Australian Government
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PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

DR WARREN MUNDY, Presiding Commissioner
MS ANGELA MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON TUESDAY, 10 JUNE 2014, AT 9.21 AM

Continued from 6/6/14 in Perth

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DR MUNDY: Good morning, ladies and gentlemen, and welcome to these hearings for the Access to Justice Arrangements Inquiry. My name is Dr Warren Mundy and I am the presiding Commissioner on this inquiry and with me is Commissioner Angela MacRae. Before proceeding any further, I'd like to pay my respects to the elders past and present of the Wurundjeri people of the Kulin nation and also to the elders, past and present, of all other indigenous nations who have continuously inhabited this continent for over 40,000 years.

As you would be aware, the commission released a draft report on this inquiry in April of this year. The purpose of this round of hearings is to facilitate public scrutiny of that draft report and to get feedback and comments, particularly from people who wish to be on the record in relation to that, from which we may draw for the final report.

Following these hearings today, there will be another day of hearings here in Melbourne, followed by hearings in Hobart, Darwin and Brisbane. We have already concluded hearings in Canberra, Sydney, Adelaide and Perth.

When the report is complete, it will be provided to the government some time in September and following the provision of that report, the government has 25 parliamentary sitting days to release that report publicly by way of tabling both houses of the federal parliament.

Whilst we do like to conduct these hearings in a reasonably informal manner, I would like to note that under Part 7 of our act, the commission has certain powers to act in the case of false information or refusal to provide information. As of this date, we are not aware of any action by the commission in that regard.

There will be a full transcript taken of these hearings so that they can be public but a consequence of this is that it is very difficult for us to take comments from the floor. As such, as will provide a short time for anyone who wants to make an additional statement who isn't on the speaking list. Participants are not required to take an oath but of course must be truthful in their remarks.

I am obliged to advise you that under Commonwealth health and safety legislation, in the unlikely event of an emergency requiring evacuation of this building, you should follow the green exit signs to the nearest stairwell. Do not use the lifts and follow the instructions of the floor wardens. The assembly area is in Enterprise Park situated at the end of William Street on the bank of the Yarra River, which is down there for those who aren't from Melbourne.

That's the preliminaries completed. Could I please ask you to state your name and the capacity in which you appear here today?

MS YOUNG (PTO): Janine Young, Public Transport Ombudsman.

DR MUNDY: Would you like to make a brief opening statement and then Angela and I might ask you some questions?

MS YOUNG (PTO): Sure. Thanks for the opportunity to present to the Productivity Commission's Access to Justice Arrangements Inquiry. In addition to my written submissions on the commission's draft report, as a member of the Australian and New Zealand Ombudsman Association I have also contributed to and endorse that submission.

As Victoria's Public Transport Ombudsman I believe I am well placed to comment on some of the commission's draft report findings, recommendations and information as they relate to industry-based ombudsmen. I will focus on four points: the opportunity for ombudsman offices to play a bigger role in addressing unmet legal need; increasing public awareness of ombudsman offices by government and service providers; provision of information about ombudsman offices to and by providers of referral and legal assistance services and systemic issues, a vital part of ombudsman work.

The Public Transport Ombudsman Limited complies with the national benchmarks for industry-based customer dispute resolution schemes and we utilise the principles of alternative dispute resolution to effectively and efficiently handle complaints. Importantly we focus on identifying, investigating and reporting about systemic issues facing the public transport industry.

The PTO scheme is relatively small compared to some other industry ombudsman schemes and we punch well above our weight. We oversight an industry that recorded in excess of 550 million passenger trips in 2012-13. We refer and investigate individual complaints about many different aspects of the interactions between consumers and public transport operators, including ticketing, provision of information, infrastructure and rolling stock, staff behaviour and, most significantly, accessibility for vulnerable consumers and people with disabilities.

Vitally, we look at the systemic nature of those complaints and we feed that back to industry for action and we follow that up, but my office and perhaps other ombudsmen can play a bigger role in addressing unmet legal need. Ombudsman provide consumers with a user-friendly option for seeking recourse. The flexibility and informal nature of schemes such as the public transport ombudsman make them particularly suited to accommodating the needs of disadvantaged and vulnerable consumers.

At the PTO we work with the consumer and the public transport operator to

facilitate a fair resolution of the complaint. Our process of shuttle negotiation allows the flexibility of communications and allows us to oversee the development of a resolution, while remaining independent of the parties. My staff are appropriately trained and mentored to recognise and take into account the legal rights and responsibilities of both parties to the dispute, rights which sometimes are unknown or ignored by parties to the complaint.

Disadvantaged and vulnerable consumers are the most likely to experience difficulty accessing public transport and perhaps are the least likely to be aware of their right to complain. Equally they are often the most reliant on public transport services.

Since becoming Public Transport Ombudsman in 2010, I have focused on promoting and increasing accessibility both to public transport services and my office. However, I believe that lack of public awareness is still a major barrier to the accessibility of alternative dispute resolution services like ours, especially for vulnerable people and those with disabilities, those who are most unlikely to complain.

I therefore strongly support the commission's draft recommendation that the profile of ombudsmen offices should be raised and agree that government has a role to play. I work hard at raising public awareness of the Public Transport Ombudsman through Outreach and community awareness programs and ensuring public transport operators provide consumers with information about my office. However, unprompted awareness about the existence of my office remains low.

Clear practical and accessible information about the various avenues to alternative dispute resolution should be more widely available to consumers. There are a number of agencies that consumers may access when they have a dispute such as Consumer Affairs and the ACCC. These agencies should have prominent information to provide to consumers. Links to ombudsman offices could also be provided on the web sites of other government departments such as Centrelink.

Like other industry ombudsmen offices, my staff refer consumers to more than 40 organisations. Anyone who contacts my office will be redirected if necessary to the right organisation. Frontline staff at relevant government agencies should also be appropriately trained so that information and resources about ombudsman services are front of mind when consumers contact them; but it is not just the role of government agencies to increase awareness. Industry's role in promoting ombudsman services is crucial as service providers are generally the primary source of information for consumers.

I therefore strongly agree with the draft recommendation that service providers

be required to inform consumers about avenues of complaint. The Public Transport Ombudsman requires public transport operators to promote awareness of our scheme in complaint correspondence, publications and on their web site, but it does not always happen and it should, and it should occur as a matter of course and not with reluctance. An organisation which proactively endorses and refers its customers to an ombudsman scheme increases consumer confidence about that organisation and the industry it belongs to.

It is my experience that both service providers and consumers ultimately benefit when service providers view complaints, whether to an internal complaint process or to an external ombudsman, as an opportunity for review and business improvement. A mature and involved approach to industry ombudsmen by operators facilitates the building of relationships with consumers after complaints have been resolved. This is particularly important in the public transport industry in Victoria as consumers cannot choose an alternative service provider.

Taking this one step further, referral and legal assistance services are ideally placed to direct consumers to the appropriate ombudsman service. Providing referral and legal assistance services with information about ombudsman schemes will allow their staff to make better referrals and free up their resources to assist more consumers.

Over the past three years I have been invited to speak at a handful of Community Legal Service Centre annual general meetings about my role. The reciprocal sharing of information which occurs at those meetings and through the relationship which is then established is mutually beneficial and, of course, to the benefit of users of our services. I also believe that referral and legal assistance services can play a valuable role in identifying and referring systemic issues to ombudsman. The investigation of systemic issues is an important function of my office and enables us to address often large-scale problems that are identified through individual complaints.

In my written submission to the draft report I provided the information requested by the commission about the cost of the PTO undertaking systemic issue work, including systemic investigations and submissions. I am of the view that this cost is linked to the real value of an effective industry ombudsman office - the consumers, the industry it oversights and other key stakeholders.

This value can be summarised as being the fact that the timely identification and resolution of systemic issue investigation limits the ongoing impact of the issue on the travelling public; assists operators to improve their practices and procedure, which in turn further reduces complaints; alerts regulators and government to the issues impacting consumers which may need to be addressed via franchise

agreements, contractual obligations or public policy; and it creates an industry culture of complaint analysis, putting the onus on identifying and addressing systemic issues at the coalface. Additionally, the publication of systemic issues by my office supports a culture of accountability and ongoing improvement and informs all the parties of their rights and responsibilities.

Before concluding, I would like to reiterate the concern expressed in ANZOA's submission that the confidence of the public in the role and independence of ombudsmen is at risk of being undermined and diminished as a result of the term "ombudsman" being used to encompass agencies that do not conform to the accepted ombudsman model. The ANZOA submission notes that the commission has included ANZOA's essential criteria for describing a body as an ombudsman in the draft report and requests that the commission recognise the importance of the ANZOA criteria by including them in the final report. Thank you.

DR MUNDY: Thanks, Janine. Could we perhaps start on the question of how you collect revenue from industry participants? Some of your colleagues have indicated that charging on the basis of fee per complaint makes managing budgets difficult. Can you just briefly talk through it? We note that you charge on a flag fall and a trip basis.

MS YOUNG (PTO): Yes.

DR MUNDY: It looks like a taxi charging system. How do you manage your resources given that pricing structure and why did you arrive at the structure that you arrived at?

MS YOUNG (PTO): It's a fixed levy and a variable levy. The fixed levy is a significant one, being that the passenger carrying operators and myki, Public Transport Victoria, pay a fixed levy of $120,000. The smaller and non-passenger carrying - Southern Cross Station, VicTrack and Transdev, the new bus company - pay 45. That covers approximately the fixed operating costs of my scheme. The rest is based on a user pays basis on their share of complaints that we handled in the previous calendar year.

In my office we have gone from around about 12 to 14 hundred complaints a year up to four thousand, four and a half thousand over the past three to four years, so that's about 135 per cent increase. Our budget has only gone up by about 30 per cent over that time and it's because of economies of scale. What it means is that a key part of our work is looking at what's coming in the door, analysing complaints, you know, what work, what resources we need to manage it, and making sure that we have got the funding to do that.

The funding process - it starts in February. I put a draft budget to my budget committee. It goes to the board. It's then approved by the members at a general manager in May annually. It means that both for the tracking of complaints from an issues perspective but also from an economic perspective for the scheme, we have to be right on the money for what we're doing so that we can keep on track of that.

When myki was in its heyday of implementation the complaints were going up from 1800 to three and a half thousand in one year. That's when you really have to focus on what you're doing and have good relationships with the schemes. It was the Transport Ticketing Authority at the time and they were open to us going to them for a special levy if something had pushed us to the level that we were beyond our resources and beyond our budget. We also have a cash reserve that's equivalent to two months' operating expenses so that if we had to, say, all of a sudden employ two or three people, we have got the scope of doing that while we go back to industry and say, "We need more funding and it's for these reasons."

MS MacRAE: What proportion of your funding would go on those systemic issues that you talked about and how much would be complaints, roughly?

MS YOUNG (PTO): The way I worked it out is that I would say I have about .5 of an FTE that's committed to working on systemic issues nowadays, so we have 12 people - we have 11.9 FTE in total and together with our policy and research officer and the work that I do and our operations manager, we are putting probably a day a week or thereabouts towards systemic issues.

We're very economic in what we do. We have to be because we are a small scheme. I guess I probably work longer hours than what I should in making sure we keep on top of some of those things, particularly when myki was being implemented and there were major systemic - or a number of systemic issues arising out of that. It's a key part of our work. If we didn't do it, we would have more complaints and therefore we would need more staff.

MS MacRAE: Yes, of course. In fact I'm surprised it's not a bit more than that, so that's interesting. We asked for that information and I appreciate that you have now provided that. Would you see value in publishing that data about what you spend on systemic issues?

MS YOUNG (PTO): I haven't considered it in the past but I can work out an average cost per case for a referral case, for an investigated case. There's no reason why we wouldn't include that in our annual report - you know, a report on systemic issues, those that we have resolved, those that we're investigating - so there's no reason why we wouldn't talk about the resource.

MS MacRAE: We could just see some value in it. Obviously when we're looking at the role and the place of the ombudsman in the whole sort of dispute resolution landscape, it's quite useful to be able to separate those things, and I guess we're not the only people is the reason I'm asking, so it might be helpful in future rather than having it requested.

MS YOUNG (PTO): Yes.

MS MacRAE: Just in relation to the word "ombudsman" - we come back to this - you talked initially about how important your service is for people with disabilities and other disadvantaged groups. Do you find that the very title that you have is a bit of a barrier or do people understand what an ombudsman does and are able to come to you fairly readily?

MS YOUNG (PTO): You can look at it from both sides, I guess. I remember I previously was at the Energy and Water Ombudsman and we did a survey and it included asking for, "Who would you go to?" and part of the survey responses - it was free text - I think we got around about 20, 25 different spellings of the word "ombudsman", including one that said "on the bus man". So the word is out there. It is known, I guess, and it's more known now than perhaps it was 11 years ago when I started in this area. Some of the general awareness research that I have seen, people would say they would go to someone like an ombudsman or a commissioner, so I think it has more understanding and the media pick up on it more nowadays than, say, 10 years ago.

When I first started working at the Energy and Water Ombudsman, AAMI the insurance company had an internal ombudsman that supposedly escalated complaints went to for this person to have an independent look at how they had been handled. I worked at Ford Motor Co for a long time in complaints area. The culture of your organisation is something that you cannot separate from looking at an escalated complaint, so that independence is something that we hold onto very strongly.

DR MUNDY: Is the real issue here the occasional corporate consumer facing company or is it really governments just bandying the word - you know, like the Food and Grocery Ombudsman and any number of others which we were able to - are the likes of AAMI the real target of this or is it government?

MS YOUNG (PTO): In fact some of those companies responded to letters from ANZOA and took that title away, recognising it. No, it is the wider use by governments of appointing ombudsmen when they are roles that are advocates for consumers. I have to have that discussion often, probably every week, with either the industry or with consumers about the fact that we're not an advocate. If there's somebody that's appointed as an advocate for a particular industry or a consumer

group, then they should be a complaints commissioner or they should have another title or be known as an advocate, not as being an independent ombudsman.

DR MUNDY: So even if they have some sort of dispute resolution capability like some of the small business commissioners do,because they have this advocacy role or in some cases a public policy role and a service provision role, particularly in Western Australia, you'd say just call them commissioners and don't call them ombudsman?

MS YOUNG (PTO): That certainly would be my position, yes, and I think that makes it easier for consumers too, to understand the differences.

DR MUNDY: Yes. I don't think small businesses are not going to go to small business commissioner on the basis he is not an ombudsman. You mentioned you've got some government agencies that are members of your scheme. We've made some observations about extending cost recovery for the jurisdiction of ombudsman into handling of complaints from government agencies. Do you have a sense that the private sector entities of a party or scheme behave any differently to the public sector one in the face of the fees that you charge them?

MS YOUNG (PTO): At this point in time, no, and that's because the current franchise agreements for the private sector companies actually enable them to - their franchise agreement covers the cost of the ombudsman scheme, so therefore, they're not really financially being penalised for complaints that come to my office. I understand that that's something that would be addressed, so Transdev, the bus company that now has the franchise for 30 per cent of Melbourne's metropolitan buses, has it that it itself is paying for the cost of the ombudsman, so the fixed levy and the variable levy. So it's coming from its bottom line which is the whole model that actually is there to drive a better complaints focus.

DR MUNDY: So the new bus franchise isn't recovering the cost?

MS YOUNG (PTO): No.

DR MUNDY: But the older rail ones are.

MS YOUNG (PTO): Yes.

DR MUNDY: This is just an aside but do you think the complete cost recovery model is the appropriate one or do you think given there's fixed and variable components, that the variable component is the bit that really needs to be not recoverable?

MS YOUNG (PTO): I've never really split it and thought about that in my mind but if you look at other industry ombudsman schemes, they're fixed costs that they're passing on to their industry members. It might be, well, it is in some - it's quite small. For example, the Energy and Water Ombudsman of Victoria which I'm most familiar, the fixed levy that Origin and AGL, both large companies, pay is $20,000. It's the variable levy that drives them, so I think - - -

DR MUNDY: So it's the variable which you don't want being recovered but - - -

MS YOUNG (PTO): Yes, you want the organisation responsible for the complaints paying that variable levy and taking that message that we need to do better.

DR MUNDY: Yes, okay.

MS YOUNG (PTO): I guess my personal view would be that the variable levy should be the higher levy than the fixed levy to drive that business through.

DR MUNDY: But you haven't seen any particular behavioural differences between government and non-government agencies?

MS YOUNG (PTO): No.

DR MUNDY: Okay, thanks.

MS MacRAE: You also have an auditing role as I understand, so you're billing six-monthly? Is that correct?

MS YOUNG (PTO): No.

MS MacRAE: No?

MS YOUNG (PTO): No.

MS MacRAE: Okay. No, okay.

MS YOUNG (PTO): The original strategic plan that I inherited when I started said that I should go in and audit their complaint systems and I pointed out that could then impinge on my independence and it could create issues in operating. If I went in and I said somebody's complaint handling system through an audit appeared to be very robust and resilient then they might say, "Why are you taking complaints against us," but I encouraged them to have independent audits of their complaint handling systems.

MS MacRAE: So you have someone independent of you doing that task - - -

MS YOUNG (PTO): They should have, yes.

MS MacRAE: Yes, okay.

MS YOUNG (PTO): I would recommend they do.

MS MacRAE: Is that widely adopted, do you know?

MS YOUNG (PTO): No, I don't think it has been adopted to any degree. I know one of the operators, V/Line, had their complaints system audited as compared to the International Standard for Complaint Handling but I'm not sure that the others have taken that step yet.

MS MacRAE: Just from your experience previously with the Energy and Water Ombudsman, is that something that they have in place? Do you know if there's audits by them?

MS YOUNG (PTO): It wasn't - - -

MS MacRAE: No, okay.

MS YOUNG (PTO): It wasn't something that we saw occurring.

MS MacRAE: But in your view it would be best practice if it was?

MS YOUNG (PTO): It certainly would be, yes.

MS MacRAE: Could I just ask: at the beginning you implied at least that there was a reticence among the service providers but also potentially, and I'm not sure if I was misreading you, some of the government agencies like Centrelink and the ACCC, just about making your availability and presence advertised in that, if I can call it, or promoting it that there had been some resistance to that. Would that be a reasonable - - -

MS YOUNG (PTO): Not from the government agency perspective.

MS MacRAE: No.

MS YOUNG (PTO): I'm not sure of the extent that they do. I know I provide information to organisations such as Consumer Affairs Victoria, let them know that we exist so that they can refer consumers. Some of the service providers when I first

took on the role as Public Transport Ombudsman were very reluctant to put direct information about the existence of my office on their complaint correspondence.

It had been agreed by the CEOs of those organisations in 2007 but in 2011 was when it finally was agreed that they would put that information there, but there are occasions when I have complaint correspondence that comes to my office that has no evidence of any information about my office on that. It's on their web sites but the person with the complaint and getting that correspondence, they need to know then and there that the Public Transport Ombudsman exists.

MS MacRAE: So that's still a bit of a battle are you saying?

MS YOUNG (PTO): Sometimes it can be, yes.

DR MUNDY: Is your scheme a statutory scheme or a voluntary one?

MS YOUNG (PTO): It's not a statutory scheme. It's not a voluntary scheme either. As a condition of the franchise agreement the operators are members of the scheme.

DR MUNDY: So it wouldn't be beyond the wit of the government of Victoria to make the publication of such notice as a condition of the franchise?

MS YOUNG (PTO): From 1 December 2013 Public Transport Victoria introduced as part of its customer advocacy a customer advocate team. It went out to all of the operators then and said that they must put information on their letters about the existence of the Public Transport Victoria Advocacy Team and the Public Transport Ombudsman because consumers have the right to choose, so I guess it has introduced that step and it will be auditing against that I understand from about the middle of this year.

DR MUNDY: So what's the policy rationale between having the right to choose between external complaints mechanisms?

MS YOUNG (PTO): It's the right of a consumer to go to the Public Transport Ombudsman. The introduction of the Public Transport Ombudsman Victoria Advocacy Team, I guess it's an additional step in the internal dispute resolution process, one that we worked very closely with PTV to make it as acceptable to us as it could be, but one which I believe if there is an additional step in the ADR process, it can be a barrier. It can cause complaint fatigue, so it's one that I'd probably prefer didn't exist; that it just referred complaints to my office and that we developed a reporting process instead.

MS MacRAE: When we were looking at trying to compare the relative efficiency

and effectiveness of ombudsmen one of the measures we were left with was looking at costs per case because, well, it was just something that we do have some data on, but we were aware that it is a crude measure and probably not the best around. Do you have any suggestions about how we could look at deficiencies that might be there for certain ombudsmen and how we might better be able to identify leading practices?

MS YOUNG (PTO): I guess I could only call on my knowledge from both working at the Energy and Water Ombudsman and being Public Transport Ombudsman. I guess looking at it from a costs per case basis enables you to drive efficiencies within your - you have to look at your policies and processes. Looking at the benchmarks, effectiveness and efficiency are two of them that we hold up very highly. So at the same time you can't disregard either customer/consumer satisfaction with the outcome of complaints and their satisfaction with your service and the industry satisfaction with how the ombudsman relates to it and works with it to resolve complaints.

Putting a value on quality and on that feedback is just very difficult to do, so getting back to that cost per case perspective I suppose and if you truly looked at and excluded the fixed costs and just purely focused on the variable costs, it is, it is very challenging to do.

MS MacRAE: It would be fair to say, would it not, that some of your cases would be much more complex than others, so the cost - it's the obvious problem with the cost per case but some are obviously going to be a lot more expensive than others because of the nature of the complaint.

MS YOUNG (PTO): We actually collect and our staff record the minutes spent on any case, and even if I get involved in an investigation, I'm contributing to that too, so we can actually work out the cost of the minutes that we spend and, therefore, the value of a complex investigation as opposed to a referral. A referral we might spend about 16 minutes on. A complaint that we're investigating that has a whole range of complexity, we might spend hours and hours and hours on. In some schemes they actually have a way of, once a complaint gets to a particular level they're charging the member of the scheme based on the minutes spent, and the encouragement there is for the member to resolve it as quickly as possible, not let it escalate. The danger with that though can be that sometimes commercial entities will say, "Well the business case for resolving this, do we spend a lot of time on it, or do we just put some money to the consumer to make it go away?" That might be the better economic outcome for them, but that doesn't resolve the actual complaint or prevent it from happening. So it is quite a complex issue.

DR MUNDY: You mentioned in your most recent submission that you support

improvements in the legal education curricula for alternative dispute resolution. I mean in your experience both in your current role and previously, to what extent do you think lawyers are well educated about the roles of ombudsmen?

MS YOUNG (PTO): I think those that have taken up the electives that might explore alternative dispute resolution are quite savvy about it, and those that see the law in a black and white context and that there's no so much a role for ADR in Australia can be quite reluctant to see the benefits in it. You know we have people applying for roles and working in our office that have practised in the law and say, "Actually I don't want to be in the dispute part of it, I want to be resolving things."

So I guess it's how the individual takes up and sees that view. But I think there would be a benefit for all in, say, if there was an alternative dispute resolution rather than an elective subject, making it a mandatory one so at least there's that awareness to say well actually, you know, should this go through a legal course of cost and time and everything else like that, or is there somebody better that can manage this quite quickly and resolve the complaint and move on?

DR MUNDY: Are there very many instances where aggrieved consumers rather than coming to yourselves end up in a small claims tribunal, or in the Magistrates Court?

MS YOUNG (PTO): Not to my knowledge, and the reason being the cost of it. You know, having a free and accessible ombudsman service. We're not there to make people happy. Some people aren't happy with the outcome of the investigation. We tell them what their rights are, we tell them where they can take it, we'll provide information about local community legal centres, whatever it might be. I've only known of one case where an ombudsman made a binding decision and the consumer then took the matter to the court.

DR MUNDY: Yes. I'm more interested in the other way around.

MS YOUNG (PTO): Beforehand.

DR MUNDY: If someone fronts up presumably at the small claims, VCAT or in the Magistrates Court, would your expectation be that those more adversarial dispute resolution forums would effectively triage it and say, "This really doesn't belong here. Why don't you go and talk to the ombudsman?"

MS YOUNG (PTO): I think them referring it to an industry ombudsman would be a much more effective use of their resources and ours.

DR MUNDY: Is your sense is that what they do, or the community knows where to

bring it?

MS YOUNG (PTO): I don't know that we get a lot of cases referred from those agencies, but that could be that there's not a lot of people that go to those organisations.

DR MUNDY: So they would be more likely to go to a community legal centre or some sort of hotline service - - -

MS YOUNG (PTO): Yes.

DR MUNDY: - - - who in effect would triage it and send to you anyway if people genuinely didn't know. The lawyer wouldn't be their first port of call.

MS YOUNG (PTO): Generally no.

DR MUNDY: Okay.

MS MacRAE: Just I guess just coming back to this issue about the extent of disadvantage of many of the people that would come to you, we've had quite a lot of evidence from various groups representing people with disabilities. Just wonder if you could tell us a little bit more about how you try to target your services and the awareness raising to those groups and what sort of challenges that presents for you.

MS YOUNG (PTO): Yes. When I started in August 2010 in this role one of the things I - I knew there was something missing right from, you know, the first couple of weeks and didn't put my finger on it for a couple of months, you know I suppose getting my feet under the table, under the desk so to speak. But I realised we didn't have a very effective outreach program, and then I had to think well actually who should we be targeting this at?

Starting at the premise that industry ombudsmen really are established to provide an access to justice for vulnerable consumers, and having come from the Energy and Water Ombudsman, I knew that it was people that were, you know, suffering from poverty, couldn't afford their electricity, gas or water were being disconnected. The outreach program there was very direct and very effective: financial counsellors and that sector. So I had to really sit back a little bit and say well what sector should I be directing my awareness program to, and fortunately I was invited to attend and speak at the Travellers Aid AGM in late 2011 - late 2010, so I got an insight then and thought it's about accessibility.

I knew nothing about disability or accessibility issues, but I thought I've just got to learn about it, and so then I started just cold calling and going to organisations

like Scope, Vision Australia, Guide Dogs Victoria, anyone that I could to actually start building relationships and get out there and talking to that sector. In February-March 2011 I had an independent engagement survey carried out to identify whether going to all those agencies - I think we went to about 26 different agencies and organisations - saying, "Do you know about the existence of the PTO? Is that recent knowledge given I'd been out and trotting the bitumen for a little bit, and are your clients likely to lodge complaints with my office?"

It was 54 per cent had recently become aware. Some still weren't aware at all. But the overarching thing was, no, their clients wouldn't probably lodge complaints, and I sort of guessed that was the answer, and the next question was why wouldn't they, and it was distrusting systems, will somebody help, "Why should I waste my time now, nobody has changed anything in the past when I've complained," or, "Actually I feel more vulnerable if I complain because they might know that I'm the blind person using Watsonia Station, or the person with the wheelchair getting on the tram at whatever," so feelings of identification. So gradually I've been just trying to break that down through going out and repeated visits and building those relationships.

We put out a report in September 2013 on closing the accessibility gap, and it focused on 173 complaints that came to my office from people complaining about accessibility issues in 2011-2012, and it came up with 14 recommendations, and they were all recommendations, and it was all focused on the easy things to fix like not building a ramp that might cost millions of dollars and be out of my jurisdiction, but providing better information, making sure that operator staff were trained to communicate with people, vulnerable consumers, people with disabilities, having available signs, signage, announcements recognising that if you're visually impaired and hearing impaired, it's a real - you know, that's even a worse situation to be in, but really about, and particularly about training staff to accept and acknowledge diversity and disability issues and to offer assistance.

That report has been positively accepted by the industry and Public Transport Victoria's public transport operators committee are working to implement some of those things. It's a work in progress. I'm still learning more and more about it every week, but it's something that - another thing that is, you know, the key value of what my office can achieve.

MS MacRAE: Do you have any feel at all, and this is probably the most difficult question and one that we've been asked to look, and we find it extremely difficult system-wide, but do you have any feel at all for the extent of unmet need because, as you've said there, there's going to be a whole lot of people that for whatever reason, even if they're aware of you, may not make a complaint. Do you have any feel for that at all in your space?

MS YOUNG (PTO): Only it's probably like the iceberg, and we see the tip of the iceberg. I was talking to a commuter a couple of weeks ago who boarded a train at Seymour to Melbourne and was put in the luggage compartment. She had MS, so she has some ability to walk. She was then assisted by the conductor to a seat, and I know V/Line are doing lots to make sure that that doesn't happen, but still it does happen sometimes. Now, this was a very savvy, resilient businesswoman, so she had the confidence, you know, to do that. If she weren't then that might have been the last train trip that she'd ever have because it's just too hard and, you know, I'm just not confident there.

MS MacRAE: Yes.

MS YOUNG (PTO): So there is very hidden - there's a lot of hidden need.

DR MUNDY: Are we done?

MS MacRAE: I think so.

DR MUNDY: All right. Thanks very much, Janine. It's been very helpful.

MS YOUNG (PTO): Thank you.

MS MacRAE: Thank you.

DR MUNDY: Could we have Transformation Management Services, please? When you're settled, could you please state your name and the capacity in which you appear and then perhaps make a brief - and brief means single digit minutes - opening statement please?

MS WALLACE (TMS): Nerida Wallace, principal, Transformation Management Services.

MR HALL (TMS): Michael Hall, principal of Transformation Management Services.

MS WALLACE (TMS): Commissioners, we are here, this is our fourth presentation. We have given you a presentation document, just going through the points we would like to make this morning. The Transformation Management Services is a consulting firm that has been looking at justice systems for the last nearly 25 years. We have had a look at your overview document and we are here to assist you with some of the requests for information in that document. We have provided you with some papers given to conferences and publicly available papers. We have others we are happy to make available to you.

Our focus is on looking at some of the research outputs we have been able to glean over that period of time. We are in the wonderful position of working with workers compensation schemes, motor accident compensation schemes and Magistrates Court and ombudsmen actually. In that period of time those organisations had the funds and incentives to look at the systems to reduce costs. That means we have been able to do that sort of research which you wouldn't generally find in the civil jurisdiction because you have got separate interests on either side and no incentives.

MR HALL (TMS): In addition to that, we are an IT company as well. We have developed innovative software. I have been granted my first US patent for some of that in January this year. We have built case management systems in a number of jurisdictions and similar areas like police, so we are aware of the system procedures.

As part of our consultancy work we have analysed the computer system outputs of a number of major systems - workers compensation and the Victorian court system. We have actually had data dumps and compared them to case analyses where we have taken multiple data points from numbers of files.

MS WALLACE (TMS): This morning I want to give you some evaluation data, a couple of key points that we think are important and some specific responses on courts governance. Michael will talk about technology and the courts and also informal and formal aspects of ADR and the application of compulsory ADR, and a

couple of short responses that I will give you. We are happy to take questions obviously and probably can answer a number that aren't in this paper.

In terms of our findings, I think the key finding is that disputes are dynamic and not static and should be treated as such. I have had so many conversations with CEOs in this area. They see disputes as widgets or fixed entities like Volkswagens. They are not. They are behaviourally driven and the learning from our research is that if you intervene at certain points in the life of a dispute, you can modify the outcome and the cost of that dispute and certainly introduce justice into it. I suppose the observation is that - - -

MR HALL (TMS): In aggregate, the systems that control those disputes can be managed so that triaging it, which you have alluded to before, is one of those behavioural drivers or behaviour control mechanisms, and there are a number of others.

MS WALLACE (TMS): I suppose the key piece of research was with Comcare in 1996. I am sorry about the age of this stuff, but what we found there was that if the claims officer at the time of the appeal rang the person making the appeal, the likelihood of that matter going to the AAT reduced from one in three to one in five. That was a significant finding. That effect multiplied if that same personal contact was made at the next level up.

You can see on page 5 that we have got this rather dramatic graph. I remember sitting with Peter Shergold and he said, "Make my graph go down" and we were able to do that. That was because they changed the way they managed those disputes.

MR HALL (TMS): The actual intervention was far more pervasive. It involved counselling of the people involved in the tasks, having them deal with the concept of a telephone, sitting around in a circle putting a telephone in there and asking them to talk about it, so it was quite a psychological approach. That is my background - a psychological approach to dealing with how they deal with clients, changing the way they perceived disputes.

MS WALLACE (TMS): I have given you a quick example on page 7 where we had two identical types of disputes in Western Australia and in Victoria - workers compensation disputes. You can see there, for instance, that in Western Australia 84 per cent of their disputes were resolved at conciliation and 65 to 70 per cent in Victoria, and another 25 to 30 per cent went into the Magistrates Court but in Western Australia the bulk was resolved outside of the court system. It reinforces the point that the type of dispute shouldn't dictate how the system is designed.

MR HALL (TMS): These systems were very comparable in what they did and

what they tried to achieve. I suppose it underlined for us that the decision to allow cases to proceed to an adversarial resolution was a choice that the system designers made.

MS WALLACE (TMS): Just looking at page 8, this is a recent study. It has now been published on the MAA, Motor Accident Authority, web site in New South Wales. It is called the CARS review. That was a very comprehensive review we did a couple of years ago, and we updated it for them over Christmas. This graph is interesting. Again the total legal payments came out of the Motor Accident Authority fund - sorry; not the fund but the insurers. Usually they lose these cases and the costs are paid but the green part of that graph you can see quite clearly is increasing. They were negotiated settlements in the first six weeks of the District Court process.

If we start at the top, you can see "Not Represented" and "Represented". These were matters that were negotiated at first instance between insurers and injured motorists. The blue - CARS - is the ADR system or actually an inquisitorial system that they have got running. You can see that was a fairly static number of cases resolved. "CARS Assessment" is where they actually made a decision. "CARS Exempted" are matters that statutorily are exempted and move into the court system. "Court Other" are matters that were negotiated.

Of course the question was: why can't we have those matters being resolved in the cheaper forum? The point of that is to say that the way the system was designed meant that it was in the insurer's interest to move that case into the courts to negotiate and obviously there were legal benefits as well. Again it is a system design issue. There is more to that story but we won't go into now.

Our learnings are that better designed systems get the right economic and justice outcome. The research would have to be directed to support the essential intervention function, so if you don't have the resources, the coordination triage resources sitting at the right part, then obviously that is not going to happen and cases will move into more expensive forums.

Our view on governance is that you have got to have local control over the budget. Everywhere we have been, we must have looked at 30 systems now. There is this massive tension between the funding body and the court and tribunal. It depends very much on the personalities, how well that tension is managed. The worst situation was a member of the judiciary appearing at a board meeting and having an argument with the CEO that resulted in one of them having a heart attack. It is always there. It's just a matter of what shape it takes. It's just about getting that balance right and moving the control of resources and the expertise to manage them back into your dispute body.

Too often we've seen a lack of control over resources inhibiting change. Over decades we've seen that. I've put in courts' governance on page 10 why we think courts' governance is the way to go and we think that the gaping hole in more efficient court and tribunal system in Australia is the expertise necessary to understand and influence and run the external justice system. So that is all of the key participants in those systems. If you don't have that management function at the centre the system is out of control and you have both heard some of the comments I made at the conference on timeliness about control. So that's quite important. I've made my points there. Do you want to talk about IT?

DR MUNDY: Just briefly, because we are chewing through time.

MR HALL (TMS): I thought you would know the problems with IT systems in courts; I thought I would jump to a solution. The perspective we have is in looking at different court systems and also developing new innovative software in different environments. What we believe the solution is in the long term is for government to take a different role for different independent court systems or tribunal systems not to grow up independently, but government's role should be as a broker of the information structure. This could be set up with new technology and I'm afraid we're probably on different planets here about how we understand this, but new technology and ours allows the growth of systems in independent forums that are linked but not driven by traditional data structures.

The government's role would be to define the standards of communication, the data dictionary, and to broker those in the long term. Perhaps pilot some systems but then open the API to open source, in an open source way to any group to develop its applications to interface with that system. Government would then extract the metadata that it needed for reports and analysis from that system, assured that compliance with those data standards was met.

MS WALLACE (TMS): We think there's a real role for government to step in here and set that up. A recent example is a cuing app so people can look at their phones and sit in the local coffee shop and get a note to say, "The Magistrates Court case is on in 10 minutes." Yes, that can be built if the company has got access into the database run by the Magistrates Court. If there's a common set of definitions any organisation can do that, any system can be built, and this is the way technology is going now. So the days of building the great big brother system are well and truly over and, in fact, have been unsuccessful, you need a whole lot of little economic activities going on to drive it.

I've just got some quick points. You've got to have compulsory ADR. You've talked about triaging already, we think that's important. We think that industry

ombudsman schemes operating under legislative licence should also be subject to your PC recommendation 9.3 for reporting. I haven't put a submission on that, I'm just drawing on experience in recent years with those ombudsman schemes for clients. We think specialist courts and tribunals should be avoided. You can have specialist panels within courts or tribunals, but otherwise you have creeping legalism, we've got plenty of examples of those.

Again, we need higher quality court administrators, trained, qualified, accredited and recognised, it's very hard to employ court administrators with requisite experience, and court counsels or tribunal counsels should include high level commercial service retail industry experience.

DR MUNDY: Thanks for that. Can I just bring you to one of your last points first, and that's specialist courts and tribunals.

MS WALLACE (TMS): Yes.

DR MUNDY: I'm sure Preston J of the Land and Environment Court in New South Wales would not agree with you.

MS WALLACE (TMS): I'm sure he would.

DR MUNDY: I guess whilst there are some bits and pieces specialist court, you know, little very specialist. I mean, the Land and Environment Court in New South Wales seems to provide a place where people can go with a dispute and then the court finds the appropriate forum, whether it be a mediated settlement by a Commissioner or some sort of administrative process, or indeed whether it needs to be judicially resolved and then, of course, it performs the appellate functions from decisions under the environment legislation and the planning legislation.

So how would you see - I mean, is your view that we should just take the Land and Environment Court and break it up and send part of it to the District Court, part of it to the Supreme Court and part of the new New South Wales Administrative Tribunal, or should we just try not and create any more?

MS WALLACE (TMS): We should try not to create more and, in fact, we should take the lessons from that court, and it sounds like they have got the model absolutely right with the front door triage and the different services within it, and you wouldn't be doing any amalgamating until the courts were in that space too. The difficulty with specialisation occurs where you get creeping legalism and you get a specialist industry around that specialisation which enables the prices to increase. So what you're trying to do is have a broader organisation that deals with disputes regardless of subject matter in the best practice model which obviously they're

delivering on.

DR MUNDY: What are practical examples of where specialists courts have led to the problems you described?

MS WALLACE (TMS): Probably the best one is the Workers Compensation Court in New South Wales. In 1999 the unit cost of a dispute to the Workers Compensation scheme at that time was $25,000. It was very much like the District Court, it operated in the same way. The chances of getting change into it were very, very difficult. Western Australia has had a similar problem, I think five years previous to that. So the change to come out of that was the Workers Compensation Commission. I can't remember the actual figures, I can get them for you, but it was in the billions of dollars in savings and the unit cost went down to - I think at its worst was $5000, and that was a change to Workers Compensation Commission. I won't talk about recent changes, that's a whole other set of problems.

DR MUNDY: That commission, I understand, is headed up by a District Court judge, Judge Keating.

MS WALLACE (TMS): Yes, that's right. Very similar from what you described the Land and Environment Court, but that commission has gone through changes of recent times and, in fact, they have set up a statutory triage which I'm not sure is going to work but we'll see how it goes.

MS MacRAE: So with that general finding of yours, as a result of that, would you say that something like VCAT which has all the tribunals sort of effectively under one roof would be the model that you would most endorse?

MS WALLACE (TMS): Yes, I would, because it enables people to move into - the judicial officers, the members, the referees, into different spheres, and their skill is in decision-making and dispute resolution. The expertise of a particular subject matter should be an adjunct, not the core of what they do. If it's the core of what they do, you get poor decision-makers and poor dispute resolvers. So it's about saying, "What are you in the business of doing?" "You're in the business of resolving disputes and making good decisions." So you have to say that's the core and we move people around to keep them healthy and ensure that the quality of the decisions is maintained at a high level. I should say these comments come from years of discussions with the heads of judiciary and heads of tribunals and just observing what goes on.

DR MUNDY: Because creeping legalism has been raised with us and I think it's fair to say VCAT has been named as perhaps an example of such fora and I think the two sources of this creeping legalism or dissatisfaction with outcomes in VCAT on

the one hand have been inappropriate representation by third parties, be they legally qualified or otherwise, in fora which were meant to be legally represented as the norm, but also a lack of skill and ability in decision-making by tribunal members.

MS WALLACE (TMS): Exactly.

DR MUNDY: So it's not enough to construct the institutional forum. Do you have any view on this issue about representation in particular?

MS WALLACE (TMS): I'll get Michael to just give you this cycle we gave to you in 2003.

MR HALL (TMS): In 2003 the Productivity Commission cycle - - -

DR MUNDY: Sadly neither Commissioner MacRae nor myself - - -

MS WALLACE (TMS): That's the creeping legalism solution and we've mapped that. We mapped it in schemes. They change every five years but your question was in relation to what to do about representation.

DR MUNDY: We've upset the Law Society and counsels by suggesting that perhaps lawyers aren't always prepared.

MS WALLACE (TMS): Well, in workers compensation we have in Victoria two - I wouldn't call them paralegal organisations, but they're organisations funded by WorkCover to assist people through the conciliation process. Conciliation - how many do they do? I think it's around 17,000 disputes a year. They have got 40 conciliators, so they're really working quite hard. Most of those cases are heard or dealt with half a day each. If both parties agree and the conciliator agrees, legal representation turns up, but the fees don't incentivise that. They resolve the bulk of matters.

I think you've got to assist people through these processes in some way. You've got to provide them with navigation advice. I'm very impressed with the Justice Connect model. I think that's the way to go, unbundling legal services and assisting people in that way so they get the right service at the right time.

DR MUNDY: But providing them with advice and assistance isn't the same as providing representation, particularly if the other party might be unrepresented. I mean, the concern is, of course, if one party is represented, the other isn't and - - -

MS WALLACE (TMS): I think you'll also find - certainly the lawyers I have spoken to with the self-represented litigant work we've done have said the cost to

them is far greater of having an unrepresented party on the other side. So have we got some solutions on that - probably some cost incentives, but also some provision of what we've done in workers compensation, some sort of assistance. We haven't got paralegals per se in Australia, but why shouldn't we, and we've certainly got a lot of law graduates with nothing much to do.

DR MUNDY: In a forum which is narrow and defined like workers compensation or - - -

MS WALLACE (TMS): You've got far more control, yes.

DR MUNDY: That presumably is fora in which non-legal - well, not admitted, I won't call them not legally trained, but people who are not admitted solicitors may actually be able to provide the assistance which may require skills - you know, doesn't require a broad knowledge of the law and may require skills that are not legal in their character, so are the sort of limited licence that we talk about and we've seen develop in Washington state with respect to family law matters. It might be an appropriate - - -

MS WALLACE (TMS): You have got to match that with conciliators, which they have done, who have got enough legal understanding to say, "No, hold on. We're settling this over here, but that's actually outside the legal framework," and that's not justice. You can have that paralegal model, but you've got to have skilled decision-makers and, in fact, when they changed the magistracy in Victoria to bring in barristers and solicitors to be magistrates that was the argument, that you needed to have decision-makers who had that knowledge to be able to offset the lack of representation or the inappropriate representation that people in those lower courts were likely to have and I think this is the same, you can't put somebody without that understanding, and they can be trained to it, into that sort of forum with paralegals, you can't do it.

DR MUNDY: That's similar in those sort of things, conciliation and types of forums, you may also want the people doing the conciliation to have other skills like understanding people who have experienced former workplace injury or loss of family members or something - - -

MS WALLACE (TMS): Absolutely.

DR MUNDY: - - - most law graduates don't emerge from university with.

MS WALLACE (TMS): No. You need experienced people to come in and, in fact, I think the first time we set up Conciliation Victoria, we brought in five retired magistrates and they just ate the work as you would expect, but that’s understanding

— it's a high stress environment, people are sick. The legal issues aren't clear and there's an underlying longstanding conflict generally in the employment environment. So it's complex.

DR MUNDY: And the consequences are large.

MS WALLACE (TMS): The consequences are very large for people.

DR MUNDY: Potentially large.

MS WALLACE (TMS): Yes.

MS MacRAE: You mentioned on one of your slides, and it might be because it was a shortened version obviously, but you said there should always be compulsory ADR. I'm just interested in that, if you thought there were any cases where you wouldn't necessarily want ADR to be compulsory. We have heard a range of views around whether it's appropriate in all cases.

MS WALLACE (TMS): I think it should be the default position and it should be known to be the default position. There is an argument and we have proposed to have the triage or what we call screening and streaming and, in fact, we have set something like that up in the Magistrates Court here where you've got your most experienced person at the front door looking at the case and saying, "This has got to be fast tracked to a magistrate or to a decision-maker because it's complex and the manner of the dispute is not amenable to" - or they have already been through a number of mediation processes. The reason you make it compulsory, so you give the court the power to divert, but the reason you make it compulsory is you're setting an expectation again of society of influencing the system that you're dealing with to get that matter resolved.

MR HALL (TMS): And if you don't, you end up with what they have in New South Wales which is shown on that graph which is all of these cases increasingly get through the mediation system and conciliation system and go to the court and then collapse because the cost scale is much higher if they do that.

MS WALLACE (TMS): Yes. So you've got to get people to a table and you've got to get them to a table with all the relevant information and you've got to give people an opportunity to be heard and you've got to have a skilled mediator or facilitator there with a quiver full of different solutions to put on the table that are specialist to that area to say, "This is how we can resolve that one," and then you've got to have satisfaction surveys six months after to make sure there's been no coercion and concerns over the justice of the outcome, and you can, our research shows you can, you know, get what, 80 to 85 per cent of matters in that process can

be resolved.

DR MUNDY: So the issues, those which I suspect are a relatively few number of issues, that enter the legal system via the Magistrates Courts which have serious matters of law that need to be resolved, triaging, the same magistrate or senior registrar will spot them and pump them away. The other issue that's been raised of concern, I think it is of concern to us, is that in the event if you go down this path, outcomes will be resolved, they will be resolved essentially privately and will not see the light of day.

Now, that raises concerns - and I think they're concerns that we see, if there are a stream of matters which all look the same and they're resolved privately, how do those facts get drawn to the attention of relevant policy makers so that the policy issuer can deal with it in a way which is probably cheaper than having to have them mediated or dealt with in courts. Now, we know how ombudsman do this because they have a statutory duty to pick these things up and report them, but if we have a stream of ADR - it could be something as simple as, I don't know, claims against - a motor vehicle type matter. So it may well be against an individual business or it may be something systemic within the law that's leadings to injustice.

MS WALLACE (TMS): Yes.

DR MUNDY: How do we identify those systemic policy or perhaps provider issues within that context?

MS WALLACE (TMS): You've got to have a feedback mechanism. I think we did quite a bit on feedback mechanisms.

MR HALL (TMS): With the appropriate IT system, you could cull a lot of that information from the metadata in the same way that you can identify credit card fraud, with patterns of behaviour, and it's exactly the same mechanism. What you need is enough data points captured by the system as it does its normal business, to enable you to then go back and do those analyses.

DR MUNDY: So we've had 18 of these in the last two months.

MS WALLACE (TMS): That's right.

DR MUNDY: And in the - - -

MR HALL (TMS): That employer, or that industry.

MS WALLACE (TMS): That's right. But the courts don't necessarily - and the

tribunals don't either - necessarily have a legislative mandate to provide information back to government on policy issues.

DR MUNDY: They do report decisions on occasion.

MS WALLACE (TMS): They do report - - -

DR MUNDY: Whereas ADR decisions won't be reported.

MS WALLACE (TMS): That's right. Well, my view would be you need to provide some - if you talk to them, they'll say, "We've got no resources to do that work." So they rely on the law societies or the bar councils to make those representations if they do, or other - - -

DR MUNDY: Or community legal centres.

MS WALLACE (TMS): Community legal centres are probably playing that role. But I've said in there we need a standing - we said in 2003, the Workers Compensation Research Institute in Boston, Massachusetts is a classic example. We haven't got anything like that in Australia. We've got our Centre for Justice Innovation, but we haven't got - and there's a few other centres around Australia that are looking at justice systems. They're badly funded, they don't have the capacity to get the data or provide the research. There should be one in every state, and they should be giving reports to the magistrates or the judicial councils, and there are civil justice councils now, and saying, "Here are the trends," and then that council should be looking at it and then providing a report back to government.

DR MUNDY: One of the issues we do raise, although I don't think anyone has said it's a bad idea, the whole question of better data collection and evaluation and analysis, but it does beg the question, who?

MS WALLACE (TMS): Well, you need a separate organisation.

DR MUNDY: So something around the Institute for Justice - - -

MS WALLACE (TMS): Yes, or - what have we got in health? If you look at health and education, you've got standing organisations that look at this data all the time and provide information back to the participants in those sectors.

DR MUNDY: Yes, I think the Commonwealth one has just been absorbed into the Department of Health.

MS WALLACE (TMS): Even so, in this day and age, we have an opportunity, we

should be stepping into the breach, and as Michael said, setting the definitions, I think there's a real role for the Commonwealth to come in and say, "Here are the definitions. Go away, build your systems, and then we can release this analysis." Just on the private issue, though, commissioner, the courts and the tribunals have to have some sort of control over those private - we have a single list of external mediators in Victoria, you have to apply to the list and the chief magistrate has to be satisfied of the qualifications as such. So you have to have a quality control over that.

The private negotiations and outcomes, if they're within the court or within the tribunal, obviously the shadow of the court and the tribunal extends. What's going on in the professional or, dare I say, small business to small business is a completely different scenario, and possibly there should be some options for people to report some of that as well.

DR MUNDY: Yes, I suspect at the end of the day the best you could hope for is that which is done within the auspices of the courts and tribunals.

MS WALLACE (TMS): That's right.

MS MacRAE: Just in relation to that - you know, the Commonwealth should set the data labels, if you like, what should be collected - do you see the current project that's being undertaken by the Department of the Attorney-General effectively performing that function?

MS WALLACE (TMS): It will perform half of it. It won't get the IT side of it, and the IT side of it is what's going on in Silicon Valley right now, in what they call "big data". So some expertise from that side from the coin needs to come together.

MR HALL (TMS): There's a separate paper which addresses those particular issues. It's a little bit technical, but the data structures now that are being used by Google, Facebook, Amazon, are different to the old relational data structures that underpinned a lot of the systems, including court based systems and systems we built for police. Those systems are much more peer-to-peer, they are scalable, they're dynamic, you can have clusters of the same system in different places and allow a much freer access by users to add on components to those systems and build them for their specific purposes, and for a law firm to differentiate their product from someone else's, and also to grab metadata without compromising the day-to-day operations of the system and analyse it in great detail.

MS WALLACE (TMS): It's almost - we've gone past - in 2004 we assisted the Victorian Magistrates Court to get $40 million to rebuild their IT system.

MR HALL (TMS): And they blew it.

MS WALLACE (TMS): Dare I say it, I think RedCrest is the outcome of that, and very few cases are actually going through that system in the Supreme Court. The day of building the Big Brother systems is over. We need to be making a gazump move forward and looking at this coming back from a Silicon Valley perspective, how do we do this? That's why I'm saying I think Commonwealth has a big role to play, because I think the states are still mired in these, "Let's build a super case management system. Let's have electronic lodgment of documents. That's all good." But there are better ways to do it now, and I think there's a leadership role to play.

MS MacRAE: So who will take that leadership role?

MS WALLACE (TMS): We're hoping you would make a recommendation, but the Commonwealth could.

MS MacRAE: But where in the Commonwealth, I suppose, specifically? Because - - -

MS WALLACE (TMS): Yes, I know.

MS MacRAE: I mean, the state attorneys-general, I think, are struggling a bit. This is not their natural territory in terms of the data projects they've got on foot now. I think they would say it's sort of - - -

MR HALL (TMS): The attorneys-general have a component called the CERT program, of which I'm a business member, that looks at cybercrime and the security aspects of small business and large business in Australia and its defence against data attacks. They do have some expertise, but it is an environment that requires high levels of expertise, and because this is a new way of doing things, it's relatively new, the expertise would have to be borrowed from the private sector, such as Google or Amazon or where we can form - that's why I've put a PPP at the top of that - for the Commonwealth to actually encourage some of those large corporates with IT expertise to get involved and reset how we gather data.

MS WALLACE (TMS): Then you would have a whole lot of small IT businesses in Australia building systems for the local state court or the local - they're the cluster, so it's a bit - you come out and there's a cluster activity here, there's - but they're all using the same way of looking at the data, and that's your big advantage.

MR HALL (TMS): And they're currently pointing their faces at the game industry, or other areas that are not justice, because it's not fun.

MS WALLACE (TMS): We think there's a bit of economic activity in the IT industry in Australia you could generate here. But you'd need to get the right people around a table, set up an advisory group, and start the process. And, yes, that is why attorneys-general are struggling with this, because they haven't got the practical how-to, how do we do this on the other side. All they can do is probably discuss the finer details of the definitions. But there needs to be a new dimension brought into this.

DR MUNDY: Given your experience with IT systems in Victoria over the years, it's probably the $60 million question - and I actually ask this question in all seriousness, and I'm happy for you to go away and come back to us - but without buying a Rolls-Royce and perhaps buying an expensive Holden, what sort of capital outlay would a jurisdiction like Victoria be looking at if it was to get its systems fit for purpose?

MR HALL (TMS): The proposal I put to you was an open-source proposal, which is how Google and YouTube get a lot of their innovative stuff done. If you open up a market but give an application program interface where everybody knows how that data structure works and how to interact with it, they will build the things. So you then run pilots. Instead of a huge system, you run pilots to do a little bit of that case management here, some core stuff here, and then make those available. Then the industry itself grows because there's demand. So rather than having to foot the $100 million bills - in answer to your question, the data project itself, setting up the data, actually is probably a $25 million project. It's not that big. It's a bit of consultation. After that, you've got to start setting up - - -

DR MUNDY: $25 million is about the annual budget of this commission.

MR HALL (TMS): You know, the last copy of Word took $400 million to build. But every major project over $70 million in IT has failed in Australia.

MS WALLACE (TMS): We have eight out of 10 in Victoria that have failed, and it was $60 million. So we could come back with maybe some thoughts on the approach we're describing, how it would work and what it might cost.

DR MUNDY: Because everyone tells us that IT is a core to the solution called efficiency.

MS WALLACE (TMS): That's right.

DR MUNDY: The difficulty that we have is it's very difficult for us to - and I think that's fairly obvious. The difficulty we have is we know how much that's going to cost, so are we making a recommendation that's worth a couple of hundred million or

are we making a recommendation worth billions? Then there's the small trick of proving benefits of said costs. But any advice you could give us - - -

MS WALLACE (TMS): We can come back. I think you're in an ideal position right now because the technologies in the field have been developing so quickly, and you were saying this morning, every industry has gone through this revolution, it's truly a disruptive technology. You're in an opportunity now to say, "If we step into this vacuum here and fill it, then it's going to be a lot cheaper across the board for all of the justice systems in Australia, and we will be stimulating some IT industry."

MR HALL (TMS): And you don't just have 60,000 legally trained people in Victoria versus 12,000 15 years ago. You have 60,000 - 50,000 of those are younger lawyers, and they are tech-savvy. They know how to work the stuff, and they will draw through the applications that you need to actually run these on your phone. "Do I need to be in court? Where do I need to be? Where are my clients? Can I get in touch with them? Where are those documents? Have they been submitted?"

All of the information will change the way it works, and in fact a lot of that work will go overseas, just as it did with the IT industry, the banking industry. We've trained a lot of lawyers here who actually started off overseas and have gone back, and they can provide services here in a global economy where - we haven't touched on this, but we've talked about this. This legal market will change. What you were alluding to before about lower costs, it will be driven by lower costs from overseas if the barriers to entry are lowered.

MS WALLACE (TMS): And they must be, because they have been everywhere else.

MS MacRAE: And that new disruptive technology, if I can call it that, would you say it's in adoption elsewhere, or is it so new that no-one else has yet sort of jumped on board, or is it partially - - -

MR HALL (TMS): Have a look at the other industries. The banking industry lost its complete middle section of managers and clerks to computers. The IT industry, the same. The componentry for development was moved offshore because it was cheaper.

MS MacRAE: But have courts - like is the legal system in another country sort of - are they there?

MS WALLACE (TMS): Well, I think they're rapidly going there in the UK, just reading what's going on there.

MR HALL (TMS): Partially. All of the stenographic work is done in Thailand overnight for legal firms, for the bigger ones. So part of the jobs have moved overseas. We're seeing it, we're just not dealing with it at the front-end interface of the court. But in tribunals, where a lot of it is on the papers, we will start to see that.

MS WALLACE (TMS): And we've seen 900 posties get sacked today, so what can I say? That is a direct result of this.

DR MUNDY: Thank you very much for taking the time. We'll now adjourn for a small cup of tea and resume at 11 am.

DR MUNDY: We'll reconvene these proceedings. Could you state your names and the capacity in which you appear and then make a brief, by which I mean less than 10 minute, opening statement please?

MR SLADE (MBL): Yes, my name is Ben Slade and I'm from Maurice Blackburn Lawyers. I'm the managing principal of the New South Wales practice and I work with my colleague here.

MR WATSON (MBL): I'm Andrew Watson and I'm also from Maurice Blackburn and I'm the head of the class actions department there.

DR MUNDY: Gentlemen, we're in your hands.

MR SLADE (MBL): Maurice Blackburn has a substantial practice. We have over 800 staff over each of the states and territories except for the Northern Territory and the ACT and Tasmania. We are particular concerned that LawAccess model in New South Wales maintains its presence in New South Wales. We think it's a very good model for Australia wide. Advice and minor assistance services really do need to be rationalised, as LawAccess is doing.

It's a collaborative approach, LawAccess was introduced and funded without stripping funding out of community legal centres or the law societies or the bar association. It provides a very good first point for people who really have no idea how to access the legal system and where to go within it and it enables a rational and clear referral and hopefully a referral service where people don't end up on the merry-go-round that they used to in the past.

The position in the past really was very confusing for people. I was in the community legal centre world and then at Legal Aid for years, and we knew of the frustration of people being bounced around from one referral option to another because they hadn't been properly thought through or rationalised. LawAccess greatly resolves that problem for those who get to LawAccess. The only problem with LawAccess is first that it's not in fact as well known as it should be and secondly that the public purpose fund, which is the key to its funding in New South Wales, has been diminished in its capital base and there's now a very serious threat that LawAccess will not be able to continue with its current funding and there are rumours that its funding won't be supplemented through other sources.

Another issue of significance for our law firm, but also of significance for the wider community, is the rather silly differential standards for advertising of legal services. To identify personal injury as an area for concern over and above other areas of legal service delivery is just not rational. It's meant that in New South Wales and Queensland there are restrictions that don't apply to my colleagues in Victoria,

they find it difficult to work out what to say, especially when they're running cases across jurisdictions as we do, and the regulations are regularly breached.

Firms are apparently allowed to use the term "compensation law", but if they say "asbestos" then that's in breach. If you say "medical negligence" then you're in breach, if you say "medical law" then you're not in breach. It's not rational and it's confusing for the consumer of legal services. Consumers really need greater transparency in the provision of legal services, which is a fundamental part of your report and we agree that consumers do need clear legal processes and clear information.

Which brings us to another concern that we have which is tribunals. We have a real concern about the recommendation in the Productivity Commission's draft report that tribunals - or at least a number of them - have "no lawyers" rules. That just doesn't help. It was a position that I held very strongly when I was in community legal centres now 30 years ago. The experience is, it doesn't work. To ban lawyers from tribunals merely gives the power to the opponent, the opponent being far more and often greatly sophisticated landlords, government department representatives, in-house counsel are appearing before unrepresented people who need the help of the tribunal, and the tribunals don't engage enough.

Another aspect of our concern is court processes. We are particularly impressed by the Federal Court's fast track system, by in the main the Federal Court's judicial intervention in cases that we run. Early case management conferences. Case management conferences deal with a whole range of issues, including how the evidence is going to be presented, what experts might be required, early and targeted discovery are all really, really useful and they make for the conduct of our complex cases so much simpler. The individual docket system is a key to that.

Other jurisdictions, such as the New South Wales Supreme Court and the Victorian Supreme Court do not have such simple systems, do not have such a level of judicial intervention, and the process of running both relatively ordinary cases but also complex cases is delayed as a result and the costs of course increase substantially. Discovery is an issue where in the more complex cases we depend very much on targeted and sensible discovery and that requires both cooperation of the plaintiffs and the defence, and the defence can, through processes such as affidavits identifying where the documents are and how they're held, through cooperation and through judicial intervention can improve the discovery process substantially on the somewhat tortuous process that some can get caught up in.

We're very concerned about targeted costs orders in discovery procedures, because we just see that as being yet another step in moving the goalposts back to the size of the moneyed defendant and the ability of moneyed defendants to complain

and scream about discovery when the reality is it could be targeted, it could be provided and it could be done sensibly, is there. We're also most concerned on actions that we take against both either the Commonwealth or one of the states that the model litigant guidelines are not complied with.

It's very rare that we see any compliance with the model litigant guidelines, every now and again we do. We've had some appalling examples where model litigant guidelines are routinely breached and we like the suggestions you've made in your draft report that there be some proposals for enforcement of those model litigant guidelines, whether it be by the courts or whether it be by the legal services commissioner or some other office isn't enormously important. What matters is that they are enforced when they're breached as they are routinely. Andrew is now going to talk about contingency fees and third party funding.

MR WATSON (MBL): I wanted to start by making three general remarks about class actions and litigation funding before I turn then to the specifics of the recommendations in relation to contingency fees and litigation funding. The first proposition I wanted to make was that class actions provide access to justice. They do so by providing an efficient mechanism whereby claims can be aggregated and legal costs spread across a claimant ground, thus reducing the overall level of those costs, albeit in a particular action the costs are often very, very high.

Examples of cases where I think genuine access has been provided, which would not have occurred without a functioning class action regime, are our bank fees cases where the individual amounts involved in litigation would simply have made any action on your own prohibitively expensive and a waste of time. Our current bushfires class actions, where a large number of victims of the Black Saturday bushfires have been assisted to take litigation which they couldn't have afforded themselves, and those which create most controversy are shareholder cases.

Again, very often, even though some of the large institutions who participate could theoretically run those actions on their own, what we know is that in practice prior to a functioning class action regime they did not. So in each instance of those examples but more generally, what the class action mechanism provides is a remedy in practice where previously none would have existed. The second proposition is that litigation funding itself can increase access to justice, and it does so because it provides access to capital for the claimants in order to run cases.

Absent litigation funding, third party litigation funding, the only mechanism for accessing that capital is either the claimants themselves, and there are usually very, very significant problems about that, or law firms, and law firms are limited in the access that they have to capital. So again, to go back to the sorts of examples I just gave, we had sufficient capital to run the bushfires cases. Those have been

inordinately expensive, but we had sufficient capital to run them.

We would not then have had sufficient access to capital to then take on bank fees. So litigation funding promotes access to justice in that way. It also promotes access to justice in that it provides for an equality of arms. It does provide a mechanism by which defendants are less likely to be able to in effect starve out claimants, and that is, like it or not, something that was a function of the way major litigation was conducted in this country beforehand, and it's less evident now.

The third proposition I want to make in a general sense is that much of the current debate regarding class actions and litigation funding involves recourse to rhetoric and unsubstantiated claims. The facts are very different to much of what is said. First, the average number of class actions in any given year is about 14. The average number of shareholder actions, those which as I say seem to excite the most comment and interest, is actually less than three, and in the years since they have been run there's never been more than six in any given year, and if you look now at the current total number of funded shareholder class actions on foot in Australia anywhere, there are five.

Notwithstanding those relatively small numbers, there have been approximately one billion in recoveries from those funded actions over the course of the last 10 years. So there is a significant contribution to access to justice in cases where access would otherwise not have occurred. But a number of things stand out, which is that there is simply no evidence of economy stifling activity on any rational basis, nor is there any evidence of widespread unmeritorious suits.

Of course, in any functioning litigation system there will be unmeritorious suits. The real question is how many and are they in greater proportion than any other form of litigation? Simply no evidence of it. That brings me then to contingency fees. More broadly and outside the field of class actions, we think contingency fees offer a real opportunity to promote proportionality of legal costs with outcomes. It seems perverse that in an environment where people are concerned about the proportionality of legal costs to outcomes, the one form of judging that you do not permit is permitting a charge of a proportion.

Secondly, legal costs charged on a contingency basis provide an alignment of interest generally between client and lawyer. There's much discussion about the alleged conflicts, but in fact we think many of the alleged conflicts are much more manifest under current charging regimes than they would be under the introduction of contingency fees. Specifically, turning to class actions, we've crossed in a sense two Rubicons. The first Rubicon we've crossed is that we allow lawyers to have a financial interest in the outcome of their cases.

People talk about it as though it's an evil thing, but in fact whilst we have conditional fee arrangements, lawyers have a financial interest in the outcome of their case, and indeed in an unfunded case like bushfires the quantum of that interest is actually of a greater magnitude than in almost any other piece of litigation that I could think of. So we've crossed that Rubicon a long while ago. We also crossed the Rubicon a long while ago of allowing people to take a percentage of a judgment outcome when we allowed third party litigation funding.

The only thing we don't allow is for lawyers to do that, and in our view that's an economically irrational outcome and one that is not to the benefit of consumers. At a theoretical level, it must increase transaction costs to have two parties, each of whom need to make a profit, involved in the transaction, and each of whom need to take some premium for risk in the way in which arrangements are structured. At a practical level what we do know is that in funded class actions the percentage commission paid to the litigation funder will be between 30 and 40 per cent and that legal fees will on average be about 12 per cent.

It is plain that a contingent fee of 35 or 30 or 25 would be a cheaper outcome for consumers. Finally, just about litigation funding, the first thing we'd discuss in relation to some of the commentary is that it's often characterised as being an unregulated industry. That is not so. There are the general consumer laws that already apply, there are conflict of interest regulations which were recently introduced and in a de facto way security for costs from courts often acts as a capital adequacy mechanism.

Our view about regulation of litigation funding is that like all lawful activity, any regulation which does occur should be kept to the absolute minimum to prevent abuse and it should not create barriers to entry or be a de facto excuse for destroying an industry which is in the nascent stages of development. In those circumstances, we don't necessarily perceive any need for a licensing regime. But if a licensing regime is to be introduced then it should be introduced in a way which ensures that competition is promoted and not stifled.

DR MUNDY: Okay, thanks for that. We might start on litigation funding and contingency fees, because they seem to us really to economically look an awful lot the same, it's just a question of who's doing what. I guess the reason - so what we see is an opportunity to deepen a fairly shallow litigation funding market by allowing contingency fees is a way to proceed. I guess we are minded that there is some community unease and therefore some sort of licence held from APRA might assuage that and achieve the policy outcome.

I guess the first question I'd like you to bring your mind to is on page 17 of your submission you argue that contingency fees should be capped at 35 per cent,

and then go on to question why as far as conditional fees are concerned there is no economic basis for a 25 per cent cap. It seems you want to have your cap and want to eat it too. But I guess the question again is, how did you arrive at 35 per cent and I guess - and I'm not wanting to put words in your mouth - is this really an attempt to assuage that community unease? I mean, we've heard it from all sorts of folk. Is that essentially a mechanism by which the introduction of this would be essentially more palatable and if so, given the competition issues which appear to be pretty apparent with respect to the third party funded litigation, there should be a 35 per cent cap there in the name of a level playing field.

MR WATSON (MBL): So I think in short you're right. I mean, one of the obvious economic consequences of having a cap is that you'll then have cases which might be meritorious where 36 per cent would have been the right number, or more likely because things are not that subtle, 40 per cent might have been the right number and they won't want to be - - -

DR MUNDY: They won't go.

MR WATSON (MBL): Won't go ahead. But there is community concern and one of the things obviously enough in the introduction of a regime like this you want to do is create a sense that there's a demonstrable benefit in what is being introduced. What we know is that currently where you have third party litigation funding, you're ending up with numbers that are north of 40. So if you introduce it at 35 you have that demonstrable benefit.

As to whether there needs to be, as it were, a level playing field as between litigation funders and law firms in relation to capping them at 35 per cent, I actually think one thing you could do is cap us at 35 and leave litigation funders, as it were, to charge whatever the market bore, and that would ensure that where cases could be run for cheaper there'd be competition obviously enough, but where for whatever reasons 35 wasn't the right number you would still have access to a more limited level of competition between litigation funders.

MR SLADE (MBL): If I might just add, if the ban on contingency fees was to be lifted in the minimalistic fashion with some constraints but not too much, then law firms would be in a competitive advantage, because litigation funders put up security for costs. Law firms shouldn't be, I wouldn't have thought, required to do that, and subject to the complications of a security for costs order being made and how that is met, which is a matter between lawyers and a client, then law firms would have some competitive advantage. So the 35 per cent cap wouldn't be quite as harsh as it might otherwise seem.

DR MUNDY: It was suggested to us in our hearings in Sydney, and I can't quite

remember who it was by, was that for particularly smaller matters where the outcomes are tens of thousands of dollars say, really the incentives on the law firm in those circumstances, whatever you think the incentives might be, really are no different to a traditional no win, no fee conditional fees type - with or without an uplift. Is that your general - - -

MR WATSON (MBL): I would have thought if you analyse the likelihood of outcome and the impact it will have on the firm, there can't be really any difference in incentive at that level much.

DR MUNDY: It's the big fish that - - -

MR WATSON (MBL): It's the bigger cases where it might impact.

DR MUNDY: I guess that brings us to the question of - you know, we say, and I think it is our view, that there needs to be some sort of prudential attention paid to litigation funders. Should a similar requirement be placed on law firms that want to run particularly large actions. So forget about the $35,000 one which looks like a conditional fees arrangement in all likelihood. But if you were going to run on a contingency basis of a bushfire - - -

MS MacRAE: Well, the bank fees one or the bushfires.

DR MUNDY: The bank fees case or whatever. Given that you would be presumably undertaking to the members of the action to bear the adverse costs orders if unsuccessful and those sorts of things, they need to have some certainty that the firm will be able to bear those orders and a licence does that for the third party fund. How would you think we would give consumers of your services in those circumstances the same level of assurance that's provided by the funders other than your good name and reputation as members of the profession?

MR WATSON (MB): There's some interesting questions there. Plainly there's an open question about whether law firms ought to be required to provide adverse costs guarantees in the same way as litigation funders are not required to provide adverse cost guarantees. In Canada, for example, law firms can if they choose to, and if they choose not to they don't have to. That's one issue.

MS MacRAE: Can I ask just quickly on that, because it is a big issue to us: what's the experience in Canada? How often do they choose not to, I suppose is the question.

MR WATSON (MB): I don't know statistics. I do know that anecdotally there has been a very nascent growth of third party litigation funding in relation to Canadian

class actions, but you could literally list on the fingers of two hands the number of cases which have been funded by a third party litigation funder as to adverse costs.

DR MUNDY: Can I just interrupt? Is the character of those actions of a securities nature or are they just across the board?

MR WATSON (MB): Generally speaking, securities actions, but the first case in which it was attempted was actually a consumer class action, although the court for various reasons determined not to permit the funding arrangement. I'm just trying to think of whether there's an example of one that has been approved outside of the securities field. I'm not sure that there has.

DR MUNDY: Because this is obviously the nub of the issue. The attorney-general I think has indicated that he doesn't have a problem with what are called traditional class actions, which I presume covers things like the ANZ case, the bushfires case. The real concern seems to be around securities. That's where the heat is. Some might call it hype of hysteria, but that's where the heat is and that's where the debate is.

MR WATSON (MB): Yes. To be honest, it is difficult to understand the level of hysteria which accompanies that issue; as I say, given that on average there have been less than three a year. More fundamentally - - -

DR MUNDY: Is it possible for you to get back to us on what you consider those actions to have actually been because the evidence in this space as you identify is pretty scratchy so if you know what these actions are that might be relevant, and the other ones that don't fall in - if you could actually list those cases for us, that would really help us in getting a handle on the evidentiary basis.

MR WATSON (MB): Yes, we can certainly do that. What other things I was going to say is just, look, I mean, we have rules that prohibit misleading and deceptive conduct and which require continuous disclosure and those rules are about in the best way we can trying to ensure the efficient allocation of capital on markets.

If you don't have an effective mechanism of enforcing those rules, then you really don't have as efficient an allocation of capital as you might otherwise have and whilst ASIC can do certain things, the one thing we know from history is that it is constrained in a budgetary sense and that because of those constraints it tends to focus on enforcement activity rather than recompense. So without a functioning class action regime that deals with securities actions or shareholder actions, you are not ever going to have the optimal allocational efficiency that you ought to have in your share market.

One of the curiosities about this debate is that people like the Australian Institute of Company Directors seem to spend an inordinate amount of their time worrying about the .2 per cent of companies who get sued in any given year rather than worrying about the 99.8 per cent who are attempting to do the right thing and who should be protected.

MS MacRAE: Just one of the counter arguments, if I can be devil's advocate for a moment: I guess there's this concern around blackmail or free mail, whatever you want to call it, that there might be an action that's threatened and a big company might say, "We think there was something unfair going on here. We're going to call a case." The company thinks, "Well, this is going to take us years in the courts to settle this because the law is uncertain and we're going to argue it, they're going to argue it tooth and nail. It's going to cost us a fortune. In the meantime our reputation is going to be dragged through the mud. We're going to be stymied, effectively, for some years before we can clear our name, so while we think we're in the right, ultimately we're just going to cave in early because the reputational damage to us and the problems for us in having this hanging over for such an extended period is a big enough threat to our name and our resources that we think we're just going to settle." How would you respond to that sort of argument?

MR WATSON (MB): Firstly, there's not much empirical evidence of people caving in early. These cases on average take about three and a half to four years before they settle and they're often extremely hard-fought with tens of millions of dollars on both sides run up in legal costs, so there's not much evidence of people just falling away.

The second thing is that the quantum of the settlements, even in those which have settled early, suggests that the notion that you would pay those sorts of amounts running into - I mean, we have now settled I think four shareholder class actions for amounts north of 100 million. We have recently settled a class action against Leighton for an amount of 69 million. These are not amounts of money that you would pay if you just thought, "Gosh, it's a bit too much trouble to go through all the pain, anxiety and hurt. Why don't we just pay 69 million to make it go away."

There are shareholder cases which have settled for relatively small sums, but again the question is not do such actions exist, but rather do they exist with any greater frequency than any other form of litigation. Is there any evidence that this is a widespread phenomenon that needs to be regulated out of existence or is it, as I would contend, less likely that unmeritorious shareholder class actions get launched than just about any other form of litigation because whether it's the lawyer funding themselves or whether it's a third party litigation funder, you do have to be up for saying, "Are we prepared to stick up to 10 million, maybe 20 million, on the line and then risk paying adverse costs on an unmeritorious action?" The answer almost

universally is no.

MR SLADE (MB): It's difficult to give more specific evidence about that because these cases settle always on terms that we don't disparage the company, we don't go on about what they did except for the purposes of education, and we can't therefore give you detail of what we say Leighton Holdings did but we could, if we were allowed to, give you fairly good detail of why it was a good settlement for Leighton. The claim was not brought frivolously. It was not unmeritorious, and none of our cases are. Neither are cases funded by Bentham IMF.

If I could just give you a snapshot of the cases I have just written down here while Andrew was addressing you of the cases that we're running at the moment, we have got two bushfires cases, which is large numbers of group members. That falls into Senator Brandis' legitimate claim; Bonsoy milk, which is on behalf of a large number of people with a substantial claim; DePuy and Johnson and Johnson, defective hip implants that I'm running out of our Sydney office. There's about two and a half thousand compensable group members in that claim, four and a half thousand people all up.

There's the Leighton case which just settled; Cash Converters, which I'm sure would move into the legitimate claim. That's claiming that people were tricked by Cash Converters into paying 633 per cent interest when the maximum interest rate was 48 per cent in New South Wales over that three-year period. Another case on behalf of 50 people who are residents of a place called Grand Western Lodge who were, we claim, effectively tortured and deprived of their liberty over a 10-year period while the state of New South Wales sat by and watched, unable to do anything for fear that they might be breaching their own regulations, and actually on behalf of young people - who were called Konneh in the State of New South Wales - who are routinely arrested by the police in breach of bail conditions when in fact they are not on bail at all and we have had the State of New South Wales run two strike-out applications.

We have had a separate determination of that issue which means that they are 100 per cent liable for at least half of the class issue, still not handing over the money, appealing one of the strike-out decisions and losing a case against the Commonwealth government in relation to equine influenza which has been run out of the Queensland office and we are about to start a case on the floods that happened in Queensland in the New South Wales Supreme Court because of jurisdictional issues. We have in relation to the shareholder class action just sent a demand off to Treasury Wine Estates' lawyers concerning an issue there and there's - - -

MR SLADE (MB): A few others, yes.

MR WATSON (MB): A couple of others; one other - - -

MR SLADE (MB): RiverCity, which is a case involving the securities which we issued in relation to RiverCity tunnel.

DR MUNDY: Yes, I think we have looked at the RiverCity tunnel recently on another matter. What you are basically outlining here is that securities class actions are a significant but not dominant part of business. That's essentially the - - -

MR WATSON (MB): That's absolutely right and as I say, is borne out by the statistics which is that on average, there are 14 class actions a year and on an average, there are somewhere between two and three shareholder class actions a year and the shareholder class action average comes from a publication by Allens Linklaters, who are a defence firm, so it's not an invention of ours. The 14 class actions per year comes from the research of Associate Prof Vince Morabito, so - - -

MR SLADE (MB): Professor now.

MR WATSON (MB): Professor, sorry, so these are not things we have made up.

MS MacRAE: Can I just ask one other thing and again, I am just interested in dealing with the advocates here, because we did hear from Jones Day last week, which is where we got some of the numbers that are in that area.

DR MUNDY: Angela is much better with this than I am.

MS MacRAE: If we just come back to this, and you have suggested that a 35 per cent cap might be appropriate, but in the absence of that, there might be an argument put that the only people that get rich out of these schemes are the lawyers, that you have got these thousands of people and it looks like a great benefit but it's only a tiny little bit of it for each of these people, that if it's no cap and there's a great damages amount here and you can take 90 per cent of it, you would only have to have one of these in your career and you would be on easy street for the rest of your days if you were one of these lawyers running the case. I think they gave the example in America where they talked about some cases where effectively the benefit to the people in the class was worth virtually nothing, less than a per cent. Can you just respond to that as well?

MR WATSON (MB): Yes. Well, the first thing to note is that if you do believe in the way competitive markets work and, you know, broadly we do, then your expectation is that over time, with competition, you won't have people being able to charge very large commissions for cases which don't warrant it and the key to ensuring that is ensuring transparency in terms of understanding about the

arrangements and also advice about the merits of a case, so that's the first thing. The second thing is we are for these purposes arguing that there should be a cap and if the cap is 35 per cent, that guarantees that 65 per cent will go to claimants.

DR MUNDY: Yes.

MR WATSON (MB): The individual amounts for each claimant might be relatively small but it does guarantee that the majority of the funds goes to claimants. The third thing is that just as winning one might provide some financial recompense, losing one where you guarantee adverse costs I can assure you is something which will in many instances guarantee financial ruin. Even losing a very large conditional fee case where you have got large amounts in disbursements, maybe tens of millions in disbursements and tens of millions in WIP, will have a very, very significant adverse effect on most law firms, so there is necessarily a calculus that will occur at an economic level for firms in making sure that they weight the risk appropriately and ensure that they aren't taking on cases that are too risky for very little benefit.

The final point I would make is that the courts have the capacity to regulate abuses and where it is plain that a case is really being brought just for the sake of the lawyers, then there is nothing clearer than that the defendant will raise that with the court and if that is the case, that the courts will deal with it appropriately.

DR MUNDY: I am just mindful of the time.

MR WATSON (MB): Yes.

DR MUNDY: But in trying to establish a series of recommendations or a framework of a recommendation which may ultimately be acceptable across the board, the fact that something along the lines, following on your last point, that agreements, be they in relation to contingency fees or litigation funding, you would see no objection to those being lodged with the court.

MR WATSON (MB): No.

DR MUNDY: The second question is would you see or could you conceive of a framework - and I'm particularly mindful of the protection of small people who could get stung with an adverse costs order - that to enter into arrangements - and I have got in mind an exclusion for what you might call in securities law the sophisticated investor, so I'm not talking about contingency arrangements for the corporations. I'm talking about punters and small businesses and stuff; an arrangement whereby those sorts of agreement should involve the funder, be they the law firm or the third party, they must accept the adverse costs order, because it's the adverse costs order that gives some teeth to the incentive characteristics in this in our mind.

MR WATSON (MB): I think there is no doubt that in most instances where you got litigation funding, it will be appropriate for adverse costs funding to be part of the provision but I wouldn't necessarily support adopting an inflexible rule or something like that.

DR MUNDY: We might leave it open to the court to be able to determine that exemption. Would that be okay?

MR SLADE (MB): It's either that or the court making a security of costs order which can't be met. Then either the law firm has to give that indemnity or the case will be stifled if the plaintiff can't pay.

MR WATSON (MB): I think there is a real - as a plaintiff lawyer now, one of the things that you inevitably have to do if you're talking about a piece of unfunded litigation where we don't give an indemnity for adverse costs is have the conversation with the client about the fact that you are effectively asking them to stick the entirely of their life savings on the line.

DR MUNDY: I understand that but we have had significant evidence that a lot of clients don't quite understand what that means. A lot of them don't but that's okay. I think that answers that question.

MR WATSON (MB): Yes.

DR MUNDY: The third is a more general issue and it goes to the funding of substantial litigation where the outcomes are not of a compensatory nature, so it may well be a large planning - I mean something like - I don't know whether you were involved at all with the Cole matter that went to the Court of Appeal but these very large planning and environmental matters which ultimately read in administrative law outcomes or interlocutory outcomes. How do you see those being funded? I guess I'm particularly mindful of this, given the apparent reduction in funding to the environmental defenders officers who typically brought or at least provided the solicitor services for these actions and the bar has generally stumped up for free. How do you see those matters being funded in the broad? Are they just something which has got to be funded on a public interest basis or through some other mechanism?

MR WATSON (MB): I think in the end, you are never going to get a system where everything can be funded on the basis of contingency fees or third party litigation or you do just have to accept that there will be some matters still which will only obtain legal redress if people are prepared to do them on a pro bono basis or they are funded in a traditional way.

DR MUNDY: Or we think up some other public framework that deals with it.

MR WATSON (MB): Precisely.

DR MUNDY: Do you want to add to that? Thank you for that, that has been very helpful. If you just want to reflect on the completeness of that. The other thing I would just like to ask you is you mentioned you might just want to ask us about the experiences that we had about matters that didn't proceed prior to class actions at some point. If you could identify a couple of those matters, that would be very helpful.

MR WATSON: It was more in the broad, but yes.

DR MUNDY: A couple would be very helpful indeed. Okay, thank you very much.

MR WATSON: Thank you.

MS MacRAE: Thank you.

DR MUNDY: Could we now please have Helen McGowan. Good morning. If you could state your name and your affiliation for the record, and then make a brief, about five-minute or so statement. Thank you.

MS McGOWAN: My name is Helen McGowan. I'm a country lawyer based in Albury Wodonga. I have my own legal practice, but I also work as a consultant to the National Association of Community Legal Centres, and from time to time with the Legal Aid Commissions.

DR MUNDY: Thank you.

MS McGOWAN: Essentially, I have submitted a written submission for this hearing and I'm happy to talk to that. It addresses four proposals that, in response to reading the draft report, which had not sort of been reflected in the current draft, so those four are the idea of a public-private partnership leveraging off our pro bono commitment as a profession to do justice to Australian communities. I can talk a bit more about that. The idea of an exemption for limited legal assistance services when they're provided in a way that does not breach the conflict of interest rules, but that actually gain some protection for those people providing those services. The third thing is a suggestion that we, in the data collection review that has been going on, we actually note the geographic or remoteness areas, because that will be useful for policy and service delivery. The final proposal is the development of national aspirational justice goals. The idea of goal setting has been reflected to some extent in the national partnership agreements, but also in the corroborative legal service delivery regional justice plans. From my observation, they seem to be quite motivational.

DR MUNDY: Angela, do you want to start?

MS MacRAE: Okay.

DR MUNDY: Thank you for being so brief.

MS MacRAE: Maybe I will take up one of the issues that you raised initially. Having the ABS identify the geographical location of services, do you see whether there would be any difficulties with doing that?

MS McGOWAN: No.

MS MacRAE: It seems to me it's an additional sort of data - - -

MS McGOWAN: The ABS released concurrent tables, it's post code identification. The data is already there, we just don't desegregate it and analyse it according to

remoteness areas. In the health and welfare professions, they use it regularly as a policy lever for government. The only time - I have been looking for it for a while - I have seen it happening was with the New South Wales Law and Justice Foundation in their current, subsequent analysis of the legal, law need. They went back and said, "Well, what exactly is happening in the more remote areas", then they found a concurrence between remoteness and access to justice, as if we needed to be told that it was there, but what they realised is that the people were not accessing the services that were there, so the question was do they know about the services and how were they promoted, but basically their comment in the subsequent reports for the New South Wales Law and Justice Foundation is perhaps the services aren't even there, perhaps they are more in the nature of the law access phone-in 1800 number. The posters aren't up in communities, so they don't know that they're there.

MS MacRAE: How would you account for that sort of factor that a lot of the bodies that we have heard from talk about doing a lot more outreach work, and doing more over-the-phone sort of things. How would you classify that geographically in terms of where the service - I suppose you would know where the need was.

MS McGOWAN: Yes.

MS MacRAE: You wouldn't necessarily, from a policy point of view, the need doesn't necessarily have to be matched to a service that's necessarily also located in that geographical area, so how would you account for those services, and how would that complicate, I guess, the policy questions you might be able to answer, having that sort of detail?

MS McGOWAN: The way I have seen it work in the health sector - and there has been a great audit done, where they actually looked at models of service delivery, so you may be thinking of the hub and spoke model, that works, and they looked at, well, if the hub is in, say Dubbo, where the spokes - how far remote are they going. So they were doing an analysis of those more remote communities and seeing to what extent they were serviced. On the one hand they were saying, "Well, we have a service that goes out to Wilcannia," then they would say, "Well, does it go out there, and is it just in the nature of a telephone number on a community notice board, or is there a fly-in fly-out supplementary?" From my observation, the New South Wales system seems to have been much more adventurous and evaluated than any other state that I've seen.

MS MacRAE: Is that because they do already collect some of this?

MS McGOWAN: I think so, and also my observation is the New South Wales Law and Justice Foundation is a leader in that area, and maybe they had good public purpose funding money that they were willing to invest.

MS MacRAE: Right, okay. You also talked about having some national justice goals.

MS McGOWAN: Yes.

MS MacRAE: Would you see them as something that you'd have separate for the private profession - - -

MS McGOWAN: No.

MS MacRAE: No? So you would want to have joint goals that would look at the totality of service?

MS McGOWAN: It just amazes me that, as a national profession, which I consider myself as an Australian lawyer, that we are so reactive and fragmented, yet when we sign on the for job, we undertake to (indistinct) administration of justice is our thing. In some jurisdictions, they are talking about, as well as swearing the oath of allegiance, we actually pledge to do more than that, and there's great work done by Kim Economides at Flinders Law School on a story that they use in Canada with the engineers. They have something called the iron ring ceremony. In the UK, they are trying to bring in this idea too. There has been a bit of resistance from the private profession, because they say, "Look, we are too busy doing what we are doing for clients, that dictates our agenda. We really can't go better and look at what it means to be in the society in this community."

My real interest is in, imagine having that conversation through the Australian Academy of Law or the Law Council, where we actually see, "What are the key issues for us in 2014 in Australia that resonate with justice?" To me, obviously, it has got to do with indigenous justice, particularly when there are children. You will hear later from Ashurst, when they come in and talk about their model for Katherine. There has been some wonderful initiatives on a case-by-case basis, but they are not being, I guess, harnessed to inspire the profession, and I think we have, already in the draft report it talks about the importance of the pro bono coordination. I think that's a really beautiful seat for the that idea to belong.

I see some law firms doing reconciliation action plans, including law societies, but there's so much individual effort that goes into pro bono in an ad hoc, fragmented way, I'm saying that's okay, but imagine if, once a year, we said, "This year we are going to focus on," or "This five years we are going to focus on this particular issue. We are going to measure our progress and see how we go with it." It's aspirational.

DR MUNDY: You mentioned, when we took evidence in Perth on Friday, the chief

justice of Western Australia drew our attention to the fact that there was no privately practising lawyers between Geraldton and Broome, that whole stretch of coast, so right through - so essentially, there are no private practising lawyers in the Pilbara. The Legal Aid Commission of WA talked about the program they have, which I think you reflect on in your submission which, unfortunately, now appears to have had some funding challenges. Would you just like to reflect a little bit on what you see the strengths of that program was and how sabbaticals and secondments might be used, particularly for places that are perhaps a bit less attractive than Margaret River.

MS McGOWAN: It has been evaluated and - I will talk about the benefits.

DR MUNDY: Yes.

MS McGOWAN: I was speaking to a remote lawyer on Friday. She had been recruited to a remote legal service because - she came from New Zealand, and she wasn't connecting with anyone. I said, "What about the country lawyer program?" So I put her in touch with them because their whole reason for being is to connect and they support. They offer remote supervision. They do the training track, continuing professional development remotely and they bring each other together and they do face-to-face time, so I think without something of that coordination at a state level, people will fall through the cracks and the country lawyers program again is exemplary but the down side is seeing this lateral recruit goes on.

The Legal Aid Commission is paid the best salary. You might start off with a community legal service. Maybe you have got an Aboriginal legal service but, you know, top dollar for profit is Legal Aid and the CLCs are unable to match that dollar because of the funding disparity between us. Not only is there a funding disparity. There is a governance issue, so the CLCs typically stand and fall with a governance committee and that depends on the calibre of the volunteers in that community and there can be great turnover. Lawyers can come but leave because they are not being looked after, whereas Legal Aid has got this model where they put them in Perth to start with, train them up, supervise them, get good relationships going with their cohort and then they keep those going for years, whereas when an independent service just employs, they just maybe get exhausted very quickly.

MS MacRAE: Is there a solution to that though, because it would seem a shame to say, well, there's this program that's working.

MS McGOWAN: Yes.

MS MacRAE: It's starving these other places, so that's a bias. It is in one sense but is the alternative to have no program working well?

MS McGOWAN: To me the fix which I have seen, which is again a declaration of interest - I'm involved with it - which is the - we call it the Fiverr, recruitment and retention of lawyers in regional rural Australia model, funded by the Australian Government. We had four regional coordinators. The only one at the moment is in western New South Wales. The fix is working for the regional law society, so the regional coordinator is employed three days a week. It depends which service they are based in.

In this case, she is based in the Legal Aid Commission. She works at all the legal services through the west of New South Wales but works very closely with the executive of the regional law society, in that case Orana, and all the legal services say, "Look, we've recruited someone. They're arriving next month," so Sharon will make contact with them and say, "How are your accommodation needs? Do you have schools?" She does all that, you know, pre-emptive strike, gets a reading of it, then when they come, they will introduce them to the estate agents, because it's very hard to get a home in the west. She will introduce them to the doctors because the doctors' books are closed. She will introduce them to the schools. She does a wonderful job. She's not a lawyer but she works very well with lawyers.

The other thing she does is coordinate the continuing professional development and she also organises with everyone else the social events, so they have set up a young professionals network and they were recognised this week. They have got a practitioner out in far western New South Wales who has been working the profession for 60 years and they have recognised a bit of an event, so I think that's the fix, someone working at a regional level who knows their community, who has got the respect of their profession and is doing that work. That's what we call the Fiverr project. That's due to finish, as most things are, at the end of this calendar year and it's a very cheap program.

DR MUNDY: Do you know how much it costs to fund? We can find out.

MS McGOWAN: Yes.

MS MacRAE: Where does run then? This is a Commonwealth thing or - - -

MS McGOWAN: It did run in north-north-west Queensland for that. It's run for the whole of the territory and for the whole of South Australia.

MS MacRAE: Right.

MS McGOWAN: But the unfortunate thing is that we only have regional law societies in Queensland, Victoria and New South Wales, so in the whole of

Tasmania, South Australia, Northern Territory, WA, if you have a lawyer remotely, they are not connected. Maybe they might go to the city twice a year for some CPD. We have got the country lawyers project which is like Hub and Spoke from Perth and then we have got the Fiverr which is based in the community doing a good job.

DR MUNDY: To some extent, you can see how it could work in northern Queensland or in central Queensland. The geography is in part determinative of where it may or may not work.

MS McGOWAN: Very much so.

MS MacRAE: Slightly odd but one is Commonwealth funding and one is state funded as well.

MS McGOWAN: I think the country lawyers program was Commonwealth to start with, so it still gets a bit of that. Basically, all it seems they are talking about is what is the case for it and that the idea is that no matter where you live in Australia, you should have the access, that people can a lawyer, yes.

DR MUNDY: You mentioned conflict of interest really in two contexts.

MS McGOWAN: Yes.

DR MUNDY: That's in small communities but also in unbundling of services.

MS McGOWAN: Yes.

DR MUNDY: The unbundling of services is something we are quite interested in.

MS McGOWAN: Have you been addressed on that already? Did John Boersig from the ACT talk about that?

DR MUNDY: Briefly.

MS McGOWAN: Okay.

DR MUNDY: Yes, we have had some discussion but I guess the issue that we are perhaps more interested in is the unbundling of services in private practice rather than by legal aid commissions per se.

MS McGOWAN: Yes.

DR MUNDY: You suggest a couple of solutions in relation to the conflict of

interest and ethical issues around unbundling. Could you perhaps briefly take us through that?

MS McGOWAN: In Australia, we have the Australian solicitors conduct rules which are being accepted by jurisdictions, currently under consideration in Victoria. They have gone from being, well, some people might say more prescriptive to more principle based. This means it devolves to each practitioner, as it always has, to what is the ethical thing to do. In this case, you must not act when there is a conflict of interest. It's pretty general but the case law, the common law, is very clear that there is imputed knowledge that flows within a legal practice, regardless of the size of the practice.

My home town is Albury Wodonga. We have a volunteer roster and we email the list through of the clients. First of all, we have to book everyone in. We don't have any drop in and we email the list of the clients through to the volunteer lawyers. They run it through their conflict system and then they say, "Look, I can't see X, Y and Z because I'm already involved." My system flags those conflicts. Then we make sure they go off and see someone. That's typically not an issue. They know who's coming. Lawyers work with that constraint but the problem arises when you have a larger law firm that has a very well developed database.

Matters have been going in a lot of country legal practices over a hundred years, so they have got lots of documents in safe storage. They have got a lot of names on their database and if they were thorough and conservative with their conflict mechanisms, they would say no to a lot of matters, so it really depends on the appetite for a very nuanced approach to the conflict rule. What I am observing, because it's through my PhD, is that there is a more robust attitude with the older practitioners than the younger practitioners, so for me it's an issue because when we introduce early career lawyers to an unsupported environment, they can be thinking they have learnt one thing at university and then they will be doing something else in practice and the reason why we need to shine a light on this particular issue is that it's a matter of being robust ethically without being compromised ethically.

In some of the North American jurisdictions they are making that a specific exception to allow for the unbundling, so when we raised it at the Law Council, the Law Council had a commentary paper on it and one of the things was - I think it's called a foreman's matter in Queensland - where they had a plan for $20 between limits for legal advice and the discussion was, well, you're only paying for $20 for 20 minutes. You can't expect a full scale legal service but the issue in that thing was whether the lawyer had under-serviced, whether the lawyer should have followed it up with a letter of advice and followed up about the expiring limitation period as well, but the court in that case found in the lawyer's favour because it is 20 minutes, $20. You know, that's okay.

I guess what I am getting to there with the unbundling is if we can say this is a discrete legal service, we are clear with the client about the constraints and the limitations to that which can more mean that, "You are here now for a short time. Our fiduciary obligation to you, the relationship to trust and loyalty, is limited," but whether they will accept that in Victoria is another matter. It's a whole - - -

DR MUNDY: But it has been accepted in other jurisdictions.

MS McGOWAN: In other jurisdictions. Victoria differs a little bit on that.

DR MUNDY: This is probably a provocative question to end but I will ask it anyway. Some would suggest, as we have seen over a long period of time about profession reform, that sometimes competition and market sharing issues are dressed up as ethical concerns. Would your view be that this is a bona fide ethical issue, rather than simply trying to preserve work for lawyers?

MS McGOWAN: I am aware of the full spectrum of views and I can't say one without the other. I think they all are present there. On the one hand we have the large law firm group and then we have the stand-alone legal service struggling to give advice and it is the same issue but through a different lens.

DR MUNDY: Thank you very much for your time, Helen.

MS McGOWAN: Thank you for providing the opportunity and for the results that are going to come from the inquiry.

DR MUNDY: We can't guarantee results.

MS McGOWAN: At least you are in there talking.

DR MUNDY: Yes, we do a lot of that.

MS McGOWAN: Thank you.

DR MUNDY: Could we now have the Law Institute of Victoria, please?

MR BOWYER (LIV): You don't mind if I disrobe here.

DR MUNDY: I'm not quite sure why I even wear a tie myself but I do for these things. I'm not quite sure whether it is morning or afternoon, so welcome. Could you please state your name and the capacity in which you appear and make a brief opening statement, because there is a number of matters. If you could keep it to less than 10 minutes, we would be grateful because we have got a lot of matters we need to put to you.

MR BOWYER (LIV): Geoff Bowyer. I'm currently president of the Law Institute of Victoria. Obviously the Law Institute of Victoria is the professional association for just shy of 18,000 solicitors and students in this state and has had a long history of involvement in terms of law reform and in basically access to justice issues. I would hope that you have a copy of our submission which we provided to you. I know that you have got a range of issues that you want to talk about, so I thought we might just cover a number of issues broadly and then let you move wherever you want.

Firstly, if I could take you to page 55 which is reforming the legal assistance landscape, the first issue we want to say there is that clearly we see this as a shared responsibility between the federal government and the state government in terms of providing funding for the needy and people who are in most need of access to justice or who are restricted in their means to do that.

We just highlight the view that in our view the Commonwealth contribution to legal assistance has shrunk over the last two decades from 55 cents of cost to barely 35 cents of cost. This has had a significant impact in terms of the delivery of services to needy people within our state. You will note in the report that we put to you that we recorded that the $9.3 million deficit in the last year by Victorian Legal Aid has significantly been caused by that lagging gap between the Commonwealth contribution and the state contribution. Overlaying that is our view that given the paucity of funds available, this has meant that in our view and in our submission this has resulted in a vastly inadequate payment being made to private practitioners doing legal aid matters which has flow-on effect.

I am the principal of a firm which used to do Legal Aid matters but it's an area we no longer do because we just cannot even from a break-even point of view make it a sustainable model. Victorian private practitioners play a vital role in the delivery of that service. What we want to see and we believe is the best form is to have private practitioners heavily engaged in that space, not only because it is good for our members but also in terms of accessibility of our members right across the state;

whereas Victorian Legal Aid offices are by necessity only in certain parts of the state and their reach is thus significantly limited.

They are some of the comments we make in regard to that. We say that the community legal centres form a very vital part of this arena and they play a different role to Victorian Legal Aid. They provide broader public benefits to society. As an example, the Loddon Campaspe Community Legal Centre is well known throughout the state and probably federally for some of the reform it has done in elder law and a raft of services which it provides to people in hospital who wouldn't in any form or fashion qualify for legal aid, and yet they have the ability to harness private practitioners to basically attend. Particularly a growing elderly population is just an example of the sort of work which community legal centres do, whilst at the same time doing a lot of policy development in that area. That particular community legal centre just is one example. It was the instigator of significant amendments to capacity issues in regards to the administration of basically powers of attorney.

I would probably take you to page 13, the unbundling of legal services. Certainly our view in regards to that is that the Law Institute supports the unbundling of legal services and should allow for limited scope representation. We say that in Victoria under the Legal Profession Act 2004 and conduct and practice rules, they do not explicitly prevent a lawyer from doing that but there would be some need to amend court rules allowing the flexibility of a law firm to indicate that they are only acting in a limited scope.

One of the challenges to that - because we are not talking about obstacles - will be that in terms of professional indemnity insurance, there will certainly have to be a significant level of dialogue with our professional indemnity insurer where firms are in and out or in a limited scope retainer issue, but we see that that area is going to be of increasing importance. We think that lay advocacy is an area that should be encouraged and is actually very active in a number of jurisdictions already.

In our VCAT jurisdiction, whether it is town planning or whether it is residential tenancy or retail tenancy disputes, there is a plethora of lay advocates involved; but we say from our perspective that at a court level there are two issues which are that there is an impairment to access to justice where the now represented party is unable to engage a lay advocate of similar training and experience - we support the idea of a lay advocate, provided they have got similar training and experience - and, secondly, one of the challenges I think we will have to look at as a nation is that lawyers are part of a professional association which is bound by ethical obligations which hitherto at this point in time do not present themselves to lay advocates. That is why our recommendations suggest that if a lay advocate was an employee of a law practice, then he would then be subject to those regulations. If that position is not adopted, there has to be at least a similar level of regulation of lay

advocates to make sure that the ethical rules and standards apply to ensure fair access to justice.

Just moving on if I can to page 23 which talks about the recommendations relating to tribunals and draft recommendation 10.1, our views are mixed about this. We support the use of lay advocacy but we strongly reject any restriction on the use of legal representation in courts. As an example, we point to the Fair Work Commission where for some time now basically leave has had to be obtained before a legal practitioner is allowed to present.

Whilst we see that as part of the status quo, we sometimes consider that when legal practitioners are involved, matters are dealt with more efficiently because they are more aware of how such matters are to be done and it would seem to be that often in many cases it is accepted practice, for example, in union positions, an employee advocate doesn't have to put his hand up to represent - and yet effectively he is in the role of a paid advocate. Our view in regards to all of that is that we believe that legal representation does not necessarily formalise hearings but can have the positive effect of focusing a tribunal on the legal issues of dispute and denying a party legal representation can paradoxically have adverse consequences in regards to access to justice.

I am conscious of the time. I would like to take you, if I can, to page 52 which is in regards to bridging the gap. In regards to that, we say two things just briefly: the whole idea of information requests, 19.1, of legal insurance is something which the Law Institute of Victoria has been more recently investigating in depth, along with the Law Council of Australia, and our paper goes to say that whereas the earlier model was probably not as well cooked as it could have been, the European experience, particularly in jurisdictions such as Germany and Denmark and the United Kingdom, the advent of legal insurance in today's world, where most people understand that litigation sadly or court appearance is something which is just as likely to happen as tripping over in a person's driveway, is something where that can certainly add to the availability to access to justice, particularly as legal aid space seems to be diminishing.

I would also just like to take you, if I could, to page 27, tribunal consolidation, which is a matter which is really important to the Law Institute of Victoria and particularly which is germane to myself and information request 10.4, which talks about consolidations of tribunals as not feasible. I come from a regional environment, Bendigo, Victoria, one would call the heart of Victoria, but sincerely, we have our courthouse there. It's certainly dilapidated but we have VCAT appearing out of it, we have County Court appearing out of it and we have a number of tribunals appearing out of it. I just want to - whilst we certainly think that certainly there is greater scope for that and it was put to myself by the current person

in the County Court that roughly 25 per cent of his clients drive past Dandenong every day and not so many necessarily go back to Dandenong after they have presented in front of him but sincerely speaking, there is obviously a need in vastly growing city suburban areas for multipurpose court space.

I'm happy to leave a copy with you of a report which was released in February 2014, headline "Out of Sight out of Justice," which is a report by the Wyndham Legal Services Incorporated about having a facility purpose built in Wyndham which would include not only Magistrates Court and VCAT but would also include a community justice centre, a Victorian legal aid office, a police station and a plethora of resources such as for family violence, would have counselling facilities available, would have for residential tenancy matters in which people are evicted housing accommodation services right in the courtroom, which would mean instead of just the traditional court being a place where you go to either receive a sentence or a fine, there will be immediate availability of services which can solve basically people's needs rather than just being a distant step in that process.

Just for your purposes, Wyndham original courthouse emerged from being a former schoolhouse, had 40,000, now has 200,000 people and by 2030 will have 1.7 million people and the Law Institute of Victoria is very much about effective justice rather than sometimes the justice which exists at the moment, so I will leave that there for you. They are some opening remarks.

DR MUNDY: Thanks very much for that. We are particularly grateful for what was a very thoughtful and balanced submission to this inquiry. There are a number of issues you raise which we want to go to but you raise the role of community legal centres particularly in policy reform and law reform advocacy. We understand that the intention now of Commonwealth funding of CLCs is to move to a more service oriented model and out of that advocacy role. Can you see any adverse consequences from that decision if CLCs are no longer funded to provide such services?

MR BOWYER (LIV): Certainly we can because I think the evidence demonstrates that community legal centres have come up - and it's great to have yourself present here today, Helen - have come up with policy positions based on an evident and ever present need in front of them and sometimes the policy deliberations of people in Melbourne, for example, or Sydney or Canberra are very remote and to a certain extent academic. They don't have to face the plight of actual issues about elderly people in front of them which you and I would say, well, gosh, we need to change the law but the process of changing the law, when it gets referred through body after body after body, gets in itself very muted. I can understand without appreciating certain governments want to have a situation where they want to restrict community legal centres from advocating positions which may or may not suit the flavour of a

government of today but I put to you that the very robustness of our legal system and democracy is best based where we have organisations who advocate for what they see as a need in the field and I think community legal centres are far better placed for doing that than any other organisation.

DR MUNDY: One suggestion that's been made to us has been that those activities could be picked up by organisations such as yourselves or the bar councils. Is that a likely outcome in your mind?

MR BOWYER (LIV): It is an outcome but I think it's a sterile outcome because the reality will be this. Let's say, for example - and I will just use Helen as an example. If Helen as a member of our Law Institute of Victoria saw an issue, she would have to hopefully - well, not hopefully, would have to make a representation to our relevant committee. It would then be the subject of deliberation by the committee in Melbourne and Melbourne would then form a view that if there were recommendations, it would make a recommendation to the Victorian Law Reform Commission and then slowly but surely, it would make its way up the tree, whereas the reality is that organisations like Helen or the Loddon Campaspe Community Legal centre are in a position where they have quality lawyers who not only have become proficient at dispensing justice but equally have the great opportunity and motivation to be able to develop law reform in the field and I think that's something which is a more effective justice provision than simply going through a sure but steady but unfortunately slow process of going through centric member organisations.

DR MUNDY: Angela.

MS MacRAE: Would you just have an example? You mentioned in particular the elder care area and some of the reforms that CLCs in that particular field seem to be involved in. Could you just give us an example or two of reforms that might have - - -

MR BOWYER (LIV): So in regards to the capacity at the Loddon Campaspe Community Legal Centre, through the result of having an elder law program where they have a funded lawyer, an aged lawyer, involved in the program, he was increasingly being called to hospitals in regard to the question of capacity and there were certain elements of how capacity was determined which were hitherto not best thought out. They were certain criteria not best thought out, so the Loddon Campaspe legal centre wrote a report about some of the shortcomings of the existing operation of powers of attorney and the instruments and set about suggesting legislative change in terms of some of the protocol required to make decisions about whether a person has capacity or not capacity, because the reality is at the moment that lawyers pay a key role in determining capacity.

They may not have the medical knowledge but they certainly have the experience to determine whether a person has capacity and that resulted in Victorian legislation I think two years ago in 2011, where the Victorian Government adopted recommendations which were founded on the Loddon Campaspe Community Legal Centre policy.

MS MacRAE: Thank you.

DR MUNDY: If I could bring you back to the question of lay advocacy and unbundled services and I must say that your organisation's view of this is somewhat different to those of your colleagues in other jurisdictions but can I just bring you to perhaps the example of town planning. I do have some familiarity with planning matters in VCAT in a former life. Can you just outline for us what you think the benefits of actually lay advocates there are and I guess just reflecting on what you said, you wouldn't expect them to be employed by law firms per se, would you, because they are not at the moment and the fact that they are not doesn't seem to be a problem.

MR BOWYER (LIV): So I mean, certainly in VCAT there, I am most experienced with the lay advocates of planning. Again, because they spend all of their life in the practical field - I mean to say it's not just about being an advocate per se but most of the lay advocates I have known in the planning jurisdiction are actually involved in dialogue with councils, dialogue with state governments about developing - I was going to say pushing the boundaries but developing the boundaries in terms of planning protocols, so they live and breathe that experience and as a result of that, are just as knowledgeable about the legislation; you can argue about the interpretation but certainly just as knowledgeable about the legislation as any legal practitioner, whether he be a solicitor or junior counsel.

Certainly I believe that senior counsel - I don't mean senior counsel in terms of silk but experienced counsel - would have that level of knowledge, but because they are probably more accessible to a client -or in my case where we act for about 16 municipalities within the state including Melbourne, quite often you'll find that council officers will, for example, be trained up to do a range of appearances at VCAT where they either represent the council's interest or in certain instances taking a different view, but increasingly we see a role for that because I don't think there's any substitute for the fact that whether the law is a profession or an industry and there's always debate about that but we say a profession because of ethics, it's about service delivery and accessibility and often it's perceived by many developers and planners because they're in their space daily are better able to produce that service.

DR MUNDY: I understand the issue of council officers attending on behalf of

council. I used to be a senior executive at Melbourne Airport. We had certain planning powers years ago and I used to send my officers and occasionally go myself. But in the case of let's say a small property developer who has got a planning dispute with his local council and he has got a planner that has helped him work up the proposals and stuff and the planner is, let's assume for the sake of the argument, a suitably qualified and professionally recognised individual. Would you see any difficulty with that person then acting for that small property developer in VCAT up against the City of Maribyrnong?

MR BOWYER (LIV): My view about that would be, yes, I would see some difficulties, obviously from a potential conflict position. Note when I say "conflict", he has put forward proposals. Obviously he has to advocate those proposals where as a lawyer whilst he is always going to be in a sense a hired gun, an advocate, he'll generally base his position on his experience over a range of - you know, been acting on one side of the fence as opposed to acting on the other side of the fence.

DR MUNDY: Yes.

MR BOWYER (LIV): So sometimes from my experience, lay advocates tend to be a little bit diminished because they're generally always pro one position as opposed to changing positions. That's an issue for the client to determine. Often it relates to costs as well in a sense because, and we often find this, lay advocates where they're also engaged in the whole planning process are prepared to discount their appearance on the basis, well, it's part of a much bigger fee.

DR MUNDY: And in a funny way what, from a legal services perspective, you might think some unbundled service from a town planning perspective is actually - - -

MR BOWYER (LIV): Very much a bundled service, yes.

DR MUNDY: Okay.

MS MacRAE: You talked in your submission and your opening comments about some work you were doing on a legal expenses insurance policy. We just wonder if there's a level of detail that you might be able to share with us, not here but after the hearing, only because we've received very limited submissions on this, so our feeling was, and you might be able to comment on this today, that we couldn't find any barriers as such to that sort of scheme being run in Australia, so there's no sort of policy barriers but there seems nevertheless to be real difficulty in establishing such a scheme.

We did hear from the individual in Perth who had previously tried to establish

a scheme in Australia and had failed, although he runs a very successful scheme in South Africa, so I'd just be interested in your views about whether or not there were policy concerns and anything you've come across in the work you've done so far and I guess to the extent you have progressed the work, whether you think there is a realistic possibility of a scheme being developed that may be successful in the Australian context.

MR BOWYER (LIV): Certainly. In terms of the latter question, we are obviously a constitutional body of the Law Council of Australia. This idea or this concept was raised at one of our meetings of the various bodies of the Law Council of Australia, solicitor bodies, raised by South Australia interestingly enough, but we as a Victoria state body have looked at the idea and our legal policy and procedure division has been working on the idea and has started to sound out several insurance companies about it. We see it as an approach where it can't be a stand-alone policy. I don't think it will have any legs whatsoever.

The Australian mindset is, generally speaking, "I'll insure the house and I'll insure the contents" or as this poor unfortunate didn't do, I didn't insure my camera and my zoom lens which I lost about a month ago, but "I will put add-ons to policies if I see that there is some prospect of a need of the policy," so public liability is clearly one of those add-ons which increasingly goes on and we are in the early stages of discussion with a couple of major insurers about the prospects of it being an add-on to the policy. So it will go on to the normal home insurance policy and we'll have a legal insurance box side, a bit like public liability, a $20 million public liability policy, which will have a small cost associated with it but to use your expression, it will be bundled into a larger policy. Provided we advocate it and provide the insurer advocates it, it will work.

It's just interesting today and it's related but not related, but pretty much directly diagonally opposite our Law Institute of Victoria is the RACV building and they make significantly more money out of their insurer association than they do out of roadside assistance and those other products. So they've bundled part of their service offering into insurance opportunities which have paid immeasurable benefits to them. So in regards to your earlier question about the policy, we certainly have developed policy on it and if I get the email details later, I will provide that dialogue back to you.

MS MacRAE: Thank you.

DR MUNDY: So really it's, and I should probably declare at this point, I'm a member of the RACV.

MR BOWYER (LIV): As I am.

DR MUNDY: Yes, I think most people, sensible people, are. So it's really an issue about, from an economist's perspective, some peculiar characteristics about demand.

MR BOWYER (LIV): Yes.

DR MUNDY: It's something about the consumers of these things. It's a bit like how many of us will take $20 million of public liability insurance if it wasn't tacked on to the home and contents policy.

MR BOWYER (LIV): Absolutely. It has certainly been the experience in Germany. Our chief executive officer Mike Brett Young was over there last year with other CEOs from other law societies. There the legal insurance model has been successful because it goes beyond the normal insurance of - you know, litigation insurance. It even extends to divorce, for example. You might say, why should there be funding of a divorce? From an access to justice point of view, for a lot of people who have got limited reading ability or a limited knowledge base or cultural base, having ability to have a divorce policy may in fact be of significant assistance in terms of moving their life on in terms of many ways.

We formed a view about legal aid generally I suppose that front and foremost in people's minds are the obvious things which happen to them. Everyone is going to get sick. Everyone is going to need education, but we don't think we're going to need legal assistance in our lifetime. We don't think we're guilty of any crime or any misdemeanour. We don't think that it's likely someone is going to run into us or cause us harm or injury, but the statistics say otherwise. So we think provided it's bundled with events which are front and foremost in people's minds, it's more likely to be brought to their attention.

DR MUNDY: Have you given thought to how this insurance arrangement might work for those people who don't have home and contents insurance and these are people who are probably more disadvantaged but increasingly people choose not to be homeowners? Have you given any thought to see how those people may be covered?

MR BOWYER (LIV): In that regard certainly, I'd hate to think that home ownership is out of the reach of a significant minority of Australians but the reality is it probably is. Most people these days are considering having at least a level of contents policy or a life insurance, some level of personal accident or life insurance policies. Increasingly the people who often are, a hitherto unrecognised group of people, falling into this access to justice issue are people who are actually employed. They may be earning 50 or 60 or 70 thousand dollars but are never ever going to qualify for legal aid or assistance in any form or fashion. At least most of those

people will probably have a need for some level of insurance but to the extent that you've got people who are unemployed or people who are imprisoned or the like, clearly that's going to be a gap - you know, this sort of policy won't cover, but we think it's one of the tools which may improve access to justice.

DR MUNDY: You mentioned previously the issue about remuneration for private lawyers doing legal aid work and you provided some quite useful data on that front. I guess there's two things to start with. Is this a problem primarily for criminal matters, or is it to the extent that legal aid provided for civil matters in issue there as well, and then secondly, you know, how should this be fixed. To the extent that scales still exist, should it be 80 per cent of the scale or how could one systematise this so then presumably it would become a basis - so it then could become a basis for funding?

MR BOWYER (LIV): Well, in an ideal world, and I'll talk about scales in a moment, but in an ideal world it would be pegged to a recognised form of remuneration which is what scales are meant to be and in the earlier stage of legal aid - and I'm showing my age here, but when I first entered practice in 1979, the first four or five years of my life I was most certainly involved in legal aid matters and there was not a large gap between what the costs which were awarded by a court for an appearance was as opposed to what was awarded for legal aid.

Equally, the preparation costs of a brief or appearance fee were broadly in line with the scales which were awarded for private practitioners. Increasingly over time - and I'm not here to say anything which is unrealistic - as Victorian Legal Aid or legal aid bodies have felt the strictures of funding they have increasingly had to tighten those proposals. But talking about the scale of costs generally, one of the things which we have noticed is increasingly clients, whether they're sophisticated clients like corporate organisations or normal clients like mum and dad clients, are even concerned about scale costs because at one sense when they go and see a lawyer, if I said to you, "Yes. Well, I'll act for you in a part 4 application of the Administration Private Act and I'll charge you scale costs," what does it mean?

What does it mean? Does it give any sense of security to a client that he has an understanding of what those costs are? Equally, they don't want to be subject to a taxi meter which is what time billing offers most clients. They want to have a level of certainty. So at the Law Institute of Victoria we're looking at an alternative billing project where we start to educate lawyers, and cost complaints represent 40 per cent of all complaints against lawyers so it's a significant issue, about alternative means of billing.

The best example I can give you in that regard is we say to solicitors, "Look at a housing contract." A housing contract is made of staged charges. So you pay so

much for preparation, so much for foundation, so much for frame, so much for lock-up, practical completion and the like. Why can't we start to project manage, in a sense, how costs are. Now, you might argue, well, why don't we do that. One of the issues is that lawyers, and I think the universities have a role to play in this, have not in any way been involved in a conversation about the fact that lawyers actually do cost.

Naturally most of us want to have our graduates of good black letter law skills, but increasingly we're wanting to look at lawyers who have a greater level of understanding about real life practice. So in that regard we're looking at establishing a pilot scheme where there will be clinical, practical clinical education of undergraduate students aligned for a law firm from the very first day they enter into university, similar to a medical program or physiotherapy program, and we're currently in the stages of establishing a pilot with a well-known Victorian university to start that process.

So that the whole costing explanation or understanding will become understood to an undergraduate from the earliest days when a client comes in and says, "Yes, I've got to go court. I've been charged with such and such a matter. It's a pre-committal mention," and they will be present when that conversation is had, so as they work their way through law school and black letter law they will also at the same time have an understanding about the practice, the real-life practice of law and the need to treat your clients as consumers as opposed to separate clients.

DR MUNDY: The Chief Justice of Western Australia on Friday suggested to us that it's possible to build a 35-storey building on a fixed fee, so it should possibly be able to run some forms of litigation on a fixed fee as well. The other issue that his Honour raised with us when he very generously gave us some of his time was around the issue of information to consumers. We've made some proposals which I think have been slightly misunderstood, but what we have in mind is some notion of a web site that supports data which provides a range of costs that consumers could expect to encounter for quite typical matters. We're not talking about, you know, Fred Marr charges this and Harry Bloggs charges that, but just a range of quite common matters.

His Honour was of the view that this would not only facilitate access to justice and remove uncertainty, but would also, you know, I guess to some extent will give consumers at least some idea of whether they go to deal with a matter they're looking down the barrel of a couple of hundred dollars or tens of thousands of dollars. Is that something that your organisation is comfortable with, or would be comfortable subject to certain caveats?

MR BOWYER (LIV): I think our response at page 7 said that we considered a

centralised online resource on typical legal fees would be difficult to develop due to differing types of legal matters. So that's a challenge. Our view is not that it's not a good idea, it's a challenge trying to - if I could use the word, horses for courses approach to it all. But certainly, I mean, the more we can educate clients about indicative fees is the issue. What we want to get away from as a Law Institute position is a range of fees. Right. "Because we can do this between $5000 and $25,000, depending on a range of variables," and clearly clients generally from my experience always say, "$5000 is what it's going to cost me," and then as those variables roll along, that's when the cost conversation becomes difficult.

So we would certainly support a centralised system but we think incumbent upon the lawyers has to be a much clearer and transparent conversation about how we charge and how it's likely this case may unfold, the various traverses along the way of litigation and how they do have a variation like a building case where if we hit hard rock instead of that soil report that said it was beautiful loamy soil, then, you know, if we have to bring in experts or join third party proceedings, et cetera, we can give indicative costs of what a third party proceeding might cost.

DR MUNDY: We make a number of propositions about disclosure and, I guess, moving off time based billing which a lot of people think is not a tremendous idea, so that discussion about alternative billing strategies and structures is something which the Law Institute of Victoria is already pursuing and tried to put in place educational frameworks and stuff to take the profession on the journey.

MR BOWYER (LIV): Yes, and we're looking at it from a point of view - obviously we're trying to get funding because we've got limited resources like everyone else. So we are in the process of trying to get funding and we've made applications to the Legal Services Board and we're about to consider other alternative sources, but our view is that as a member body of the Law Council of Australia, if we can get a pilot up - and it's got to be a measured scheme, so it's not just about information dissemination. We want to be able to do a project over say 50 law firms and go through that project and see from the Legal Services Board statistics a drop in the number of complaints about the types of fees charged so that there's empirical evidence that such a project would get results.

But we do believe that it's a bit like mental health. Mental health doesn't come about in our profession once they walk through the law firm, it comes back much earlier than that when they go through the whole journey of university and we're saying that if lawyers can understand that the service of law is just like another provision of a consumer service and that price is a necessary discussion early on in the discussion as opposed to, "Yes, I better bill," then it's more likely to have a positive result.

MS MacRAE: Would you like to comment generally on how the complaints mechanism works in Victoria? Do you think it's a good one, and are the checks and balances adequate?

MR BOWYER (LIV): The complaints mechanism in Victoria as it currently exists at the moment is a twofold process. The Legal Services Commissioner is the major forum for complaints, and speaking to the Legal Services Commissioner as recently as last Wednesday, there's been a significant drop in a number of complaints in Victoria. That's not a reflection necessarily of the fact that lawyers are doing a better job, although I'd like to think that was the case, but it's more about the Legal Services Commissioner engaging a number of employees, some former Law Institute of Victoria, who can broker a mediation approach to how the fees are structured and certainly from that mechanism there seems to be positive results, the Legal Services Commissioner.

Consumers also have got the ability to go to Victorian Civil Administrative Tribunal and 40 per cent of legal complaints actually go to VCAT because I think interestingly enough more and more of our clients see law as another consumer activity, which I'm trying to get - whilst we've got ethical obligation, I'm trying to see our body of lawyers to understand that we are providing just, in a sense, a consumer service. VCAT also has had through its mediation processes significant inroads in that. But really that's the delivery of the medicine. We want to try and get at the forefront and try and address the root causes which are, we think, better conversations and understanding between the consumer and the lawyer about how costs work in terms of any litigation or any activity.

MS MacRAE: So do the rules around disclosure of costs then, are they not working?

MR BOWYER (LIV): They certainly are working in the sense that if you don't give proper disclosure in Victoria you can suffer significant penalties, including professional misconduct. So that in Victoria we have a threshold where a cost disclosure statement has to be given which is - correct me - but I think it's in the order of $700, and if any service under $700 you don't. We recommended to our members, so for example preparation of simple wills, we believe every activity we do should have a cost disclosure statement. Right.

Because that way, at least, you're on the front foot, but if a lawyer doesn't have a cost disclosure statement and if that lawyer was using a time cost basis then he is going to automatically as a result of not having a cost disclosure statement find himself in a position where he's on a court scale level of costing which may in turn result in a lesser charge or a lesser assessment than what he's charged and leave him open to a misconduct claim.

DR MUNDY: These cost disclosure statements, it's been suggested in some jurisdictions that this is a bit of a con at the end of the day and they're described as the old product disclosure form for financial services or a mobile phone contract. Are they, in your mind, documents which are relatively simple for the average user to understand, or do you need at least two degrees, and preferably one of them in law?

MR BOWYER (LIV): Well, I think, you know, they're somewhere in between is true. Generally cost disclosure statements are one size fits all. So if it's a sophisticated client or an unsophisticated client, really from my experience as a practitioner I don't see a lot of degree of difference in them. So from my experience, and I think from the Law Institute of Victoria's experience, where we're trying to get lawyers to is saying, "That is the starting point of a conversation. That's a not negotiable. You've got to have that engagement letter and a cost disclosure statement." But, as they say, there's much more if you're going to have a client who's reasonably comfortable about where costs go.

DR MUNDY: Let's say, you know, I'm a business that employs 50 people in Bendigo, I've just built myself a new factory, I've got significant issues. The factory cost me 10 million bucks to build, I've got some significant issues with the builder. I come in, see you. Your cost disclosure statement is two pages or 50?

MR BOWYER (LIV): Firstly, I never give a cost disclosure statement as soon as they walk in the door.

DR MUNDY: Yes. But at some point.

MR BOWYER (LIV): Yes, at some point.

DR MUNDY: How big is it?

MR BOWYER (LIV): Yes. Well, our base cost disclosure statement is five pages, and you're right, but there are parts of that which talk about obligations to do this. There's parts about the rights of a client for the various complaint mechanisms he can go through. Then there's information about how - the range of fees and the basis of how those fees are charged. So, for example, if I've got a senior lawyer we'll either use - if we're going to use an hourly rate we'll put his hourly rates, if it's a PA, we'll put her hourly rates, or if we are going to go by scale we will refer them to the Supreme Court scale.

But in a sense, if that's all you do, then from a consumer point of view that's probably not enough because you're probably going to have a sort of quasi cost

lawyer's degree in understanding how that scale works, aren't you? So that's why we talk about from our perspective, and again it's our firm's perspective, about typical cases. So if it's a County Court case which is less than $1 million we talk about the various stages so that, "If after this meeting, if you're inclined to engage us, there will be a cost for us to basically take instructions," and I always say to them, "Junk in. Junk out. If you can prepare proofs yourself and give it to us, if you can give us information in a digital medial form properly indexed, well, that's work we don't have to do," et cetera.

We give them a fee for what the initial instructions and advice will be. Then we say, "For your insurance purposes we recommend a counsel view on this. We think we have a reasonably sanguine view of where the law is, but we'll go to a barrister for an opinion on the merits of the claim which will be" - because he has a cost disclosure statement - "such and such," and then we take them through the various elements of preparing.

DR MUNDY: So you give them some sense of how much - - -

MR BOWYER (LIV): Yes.

DR MUNDY: - - - of these different bits you're going to consume.

MR BOWYER (LIV): Yes. Then we say, you know, "The only certainty of the proceedings is the uncertainty of the result. So that's why we suggest you enter into, you know, a process where you may be offered a sum which is less than you think you're entitled to, but there are significant costs," and we talk about the daily costs of engaging counsel and solicitors to attend, court fees and the like.

MS MacRAE: A lot of that level of detail is your own good practice and not a requirement of lawyers.

MR BOWYER (LIV): That's exactly right, but it's hard to get one size fits all, but I suppose the only thing is, and again, I think from our institute's position is the cost of a lawyer of a complaint to that firm is immense in terms of the time to basically reconstruct the file, hopefully he's got file notes, hopefully he's got, you know, good details of all conversations, et cetera. It's all energy going backwards. You've got a disenchanted client who will talk about his ongoing saga with the solicitor, it's not likely to get you any more work.

DR MUNDY: We are running out of time, but there was just one final issue I think we probably would like to bring you to and that's the issue of court fees which has attracted us some notoriety. The realities as we seem to think - see it are these, you know, Magistrates Court here in Victoria recovers about 50 per cent of its costs, the

Supreme Court gets about 20 per cent. So I guess putting that aside and again I think we may have perhaps not helped ourselves in our initial drafting, but I presume it is not the position of the Law Institute of Victoria the court should be free, so it therefore begs the question of who should pay for what.

Do you have any views about how we should think through that? I mean, our motivation in doing this was twofold, one was to present appropriate incentives to parties to behave in an efficient way, and the second was perhaps a slightly more vain hope which was perhaps we might be able to raise a few more bucks for the courts who seem a bit short of dough.

MR BOWYER (LIV): Well, certainly in regard to the last comment, speaking to the various heads of jurisdiction, their view is that they like to see any court fees charged going back into the system, so that not only does it pay the costs of operating a court but it may well - some part of that may be provided to assist people who are unrepresented and the like.

DR MUNDY: Yes. Improved technology for the benefit of everyone and all that stuff.

MR BOWYER (LIV): Yes. You've got the competing case of governments, and I can only talk about Commonwealth governments who, particularly at Federal Court level, and Law Council of Australia certainly have taken very strong views in this, have raised fees towards increasing cost recovery so that the cost of a government person is less. Our views are that really when we talk to clients, again from a third point of view, we talk about Medicare and private insurance, all right, that if you go to a GP and you've got private insurance you'll get maybe 60 per cent of the fee back and you'll be 40 per cent out of pocket.

But that's not going to help the underprivileged, absolutely unprivileged part of the community and we certainly strongly support - and in our submission we've made that case, there should be significant fee relief for people who are in need. The question always is, the $64 question, who is in need, and that goes back to the eligibility criteria and we have listed on page 47 eligibility for fee waiver where we say legal aid for health care, pensioner concession card, seniors card, Department of Veteran Affairs, et cetera. I mean, I think every child under 18 years of age in receipt of Youth Allowance or Austudy or under Abstudy, we think those sorts of things are not negotiables. What we're absolutely opposed to is a HECS type system where effectively that gets added to your taxation bill.

DR MUNDY: I don't think we're particularly - the issues we're having are not with the needy.

MR BOWYER (LIV): Yes.

DR MUNDY: I guess the question, you know, the Bell case in the Supreme Court of Western Australia cost that court $15 million and they didn't get a fifteenth of it back, and that was a dispute between a pile of banks and a couple of insurers. Now, it doesn't seem to me that there was over $14 million of public benefit attached to that litigation which couldn't have been recovered from well resourced parties. So I guess what we're trying to think through - and I'm not meaning the poor and the dispossessed where the issues really lie, it's the half a million dollar dispute in the County Court between two companies.

How much of that - you know, and let's say it takes up five days of the court's time and, you know, judges come at three grand a day or whatever they do and the court, how much of that dispute should the tax payer be subsidising, or at least what should the principles in that be?

MR BOWYER (LIV): Well, there's very much competing principles and clearly I mean from a state or government perspective, their view is, whether it's Victoria, Western Australia or Commonwealth, we want a place where it's good to do business and if the costs of running litigation are far too high from a court perspective, then clearly having a jurisdiction in Malaysia or Hong Kong or the like are going to be significantly seen as beneficial. I think it's very dangerous from a perspective of saying, well, business should necessarily pay for it, because you're right on one hand they may have more capacity, but equally they have far more greater capacity as to where they source their business for the future.

I think that's a cost for the government of the day to accept that. The whole plethora of administration adjustments will touch various elements, but I think there's significant risk in loading a business model because - a case in point is, for example, mediation or arbitration. In Victoria we're trying to develop an arbitration model, an arbitration hub. We've recently had - basically launched a facility, Melbourne mediation and arbitration centre. We're trying to argue Victoria is a good place to have arbitrations because we can do it effectively, relatively efficiently, and the whole culture of an Australian based jurisdiction is something which should attract businesses.

But there's lots of competing countries who are light years ahead of us in that space, Singapore, Malaysia, to name two, who have really captured a large segment of a market and it's not only do they capture the litigation market, but they also then capture the hearts and minds of those corporations who are saying, "This is a good place to do business. Why are we not there," which in turn results in additional employment and the like. So I understand the noble aspirations of what you're trying to do, but I think it's got to be seen in the broader context of doing business in

Australia.

DR MUNDY: All right. Okay, thank you, Mr Bowyer for your time today.

MR BOWYER (LIV): Thank you.

DR MUNDY: We'll adjourn these proceedings until 1.35 so Commissioner MacRae and I can have some lunch. Thank you.

(Luncheon adjournment)

DR MUNDY: All right. We'll resume these proceedings. Could you please state your name and the capacity in which you appear, and then perhaps give us a brief five, but no more than 10-minute opening statement.

PROF NOONE: Thanks very much, Commissioners. My name is Mary Anne Noone, and I'm a professor at the law school of Latrobe University.

MR NOBLE: My name is Peter Noble. I'm the executive officer of the Bendigo based Advocacy and Rights Centre that operates the Loddon Campaspe and the Goulburn Valley Community Legal Centres.

DR MUNDY: Okay. We're in your hands.

PROF NOONE: Thanks very much for giving us the opportunity to speak to you today, Commissioners. My career, I guess, has been focused on access to justice and I've been involved in various parts of the legal assistance sector for a long time. I've certainly been involved in community legal centres for well over 30 years. I was on the board of Victoria Legal Aid for some 12 years and of interest also to you may be that I teach a subject called dispute resolution in the law school and the professional ethics subject. My research and teaching has been involved in access to justice and my passion, I guess, is how to improve access to justice, particularly for the poor and disadvantaged and different aspects of my research have addressed that at different stages.

I am also engaged in encouraging law students, usually through clinical legal education, and so I endorse my colleague Adrian Evans' submission in relation to that, but through clinical legal education, to be lawyers who actively engage in improved access to justice. Clearly the commission's terms of reference are wide and varied and these are issues that over decades have engaged numerous inquiries. The one first that I was probably involved in was way back in 1992 where the senate looked at the high cost of justice, and when I looked at your report, many of, you know, the chapter headings were not dissimilar from those in that inquiry. Of course, the more recent one is the Australian Law Reform Commission's managing justice.

These are perennial issues and as you've come to grasp, access to justice is a complex and a difficult concept to implement. I've addressed several issues in my submission and am happy to take any questions at length. I just would like to make a few specific comments. The first is in relation to, you know, in trying to respond to this question of how to improve access to justice I endorse the commission's approach which is an evidence based, you know, policy approach.

I think that the idea of trying to identify an issue, a problem, to then select the best solution to that problem, but then to canvass who is going to provide that

solution. So it's not thinking about the providers initially but to think about where and who might provide that solution best. So that's a concept I think, you know, plays out in your various recommendations and I endorse that.

Just to stress again, given my lengthy experience in the sector and involvement in the, you know, range of international endeavours in relation to legal laid, I certainly would like to stress that I think the Australian mixed model of legal assistance provision is basically a sound one and that it offers a way of having a variety of responses and appropriate responses to the various issues and needs of particularly the poor and the disadvantaged. I think that within recent times within the legal aid sector there's been a greater focus on the issue of identifying need and then setting clear priorities and again I would suggest that that's an approach that we need to endorse and encourage, but it needs to be done collectively across the legal assistance sector.

Two particular matters that I've raised in my individual submission and that is addressing the increased use of mediation or dispute resolution. I am currently involved in several research projects where we're trying to assess whether there are benefits in the increased use of mediation and again, particularly for those who are poor, illiterate, disadvantaged, and from that research it's coming through clearly that in order for mediation to be an appropriate dispute resolution method for those groups of people, there needs to be proper intake processes and there needs then to be available access to legal information, advice and support. So I guess in saying that, it seems to me it's important to recognise that mediation is not necessarily going to be a cheap option, particularly for the poor and the disadvantaged, but if they're going to be able to participate fully and for that to be successful then it needs to be adequately resourced.

Then the second aspect which I've referred to in the submission was the innovations that are occurring within the sector and, in particular, the innovation related to what in Australia we're calling advocacy health alliances, but you've mentioned in the draft report, you know, the idea of medico-legal partnerships. I guess this is how that evidence based approach that I mentioned before plays out, you know, the law survey shows clearly that people go to other people other than lawyers for assistance. So they go to doctors, they go to local government, etcetera.

So I think that we then need to say, well, if that's where people are going, how can we best provide services in those locations rather than trying to get individuals into lawyers' offices. So there's a group of us working on this idea of, in particular, the integrated legal and health services and Peter and I are here particularly to talk about that. Obviously any integrated services requires the support of many different levels and that includes government, so the idea that, you know, funding sources could be, you know, multiple funding sources, but government agencies obviously

need to work together.

The organisations who might be working together need to also engage staff. You know, it's not easy. You've got different disciplines working together and clearly clients need to want those services as well. So I might allow Peter to make a few comments.

MR NOBLE: So I have been associated with the community legal sector for the best part of 17 years, initially as a volunteer and then as a legal practitioner. In 2005 I joined the Loddon Campaspe Community Legal Centre, which is based in Bendigo, as its principal lawyer and carried on that role for approximately six years. More recently I've become the executive officer of the Advocacy and Rights Centre, and just to explain the relationship, which I think is an important part of the submission today; Advocacy and Rights Centre is a company limited by guarantee that operates over a large part of northern and central Victoria and operates not just the Bendigo based Loddon Campaspe Community Legal Centre but the fledgling service in the Goulburn Valley, the Goulburn Valley Community Legal Centre, which has three lawyers and an administrator.

It also operates a housing advocacy program. So through that corporate vehicle we're able to operate a number of different services of a similar nature but across different localities and therefore make substantial savings and so on, on the back end. One of the reasons why I'm attracted to that model is because I'm interested to see how we can do our work more effectively and efficiently, and that's another reason why integrated legal service delivery appeals to me and to our service and has been one that we have pursued.

The Clayton Utz Foundation have supported research into medical-legal partnerships, or as Prof Noone has now described them, advocacy-health alliances, and on the basis of some work done by myself and our service a number of years ago, we've been able to generate I think a not insignificant amount of interest in that integrated approach and seeing how we can deliver legal services in a health context to pick up the types of target groups that we should be really focussing on as community legal services but that we frequently miss, because as the law survey says only 16 per cent of those people end up coming to see a lawyer anyway.

On the basis of that we have more recently commenced a pilot again with the financial support of the Clayton Utz Foundation, in partnership with the Bendigo Community Health Services and targeting children who are serviced by their Child Health Invest team. So particularly young people with learning issues who might need some particular assistance either themselves or their family might need particular legal assistance.

To provide the Commission with some just brief background about the work of the service, I've prepared a supplementary submission that just describes some examples of the work that we provide, some basic statistics and then examples of the law reform work. If I might also say, one of the reasons why the medical-legal partnership or advocacy health alliance model appeals is because it recognises that some of the best preventative work that can be done is policy work, and no doubt you've received submissions to that effect from the community legal sector at length.

But I wanted to just pick up on a number of things, one was the research work done through the advocacy health alliance's report that demonstrates the value of integrated services, and I have copies of that for the commission. Another flows out of the 2006 parliamentary inquiry by the Federal Government into the legal needs of older people, and one of the particular findings of that inquiry was that the Australian Government work in cooperation with the banking and financial sector to develop national industry-wide protocols for reporting alleged financial abuse and develop a training program to assist banking staff to identify suspicious transactions.

On the back of that our service led ground-breaking policy research into the veracity of the legal barriers that affect banks and financial institutions responding more effectively to the financial abuse concerns of older people, and that has in many ways influenced the financial services sector to create voluntary educational materials for banks to respond to that. The last policy issue that I wanted to mention flowed out of our evening advice service, and that's how the best policy work done by our services arises is from direct case work experience, and that was through the experience of David and Julia Rosewall who were - David in fact was a financial planner in Bendigo and you would immediately think, "Well, that's not our target group, is it?"

Well, David and his wife had exhausted all avenues of assistance to try to be able to manage the affairs of their missing son, Daniel, who had bills to pay and rent to pay and mail to take care of and so on, and they were at their wits' end not having a power of attorney to be able to operate under or be able to apply to the VCAT for the appointment of an administrator. They'd been to their local member, they'd been to private lawyers, but they were hitting brick walls about what they could do.

When they came to our evening advice service we advised them of the law, which was that there was very little that could be done, but that we wanted to take it up as a law reform issue because there was a clear gap in the law in Victoria, whereas two other Australian states had specifically legislated to enable the families and friends of missing persons to apply to be able to manage their affairs in their absence, Victoria had no such provision. So with bipartisan support, within the matter of about four months, legislation was passed through the Victorian parliament enabling applications of this nature to be made in the VCAT. So they're just a

snapshot of some of the policy work that we've been able to do in the last number of years, and if I might provide these further materials to you.

DR MUNDY: Thank you. We will take them off you when you're finished.

MR NOBLE: Thank you.

MS MacRAE: Well, you'll be pleased to know that our previous participant from the Law Institute of Victoria spoke very highly of your particular CLC and gave us some other examples of work that you've done in the elder care space, so that's very useful. Could you just explain to me, and it might be that I just didn't pick up the detail, but was it necessary for you to set up the Advocacy and Rights Centre to have the legal structure to allow you to provide certain services in that integrated service setting or not?

MR NOBLE: No, I think is the brief answer.

MS MacRAE: No, okay. Sorry, I might have misunderstood - - -

MR NOBLE: No, so that was just the legal entity or legal shell. But what you often see with community legal centres is that they are either stand-alone organisations or they are part of very large multi-program centres, like an Anglicare or a - what's some other examples. Anyway, that's a classic example. Advocacy and Rights Centre is only a two million dollar organisation, it's a relatively small not for profit, but it's larger than a lot of stand-alone centres.

MS MacRAE: Right.

MR NOBLE: It is able to operate a number of different services through that corporate shell, but all of a similar nature. I suppose it could in its own right take on some sort of health service, but really the model that we were trying to pursue was for the legal centre that came under ARC's umbrella to partner with a local health service, just as West Heidelberg Community Legal Centre partnered with Banyule Community Health to improve accessibility to legal services in that health environment.

MS MacRAE: Right, okay. I just wondered because we're quite interested in the institutional structures, so I just wanted to make sure I had that right.

MR NOBLE: Yes.

MS MacRAE: Could we come back then to you, professor. You noted in your submission that the mandatory nature of ADR sometimes gave bad outcomes and I

wonder if you could just comment a bit more on what made those particular cases inappropriate for ADR and what were the features of those things that made it inappropriate and whether - you know, we make quite a - well, we say some pretty good things about the extension of ADR, but that there are concerns about it maybe going too far. So if you could comment on that.

PROF NOONE: Well, I agree that I think there's a lot of positive aspects of ADR. But as with many innovations, I guess I'm coming to this from the position of those who are least able. So whether they're poor, whether they're illiterate, whether they have some other issue about their capacity. It's how the innovation law addressed - because those people have been shown, and the data is clear, to suffer most if you like within our civil justice system and justice more generally.

So how do we make sure that any innovation is going to adequately address those people, and I first was alerted to this issue I guess by my involvement with some people from the Consumer Action Law Centre, and you have submissions from them and I think they're appearing as well. Because they've had this experience, and they'll talk in great more detail about it, whereby if somebody has - so somebody who has in a sense been pressured into signing a contract, whether it's a mobile phone, whether it's a car, whatever.

They default. There might actually be some legal grounds, maybe the contract wasn't valid. But even if that's not the issue, even if there's an issue about the repayment, getting those people back into the room with the same person that might have pressured them into signing the agreement seemed to me just to be flawed from the beginning. So what we have done, we've gone and talked to something like 21 experienced and expert mediators and we presented them with a range of scenarios, and a scenario not dissimilar to what I've just described.

All those mediators' responses were basically, "Well, this would never had got into the room, because we would have done a proper intake, we would have checked out whether this person was able, willing to be involved in this mediation, and if they were then we would also have asked them, did they have proper legal information. Had they had access to some legal advice." Because there are legal aspects often too in particular consumer disputes, that people may decide they don't want to pursue, but they need to know about them before they can make that informed decision. So it's those aspects I'd guess that I'm most concerned about.

MS MacRAE: Yes, okay. One of the other issues that has come up fairly - well, more regularly than we were anticipating, because we thought that wills and probate and those sorts of issues were sort of almost outside the terms of our inquiry, because we were regarding them more as transactional issues. But it seems that from a number of the participants that we've had for this inquiry that quite a lot of those

issues go immediately to the Supreme Court, when it would seem that there might be alternative mechanisms that might be more appropriate, and we were thinking about more use of ADR type arrangements there, and so I wonder if you would have a view about that?

PROF NOONE: Well, I agree again, I think ADR is generally a good alternative, and not necessarily an alternative but a primary dispute resolution. So if you take the model of family law where mediation is described as the primary dispute resolution. So it's not alternative, it is just the way that you do things. Again, I think the way that family law has dealt with a range of these concerning issues is that they have - you know, that's one area for instance where there is legal assistance available. So if you were going to set up a scheme of sort of dispute resolution that's different from the alternative, I think we just have to recognise that the same issues will apply there for illiterate disadvantaged. They need access to information, advice, support if needs be, before they go into those forums.

MS MacRAE: You also expressed strong support, and I think we'd have to say it's been near universal in our submissions about the mixed model of provision of services. One of the issues that comes up there is the increasing gap between what private lawyers actually charge and what they're actually paid for under Legal Aid. What would you see as the best way of setting up a relationship between those rates, that might be the commercial rates of lawyers and what the scales or the payment might be? What sort of reference should the Legal Aid Commissions be making in terms of what they would pay lawyers that they take on for particular cases?

PROF NOONE: I think there's a couple of preliminary issues in that question. The first might be, "Are the rates that lawyers are charging privately realistic? Are they fair, is that what we want to measure it by?"

MS MacRAE: Sure.

PROF NOONE: So that's the first question. The second aspect of it is that - and I do endorse the mixed model. But I think there is scope to look at the arrangements within the mixed model and I think there's - you know, you have one table in the draft report about how grants of Legal Aid are divided between private practitioners, in-house counsel, etcetera, and I can't remember off the top of my head but, you know, data that I've looked at that over the years shows that there's a great deal of variation between the Legal Aid Commissions about what percentage of the Legal Aid dollar goes to private practitioners and goes in-house, and I think that's been an issue of controversy in the legal assistance sector from sort of the 1970s onwards.

So it is one of tension, but I think it's one that needs constant review and reflection about what's (indistinct). Again, and I come back to that question, "Well, if

direct legal representation is the best way of addressing a particular issue" - so we've already jumped a couple of steps, but if that's the best way of - "Who is the best person to provide that? Who and where?"

DR MUNDY: I think the Chief Justice of WA suggested to us on Friday that if you happened to have a civil matter north of Geraldton, it will be no-one.

PROF NOONE: Absolutely. Exactly, and so there are - - -

DR MUNDY: Until you get to Broome.

PROF NOONE: Yes, that's right. So the market of legal services provision hasn't catered adequately for people in particular areas and groups of people. So to rely solely on that sort of - you know, we can't rely on the market, we have to rely on some sort of intervention. But we want to maintain private practitioners' involvement in the scheme, because they are critical for a whole range of things, for balance, for internal tension almost, because that actually, I think, is quite a healthy thing.

It's problematic at different times, but it's a healthy thing. In terms of the actual fee, that's got to be a matter of negotiation. But I do think you start by saying, "Well, maybe what the private practitioners charge now is not necessarily the fairest fee," and so - and remembering that when Legal Aid began the rate was 80 per cent of the standard rate.

DR MUNDY: How do these issues play out? I mean, the country between Geraldton and Broome is probably a little bit different to Bendigo, Shepparton, and that's perhaps - if you like - a bit more normal, and perhaps give us a better sense of things up the coast of New South Wales round Dubbo, those sorts of places, up the Queensland coast out to Toowoomba. So that you're probably in a more typical rural type area. Do you experience the same difficulties with the provision of Legal Aid by private practitioners in those areas?

MR NOBLE: Well, there are certainly some areas of Legal Aid work that certain practitioners choose not to do, either because it's not rewarding them enough or there are other, perhaps conflicts, that they don't want to embrace. So for example in a small rural community, it may be that a small practice doesn't want to take on a family law dispute, because they think it's more advantageous longer term to, for example, represent a man because he's going to remain on the land or keep working that land to the cost of representing a woman typically in a family law property dispute, and therefore there will be an unrepresented person there or that person might have to go further afield for assistance.

Our service provides a large amount of assistance in the family violence arena. I've provided some statistics about that. But it's a very large proportion of the court based work that we do that is not particularly attractive to the private profession, and so we now deliver that service at, I think, eight courts in regional Victoria. That's an example of where there's a service gap. You'll sometimes hear community legal centres say, and I agree with this as well, that they shouldn't be Legal Aid on the cheap.

So really, my only other comment is that while there might be a gap in work that could be filled or could partially be filled by community legal centres stepping up to the plate in that mixed model. I think you've also got to be mindful of remuneration rates for community legal centre lawyers, which again are below Legal Aid. So there would just be some parity issues there to be addressed.

DR MUNDY: They're below the rates paid to Legal Aid's own lawyers - - -

MR NOBLE: Lawyers, generally speaking.

DR MUNDY: Or the rates paid by Legal Aid to private practitioners or both?

MR NOBLE: No, well, I don't know about money paid to private practitioners by Legal Aid. But certainly Legal Aid's own lawyers. But then again, there are different expectations in terms of the amount of appearance work, for example. So by and large, Legal Aid's lawyers will be doing that acute, court based representation work and it's a different mix of work done by CLC lawyers.

DR MUNDY: And in a rural and regional setting where there is a conflict, and let's say it's the woman who would normally be Legal Aid funded, but for whatever reason a practitioner can't be found and the CLC lawyer steps up and does the job, do you receive the funding from Legal Aid to do that work?

MR NOBLE: No. We're already funded to provide a level of assistance, and we'll agree our targets in advance, and part of the objective of that mixed model is to provide greater coverage and so to avoid those conflicts of interest. It may be, for example, that there is a stage of litigation that we could apply for funding for, but the CLC itself won't receive that funding. We might use it to cover disbursements or to pay for a barrister, for example.

DR MUNDY: What would be the outcomes if Legal Aid was in a position where it was normally a matter it would deal with, but for a conflict issue it passed it on to yourself? What would be the consequences if they did fund you at their normal rate?

MR NOBLE: Well, one of the consequences is we would be able to recruit, I

guess, at a higher rate, perhaps more experienced practitioners, and that would have, I think, a whole leavening effect within the service itself to incorporate more expertise and capability.

PROF NOONE: I mean, I think they are really interesting questions. Again, questions that have been discussed at length over the years. Of course, there is one model of a service that does work like that, but there are also now newer models of - and I don't know whether - I can't remember whether - do Salvos Legal - - -

MS MacRAE: Yes.

PROF NOONE: So that idea of different legal practices developing priorities and how they're going to fund their service. So as I understand it, it's sort of a third legal aid work, a third for free, and then a third fee-paying. So I think it's important that we think broadly about how these things can be delivered and encourage innovation in that way.

DR MUNDY: I think, though, with respect to Salvos Legal, I think where we have got to, that space is probably - we should make sure there are no barriers, but we're not quite sure how you cause such organisations to come, but for the edifice of an organisation which has a lot of inherent property needs of its own. I mean, I think Salvos Legal is very interesting and it's absolutely something that shouldn't be obstructed as a question of policy, and indeed we see similar organisations like Anglicare, auspicing - I'm not sure it's a way to - a primary policy lever for government to pull, I guess is what we're thinking, unless you've got a different view.

PROF NOONE: Not necessarily government-directed, but I think we need to ensure that those initiatives can flourish. So I've actually - and I wish I could remember the name of the woman, but I sat next to a young lawyer a few years ago, and their firm was doing - so it was a private firm, but they were sort of taking this approach, they were reducing the profit that they were aiming for in order that they could do this mix of service. So I think there are some lawyers out there for whom the profit is not necessarily the endgame.

MS MacRAE: We've heard a fair bit about the problems that conflicts of interest present, and we've discussed it a little bit. I'm just wondering, given that you teach ethics, whether you have a view about how the regulations work. So there seems to be a bit of variation between jurisdictions, but are there some jurisdictions that do it better than others, and are there instances where the conflict of interest rules could reasonably be somewhat relaxed? Because, in the absence of that relaxing of the rules, it seems to be that in some cases people just have no option but not to be represented.

PROF NOONE: This is the classic problem that you present students with during the exam, of course. I don't think there's an easy solution, and I know that my colleagues, like Adrian Evans, for instance, who I think again is appearing - you know, I'm not sure whether he's going to talk about it, he probably won't talk about it tomorrow, but you could ask him, because in relation to the current promulgation of a new set of rules relating to - there's a lot of controversy within the legal ethics sector teachers about those rules not being strong enough on conflict of interest. However, I think there is a real issue about access to justice and how the conflict of interest rules play out, and particularly because you have - when you have an institution like the Legal Aid Commission, that are one firm but they have multiple offices, that rule to me doesn't seem to be as effective as it could be.

We need to, in certain circumstances, I think, have exceptions to enable, in particular, greater access. When there's a limited number of legal services available, then you have to take that into account in the mix. You know, this problem has got more acute because of technology, so once upon a time if somebody was given a duty lawyer service out in Sunshine, the other party went to the Frankston Legal Aid office, it would be a long, long time before the organisation actually realised that that was - and so, as I said, technology has changed all that. So we have to take into account how we work the technology as well in that regard to ensure that there is no transfer of confidential information, obviously. I don't think it's something where we can just say, "It's a conflict, we can't do this." I think we need to work towards it. Victoria Legal Aid has certainly produced several discussion papers on this.

DR MUNDY: So there's more we can do with achieving what the intent is, but perhaps we've lost the forest for the trees?

PROF NOONE: And there would be some who say, "The rules in relation to confidentiality were developed for other purposes. They weren't developed with servicing this group of people in mind."

MR NOBLE: I formally chaired the Victorian and the national professional indemnity insurance working groups within the community legal centre sector, and one of the tasks of that group was to review the risk management guide that all community legal centres follow, so 200-plus services, and in the course of that we had to grapple with these issues, and I can assure you that, at least when comparing it to Victoria, there is a higher standard applied in community legal centres, perhaps to the detriment of CLCs and their clients, that is applied at Victoria Legal Aid. So, for example, we would conflict-check every person that we give advice to, because we think that in the course of providing that advice, we receive information that could be used to the detriment of that person if it's later disclosed to another party.

A different approach is taken within Legal Aid. It's considered a discrete piece

of work. There are further examples - so, for example, when duty lawyer services are provided, and Mary Anne has already described where duty services might be provided at multiple places simultaneously across Victoria, and how do you practically resolve those problems - and the way some of the rules are presently constructed is a hindrance, and I think that some practices are choosing to push the envelope on those things because they feel that they can persuasively argue that they are still preserving the best interests of the client, notwithstanding that there might be some perceived breach or technical breach of the rules. So, for example, the principle that knowledge of one is knowledge of all is a real problem where, like Legal Aid, you've got all the solicitors across different practices, you might have a criminal division, a family law division, in multiple locations.

To bring it back to the Advocacy and Rights Centre, we have an information barrier, sometimes described as Chinese walls, which, imperfect as they may be, provide a level of division between our housing advocacy program and the community legal centre sector service within our organisation, so that we can offer a level of service in both of those places. But for some people that would make their hair curl, seeing that. But in my time at the service, which is nine years, I don't think there has been a significant conflict issue that has arisen.

DR MUNDY: I am mindful of time. So thanks very much for your time, and thanks very much for the materials you've provided.

PROF NOONE: Thank you.

DR MUNDY: Right. Could we have Flemington Kensington Legal Centre.

MR WILSON (FKCLC): Unfortunately, Sophie couldn't be with us today. My name is Matt Wilson, this is Julian McDonald.

DR MUNDY: Thank you. Just take a pew and, for the record, state your names and the capacity in which you appear.

MR WILSON (FKCLC): Matt Wilson. I'm a solicitor with Flemington Kensington Legal Service, and I appear on that basis.

MR McDONALD (FKCLC): Julian McDonald. I'm a volunteer at Flemington Kensington Community Legal Centre.

DR MUNDY: Could we invite you to make a brief - that means somewhere between five and 10 minutes at the most - statement, please.

MR McDONALD (FKCLC): Yes. I have one prepared. Good afternoon. Our submission comes from Flemington Kensington Community Legal Centre. We provide a hands-on perspective dealing with clients from disadvantaged and often foreign backgrounds. We have notably been involved in civil litigation with the establishment of the Police Accountability Project in 2007. It has highlighted some systemic roadblocks for clients with limited financial resources who pursue civil litigation as an avenue for address.

Our full recommendations are in our submission we've provided, but at this time I'll overview our positions. We support the use of alternative dispute resolution as an appropriate way to reduce the workload of courts and a swifter way to resolve disputes, however, a significant obstacle for litigants who are ineligible for aid and do not have a means to pay for a mediator is the often prohibitively high cost of mediation fees. Our experience is that mediator rates can range from approximately $165 per hour up to $480 per hour. In addition to these costs, venue hire must also be paid for by the parties.

In some jurisdictions including the County Court of Victoria, parties must reach an agreement in which a private mediator will carry out compulsory pre-trial mediation as a mediator is not appointed by the court. A solution to this problem would be to establish a pool of court appointed mediators who can do pro bono work. An alternative is for the parties to be able to apply for a fee waiver for mediation fees. The purpose of fee waivers is to provide access to justice for clients who cannot afford to pursue litigation. This principle should logically extent to mediation as well, as mediation is often compulsory.

We submit that not funding this compulsory process is sending a message that access to justice is only for those who can afford it. On the topic of costs arrangements and pro bono cases, we strongly support the recommendation provided by the Commission. Due to the decision in King v King which put into doubt the validity of pro bono parties to receive costs if they otherwise be successful in a court in a costs order, although the more recent case of LM Investment Management Ltd distinguished King v King, there still remains uncertainty in this area.

It is also in the interests of clients, many of whom come from non-English speaking backgrounds to be told that the work is for free rather than signing a complex cost disclosure statement for the sole purpose of enabling lawyers to apply for a costs order in the event they are successful. It would also be better if pro bono lawyers could carry out their work without having to negotiate complex fee agreements with disadvantaged clients safe in the knowledge that they will be entitled to seek an award for costs in the event they are successful. Without this protection, there is a disincentive for lawyers to act pro bono and more clients will have to rely on their lawyers waiving their fees or acting under a no win, no fee basis.

On the topic of protective costs orders, we support the introduction based on the English model jurisdiction from Corner House with the following quibble, we don't support the provision that requires that the litigant not have a private interest in the case. The reason we don't support this is the purpose of a protective costs order is to provide access to justice that is in the public interest. Whether the litigant who is moving the initial case has a private interest in the matter is irrelevant. The point is that public interest litigation should be able to proceed.

This provision that was introduced in Corner House is just a disincentive, particularly for young people because if the costs order is found against them, they may spend years paying back such an order, and this provision may discourage them from pursuing public interest litigation which would benefit the community at large. So we don't see any reason to include such a provision.

Lastly on fee waivers, currently the fee waiver process is costly and time consuming. We would heavily support the automatic granting of fee relief to parties represented by a state or territory Legal Aid Commission or clients of approved community legal centres or pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief. Another mechanism that would aid the streamlining of fee waiver processing would be implementing a single fee waiver application process which would be made and processed at the start of litigation.

Currently clients must continually apply for fee waiver for the many steps of

fees they need to pay in a case. We believe there should be just one fee waiver process that would be at the start of the litigation and no more. Fee waivers should also be much more comprehensive. We have mentioned mediation earlier but it should also include viewing and photocopying documents under subpoena as well as reviewing court transcripts. Currently we have to pay a third party to do this for us. Streamlining is important as there are time limits on filing appeals, interlocutory matters and other court related processes. Clients need to know that they have been approved for fee waiver before they can pursue these avenues. If they aren't notified in time, then this avenue is closed to them.

On the use of technology, we believe that fee waivers should be able to be filed electronically through Sitetech. Currently this is not an option. Lastly, we support a full fee waiver rather than a postponement on the basis that the purpose of compensation and tort law in general is to put the plaintiff in a situation he or she would have been if not for the tort. If court fees are taken out of compensation payments which are calculated for the aforementioned purposes, then victims will still be at a disadvantage after receiving a judgment in their favour.

Conversely, if the fees are to be paid back out of an award for costs in their favour, it is possible that the complete costs award may not ultimately be recovered or only partially recovered from the defendants. In that scenario the court should keep the fee as a waiver rather than a postponement as a plaintiff would not have recovered the money to pay the fees. That concludes my remarks.

DR MUNDY: Can you tell me this question about protective costs awards, it seems that in very many cases parties that would bring this sort of litigation may well benefit from it, for example, a matter that clarifies law around bank fees, for example, where the parties have a clear beneficial interest in the outcome of the case, but clearly there's some public interest in the establishment of the law but also in testing the law and then others can access the decision. So an economist parliament says public and private goods going on here.

I mean, the challenge for us is in a normal economic analysis would be, well, you shouldn't actually provide any assistance in this circumstance unless you think the public good will not be produced. So you can conceive of circumstances, for example, in litigation funding matters, where - and the ANZ fees case is a classic one - where there are significant private benefits to the parties but there is also a substantial clarification of the law which benefits other parties, whether it actually clarifies the law is a different question, I guess. So in those circumstances should - I mean, I take your point about there being no interest, you know, and I think that's what the UK has tried to get at.

MR McDONALD (FKCLC): Yes.

DR MUNDY: In the UK structure you would not get a protective costs order to run something like the ANZ fees case.

MR McDONALD (FKCLC): That's correct.

DR MUNDY: Should there be a test perhaps that says that - maybe it's covered in the notion that the public interest should be resolved, maybe the test should actually be - and I'm not - I'm just floating something - that the public interest would not otherwise be resolved. So that would still allow there to be a benefit in it for the litigants but not perhaps - so it would distinguish it from the circumstances of say the ANZ fees case. Because what we're trying to do is make sure the public interest cases get run, that wouldn't otherwise be run.

MR McDONALD (FKCLC): Yes. That's exactly our purpose as well. So the measure you suggested does go further than the English case, and I suppose we would support it. We would be worried that the test would have to be set up in such a way that the purpose we wanted actually came, like, making sure that if there was no other way the case would be run, then there could be a protective costs order.

DR MUNDY: So we've both got the same intent, it's just a question of thinking through the economic incentives and how it might work.

MR McDONALD (FKCLC): Correct.

DR MUNDY: Okay.

MS MacRAE: On something that's a little bit more mundane. How is the CLC funded? So where's your sources of income?

MR McDONALD (FKCLC): There's a number of funding sources. We have funding through state and federal government, grants to Community Legal Centres, and that's definitely over 50 per cent of funding for our centre. We have projects at Flemington Kensington that run litigation around specific issues. The Police Accountability Project where I'm a solicitor is an example of that. There's a level of philanthropic support that comes through for specific projects like police accountability, so that's one of our avenues as fundraising obviously but we're obviously still heavily dependent upon government funding for the service.

MS MacRAE: So how is the quantum of money that you get from the Commonwealth and the state determined? What sort of formula applies or is it a formula? Is it historical?

MR WILSON (FKCLC): I must admit that I'm fairly new to the centre. I've been there for three months but my understanding and I have experience working in the community sector is that there is a process of evaluation that takes a number of factors into account, including the case load experienced by the centre. The statistics are provided to Victoria Legal Aid certainly and I think that applies for all legal centres.

Also the demographics are taken into account in terms of the areas, how the make-up of the community legal supporting is changing. Those issues are taken into account and I would assume that the projects beyond general casework, how they're impacting the community and growing, they're also factors relevant to those determinations.

DR MUNDY: Can we just ask about those matters beyond general casework because we understand that the government has had a change of view as to where the priorities of particularly Commonwealth funding should lie and to what you should obviously call frontline services and has adjusted CLC funding over the next couple of years to reflect that change in priorities. Are you able to outline first of all what are the impacts on your organisation of those funding cuts and, secondly, the extent to which it will affect frontline services or rather will it affect advocacy law reform activities?

MR WILSON (FKCLC): I think it would be fair to say that the impacts are currently being considered. We're in the process of preparing budgets for the coming year and there's obviously an amount of belt tightening that I think will be going on across the sector. We're looking at methods of maintaining the services being provided. It's difficult to determine at this stage though just how significant the impact will be on our projects, although I think that it will be frontline services that will be ultimately struggling. There are concerns around the conditions that have been proposed in relation to specific projects, advocacy and public interest areas. Once again I think those concerns are felt across the sector.

DR MUNDY: How do you see those concerns?

MR WILSON (FKCLC): Not knowing the details but having seen some of the impact that there has been in other project areas, such as the Environmental Defender's Office, obviously significant concerns about advocacy work, these target around specific issues affecting government or certain organisations. The free reign that the centres have to explore those matters that impact upon public policy, especially where the work is being conducted around advocacy for particular campaigns, will have concerns, I would say, for people - - -

DR MUNDY: Is the character of this advocacy one of attempting to get individual

government decisions altered or is more of an addressing systemic reforms that are required to improve justice or indeed might just be there's a whole pile of people having a problem like this and everyone would be better off if you did that?

MR WILSON (FKCLC): I think, speaking from the perspective of police accountability, we have a broad number of intentions or goals in the advocacy work. We do seek to address systemic issues. The work that is being done around the race discrimination case is a clear example of that. We've worked closely with Victoria Police in establishing a commission into issues of race discrimination and discriminatory policing.

There is also an interest (and it's an aim of our project) to see a greater level of independence established in the bodies that regulate and handle police complaints, so they're certainly goals that we'd see in terms of affecting government policy. So yes, look, there are a number of different aims for our centre but mainly around state government activities.

MR McDONALD (FKCLC): It's mainly around the state government, yes. Also, the federation which is appearing tomorrow will be more able to speak on those budgetary issues I think.

DR MUNDY: Yes. We're just trying to gauge across participants what the broad scope of the consequences is worth in people's own words who are faced with these issues.

MS MacRAE: Can I just ask: we've talked a bit about advocacy. Assuming you're also very much involved in community legal education, I'm just wondering if you can talk about the way that you try and measure the success of your education programs, if you're able to do that. Also we're aware that NACLC has developed this database which is called CLEAR which probably stands for something and I can't remember what, to share their community legal education resources. I'm wondering if you use that and how useful that has been to you.

MR WILSON (FKCLC): No, I haven't used it myself but it may be being used at the centre. In terms of legal education, the activities that I've been involved in - we certainly seek feedback from participants and I guess a measure of success is also shown by the number of people who are coming along and the way the message is being spread but those monitoring and evaluation steps are very central to those legal education projects, in the sense that we need the statistics to maintain funding and to establish that they're showing progress.

MS MacRAE: Do you find being very locally based that you're able to better target that education because you're more aware of the issues that are of particular concern

to the people that live in your area? Do you do outreach work and education beyond your borders as well?

MR WILSON (FKCLC): Not so far beyond our borders. We are in the process at the moment of establishing a new project connected to the co-health centres or Doutta Galla as it was formerly known. That's just outside our catchment area but it's being initiated with a view to see whether legal support for those who are dealing with health issues can show positive results and also show results in improving people's health outcomes in connection with the public health system.

So it will be interesting to see how that evaluation assessment plays out and what sort of benefits are shown, but all of those projects tie you closer into the community and we also see the benefits in terms of knowledge and awareness of the centre and the services offered, spreading out not only through picking up people through specific projects but also bringing people in, for instance, the police accountability project. We've definitely seen an increase in the number of people who are aware of that through the public forums that we've held. They have been held outside the area. You may be aware there was one in Melbourne at the Town Hall before I started but that has certainly brought a number of clients to us from across Victoria.

DR MUNDY: I should know this because I did once work for the federal member for Melbourne but can you remind me what your area is or your catchment or your jurisdiction, however you want to describe it?

MR WILSON (FKCLC): That's a very good question. I was just about to get an answer before I came along today but I think - - -

DR MUNDY: Broadly.

MR WILSON (FKCLC): Yes, look, we're bounded by other legal centres that are in position such as Moonee Valley, North Melbourne. Effectively I would say to the east would be around about where the City Link toll road runs over.

DR MUNDY: Yes.

MR WILSON (FKCLC): And we head out across to - - -

DR MUNDY: Kensington Flemington.

MS MacRAE: Flemington Kensington.

DR MUNDY: That's where you bump into Footscray or something.

MR WILSON (FKCLC): Yes, Footscray to the south, the showgrounds to the west.

DR MUNDY: So it's quite a compact area compared to a lot of CLCs that we're aware of.

MR WILSON (FKCLC): It's a high density population area. It's also quite a mixed area and we have a large number of high rise estates in there, so I guess it is changing in terms of the affluence of those who live in the older established - - -

DR MUNDY: But there is still that very hardcore of relatively economically disadvantaged people in the high rises in North Melbourne and Flemington.

MR WILSON (FKCLC): Absolutely.

DR MUNDY: I guess the question then is, and I understand the issues around racism and racism in policing - my understanding largely arises from emerging numbers of people from African backgrounds, by and large. Do you share those learnings with, say, similar - from a former life, I am familiar that there are similar perhaps, not greater, concentrations of people of that ethnic background around Richmond, the Housing Commission in Richmond. Do you liaise with - it is probably Fitzroy, if there is not a Richmond one.

MR WILSON (FKCLC): I would say probably our closest relationship outside our direct neighbours would be with the Fitzroy Legal Service. We do have a lot to do with them and share a lot of information.

DR MUNDY: I guess one of the things that has been of interest to us is that whole question of how some legal centres seem to be quite small and the question that begs is: should there be, for want of a better word, amalgamations? Is there anything you can sort of share with us about the way that cooperation works, as opposed to an alternative - some sort of mercantilist amalgamation process, perhaps in the police project?

MR WILSON (FKCLC): There is a level of cooperation in the provision of information about the projects and legal education information that is on offer. There is obviously a level of cooperation whenever we are contacted and we are often contacted by other legal centres, by solicitors who have come up with issues of police abuse or information about cases where they are seeking to make complaints. We build up a body of knowledge and are able to access the specific material and resources that those people need on a case by case basis.

I guess in a broader sense we work collaboratively with different centres around specific projects as well. It is different. We pick up matters in a sporadic sense outside our boundaries and we take them on the basis that they are of strategic interest to the projects that we are running but we would also, and have found ourselves doing so increasingly lately, be referring matters that we are picking up, for instance, in the aftermath of the Horvath decision by the United Nations. There has been a lot of interest in the centre from outside our area. We are obviously sending those cases out to the legal centres and services closer to them.

DR MUNDY: There is just one other question. I mean, a lot of the material you have given us has been around the police project. Our terms of reference are primarily the resolution of civil problems, rather than criminal matters but are you able, on the basis of your experience, to give us any reflection on how the two are related? We are particularly concerned with people who seem to be quite intensive users of the system. They have criminal issues - and particularly if they suffer some form of disadvantage. They might be recent migrants. They may have been refugees. Do you have any insights into I guess complexity and how we need to support the civil system and help people who may turn up to you with a criminal problem, which then goes to the question: how do you attend to all their needs, rather than the fact that the coppers have pulled me over and done me?

MR McDONALD (FKCLC): We certainly do have a number of criminal matters that we help with. The whole reason the police accountability project formed was the shootings, I believe. Matt may be able to fill you in more details of that. We realise obviously the two are interlinked. The reason that we are pursuing litigation against the police originally started with a criminal dispute so obviously the two are linked. I would just say that we sort of handle them separately. Sophie Ellis who also wrote the report is just in charge of civil matters, similar to Matt, I believe.

MR WILSON (FKCLC): There is a bit of crossover. I think, as Julian has pointed out, often people's encounters with the police are kicked off or sparked by a criminal investigation and what we are doing is trying to find out what has happened down the track there but we obviously do defence work as well. In terms of reform in the areas of litigation there is a lot of doubling up I think which really places a huge strain on the points that Julian has raised about fee waivers. We have got clients going through so many hurdles as they work their way through the justice system.

DR MUNDY: You should almost prove it once and get a pass.

MR WILSON (FKCLC): It would seem to make sense and I think it would certainly save money. These hurdles - I think there is an expectation that sooner or later your client might trip over one of them. Those potentials obviously are a problem for getting to the resolution of a matter, as it should be resolved, but also

they may create incentives for matters to take longer than they should as they offer benefits to the opposition. We deal with people with great disadvantage. The process is very stressful. We have found a lot of benefit from setting up a welfare support project that runs out of our centre for the people dealing with police abuse cases because they do feel quite vulnerable. I think streamlining the process, the sooner people are out of the process, the better for them.

DR MUNDY: So having a single waiver would reduce your time in having to deal with it and presumably the court's time in having to process it multiple times.

MR WILSON (FKCLC): Yes.

DR MUNDY: And would reduce stress on someone who is probably pretty stressed anyway.

MR WILSON (FKCLC): Yes.

DR MUNDY: Thank you very much for your time.

MR WILSON (FKCLC): Thank you.

MS MacRAE: Thank you.

DR MUNDY: Could we now have Justice Connect please. When you are settled, could you please for the record state your name and the capacity in which you are both appearing and perhaps then give us a brief opening statement? That means no more than 10 minutes. You get a prize if you can get it under five.

MS McLEAY (JC): I will do my best.

DR MUNDY: Thank you. We appreciate it.

MS McLEAY (JC): I'm Fiona McLeay. I am the CEO of Justice Connect.

MS LYONS (JC): And I'm Anna Lyons, manager of pro bono relationships at Justice Connect.

DR MUNDY: Off you go.

MS McLEAY (JC): Thank you for the opportunity to attend and to speak. It's a really important process that the commission is undertaking and we are very pleased to have the opportunity to be part of it. We have made two submissions, as you would know. I wanted to give a brief overview of our work, highlight a few areas that we think are particularly important, present a couple of very short stories of clients we have assisted and then have a discussion.

Justice Connect formed on a merger of PILCH Victoria and PILCH New South Wales. That took place about a year ago. For about 20 years before that both PILCHs played a really key role in the development of what is a very strong pro bono culture among lawyers in both Victoria and New South Wales and indeed now nationally. I travel overseas in relation to this work and I think it is fair to say that the pro bono culture in Australia is viewed as being one of the strongest in the common law world.

The PILCHs and now Justice Connect have played a role in developing this strong culture and in the establishment and expansion of pro bono programs in law firms, at the Victorian Bar and at the Law Institute of Victoria. Our focus really is partnering with pro bono lawyers to develop and strengthen this pro bono capacity and to strategically match this with unmet legal need that we see in the community.

Our strategy highlights this approach. There are three components to it. Each one logically flows from the other and the three things wouldn't work as effectively if they were not in place, so the first thing is to build support and engage a strong commitment to lawyers' pro bono responsibility; then obviously to deliver access to justice programs using pro bono lawyers as the primary resource to people experiencing disadvantage and to the community organisations that support those

people; and then to improve laws and policies which cause or perpetuate disadvantage using evidence from our case work and the stories of our clients. We see those three things as being inextricably linked.

We have got a range of current programs. We have a generalist referral service which accepts requests for assistance from individuals in the community who have been otherwise unable to get legal assistance. We have three outreach services which target three specific client groups. One is Homeless Law, which obviously works with people experiencing risk of homelessness and its primary focus is on trying to sustain the tenancies of those people by addressing legal problems which can cause them to become homeless.

We have Seniors Law, again an outreach service for older people looking particularly at elder abuse but considering a whole range of civil law issues that arise in older people; and a service called Mosaic in Inner Western Sydney which supports newly arrived migrants, refugees and asylum seekers. It helps to address their civil legal problems, the sorts of things that can cause them difficulties in establishing themselves in the community and again things like credit and debt, housing, those sorts of issues.

We run Not-for-profit Law, which is a specialist legal service for not-for-profit community organisations, again targeting very much the smaller volunteer grass roots community organisations that really form the backbone of the not-for-profit sector in Australia. That's a service that looks at legal, regulatory and compliance issues for those organisations and ranges from a web site, a training program, a telephone advice service, through to referral.

Shortly we will commence running a self-representation service in the Federal Court and the Federal Circuit Court, a newly funded program by the Federal Attorney-General's Department which will provide short advice to unrepresented people in those jurisdictions. We will be providing that service in Victoria, New South Wales, Tasmania and the ACT, and sister organisations in Queensland and South Australia will cover Queensland, SA and the Northern Territory.

Our primary focus in our work is civil law, although in Victoria we do make some referrals in family and criminal law as part of our management of the Law Institute of Victoria's pro bono program and the Victorian Bar pro bono programs. That partnership with both of those professional bodies is a longstanding one and an extremely productive and effective one. They effectively have asked us to manage those programs for them and it means in Victoria we operate as a sort of one-stop central hub for pro bono.

The kinds of cases where we would perhaps be able to make a family law

referral are where the client's circumstances are unusually compelling and I wanted to share one particular case study with you. It also illustrates the way that we partner with other actors in the legal assistance sector, Community Legal Centres in particular in this case.

A client that we will call Lucy approached the Women's Legal Service for assistance a week before a final hearing of her application for a sole parental responsibility before the Family Court. The father of her child had perpetuated serious family violence against her on more than one occasion in breach of existing intervention orders. At the time of the final hearing the father had supervised contact with the children. Lucy was seeking consent orders to graduate up to unsupervised contact for the father on the condition that she obtain sole parental responsibility.

Unfortunately Lucy's former solicitor had ceased to act as a result of changes to funding that was available through Victoria Legal Aid and so she found herself unrepresented. Women's Legal Service sought assistance from Justice Connect to try and obtain counsel to appear at the hearing. Women's Legal Service were prepared to be the solicitors on the record but needed counsel to actually appear in court. On very short notice we were able to find a barrister who was able to appear. The hearing was adjourned and then relisted for later in the year.

Women's Legal Service agreed to continue on to represent the client and we then sought to attain further assistance from the bar. For a range of reasons it took 20 phone calls to 20 different barristers before we finally found one who was able to take up the case. The hearing was likely to be longer than a couple of days and it was towards the end of the year, so very busy, but this was a matter where our referral lawyer persevered and we did find a barrister who was willing to act and the client was successful in her application.

She talked a bit about the stress really that she was under facing the thought of being unrepresented, potentially having the perpetrator of violence opposite her in the court, so a good example of the kind of work that we can do: quite specific, quite detailed, quite time-intensive, but very impactful for the client concerned.

In all of our programs we make an intake assessment which asks the following questions: is the client or the client group unable to afford to pay for legal representation or does their legal problem otherwise raise a public interest question? Is there another agency that's better placed to assist the client or the client group? Do pro bono lawyers have the skills and the willingness to assist the client or can we help to develop these skills and willingness or to facilitate it?

Those questions are really crucial to us in our model because we want to ensure that pro bono doesn't displace other forms of legal assistance, whether government

funded through Legal Aid Commissions or Community Legal Centres, or other ways that legal problems can be resolved: no win, no fee, for example. We have a number of firms that do that work that we will refer clients to if we think that their cases meet that criteria. We also want to obviously avoid overlap and duplication. Secondly, we want to make sure the pro bono resources are devoted to where they can have the most strategic impact having regard to the skills of the pro bono lawyers and the support needed to ensure that they're well directed and managed.

As that case study illustrated, partners are really critical in our work. Most of our clients come to us on referral from another agency or we are working in partnership with the host agencies of our outreach services and they all help to ensure that clients that are likely to meet our criteria come to us. Non-legal agencies such as drug and alcohol case workers, social workers, financial counsellors, et cetera, also refer clients to us, as do law firms and barristers who get what you might call cold calls from clients.

We see ourselves very much as part of the access to justice sector and we really rely on these referrals to be efficient. We're not set up or funded to be an open access inquiry line to the general public, so any reduction in the effectiveness and the funding of these other services directly impacts on us. The family law example is a good one. We saw a 25 per cent increase in inquiries for legal assistance in family law matters when Legal Aid was forced to change its guidelines due to funding restrictions. So we get an increase in demand and a reduction in our capacity to respond. Our service levels and funding gets reduced from time to time as well and we certainly don't get additional funding when other areas of the sector are defunded, so we can't work absent the rest of the sector working effectively.

In our submission we stated that while relatively small, in our view the work undertaken by pro bono lawyers is critically important and strategically significant because by definition it's work that would not otherwise be done, if you think back to our criteria for accepting a client. Good pro bono in our view is often done for clients whose matters or personal circumstances are particularly complex, are outside areas for which Community Legal Centres and Legal Aid are funded, or where they have insignificant resources.

Another example is a client we will call Suzie who came to our Homeless Law outreach service for assistance with infringements; a very common situation for disadvantaged people. Due to her life circumstances she had been unable to address a series of fines which had resulted in her being arrested and then she was facing imprisonment. She had been struggling following the breakdown of a close personal relationship a number of years ago and her children had been exposed to significant trauma. Suzie's housing, finance, health and mental health had been affected by the ongoing impacts of the family violence that she had endured.

By the time she came to Homeless Law, she had found transitional accommodation and was starting to address some of the issues that she had put on the backburner while she was in transient accommodation. She initially appeared in the Magistrates Court in relation to the unpaid fines and the matter was adjourned because the magistrate wanted to see more evidence of her circumstances, so the pro bono lawyers that were assisting her came back to Homeless Law and asked if our social worker could give them some support to collect the relevant information from the various agencies that had been working with Suzie.

Over a period of time conversations were had and the material was gathered and our social worker was also able to contact housing agencies, Centrelink, Department of Human Services, general practitioners, to gather the information together. The result of all of this was that the magistrate was satisfied of Suzie's exceptional circumstances as the legislation requires and her fines were discharged. She avoided gaol and was able to return to reconstructing her life.

The overall amount of the fines in that case, relatively small, but a high cost to Suzie and her children, had she not been able to pay them. It took time to resolve, work for the homeless with a lawyer, the social worker and the pro bono lawyers, but critically important work to ensure that Suzie remained housed. The work that happened as part of that case fed into a broader law reform program that we're undertaking in Victoria to push for reform of the infringement system. We've been working very closely with the Victorian Department of Justice and the Attorney-General's Office on that work.

I just wanted also to make a slight correction to our submission, our second submission, on page 3. We state that pro bono work from larger Australian firms at around 7 per cent capacity to free legal services. I should just clarify that that includes work done for not for profit community organisations as well as individuals. So the 3 per cent figure quoted by the commission in your draft report we think is a reasonable estimate based on incomplete data of work that's done for individual clients. So that's my five minutes. Anna just wants to add a couple of things and then we'd like to have questions.

MS LYONS (JC): Just a very quick comment regarding the efficiency or the need for coordinated law firm pro bono. Our membership which we refer to in our submission has around 50 members and it ranges from very small firms with one lawyer through to all of the large commercial practices in the country. Some of those have very well established and well-coordinated and well-resourced programs and others really don't and often come to us at the really early stages of developing their practices.

So over the years we've seen a number of firms joining Justice Connect or previously the PILCHs with a view to establishing programs and some of those who started off very small or began their work with us have gone into really self-sustained, very well run programs but we want to make the point that there are still firms who don't have existing links to community legal centres and also to community organisations who are able to connect them with disadvantaged clients. In our written submissions we've talked about the benefits of coordinated pro bono which means that we can really facilitate the meeting of the disadvantaged clients with the law firms who are willing and able to do the work. So if you have any questions about how that works in practice, we'd be really happy to discuss these with you.

MS McLEAY (JC): I'm not sure if we get the prize but I think we were under 10 minutes.

DR MUNDY: You were just. I think it was raised with us by Legal Aid WA or it might have been the Chief Justice that there is no public interest clearing house in Western Australia. I note that you cover both New South Wales and Victoria. What benefits come from being able to deal with both and do your national activities suffer from either there being these other ones which by their very nature must be smaller and the fact that there is none on the other side of the Nullarbor?

MS McLEAY (JC): In relation to the first part of your question, I think there have been definite benefits from the merger between New South Wales and Victoria. There were many reasons why we embarked on that enterprise. One of them was because many of the law firms that were members in Victoria were also members in New South Wales and it just didn't really make any sense, particularly as the legal profession itself in Australia is really a national profession and in fact for some of the large firms an international profession.

DR MUNDY: Not according to Western Australia.

MS McLEAY (JC): Yes. They are in theory at least joined up partnerships. So we've certainly found that the ability to scale across states, to take something that works well in one state and develop it in another, to learn across the different places, to share back-end, back-office functions, PILCH Victoria had reasonably good capacity to raise funds from philanthropics and others which we've been able to bring into the way the New South Wales PILCH was working. It's early days but from our point of view we feel very positive about the benefits that have come from that.

In terms of Western Australia, there is a Law Society pro bono program in WA. We've had some discussions with them and with our member firms that have offices in WA through the course of last year and indeed earlier this year. There's

interest from our member firms for us to have a presence in Western Australia. It's really just a question of how we would resource that. Our model, as we've described, is very much to work in partnership and collaboration. We certainly wouldn't be wanting to impose ourselves on the Western Australian legal community.

We've had some discussions, as I said, with the Law Society, with the Bar over there and with law firms, so we're looking for opportunity but also I guess resources to be able to set something up.

DR MUNDY: To what extent, and it might be entirely irrelevant, was the New South Wales/Victoria merger a function of uniform national legal practitioners and also I guess the fact that many of your larger members I presume are on the Commonwealth panel? Does your amalgamation facilitate their obligations under the panel as well I guess is what I'm asking.

MS McLEAY (JC): You probably need to direct that question specifically to one of our members. I'm not sure that the amalgamation per se facilitates the work they do under the national panel arrangements, but we did know that - we refer a matter to a firm. It's up to them how they want to resource that internally. We know anecdotally that if it was appropriate it may be that although the referral had come out of PILCH Victoria, it may have been managed by a lawyer in New South Wales or indeed Western Australia, so firms are already making those resource allocations internally.

The first half of your question about the national profession, that certainly was in our mind when we first conceived of the merger. It was more like it might be a truly national profession but it was certainly one of the things that made us think about the change, but not by no means the main one. I think it was recognising that there would be benefits that would come from a larger footprint, the ability to share resources and the express preference of our member firms that we consider this.

MS MacRAE: Are you able to say a little bit more about how you choose the service? I'd just be interested - you talked obviously some individuals that get help and not for profits. Do you see there's a bit of a gap there for small business or can they adequately - no-one I guess can adequately access services in this whole space but we know they can go to their small business commissioners for information and advice at least. Is there a gap there at all that's not filled and is it something that could be looked at in any other way if it's not appropriate for you to - or something like your organisation to deal with?

MS McLEAY (JC): Yes, I think there's definitely a gap there but I'm not sure that it's one that pro bono would necessarily be able to respond to with any great degree of significance. There is some emerging interest in assisting social enterprises but

different firms have different views about whether or not that's appropriate for pro bono. Some take the view that any profit involved will put it outside of pro bono. Others look more at the mission, the social mission of the organisation, so I think that's probably a watch this space. In relation to the first half of your question, how do we choose? We go back to those questions that I asked. Who else is in the space?

MS MacRAE: Sure.

MS McLEAY (JC): And do we think that pro bono lawyers have the capacity? Do we have the ability as well to be able to support a response? So we're looking for areas of unmet legal need for client groups that are not otherwise accessing services. We're looking for areas where we might be able to partner with others who were running a complementary program.

In terms of our general referral work, we haven't identified a target group like we have with homelessness or older people or whatever. We're actually there quite flexible, so we've got the general principles that we apply but the detail that sits behind them can change from week to week, month to month as we hear of changes in Legal Aid guidelines or a community legal centre might call us and say, "Look, we had capacity to assist or to support these kind of people with these problems but we currently don't. Can we send them to you?" We might say, "Yes, we think we can place some more of those, so send some more." Then if our ability to place people with firms changes then we'll adjust our guidelines and be stricter on what we can accept. So there's a lot of finetuning that happens on a weekly basis really.

MS MacRAE: Would you say you do much advocacy work?

MS McLEAY (JC): Yes. We do a lot of law on policy reform work. Advocacy has become a word I think that doesn't have - it means so many things. It's open for context, so all of the clients we refer to lawyers, the lawyers advocate on their behalf but the law reform on policy work has been an integral part of the way we've operated our whole history and continues to be. It's for a number of reasons, one, because we genuinely think that that's the most effective way to use the pro bono resource. The infringements work that we do in the homeless law service is a really good example. There are large numbers of people experiencing homelessness who have infringements. They get fines because they're in public, living their lives in public, and so things you and I would do at home become visible, they are fined for that behaviour often, and also because they don't have enough money to access public transport and so on. So there's far more of those kinds of cases than any amount of resource pro bono otherwise could meet.

For quite a long time we did our very best to address as many of those kinds of

cases as came to us, but after a while we started to feel it was a bit like Sisyphus pushing the rock up the hill, and also our pro bono lawyers started to say, "Look, this was all very interesting when we started doing it seven or eight years ago, but really there's a limit to how many of these cases you can do before you start to have enough of them."

That really reinforced our thinking also that really there had to be a smarter way, a more efficient way, a more effective way, and so that encouraged us to continue to be more active in that space and to go to government and say, "Look, it's not in your interest either to have all of these people in the system who are never going to be able to pay a fine," at the risk, like the client I mentioned, of being locked up for not paying a fine with three children who will then become in the care of the state.

It just doesn't make any sense and we find that government wants to hear that information about how their policies are actually playing out on the frontline. They're trying to bring about good in the community as are we, and so our approach is always to go to policy makers with evidence and with suggestions and to say, "Can we work together on something that's going to be more effective." So it's very important to our work.

DR MUNDY: I think in your submission you mentioned legal health checks are useful and that's something that you guys are supporting and sponsoring. I guess the issue, one of the questions for us that was raised - I can't remember who raised it, but - is that it's one thing to develop a nice form, but it's another thing to train non legal workers to properly use the instrument, in the parlance, and I guess it's a wider question of something we've raised about the - particularly for community sector workers.

How do we get this legal education to them so they can identify people with needs so they can use the sorts of instruments you're trying to develop. We know in South Australia there's actually a Cert IV course in the TAFE system for legal training for community workers, just not more lawyers, it's for community workers. Do you have any thoughts about how that whole legal health check space and the interaction with people who work with people who are likely to suffer entrenched legal issues and how pro bono supports that and what other levers need to be pulled to get that going better?

MS McLEAY (JC): I think we would say that the best model of that is what you see and what we have called with others the Advocacy Health Alliance model, and I think Mary Anne Noone and Peter Noble probably mentioned that before. So over the last 12 years we've been running Homeless Law, which is an outreach service based in agencies that support the client group. The logic behind that is that

obviously that's where the clients are but also that the case workers can help to identify legal problems.

What we've found is that it's not enough to just co-locate a service, and it's not even enough to just have, you know, posters up and to do the odd sort of CLE. What you really need is that close, integrated partnership among all of the people that are supporting a particular person, and so the best model that you see of that is the Medical Legal Partnership, Advocacy Health Alliance partnership, and so from out point of view as we develop legal health check tools, they're very much to be used in that partner in context.

I don't think our view is that we're training health workers to be able to - in kind of law for non lawyers. They've got enough things that they're trying to juggle without an extra overlay of trying to work out - what we really want is to have a tool that can trigger for them a couple of simple questions that they can ask that they may then think, "Okay, it's time to go down the hall and see the lawyer, or make sure that the nurse books a person in for an appointment with a lawyer." So that you're just part of the general treatment or intervention that's happening, rather than a whole kind of overlay that goes over the top.

DR MUNDY: Okay. I think that's probably about it.

MS MacRAE: I think so.

DR MUNDY: I think one of your submissions mentioned - or we might have made it up - but online volunteering. Do you have many observations?

MS LYONS (JC): I think we very briefly mentioned that in our reference to Michael McKitrick's report on volunteering at community legal centres. I think he explained that as one of the things that CLC should consider if they wanted to tap into a new generation potentially of younger volunteers. So our thoughts on that?

DR MUNDY: Yes. I mean, I guess it's more in the context of - and a number of CLCs have suggested to us, who have quite big pro bono programs like Redfern Legal Service - and it's in part about the discussion about where CLCs are located, but one of the points they make is that if you're going to be located in a capital city and you want to procure pro bono assistance, best you be close to the CBD because that's either where the pro bono lawyers are going to be working in their day jobs or they'll probably live closer to the city than otherwise.

I guess the issue with that is the extent to which - and Martin J in Western Australia attentioned the fact on Friday - that there are no private lawyers between Geraldton and Broome, yet there are places like Port Hedland, Karratha, Mount Tom

Price, those sorts of regions where we probably would expect the odd civil problem to come along, and I'm just wondering whether that sort of online environment is something which people could be provided advice online in some way on a pro bono basis, and it wouldn't - for example, you wouldn't need to service the Pilbara from Perth.

MS McLEAY (JC): I think the question of regional, rural and remote service provision and the role of pro bono in that is a really important one. I think that you could have some kind of, you know, Internet based response that could be part of that. But I think there's more to it than that. There's some very interesting small models of what's possible in triple R work in NSW and indeed in WA, and they require again partnering between CLCs and law firms primarily, or law firms and Legal Aid Commissions.

Our view is that there's more capacity in law firms to do stuff in the regions. What's missing is the coordinating capacity that a Justice Connect can bring if resourced to do it. So identifying the right community partners in the community doing the brokering that is our sort of daily work between the clients and the community organisations and the law firms. So I think there's a lot of potential there. I think that, you know, the Skype type of idea, there are some interesting models of that both here and overseas. It does require people on both ends of the Internet line, if you like, it's not as simple as just putting a client in a room with a computer. But yes, as I say, my view and our view at Justice Connect is that there's a lot of potential there. We're very keen to explore that. But, you know, it's a big country so we need some resource to do that.

DR MUNDY: Just one other question; obviously, particularly with respect to what you might call the distribution mechanism, so appropriate IT services, that sort of thing which could be bought in rather than provided.

MS McLEAY (JC): Yes.

DR MUNDY: Do you ever get any interest from non legal firms, like for example, big mining companies or something might come along and say, "Look, as part of our community development program" - obligations, whatever you want to describe it as - "we'd like to support the provision of legal services into this mining town which we're effectively the dominant employer in." Is that something you see very often?

MS McLEAY (JC): I haven't. That's not to say it couldn't happen, but it's not something that I've particularly seen.

DR MUNDY: Not something that would bother you if they came along and said, "We're involved" - I mean, one of the big coal miners might come along and say,

"We've got an issue in the Hunter. We'd like to work with you to develop better employment outcomes or legal access outcomes for those communities."

MS McLEAY (JC): Yes, so again, our primary criteria is whether or not people can afford to pay for legal assistance, not just that there's a gap, but even if there were services there would these people be able to purchase them. So there would definitely be groups in those communities that would meet our criteria, whether they would necessarily be the focus of a mining company's attention, I'm not sure. In principal we'd be happy to have a conversation.

DR MUNDY: Yes, it's probably an indigenous community in a remote area probably, is more likely to spring to mind.

MS McLEAY (JC): Yes.

DR MUNDY: All right, that's all I've got. Okay, thank you very much for your time.

MS McLEAY (JC): Thank you.

DR MUNDY: We now plan to have a small break.

DR MUNDY: We will resume. For the record, could you please state your names and the capacity in which you appear.

MR CURRY (ASA): Ian Curry, Chairman, Australian Shareholders Association.

MR MAYNE (ASA): Stephen Mayne. I'm Policy and Engagement Coordinator, Australian Shareholders Association.

DR MUNDY: Would either of you like to make a brief opening statement?

MR CURRY (ASA): Yes, thank you. The Australian Shareholders Association supports the litigation funding system and the class actions which generally drive that. In our view, that has been brought about by the failure of the continuous disclosure system and directors and management advising shareholders appropriately of events which are affecting their share price and their company's future. We have noted that no class action at this stage has gone to court for a final decision. Companies are settling out of court, clearly recognising in doing so that they have a liability. which of course is not admitted, which would be the proper step a company would take. In all probability those actions being settled out of court are being settled for less than probably would be incurred in court.

We do support litigation funding. We believe those funders need to be properly resourced. We don't support being licensed because we think that would diminish competition and that in effect it would be a way in which these funders were muzzled or made it hard for them to take action. We have noted that in nearly all cases no directors have ever been personally liable, which we believe is wrong, and that insurers are carrying the risk which means higher premiums for everyone, and indeed that auditors and other professionals have had to pay out and in turn have been covered by their insurers. So that we believe the system as it stands today is appropriate but we would think that directors and management should be more aware of their liabilities. Thank you. I will ask my colleague to add a few comments.

MR MAYNE (ASA): We disagree with the argument run by our very well-resourced friends at the Institute of Company Directors with their 190 staff and 25 million a year in revenue that there's a safe harbour problem or there's a paucity of directors willing to serve because of the risks that they're taking. The fact that not one director that we're aware of has paid $1 towards settling any class action brought by litigation funders or the Slaters and Maurie Bs of the world we think disproves that argument about the paucity of available directors, so we don't believe there needs to be any strengthening in so-called safe harbour.

We feel that the action of the litigation funders is effectively working like a privatised ASIC where they are going around and driving improvements in

disclosure because directors know that if they sit on bad news and they overprice their shares, they will be sued and this will threaten their reputations and potentially lead to a substantial settlement.

Overall, as far as we can tell, close to a majority of all settlement funds come from insurers, many of them offshore, so there has been, you can argue, an offshore capital contribution to the system in Australia and the system has helped contribute to IMF, which is the world's largest listed litigation funder, an entrepreneurial Australian company which has grown to be capped at north of 200 million, and equally Slater and Gordon is the world's biggest listed law firm. It's quite unusual for a jurisdiction like Australia to produce two world-scale outfits. In Slaters it's only a minority of their profits, but in part from this system, where in many of the companies that have settled - and if you go through the list, there are the GIOs, the Transpacifics, the Nufarms and the AWBs, they were sitting on bad news. They should have disclosed it earlier. They did mislead shareholders and that is why they settled, because they hid bad news. Sunlight is the best disinfectant. A culture of transparency - get the bad news out early. That is a system we should encourage and no-one would get sued if they could show that they weren't sitting on bad news.

All these settlements suggest that discovery would be very embarrassing for the directors in terms of hiding bad news, effectively leading to a misinformed market and shareholders who buy into that misinformed market losing money and in the end being rightly compensated. I guess for those reasons we think that there isn't a need for a heavy-handed regulatory intervention; that small shareholders are getting access to justice that they wouldn't get without litigation funders supporting them.

Our biggest issue in terms of any regulation is the capital adequacy question where you don't want a fly-by-nighter coming along, suing a top 50 company and then getting and adverse cost judgment against them and not having the readies to fund that. I think the capital adequacy of those approaching small shareholders seeking money from them is probably the most important area in terms of any regulatory intervention to ensure that they have got the readies to back up their initiation of a class action. Clearly with the likes of a Slaters or a Maurice Blackburn or an IMF, it is clear that they do have the capital adequacy to follow through.

DR MUNDY: Thank you for that. Mr Curry, you indicated that perhaps those who were recommending regulation of litigation funders were trying to muzzle them. In fact we have made that recommendation precisely for the reasons that Mr Mayne outlines, to provide appropriate prudential supervision of these organisations. I think that is an unfair representation of the views of the commission and indeed of IMF Bentham who also support regulation in this area, just to correct those facts.

Maurice Blackburn when they gave us evidence earlier today suggested to us, and I think this may be right - I mean, essentially what we hear is ASIC-light, but the point is that these settlements are occurring in private. Directors aren't being held accountable. Whether or not they should be held accountable and whether they would meet the test more generally, they are not being flushed out. They may well be repeat offenders. Is it your view, bearing in mind that our concern is not only securities' based class actions but things like the ANZ fees case and things like claims for dodgy hip implants - so we are obliged to consider this matter more broadly than just this case. Is it your view that this is an inferior solution to proper regulation of directors by ASIC or is it a preferred outcome, perhaps in a range of circumstances?

MR CURRY (ASA): In an ideal world of course there would be no need for anyone to take action. We think that there are steps in this position where companies through their directors and management need to disclose better. We think ASIC has a role there but ASIC has its own challenges in terms of resources and probably in the future would find it more difficult to cover all the situations it needs to. If you like, the privatisation of ASIC's role is a next step because that is the only next step probably available to the people who don't have the capacity to do something on their own.

MR MAYNE (ASA): I would probably add that over ASIC's 24-year history, I don't think they have had a stellar track record of going after directors. I have published previously lists of everyone who has gone to jail and it is the proverbial financial planner from Tootgarook who wasn't meant to manage a super fund who has been prosecuted and it is not top 200 company directors, so no-one from Babcock and Brown. 10 million disappeared. No-one prosecuted anything. I think the record has been sort of a tardiness to take action and when they do take action, they get a massive response so Fortescue, 15 million later; James Hardie; Centro - a huge cost to the taxpayers to get modest slaps on the wrists and modest fines in court; whereas this system is more market-driven. It is more professional and they go where there are precise issues.

A scoreboard question here: scoreboard ASIC; scoreboard class actions. A billion dollars plus in settlements; not one gone to trial. Directors cave in all the time; whereas ASIC when they take on the big ones - fight, expensive, lots of money and then a mixed record. I think the private model is working quite well.

DR MUNDY: It was put to us on Tuesday - and this is by people who are concerned with an Americanisation of the Australian legal system. You will be familiar with the rhetoric, I am sure. One point they do make is that because these actions take a significant period to settle, they create significant distraction in the company; they may suppress share prices. Evidence from the US is cited in this

regard.

The subtext is that these claims aren't meritorious and if they had run to court, then they would get knocked off but because of just the cost and the distraction of this lengthy pending litigation, companies settle them even if they were of the view that if they went to court, they would be successful. Do you have a view on either the statistical factual basis of those claims or even the behavioural basis for those claims?

MR MAYNE (ASA): I think that the directors are very concerned about their reputations. I think that is a driver in part as to why they are settling. The distraction issue is legitimate. You do hear it all the time but a lot of people have litigation going on all the time. I mean, litigation is just a part of life. Why you have to settle this sort of litigation as opposed to other forms of litigation, I struggle to see why it is, except that it goes to the heart - discovery goes to the heart of communications between management and boards on bad news.

As I said earlier, I think they are settling to avoid public ventilation of that discovered material in part and I just think the cases that have settled with the big dollars - you can see why. I have been a shareholder in all those companies. I hold 6 million stocks just to experience being a shareholder. All those ones that have settled have had a pretty strong case and it hasn't surprised me that they have settled, because they have done a shock downgrade which should have been announced earlier.

MR CURRY (ASA): There hasn't been a huge number of these when we look at the number of class actions that have been run over the last decade, let's say, or going back further to GIO which was probably more than a decade ago. Even the ones that are being talked about - some are talked about but never proceed of course. They have been so few compared to the American experience that I think to try to compare the two jurisdictions is not a fair comparison.

DR MUNDY: Mr Mayne, you mentioned management and directors. Is the agency problem in this the relationship between the directors and the management or between the directors and the shareholders or both?

MR MAYNE (ASA): It's definitely both. Every situation is different. I mean, I am in a sense management; Ian is on the board. Sometimes I won't tell him bad news. That is human nature. At the City of Melbourne, I am on the council and the management there sometimes won't tell us bad news for fear of how we will respond to them. My best guess on that is that the problem is more on the management side, not wanting to tell the board their bad news because they will get fired and they have got a lot riding on it with big incentive schemes. I think they sit on things, but the

board needs to be creating information flows, mandated information flows that give them line of sight into any form of deterioration so that the risk framework - boards should be responding to it but my guess is that on history, it is more management hiding stuff from the board, rather than the board deliberately hiding stuff from shareholders.

MS MacRAE: Just in relation to our recommendations or draft recommendations specifically, how do you see lawyers themselves entering this space? Would you recommend that they should be able to fund cases or should there always be a litigation funder involved, so should lawyers be able to charge contingency fees and if they can, should they necessarily have to bear or have the ability to bear an adverse cost order as a litigation funder would? Then the final part of the question is, should there be caps on those sorts of fees to ensure that not too much of the damages goes to the funder, be it the lawyer or the litigation funder rather than to the participants in the class action? Sorry, that's a lot of questions all rolled into one.

MR CURRY (ASA): Yes. On the fees side, typically the fees might be around 30 per cent but they will be taken on a judgment or however it's arrived at, that'll be around that figure. We think there are some issues around the way in which class actions are presented to shareholders inasmuch that's it's no win, no fee but there's no, generally, up-front when you talk about fees or costs if you lose and that does need to be dealt with better.

As to whether a law firm itself should, if you like, be the funder and the representative of the shareholders, I think there's a case for separation because there are two significant pieces of activity involved in looking at the class action value, if you like, and then taking it through the court. There's two stages there. Again, if a law firm was to be the one party involved then it would need to be the same financial capacity, the same capital requirements in their case.

MS MacRAE: Yes.

MR CURRY (ASA): In most cases they're not listed. They're companies generally these days or they're set up in a form which tries to limit their liability but they wouldn't be, I think, as strong as having a separate funder.

DR MUNDY: That's one of the reasons why we would expect someone to hold a licence from ASIC so that an assessment by a competent regulator could be made of their prudential position. I think Maurie Blacks gave us some evidence earlier today where they suggested they could - they're running a class action in respect to bushfires which they're able to pull on their own balance sheet, it appears, and that's on a no win, no fee, conditional basis, I suspect but they could not have brought the ANZ fee action as well, so our interest in contingency fees is ultimately to provide

competition for the litigation funders.

Our expectation would be that they would all be regulated in a consistent way and we were assured by the Chief Justice of Western Australia on Friday that the superior courts where these actions would be heard could happily regulate the ethical issues that are raised. Is that something that would fit comfortably with you?

MR CURRY (ASA): Yes, that's a reasonable position. Certainly the IMF's margins in Australia are getting up around the 40 per cent mark. That $42 million cheque they got out of Centro was an eye-popping big cheque, and I was at a Maurie B conference on class actions a few months ago and I heard the comment made that in the US the margins are more around the 18 to 20 per cent mark, so if you are interested in competition, I guess barriers to entry from no win, no fee being prohibited may leave the field to a smaller number of players.

I guess from a small shareholder point of view you just don't want six different small law firms bombarding shareholders and soliciting because I think the risk would be on the multitude of actions, confusing shareholders and everyone competing. Centro was a bit unseemly when you had Maurie B and Slaters running separate actions and each trying to attract more shareholders. It's best if they came together. There should only be one class action and so a system that doesn't have five competing is probably better so I would have thought - - -

DR MUNDY: But that was the funding issue. That's what we have now and the problem is we have very little competition for funders and the likely entrants, because they've told us they will, are the plaintiff law firms properly regulated. Just on the question of - and we had this discussion with Maurice Blackburn earlier today. It has been suggested to us that if you were to allow contingency fees you might put a cap on them, and they suggested 35 per cent but let's not worry about what the - but it's going to be a number like that with probably a three in front of it. I think they made the observation that funded outcomes are in the 35 to 40 per cent range or 30 to 40 per cent range plus about another 12 per cent for the lawyers, so that's where the resources are going.

Their suggestion was that a cap on the percentage take in a contingency fee arrangement might actually serve to cause the funders to sharpen their pencils a little bit because otherwise now there's a question of what the capital capacity of the plaintiff firms to bring these actions really is, but that's a regulatory question that will result over time. I'm also mindful there are a lot of concerns which are expressed by thoughtful people, particularly on the bench, about funding and contingency fees. Would you see a problem with the imposition of a cap at least for an initial period if we were to allow a contingency fee as almost a way of giving the community some assurance that the lawyers weren't just going to go gouging?

MR CURRY (ASA): I'm not married to a lawyer. I know - - -

DR MUNDY: Some of my best friends are lawyers.

MR CURRY (ASA): Yes, I know and I've been sued a few times over the years. We haven't conferred on this but my view would be yes because there's always lawyers who know how to charge and charge like wounded bulls, so anything that protects, because often people are first time litigants, don't know what they're doing. There's an information asymmetry between the person promoting the class action and the free ride. If you can get something for not much, so something that protects the voiceless and the first timers - at ASA we spend quite a bit of time thinking about the non-participating ignorant shareholder, how the system protects them. They are the biggest losers in our system in Australia, so something that protects them, not something that's too low where it's uneconomic, so with a three in front of it probably sounds reasonable.

DR MUNDY: Yes. If you want to think about this and particularly that whole question and come back to us, we'd be more than happy to get a short note from you just if you want to think about it and talk about it a bit more because I know it's an issue you obviously haven't thought about. We'd be more than happy to - because we are interested in the consumer. For us, the big issue here is the consumer protection angle, both from the active willing participants in the contingency fee arrangement or the funded arrangement as opposed to the inactive one to whom someone must have a duty.

MR CURRY (ASA): Yes. We don't want to see an ambulance chasing the system in the investigative arena or the employment arena, as in both employment and accidents.

DR MUNDY: I think that's an arguable proposition but the other issue I guess is the question - it has been put to us and it's our own analysis that the presence of adverse costs orders is a significant break and on the sort of conduct that is alleged to occur in the United States in particular. We note that there are other similar jurisdictions where adverse costs orders exist where this behaviour doesn't appear to have occurred. Would you see it as an unreasonable fettering on the trade of lawyers and funders if the regulatory framework required them in most circumstances, particularly in relation to where there are small participants in the class, to accept the consequences of an adverse costs order rather than allow that to flow through to the members of the class as a way of putting a break on unmeritorious litigation? We understand at the moment typically that's what happens and whether we should insist upon it in all cases.

MR CURRY (ASA): Typically it's passed on to the class or typically - - -

DR MUNDY: No, typically the funder will wear the adverse costs and I think that's one of the attractive incentive characteristics of the regime.

MR CURRY (ASA): I agree, so I think that you pay 500 bucks and that's it. You're in.

DR MUNDY: Yes.

MR CURRY (ASA): That's one of the good things about it. It has had 28,000 GIO shareholders signed up and, yes, because the system is working like that now in practice. If that was codified and locked in, ie, to protect the class members, it may reduce activity a little bit but I don't think, given the track record in Australia, that it would kill the industry or - - -

DR MUNDY: Maurie B was telling us today there's probably only three or four a year, so it's not a big thing to kill.

MS MacRAE: I think we have asked most of the questions around this particular matter.

DR MUNDY: We do I think in the report acknowledge that we do think litigation funding in the broad - I mean, one of the concerns I guess that we have is that all the heat in this debate is around securities-based class actions. It's not for, as I said, dodgy hips or no-one has raised concerns about the ANZ fees matter.

Perhaps the last question, and you alluded to it before, is that this is effectively, if you like, a supporting tool on the policy armoury to enforcement by ASIC. Is the most efficient way of dealing with these sorts of concerns about directors these frameworks or are other forms of law reform preferable or needed? Are there supplementary of complementary public policy initiatives that could be pursued to address the issues that are of primary concern to you and your members?

MR MAYNE (ASA): About director accountability?

DR MUNDY: Yes.

MR MAYNE (ASA): Yes. I mean, it's amazing that a privately owned company, the ASX Ltd, has been able to come up with a set of rules that have led to a billion dollars of settlements, so ideally it would be in the Corps Act as opposed to just in the listing rules because the ASX can change the listing rules whenever they like. They can say, "We don't like continuous disclosure because it's costing our directors.

Therefore, we all vote to take it out." I think that Australian listing rules have a surprisingly large amount of power and clout relative to the legislation compared with other jurisdictions. That might be one change.

I guess one other little comment I was going to throw in is I have noticed in The Australian newspaper they seem to be running the line quite aggressively, coming ultimately I think out of the American Chamber of Commerce into the Australian market, and it has been quite a vociferous campaign they have run which the attorney seems to be quite interested in. I just note that there have been a number of class actions against the owner of that newspaper who personally doesn't like class actions and I get a sense there's a little bit of, "We wouldn't want that happening in Australia," so I would simply say read those comments with a grain of salt and think about the interests of the proprietor in pushing that particular line because it has been a very aggressive one-sided argument they have been running over a few months now.

DR MUNDY: All right. Thank you for those observations. We might draw this to a close. Thank you very much for taking the time on what I know was relatively short notice, so thank you very much.

MR MAYNE (ASA): Thank you.

MR CURRY (ASA): We will hand these forms to someone.

DR MUNDY: We have now the Office of the Public Advocate. Thank you. Apologies if bringing you on a little earlier is inconvenient. Could you please state your names and the capacities in which you appear.

MR GRANO (OPA): Yes, my name is Philip Grano and I'm the principal legal officer of the Office of the Public Advocate in Victoria.

DR FEIGAN (OPA): Mark Feigan. I am senior policy and research officer with the Office of the Public Advocate.

DR MUNDY: Thank you. Would either, or both of you for that matter, like to make a brief opening statement of no more than 10 and preferably no more than five minutes?

MR GRANO (OPA): Certainly. If I could just outline what we thought we might cover, which would be helpful to you, where we thought we might be most helpful to you. One would be the legal health checks in relation to people with a disability. The second area where we thought it would be useful for discussion is a single entry point for legal assistance; a little bit about supported decision-making for people with a disability and how that impacts upon being a participant in the legal system; and then a couple of issues that are specific to people with a disability in the legal system: litigation and guardianship. I don't know whether you have had much opportunity to consider that.

MS MacRAE: No.

MR GRANO (OPA): It's a role that the Office of the Public Advocate is being asked to undertake for people with disabilities, with cognitive impairment, and that creates complications for the legal system and for us because we're not resourced to do it. Then I would like to talk a little bit or perhaps field questions in relation to the court's alternative dispute resolution and inquisitorial jurisdictions.

DR MUNDY: Off you go.

MR GRANO (OPA): That's my introduction. I thought you may have questions about that. In relation to the legal health checks, disability advocacy services don't figure in your report at this point and I'm not sure whether you have heard much about disability advocacy services.

DR MUNDY: We had DANA before us on Monday of last week.

MR GRANO (OPA): Okay, great, because they are I suppose a body where people with disability get an opportunity to raise issues there. Whilst some of them are legal

advocacy services, most aren't and most provide a way of getting justice or getting some resolution of issues that arise for people without resort necessarily to legal processes, but using things like policies, procedures, to say you are not approaching this personally in a way that they are meant - receive services. So that provides, I think, an important avenue for people with disabilities to have a voice that they would otherwise not have without going to litigation.

I think that's particularly important because most of the issues that people with disabilities usually have to deal with are service issues and getting litigation in relation to services is particularly difficult and how services are funded - they're usually funded through government. I think that one thing, though, that has happened over recent years has been the diminution in the value of those advocacy services and the role that they play in the lives of people with a disability and it would seem to the office that their augmentation would assist people with disabilities to resolve a lot of disputes without the costs of litigation and so forth.

DR MUNDY: You hit on something which we are very keen to continue to explore but, sadly, this inquiry keeps getting dragged back into the courtroom. Would it be fair to say that these disputes arise because of a lack of training on behalf of the staff of service providers, an absence of appropriate dispute resolution mechanisms when the problem first emerges and a lack of adequate resolution processes?

MR GRANO (OPA): It's hard to identify those specific things. Perhaps I would identify that because the service system itself is under-resourced, it tends to cut corners and when it cuts corners, people fall out of getting the service that they expect and would have enriched their lives. Having mechanisms such as the Disability Services Commission, which we have in Victoria, we now are getting under the new Mental Health Act a mental health complaints commissioner. We have a health services commissioner but that's in relation to health matters.

Whilst they do a particular role, there has to be strong processes within organisations themselves to deal with complaints so that advocates, or even family advocates, can pick up on those policies and run with them and make the running there. When these things often get reduced to litigation you run into all the complexities of a person lacking capacity and then who is going to litigate and where do you get instructions and how will it proceed? All those become impediments to the effective resolution of the matter. I think services could be better informed but I do think it is in part due to the fact that people are trying to cut corners somewhat in the way they deliver services too.

DR MUNDY: Does that mean that these disputes - and accepting the budgetary constraints as what they are, part of the problem here is a failure on the part of service delivery agencies when they are trying to cut corners is a failure to properly

manage expectations of service users, because service agencies don't want to go through the heartbreak of turning up and saying, "What you used to get you're not going to get now"?

MR GRANO (OPA): I don't think it is just that. I do think there is a problem in the field of the squeaky wheel gets the services and therefore those who don't have an advocate can really miss out and get the raw end of the stick. You have got to be careful about managing expectations. A lot of the expectations are legislative. They are also in policy documents which have given people expectations of having lives that will be lives in the community and having expectations about that as a reasonable thing within Australian community. I don't want to diminish those things for those people and say that they shouldn't have them because of a lack of resources.

DR MUNDY: I guess what I am trying to get at is ways - I mean, one of the ways of reducing unmet legal need or unmet need in relation to dispute resolution is to better manage the processes that themselves lead to dispute. I guess that is what I am trying to do, trying to understand what the cause of these disputes is and can they be dealt with in a systematic way, as opposed to them having to end up in even the best - even the best dispute system in the world is a worse place than a dispute - well, not quite but in many cases it is a better outcome and I suspect a cheaper outcome than a dispute avoided.

MR GRANO (OPA): Perhaps if I gave you an example of the sorts of disputes, a person lives in a group home, a person with an intellectual disability, and they are in dispute with another person in the home and they are not completely compatible. The service is not really dealing with that in an effective way, either by bringing in further resources or some behaviour management or attending to the conflict between them and so that escalates. There is then an incident. The incident then gets drawn to the attention of a family member or a community visitor or someone of that ilk. Then it gets a report. Then it becomes a matter that gets reported to the department. Then you might have a process where that matter is investigated and why weren't steps taken earlier and what can be learned from it?

It is true that perhaps if the people at the coal face in the first place had identified the incompatibility and the issues and tried to have something done it about quickly, the whole thing would have been prevented from happening. I think that can be a problem, that sort of issue. It takes a number of layers before it actually gets revealed and dealt with.

MS MacRAE: Just coming to mind about what causes some of these disputes, we heard from the Public Transport Ombudsman this morning. She was very frank with us about, since she has been in the position, how much work she has had to do coming into that position to understand the needs of people with disability and how

much work she is putting in, trying to make connections with a whole range of service providers for those people so that she can better understand the needs of people and what is a large segment of the population that she would be interested in hearing from.

I would be interested in your views about how much of this lack of service provision - some of it is funding. I just wonder how much of it might be pure ignorance. When you get in touch with some of these service providers, for example, if you were the advocate and you say, "This person was finding it extremely difficult" - for example, she was saying for someone who is hearing and sight impaired, just working on which train to get on or where you need to go for the bus can be very challenging. Is there an element of ignorance here and is that something that will need to be addressed to try and meet some of this unmet need?

MR GRANO (OPA): I think in mainstream services that would certainly be true. Even though there are disability standards under the Disability Discrimination Act, people's awareness of those or their implementation of them if they are aware can often be poor. I think in relation to transport - but I know originally there were problems with myki, for instance. If you were in a wheelchair, you sometimes couldn't reach up to actually touch on and touch off, and practical things like that. Also impediments around transport can be just simple things, barriers that are put up by workmen who forget that the pathway needs to be available to someone in a wheelchair. These are simple things. If you had to push a person around in a wheelchair, you would not make that mistake.

MS MacRAE: Yes.

MR GRANO (OPA): It is true that one does at times despair that people do not have a mindset because they perhaps haven't had the experience of being a person with a disability or helping a person with a disability. These things do matter. I am glad that the commissioner is taking on board those things. On the way here we were remarking that issues that we raised in the 1990s about access to trams - and we came here using super stops. There is progress.

MS MacRAE: Yes, slow as it might be if it was 1993.

DR MUNDY: Just in relation to adversarial as opposed to inquisitorial matters, I think you raised these in your opening remarks. Our understanding is that the guardianship list in VCAT has a more inquisitorial character to it, whilst the Children's Court which I think you occasionally appear in has a more adversarial character. Can you give us a sense of the pros and cons of both, particularly from the perspective of the disadvantaged person involved getting access to a decent and just outcome?

MR GRANO (OPA): The guardianship list at VCAT - the supervising legislation requires the tribunal to act in the best interests of the person so it is not simply a contest between the parties and the information the parties put before the tribunal. The tribunal has its own legislated onus to act in the best interests, so if it considers that there is insufficient information before it upon which to adjudicate, then it is possible that it can then seek from the public advocate an investigation that goes to the issues that are unknown and seek a report. In fact if it does that, it cannot adjudicate on the matter until it has received the report.

That provides a way of checking that goes beyond the evidence that is put to the tribunal by the parties. I think that is particularly important where one of the parties, it is alleged, will have a cognitive impairment and therefore will be at a disadvantage compared to someone who does not have a cognitive impairment involved in the same litigation.

I think that generally works very well because it gives the tribunal an opportunity to collect all the information it needs. It also depends somewhat upon the ability of the Office of Public Advocate to do the investigation. Those investigations are rarely done by lawyers. They are done by people from a variety of backgrounds, a variety of skill sets, who then put a report to the tribunal. The tribunal looks at the report. The report is made available to the parties if they want it and they can interrogate the author of the report as to the information they have found.

It also has the advantage of bringing forward players in this matter who otherwise wouldn't know even about the litigation. I think that is particularly important, that there are other perhaps protective people, other family members, who don't know anything about it. That's the pros of it.

The cons I guess are a little bit about - is it as robust as the adversarial method? I think I'm unsure about that. At times it can be very robust. People will be represented. The lawyers will cross-examine the witnesses in great detail, so they can be robust. At times, though, I think there can be an over-reliance on the information that perhaps is provided by the public advocate because we don't always get all the information, so I think that can be a bit of a down side at times.

I compare that, though, to the litigation we have had in the Children's Court where the person has been found - this is the parent, often the mother - it has been I think almost exclusively the mother, and there is a protective application in relation to the child, so someone has determined that the mother doesn't have capacity to pursue that litigation, "Let's appoint the public advocate to stand in her shoes and make the decisions that she would make if she were a competent person in the

litigation."

When we have been involved in those initially we approached, and I think we still do, that everyone there is really trying to do what's best for the child, but we did find that the adversarial nature of it meant that people became defensive about positions rather than open about positions. They would be protecting their patch rather than exploring solutions.

We found this particularly diminished resolution of issues in a way which was constructive, particularly for the parent, so we might promote, "Okay, we cannot adduce evidence that means that there could be reunification of the mother and child. However, we think there needs to be greater effort in terms of access, keeping the relationships alive and so forth." That won't be permitted because these particular orders don't even give you ability to have access orders. Access will be determined by the guardian and it's hard to negotiate, so particular orders really put you on the back foot of being able to negotiate solutions for people.

DR MUNDY: Whereas if it was a matter in the Family Court about access of one parent to the child and one parent has custody, the court can make such orders.

MR GRANO (OPA): Indeed.

DR MUNDY: What you're saying is, for example, if the child ends up being a ward of the state, the guardian gets all the rights, whereas if there's a custodial parent, the courts are actually able to make orders that facilitate access in a different way.

MR GRANO (OPA): That's true, and I have got one of those at the moment and the other dilemma that is coming up in that case is the costs associated with the litigation. Where I'm standing in that, I am running up costs on behalf of a person who really doesn't have much in the way of funds and so my dilemma is trying to settle the matter in such a way that I do not exhaust the funds to do it. In that jurisdiction I'm not likely to get a costs order against me, but in some jurisdictions as litigation guardian if I lose the litigation I will get a costs order against me. We have had to say to the Supreme Court on two occasions at least, "We don't have the resources to run that risk of a costs order against the office," so the litigation just stalled.

DR MUNDY: We talk in relation to public interest litigation about protective cost orders. This is probably not quite the circumstance we had in mind but there is no capacity or a lack of willingness on the part of the Supreme Court to provide a protective costs order?

MR GRANO (OPA): I haven't been in a situation where that has been sought. We

have approached the other side and said, "If a litigation guardian is appointed, will you forego a claim against the litigation guardian?" There have been some occasions where the other side has decided to do that because they wanted the matter resolved, but there have been occasions where that would - - -

DR MUNDY: But there's no capacity for the Supreme Court to provide a protective costs order?

MR GRANO (OPA): I don't know. I don't know about that. We usually act by lawyers in these things, often pro bono lawyers. They haven't raised that particular issue as a protective costs order could be made.

DR MUNDY: The other party to the litigation is typically Children Protective Services?

MR GRANO (OPA): In the Children's Court that is so. We don't have an issue of costs there. It's more where you went to the Family Court and then went from there to other courts where there has been civil litigation perhaps more over money. That's where we have run into the costs issue more particularly.

DR MUNDY: Okay. Not so much over children.

MR GRANO (OPA): No. Costs is not an issue over children.

MS MacRAE: You mentioned in your opening statements about legal health checks. I'm just wondering if you could give us a little bit more information about who you think is best placed to do those legal health checks for people that have cognitive impairments and mental illness.

MR GRANO (OPA): We were thinking about this in terms of those disability advocacy services and what Mark found today was an interesting publication put out by the Disability Advocacy Resource Unit which has some figures in here around the sorts of complaints made to disability advocacy services in the last financial year, which I thought you might find interesting. I haven't had a chance to look at it fully, but I suppose it shows you a variety of matters that they have been asked to look at.

Education was the number one issue, disability services, accommodation, other, then health, family, legal, abuse and neglect, leisure and recreation, transport, employment, built environment, gender. That gives you a variety. Because disability has unique issues to it, I would think that a generalised legal service wouldn't know or wouldn't be able to identify the specific issues for people with disabilities.

MS MacRAE: So education is the number one issue?

MR GRANO (OPA): Yes. I'm surprised about that.

MS MacRAE: Would that be children being excluded from mainstream schools?

MR GRANO (OPA): I haven't got to the detail of that but I assume that that may be one of the issues, yes.

DR MUNDY: If you're able to share that document with us, if you could leave it with Mr Irwin on the way out, that would be most helpful. When we discussed this whole question of legal health checks with DANA a week ago now, they suggested that what needed to be done is much more than just the promulgation of a form which advocates or whoever could fill it in, but that some training would be required so that advocates could in fact properly administer whatever the instrument was. Would that be your sense?

MR GRANO (OPA): Yes. We were discussing this and one of the things we noted was that just having information in and of itself doesn't help people. You need to be able to apply the information to the particular circumstances you're in. I think with anyone in advocacy it's being able to identify what is the legal issue, the advocacy issue, and then saying, "This is where you might go for this particular expertise," or, "I could ring them and find out a bit more and get back to you on that." I think it does need to be a bit more than just filling out a form. There needs to be - - -

MS MacRAE: You need to be able to action it.

DR MUNDY: Some training, which then involves issues around people in regional areas and how do you get the training to them and all that sort of stuff.

MR GRANO (OPA): Yes.

DR MUNDY: Yes, okay.

MS MacRAE: Do you have any feel for the sort of scale of funding that might be required to make that operational?

MR GRANO (OPA): I don't, and I wouldn't - as a lawyer it's not my field, I'm afraid.

DR MUNDY: DANA would be the best people to ask, I suspect.

MR GRANO (OPA): Yes, I think that would be the better idea because - - -

MS MacRAE: And we did ask them that question.

MR GRANO (OPA): - - - I don't want to - I was in a Community Legal Centre at one stage that was funded by the advocacy program. It was Villamanta in Geelong. It was for people mainly with an intellectual disability but for people with disability generally. We had an advice service as well as case work as well as community education. So it was a traditional CLC model and it was statewide for that particular group of people, but I think, as I was there it was increasingly difficult to provide the statewide side.

DR MUNDY: So it was a specialist CLC?

MR GRANO (OPA): Yes, it was.

DR MUNDY: How did it - I mean, this is just a more general question because it's been put to us that for lots of good reasons specialist CLCs seem to be clustered around central business districts and, if not, in suburbs perhaps like Fitzroy or universities close to or whatever. Geelong is a reasonable journey from the centre of Melbourne.

MR GRANO (OPA): Villamanta is in Geelong.

DR MUNDY: Did that present any - did you ever think - did people ever think about moving to Melbourne or is that where it had grown up and the volunteer and support network was there so to move it would have ripped that sort of thing apart.

MR GRANO (OPA): It was considered at one stage, moving it to Melbourne. I don't think we really had the resources to - rents were cheaper and things like that, were cheaper, so we gained some level in moving to the city we would lose in other ways. Also Melbourne and Geelong aren't that far apart, so it did prevent more access to the north-east of the state but, you know, a lot of the work was done on the telephone system too.

DR MUNDY: Okay. Thank you very much for taking the time to come in and see us today.

MR GRANO (OPA): My pleasure.

DR MUNDY: Could we have Jemal Abdelrehem, please. Could you for the record please state your name and the capacity in which you appear.

MR ABDELREHEM: My name is Jemal. I'm not a lawyer or representing any company but I think the last 12 years I have been full time doing this issue so I think it will put me in a position where I have the knowledge required to be addressing you on very good points.

DR MUNDY: Could you perhaps make a brief opening statement of about five minutes and then Commissioner MacRae and I will have some questions for you.

MR ABDELREHEM: One point I'd like to mention is the overcrowding of the court system and overcrowding of the services and I would think not individual incidents have to be looked at here, but the main cause for this overcrowding. When, for example, as my experience, when there is a legal issue between a very weak person and very strong individuals or groups, that creates, just triggers more cases, unnecessary case, and then the courts are full of small issues and the person, the victim, cannot deal with all this at the time. To a degree, one legal issue can trigger 100 legal issues in some occasions because the victim is under siege and sanction.

I myself, I left my job of 20 years without even asking for redundancy because of stress which was a result of dissenting and still the problem is not solved. All those who are coming and speaking here have passed through them one by one, and it looks like they are looking at the new one coming issue and then the next one and then the next one, it goes on and on. So my conclusion is I come from cost control background and I am an engineer. I am very good at fault finding in other areas and the cost comes with it and I have a background of political economy and all this combined, it gives me the chance to be able to address a point which is central to many points.

As I read across the draft report I found out that there is no word called "corruption" mentioned there, but I feel it, whenever I am reading I feel that it is there. Everybody wants to increase their income. Some factory workers might try to work overtime to profit more. Some organisations they are trying to do anything to increase without seeing the consequences to others, and so the costs, sometimes they don't want it to end and sometimes they don't want the queue to end, because that is their justification for asking for more funds or asking for more money, and I saw this myself, I went through it, and I can tell you that I survive it, but maybe there is a lot of people that are not surviving incidents like this.

I have to be proud of what I did and up to now I have written like over 20,000 pages, most of them handwritten, on trains, on trams, to government departments and legal bodies, but I was dealing with any problem which comes now

and forgetting the main core of the problem because you are stuck in there. So corruption plays the main role in here, and where you can - judgment is jagged by comparison, with the case at issue, issue or whatever, and comparison is about measurement. When we say equal, being treated equally in front of the law, for example, it means fifty-fifty, being treated equally means fifty-fifty which is equal. The equal sign is mathematical, it is not legal issue.

Then when you say again equal opportunity, it is equal, but where do you measure corruption. When you're trying to go to a case which is very clear and easy, you find breakage, you're hitting a brick wall every time, and then this is where you measure the corruption, how much it's widespread. Corruption is not done openly, it is in secret and then also it is investigated in secret, then also talking about it is secret, because not many people will address it as a main core reason, but I say it is just there, everybody feel it.

So what happens is, after long time, the people who keep the secret and have been a secret society, because they have to compromise each other, and that is the history, the world has been always like that. Now, sometimes also, because the disadvantage, like me, is that with person nobody wants to bother. Maybe a judge or maybe someone very important have done mistake to this little boy, they will try to cover it up, so the mistake brings another mistake, and so on and so on it goes.

So my measurement is for this - it is - when we say "double standard" it also means times two, which is mathematical again. But there is triple, there is quadruple, there is whatever. So the words cannot be put into figures and be calculated. But the decisions which come from the judge, the words which are said, the steps you have taken, all this, are like mathematics, you can't calculate them and find out, and the legal system didn't come up with this here. We call it half-full, half-empty measurement, which looks like equal, but full and empty is two opposite things, and the system seems to work the same way.

Where can improvements be made is starting to follow the one goal and where it ends up, before just finding or whatever. Because sometimes, when you go - for example, I give an example where three or four people, who came together because everybody have a legal issue - so we've got legal service, we've got the Law Institute of Victoria, we've got all this and that. We're spending our time, we're wasting - somebody stand with us, that's all public money. They are paying rent, they are paying telephone or whatever, but then if you ask what did the victim get, sometimes you get nothing. So that is public money. Sometimes it's used to break you instead of giving you access.

But in all the ways, they have the information, they collect the information. I don't know where that information goes at them. An example is the Law Institute

of Victoria, in one instance, which was the advice to go and see a lawyer, and that advice was, the legal system is not always perfect. Just understand that this is a big problem, and you are right, but the legal system is not perfect. So to get that answer, the government or whoever is paying for that. The legal service is sometimes similar, but it is not in every incident. When it's against - a very strong person against a very small and very weak person, and I am talking about what I experienced, not what I read or what I heard or whatever. So this has to be addressed, and that corruption, existence of corruption, has to be clearly shown in any draft report or any decision made, because it is reality.

MS MacRAE: I understand the point you make about power imbalances and how you can have a very small party and you can have a very strong and powerful and well-resourced party, and our justice system does try and take those things into account in many respects, and I'm wondering if you've got any suggestions about how the mechanisms that are used in courts and in other mediation and conciliation and in tribunals, whether there are ways that you might suggest that that power imbalance could be better accounted for than they are under the existing processes.

MR ABDELREHEM: I have to say, there is a lot of improvement without just - maybe I am talking about the past. I saw the difference. There is a lot of improvement. But that damage has happened to some. But at one stage there was a network. A network means everywhere you go there is someone there blocking your access. So they would have done things, should have been - all right, it is a matter of investigation. The investigation bodies are the same. I don't know how, but I'm a hundred per cent sure, I have kept record of every step that I did, because people underestimate you sometimes, they do wrong in front of you and you catch them, and I lost count of how many times, because they judge you poorly and they do a mistake in front of you.

Then when it gets too much, you go to the investigator, or to who - whatever, they see too many good people who have got in trouble. Nobody will stand with you because he is confronting others beside you. So everybody is scared. Sometimes they openly tell you. This is the reality. Now, if somebody have the proof, a clear proof, and too much proof, he is still going to be blocked. What they're waiting for is, at once the victim will collapse. It will be his fault for not being on time to report or to go to the court or whatever, but the victim is sick.

For example, at one stage, my letters piled up like this, and the social workers, they are telling me to send me somebody to read for me my letters, somebody which is less capable than me to read. It is not that I haven't got English language, or I can't read, but it is - because there is too much stress, even if somebody is reading for me, I'm not going to understand anything. It piles up, and then a deliberate sanction and siege comes to you, because they want you to relive that issue, and they suggest

small things to help you, and this to help you, and that. It doesn't work. You're asking for a particular thing. This is not new. It's been there for a long time. Many victims have died. Many victims have got sick, mental hospital. Many victims, they stopped doing that. Some people, they don't want to know you if you want to remind them of how they were victimised.

So I saw this by my own eyes, and I became instead - I learned from this, and every day I'm going with someone to the court, helping someone to fill their form, helping someone to understand something, and there was a lot of result as a result of that. Still, the problem is not solved. I came to this country, in a few weeks I already had a job. For 20 years I worked and then stopped, a job which will last forever to retire from. Too much stress. I cannot even ask for claims that I had, or I cannot even tell what eligible to, just too much stress led from that. Then you go to Centrelink or whatever, they don't understand, you left a job. They want to kick you to make you look for job and go to job network. A hundred times you tell them, as if there is some network in there too. Then you become homeless, then you are cleaning houses or whatever.

This happens to many people There are people dying, you never know who killed them. There are people - happening a lot of things. The potential of the case I have has put me in a position where I have faced this all in just the very few - lucky I kept surviving. I only want to highlight that there is corruption, and it is improving, but still people didn't get through their minds and understood that there is change going on. They're doing the same thing what they always did, and this has to be - the government have to know this, and they have to also follow the people, who I have met, to check corruption, and they have to be strict.

DR MUNDY: Thank you very much for coming. Your story is really interesting, because one of the things that we are trying to impress upon the government is that not dealing with legal issues properly and quickly and effectively ends up creating all sorts of social consequences, and real damage to people in the way that you describe. So thanks very much for your time today. Thank you. We'll adjourn until quarter to 5.

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

MS KINGSTON: My name is Madeline Kingston. I'm a member of the community and I am not associated with any organisation.

DR MUNDY: Would you like to make a brief five-minute or so opening statement and then we will move on to questions?

MS KINGSTON: I have a massive submission and I won't be speaking to all of it. It stands at 3000 pages and I have brought 1500 of those in support. I am very concerned about the state of affairs with the statutory system, with the complaint system and general access for the community. I do understand that there are many worthy advocacy organisations who do policy advocacy and who are involved in advocating for the 12 and a half per cent of the community who are labelled as disadvantaged.

What isn't available at all are the needs of those who don't fit that category. I see the work that is being done as extremely worthy and I have addressed many of those issues - 17 categories of people who are disadvantaged. I would also like to make a plea for those who can't access those services at all. There are absolutely no available funds for civil action through Legal Aid, so I very strongly support the Law Council of Australia in their recommendations for more funding.

The issues that ordinary members of the community who don't fit that category face are different in many ways. I will be addressing what I see as the policy contribution towards unmet legal need. I believe that there is a significant degree of policy corruption. This is meant very broadly of course. The regulators are particularly slack.

My area of interest is in the utility area particularly. That is where certain categories just don't get a response. I spent 18 months as a third party representative trying to lodge a complaint with the Melbourne industry complaints scheme, EWOV. It was 18 months before they admitted that they didn't have jurisdiction. I was placed under enormous pressure with the legal stance. This was third party. I was doing this for someone else. It was still a very stressful situation. They had legal advice. They threatened to close the file if legal advice were to be sought for the client. There was a lot of posturing and there was a lot of pressure.

The impression I gained was that they were gatekeepers; that there was a significant level of prejudice and bias in favour of the industry and that their main goal was to have a turnover. This was a lucrative matter because not only do they charge membership fees but they also charge a daily rate. At the end of the day,

although most of these complaint schemes advertise their services as free, they are far from free because we do pay for them in our bills.

There are a number of corruptions that I would like to address. I became involved with a community association who asked me to go through their files and help with a referral that was to be made. It was a major dispute involving 300 people in a Melbourne property, a strata title property. They weren't able to get any form of redress, none at all. They became embroiled in a Supreme Court matter. The regulators are so slack about everything that it just isn't possible to get any kind of attention, so I have many case studies that I am going to bring forward. Some of them reflect what has already been said to the commission. I won't labour it now because it is very, very lengthy submission, so I hope you will take those matters into account.

My view is that by merely advertising for schemes that are seen by the general community as being biased, coming from the industry - their ombudsmen are nearly always chosen from the industry. I haven't found them to be responsive, particularly where you are dealing with fungible goods, essential services. I have never felt that that should have been privatised in the first place but given that it is and given that we have a very slack environment from a regulator's point of view, I would like to see something different done. I support the recommendation of the Victorian Ombudsman to rationalise things, to streamline them, to nationalise them, to have some sort of control - people who are more objectively assessing what is being delivered - before you rush off and before you make recommendations to improve the image of these.

Many of us feel that calling them ombudsman is a misleading way to label them. I resent that. I will be addressing that. I think that it drives down the image of the state ombudsmen who have an entirely different range of powers. They are not on parity with them. They are not the same. They want to call themselves officers. What they are delivering, what the community sees, is a very unsatisfactory service. 18 months, legal stancing, high pressure - that is not what I call a friendly complaints scheme that is objective.

DR MUNDY: Thank you for that. You will appreciate that we are not in a position to investigate individual matters.

MS KINGSTON: Of course you are not.

DR MUNDY: It is difficult for us to engage with you without having seen this material, for our staff to have considered it, and you will appreciate that there are much more concise submissions that have been put to us in a timely fashion that we need to consider right around the country.

MS KINGSTON: Right.

DR MUNDY: Can I ask you whether you have had any dealings with or have any views about the financial services ombudsman?

MS KINGSTON: I know that they collapsed three or four of them and they are now called the financial services ombudsman but there were several of them. Four of them came from different areas in Victoria and are members of ANZOA. ANZOA is a publicity organisation who only gives personal memberships. They don't give memberships to organisations, so it all depends on what I see as being a peer review, peer support outlet. They are there to promote their members.

DR MUNDY: My question was - - -

MS KINGSTON: I'm sorry.

DR MUNDY: - - - specifically about any views that you have about the financial services ombudsman.

MS KINGSTON: I have had no direct dealings with them but I have heard that there are difficulties. Lots of people have complained. Peter Nair's submission addresses some of those issues. There are plenty of them around but the level of service - I can't answer in a personal capacity.

DR MUNDY: It is just that we have had evidence from the financial and insurance CLC. I can't quite remember their precise title. They operate a national service in respect of insurance. They speak very highly of the financial services ombudsman so I am wondering whether - I mean, that is why I asked you the question, because you seem to have a fairly dim view of ombudsmen. I think that is a fair summation of what you have said; but yet we have an organisation set up to advocate for the needs of financial services consumers which is entirely separate from the financial services ombudsman which is speaking positively of them. I was just wondering whether it might be a problem with ombudsmen in Victoria or utilities ombudsmen.

MS KINGSTON: Utilities in particular. In the statutory area, I think there is a certain line drawn. If it comes to building and construction, certain industries are better served than others. There were reasons why they collapsed the financial services but there were two services in the building industry that were closed down. One of them was a statutory authority. There is a lot of evidence that there are variable responses. I have been looking at all your responses and all the things that I hear from the community. I can't answer the financial - I don't know. I can't make a criticism, but if it comes to utilities I will stand up and be counted for that because

that was my personal experience and I am not happy.

MS MacRAE: I think it might be best if we wait and see your submission. We will be hearing from the telecommunications ombudsman tomorrow I think. We did hear from someone who previously had been an energy and water ombudsman.

DR MUNDY: You reflected on the Victorian Ombudsman who is of course an officer of the parliament.

MS KINGSTON: Yes.

DR MUNDY: Would your view be that - and certainly in Western Australia the equivalent officer I think performs the function for the water and energy sectors in Western Australia, essentially because they are still government-owned. Do you have any reflections on - - -

MS KINGSTON: I have, and I have addressed that. I certainly don't mean any offence, but as a member of the community I find that a conflict of interest. The particular post-holder had numerous positions, at least three statutory positions. He has also been associated with (indistinct) here and has had - - -

DR MUNDY: Just be aware there is no protection of defamation for what you say here, so if you are reflecting on an individual, I counsel you not to.

MS KINGSTON: No. I am simply saying that I view the office of a statutory ombudsman as being something quite separate. I view it potentially as a conflict of interest.

DR MUNDY: So if these were separate statutory officers, rather than creatures of the industry, if you like - so if the industry ombudsman arose out of a statutory scheme and they were appointed presumably by the governor-in-council or some other traditional method, that would allay some of your concerns.

MS KINGSTON: In principle, I would not be happy with someone wearing an industry hat called an ombudsman. It doesn't matter who it is, whoever holds that office. I see that as a potential conflict. If they also are running a private business advising schemes - you know, there is just the potential. It is not about pointing fingers at persons.

DR MUNDY: I will bring you back to the question I asked you. If the ombudsman - say, the Energy and Water Ombudsman in Victoria - was a statutory scheme with its own act, with the ombudsman accountable to the parliament, appointed by the governor-in-council, that would deal with a lot of the conflicts that you identify, and

did nothing else and could do nothing else?

MS KINGSTON: I think that the whole ombudsman service should be in a statutory setting where there is a juristic basis for it. At the moment there isn't and there are conflicts. The kind of things I will be addressing are to show that public submissions made by some of the ombudsmen, and I am thinking of utilities in particular, suggest a certain bias. They are reluctant to extend their jurisdictional powers. They have their synergies. They have been established in the industry, and where you have that exposure, it is very, very difficult to change public perception.

You can say whatever you like and you can call it whatever you like but public perception is a very subtle thing and once you have an entrenched view that this is a conflict, I would find it very difficult to shed my prejudices on that. I still wouldn't accept it. I think it needs to be a separate body that will coordinate the services. I personally think that all the small ombudsmen should be shut down altogether. You have a brand new slate and you have something that is accountable. You have something that can be accredited. The present benchmarks are 17 years old. They are ancient. There are better standards than that. They have no quality criteria to go with them. They have no basis on which any exterior assessment can be made of their efficacy.

I just think the whole thing is run in a very insular way and I wouldn't be happy using them and some of them I wouldn't recommend to anyone. It doesn't matter how you advertise them. There is an unshakeable perception. It needs to be a statutory set-up.

DR MUNDY: So you would support the recommendations we make about publishing of outcomes and so on for the industry ombudsmen.

MS KINGSTON: Yes, I do. I think the suggestion that has been made by the newest Victorian ombudsman is very sound. They want to separate themselves from being homogenised with groups that are associations offering personal memberships. They would like to see themselves on par with the attorneys-general. They would like to see some sort of stature and status and some demarcation and I strongly recommend that.

I think it is not a service to the statutory parliamentary ombudsman for them to belong to the same industry association. I don't see them as being of the same calibre, the same training and the same juristic basis. There is no juristic basis.

DR MUNDY: They belong to ANZOA by choice of the individual ombudsman.

MS KINGSTON: Yes, some of them do. I know there are seven of them and one

from New Zealand and one statutory and the rest of them, and there are 10, are industry but they are in my opinion not doing themselves a service doing that.

DR MUNDY: I guess that is a matter for them.

MS KINGSTON: Of course it is.

DR MUNDY: You just made the observation that they want to be on the same standing as the attorney-general. I think you meant the auditor-general, just for the record.

MS KINGSTON: Pardon me. I did.

DR MUNDY: I think my colleague made a very good point. It is very difficult for us to have a meaningful discussion around a submission which - - -

MS KINGSTON: I have it here.

DR MUNDY: - - - will take us some time to obviously digest. We are on the road ourselves for the next couple of weeks to ensure that citizens have the sort of access that I think you think they probably should. Perhaps the best way to proceed is that once our staff have had a chance to look at this, maybe someone will get in contact to clarify any further points you wish to make.

MS KINGSTON: Thank you. I appreciate it.

DR MUNDY: These hearings are adjourned until 9 o'clock tomorrow.

AT 5.11 PM THE INQUIRY WAS ADJOURNED UNTIL
WEDNESDAY, 11 JUNE 2014