REPORT OF PROCEEDINGS BEFORE

JOINT STANDING COMMITTEE ON THE OFFICE OF THE VALUER-GENERAL

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At Sydney on Monday 11 March 2013

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The Committee met at 1.00 p.m.

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PRESENT

Mr M. J. Kean (Chair)

Legislative Council
The Hon. S. MacDonald (Deputy Chair)

Legislative Assembly
Mr C. G. Barr
Mrs L. G. Williams

TANIA SOURDIN, Director, Australian Centre for Justice Innovation, Monash University, sworn and examined, and

STEPHEN LANCKEN, Director, Negocio Resolutions, affirmed and examined:

CHAIR: Can you confirm that you have been issued with the Committee's terms of reference and information related to the examination of witnesses?

Mr LANCKEN: Yes, I have.

Professor SOURDIN: Yes.

CHAIR: I remind you that, whilst you are protected for any evidence that you give before the Committee while you are participating as a witness in this hearing, you will not have the same protection if you repeat, republish or refer to any of your evidence outside of these proceedings. The Committee's role is to monitor and review the exercise of the Valuer-General's functions with respect to land valuations. It cannot investigate the valuation of a specific parcel of land.

In keeping with Parliament's recognition of the role of the courts, the Committee will not be considering any question currently before the courts for determination in respect of land valuations by the Valuer-General. You should have careful regard to this position when giving your evidence. If you wish to raise any particularly sensitive or confidential matters with the Committee, you may request for part of your evidence to be heard in private. Do you have any questions regarding these proceedings?

Professor SOURDIN: No.

Mr LANCKEN: No.

CHAIR: Before we begin our questioning, I am the member for Hornsby and I chair the parliamentary committee which oversees the Office of the Valuer-General. I introduce my Deputy-Chair the Hon. Scot MacDonald, who is from the Legislative Council of the New South Wales Parliament; Lesley Williams, who is the member for Port Macquarie and a member of the National Party; and Mr Clayton Barr, who is the member for Cessnock and a member of the Labor Party. This is a bipartisan committee. We are overseeing the Office of the Valuer-General whose role is to provide all the valuations of land in New South Wales.

In addition to that, the Office of the Valuer-General provides valuations when land is compulsorily acquired by the Government, and that brings me to why we have invited you here today. There are two processes. Firstly, we have a mass valuation system. That is, I suppose, a cheap method of providing a lot of valuations right across the State. We also have a system whereby, when the Government acquires land, it is the Valuer-General's determinations which determine the compensation that is payable by Government to a private entity. There is an objection process for both of those types of valuations, so we have a valuation process and an objection process, and if it cannot be resolved at the objection level then it goes off to the Land and Environment Court where the court can review the merits of a decision per se.

There are two major concerns that this inquiry has identified, the first being with regard to the independence of the objection process. Although he contracts out the review of a valuation as part of the objection process to a different party that undertakes the original valuation, the Valuer-General is still the final umpire. So, in effect, we have a situation where the Valuer-General is poacher and game keeper, or that could be the perception created by the system that is currently in place.

The other situation raised with us during the inquiry is where there are more complex valuations, for example, in relation to mines, shopping centres and marinas, which require a review of cash flows and making some technical assumptions. The concerns that have been raised by stakeholders involved in that process is that they do not necessarily have an opportunity to work collaboratively with the Office of the Valuer-General to ensure that the valuations that they receive are in line with their expectations. So what we are seeing is a lot of money being spent in the Land and Environment Court, with people objecting to the valuations they receive. So the objection process is not delivering the outcomes that we would hope they would deliver; people are going to court and a lot of money is being spent in court by individuals and government, when these matters could be resolved before they get to court. Another concern relates to barriers to entry into the objection process. We are

seeing the situation where, because the legislation is so complex and because the cost of going to court is quite high, that is providing a barrier to entry. So, effectively, the big end of town are able to object, whereas it is too difficult for Joe Public to enter the process. I think that is a pretty high-level summary.

I just want to mention that two years ago in Queensland there was a comprehensive review of that State's valuation system. PricewaterhouseCoopers issued a report following a review of a number of things, including how the objection process worked. Queensland has adopted a mediation approach which is used for objections. A number of parties have submitted to us that they would like to see a more collaborative process, in line with what is happening in Queensland. So I would like to get a general understanding of the alternative forms of collaborative dispute resolution systems available, and any pitfalls and unidentified consequences that could be identified by you.

More broadly, I think what we want is a process that is collaborative, in the sense that people understand how their valuations were made, and have the opportunity to identify any major issues with the Valuer-General's approach. But we still want to keep a level of independence in the valuation system, so that interest groups are not able to influence it in any way. I also want to ensure that the system is accessible for mums and dads who may be time poor, et cetera. So I would like to start with a general question. What do the major forms of dispute resolution look like, and what are the pros and cons of each?

Professor SOURDIN: It is a very big topic because there are so many forms of dispute resolution out there. I have a book on the topic; it is very long, and I know that I can add to that every year and I will never finish it. But I will try to give you a quick summary. I suppose you start with the negotiation processes, which can operate in different sorts of ways; some can be supported negotiation processes, and we have seen the emergence of collaborative law and other processes that are designed to foster more collaborative arrangements which involve lawyers and other experts getting together and agreeing on a series of guidelines about how to approach the process, and then having a number of meetings.

Mainly, that sort of process is used in the family law space; but in the United States of America and Canada it has emerged in the commercial and civil space. Really, partnering and dispute resolution boards which operate in the construction area are variations of what I would call a collaborative negotiation approach. So they are really approaches where you have a team of people working together on a problem; and that is probably at the unassisted end, if you like, in that you do not have a third person or a third person practitioner coming in to help chair those discussions.

Then you have forms of mediation, and there are a few of them. We have seen them operating right through Australia. I think every court and tribunal now has the capacity to refer to some form of alternative dispute resolution, and often it is a form of mediation. Essentially, in mediation the person who is facilitating the communication is not providing advice, or at least that is the primary intention. Then there are other forms of mediation, sometimes called evaluative mediation, but probably more properly called conciliation and conferencing, where the person does have some advisory input. We see those sorts of processes often allied to court systems, where you have more of a focus on legal rights rather than just the interests that are at stake; and, probably more appropriately, there is no continuing relationship, and sometimes the matter is not that complex.

Going from there, you have got expert appraisal and also a valuation in a different form. Sometimes those words are used interchangeably, but often they are used to denote a situation where a lawyer will give a view as to what the outcome would be if the matter proceeds to hearing, the other one being a form where you actually bring in an expert who will give expert advice. I also sit at the Commonwealth Administrative Appeals Tribunal, and have done for about ten years, and it is not uncommon for a medical member, for example, to give advice about prognosis. So those sorts of processes are there as well.

Then you have got the more arbitral process. So you really go from the facilitative, to the advisory, to the arbitral. There, you have got forms of mini trials, sometimes what is called a quick look-see by a retired judge, and other forms which are really almost advisory but sometimes can be determinative and can be binding if the parties consent to that. So there is a spread of different alternative dispute resolution processes, and they are used in different ways all over Australia, in different sorts of systems and schemes; and sometimes it is related to income, sometimes it is related to the schematic and systemic structure that surround it in terms of their success.

But there are other factors as well. So, I am sorry, but it is a big question for me to answer. I appreciate your asking, but there are a spread. There are also variations, hybrid processes; and I work a bit in the artificial

intelligence area as well, where increasingly we are seeing a bit more of that. You can see mediation, for example, allied to conferencing in the family area. Those sorts of processes are what I was thinking about when you talked about accessibility.

Mr LANCKEN: It is a big topic and it is a bit hard to summarise it briefly, but the way I see it is that over the past 15 years that Professor Sourdin and I have been involved in the field its value has come from its diversity. There are many different types of processes that people can use and they can be adapted for the circumstances so that they make sense—in the circumstances you have where you might need accountability or you might want to have privacy and those two things may be in conflict. Professor Sourdin talked about a spread and I see there is a spectrum of alternative dispute resolution [ADR] processes from the very self-determinative such as negotiation that nobody oversees and we do in private through to a dispute that is resolved in a court, which is very public and the decision is taken out of the hands of the parties involved.

Professor Sourdin was talking about that spread between the very private and personal where we make the decisions ourselves all the way through to the very formal and determinative by a judge. Those processes are adapted and, as Professor Sourdin said, sometimes put together in ways that make sense for parties who have conflicts or disputes and want to have decisions made. A lot of the work you are talking about is how we make decisions as to what is a fair valuation and how we assist people to make decisions in a way that is effective, fair, accountable and transparent and all those sorts of things. I think the word "spread" is a very good one.

Professor SOURDIN: Even right at the adjudicative end when we are talking about court proceedings the hot-tubbing or concurrent evidence approaches currently used at the Land and Environment are an example of a hybrid ADR process being used within a hearing process. In a sense the way we are giving evidence could be referred to as concurrent evidence, a hot-tubbing approach.

Mr LANCKEN: Does the Committee know what hot-tubbing is? It is not something you do in a bathtub.

CHAIR: No, can you elaborate?

Mr LANCKEN: It is called "hot" because if you get two or three experts together sometimes it gets hot. You put them in a room or place together and they talk about their different opinions as experts. Their goal is to understand where and why their opinions differ. Have they made different assumptions? What are the reasons? In that process very often the courts have found in the Land and Environment Court and in building cases in other places that experts themselves by better understanding the way another expert looks at the problem can come up with a collaborative solution or answer to a question that a court or somebody else might pose to them. It is about forcing experts together to have a discussion.

CHAIR: I will come back to the options in a moment and we can talk about hot-tubbing and getting experts together. I want to talk about procedural fairness and making sure it is afforded to all parties. Do you think people should be given the opportunity to respond to adverse pieces of information that they were not aware of?

Professor SOURDIN: That is government determined by legislation and I sit in a Commonwealth system as well and there are circumstances where that might not be appropriate but they are very few and far between. I would have thought that as a basic rule of thumb, yes, you ought to be able to consider and respond to matters that are raised. People will not consider that a process is fair, either procedurally fair or in terms of outcome, if they have not had a chance to say something about it, even if they disagree with it. There is a lot in this notion about what is or is not procedurally fair because it is caught up with expectations around process and most people have an expectation that if they disagree with government the Government will listen to them and at least give them some sort of sounding or listening to in relation to it, and that the person who listens to them will not have a conflict of interest. These matters are all caught up in what is the notion of procedural fairness. I do not know that I have answered that as well as I could.

Mr LANCKEN: I have a slightly different answer. If the ultimate arbiter of a decision, such as a valuation, is a court, courts determine those things on the basis of evidence. If the Government or another party to litigation has evidence that they want to use in court later on or that goes to the very issue in question, say a valuation, it seems to me pragmatic that that information should be exchanged as soon as possible. Whether it is procedurally fair or not may be a question of law but in terms of the man in the street, if the Government is making a decision based on information about a valuation that he does not know about that does not seem to me

as a normal person to be very fair. Pragmatically, I will find out about it later on if it goes to court and then I will be even crankier that they did not tell me earlier because I might have changed my mind if I had known about that information. There is a class of information that goes to security, of course, but rarely is that going to happen in a valuation; rarely is there going to be something relating to how much a piece of land is worth that is so embarrassing for a government or concerning our security that it should not be exchanged.

Professor SOURDIN: I have one other comment in relation to procedural fairness and it probably arises from a lot of the research we have done relating to procedural fairness: If something takes too long or costs too much people do not think it is fair. That is a really important observation to make at this point because you can have the best court system in the world, and that is wonderful, but if it takes too long and costs too much people will not regard that as a fair system.

Mr LANCKEN: Going one step from that, I have given some information to the Committee secretariat. The other thing about procedural fairness is that people need to know what the playing field is. With those government departments that have successfully had collaborative approaches to problem solving or decision-making the playing field is well defined. For instance, the Commonwealth Director of Public Prosecutions has the ability to negotiate over charges. I have given you copies of these documents. They publish the boundaries around which they can negotiate charge very clearly in 15 paragraphs so that everybody knows when they are going into that negotiation what the Commonwealth can and cannot do. Professor Sourdin and I are involved with the Tax Office.

Professor SOURDIN: We both sit on the National Tax Liaison Group.

Mr LANCKEN: We assist them to come to grips with these sorts of questions. They have published a very clear set of boundaries—with the Taxation Office it is very long as you can imagine because anything that is written about tax is very long—around which they can negotiate and, obviously by definition, where they cannot negotiate. Before people go into a discussion they know what the playing field is. That is another part of the concept of procedural fairness, not the legal concept but what the man in the street would say is fair. If I am going to negotiate with government I want to know before we start what they can and cannot negotiate and what we can and cannot talk about.

It seems to me that those things should be reasonably easy for government to define in fairly simple ways in this sort of process. I think the Commonwealth Director of Public Prosecutions has done it really well in a small number of paragraphs. I think the Tax Office is very complicated but that is because the tax system is incredibly complicated. There is a recommendation from the Inspector-General of Taxation to simplify that and put it into plain language but that is a matter of just making it easier to access. When people know what they are allowed to talk about and the basis upon which they are talking they are more likely to see that as being a fair process. There are two aspects, I think.

CHAIR: Before we go back to the options around facilitated and unfacilitated approaches, is there a problem with a system that, after an objection, provides a valuation based without reasons let alone raising issues that are adverse to a particular party? Can you comment on that?

Mr LANCKEN: Just to be clear, do you mean a system whereby someone says, "This is our decision and we are not going to tell you why"?

CHAIR: Yes.

Mr LANCKEN: Again, if a decision is made by government that affects the man in the street's wealth and the government does not say why he will not feel so good about it. Exchange of information is what helps people to accept decisions, even adverse decisions. As a matter of pragmatic reality, reasons make it easier for people to accept things and less likely that they will argue. What you are talking about is called an objection process. Once we start talking in terms of objection we set up contests in terms of language. What you are talking about is how we make wise decisions about whether a court should decide a valuation or whether we should accept the decision of government. We make those wise decisions by a frank and open exchange of information. It seems to me common sense that that is the way people, especially business people, go about their work. I do not know whether that answers the question very well. It seems to me to be obvious that if I get a determination which impacts upon my wealth and it does not have any reasons I am suspicious of it.

Professor SOURDIN: It is an interesting question around to what extent you have to have reasons and how long they have to be. I think because I do a bit of work with the Commonwealth Government in particular at the Administrative Appeals Tribunal [AAT] where really reasons have to be given. Once you have had something sent to an authorised review officer there is an expectation that there will be reasons. There is an issue about how long those reasons need to be and how detailed. I think that you do not want to make it so cumbersome that people cannot understand. A lot of times people will get a decision from government and be quite content and will not necessarily disagree. Oh yes, they have had another look at it. It is really providing a bit of background information I think which is helpful for people so that they can understand the key issues that they looked at, rather than having too much detail. And then providing an opportunity for a follow-up if that is required. It is the follow-up piece that is the important one.

CHAIR: Can I give you a scenario that we have recently seen and for ask your opinion on it. There is a quarry in my electorate of Hornsby. It is a disused quarry and the council there was forced to compulsorily acquire the quarry from a private entity, CSR. The Valuer-General was the body that determined the compensation Hornsby council was required to pay to the dispossessed landowner. The Valuer-General took evidence which formed the basis of the valuation from one party, CSR, but did not afford the opportunity for Hornsby council to provide evidence to counter that. Basically there was a valuation done on the basis of information from one party; the other party was not allowed to counter it. Do you think procedural fairness should be afforded in a situation like that to both parties?

Professor SOURDIN: I think that is an interesting question. I would have thought that the likely outcome of the scenario you have just sketched out is a Land and Environment Court hearing, which would be incredibly complex and costly, but perhaps I am incorrect. It seems to me that had there been a mediation at the point before an opinion was given where the valuers actually got together, because they would have engaged separate experts in a matter involving a quarry, I would have thought, it would have been very useful to have heard that discussion and then seen whether or not there was an agreed outcome that could have been reached. If not, then whether or not you could have moved to some sort of mediation and arbitration process.

CHAIR: What about the issue of whether the other party should have even known about the information?

Mr LANCKEN: Sorry, the council should have known about the information that had come from CSR?

CHAIR: The information that had affected a decision that was going to adversely affect them.

Professor SOURDIN: I would have thought that yes, it would be appropriate for somebody to know under these circumstances. I think what you are trying to do is really reduce the amount of litigation that tracks through to the Land and Environment Court. I do not have your statistics and I am not sure to what extent the Committee has the statistics on number of objections, numbers that are disagreed with, how many then end up in the Land and Environment Court and how many end up with a contested adjudication, because mapping the system is often helpful and I am sure you have already thought of that.

CHAIR: We will look into that.

Professor SOURDIN: It is very difficult to find out these questions. You would think it would be quite simple but sometimes it is not.

CHAIR: We have found that.

Professor SOURDIN: It is amazing, isn't it? In any event, it just seems to me that under these circumstances you could have inserted a different process, particularly because valuing a quarry would not be an easy task. I must say too that some 25 years ago I was at the Crown Solicitor's Office in New South Wales and had cause to act on a number of resumption cases, so I do recall the complexities involved. After that I think I was at the Supreme Court and saw a couple up there for other reasons, but that is another matter.

Mr LANCKEN: I will be even more robust than that. I think if I was the council in those circumstances and I saw a valuation I did not agree with I would be feeling pretty upset about it. Especially if I knew that the Government had been listening to CSR and does not hear from me. I am the local government, I know what is going on in my area and they have not asked me what I think about this. I can imagine

notwithstanding that the valuation may have been absolutely correct the council would have had some reason to be upset. That is the thing that I focus on, because the process by which we make decisions is what makes us more or less likely to want to dispute them.

Professor SOURDIN: The danger is though, and it is a pitfall and it probably is similar to what happens in the banking industry Ombudsman scheme, you get information from one party, you make it available to the other and then it just ends up being this kind of negotiation by paper, which is always problematic because that just leads to more paper being generated and can actually inflate the dispute a little bit. It is really about at what point do you insert a process which is going to prevent that from happening, if it is in fact preventable? That is probably the point that Mr Lancken and I agree furiously on.

CHAIR: How would you prevent that from happening? Would you put time limits in or would you put some kind of restrictions in the process?

Professor SOURDIN: With a large matter—and it is a question about what is a large dispute or a small dispute—I would probably want to have somebody who does case management work at the Valuer-General's office pick up the phone and actually say to the council, "We are sending you through this valuation, together with details of our process that we can follow from this point. We don't necessarily think that this is a contentious valuation but if you have any concerns about it I will ring back in seven days and we will talk about how those concerns can be managed if they exist." And then basically the same sort of thing in a letter, but it is the pick up the phone piece which can be quite important as well.

CHAIR: Just on this topic of procedural fairness and how the Office of the Valuer-General works, basically you have got a situation where the Valuer-General is an independent statutory officer but in the early 2000s a lot of the valuers were actually moved from this independent statutory officer into a government agency called Land and Property Information [LPI]. The idea originally was that you would have valuers who were independent of the body that would then levy a tax on those valuations. Firstly, how important do you think the independence of the Valuer-General is? Secondly, in relation to procedural fairness, does the independence of the Valuer-General from the government agency matter when determining decisions or making decisions?

Mr LANCKEN: I focus on process and so if people go about things in a way that is seen to be fair to others, that is one of those people that make good decisions. We can wrap things up in rules and the exact way of doing things and separating powers and that sort of thing when what people really want is they want things to be fair. I look at things, as I have said a couple of times, from a pragmatic perspective. That then becomes a question of how we skill people, how we train them to make decisions, the information they seek when they make decisions.

Sometimes I worry that we have too many rules and the more rules we get the more lawyers we get rather than focusing on what people want. They want to be treated with respect and they want decisions to be fair and to be seen to be fair. Lastly what protects everybody is if they do not think that, they have had an independent arbiter, which is the Land and Environment Court. I am hoping nobody suggests that we should not have that independent arbiter at the end of it. I would be wary about creating too many rules upfront, but I certainly would be wanting to make sure people were skilled at decision-making.

CHAIR: On that point, do you think that the independence is important and if there was a perception of a lack of independence it could undermine the perception of an impartial decision-maker?

Mr LANCKEN: I think that all of our research would show that that is common sense. Unfortunately the reality of life is that nobody is completely independent and again there is a whole spectrum. The mere fact that you work for or you are paid by the government people will perceive as having some lack of independence, right through to judges, who are seen as the most independent, but they are still paid by government. We cannot give absolute independence and we have to be pragmatic about the way in which we approach that and the skills and the rules and those things that we put around that decision-making process.

Professor SOURDIN: It would be quite interesting to survey the people who have used the independent valuation service and find out why they actually consider that it does have a lack of independence. Is it, as Mr Lancken says, because you have got unresponsive people who might be rude or arrogant or something else? Or is it because the process is unclear and people do not understand it to begin with? Or is there a genuine concern that market forces are driving this and nobody wants to disagree with what the Valuer-General has said? It is quite interesting to find out why people have formed a particular view that they

have as well and also whether you might not just be getting a tiny sliver of the disenfranchised or the disappointed, because that I think is always a bit of a risk if you are going to look at mass systemic changes.

I totally agree with what Mr Lancken says about the importance of educating those who are making these decisions so that they not only know how to make decisions, which is important, but they know how to convey them and also how to run a process which people understand and is fair, because that actually takes quite a bit of work. If you have got people in there who are not doing that then really you probably ought not to be using them.

CHAIR: I am sorry this has been all over the place, but could we go back to the options available for the mediation process. We talked about facilitated approaches versus unfacilitated approaches. Would you explain to the Committee the benefits of both?

Mr LANCKEN: I can. Well, I can try, and then Professor Sourdin can tell me what I have missed.

CHAIR: Perhaps the benefits and the downsides of both would be better.

Mr LANCKEN: The benefit of having somebody facilitate a discussion is that that person can help them get through their communication or their relationship difficulties and help the conversation focus on the issues that need to be determined. As a mediator, what I spend most of my time doing is getting people back to the table when they get upset with each other, or when they have different perspectives of something that occurs. In a gold-plated system, an independent facilitator of conversations is of great value. When things are likely to be more important, or relationships are likely to be more broken down, or people are likely to be more emotional, if we do not have a facilitator in the room there is a risk that people will butt their heads and they end up disliking each other for reasons that do not make any objective sense. We then fight about something that we are not fighting about. There are lots of court cases that Professor Sourdin and I have been involved in in many capacities where we are not fighting about what the case is about, we are fighting because we are fighting. A facilitator can help you avoid misunderstandings and can help you clarifying things. To put it simply, good facilitation skills can avoid a huge amount of conflict in the future because we do not argue about the wrong stuff.

Professor SOURDIN: The differences between the two is quite an interesting issue. I have been mediating now for 25 years, and in respect of the differences, they vary from dispute to dispute. The reasons that people use a facilitative process over an advisory process are many. Often times, as Steve has noted, what I see is people who get into dispute not just because they disagree on the substance or the outcome, but they disagree with the process and the people involved, and there is often a lack of trust. One of the reasons that the Australian Tax Office, for example, has been so interested in using more facilitative processes is because they realise they have got a life-long relationship with people in Australia. If they make a determination then, yes, people may comply with it initially but that impacts on the relationship that an individual or a group or an organisation has with the Tax Office into the future. Primarily, you see facilitative processes used when there is a continuing relationship and where there has been a breakdown in communication, and those are often very good places to use facilitative processes—continuing business, family matters. Increasingly, we are now seeing that with Government because Government wants to make sure it has a continuing relationship with the community, if you like.

The evaluative processes tend to work quite well if you have got somebody who also understands what facilitative processes are, but the dynamics change significantly when someone is making a determination compared to when people are trying to persuade one another. In the example you gave before, it is almost the Valuer-General on one side and Hornsby council on the other. A facilitative conversation is a very different conversation where they are trying to persuade one another rather than trying to persuade an independent valuer who is going to give advice about the outcome or make a determination. When they are persuading one another, they will spend a lot more time talking about other issues and may talk about other interests that are important as well, including the role of the quarry and where it is, and what impact it is going to have on the surrounding landscape. They will talk about bigger issues than those that you might get in an advisory context. Would you agree with that, Steve?

Mr LANCKEN: Yes.

CHAIR: Is there research available that supports one approach over the other?

Mr LANCKEN: They are different. One is about somebody else making the decision. That is what Professor Sourdin calls the determinative approach. The other is about somebody else helping us make our own decision, and that is a facilitative approach. One is not better than the other. They are different processes for different purposes. At the extreme, a judge is a person who determines on behalf of the parties and the State what the answer is, back to, "Somebody has written me a letter and I disagree with the valuation. I am going to give them call and explain to them why they might have got it wrong or fix it up", and it gets fixed up. All along that spectrum there are different ways of doing things. They are different. One is not necessarily better than the other.

Professor SOURDIN: I have done a lot of research on mediation, used both in courts and external resolution processes [EDR]. There are now many external resolution schemes in Australia. I am currently reviewing the family dispute resolution area and have just completed a big project on pre-action protocols around Australia as well that require people to do a lot more before they commence litigation. There are differences. The reasons why sometimes some arrangements work better than others are linked to lots of things. They are linked to the way the judiciary and the legal profession engage in these reforms; they are linked to the guidelines you have around them; they are linked to the quality of the practitioners who are involved. There are many things which impact on whether or not some of these arrangements are more successful than others. Maybe that is the question you were driving at.

The retail lease schemes in both New South Wales and Victoria are probably interesting for this Committee to look at. They help in respect of access and help with small business and other arrangements. That kind of architecture can work well when you have got people who may not have a lot of power and may not be represented and may need a bit of support in the background to understand what the legal rights or what the track would be if they progressed down the litigation system, not that they are giving legal advice, but they are giving information, if you can distinguish between the two. Then you have got a facilitative process that helps to deal with the dispute.

Mr LANCKEN: In a perfect world, because processes are different, we would have somebody in triage, like we have in hospital. The triage nurse would say, "There is a dispute happening here. Let me have a look at it. Let me see what is going on and see if we can get the right doctor, the right facilitator, the right determination." That is a perfect world. That is sometimes too expensive. That is the way that I think of the question that you asked: How do I make the best decision possible as to how I sort this out? That comes back to skills. The triage nurse does not necessarily have to be independent. The triage nurse could be somebody sitting in the Valuer-General's office whose job it is to look at situations that might turn into disputes and finding the right way to deal with them. That is a form of triage, rather than having things going down tracks, which is what happens sometimes in government. Oh, the person does not like the valuation; therefore, we have got to do an objection; therefore, we have got to go to court.

Professor SOURDIN: And here is the next hurdle.

Mr LANCKEN: As far as possible, we want to make sure that people have opportunities that are off those tracks. That is quite difficult for Government, because it is difficult to legislate or to create rules around some of those things that are common sense. That is the dilemma. You want things to be flexible. Government has to create rules. How flexible or inflexible do you make the rules? How much authority and power do the people on the ground who are making the decisions have? They are the difficult things your Committee is going to have to grapple with as it goes through its process.

The Hon. SCOT MacDONALD: I think you have answered everything I was going to ask. I would imagine that the Family Court is very emotive. This is very dry administrative—

Mr LANCKEN: Most of the time, except maybe for the Hornsby council.

Professor SOURDIN: And the owners of marinas and others. There is emotion there.

Mr LANCKEN: Yes, people get upset about their wealth too; This is true.

Professor SOURDIN: They get upset about their land.

Mr LANCKEN: They get more upset when they think they have been treated unfairly by Government. That is what causes people to get upset. You are right: It is not so much the money, it is the way I am treated.

The Hon. SCOT MacDONALD: I think you have answered this question. In this more administrative environment rather than the personal environment, if you like, notwithstanding what you have just said, is dispute resolution more effective or less effective?

Professor SOURDIN: I said at the Administrative Appeals Tribunal [AAT], we appeal matters. I do not know how many we have got a year—probably 10,000 or more matters per year. Most of those matters are resolved through a facilitative conference. That is when a decision has already been made and there is an appeal from another decision of the Social Security Appeals Tribunal [SSAT] or somewhere else. These are Government decisions across a range of different bodies. I think we deal with more than 100 pieces of legislation. Alternative dispute resolution [ADR] has been found to be remarkably successful in dealing with those disputes. It has been a long time—since the mid-70s—that we have seen alternative dispute resolution being used.

The Hon. SCOT MacDONALD: It has built up gravitas and authority, if you like?

Professor SOURDIN: I think so, yes.

Mr LANCKEN: I try not to think of it as gravitas and authority. People understand process better. The great benefit of this process—whether it be the dry area or factual or technical areas— is that we focus on the right questions. We try to explore the right information, even if there is no emotion involved. We still have an opportunity to exchange information that will help us to make wiser decisions. In terms of the work that Professor Sourdain does at the Administrative Appeals Tribunal [AAT] and the work I do as a private mediator in those sort of commercial disputes, people value the opportunity to find out as much information as they can, in a fair way.

The Hon. SCOT MacDONALD: Yes.

Mr LANCKEN: When they can speak with people, so that then, when they make their decisions, they are based on the best information they can be, and that makes it easier for people to make decisions.

The Hon. SCOT MacDONALD: All right. I had better be quick because others want to ask questions. My second-last question is this: Should it be binding?

Mr LANCKEN: What do you mean by "binding"?

The Hon. SCOT MacDONALD: If we go to alternative dispute resolution [ADR], if you elect to go to alternative dispute resolution or dispute resolution and—

Mr LANCKEN: If we agree on something?

The Hon. SCOT MacDONALD: —and we agree, that is binding, and that is the end of the matter? It cannot then go to the Land and Environment Court.

Mr LANCKEN: If we agree, we cannot have—I should not say that—it is dangerous to have processes that look facilitative where somebody's make a decision. If at the end of that process—

The Hon. SCOT MacDONALD: Everybody says, "Great. I can live with that."

Mr LANCKEN: —there is an agreement, and provided that agreement is not against public policy, of course, or otherwise against the law.

The Hon. SCOT MacDONALD: Yes, but if I change my mind a week later or a month later—the mother-in-law has leaned against me, or whatever—

Mr LANCKEN: I think Professor Sourdain and I would both so that, absent extraordinary circumstances, if people agree on something, they should be held to their agreement.

The Hon. SCOT MacDONALD: Okay.

Mr LANCKEN: Even if it is with government.

Mrs LESLIE WILLIAMS: Following on from what Scot is talking about, should that understanding be before alternative dispute resolution starts? Should you not sit down beforehand, or would it be advisable? I guess it goes back to what you said before about process. We know that there is an understanding that, if we go through the alternative dispute resolution, at the end of it, if we agree—

Mr LANCKEN: If we agree.

Mrs LESLIE WILLIAMS: —then it will be binding. Would that be a normal process?

Mr LANCKEN: Yes. And the important thing for people to know coming into that, that makes it fair, is that you do not have to agree. So you can leave that process and say, "I disagree, and I'm going home", at any time.

The Hon. SCOT MacDONALD: And "I'm going to go the full Land and Environment Court path".

Mr LANCKEN: "And I'll go to court", yes. And that is what makes it fair.

Professor SOURDIN: I might just add to that: in relation to the compliance with alternative dispute resolution outcomes and mediation outcomes, there is limited research on it, but it suggests very high compliance rates. That is because mediators do a lot of reality testing and do a lot of other things to discuss what might happen if your mother-in-law says that that is a stupid idea in a week's time. You actually do that reality testing as a mediator. But it is quite interesting that at the Victorian Civil and Administrative Tribunal [VCAT], where people are self-represented, there is now a process where there is an in-built cooling-off period.

Mrs LESLIE WILLIAMS: Okay.

The Hon. SCOT MacDONALD: Okay.

Professor SOURDIN: I think it is 48 hours. They have found that despite having that in-built cooling-off period of 48 hours—

The Hon. SCOT MacDONALD: You do not get a lot of change of mind.

Professor SOURDIN: —only 3 per cent of matters have actually fallen over. It really is something which I think can be considered in the context of self-represented folks. If it is a situation where somebody is self-represented or vulnerable for whatever reason, having an adjourned process and perhaps having two sessions to ensure that they have a chance to get expert advice, if they need it, is useful. That can all be factored into a system that you build.

Mr LANCKEN: As is having skilled facilitators who know and can recognise when people who are vulnerable.

The Hon. SCOT MacDONALD: I am sure.

Mr LANCKEN: To make sure that they do not get forced into making decisions that they are going to later regret.

The Hon. SCOT MacDONALD: That they are sort of bullied into. You have actually just touched on my last question. You mentioned the Victorian Civil and Administrative Tribunal [VCAT]. New South Wales literally has just passed legislation.

Professor SOURDIN: I know—for Civil and Administrative Tribunal of New South Wales [NCAT].

The Hon. SCOT MacDONALD: So in your mind, with the chairs or committees exploring dispute resolution, what about a merit appeal in the new Civil and Administrative Tribunal of New South Wales—low cost and maybe self-representation, pretty quick, and a pretty informal sort of hearing, if you like; the rules of evidence are a little bit looser, et cetera, et cetera, et cetera. This might be against your interests a little bit. But

instead of dispute resolution, what about, within a division of the New South Wales Civil and Administrative Tribunal, Valuer-General objections?

Mr LANCKEN: I would not say "instead of".

The Hon. SCOT MacDONALD: In addition to, you would say?

Mr LANCKEN: In addition to.

The Hon. SCOT MacDONALD: For the slightly more complex ones? You are saying maybe dispute resolution at a lower level?

Mr LANCKEN: I think we should also always try to have our disputes resolved at the lowest level possible, whether that is on the telephone with an officer or at an informal conference.

The Hon. SCOT MacDONALD: Yes.

Mr LANCKEN: The tribunal has not set up its rules yet.

The Hon. SCOT MacDONALD: No. It kicks off in 2014—in a year.

Mr LANCKEN: What we do know from the Victorian Civil and Administrative Tribunal [VCAT] and the Administrative Appeals Tribunal [AAT], though, is that there are processes in those tribunals, because they are run on a slightly different model, where people in the Administrative Appeals Tribunal are registrars. Who in the Victorian Civil and Administrative Tribunal [VCAT] does informal hearings?

Professor SOURDIN: Often members, but we have trained staff as well to run a staff program, and they seem to work quite well.

Mr LANCKEN: So low value conflict or low value disputes can be streamed—again this is a triage thing—can be streamed to a registrar or a person who can have that conversation and see if it can be sorted out. It is harder to digest—

The Hon. SCOT MacDONALD: So you are not saying one or the other.

Mr LANCKEN: No. I do not think it is one or the other. I think it is about horses for courses.

Professor SOURDIN: It is all about quality of process, though. I may say, again drawing on my childhood in dispute resolution, I was a member at the Consumer, Trader and Tenancy Tribunal [CTTT] and its predecessors from 1993 and took on a senior membership for about a year half time in 2008 just because I wanted to go back in an do a bit more of the work. My observations in relation to that are that there was a very large workload and not a lot of time to ever spend with people. I think a lot of people are quite dissatisfied with how it can work.

The Hon. SCOT MacDONALD: We saw it in action in Victoria—a sausage machine.

Mr LANCKEN: Yes.

Professor SOURDIN: You know, there are really significant issues, if people do not have enough time to speak and be heard. I think there are significant issues as well if you do not ensure that the process is respectful and people understand what is going on. I just raise those concerns. With anything that you have, you need to have quality controls built into it. In a sense, most of the industry schemes have got that because they have got mandatory reporting using qualitative and quantitative indicators every five years to the Australian Securities and Investment Commission [ASIC]. They have requirements to do reporting, which government courts and tribunals do not have. So there are differences. I would point to quality of process as being really critical.

CHAIR: I will conclude by asking you this: Put yourselves in our shoes. We have an objection process that we are looking to improve. We want to make sure that it is accessible to mums and dads as well as the big end of town. What are the things we should be looking at in order to get a first-class objection system?

Mr LANCKEN: A first-class objection system? We have no budgetary constraints.

CHAIR: What is best practice?

Mr LANCKEN: As I said before, I would not call it an objection system. I would say we would have a merits review, which gets away from the problem of somebody needing to be independent. So we would have a review of initial process and then we would have an opportunity for information exchange, which might be some sort of facilitative discussion. Before we ultimately make decisions as to whether we dispute this in a court or have a decision-maker make the decision, firstly we go through a process where somebody says, "Somebody else in the department has looked at it". Then, okay we are going to talk about it to make sure that our assumptions or the facts on which we are basing this are not inconsistent—let us see if we can bridge that gap.

The Hon. SCOT MacDONALD: Yes.

Mr LANCKEN: And then if we cannot, we may have narrowed the issues and we are going to go and have somebody decide, based on the full amount of information. That requires a little bit of reconceptualising of the way in which government does business. I think we would need to ensure, importantly, that government officers, who are involved in those processes and discussing things with taxpayers to make decisions, are not only well trained in the way in which they have those conversations but are well supported to be able to make decisions. One of the perceptions that we hear of in our work as mediators is, "Oh, the government officer won't make a decision because they're afraid", and they are better off having a court decide. We need to take that off the table.

The Hon. SCOT MacDONALD: People are racheting everything up—costs, time.

Mr LANCKEN: Yes. That means that public servants or officers of departments being equipped both with skills and training, but also with support as to how you make decisions and how you justify, to make those decisions accountable, based on information. And then we want to allow them to go and make their decisions without feeling like they are going to be criticised for getting it wrong. If you, as an officer of the Government, make a decision based on a set of criteria and you can justify that decision, you should not be open to criticism for doing that. It is the fear of that that stops good people making appropriate decisions and so on. There is a whole gamut of things that would need to be done. Some of them are not particularly expensive. It is not hard to train people how to listen well, how to understand different arguments, or how to document their decision-making based on a set of criteria, which we can publish in advance.

Professor SOURDIN: I have a couple of views, and again I am speaking from a perspective of not understanding the architecture and flow-through of your system very well. My comments are somewhat guarded as a result of that.

CHAIR: Of course.

Professor SOURDIN: It sounds to me that you are talking about different sorts of facilitated processes. One is a conference-type process and the other a mediation-type process. What is really important when introducing new processes is to have very clear guidelines so that people know what they are going to get. There should be some structure around that in terms of timing points and in-out points because responsiveness is critical. There should also be supportive material including DVDs and other things so that people know what they are going to get and they can educate themselves. There should also be good intake points so that people can pick up the phone and get an idea about what to expect.

The Hon. SCOT MacDONALD: Like the Consumer, Trader and Tenancy Tribunal process?

Professor SOURDIN: They make a system work if they are done well. I totally agree with what Stephen Lancken said about the people involved in this work. They must understand the differences between processes, how to listen respectfully and to summarise so that they create a neutral agenda about the issues, whether it be conferencing or mediation. They must have an understanding. They must also not be involved in the abrogation of decision-making. I agree that it is a key point with government decisions: We need people who can negotiate and a process so they can insert and have appropriate authority do something binding. There are more innovative approaches. Skype conferencing probably works increasingly well now and we will see more of it in the next 18 months. It is low cost, it is good and it is something people can access after hours. It works

for many people and it is much more workable than it used to be with broadband getting better. They are observations and I am very happy to provide more. However, I am not sure about the flow-through situation, and that would be helpful to know.

CHAIR: Is there an example of an objection system that you can point to that does work particularly well in the government or private sector context?

Professor SOURDIN: The Financial Service Ombudsman is a good example. It deals with more disputes than just about any other agency these days. Many of the external dispute resolution bodies work well and deal with a large number of disputes. They do immediate triage when things hit the door, then send them to different processes and ultimately have a determinative process. It would also be worthwhile to look at the Australian Tax Office. It is in the process of building something that is world class. It is an interesting organisation to look at in the context of these types of disputes because its customers, so to speak, are very similar to the customers you are dealing with. There is the big end of town and the small end of town. You have similar people who are experiencing disputes and probably similar issues about distrust of government. Some of the issues that emerge in mediation or other settings are around distrust and that can taint a process. So there must be boundaries and guidelines in place to ensure that those conversations take place. They are probably two that I would recommend.

If the Committee is looking at it from the land and environment perspective, it is important to consider what people are required to do before they get into court. You cannot look at only one part of the system. The Land and Environment Court, if it is the ultimate decision-making authority, needs to understand and be involved in the design of what happens elsewhere. If you exclude the legal profession, you do so at your peril. They must be open and engaged in these types of processes. They will be a thorn in your side unless they are engaged and involved. They are probably some robust comments to make at the end of our interview.

Mr LANCKEN: Given that the question was asked without notice it is hard to provide examples. The work that Professor Sourdin and I have been doing in Australia is around those systems and schemes, and there are many of them, that try to resolve conflict as early as possible. Our goal is not to stop cases going to court because they will. Professor Sourdin is right, we cannot exclude lawyers from these sorts of things.

CHAIR: Can you explain the effect of time limits on the objection process? What are the benefits and disadvantages?

Professor SOURDIN: It is partly about procedural expectations and satisfying them. People have expectations about how long something will take. When someone from government says, "It won't take long", meaning that it will take less than three months, people might think it means it will take a day or two. It is about making sure that the parameters are very clear and tracking them to make sure they are responding. The parameters must also be realistic and achievable. One of the biggest concerns when dealing with government is that there is simply no response. Therefore, having time limits is important. They also need to be realistic. If you are shaping them, ideally you set them up through a case management-type interview in a complex matter and get the parties to agree on a timetable. You should then confirm that by email and follow through to make sure it is being complied with if you are getting people to lodge material, for example.

CHAIR: You talked about new technology such as Skype and some of those mediums. What is the effect of face-to-face or mediation conferences in dispute resolution?

Professor SOURDIN: Face-to-face conferences—that is, having people in the room—is always a fabulous approach. People get something from being in the room that they do not get via Skype. It is like us sitting here in this room; it is different from a Skype experience. There are also opportunities for people to do small talk before and afterwards. All these things help to build a relationship. Sometimes part of the small talk becomes part of the big talk about the issues. Things can almost be resolved on the way through. It is a different facility. Using Skype as a conferencing mode suits many people, particularly when there are time issues and people do not want to travel to a neutral venue. It also suits people because they can think about things in the comfort of their own home and they will not be forced into some environment that feels uncomfortable. They can also be in a business environment. Skype is a very usable technology that is being used increasingly. I use it more at the back end of mediations, but I have also mediated entirely by Skype and it has worked. It is different.

Mr LANCKEN: I am wondering whether you are on the payroll.

Professor SOURDIN: I am a bit of a techie. I believe we will get a lot more out of artificial intelligence in the future in terms of giving people more advice about the possible range of outcomes should they litigate. People are already doing their own very basic data mining. Everyone goes to Dr Google now if they sick or Google SC if they have a legal problem. These types of things are already happening. Most people are going to be doing that work before they come in with an objection. That is problematic because the information they are getting is not necessarily useful to them. Thinking about how you can support their decision-making is a key feature, but it is probably more for the future.

Mr LANCKEN: And exchanging information. There are other useful technologies such as secure drop boxes for information and emailing is an effective way of exchanging non-sensitive information. The imagination will take us to all sorts of places in terms how we exchange information. However, I agree with Professor Sourdin that the more distant you are from the source of the communication the less information you get. If I am sitting across the table I am getting much more than if I am sitting in the next suburb or if I am on the phone or on Skype. That is the reality of the way human beings communicate.

Professor SOURDIN: We are about 10 years from holograms.

CHAIR: I refer to organisational change. There is a perceived culture of not engaging in the court order mediation process. We have a number of parties involved in court ordered mediation on valuations who believe that the Valuer-General's Office was not willing to budge on the original valuation. How would we bring about organisational change in that environment?

Mr LANCKEN: I would skill those people up who were being involved in those processes. The Government's response in a process like that is, it should not be measured upon whether they change their position but upon how well they listen, understand the arguments and make their decisions. The concept that, "Because we go along to mediation, Government should compromise", would be as abhorrent to Government as it is to me if I go along and say, "I have to compromise". What people are saying is that people are not equipped to have frank and open discussions and to exchange information in ways that make sense to them. That is a matter of skills and is probably not about decision-making. More often than not, when I see these sorts of things, people make good decisions but they make them in ways that others do not understand or that do not show respect for others. That is the sort of research that Tania will say will give us more information as to why people feel that way but from my experience as a mediator, it is more often a failure to communicate in a way that is effective to the other party. That would be my answer to that question.

Professor SOURDIN: "The computer says no".

Mr LANCKEN: That is right. I remember when I was a young lawyer the Government Insurance Office had a problem with massive decisions about the Compulsory Third Party insurance program. It brought in a computer program named after some Greek god and the legal profession said that the god was making the decisions and they never got to speak to anybody. So they reacted about this quite effective and useful piece of technology that assisted people in making decisions, not because it was useful technology that helped people make decisions but because nobody listened to their side of the argument. They felt that the computer would not listen and the people would not listen.

CHAIR: If you had a chairperson mediating between the Valuer-General and a stakeholder, what power should they have?

Professor SOURDIN: If you are mediating then it is essentially a facilitative process. What you could do, if you wanted expert input into that process, is that you could team them up with somebody from the Land and Property Information [LPI] so that there is a co-mediation approach. If you are talking about mediation we are talking about a non-advisory process. Is that what we are talking about here? If you are talking about something that can become potentially advisory, it is another matter and the skills and qualifications of those doing that work need to be very different. They not only need to be trained facilitators but they also need to be trained experts and understand what the conflict of interest and other issues are. I add that you are more likely to get appeals and dissatisfaction as soon as you get an advisory process because people are being told what to do and they do not like that.

I should also say that most matters that go through good mediation processes do resolve. The settlement rates vary from place to place but are often around 70 to 85 per cent, even in matters that are regarded as

intractable disputes. For an advisory process it tends to dip and again, it is often related to the skills of the person running the advisory process.

Mr LANCKEN: I agree—more skills; less power.

CHAIR: The only other question I have is coming back to face-to-face mediation and I was concerned that that in itself may be a barrier to entry. Mums and dads are time poor, they work, come home, cook dinner for the kids and they are not going to have time to go in and mediate. That may be a barrier to entry in itself. There are other mechanisms that could be used.

Professor SOURDIN: Telephone mediation is another one.

Mr LANCKEN: The Workers Compensation Commission does that. The first entry in the Workers Compensation system where there is a conflict is a telephone conference that is facilitated by a member of the Commission. That has been an incredibly successful way of resolving disputes. Mums and dads can get on the phone for an hour, have a chat with their lawyer on the phone and it is remarkable, the number of misunderstandings that are resolved in that way. In an incredibly complex dispute we are not going to do it that way but for the sort of things you are talking about, the telephone is really valuable.

Professor SOURDIN: Their approach is a Conard approach. They will do a conciliation and if the matter has not resolved at that telephone conciliation, then it will go on to arbitration within 14 days. It is a very quick process and it is highly regarded. Some people do not like it but most do.

CHAIR: Your testimony today has been outstanding and helpful for what we are trying to achieve here. Thank you for your professionalism and giving up your time to assist the Committee. My Deputy Chair was so excited by your testimony that he was hoping we might be able to use you as a sounding board for proposals that we may come up with. If we were to put additional questions to you, would you be comfortable coming back and assisting the Committee with that?

Mr LANCKEN: I would certainly be happy to assist if there is any more information required.

Professor SOURDIN: It might also depend on your timing.

CHAIR: We would like to work with you in this process. Your testimony has been outstanding and the Committee is very appreciative.

Professor SOURDIN: It was a pleasure and I wish you good luck.

The Hon. SCOT MacDONALD: What I was going to ask, and I think the Chair is agreeable, I do not think you put it in the submission, so the thrust of the question will be and you have talked around and about it, to hopefully put in a submission where you can put up a few models of possible dispute resolution and all the things the Chair has raised. So there might be a few different pathways and as you were saying, you have probably only touched on a few. I mention possibly NCAP being somewhere in there. I do not know if you think that is a good idea or not, but treat us as pretty basic and if it is graphic and has flow charts and things, that would be good for me at least.

Mr LANCKEN: It would help me if there were specific questions or ideas, rather than doing a general submission because a general submission is too broad and would take a lot of time.

CHAIR: The Committee members and I can come up with some questions that would assist you in your time and help us to get more to the crux of the question. In that regard, if we could send you those questions or some ideas that we have or are looking to pursue and to get your feedback, that would be appreciated.

Professor SOURDIN: My difficulty is that I will be out of the country for most of April.

Mr LANCKEN: I am out of the country for most of May. I am sure professor Sourdin and I can work together to do things collaboratively in a way that will get you information you need that will help you make decisions. If Tania is out of the country and I can help and vice versa, I am sure we will.

CHAIR: I am impressed seeing your skills put to good use here at the Committee table. Thank you for your time and we will be in touch.

(The witnesses withdrew)

(Short adjournment)

DONALD LAWRENCE TYDD, Executive Officer, Association of Mining Related Councils, affirmed and examined:

CHAIR: Will you confirm that you have been issued with the Committee's terms of reference and information related to the examination of witnesses?

Mr TYDD: I have.

CHAIR: I need to go through some procedural matters with you.

Mr TYDD: Certainly.

CHAIR: I remind you that while you are protected for any evidence you give before the Committee whilst you are participating as a witness in this hearing; you will not have the same protection should you wish to repeat, republish or refer to any of your evidence outside these proceedings. The Committee's role is to monitor and review the exercise of the Valuer-General's functions with respect to land evaluations. It cannot investigate the valuation of a specific parcel of land. In keeping with Parliament's recognition of the role of the courts, the Committee will not be considering any question currently before the courts for determination in respect of land valuations by the Valuer-General. You should have careful regard to this position when giving your evidence. If you wish to raise any particularly sensitive or confidential matters with the Committee you may request for part of your evidence to be heard in private. Do you have any questions regarding these procedures?

Mr TYDD: No, I do not.

CHAIR: Have you provided a submission to the Committee prior to giving your testimony today?

Mr TYDD: No, I have not.

CHAIR: Would you like to make a submission to the Committee?

Mr TYDD: I will think about that after I hear what goes on today. I only learnt about this last week.

CHAIR: Would you like to make an opening statement before we commence with questions?

Mr TYDD: Certainly. I have had a broad background in local, regional, State and Commonwealth organisations. I have been executive officer of the Association of Mining Related Councils since January 2012. I do this on a part-time basis, as well as run my own consulting practice. The background to the association I think is important. Since the early 1980s the councils where coalmining was becoming important formed themselves into an organisation called the Association of Coalmining Councils. In the early 1990s there were representations from local government where other minerals were being mined and that is when it became the Association of Mining Related Councils.

Currently there are 22 local government bodies as members and there are also other councils looking at becoming members. We cover 11.4 per cent of the New South Wales population and 19 per cent of the land area of New South Wales. The association extends from the Wollongong and Newcastle councils, which—as the Committee would know—would be exporting ports for minerals. We cover councils in the Far West, Central West, lower mid North Coast, the Hunter and the northern slopes and plains, which represent the newer areas. It would be fair to say that there is a different approach to mining within all those councils. Some such as Broken Hill and Cobar, we have probably been mining in those areas for 100 years plus.

Around the lower Hunter there has probably been mining there for 40 years around Singleton and Muswellbrook. Other councils really only got underway in the early 2000s, such as the ones on the northern slopes. The importance of the rating system is that traditionally that has been the revenue for councils where mining has been occurring—I will come back to that. The newer arrangements include voluntary planning agreements [VPAs] and, of course, the State Government has been discussing resources for regions and that reflects back to the association's Royalties for Regions scheme, which was an attempt to build up the revenue sources locally and regionally from where mining was occurring.

It would be fair to say in referring back to the rating, that the problem I guess with voluntary planning agreements is that different companies have different approaches. Some are involved with associations of their own, others just go it alone. The local government councils across the State vary in how they approach mining and it does mean that there has to be some reflection of the traditional ways of raising revenue. The big challenge for local government is the provision of social and physical infrastructure, especially where mining is occurring—the Committee has no doubt seen some of that. This, based around many of the policies of the companies in fly-in, fly-out and temporary accommodation—such as what you see in the northern areas of New South Wales now—are causing different problems and solutions I might add, for councils depending on what the local communities wish and want.

Again the different approaches by local councils and companies I think has to be looked at in view of where the traditional financial resources come from and just where we might be able to go with that. Some council areas seem to be adjusting well to mining—and here I talk about such as the Parkes Shire Council in association with the Rio Tinto group; that is a great example if you wish to see cooperation in a local situation. For others there are definitely challenges out there. It also depends—some companies are national based, others are overseas based, all have different approaches. So it falls back to how those local communities can fund some of the infrastructure.

I am aware that you have been out to Broken Hill City Council. I have been in touch with that council in the last week. They are still very concerned about where that rating challenge will leave them. It would be fair to say from my documents here, we had an original land valuation of $20.9 million. There is a huge variation of rates of $2.2 million or thereabouts. Those sorts of challenges will present problems and are being watched by a lot of our members. The association, in trying to meet these challenges, is looking through opportunities to discuss these matters. We are having a meeting in May 2013 with the Minerals Council CEO, Stephen Galilee. The whole aim of this and previous meetings also is to work together on some of these challenges and see if we can get the companies that are represented by the Minerals Council to the table and perhaps sit down together and work out how we can approach these issues on a joint basis rather than from opposite ends of the scale.

We are also, in the May 2013 meeting, talking to the New South Wales Water Commissioner, Jock Laurie, on all the issues surrounding mining. Again, I know that is evidence that we need to see what the State Government is doing because a lot of the decisions that will be made with regard to mining in local areas will be at the State level. On the previous day we are having a strategic planning meeting where a lot of the issues that I have discussed and valuations particularly will come up and we will then determine our four-year plan and go from there.

CHAIR: I see that you are a leading advocate for local communities on mining-related issues. We have just been to Broken Hill. Can you tell me the impact of the Valuer-General's decision or the court's decision to reduce the valuation from $20.9 million to $4.9 million on the community of Broken Hill?

Mr TYDD: I cannot reflect what the community has been saying but I can from discussions with their council and their delegate to the association. There is grave concern out there about where this court decision might go. As you can see from the figures I quoted, that is a fairly substantial hole in the council's budget. As you would be aware from being in the western areas of New South Wales, there may be a little bit of agriculture in the form of stock grazing but traditionally those areas have been dependent on mining and have been for a century plus. I think from discussions with the delegate, they are just not sure if that case, which I believe will be happening in July—I spoke to the council on Friday—will curtail significantly the ability of that council to progress infrastructure and other normal services. So it is something, as I said, that Broken Hill is watching with some concern. Of course, if that becomes a precedent, other councils will be watching it as well.

CHAIR: Which other councils have raised concerns with you about the Valuer-General's decision in Broken Hill?

Mr TYDD: It has not been directly raised with me. It is just in discussions around the table. I cannot name which councils they are; it is just general discussion I suppose since this decision was made. To be fair, it is being left to the court's decision. Then I think it will become an issue for us on our agenda, but at this stage people are viewing it, because it is so far west I guess a lot of the councils probably think, "We'll worry about that when it happens in our area." It is just a wait and see.

The Hon. SCOT MacDONALD: When we were in Mudgee we heard a bit about the offsets, and we are hearing this about Lawson's Creek, for instance, at the moment as well. Part of the EIS is to buy six or eight

times. You will probably have to take this on notice. Can you let us know if that offset land continues to be rateable? I am anticipating your answer will be a bit variable because we heard at Mudgee some of it was literally handed over to National Parks, some of it stayed in a lower conservation category, some of it sounded like it was even remaining, if not farming, then just shut up country basically. Maybe you could take that on notice.

Mr TYDD: I can make a comment on that.

The Hon. SCOT MacDONALD: Sure, please.

Mr TYDD: The Upper Hunter Council based at Scone is a member of the association. They do not have any mining as yet but I know that the mayor and the general manager have raised the issue at another meeting I had with them on the fact of offsets causing a lot of land to be, in their opinion—

The Hon. SCOT MacDONALD: Sterilised.

Mr TYDD: —locked up, sterilised. The effect is that is causing a shortage of grazing land in the Merriwa area for instance in the upper Hunter. That has the effect, of course, of raising the costs of land for anyone who wants to expand.

The Hon. SCOT MacDONALD: I want to get to that in my next question.

Mr TYDD: The other issue I suppose is what happens to that land. There is some thought that if it is just locked up, what about the effects on noxious weeks, animals, et cetera? I know the one that Whitehaven has just bought as an offset—I grew up just away from there—it will be interesting to see what happens to that land because it was mainly a forest where people went in those days and secured timber. It will be interesting. That adjoins the national park.

The Hon. SCOT MacDONALD: From the Committee's perspective, I should restrict it to a question about whether it remains rateable.

Mr TYDD: Of course. The value would drop I would think significantly if it is just an offset, unless the company takes a view that perhaps they can continue it in some use and lease it back to the adjoining landowners or something like that perhaps.

The Hon. SCOT MacDONALD: I will not go down that path, but that negates the offset, the conservation goal.

Mr TYDD: Yes.

The Hon. SCOT MacDONALD: But if you could take that on notice, I do not think you will have a blanket answer for New South Wales, but perhaps some examples of offsets and what the valuation impact might be. When we were at Mudgee we started to get some intelligence and evidence about speculators moving into an area where mining is developing and their impact on property values and therefore obviously valuation. Anything else you can add to that bank of knowledge for us—is it true or is it anecdotal; is it having a real impact on property values and therefore rating, and what that might mean to your councils—would be handy. We heard typically that it was inflating land values, therefore inflating valuations and therefore pushing up council rates, and what that means for councils and other property holders. Anything, either now or on notice—whichever you prefer—would be handy, because I was previously not aware of any of that.

My final question relates to voluntary planning agreements. I think there is an impact on valuations and therefore revenue for councils. Should voluntary planning agreements be standardised and reviewed by State Government, even if it is not a consent or determining authority, so that it could say, "That is a load of rubbish", or "You have missed this", or "You are being a bit low"—or high—"on that".

Mr TYDD: Could I go to voluntary planning agreements first, or the speculation?

The Hon. SCOT MacDONALD: I will take the advice of the Clerk or the Chair. Are voluntary planning agreements within our terms?

Committee Clerk: If they influence valuations and the system in any way, as long as this is discussed in a general way.

CHAIR: Go for it.

The Hon. SCOT MacDONALD: We can go down the path of voluntary planning agreements if there is an impact on valuations.

Mr TYDD: I will try to relate it back, but we can go to speculation. From my experience so far in this job, certain areas' land values seem to have gone up because they are attracting permanent employees. In other areas I would have my doubts whether it would because people are really only flying in and flying out, or driving in and driving out. Again it depends on the area and the size of the town adjacent to where the mining is happening.

The Hon. SCOT MacDONALD: Is it distorting the market? Is there a market failure here that the Valuer-General should be conscious of?

Mr TYDD: It is interesting. In some of the new areas, such as Quirindi, Gunnedah and Narrabri—particularly around the Gunnedah and Narrabri area, with Boggabri right next to it—certainly the values have gone up.

The Hon. SCOT MacDONALD: But that is not necessarily market failure, is it?

Mr TYDD: No. I can speak from having a family connection there. Before the mines came to Boggabri the values were ridiculously low. You could buy a house there for $10,000 prior to the big mining that you would be aware of. Those prices now have moved up to what I would consider reasonable when you base it on land values of other areas, adjoining areas, so yes, there has probably been a tripling or quadrupling of the value in an area like that near new mining, but it is probably only bringing it back up to where it is realistic anyway.

The Hon. SCOT MacDONALD: We heard in a number of cases last week that the person doing the valuation was contracted, and they came from quite a while away. I think the Broken Hill bloke was from Dubbo and the Mudgee fellow might also have been from Dubbo.

Mr TYDD: He would have been.

The Hon. SCOT MacDONALD: Do you think someone from that sort of distance away can have an appreciation of the market and what it is doing?

Mr TYDD: That is a really good question and I thought about whether that would come up in these discussions. I do not want to go back in time, but if we go back to the way valuations were completed in the era of the 1970s, for instance, your valuer was located in a subregional area and was acutely aware of everything because they inspected pretty much every block of land within a shire area. They were known and were respected. I think a lot of the issues that come up now would not have come up in those days because someone had somewhere to go, and that was a district valuer-general's office, which in turn would represent back to probably a regional office. I think that is how it used to be. You had people who you could walk up to and discuss valuations, whether it was the council, a private citizen, a landholder—everyone had access to that person and they lived in the community and were very much aware of it.

The Hon. SCOT MacDONALD: Have your members related to you the experience that we heard, that it was virtually almost a fly-in-fly-out situation? This contractor who came from quite a while away—and I cannot remember if he came every time, but if he came—was there for a morning or a day, and he left on the last flight out, or drove out that evening.

Mr TYDD: It has not been raised within the association, but it is an issue that we could check because the association is more concerned about the revenue side of how they are going to fund the different infrastructure and services within their local communities. We do not get down to the traditional sort of local government, what is going on in the area; we only meet every three months, so it tends to be caught up in what the bigger issues are with mining. But it always has been, from my experience when I was in local government, that once you saw the move from local or subregional people to drive-in-drive-out or fly-in-fly-out services, people did have concerns about that.

The Hon. SCOT MacDONALD: Could you ask some of your members if they have service agreements with these valuation contractors because from what we heard there was an annual payment, which varied across the councils a little of course, but the councils did not have a strong understanding of what they were getting for their money and at least with the two councils we heard from last week there was no service agreement to say, "This is our job and this is what you can expect; if you have a problem, this is the way to go about it."

Mr TYDD: Yes.

The Hon. SCOT MacDONALD: Could I leave that with you as well?

Mr TYDD: Yes, certainly.

Mr CLAYTON BARR: Mr Tydd, earlier in your testimony you recognised that the mine out at Broken Hill had gone from $20.9 million to $4.9 million. Are you aware of and/or can you explain to me the reason for that difference in valuation?

Mr TYDD: I do have a copy of the judgement here.

Mr CLAYTON BARR: Just in broad terms?

Mr TYDD: I read it a while ago. It seems on the evidence that the assessor just made a decision that it should be reduced down. It does not seem to be other than on the evidence that the $20 million in his opinion was too high, so it was reduced accordingly. I guess that a lot of the evidence would have revolved around uncertainty and fluctuations in mining, but that can happen with all land values let alone mining values. At the time that the land value is assessed sometimes the market might have gone down.

I was only made aware of this in November when the delegate from Broken Hill raised it and said, "This will become an issue." I have followed it from a distance. It would appear that some of the evidence indicated there was a need for that to be done. I believe the Valuer-General may not have the same answer and that they believe it was a reasonable valuation. It certainly shows the cyclic nature, if you like, of mining if it comes to a court decision, because I think that obviously has come into that valuation. In the judgement they go into how much it would cost to establish that mine again. It gets down to evidence from the two parties really. It refers to capital cost of equipment, set-up period, prices for extracted materials—

CHAIR: I ask you to be careful about making personal reflections or reflections on a judgement of the court.

Mr TYDD: I will withdraw that if I have to.

Mr CLAYTON BARR: This question is a little bit like asking how long a piece of string is. I acknowledge that up front. Are you aware of how much the set-up, establishment fee and infrastructure costs would be for a coalmine—a ballpark figure?

Mr TYDD: I really cannot comment other than to say it is a huge capital cost which must be reflected—

Mr CLAYTON BARR: Hundreds of millions or billions?

Mr TYDD: It really gets down to the amount of resources that are capable of being mined. Some mines probably have a life of 30 years and some mines have a life of 10 years. I have seen them around the Gunnedah area where they were mined open-cut for only a couple of years just to fill a void. It is something I do not have the expertise to comment on other than to say it is a very expensive thing to set up and maintain. The issues with mining today are very different from what they were even 30 years ago in relation to safety and the number of procedures that have to be in place, as you might have seen. The overheads have probably gone up in mining.

Having said that, I think the ability to drag coal out now from an open cut would reduce the overall expenditure for the duration of the mine. To give an example, one of the Whitehaven open cut mines near

Gunnedah is operated with about 130 people whereas at their underground mine there are 200 or 300. It varies from place to place according to how much overburden is on top, whether they are near a railhead and whether the mine has to truck coal somewhere. Then of course it gets down to the market price that is going to be paid. It varies from month to month really.

CHAIR: Can you help me understand the impact on Broken Hill's budgetary position after this decision was made by the court?

Mr TYDD: I really cannot comment. I went to make contact with their general manager on Thursday but he has left, so it is a caretaker position at the moment. I did not question those people about where they are up to with it. I think they are waiting on the decision in July. It will have a huge impact according to their delegate who is a councillor there.

CHAIR: Are you aware of how much Broken Hill City Council relies on mining revenue as part of its rating base?

Mr TYDD: Not other than they sent me a graph that shows the reduction in rates that would come about if that valuation came in.

CHAIR: If you have a copy we would appreciate it.

Mr TYDD: I am happy to table this if you like.

CHAIR: It can be tabled for the information of members.

Mr TYDD: I have to clarify this. This was supplied to me by the then general manager so I cannot comment on its accuracy but I assume that this is the best I can work on,

CHAIR: When we were in Broken Hill last week we understood from the council that mining revenue accounts for about 26 per cent of their total rate base. Are you aware of other councils within your membership that have a greater reliance on mining income as part of their rate base?

Mr TYDD: I am not aware of their individual rate bases but I assume the two most western members, Broken Hill and Cobar, due to their geographic location and the nature of the climate and the environment, would be more dependent on it as income than say councils further east towards the coast. That would be my assessment.

CHAIR: I am trying to get an understanding of the membership of your organisation. I assume mining forms a key part of the rate base of the 22 councils. Is that correct?

Mr TYDD: It depends on the individual councils. Broken Hill and Cobar would be highly dependent on it because there are no other industries around there. Muswellbrook is not a member. Singleton is, in the lower Hunter, and mining is a big industry and has replaced agriculture to a degree. In other council areas such as Parkes it is fairly balanced with agriculture providing some of the revenue for their rating base. The newer areas in the Namoi Valley would still be getting the large majority of their revenue from agriculture and services.

CHAIR: As the Executive Officer of your organisation can you tell me whether mining rating plays an important part in the total revenue base of your member councils?

Mr TYDD: As I said, it would be very—

CHAIR: Could these councils do without mining revenue?

Mr TYDD: The only one of the members that does not have mining at the moment is the Upper Hunter Shire Council. The rest would derive some of their income from mining rates.

CHAIR: I assume those rates are important for providing essential services.

Mr TYDD: They are, particularly with the current rate pegging. I think most councils would be looking to the mining industry to pay their way.

CHAIR: Have councils raised with you in the past issues around the valuation process?

Mr TYDD: As I said, I only took over running this organisation in January last year. I believe valuations have played a part. The previous executive officer when she was handing over gave me boxes and files of information that indicated that valuations had been part of the process at some stage. I cannot comment on them because I am only aware that it has come up in the past.

CHAIR: Are you able to provide the Committee with a list of issues your association has had with the valuation system?

Mr TYDD: I would be happy to.

CHAIR: And which councils would have been affected by valuations?

Mr TYDD: Yes.

CHAIR: We heard testimony in Broken Hill that the first time Broken Hill council was aware of legal action being taken against it in the case of Perilya was when Perilya informed the council it had been successful in its court case. Are you concerned that Broken Hill City Council was not informed by the Valuer-General about legal action that would adversely affect its financial position?

Mr TYDD: I cannot comment on whether Broken Hill would be concerned or not but if I was involved with that council I would be seriously concerned that the first I knew of it was advice that it was in court.

CHAIR: Given that the valuations provided by the Valuer-General form an important part of the rates your member councils derive in their total rating and taxing system, do you think it is important that the Valuer-General gets his decisions right?

Mr TYDD: Most certainly. As you can see in the Broken Hill case, if there is a large reduction in the valuation and therefore a reduction in the rates after the event, local government is under a big obligation now to forward plan. Obviously their potential rate income, based on the valuation as it stands, would become part of their budgeting for the next two to three years. Many years ago councils just had annual budgets. Now they are expected to plan well ahead. That is why I think this decision is playing on their minds a bit. They would have made certain plans within their statutory planning, including this sort of extra rating. Therefore, that will cause a great deal of concern. If their forward estimates are such, they will have to redo the whole budgets into the future, as you can see there.

CHAIR: Given the importance of these valuations for your member councils, do you think it is important the Valuer-General communicates with the councils to keep them informed of legal issues or matters that may adversely affect their rating revenue?

Mr TYDD: Absolutely.

CHAIR: Do you think there is sufficient transparency around the valuation process in New South Wales at the moment?

Mr TYDD: Normally the first that a landholder knows about it is there may be something in the media that a valuation is about to occur, and then you get your slip in the mail with the opportunity to object to it. In this centralised system that we exist under now, a lot of people are then obliged to go through certain processes, whereas possibly in times gone by they would have had the opportunity to discuss that locally or regionally. I do not think there is the level of communication that there was previously with valuations—I am speaking personally. Often the valuation would be desk top presentations based on market sales, market information, which is very generalised, in my opinion, to a point that previously when it was inspected by a valuer they would be in a position to physically see the differences in the rating aspects. Whereas if it is done centrally, it is done on a system so that everything is the same. I do not think the amount of information that goes into valuing now at local and regional levels is there. I think that makes it hard. As I said, there are not a lot of objections in

my experience to valuations. Certainly people feel is it possible to go through these processes. That is, again, a personal opinion, not an association opinion.

CHAIR: Mr Tydd, thank you very much for your time. It has been very helpful.

Mr TYDD: Thank you.

CHAIR: On a formal note, if we have additional questions in writing, the replies to which may be made public, would you be happy to provide a written reply to any further questions?

Mr TYDD: Yes, that would be fine.

CHAIR: With respect to your members, you can inquire whether there are any issues that they have with how the valuation system is operating and if there are any recommendations they would like to make to the Committee with regard to how the efficiency, effectiveness and equity of the system can be improved. The Committee is reporting back to the Government by mid-April, so if you would like to make a submission, or make it available to your members to make a submission, we would need it by then. We have written to every government area in New South Wales, but we would welcome a submission from the association.

Mr TYDD: If I got something back to you by 31 March, is that okay?

CHAIR: Yes, that should be fine. The secretary, Mr Miller, can help you with the details of how to make the submission.

Mr TYDD: I have got the details here. I will go back to the members this week and see what information I can get back for you.

CHAIR: That would be great. Thank you, Mr Tydd.

(The witness withdrew)