly encourage you to express a similar view in your final report. The Financial Rights Legal Centre has many examples of advocacy that has led to systemic change for consumers in the financial services sector, including the regulations of mortgage brokers and the banning of mortgage exit fees, where we

worked hard to get those outcomes. We are currently finishing a report on the efficacy of law reform work in community legal centres, and we have some survey results to give to the Commission and we'll hand those up in a minute.

Just to give you an indication on how much time is spent in CLCs, according to our survey results, it's around - about 10 per cent of time doing law reform and systemic advocacy, and the vast majority, it's less than 25 per cent. So we're not talking all our time, but a very important part of time. We argue that the time we have spent on law reform and policy has benefited many more people than the individuals we could help with advice and case work alone.

The second point I would like to make in regards to access to justice is that specialist legal centres are a critical part of the legal assistance landscape - rather self servicing because we are one - but we genuinely believe they're a critical part of the CLC landscape. Generalists are extremely important; specialists are extremely important.

We consider ourselves to be an effective, efficient, and highly productive model of providing access to justice. NACLC, who appeared earlier, commissioned an independent report on the economic cost benefit analysis of community legal centres, which was published in June 2012, and found that our service had a benefit of $33 to every $1 spent on funding. Any funding model for legal services must, in our views, incorporate specialist centres along with generalist legal centres.

We offer a multi disciplinary - the integrated specialist service that provides financial counselling, legal information and advice, ongoing representation as well as training and publish resources to other community organisations and generalist legal centres. It is important to recognise that clients in financial difficulty often don't know whether they need a financial counsellor or a lawyer, and many times they need both. Clients are more likely to seek advice earlier in an integrated service because they don't identify their problem as legal until it's well advanced.

Finally, I want to emphasise the importance of advice. Quality legal advice, as opposed to just legal information, is a critical part of what community legal centres provide. Quality legal advice is developed from case work experience. It cannot be duplicated in referral centres, such as Law Access New South Wales. It is our submission that any referral centre should be just for referral. We provide highly specialised expert advice for many people every year. We can give large amounts of advice because of our telephone based legal assistance model. Last year we answered 20,000 calls with only 17 full time equivalent staff in our centre. In addition, telephone specialist advice helps meet the missing middle, that is people who can't afford a private solicitor that don't meet Legal Aid eligibility or don't have a general centre near them. That concludes.

MS MacRAE: I just might invite you to give the example you were talking about at morning tea, about your biggest success story in terms of - - -

MS LANE (FRLC): I've been doing this for a long time - 13 years, along with the coordinator, very similar amount of time. We've done a huge amount of work over many years - which, of course, is less than 25 per cent of our time because we're doing all our advice and case work - where we've worked on systemic issues to identify a problem and to work out, and one of the ones I named earlier was - we already named one which we worked and advocated, and lobbied for the credit laws to change so that we had compulsory dispute resolution, mortgage brokers were properly regulated, interest rate caps were put in, universal dispute resolution.

So all those things but the one example I gave earlier was the issue with financial hardship. When the dispute resolution scheme set up, one of the issues was they weren't considering financial hardship. We advocated for many years to just change the jurisdiction to include financial hardship as part of the matter that the dispute resolution scheme, financial ombudsman service or the credit ombudsman service could consider, and that lobbying was successful, and now financial hardship is one of the most - it's the most - common complaint that goes into a dispute resolution scheme now and that type of work came out of the giant demand we saw from our advice and case work where people were desperate to have a review of financial hardship decisions, and court was just completely too hard, and of course it's axiomatic when you're in financial hardship you can't afford court. There is no legal court, court is just expensive, you've got to even fight to get the fee waived.

MS MacRAE: Thank you.

MS LANE (FRLC): I could go on about it.

MS MacRAE: No, that's fine. How do you find the ombudsman services generally? Would you say that they're now operating well in this space?

MS LANE (FRLC): Absolutely. I mean, the reason we advocated so hard for comprehensive and compulsory membership of dispute resolution in financial services is simply because they are the biggest, most important change in access to justice in the financial services area, since I can remember. It is, in terms of access to justice - I mean, thousand and thousand - well, it's hundreds of thousands of Australians now have access to a dispute resolution mechanism that's free, easy, informal to resolve their dispute. I cannot stress enough how much it's changed the landscape.

DR MUNDY: One of the observations we make about industry ombudsman in particular, not so much the jurisdictional ones - and I'm sure ANZOA will make this

point this afternoon - is their capacity in dealing with matters to identify systemic issues and is your experience that since these arrangements were set up largely for the dispute resolution purposes you describe, that the ombudsman that you deal with are doing that and that they are identifying problems either with the industry as a whole or with individual providers, and that the industry's responsive to the things that they find.

MS LANE (FRLC): Yes, absolutely. There is no doubt and it's one of the things again that consumer advocates have played a very vital role and we've consistently - and consumer advocates sit on the boards of these dispute resolution schemes - consistently press for - and identifying systemic issues, reporting them to a regulator, dealing with them. I mean, we have worked long and hard on trying to expand that role of the ombudsman service but there's no doubt the ombudsman service has been doing that proactively as well. I mean, it's resulted in many, many excellent outcomes for consumers that have just been well and truly sorted out through an ombudsman service.

DR MUNDY: Is your sense that the banks or the insurers, or whichever the financial institutions are that have been dealt with, that they're receptive to this sort of identification of issues - - -

MS LANE (FRLC): Yes.

DR MUNDY: - - - by the - it's not something "oh, God, it's the ombudsman again"?

MS LANE (FRLC): I can't stress enough, again, how important it's been with the culture change in financial services over a long period of time and I think the consumer advocates again need to take some of the kudos here of changing that culture. External dispute resolution schemes have worked very hard on changing the culture and improving dispute resolution in industry, and consumer advocates have worked in concert with the dispute resolution schemes and with industry to get these outcomes. So yes, I think an industry has been - again, the culture change has been fantastic. The industry are keen to fix any systemic problems, they're keen to hear from consumer advocates about problems, they're keen to hear from dispute resolution schemes.

DR MUNDY: It's something that's always struck me as curious, in respect to the ANZ litigation. It seemed to me that was, to an extent, a systemic issue certainly within that bank but clearly it may have been an issue in others. Are you able to - and if you can't, that's fine, but I just find it curious that a well-functioning ombudsman service hadn't found that problem or was there a fundamental issue in law there which the court needed to solve?

MS LANE (FRLC): Which litigation are you talking about?

DR MUNDY: The recently funded ANZ case about bank fees.

MS LANE (FRLC): Yes, the one run by Maurice Blackburn?

DR MUNDY: Yes, that one.

MS LANE (FRLC): Yes, thank you. It's just that it was original ANZ litigation, this is not the first lot of ANZ litigation.

DR MUNDY: I think it's an interesting example of something - - -

MS LANE (FRLC): I do, too.

DR MUNDY: - - - which looks like systemic and it ended up in court, we have interest in it because it was funded and it's a different - we might come to that. But I'm just interested in why the ombudsman didn't fix it.

MS LANE (FRLC): It's an absolutely brilliant observation. One of the things we, as consumer advocates, said for years prior to the ANZ litigation is that these fees were excessive and above the costs. People - my colleagues at consumer action put out a report, it was clearly a penalty. There was no doubt in our minds. We all advocated to the ombudsman and the ombudsman took the view that it was a fee matter and therefore it was outside its terms of reference. This is one of the limitations of ombudsmen. They don't do everything, they're particularly funny about commercial decisions and fees. We advocated hard but in the end it had to be run through litigation and, of course, we support Maurice Blackburn in that endeavour because it was clearly a problem that was systemic. Interestingly enough it's reformed, a lot of it, since the litigation but again, I think this was a loophole in the way that they ombudsman service - certainly we argue they made the wrong decision there.

DR MUNDY: So the ombudsman, effectively, formed a jurisdictional view of itself and wouldn't shove its beak in.

MS LANE (FRLC): Yes, that's exactly right. It took a jurisdictional view and we argued strongly against it but we could not get anywhere and it was absolutely required to do litigation to sort it out.

DR MUNDY: Just while we're talking about this matter, there's been some contention around some of the observations we've made about litigation funding and particularly around contingency fees as a way of enabling people who don't have the

resources to bring litigation if ANZ cases obviously want a more traditional class action. Is that, as a consumer advocate, is litigation funding something that you think is important within the gamut of tools available for dealing with these sorts of issues?

MS LANE (FRLC): I believe so. Unfortunately I'm just not a large enough centre to run a class action. I'd love to but that's well beyond my capabilities. I do think that sort of thing which Maurice Blackburn does in relation to - and there's Slater and Gordon, there's a whole heap of class action firms - I think that serves an important public interest. I don't think there's any doubt. I mean, Maurice Blackburn is not only running the ANZ case, they're also running the - this is in my sphere - the Cash Converters case which are clearly systemic issues that need to be litigated and sorted out for the public interest. So obviously I think in - I think there might be tweaking required to make sure it works fairly and transparently, and to serve the public interest but do I think this class action litigation funding is necessary to be able to run these class actions? I suspect it is.

MS MacRAE: We've made a draft recommendation around a threshold being applied through which compulsory ADR would take place and I think in your submission you had some problems with the value that we support, and we've suggested maybe something like $50,000. Do you have a view on what that number should be or, in fact, whether it's reasonable to say that there should be a level of compulsory ADR?

MS LANE (FRLC): In principle, I've got no problem with compulsory ADR whatsoever. The problem is: I'm an extremely specialist lawyer. I turn up to get ADR and the mediator has no clear about my area, like nothing. I'm sitting there - I think the last dispute resolution I turned up and I ended up a mediator who does dividing fences, when I was running a serious consumer lease matter where I thought that a contract was unjust. It gets ridiculous.

So the quality is really important and, of course, the people who have got money can afford very good mediators who are very good at getting to an outcome and guiding the parties and then, of course, the problem is, for poor people, who can't afford that, you end up with Court appointed and the quality can be not very good, particularly - I think the assumption that I need to start with, because I'm a specialist, is that, if you don't know anything about the law in the area you're mediating, it's a problem because it's, like - you know, I know people think mediating is just a skill by itself. I just don't think that's correct. I think you've got to understand what you're mediating and I think the best outcomes are from that sort of situation.

DR MUNDY: Is that an argument that only lawyers should be mediators?

MS LANE (FRLC): Maybe, because it's legal matters, but yes, I think I'm getting

to that. It's like - I just think that the best mediation I've ever seen is where they understand the area of law really well and can see what the options are for solutions because I think the best mediators generate solutions.

DR MUNDY: Let me just explore this because it is an issue that we are interested in. What if - perhaps not in your particular area, but what you see in, for example, mediations around planning matters is that you might have a professional planner who will - or in your case, you might get someone who has decided to become a mediator and may have been a former banker. That circumstance, there is a fair chance that a non-legally qualified person will know enough about the law, but you would want them to have that skill?

MS LANE (FRLC): Absolutely. I'm not - I mean, look, I employ a tonne of non-lawyer, so just - I'm not wedded to it has to be a lawyer, but it has to be somebody who knows the area.

DR MUNDY: How would - I tend to agree with you, but my agreement might be self serving. How do we set up a framework around - you know, it is all well and good to have mediator accreditation and that is a tick, they have got the general skill. How would you see a framework that would deliver that sort of outcome, that they know what they are talking about when they come to talk about matter X? Who - - -

MS LANE (FRLC): I think you need to have the LEDA qualification, plus I'd like some university qualifications in dispute resolution subjects, plus I'd really like them to be a specialist panel. I think - look, there are going to be disputes that sit in the tribunal that are mediated every day over your microwave where you don't know you're a specialist, but - so there are a group of disputes, but I'd still prefer the mediator to have experience in general consumer matters. I mean, if it's a fence or it's a microwave, it goes better if they understand basically what the law is in those situations.

So specialist panels, well-trained mediators for very small disputes over microwaves and things like that, and up to $50,000 is a large amount of money for people who are poor and I just think, once it gets to - you've got to have - I think this is what we're trying to make the point in our submission. There are matters where the issues are very complex and the amount of money is not large, and it's basically almost a test case of some - minor test case - and you want a very specialist person sitting on those, so I think, yes, you've got to be able to access the panel and make your case on your particular merits of the dispute.

DR MUNDY: Just on that, I mean, one of the concerns that you have expressed to us about ADR is that the matters, or mediation in particular, is that the matters are resolved privately. So the revelation of systemic issues, say, for example, you would

lose that, but you might get - particularly with an ombudsman arrangement and to a lesser extent, if matters are resolved in open court or tribunals, there may be some reporting of it. Also, I guess, the other issue is - and you used the word "precedent" - is that, you know, the development of the law, or the clarification of the law, even if it happed in a place like VCAT, which are occasionally reported, we lose that too.

MS LANE (FRLC): Yes.

DR MUNDY: How do we balance that?

MS LANE (FRLC): I've given a lot of thought to this because - - -

DR MUNDY: Excellent.

MS LANE (FRLC): I have because, in advocating over many years for ombudsman services, I knew what I was giving up. I mean, like, I knew that part of the issue would be that there would be miles less court decisions, miles less tribunal decisions, and a whole heap of stuff would just go under the carpet, and that's why - in terms of what I've been doing to try - look, it's always the best interest of your client. There's no doubt in my mind about that. You can't be running cases where it isn't in the best interests of your client to get a result where they are at risk of losing everything. Some people will, that's their choice, but the vast majority just settle and, in fact, because of my low income client, it doesn't take a lot for the other side just to throw money at them to settle anyway.

I think there's a couple of things that are really important. Ombudsman services have to be doing better on systemic issues. They're doing well, but they need to do better because they have such a vast amount of data now and we need that to work really well because how on earth does a regulator or anyone - the government regulator, ASIC - know what's going on unless somebody's telling them. The other thing I do is, as soon as I see an issue, regardless of the outcome for the client, I tend to tell the regulator about it if I think it's systemic, but all of this is no substitute for access to justice to get a decision when you need it. That is, again, why you need the Maurice Blackburns being able to do the class actions.

It also means you've got to have a way of doing it so we can recover our costs, which came up in the last session. We need to be able to recover our costs and our barristers costs for running a case through to conclusion, if our client will do it, and we need to be able to go to the tribunal and represent people on matters that are complex. So all of those things need to come together to make sure that these systemic issues are coming out, where necessary, but I can't think of anything else, apart from those things, to make sure - balancing the best interests of the client and

access to justice, versus getting systemic issues out, I think that's the right balance.

DR MUNDY: Ombudsmen clearly have the benefit over privately arranged - - -

MS LANE (FRLC): They have got the data sitting in front of them. They can see the trends. I mean, we rely on heavily on them to do this well, and that is why we put pressure on them - and they put pressure on themselves, which is great - to identify the systemic issues. I think they are doing well. I would like them to do better.

DR MUNDY: When you bring matters - when matters go to Court - I presume you're agreeing with our proposition that people represented pro bono should get costs awards?

MS LANE (FRLC): Yes, absolutely. There's no doubt. I mean, and it needs to be clarified at law. Occasionally, I get crazy solicitors acting for crazy industry people who seem to think that they can just, you know, "We're running it for free, therefore, there will never be any cost." That's just completely inappropriate and it allows for very bad behaviour on the other side.

DR MUNDY: You have seen the absence of costs?

MS LANE (FRLC): I have seen it where the other side is wanting it to the High Court, if necessary, that we can't get our costs. Usually, it settles, but what a waste of my time. It just needs to be clarified. I mean, we consider we do get our costs, but I don't really want to spend my time trying to draft my costs agreement so carefully. I just want it clarified because you don't want poor behaviour on the other side simply because of a loop hole in the law, which arguably I don't think exists. I mean, let's just clarify it. All these people who spend all their time doing pro bono work, people like me, who are free lawyers, we need to be able to cover our costs if we run a case that's successful.

MS MacRAE: Can I just ask - it was interesting to me that you were the only CLC for insurance Australia wide.

MS LANE (FRLC): We think it's interesting, too.

MS MacRAE: How do you go coping with matters that are drawn to your attention from Western Australia, or somewhere?

MS LANE (FRLC): We do very well because we have a dispute resolution scheme sitting there. I've got to say from the start, though, we've just received one year of funding until it all comes up, pending this report. We can't meet the demand for the

whole of Australia with the three or four people we've got answering the phone for the insurance law service, but we do a very - what I think we do a really good job of is, all the calls come in from - I take these calls. I'm one of the people who takes the calls. The calls come in from all around Australia. We give them advice. We tell them how to run through the financial ombudsman service and for low income and very disadvantaged people we lodge in the ombudsman's service and run it through them for them. I haven't had a matter yet that needed to go to court but as far as I'm concerned if I was properly funded I'd get on the plane. I mean if it's important enough or I can find pro bono I have never had a problem with organising the access to justice element of running an Australia-wide service. I would make it work. I do make it work.

We do a lot of law reform work, so we're very, very involved with dealing with the industry, working on the flood issues. I mean particularly if big challenges are coming forward in terms of climate change and natural disasters that we think we're just essential for, we need an Australia-wide insurance force service to gather data and really provide access to legal advice, because it's the only one in Australia.

MS DAVIS (FRLC): Can I also just add that what makes this work at least for us being remotely located here in Sydney, is that it's a telephone hotline. We have a ton of self-help resources on our website and the ombudsman service is all run remotely through telephone and the Internet, so we can have people call us from Tasmania, from Northern Territory. We can give them quality advice about insurance. We can tell them exactly how to do it and we can help them lodge in the ombudsman if we need to and it can all be run remotely from our office here.

MS LANE (FRLC): We represent hundreds of people a year, no troubles as all and, look, a lot of - because we were at risk of losing our funding recently, so we were about to be shut down, we got a year's reprieve, I can't tell you the amount of people who rang me and said, "I don't know where we'd go" and the good question is where would they go? Myself and the coordinator of the service were the ones who wanted this service. We wanted it because we saw a need. There's no doubt we built it and they came in droves. We only answer about a third of the calls that come in.

We are enormously under-resourced. The demand is enormous for our service, and, look, I'm not surprised by that because I could see the demand everywhere already and that was prior to the natural disasters, so, look, I think that that type of service, that type of special service where you get somebody on the phone and they know exactly all about insurance is critical, is critically important.

DR MUNDY: We done? All right. Well, thank you very much for your - - -

MS DAVIS (FRLC): Thank you. I brought you - sorry, we just finished this

state-wide survey of law reform among CLCs, so I brought these for you if you might find them interesting. We can send them by email if that's easier.

DR MUNDY: That would be better because then we could share it with - Vashti will give you a card on the way out and if you flick it to her than she will make sure all our folk are aware. It is a matter of which we have some interest.

MS LANE (FRLC): Good.

DR MUNDY: I will adjourn these proceedings until 1 o'clock.

DR MUNDY: Thanks very much.

(Luncheon adjournment)

DR MUNDY: We reconvene these hearings. Could you please state for the record your name and the capacity in which you appear?

MS PETRE (ANZOA): Thank you. It's Clare Petre, I'm the chair of the Australia and New Zealand Ombudsman Association, ANZOA, and I'm also speaking on their behalf as well as on behalf of the Energy and Water Ombudsman New South Wales.

DR MUNDY: Clare, if you would like to make a brief opening statement perhaps and then Commissioner MacRae and I might ask you some questions.

MS PETRE (ANZOA): Thank you. Obviously I don't want to go over things that you've already read but I just probably want to emphasise some of the main points of the submissions from ANZOA and EWON and the first is, clearly, the value of ombudsman services. It's interesting that I was on the original Sackville inquiry, a member of that inquiry, and it was very interesting to go back and read that report and what the report said about ombudsmen because they were sort of in the early days then and it's been fascinating to see how ombudsman services have grown in Australia and New Zealand but particularly in Australia.

I think the information that ANZOA members provided that we put in our original submission really confirmed that ombudsman services are meeting the essential criteria of timeliness in that 80 per cent of matters are either resolved or finalised within 30 days, we're accessible, fair, et cetera, that ombudsmen have increasingly put an emphasis on looking at systemic issues arising from complaints so that I've always thought that just dealing with individual complaints while it's our core business and really important, if we don't use that information to look at trends and patterns of complaints then we're wasting our time, to be honest.

I think all ombudsmen have had a real emphasis on that so that we can reduce or eliminate areas of complaints; and the third area of community information and outreach to get information out there to either empower consumers to deal with their own matters or tell them the essential things that they need to know to avoid trouble in financial services and energy et cetera. It's not enough for us just to assert our own worthiness. I think we have included in our submission information about our stakeholder surveys. The ones that matter to us of course are surveys of the people who deal with us.

I had a look at the Energy and Water Ombudsman, our last consumer survey, and very high levels of satisfaction but the question that's most important to me is the one that says, "Did you receive the outcome you were seeking? Yes or no? " If yes, they're always happy. People are happy. If no, people may be dissatisfied but we go on to ask the question, "If you did not receive the outcome you were seeking" - a

series of questions. That's the one that matters most to me because 94 per cent of the people who did not receive a satisfactory outcome from us said that it was easy to make a complaint to us.

79 per cent said that our staff were courteous and helpful. 72 per cent said they're recommend EWON to a friend and 66 per cent said the outcome was clearly explained and that's actually the key one for me because ombudsmen can't deliver outcomes to everyone who comes but we can treat everyone with respect, explain things clearly and let them feel that they really have their complaint heard.

That said, the area that ANZOA is concerned about most is probably the risk to the reputation of ombudsmen, because of the growth of them and I guess the popularity of them. We are concerned about the inappropriate use of the name "ombudsman". We've referred to that in the ANZOA submission. We think the Commission's draft report has not clearly distinguished ombudsman from other complaint handling bodies. I think there was a reference to 83 or something ombudsman services but it's really 83 ombudsman and other complaint services around Australia. I think it's really important to do that. I learned a lot about little ADR schemes I'd never heard of, so that was interesting but they're not ombudsmen.

DR MUNDY: A lot of other people haven't heard of them either.

MS PETRE (ANZOA): You mean consumers?

DR MUNDY: They mightn't need to be heard of for much longer.

MS PETRE (ANZOA): Yes, indeed. Indeed. At the moment we have written to treasury, for example, about a proposal to set up a small business and family enterprise ombudsman. We have said, "Fabulous idea. Small business needs all the help it can get but it's not an ombudsman." The opening, forward, by the minister, Minister Billson, says, "This will be an independent advocate for small business." You can't be an ombudsman if you're an advocate. You just can't be. So we have strongly suggested that every aim of this new proposed body is fabulous but it needs to be called something else, a commissioner or something but not an ombudsman, because I think it confuses people. It will disappoint people, consumers, if they have an expectation about what this body called an ombudsman will do. So it's really important and we've asked the Commission to consider incorporating into your final report the guidelines for use of the name "ombudsman".

It's not a matter of, "We're in the club and we don't want anyone else in it," but it is really important for an ombudsman to be truly named that way. There was a reference to a suggestion that the whole issue of access to ombudsman - we're aware, for all the people who come to us and we're increasingly busy, there are many people

who still don't know about us. There was a suggestion that there be sort of a one-stop shop arrangement for people who have a complaint. We are concerned about that. We don't think in practice that will work just because the people who staff such a service would have to be so trained across so many issues just to even identify the area that we think that it would possibly become just another bureaucracy, but what we need - I think maybe more shared facilities among ombudsmen.

We've got very good referral arrangements anyway, so no matter at what point in the system a consumer hits, if they ring the financial ombudsman and they have an issue, a telecommunications problem, they will be referred on and if people come to my office we will refer them on. So we think it's more a matter of sharpening up those processes rather than creating perhaps another organisation. In terms of access, as I said, it's still a real problem but ombudsman can't afford mass advertising and I don't think it's really appropriate anyway because you could bombard people with those messages but they only need an ombudsman when they need them and so it will go over their head.

We think the key message to get out to the community is if you have a problem, you have a right to complain and there's probably somewhere you can go. ANZOA, for example, got together some years ago and put up a combined postcard which just said that, "Speak up. Everyone has a right to complain. If you have a problem about any of these things, you can find yourself an ombudsman," and that was distributed widely throughout Australia. We think if that message, rather than, "There's this ombudsman with this jurisdiction and these details" - it's much better to get those messages out so people feel entitled and think, "There must be somewhere I can go."

Certainly EWON's outreach activities, and we do a lot of it, is not focused necessarily on consumers but we ask ourselves, "Where would consumers go if they had a problem?" So we target the gatekeepers, the MPs, community organisations, Office of Fair Trading, the places where people would think to go. I think that's where we focus our outreach activities, although we do talk to community groups but even then we've found with - we're currently working with Legal Aid in a partnership in terms of reaching some regional and remote indigenous communities. It's absolutely clear that we have to go to them. There are people there who are never going to come to an ombudsman.

While it's time-consuming and resource intensive, it's really important for us to do that and not only to visit once but to go back again, so that there isn't that, "Who was that person with the clipboard who came last week?" So that has been a really good partnership for us and we're going out to some community multicultural organisations who have set up "bring your bills" days for people who's first language

isn't English. Again, it's quite clear that they would never contact an ombudsman. We have to go to them and be seen to be helpful and to offer practical assistance.

We don't duplicate our work. If someone has already been to a tribunal or a court and they come to EWON, we don't deal with it. If someone has been to EWON and then goes to a tribunal or a court, they will still deal with it but it doesn't work the other way around. We've had one case where a magistrate adjourned a case pending investigation by EWON. So there's some quite good linkages there. I have to say in 16 years where we have given customers adverse outcomes, we didn't find for them, only a handful have ever gone to a tribunal because we take great care in explaining the reasons for why we cannot find grounds for taking a matter further. I think people understand and accept, they don't like it, but I think that has been the reason and they have generally not taken it any further.

I'm going to leave you with this information that we've put out because I think that is important and just the last thing, as part of our systemic work, it is a matter of trying to react really quickly to complaints. Apart from Legal Aid we've got really good relationships with other agencies and in New South Wales we work closely with Fair Trading, for example. In the course of a couple of a complaints - and it only takes a couple for us to - for the alarm bells to go off - customers were saying that they had been sold devices to save energy by up to 30 per cent and that sounded very wrong to us and we got onto it very quickly. Through that sort of work we have uncovered two absolute scams - this was the first, people were being sold this device which was supposed to save energy and I think it cost $160, COD at the post office and this is what they got. It's absolute junk. It's worth a couple of dollars. It doesn't do a thing.

Then we discovered after that one another one that was being sold to very vulnerable people that was $2000. So we've had some very good work with Fair Trading. They got onto it very quickly and exposed it and closed them down. So that's the sort of work, I think, that comes from the Ombudsman's offices. So I think they were the main points that I just wanted to highlight and you've obviously read the submissions, so I am happy to answer any questions.

DR MUNDY: I will probably start on this issue of systemic work. It's relevant to our inquiry in regard to recent decisions by the government about the termination of funding for CLCs to do systemic work and we had the folk along from the financial services and insurance service. Has ANZOA, or are you aware of any work that seeks to value or discuss in a fairly deep way the value to the community of this sort of systemic work of what you do? We made some findings about systemic work initially and we're trying to just understand that.

MS PETRE (ANZOA): Look, it's a really good question and probably the short

answer is no. It's not impossible to do. "How do you value by closing this down and stopping all those people buying this junk - what's the cost of that?" I actually don't know but I guess from experience - - -

DR MUNDY: What about issues like identifying - you get a stream of complaints and you have a look at them and you think, "These people have got a reasonable beef, the public policy needs to be tweaked a bit at the margin and it's not" - it's an unintended consequence perhaps. Is that something you see very often?

MS PETRE (ANZOA): Yes, we do, both in terms of legislation and whole of government policy. I know it's a sad thing to say but ombudsmen are really good at finding problems. We don't see the joy of life, we see the problems and so we are actually pretty good at even anticipating what those might be and we often - for example, members of my scheme will come in and talk through a new proposal and we can pick the eyes out of it or we talk to the regulators and other people in our industry and even at that early point we are pretty good at following through the links. But then when it is implemented, we can pretty quickly pick up any unforeseen consequences where people are bringing those issues to us and we then feed that back to the relevant government department or agency.

DR MUNDY: Absent you being there performing that function, that systemic function either before the event or after the event, if you like, what's your sense of how those matters would otherwise be dealt with and played out? Would people be dragged through — and eventually banging on the MP's door gets the matter fixed?

MS PETRE (ANZOA): Look, probably. I think a lot of consumers would simply suffer in silence. I think that's the reality of it; or they would go to their MPs' offices — and we receive a lot of calls from MPs — or it would take a long time to be identified through that process. I think again ombudsmen - we're now pretty nimble and skilled about picking things up, turning them into intelligence and feeding them - we know who the stakeholders are and feeding that back. So I think ombudsmen have got that down to a pretty good art actually.

MS MacRAE: I've always wondered and this might be a bit of a stupid question but the name "ombudsman" itself people will hesitate over. Once you've joined a certain level of society, I guess, it's a word you come across but for a lot of people it's something they would rarely hear and then there is always this - we have even had people here say, "I don't like saying ombudsman. It needs to be ombudswoman," and you get all this sort of thing. Do you find that the very title itself can sometimes be a barrier to understanding what you do?

MS PETRE (ANZOA): Yes and no. I think it is a difficult word for some people and I have just seen a study today about the levels of literacy and numeracy in our

community where so many people have such levels that ombudsman would be a real challenge, I think.

MS MacRAE: I'm not suggesting — I don't know what you do about it, I suppose.

MS PETRE (ANZOA): But on the other hand I think once you develop - let me put it crudely - a brand and that has some gravitas or meaning attached to it, I think it does work more and I think because there are so many ombudsman there is an acceptance and understanding that an ombudsman is somewhere where you can go to complain. So I think it has really developed a lot since the Sackville report and so it is a gender-neutral word, of course, so we don't have any problems using it. I don't think there is an alternative and we have actually talked about it and it's up to us to really get it out there. The financial ombudsman in the UK has just done a fabulous cartoon video on ombudsman and it's very good actually. We might try and copy that at some stage.

DR MUNDY: You raise the issue on the use of the word and I should probably confess that I was the person who drafted the terms of reference for Mr Brent's role as the aircraft noise ombudsman when I was deputy chair of Air Services Australia. So I possibly committed this sin but was doing so upon the instruction of the minister of the day. Is this an issue which governments just should be careful with when setting these things up or is it more that this needs to become a protected word like "bank" is protected in the Banking Act?

MS PETRE (ANZOA): In New Zealand the Chief Ombudsman of New Zealand has been given the power to determine who can be called an ombudsman or not. We were always very wary of that but we now are becoming a little more favourable to that in the hands of the right person, like the Commonwealth Ombudsman, for example, just because we do think there is such a risk to the name. We have local governments in New South Wales and maybe elsewhere who have positions called "internal ombudsman" and if you put internal and ombudsman together, it's not an ombudsman because it's not independent.

MS MacRAE: Yes, by it's nature it can't be.

MS PETRE (ANZOA): AAMI insurance company used to have an internal ombudsman. It just can't be an ombudsman. So we do think it really does some damage to that community understanding. I know the Aircraft Noise Ombudsman is working very hard to meet the - - -

DR MUNDY: He has been working very hard for a number of years and with - I think to be fair, although I am no longer a director of air services - the general support. I mean, the challenge is the matter in which he is - and the role has

developed. I just wanted to get a sense of whether you felt this was almost at the point of where we have to protect the word.

MS PETRE (ANZOA): I think I would have to say yes. I think we are at that point because we are victim of - without being too silly about it - our own success and people do want to adopt the name because or what it bring with us and I think there are real risks to that.

DR MUNDY: Just before we move off this point. ANZOA's membership is public knowledge.

MS PETRE (ANZOA): Yes.

DR MUNDY: Are there people who are - I guess I'm trying to identify how many people are purporting to be ombudsmen which would not qualify for ANZOA's membership and we can probably work that out, but I guess the question is are there what you would consider to be bona fide ombudsmen who are not ANZOA members or can we take the ANZOA membership list and say, "They are the ones that ANZOA reckons - there is no sort of someone who would qualify but has not bothered".

MS PETRE (ANZOA): No, if they would qualify we would be out there encouraging them strongly to join.

DR MUNDY: Okay.

MS PETRE (ANZOA): State government wrote to us to say they were proposing to set up a health complaints - it was a health complaints commissioner, they wanted to call it an ombudsman and we suggested that it - again, no problem with the service - but it wasn't an ombudsman because it was prosecutorial, it reported to a government minister and it just didn't fit the criteria. They went ahead and called it an ombudsman anyway.

DR MUNDY: So we have got people who should not be called ombudsmen being called ombudsmen but people who - - -

MS PETRE (ANZOA): Yes.

MS MacRAE: It is not the other way round.

DR MUNDY: I am just trying to make Vashti's research task a bit less. We had some folk here this morning from the Australian Centre for Disability Law and we were talking about difficulties of people with disability suffer in getting disputes

resolved. I am just wondering what either your own organisation or ANZOA members more broadly, how they approach these issues of dispute, particularly people with mental and physical, quite profound disabilities.

MS PETRE (ANZOA): Yes. I think most of - well, probably all of the ombudsmen do the standard things in terms of people with hearing disabilities and sight problems and, where necessary, we will go to them or many people have to have an advocate, but most ombudsmen would say that the most challenging area is mental health. We have had some people who have contacted us. It's not a matter of them not being able to reach us but their problems are exacerbated by their mental health issues and it can be very challenging.

One of my senior staff has spent untold hours - I just cannot tell you how many hours she's spent - assisting a man on the autism spectrum who got into all sorts of trouble; his bills were wrong and he had a meter on his property that wasn't being used. He asked for it to be removed. It wasn't removed. He went at it with a hammer and smashed it. Ended up being described on the network records as dangerous, which really, really upset him. He wasn't good verbally and would literally - and he would say himself, "I lose control" - and he would literally scream at everyone and then he had all sorts of billing problems, so we were trying to assist him with both the bills and the network issue about this meter.

It eventually involved hours and hours and talking to him and talking to the agencies, a home visit to him to be with him when they came to finally remove the meter, having the reference to being dangerous removed from his file, having his bills sorted out and sorting out the payments and dealing with him when he rang and just screamed for hours, literally hours on end. At the end of it when we resolved that, we knew that as an ombudsman's service we had spent an enormous amount of resources on this one case, but we just asked ourselves if we had not done that who would have?

No-one would have. No-one would have had the patience to. He alienated everyone he spoke to and we are good at dealing with that, so it is a real issue and I think a lot of the ombudsmen are saying that's an issue that we're looking at to see how we can really assist people in those areas because they - it can lead to that sort of drama that needs a lot of care and patience to address.

DR MUNDY: There was one thing, I guess, and this is bordering on an economic question, in particular with respect to industry ombudsmen. I mean we understand that some members of the scheme just pay a flat fee, some members of schemes pay essentially on a per complaint - - -

MS PETRE (ANZOA): User pays.

DR MUNDY: - - - and I suspect there are some schemes where you pay a flat fee and per complaint. That would seem to be the way these things - - -

MS PETRE (ANZOA): Indeed.

DR MUNDY: - - - this is how multi-part tariffs work. Do you have any views about the incentives or otherwise that the different fee structures might present for the behaviour of participants in schemes and does ANZOA have a view on what is best practice, pricing structure for an industry ombudsperson?

MS PETRE (ANZOA): Look, it does depend, for example, in Tasmania or Western Australia where there are - there's no competition.

DR MUNDY: Yes.

MS PETRE (ANZOA): They only have one or two companies so there's almost no point in going through the rigmarole per complaint because they're going to pay for it anyway so - - -

DR MUNDY: They are going to pay for the cost of the ombudsman come what may and how you cut the cake is - - -

MS PETRE (ANZOA): Yes, that's exactly right, yes.

DR MUNDY: You're still going to get your $2 million a year or whatever you've got to get.

MS PETRE (ANZOA): That's exactly right, so I think it's not necessarily in those - so the reason for those different economic approaches can be that sort of reason, but where there is competition I think it's important - our scheme is a mixed fixed fee plus user per complaint fee and I think that works well because even if you don't have a lot of complaints you still have the benefit of offering an ombudsman service to your customers and so you pay a small fixed fee just for belonging to be able to offer that service. It is really the relativity of the fixed fee to the - - -

DR MUNDY: And in your scheme you would have government agencies and private entities.

MS PETRE (ANZOA): Yes, we do, yes. In the beginning they were all government owned, so I notice that's an issue for the parliamentary ombudsman but we've been billing state government agencies for a long time.

DR MUNDY: If I set up a retail electricity business, the New South Wales law requires me to join?

MS PETRE (ANZOA): It does.

DR MUNDY: So and then you just recalibrate your collection framework and stuff like that.

MS PETRE (ANZOA): Yes. But I have to say the user pays system absolutely - I've worked for the commonwealth ombudsman, the parliamentary ombudsman as well as EWON and I think the financial situation really focuses the attention of businesses on their complaints. We say if you're paying a lot it's up to you to reduce that and it does not only per complaint but per level of complaint so as complaints go on the cost of the complaint goes up and, again, it's a matter of focusing the attention. Sometimes the companies will say, "We know," but it's really important for you to try and resolve this, it's been circulating within our company for their legal team and their senior management team to deal with a complaint that isn't resolved and just floats around.

If they sent it to us, even if it does end up being a bit costly, it's often worth it to them so that they can say to the MP or anyone else, "The ombudsman has investigated it, this is the outcome, we're bound by it," and that's it.

DR MUNDY: End of story.

MS PETRE (ANZOA): So it's really important.

DR MUNDY: We made some observations about how - well, what our intention was, was to try and strengthen incentives for good behaviour by government agencies and we suggested, not so much as a mechanism of funding ombudsmen, but as to provide some sort of incentive for improving complaint management and possibly good behaviour that agencies could be levied for the use of the ombudsman service.

Now, we did not actually have in mind that this was going to be how ombudsmen would be funded wholly and solely, but the fact is that I think our view was, and probably still is, is that departmental secretaries getting a report is one thing, departmental secretaries handing over $80,000 to an ombudsman certainly focuses the mind a bit more.

MS PETRE (ANZOA): Indeed. Indeed.

DR MUNDY: I think the Victorian ombudsman has made an observation that this

would not be appropriate given the nature of the work. I guess my question is more - is really along the lines of are there investigations of criminality by police? Is there a range of matters, particularly if government agencies are working and there is some sort of commercial character, or service, or some type of characteristic that those arrangements might be appropriate, if not in all arrangements for jurisdictional ombudsmen, particularly drawing on your own experience in the Commonwealth jurisdiction?

MS PETRE(ANZOA): Look, I think there could be. I agree. I think there are some issues and I think the police is a good example of that, but - - -

DR MUNDY: Intelligence services is probably another one that springs to mind.

MS PETRE(ANZOA): But I think the parliamentary ombudsman would be very interested in at least participating in the discussion. It's certainly not appropriate for government agents just to say, you know, "We could never do that," because we did it. Government departments and agencies in New South Wales have been paying ombudsman for a long time, since we've been there. I think it is a debate that the ombudsman would like to participate in, but it would need a lot of discussion.

DR MUNDY: Is that something you could perhaps just take back to your members that are jurisdictional ombudsmen rather than people like yourself, and just see if there's any more nuancing around it, that they could perhaps send us a one-page note or something? That would be very helpful. I guess the broader question is: we are quite mindful of - we see it all the time because we review regulators regularly. We see a lot of complaints about the conduct of government agencies and submissions have been made to us about the quality of their own internal dispute resolution processes. I guess your jurisdictional members see the outcome of those processes where they have been unsuccessful.

MS PETRE(ANZOA): Yes.

DR MUNDY: Is there any views that you have as an organisation, or drawing on your own experience, about what we can do to improve complaint handling by agencies so that they do not end up with the ombudsman, and also, I guess, how far through government could that go? The Commonwealth has a process in name. It is a question of whether it is effective or not, but I mean, one of the issues that I have a particular interest in with previous work that I have done at the Commission is local governments and how those matters might be resolved?

MS PETRE(ANZOA): To be honest, I think one of the main ways of improving internal dispute resolution is for there to be incentives for them to improve it and, until there are those incentives - and cost is one of them - why would they bother?

They can just send somebody off to a parliamentary ombudsman at no cost to themselves. I think we have one company that finally twigged. It was interesting. We'd had a lot of battles with this company in the early days - and it was a government agency at that stage - where they had so many complaints and they finally worked out that they were spending a million dollars a year on our service, and somebody had the thought, "Well, if we spent a million dollars on ourselves, then maybe we could reduce that." So they did, and they improved their internal processes.

They resourced their complaint handling groups appropriately and not only were they able to divert complaints coming to my office, but they handled other things - I mean, they handled many more complaints than came to us, and they just had a far better. Everything went quiet all of a sudden because they had understood that they sort out their own customer issues then they don't need an ombudsman. One of the better company CEOs always said his role in life was to put me out of business, and it's a very laudable aim. It's not going to happen, but good luck to him.

DR MUNDY: There is just one more thing I wanted to ask you and this is on the ongoing, vexing issue of data.

MS PETRE(ANZOA): Yes, sorry, I meant to comment on that.

DR MUNDY: You made some observations that organisations like ANZOA would be best placed to collect this data. I think that is probably a fair observation about ANZOA. I am not sure the extent that it is a fair observation for all the other bits of the civil justice system we are interested in. Is there any impediment today against ANZOA doing that and, if so, how could it be removed?

MS PETRE(ANZOA): Look, I acknowledge that is an issue for that, that, for organisations that are essentially in the same complaint handling business, our data is not always consistent. That, to be fair, can be a factor of history, jurisdiction, legislation, a whole range of things where we have to report differently, based on all those things. However, it is important - we are in the same business, and I think certainly the Energy Ombudsman, which is still a state jurisdiction, we have recognised that we have got even less excuse to have similar reporting structures. So we are working on that really hard to do that. I think while there are differences, there are enough similarities where we could do some projects to try and improve the quality of the data and make it more consistent, more telling, more useful to external stakeholders and to ourselves. We are already doing that. We have got lots of working groups trying to share information and work together, but I think we could do more in that area, absolutely.

DR MUNDY: I think we are probably done. Thank you very much for your

assistance to date - - -

MS PETRE(ANZOA): My pleasure.

DR MUNDY: - - - and taking the time to come and see us today.

MS PETRE(ANZOA): I'll leave you some propaganda.

DR MUNDY: Leave it with Vashti on the way out.

MS PETRE(ANZOA): I will, thank you.

DR MUNDY: She is the pack horse for this expedition.

MS PETRE(ANZOA): Thank you very much.

DR MUNDY: Thank you.

DR MUNDY: Could we now please have the City of Sydney Law Society. Just bear with us while we shuffle through our notes for a moment. Could you please state your name and the capacity in which you are appearing today?

MR ROBERTS (CSLS): Certainly. My name is Phillip Roberts. I'm a solicitor and the capacity in which I'm appearing today, I'm the convenor of the Practice Viability Sub-Committee and Committee Member of the City of Sydney Law Society, which is the chapter of the Law Society taking in solicitors within the CBD area.

DR MUNDY: Yes.

MR ROBERTS (CSLS): Just speak generally now, or - - -

DR MUNDY: If you would like to make a brief opening statement, that would be helpful.

MR ROBERTS (CSLS): Sure. I will try to keep it brief. In essence, I will make brief references to our two submissions, which I believe you have copies of, don't you?

MS MacRAE: Yes, we do.

MR ROBERTS (CSLS): Although I won't go verbatim through them, I will speak, however, in general terms, on three main points. One will be the background and the situation in general that I will be drawing upon and, secondly, the problem - the key problem, as we see it, in terms of access to justice, and the third one is proposals as to solutions. Just in terms of background, I just mentioned to you - and I just need to add a little bit further in terms of where I am speaking and where I am coming from so you will get it accurately. Our City of Sydney Law Society is a chapter - as I said, it covers all the solicitors in the CBD area. There are another 26 chapters of the law society all around New South Wales, each of them covering a particular area. I will be speaking, and our society speaks, on behalf of our members, which is about 600 and growing.

I don't pretend that we're speaking on behalf of the members of other chapters of the regional law societies, but nothing in it - we do have linkages to those regional law societies and there are meetings held regularly, twice a year, between the presidents of those law societies, and nothing in any of those communications have suggested to me that there's anything different to - largely, in terms of these issues, we all cover the small to medium-sized legal practices. So in terms of - and this very much sets the picture for you. If you have a look at annexure A to our initial submission. I don't know if you have it there?

DR MUNDY: Not with me.

MR ROBERTS (CSLS): No, you don't have it with you. It's not difficult to describe. I suppose the main point here is one of the assumptions about the legal profession and law firms in the legal profession is that we're largely made up of large law firms. Whether it be the media or television programs, or whatever there is a general - or American television programs - there's a general high emphasis on lawyers walking around looking very well-spun and working out of high rise buildings on four or five, or more floors and in fact, from my experience and talking not only to non-lawyers but also to students who are yet to enter the profession, there's a very high assumption that the larger law firms are the profession.

In fact, when you read many media reports about the profession you can actually see media reports where they talk about the profession, they refer to the profession, yet when the example as to what they are talking about are given they'll list 20 firms and those 20 firms are only from the large group. So they are talking about the legal profession as if it is the large firm group. When you come to the annexure A that we've got on the attachment to our first initial submission you'll see how surprising and how different the reality is. In New South Wales the sole practitioners, when calculated by a number of firms - and this was as of November last year - they made up roughly 87 per cent of the firms in New South Wales.

When you took it from firms that had two through to 20 solicitors, that took you up to yet another - well, another 12 per cent of the legal firms in New South Wales. In fact, the large law firms - I mean, if you can put that at 40 solicitors or more - they represent less than one per cent of the law firms in New South Wales. The numbers do sort of correct themselves slightly. If you're doing it by the number of solicitors - because obviously one law firm, if they've got 10 floors of solicitors and they have a thousand or more solicitors just in that one firm and it does right itself out to a certain extent, so that sole practitioners make up 40 per cent and the rest of them from two through to 40 make up another 40 per cent, and 40 or more make up 20 per cent of the profession. But still, the firms from one through to 20 practitioners make up eight per cent of the solicitors in New South Wales.

Why is that important? Why it's important is because - and I've put this view on a few occasions to - or a number of occasions in our society and I've got general agreement, the depiction of law firms and the legal profession as largely being large law firms often leads to the assumption that law firms are extremely wealthy, that they're making lots of profit. Look, I don't say this in any accusatory way; to some extent that's similar to one of your tables, I believe it's at page 221 where you have a table there. That's quite common and there's a little thing about - the couple of lines about small law firms.

The problem is that when we come to this area of access to justice the immediate assumption is that all lawyers are rich. They've got lots of money. Clients are doing badly, it's encouraged by so many of the media report which seem to focus on overcharging or misconduct issues and they'll have a photograph of a partner or whoever it was who has been involved in some sort of misconduct issue, or course driving a prestigious car and this leads naturally, if you like, to the sort of tall poppy response that these guys need to be brought down to size. I don't say that in any inflammatory way, but it does set up the scenario that leads to the sorts of processes that we've seen, which is that more restrictions need to be brought into the market in order to address the issues of access to justice.

In fact many, many solicitors are experiencing great challenges in basically surviving financially, quite frankly. I don't want to exaggerate that. It varies greatly. Some solicitors come out of large law firms, they've got clients who are large firms, they're doing relatively well. There are others - the solicitors who have only been in the profession for a couple of years but for one reason or another they've gone out to set up their own practice and they don't have those sorts of clients. So they're obviously in a very different position, so it's a great range. I don't want to exaggerate there but as is mentioned in the attachment to our first submission, you see there - and I don't want to dwell on this, but this article in 2012 refers to small firms under threat and talks about, "When you are running a small practice you have high overheads relative to other businesses, particularly around professional indemnity insurance and the like. To be constantly having to comply with increasing tide of regulation actually makes things a hell of a lot harder."

He confirms the fact that sole practitioners make up over 85 per cent of the profession in New South Wales and he talks about an estimate that the average sole practitioner in rural areas working six days a week and earning less than $70,000 a year. One of the problems is that there's simply not enough statistics about the sector. Most of the statistics also focus on the large firm group unfortunately, so we're at a bit of a handicap to know completely what's going on but anecdotal evidence suggests that at least a significant number of sole practitioners are earning less than $50,000 a year.

So that's the situation as it is. In terms of the key problems in this area of access to justice, firstly the lack of statistics in regarding the profession in general, particularly the small to medium size sector. I appreciate that's not exclusively the focus of your review but it's intrinsic to this process when you're dealing with a profession that's very well - lots of statistics about one part of it but not about another part of it which, on our argument, is the bulk of the profession or arguably the big end of town, if you like, because we are so many.

In regards to the problems as it comes to access to justice, one of the key problems is that as I and many of the people in our society believe it's not so much a problem of lack of resources by clients. Yes, clearly there are some clients who have low income. If you take the legal market - and when I say the legal market, I'm not talking so much about the alternative dispute resolution mechanisms or the ombudsmans like Clare Petre, et cetera - if you look at the market for lawyers there's largely three sectors. One is the high end which is large corporations and high net worth individuals. The other end is the low income individuals who don't have very much money at all and then, of course, you have a large group in between - and as you know, of course, commonly called the in-betweeners in the literature. In regard to the large or the high end of income earners, the problem as we see it is that traditionally we've gone at the problem of how do clients get access to legal services from the viewpoint that lawyers are very expensive and that the sorts of fees that large law firms charge are very expensive. Fine for a large corporation, they can afford those sorts of fees, but ordinary individuals clearly can't. The solution unfortunately, in my view, and what I put to the Commission is the solution has been, well, let's find other ways to provide services for free.

It's fine and entirely appropriate for low income individuals. The only problem is that it's meant there is no third alternative, there is no "how do we find appropriate mechanisms by which small to medium sized practices can get sufficient resources from working their practices? " In short, when the average in-betweener comes to a legal problem, they've never planned to need a lawyer. Not like for doctors or for dentists or anybody like this. Generally speaking, they go, "Oh, struth, I need a lawyer. I've maxed out on my credit cards. I'm spending money on sending my children through private school," a whole range of things where very frequently the individuals in the in-betweeners groups may very often have considerable amounts of income but it's all fully committed.

When it comes to a legal problem, they've had some sort of accident or their small to medium sized business has insolvency problems, they simply don't have discretionary cash and discretionary money, money that they can find, so they say, "I can't afford it, I don't have the money. Lawyers are too expensive." In these situations it wouldn't matter whether the lawyer is charging $400 an hour, $100 an hour or $40 an hour. In many cases they simply don't have any money, any funds at hand to spend on lawyers. Coming to the solution - and I'm mindful that you wanted me to keep my statement brief.

DR MUNDY: We do not have much more time for you.

MR ROBERTS (CSLS): Sorry. All right. Sorry. You'll see in the submissions that we put forward that we propose that the appropriate thing to do is to put more emphasis on bringing the private sector to addressing these issues particularly of the

legal needs of in-betweeners and there are a range of ways. You have been involved, obviously, in the drafting of the reports and familiar with them. They're are quite a bit involved in that. Two ways, for example, is legal expense insurance and obviously LEC, legal expense contributions. I won't go into detailing all of that because I imagine that you're familiar with how those sorts of schemes work, but very shortly I can say that legal expense insurance, for example, I was in Europe in January and I took time to talk to lawyers about how it works in Europe and they're very positive about how it works in Europe. They're very positive about how it works in Europe.

It has it challenges like everything else, but in the common law world it's only now Australia and New Zealand that doesn't have legal expense insurance. It seems to be the tyranny of distance and this is an appropriate time for us to start looking at this sort of development. And I'll leave it there.

DR MUNDY: Just on legal expense insurance, it is not clear to us - well, we are probably satisfied that there are no regulatory impediments for the establishment of legal expense insurance. We know that the Law Society in New South Wales at one stage did try to get a scheme up. It fell over, frankly, for lack of demand. Do you have any views on why in the absence of any apparent regulatory obstruction, I mean there is no statutory monopoly issues like there is with indemnity insurance? This market is contestable, it's enterable and no-one is in it. Do you have any views as to why?

MR ROBERTS (CSLS): Well, there is one traditional reason which is that it's not now illegal but it used to be illegal. There was a law of champerty. That's gone.

DR MUNDY: But there is nothing now. No.

MR ROBERTS (CSLS): There is no legal restriction.

DR MUNDY: You are not aware of any other characteristics other than perhaps Australians are not the world's best insurers as a general product. There is a cultural tendency of us not to insure in the way that others do.

MR ROBERTS (CSLS): I think that would be part of it, yes. Well, it seems to me that it is partly related to one of the points that I was making before which is that the way that it was addressed to - I mean clearly many people are agreed that this is a challenge and this is a problem, that not enough people are able to locate the funds to be able to pay for lawyers, but the solution that we came up with, Australia, some 20 to 30 years ago was putting a lot of emphasis on Legal Aid. Now, that's great. I used to be a Legal Aid lawyer. I volunteered at the Redfern Legal Centre. In fact, Clare Petre used to work there as well.

I used to volunteer there. I'm saying I'm a Legal Aid lawyer originally, I've got no hostility towards that. My point is, however, it has put in the minds of many individuals that there is this sort of nebulous idea, "Oh, if I have a legal problem I'll be able to get Legal Aid, won't I, and so I probably won't need it."

DR MUNDY: That's not true. The United Kingdom has legal insurance markets.

MR ROBERTS (CSLS): They do.

DR MUNDY: And they have a historically much more generous Legal Aid system than we do particularly in Scotland but to a lesser extent in England and Wales, so the fact that Legal Aid is there and present in other jurisdictions which have a developed and I much - I mean you can get Legal Aid in Scotland for defamation, so it does not seem to me a compelling argument with the presence of Legal Aid of itself. It is not going to lead to the emergence of this market because - - -

MR ROBERTS (CSLS): I wasn't suggesting that that was the only factor. I'm certainly not suggesting that that was the only factor. It may be just a, shall we say, an organic cause. Essentially it seems - and I've looked into the history of it, legal expense insurance. They call it in France "protection juridique" and it seems to have originated in Italy or France in both of those locations and it's sort of grown out of there and then across to England and the United States. It may simply be - and now 20 years ago, I believe, it went to South Africa, so it seems to be going and I understand the last five years it's come into Canada.

DR MUNDY: I just wanted to ask you, your submission at item 3 indicates that your members have concerns about the current high level of insurance - - -

MR ROBERTS (CSLS): Yes.

DR MUNDY: - - - and, as you would know, there is a monopoly insurance provider in New South Wales, even though it is subject to regulation from a prudential perspective from APRA. I just was not entirely sure but is the suggestion that you are making there that the statutory monopoly should be - or at least the Attorney-General who authorises the provision of legal indemnity insurance in New South Wales should be more vigorous and authorise more providers other than the scheme provided by the Law Society?

MR ROBERTS (CSLS): Look, I have to say that it's not - that part of the situation is not something that we've investigated, so - - -

DR MUNDY: So you are merely making the observation that legal indemnity

insurance is expensive?

MR ROBERTS (CSLS): Yes.

DR MUNDY: But not necessarily calling for - - -

MR ROBERTS (CSLS): I mean obviously that's not an issue that we've been - we've gone into in great depth. I'm simply saying that when we have our regular meetings once a week and if there's a general discussion you can bet there is going to be at least two or three in the group who are going to be hot on this issue.

DR MUNDY: Okay. No, that is fine. I do not have any more. Okay. Thank you very much for your time.

MR ROBERTS (CSLS): All right. No worries. Thank you.

DR MUNDY: Can we now have Grays Institute, please? Good afternoon, if you could take a seat and when you are settled down could you please state your names and the capacity in which you appear?

DR GRAY (GI): Good morning, Commissioners. Can you hear me okay?

DR MUNDY: Yes, no, we are fine. Could you please state your name and the capacity in which you appear, please?

DR GRAY (GI): My name is Dr Pamela Gray. I'm the trustee of Grays Institute and I appear today on behalf of that charity.

DR MUNDY: Would you like to make a relatively brief opening statement and then we will probably ask you some questions?

DR GRAY (GI): Well, I've give you some talking points and the opening statements from that is that there's a number of assumptions that are being made in this talk. Firstly, that productivity is hindered by injustice when you can compare that to the problem of worker health and well being, productivity can be hindered by worker health and well being. Secondly, the productivity can be increased if speed is increased and cost is decreased. The legal system is massive, complex, costly and inaccessible. Automation of the application of rules of law to nominated cases can greatly speed up access to justice and reduction of its cost.

Automation of the application of rules of law to nominated cases can assist dispute resolution and guide pathways to legal goals. That's the benefits of law. I've now got a number of questions that I would put and answer so that these assumptions can be addressed. Would you like me now to proceed with the questions?

DR MUNDY: By all means.

DR GRAY (GI): Firstly, how is the automation of the application of rules of law to nominated cases possible? I've worked in this research field since the 1980s and I've been in the legal discipline practising law for over 15 years and I think I'm qualified to answer these questions. The answer to that question - and this has taken me a lifetime of research - is that by the determination of a computational legal practitioner's epistemology and design of a shell accordingly, and this has been done, and the shell is called eGanges.

I've given you a list of URLs for the theses in which this is established. My son, Xenogene Gray, is on my left here today and he programmed eGanges. He's a scientist and a mathematician and a computer programmer. His qualifications are from the University of Sydney. He's got a BSc with honours advanced. The shell's

been used in teaching law. I've used it in teaching law at Charles Sturt University and degree students have learned the user friendly shell in about one hour.

The next question, what is epistemology? I have an arts degree in philosophy from Melbourne University so I think I'm qualified to answer that question. The simple answer is it's a method with logic. The next question, what is the computational legal practitioners' epistemology implanted by eGanges? The answer is that eGanges' interface has four substantive components. I brought along today some images of the eGanges interface so that you can better understand what I'm talking about. I will just hand up this first one which is the interface that shows the map of negligence rules where all those lawyers pretty familiar with negligence rules - I've got them here with me.

DR MUNDY: Dr Gray, you should not assume that my colleague and I are lawyers.

DR GRAY (GI): Okay. Well, it's actually a quality control diagram taken from Ishikawa's fishbone, quality control fishbone, so it has the advantage of giving the legal system and its processing quality control, so you can see from that that this is a river structure diagram and it sets out the rules of negligence law. The end result is deciding whether or not there's negligence. Every stream in this hierarchical structure, which we call the river, is a rule, so if you have certain things then you get to negligence and to establish each of those things you might go up a secondary stream that's another rule. If you've got those things then you get to the point on the primary stream.

The four components of the eGanges interface include the rule maps. That's the first component and that's an example of the rule maps, the negligence map. That's the current project completing this negligence app. There's about 30 questions that are required in order to complete the map with the interrogation system and the interrogation system you will see on the interface of eGanges and it provides for the user to answer a number of questions. There's a questions window there and sometimes there are notes to help the user to answer the question.

There are three possible answers and that's three of the four values so you can answer, "Yes, we've got this point. No, we haven't" or "We're uncertain" and the fourth value comes from if no feedback is given. I mean if no input is given by the user, so that's the fourth value, unknown. We don't know if we've got this point or not. The questions are put to the user and the user selects the value and failure to select a value is treated as unknown. The interrogation system is the method of taking the user's instructions, so every lawyer in their method, every legal practitioner when they first see a client will take instructions and then they will identify the relevant rules that have to be applied to that user's case in order to find

out what the consequence of those rules is.

The interrogation establishes the user's input or instructions and then the rule maps are applied to each answer and the eGanges system allows for glosses, which are relevant information relevant to the rules that's available for data retrieval to assist users in understanding the rules and the interrogation questions. There are various types of glosses that can be added and one of the types is to link the question to some other database on the web such as the black letter law, relevant black letter law on AustLii, but premises for legal induction and abduction logic are provided for in this way.

There's no automation of the induction or the abduction. There's only automation of the rules by deduction, and the fourth characteristic is the feedback windows. As input values are received from the user, they are processed and the results are shown in the feedback windows. The possible four value combinatorics used by legal practitioners applied to extensive and complex rivers of rules produces a massive combinatorics and this is the most difficult thing that lawyers have to do in their legal practice. Truth tables were devised to guide the deductive processing of the combinatorics.

As I said, my son is a mathematician and a computer programmer and he devised the truth tables to guide the processing of the input, so that with each answer, the user is given the feedback as to what result that answer has, so the automation of this combinatorics characterises the eGanges of the super expert legal system. It has the potential to significantly speed up and reduce costs of access to justice. It might also be expected that the anxiety experienced by lawyers and bureaucrats due to the unmanageable complex combinatorics might be considerably reduced, so my son's infill thesis at Macquarie University explained the eGanges in terms of its super expertise. It's super expert because it automates massively complex combinatorics.

My PhD was paid for by the Federal Government because I received an Australian postgraduate award that brought a living allowance, so that's how my work was accomplished. Once I had designed eGanges, which happened following my development of the computational legal practitioner's epistemology and my masters thesis at Sydney University Law School, I was able then to go on to a PhD and I was fortunate enough to find suitable supervision at Western Sydney University and I was able then to design eGanges as a program based on the epistemology I had developed in my masters thesis at the University of Sydney Law School.

The next question is how is eGanges made freely accessible to the public? The answer is that the mission statement of Grays Institute is to expand justice. For the 15 years that I was in legal practice in three different common law jurisdictions, I

found in the end that the law was not accessible to most people because of its cost and it was an intolerably stressful experience to prosecutors because of the delaying, the time delays in achieving the end result of any process of justice. The means of achieving this is to provide an on-line library of legal super expert systems in various fields of law freely accessible by the public. This facility might eventually reduce the costs of running the legal system and add to its effectiveness and efficiency.

The library with expanding apps was available to the public throughout 2013. In January 2014, the library was made inaccessible through the requirements for payment introduced by a change in ownership of Java, which was the software used to 2002 to program eGanges. Oracle, the new owner of Java, has worked out how to make money out of Java, which was always a free system, and they are now requiring $500 a year to give access to the apps online, so at the beginning of this year, access was blocked and then, fortunately, when I was at Sebut, a technical conference in Olympic Park, recently, by chance I met a woman who was concerned about this and she donated the $500 for the reopening of the library.

The other solution is that my son will put the whole eGanges system into HTML5, which is a program suitable for mobile technology, but that will take him about a year, so in the meantime, we can use the donation of $500 to reopen the library. It's actually $500 American, which is a bit more than we received from the donor, but we did already have $250 from the Commonwealth Bank, so we are going to be able to make up the $500 US.

Are there other important considerations and the answer is, yes, there's two other things to consider. Firstly, the paradox of common law justice that ignorance of the law is no excuse but reasonable access to law is not available; this is injustice and I discuss that at length in my book, which is in your list of URLs, called Artificial Legal Intelligence, published in 1980.

DR MUNDY: 1980?

DR GRAY (GI): Sorry, 1997, in Prof Tom Campbell's famous series on applied philosophy and law, so you could read that. The book is available. It is not available online but I have given you the page references and it's in the Sydney Law Library, the university law library, and you can get it on inter-library exchange.

The second point that's important is that eGanges has been offered to government free of charge, so that public servants can now produce apps for the free online library of the charity. Without reason, these offers have not been taken up and the offers have been made in several ways on several occasions since the eGanges were successfully promoted in overseas international computers and law conferences and that's from about 2005, so as you can see, it's very difficult to innovate a most

important characteristic in this day and age and at the same time give the benefit of that innovation to the people for whom it was created and in particular, government departments, so my submission today is that we need to change the attitude of government, so that they will take up this opportunity.

DR MUNDY: Thank you very much, Dr Gray.

DR GRAY (GI): I have just got a couple more things to give you. I will just hand you this bundle of papers.

MR GRAY (GI): Would it be okay if I just made a quick submission?

DR MUNDY: Please do.

MR GRAY (GI): So basically the core idea - - -

DR MUNDY: Sorry, could you please state your name and - - -

MR GRAY (GI): Sorry, my name is Xenogene Gray. I am basically supporting the Grays Institute Charity. I wrote eGanges and I'm supporting my mother in her main application but I just wanted to make a quick addendum. The essence is in order to improve productivity, what we have found throughout history is that automation is the major way to improve productivity. What we are trying to do with eGanges is to provide an automatic system that is not a black box, something that is transparent, so that people have faith or trust in actually what the decision basis is. We do actually have a copy here for you, if you are interested in having a look, but it's entirely graphical in its interface and it lets you see exactly why a decision has been reached the way it is.

It's designed to be a network structure in the same sort of way that a human thinks about things. We talked to, for example, Justice Michael Kirby and discussed how he actually thinks when he makes a decision, and it's the same basic process. You make the points. You have it structured. You make sure it's all clear and transparent, so that it can be automated as much as possible. My mother was describing the difference between deductive reasoning, inductive reasoning and abductive reasoning, so those three different types of reasoning basically encompass all of what she believes encompasses law as a whole. Deductive reasoning is the easiest one to automate and that's what we're mainly focusing on, but any system that tries to encompass or that needs to account for those two additional types of logic. That is the goal here.

DR GRAY (GI): I'd like to say one more thing.

DR MUNDY: Yes, please do.

DR GRAY (GI): Our most recent applet was the dangerous driving offence of New South Wales, and it was constructed with a Chinese lawyer, Guan Yu Zhu, also known as Frank, and his plan is that once we produce the New South Wales applet, he will then do the equivalent applet for the equivalent offence in China, and he's showed me the wording of that and it's clear to me that this computational, legal practitioners epistemology is international. It will apply to any country, whether they're common law or not. So it will apply to the Chinese dangerous driving offence. He has a copy of eGanges. He can now get on with doing the Chinese applet and I will help him, if he needs help, and that may lead on to other things. So it is an international innovation and it stands to provide for peace internationally because if you've got clearly understood law in all countries that you can access readily and at an affordable price, then that's the first step to peace internationally. So Gray's Institute, on its website, claims that it is looking for peace.

DR MUNDY: I just have one question. You say that you have offered the software to various government departments. Have they both been state and federal agencies?

DR GRAY (GI): Yes. We're currently going to approach the new AG in the new, New South Wales government. I spoke to Geoff Lee, who's the Parramatta member, about this quite recently and he says that it might work this time, but they won't even let us show - I showed Geoff Lee the workings of eGanges on this laptop in the Telopea shopping centre when he was visiting there one day. It's been offered to the - well, when the Labor government was in power federally, we offered it to the AG, as he then was. We even offered to do a whaling applet for him.

DR MUNDY: Is that Attorney General Dreyfus or one of his predecessors?

DR GRAY (GI): Can't hear.

DR MUNDY: Was that Attorney General Dreyfus or one of his predecessors?

DR GRAY (GI): Yes. No, Dreyfus.

DR MUNDY: Thank you.

DR GRAY (GI): He's a senior counsel.

DR MUNDY: Yes, I know Mr Dreyfus.

MS MacRAE: Perhaps I'm still not getting the complete context of this, but why would you offer it only to the government sector? Would this apply for private

sector lawyers? Is there a reason why you'd be looking for the government sector to take it up?

MR GRAY (GI): The major goal with making it the government sector is if the government actually created legislation in an eGanges applet, then there would be no doubts as to what was the correct interpretation. At the moment, the way the government works is they produce massive amounts of legislation that is not always very easy to interpret and so a lot of law firms have different interpretations of how that should actually be represented. For example, Layman Allen, who's a famous legal logician in America, he basically has spent his entire career just trying to piece out, for example, how you can interpret different pieces of legislation. There's a very famous paper where he takes the - I think it was about 14,000 different possible interpretations of the core of the American constitution because legal language is not necessarily very clear and his major goal was to try and emphasise that legal language should be vague but not ambiguous and, more often than not, it's actually ambiguous, which means there are multiple interpretations.

Vagueness is necessary to give the judges and anyone actually implementing the law the ability to actually have some wriggle room with cases, but ambiguity means that there are multiple potential interpretations and most forms of legislation have multiple interpretations. So to make an eGanges application that is universally accepted as the correct interpretation, it would be best if, rather than just producing large chunks of text that then get debated over, if the government, itself, produced the applications that were then concise. We offer it, so they can put it as applets for free so that everyone can access it. So the goal is not to make a lot of money; the goal is to try and spread knowledge and justice. That's the purpose behind the charity and the foundation.

MS MacRAE: How did you cope with the negligence map we've got here, given that would have been designed as legislation that was written with that - - -

DR GRAY (GI): No, that's common law.

MS MacRAE: So you have taken the existing case law and designed something that is sufficiently clear that - - -

DR GRAY (GI): Yes.

MS MacRAE: - - - you think you would get the right answer out of this map, come to the same conclusion that any Court would come to?

DR GRAY (GI): Negligence law is basically case law, so the principles of - or the rule of - negligence are pretty well known to lawyers. It's a lot easier to get to know

case law than it is to follow legislation, which is, you know, a bit here and there. We just got the widely-accepted rules and schemed them into the river. I was assisted in drawing that map by a colleague who was teaching the subject as well, Ann-Marie Scaff. And Philip Argy, who was the technology lawyer for Mallesons, also contributed one part of that map. So it was well revised. If there are any alternative interpretations or difficulties in establisher node, then you can use a gloss to explain what those vagaries are. We do provide for the vagaries that concerned Layman Allen.

We actually stayed with Layman Allen when we were on our way back from a conference in New York. We stayed at his home in Michigan and Xen put to him the solution of the truth tables and he was most impressed with that. I think he saw truth tables as the way forward, but I've given you some of the conversation between myself and my honorary advisers of the trust in this hand out. You'll see that there's discussions from honorary advisers, the leading people in this field, in the U.S., Marc Lauritsen, who I worked with at Harvard Law School way back in the early 90s, and Professor Erik Schweizhopper from the Vienna University, and Professor Giovanni Sartor from the University Institute of Europe, which is near Florence, and he's another leader in this field. So I keep in touch with what's going on in America and in Europe through my honorary advisers. I've got three advisers in Australia. One of them is the author of many texts and you'll see correspondence that we've had with him.

DR MUNDY: We will have a look through the correspondence and if it raises any issues, one of our team members will - - -

DR GRAY (GI): Contact me.

DR MUNDY: - - - get back to you.

DR GRAY (GI): You will see that there's not a great deal of progress being made in America or Europe in this area as well.

DR MUNDY: Thank you very much for taking the time to put the material to us that you have and for coming along today. We do appreciate your attendance.

DR GRAY (GI): Thank you.

DR MUNDY: Can we have Dr Ronald Strauss, please? Could you please state your name and the capacity in which you appear, and perhaps make a brief opening statement?

DR STRAUSS: My name is Ronald Strauss. I'm a career medical officer and I retired to become a full-time carer for my late mother for a period of 15 months and then after her death I was subjected to a lot of legal action and I want to convey the consumer's perspective to what went on. I believe there is a lot of room for improvement. Commissioners, do you want me to go through my points in the order?

DR MUNDY: Yes, briefly in five or so minutes would be helpful.

DR STRAUSS: Okay, I'll try.

DR MUNDY: Or 10 minutes, whatever works for you.

DR STRAUSS: All right. The first point is probably the longest to talk about but I just want to tell you, and you have noted it in your report, how difficult it is to understand and navigate the system. I was totally naive to the system. I had to find a lawyer and of course I followed standard practice I presume, going to the Law Society and I was provided with a list of practitioners and then I had to go through the process of trying to find an appropriate practitioner.

At the top end of town I had to demand to see one of the partners in a firm who had about five minutes for me. He had a brief look at the most simple of all wills and then said he was too busy himself, he could delegate it down the line and it would cost a quarter of a million dollars to defend the will. Apart from giving me a good cup of tea, it wasn't worth the exercise going to visit him.

I went to lots of other firms. Some looked very keen and I had no real idea of who was going to do the right thing for me. I was confused, so I thought I'd go to the tennis court and there was a so-called retired semi-part-time judge there. I looked for direction from him. I gave him a copy of the will and he said, "I've got an appointment with So-and-so for you. Be there at 10 am and I'll be there to introduce you to this practitioner."

He didn't disclose to me that he'd referred me to a company of which he has got a vested interest in; that he is financially involved with. Nor did he advise me that this company dealt with really corporate clients, but they were quite happy to take on my case. So it wasn't long before the solicitor told me he needed to get advice, as they do, from barristers, and he was quoting me $2200 an hour and that he would sit in for $550 to learn what he had to learn. That's more than I earn in a day. So I had

to terminate his services and then I had to try and take on the system by myself.

So I just feel that you have spoken about this gateway and I think it's important that disclosure and some sort of credibility gets incorporated in this gateway, because you don't want people advertising themselves as something when they're really not that thing that they're supposed to be. That was my first comment.

The next comment and this is probably one of the most important things is: how important I feel that you have this alternative dispute resolution. I'm a great believer in it. Personally I don't like the word "alternative dispute resolution". I would like "alternative resolution process". The rationale for that is that sometimes you can have a misunderstanding which if you get it early in the bud, it doesn't become a dispute. This is where we've got to go.

We've got to try and tackle things as early, as informatively as possible before lawyers can lodge their Supreme Court actions. If you could just give me a couple of minutes just to tell you how adversarial the system is - will you allow me a couple of quick seconds?

DR MUNDY: By all means.

DR STRAUSS: My mother died on 6 April in the year 2010. Within 16 days I'd already received a letter from the lawyers. Within a month they were already proposing procedural orders against me. The following month I had a junior lawyer tell me he can easily take me to court and as I expected in the third month they'd already filed proceedings against me. I told him I was a tired, worn-out carer. I was going to produce the will when I felt that I should. I had to hire the lawyer I previously spoke about and on 29 July, that's within the fourth month, I sent them a will and I was prepared there to pay their filing fees. I wanted to stop the action. There was no way they accepted that.

I also want a change made in your draft report, if you don't mind. It says "attempts to stop, parties have little control". I'd like that replaced with "parties have no control" because I was then subjected to this legal process which I found really stressful. That comes on to the next point I'm making: my mother took great pains prior to getting a will to even have a planning document. She met with a very senior lawyer. She had a very detailed planning document.

She had a very simple will. It was designed to be fair and equal and it still is designed to be fair and equal. Apart from minor little gifts on the side, all major parties to the will get equal shares, but despite that the lawyers were able to proceed with the Supreme Court action and the whole intent, as far as I'm concerned, was to try and wear me down to give major concessions to one of the parties. So I think if

we had this alternative dispute resolution process or whatever, we would be able to stop a lot of this unnecessary going to court because I'm a reasonable person but I don't want to be pushed and bullied around. Of course as this report says when you're pushed, you don't want to cooperate.

I was also quite concerned at some of the tactics that the legal profession can do in terms of you appear and they can have multiple adjournments. They can think of any reason under the sun. "Let's have another adjournment." They were even questioning mum's testamentary capacity. She worked for two years after the last will and it was a fair and equal will. Why would you want to question somebody's capacity if it's an equal will? Then of course they even had an adjournment to work out costs and apart from that, they issued multiple caveats to stop me from going on and getting probate and then in the end I lost interest in getting probate. Then they got concerned why I had lost interest but they took the interest from me.

I'm also very concerned what happens to people who don't have legal representation because I was in a very unfair hearing where a registrar in the equity division really made me feel like I was very inferior. I didn't have an appearance form. Every reasonable solicitor says that he should have adjourned it for a few minutes and told me to go and get an appearance form. When the other party produced their affidavits, he totally refused to accept anything from me and I felt in a way that I was an alien or something.

So I really think that that was wrong and then I had to ask him on many occasions to talk in plain English. Really in the year 2010 when this was - we talk plain English in this country if you've got somebody who doesn't understand what's going on. With my clients I try and make it simple. I make it as simple as possible. There's no reason why the legal profession in this day and age has to resort to fancy words in front of people who clearly are not part of that industry.

Going on from that, I'd like there to be a much more rational way to appeal on costs. I hope you don't think my simplistic analogy is too simple to be true but the car insurers these days, even some of them who work together and are owned by the same corporates, have an assessment centre where you drive your car in and it gets assessed and a decision is made. I actually believe the Supreme Courts should have a special centre for costs assessment. It should be something where you can go within days, weeks of getting a bill, so it has got a real-time flavour, not something that was handed out four years later when clearly your chance of doing any good is negligible. So I really think there has to be major changes in the way costs are assessed.

The next thing, I am a great supporter of Richard Ackland and his letters. We really have to introduce a value to be linked into the fees structure. So, in other

words if a form is completed that doesn't have much value and you can't - just because you're a fancy law firm, it shouldn't give you the right to have a fancy fee. But surely if you're doing something intelligent then surely you've got the right to demand a good fee and I'm not, you know, against that, but there has to be some rationality introduced into the fee structures.

And, finally, the thing that really upsets me the most is that there has to be strategies to prevent long-term harm to individuals and families. I have lost my family because I believe the lawyers didn't go through a true explanation of how the process should have proceeded. I really do believe that my sister and brother-in-law in America didn't really mean it to be so bad, but they have subjected me to so much pain and suffering and I feel that I'm not the only one that's gone through this and the lawyers must have some understanding of what they're doing to people.

When I walk, and I have spent a lot of time in the courts - I see people who have lost out, people who are poor. They're walking almost lost in the corridors. They're looking for free advice. They don't know where to go. These people are lost people and, you talk about case management, these people need case management. It's got to be case management not from just an ordinary clerk behind an office desk, it's got to be maybe a retired judge who's got a few hours to spend. It needs to be maybe a psychologist. Maybe it needs to also be a social worker. These people have to be re-integrated into society. Some of them just can't progress. You've got to rescue these people. People are entitled to a life.

The legal system has no right to take away life from people and I would like you somehow to incorporate this in your report because there's a lot said about pro bono and a lot of these big law firms advertise how great they are, but what are they doing to alleviate pain and trauma in some of our people who have gone through the system. So I'd like to thank you for the time and I wish you well with the report.

DR MUNDY: Thank you.

MS MacRAE: Yes. Thank you.

DR MUNDY: Have got any questions?

MS MacRAE: I feel like asking you - anything's going to make things even more difficult for you.

DR STRAUSS: Not really.

MS MacRAE: So I appreciate that it's very hard for you to re-tell that story and I'm very sorry that you've had such a tough time. Well, I just wonder, it sounds like

there was - and it was a terrible time for you with your mother recently gone, that perhaps the opportunity for something that would have been able to precede a court proceeding might have helped you in those circumstances given that your - sounds like your sister and brother-in-law might have been the parties here - that if you could have got together earlier.

Was there something when you got to court? Was there a question about whether you'd been able to look at other means to resolve it before moving into the court case in more detail.

DR STRAUSS: Well, the whole - to make it very simple, mum left everything to a trust and the other side just want cash out and they just don't want me to comply with the will and so they've used every mechanism to try and soften me up, that I'll give in and just go against what the will specifies and I believe as the executor of the will it is my duty to do what she wants. She wanted to look after the welfare of the family as required, you know. She - and these people just wanted cash out and they wanted, you know - and I didn't really - and they weren't really going to sit down, they were going to sort of tell me. They use this sort of authoritarian thing and when the brother-in-law sent me a note, an email saying he's got a barrister waiting. You know, there was none of this, "Let's work it out." It was all confrontation, and I believe it was confrontational because they had already gone to the lawyer and this is the way they were probably advised how to deal with it.

Nobody said, "Let's go to a round table with a - with some conciliation process," because if that would have been the case I would have taken myself there with pleasure. It was just this antagonistic approach that we were going to tell you what we were wanting and that we were going to do it to you and that's it, you know, and then in the end I lost interest in proceeding. I mean, you know, I had no interest in rushing for a sale or doing anything, but you know, they were just so antagonistic and this is exactly what comes out in this report. Something has to be changed. We've got to work towards a purpose, a good cause, without making it a battlefield.

And that's the other thing that frustrated me, that when I went to the registrar's sitting often I'd watch, you know, different parties. They'd be, you know, having adjournments and they're supposed to be in battle with each other and they're winking and carrying on with each other, you know what I mean? They're only battling because that's the process, you know, they weren't battling - you know, they were mates. So I think we have to change this attitude that everything's got to be a fight. It's got to work towards a purpose and a simple solution if possible. Clearly some things are very complex, some things require the standard court process and I'm not trying to change the legal system around, what I'm trying to say in cases where you could have had a much easier and quicker solution, you should have resorted to that.

DR MUNDY: And you would have thought that - and it's one of - you know, there are some matters which are not suitable to mediated facilitated outcomes, but you would have thought that matters around estates might have been in the category more likely to be amenable to that, and I think it is - the issue around the estates is something that has been raised with us on a number of occasions and the capacity for parties to also of course chew through the cost of the value of the estate because often in many cases it's the estate that pays for the resolution of these disputes, not for the party who's bringing them, so - but, look, you've raised some very helpful points for us and, again, I mean, I agree with - I mean, obviously what's occurred to you is probably a travesty of justice and, you know, hopefully we'll be able to make some recommendations that, if we're not able to assuage your pain, may prevent others from having to go through what you've gone through. So thank you very much.

DR STRAUSS: Thank you.

MS MacRAE: Thank you.

DR MUNDY: Can we have the East End Mine Action Group, please. Could you, when you're ready, please state your name and the capacity in which you appear.

MR LUCKE (EEMAG): My name is Alec Lucke. I'm the research and communication officer for the East End Mine Action Group and this is my wife, Heather.

MS LUCKE (EEMAG): I'm the assistant secretary for the East End Mine Action Group even though it was more convenient for us to come to Sydney than to Brisbane from where we are in Bingah and we've remained involved even though we've left the area because we're a unified little group and the group asked us because I'd been the secretary for a long time and my husband had been involved for a long time you accumulate the information piecemeal over a long period of time. You can't just dump that in someone's lap and walk way.

DR MUNDY: Fair enough.

MS LUCKE (EEMAG): So we're happy to continue.

DR MUNDY: Could I ask you to make a brief statement? Can I just - to facilitate proceedings, if I may, the Commission is not able to re-try matters.

MS LUCKE (EEMAG): I realise that.

MR LUCKE (EEMAG): Understand.

DR MUNDY: And we are not in a position to make recommendations about particular matters. It is not within our statutory capacity.

MS LUCKE (EEMAG): We realise that.

DR MUNDY: If you're able to focus your remarks around systemic issues of the process rather than, you know, and obviously your experience to illustrate those points.

MR LUCKE (EEMAG): Okay. Now, when we made our submission, which is 14 pages, and in the knowledge that we were coming here what we've done is we've condensed what you were asking for, which was the nub of our issues where we thought the fundamental problem was and where we saw a need for change and also a situation that expands way beyond our own particular instance so that it's a broader issue in itself. What we have done, we have prepared a presentation and if I could give you each a copy and then present the presentation.

DR MUNDY: Yes, fine.

MR LUCKE (EEMAG): Can I hand this in?

MS MacRAE: Sure. Thank you.

MR LUCKE (EEMAG): Given EEMAG's evidence - I'm going to read this for two reasons. I would prefer to do a presentation that I didn't have to read and I would customarily do that. The issue here is very disciplined in terms of what I need to present so that I don't get off topic and waste your time and my time and still haven't presented.

MS MacRAE: Sure.

MR LUCKE (EEMAG): Given EEMAG's evidence to various Commission inquiries and studies, we are seeking recognition that our access to administrative justice has been traded off under a confidential minimum compliance contract between the executive government of Queensland and a mining company. The contract, HOPI 2006, controls socioeconomic community demands and, equally important, minimises legal exposure. That was in our EEMAG submission 037.

We respectfully request that the occurrence of confidential executive government contracts for projects be thoroughly examined and for the Commission to recommend structural change and transparency to require effective, efficient and fair governance so that the rights and interests of potentially affected stakeholders are properly considered and protected.

It is noted in the Productivity Commission's research report of November 2013, Major Projects Development Assessment Processes, that the Productivity Commission in recommendation 5.1 on page 33 supported the concept of regulatory certainty, transparency and accountability.

MS LUCKE (EEMAG): Because executive government processes are highly secretive and commercial-in-confidence, the public has virtually no knowledge of contracts, comprehension of their binding nature or the insidious effects contracts have upon them. As long as secrecy surrounds executive government contracts, there will be further victims as stakeholders, unacquainted with contracts, are driven to civil unrest and endeavours to protect their strategic cropping land and aquifers, et cetera; for example, people involved in Lock The Gate movement. Our organisation is a member of Lock The Gate.

To change the situation and ensure access to justice for third parties affected by a project under executive contract, it seems that our society must recognise the

problems that arise from executive contracts for potentially affected third parties whose rights and interests are not considered or protected under a contract and find a medium through which to inform the uninformed of the problem and - and this one is really important - obtain a court determination as to whether legislation and the role of the public servant is overridden by an executive government contract for a project or not, and establish an independent and affordable process to ensure integrity of the sides; for example, a merits appeal with hot-tubbing of experts - you mentioned in your draft report on mechanisms for expert advice - demand our elected representatives face up to evidence of non-enforcement of laws and the related evidence of official misconduct and maladministration of projects under an executive contract.

MR LUCKE (EEMAG): Going on from there, the East End Mine Action Group has existed for 19 years and the dispute has related principally to executive contract with minimum compliance clauses, evidence of science shaped to fit minimum compliance, failure of the regulatory process to enforce compliance and entitlements, and allegedly false benchmarking of the mine's environmental authority so that the mine remains in compliance.

In our experience, the initial and subsequent contracts entered into by the Queensland Government has bound the state and its regulatory and administrative agencies, including the oversight bodies of the ombudsman and the Crime and Misconduct Commission, to an unofficial policy of minimum compliance over the 35-year life of the East End Mine. We have that data and we have it in such a way that we can make those statements and back them up with the documentation.

In our submission DR168 to this Commission re leading constitutional lawyer Nick Seddon, The Interaction of Contract and Executive Power, the list of public law values includes openness, fairness, participation, impartiality, accountability, honesty and public law. Contract is traditionally about secrecy, no duty to act fairly, participation of the immediate parties but otherwise not concerned with third parties, no duty to act impartially, accountability only to the extent required by the contract and only then to the party, and no duty to act rationally. When traditional contract values are combined with the public purpose, the mix does not necessarily work very well. There is no, or at least a very limited, special law of contract that applies to government contracts as there is in France and to a lesser extent in the United States. The safeguards for the protection of citizens' interests and wellbeing inherent in public law are simply absent with contract and there has been no adaptation of contract to fill the gap.

Although advice on whether executive government contracts override legislation conflict, more generally it is suggested that executive government contracts are subservient to legislation and the role of the public servant. If this is so,

then governments with executive power contracts operating under an unofficial policy of minimum compliance allegedly operates ultra vires. In Queensland the science is determined by government without inclusion of independent findings. Original environmental project approvals are preserved by the Environmental Protection Act 1994, division 4, section 232(4):

> To remove any doubt, it is declared that a submission made under section 160 as applied under subsection (1), that is, a public objection -

so in other words, this would be a party making an objection to a mining lease application or of that nature, and the problem that comes in is where there has been an application for an amendment to an environmental authority, and section (a):

> May be made about an existing provision of the environmental authority only to the extent the provision is proposed to be amended under the amendment application, and (b) can only be made about activities carried out under the environmental authority before the deciding of the environmental application.

In other words, what effectively happens is that when an application comes in for an amendment to an existing operation to have some form of expansion, you can only object to the expansion and the amendment and that preserves the operation even if the operation is deficient and even if there are enormous problems about its operation. You can't examine those. You can't scrutinise them. You can't object to them.

MS LUCKE (EEMAG): You can't object against the inadequacy or inappropriateness.

MR LUCKE (EEMAG): We understand no legal precedent has been set in Australia to determine whether (a) contracts, or (b) the legislation and the role of the public service prevails. Our advice is that the legislation and the role of the public servant prevails but the reality is in our case that has not occurred and we foresee that similarly it will apply to other people as well.

Janet McLean, who was quoted within this Interaction of Contract and Executive Power and I presume to be a barrister, otherwise I couldn't see Nick Seddon relying upon her - Janet McLean has also commented on the scope of the executive power in relation to the fact that a contract made by one administration may tie down the next administration and other administrations into the future.

Despite the doctrine of executive necessity which allows governments to break contracts if it is necessary for the public good to do so and the possibility of

legislation to override a contract that is no longer compatible with the new policy, the ability of government to escape contracts by use of these devices is severely limited. It does not look good in the eyes of the rating agencies if governments resort to these devices to cancel contracts. There is even the possibility, contrary to the received doctrine in Australia at least, that a government which exercises executive or legislative power which is inimical to the existing contract may be in breach and liable to pay damages. McLean argues that contract ties successive governments down more effectively than does legislation. EEMAG considers our experiences are just the tip of the iceberg. Queensland Hansard of May 2008, page 1792, provides evidence that Mt Isa Mine has a minimum compliance agreement contract. In recent times we have observed the proliferation of significant project status with the valuation conducted by the Queensland Department of the Coordinator General and others without public objections or other means of challenge.

The enormity of projects like the coal seam gas conversion plants on Curtis Island and the desire for project certainty so as to raise and commit tens of billions of dollars in funding has obviously resulted in contracts between executive government and proponents. In the case of the East End Mine the central and southern pacific shale oil project and the Gladstone harbour controversy all within a 30 minute drive, so in other words it's like a cancer cluster. Regulatory compliance was not enforced, co-existence was abandoned and environmental degradation accepted with resignation and reckless indifference.

Now, what we are saying is that the circumstances are actually out there, the proof is abundant that, effectively, what's happened is that the enforcement of the regulations, which should have ensured the co-existence and should have protected the communities, didn't happen and you've got to ask yourself if it didn't happen, okay, why didn't it happen. Government control and scientific assessments were allegedly corrupted through obfuscation and inability to determine causes while allowing development activities to continue despite independent findings of adverse health, particularly with the shale oil and environmental impacts.

Recently the New South Wales Gateway process assessment found that the Kepco Coal Mine proposal at Bylong failed on 11 of the panel's 12 assessment criteria yet it got a provisional licence and seemed set to proceed. The recommendations of the independent scientific water trigger panel for the Carmichael Mine in Queensland was also reputedly ignored. We now see Federal Government proposing to divide the water trigger legislation across to the states. Why, we ask, should this occur? Well, from an entirely rational point of view is a state enters into an incentive package, that is, a contract with a developer proponent and along comes the expert panel with embarrassing findings under the water trigger legislation, the state might have to alter the contract and/or pay compensation.

If the state controls the process it is all in-house. Since EEMAG became aware of the nature of contractual arrangements between government and the East End Mine in about 2006, we have received advice from people as eminent as Julian Burnside that our best course of action was to agitate for a political solution. To date such overtures have proved futile. In our view, any political process offered to us by government has been hollow and designed to terminate the dispute on terms satisfactory only to the government and the company as they wait for us to age and run out of motivation.

From our representations and experiences we can only conclude that the COAG agreements on national competition policy, water reform and the national water initiatives where, I might add, we've made any number of submissions over time, permit mining and coal seam gas to be exempt from compliance with the principles and objectives of these agreements. Now, that's our presentation for the day, thank you. I'd like also to suggest to you that in preparation we did come with some justification, which is in this document here, and it contains a number of items which would substantiate the type of things we're saying.

It also includes at the back of it a 17-page lot of freedom of information which demonstrates in 1995 when the East End Mine received approval for a trebling of production of the mine. It came without public objections being permitted and it came with environmental approvals unchanged, so, in other words - and it also came at a time where it was demonstrated that there was an entrenched water depletion problem that hadn't been assessed. So there's any number of things that support what we're saying.

MS LUCKE (EEMAG): And there's a lot of other people out there experiencing the same sort of things. People are intimidated from writing submissions and that's why there's so much unrest out there and that's why people are out, you know, with demonstrations. We've seen them in the Leard Forest and that sort of thing - which is in New South Wales - but there's also a lot of unrest in Queensland and people are victims and they're provoked into these actions because at the end of the day you're treated like dills. Nobody told us when we started off. They reassured us that there was special conditions that the water supplies would be protected, that people's welfare would be protected, but in reality everything is secretly traded off.

And yet we went along believing that the system worked and it doesn't and it's designed not to work.

MR LUCKE (EEMAG): We thought for a long time with this water depletion issue that if we got independent science and we demonstrated to the government the extent of the company's liability that the government would then bring the company back into compliance and then fix up the issues so that there was a co-existence

factor. That's not what happened at all. They never wanted to fix it up. They weren't interested in the science and it didn't matter how much science was produced. Since 1995 there had been over 40 hydrology studies for the East End Mine. Now, it's just ridiculous.

MS LUCKE (EEMAG): And we've not been able to get a process to have a consensus sorting of the science. The regulators use the government and the company science but not the independent dissenting science and we have been to lawyers and all the rest of it, but it's way out of our price range. It's hundreds of thousands of dollars and you just can't go there.

MR LUCKE (EEMAG): The biggest single thing in our coming here today isn't to fight for our cause. It's to fight for the fact that we epitomise a much bigger, wider problem and it's a problem that people don't know anything about. I talked to Drew Hutton - it might be a name that's known to you - who leads Lock the Gate and Drew has been politically active and was a founder of the Greens and any number of things. He spent a lifetime and I've known Drew for decades and I talked to Drew about contracts which we've only become more enlightened about recently - - -

MS LUCKE (EEMAG): Researching for the submission that went in on 15 May. We stumbled across it.

MR LUCKE (EEMAG): And Drew said, well, he hadn't even thought in terms of things like that being influential about why governments wouldn't respond to community-driven concerns.

DR MUNDY: I was one of the Commissioners who worked on the major project review.

MS LUCKE (EEMAG): Oh, were you? I'm sorry.

DR MUNDY: By way of background, I also have a master's degree in environmental law from the ANU.

MS LUCKE (EEMAG): We had Dingle Smith from the ANU was very helpful to us. I don't know if you knew Dingle.

DR MUNDY: If I might finish.

MS LUCKE (EEMAG): Sorry.

DR MUNDY: The matters that you raised here about third party enforcement of environmental conditions and a range of issues, we canvassed at length in that report.

MS LUCKE (EEMAG): Yes, you did. That was good.

DR MUNDY: We made recommendations to the effect that persons aggrieved about, effectively, when regulators fail to do their jobs that third parties should be able to bring enforcement action of conditions and moreover that we also made recommendations in chapter 9 about issues about standing and issues about costs in relation to public interest and environmental litigation. We have also made draft recommendations in this report about public interest litigation and the importance of the - - -

MS LUCKE (EEMAG): Yes, you did.

DR MUNDY: - - - funding of that and the importance - we have also drawn attention to the ability of community legal services and in this particular case it would apply to Environmental Defender's Offices to be able to exist and do what you might call advocacy and public policy work. I have to be honest and say we did recommend that the Commonwealth Government repeal the water trigger because we didn't think it was an appropriate and certainly not a well-developed piece of public policy when it was implemented, but I do make in relation to your point 9 is that irrespective of whether the Commonwealth is able or chooses to delegate its powers under the EPBC Act which are a broad and long standing and have at their heart a sensible public policy rationale, in my view, and, indeed, I think in the view of the Commission.

The reality remains that decisions that are made under that delegation is subject to the application of Commonwealth law and, in particular, the decision-maker's decisions are subject to the normal appellate arrangements contained in the Environmental Protection and Biodiversity Conservation Act, which I sometimes do not get out properly. I think there are a range of issues here but the space which the Commission has - - -

MS LUCKE (EEMAG): Agreed.

DR MUNDY: - - - travelled before - indeed, we have submissions from some of the EDOs saying we have not addressed certain issues around standing and all these sorts of things, and with the greatest respect we have. I mean, as you've seen, our report is very long and it covers a very wide range of matters. What I guess I find interesting is the extent to which a contract has been able to shut down the normal probative processes of agencies like the Crime and Misconduct Commission.

MS LUCKE (EEMAG): We only learnt about the contract business when we were doing up this submission. Alex stumbled over it after he'd been talking to

Jim Leggat.

MR LUCKE (EEMAG): I need to clarify. We've known for a very long time what the Queensland Government and how they - I mean, the original mining project at Mount Larcom when it was granted in 1976 as a lease and then there was a Franchise Act with Joh Bjelke-Peterson in 1977. Now, all those Franchise Acts - they were Special Agreement Act mines. There was seven of them or something like that and all of them were bits of the disgrace in some manner or another, and they're all contractual things with legislation but what we didn't know was that, for instance, when the Goss government gave the company a capacity to shovel their expansion, a $220 million expansion with a cabinet agreement, an incentive package, what we didn't know was the re-writing of a contract and that the contract that had existed was still there but it was reinforced and none of the things that were beneficial to us were included. It was just freshly drawn up and just life went on again as before.

What I'm saying to you is that the mine is still regulated on the same basis of what it was when it first started and at the moment the off-lease impacts - it depends whether you accept the government findings can be as much as 50 square kilometres of off-lease impacts on properties and land holders or whether you go to the independent findings, which is probably about 70 or 80 square kilometres and where the government doesn't accept that independent advice. So, you know, I mean - - -

DR MUNDY: I have to be frank with you, governments don't accept advice all the time.

MR LUCKE (EEMAG): They don't accept any advice from - - -

DR MUNDY: They regularly don't accept ours.

MS LUCKE (EEMAG): Well actually, the Queensland Government's winding back, so EEMAG won't have standing when the mine has another expansion because it may be that people only affected by the mining lease itself, not people affected by off-lease impacts may not be able to lodge an objection. But the contract is the nub of the problem and it was like a smack between the eyes when it was found out. It took me a week to get over it because I'd never contemplated people's rights being traded off like that, and that's what's happened. I mean - and I understand it's what's happened at Mt Isa as well and that's people's health. The contracts - it needs to be got out there that they exist and that they may override, it needs to be established as to whether they do override the legislative process or not.

DR MUNDY: That's ultimately a matter that a court will need to resolve. It's not a matter which we can resolve.

MR LUCKE (EEMAG): No, we know that.

DR MUNDY: Nor is it a matter which - I, with the greatest respect, would be reluctant to engage with because I know that the judiciary hold their jurisdiction dear.

MS LUCKE (EEMAG): Absolutely.

MR LUCKE (EEMAG): Yes, well the difficulty is that there apparently is a reasonable case in New Zealand with Prime Minister Muldoon when he first took office, which is not too dissimilar about whether as executive power he could do what he did, and when he was challenged it was found that he had to remove the legislation which applied. He couldn't just make a - as he did, he made a declaration publicly, "You don't need to do that because we're going to change the law." But in the meantime, the law hadn't been changed. It was found that the law took precedent and the role of the public servant was preserved.

DR MUNDY: My understanding was that contracts entered into by the state are entered into by the state as the legal entity, not the government of the day and they necessarily must endure otherwise lease hold titles would fall over and ministers - but the issue about distinguishment of contract with government usually involves an act not of the government but of the parliament.

MS LUCKE (EEMAG): These ones bypass parliament. It's - - -

DR MUNDY: I'm trying to explain the general proposition and I'm loath to comment on documents I haven't seen, but the Commission - I have advised and dealt with people with airport leases, for example, which are contracts of a lease with the Commonwealth. There is no sense in which people believe that if there was a change of government - where there was a change of government in September that contract was at risk and no-one would believe, even if the incoming government wished to set it aside, it would do anything but go to the parliament and have it extinguished. The only variation to this is, indeed, if that was authorised by some law of itself.

State Agreements Act - and I was a treasury official in Western Australia for a number of years where there are similar State Agreements Acts to the ones that exist in Queensland which were there to facilitate the building of the rail and port infrastructure at Port Hedland and at Dampier - Karratha, whatever your view is - they authorised the entering into of contracts and the contracts had the affect of the Agreement Act. But those contracts are public and they're not controversial in the sense of - - -

MR LUCKE (EEMAG): This is the difficulty that we've faced, is that we had known approximately what happened but we didn't have any in-depth knowledge. And as we've become more familiar with material we've accumulated over time - and that's what happens when you continue for 19 years, you accumulate and if you hang onto your material little pieces of the jigsaw come together. But because it's secretive and because it's commercial-in-confidence, I mean, these contracts are just not floated around out there for people to know about. Yet they're affecting their lives and they're taking away their rights, and - you know, I mean, it's just sort of - people are actually, typically with Lock the Gate, fighting and having civil unrest at the same time as they really don't understand the true nature of their problem which, in many of the cases, significant project status entered into by contract, agreed in principle before the environmental impact studies are done so that people are sort of saying, "Well, we'll go and make our submissions to the environmental impact statement". Yes, well we've done that too, just like we've come to the Productivity Commission.

MS LUCKE (EEMAG): We trusted the system at the time.

MR LUCKE (EEMAG): We go to all the things that we can to make our representations because you've got to be a participant and, you know, after 19 years we've always operated within the law. We're not radical and gone out there and chained ourselves to bulldozers, and all the rest of it.

MS LUCKE (EEMAG): We're not planning to get outside of the mine.

MR LUCKE (EEMAG): But we want - there have been 24 alternative water supplies to the land owners supplied at the company's expense and that has been like pulling teeth. But the biggest single problem was that at a time when the district values collapsed over a 10-year period - and within these two documents I'd like to leave with you, it shows you letters from two neighbours that the company provided in 1996 that said "we've acknowledged that we've injuriously affected your properties". The special conditions had injurious affection clauses. The departments would not administratively enforce any of the injurious affection.

Now, our barrister - and we did have a barrister's advice - said that the right to an alternative water supply at the company's expense, that was part of the special conditions. But equally part of the special conditions was the entitlement to compensation where there is injurious affection. And how the injurious affection came about was because in the period between 1980 and 1995 the water monitoring data was collected but it wasn't interpreted. When it was interpreted, it was interpreted at the community's insistence to coincide with this project expansion in 1995, then they found they had a problem. They tried to cover it up - the government, I mean, tried to cover it up - and they just run away from any talk about

compensation to land owners and all the controversy that ensued, all the values collapsed and that happened over a 10-year period, and for 10 years people aged, and died, and couldn't sell, and all that sort of thing.

MS LUCKE (EEMAG): There was a lot of hardship for people, too. Marriages fell apart and people's investment that they'd saved all their lives for, they'd lost their values and all that sort of thing.

MR LUCKE (EEMAG): And listening to this gentleman that talked before we did, I can empathise with him, and I can sympathise and understand with him because we've seen all that and we know all that.

MS LUCKE (EEMAG): And I did think you did a good job on that major projects one. When the report was sent out, there was a little card sent in that we were to respond on and we had family late Christmas coming up, and I put it up on the shelf and it's still sitting up there, and I'm sorry about that because, I mean, over the years I've complained a lot about government but I'll always believe in telling you when something's well done and I think it was well done.

I did send the final report off to a person in Lock the Gate because I thought it would give them heart, that it is worthwhile going back to talk to government because people do despair, and they do believe that government doesn't listen. Thank you.

MR LUCKE (EEMAG): Can I leave you these two documents which - basically, it's some of the justifications of what we talked about today. I also have written a book about these experiences. I'm happy to leave you both the book but, I mean, is that appropriate that I do so?

DR MUNDY: It's up to you. I mean, given the amount that we read I'm not quite sure we will get around to reading it.

MR LUCKE (EEMAG): No, look, it's not part of this submission. This is a bit of night-time reading. This is a bit of bedtime reading.

DR MUNDY: More than happy. Thank you very much.

MS MacRAE: Thank you.

MS LUCKE (EEMAG): Thank you for your time. We do appreciate the opportunity.

MR LUCKE (EEMAG): Very grateful for the opportunity.

DR MUNDY: I'm presuming there are no persons in the audience who wish to make a - in which case I will adjourn these proceedings until 8.30 tomorrow morning in Adelaide.

AT 3.21 PM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 5 JUNE 2014