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REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NEW SOUTH WALES

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Friday 16 December 2011

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The Committee met at 9.15 a.m.

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PRESENT

The Hon. D. Clarke (Chair)

The Hon. S. Cotsis
The Hon. P. Primrose
The Hon. S. MacDonald
The Hon. S. Mitchell
The Hon. S. Moselmane
Mr D. Shoebridge

CHAIR: Welcome to the second public hearing of the inquiry by the Standing Committee on Law and Justice into opportunities to consolidate tribunals in New South Wales. The Committee is to consider what opportunities are available to rationalise the numerous separate tribunals in New South Wales in order to ensure access to justice for the people of New South Wales and to increase the overall efficiency and effectiveness of those tribunals. The Committee is interested in a full range of views on this issue. Today the Committee will hear from a number of witnesses, including the Law Society of New South Wales, New South Wales Bar Association, Redfern Legal Centre, Transport Workers Union NSW and others.

Witnesses and staff are advised that any messages to Committee members should be delivered through the attendants or the Committee secretariat. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to witnesses under parliamentary privilege should not be abused during these hearings. I request that witnesses avoid the mention of other individuals unless it is absolutely essential to address the terms of reference. I ask everyone to turn their mobile phones off. I welcome our first witnesses today from the Law Society of New South Wales.

HEATHER JANE MOORE, Law Society of New South Wales, , Sydney, affirmed and examined:

JOSEPH JOHN CATANZARITI, Law Society of New South Wales, , Sydney, sworn and examined:

CHAIR: Would either of you like to make a short opening statement?

Mr CATANZARITI: Yes, thank you. It might assist the Committee to provide some context for the Law Society submission. The Law Society of New South Wales has 19 policy committees, most of which focus on a particular area of law. Five committees contributed to this submission, each with a different perspective based on its area of expertise and experience of the tribunals that operate in that area. That difference in perspective has resulted in differing views being taken on the overarching question of whether there should be one amalgamated tribunal in New South Wales. The committees with a more general perspective could see benefits from consolidation, including improving service delivery and facilitating access to justice. The committees in more specialised areas were concerned about the risk of consolidation, particularly in relation to guardianship matters.

Overall it is possible to say that the Law Society is in favour of some consolidation, particularly in relation to the jurisdiction of the Industrial Relations Commission. The submission makes some suggestions about the options that have been provided in that area and it prefers modified version of option 2A in the issues paper. I should note that there was some confusion about whether the function of the Workers Compensation Commission was intended to be covered by the inquiry. We have now received advice that the Committees is interested in examining this question and our Injury Compensation Committee is considering a response. In the meantime I can say that the Law Society would be very concerned about any proposal to include the Workers Compensation Commission in an amalgamated tribunal.

The Hon. SHAOQUETT MOSELMANE: Point 1.1.2 on page 2 of the Law Society submission states:

> ... a "VCAT" type tribunal ... needs to be approached with caution.

Will you elaborate on those concerns? What measures do you suggest the Committee should take to avoid those concerns?

Mr CATANZARITI: As I understand it employment law is not part of the Victorian Civil and Administrative Tribunal [VCAT]. The Employment Law Committee was concerned as to how that would sit within a consolidated New South Wales system. That is why it went for option 3 as being something for the future, perhaps, and it took the halfway option of 2A, where there was recognition of the employment law jurisdiction in this body. That was really its focus.

The Hon. SHAOQUETT MOSELMANE: So what should this Committee be avoiding in its deliberations?

Mr CATANZARITI: What the Employment Law Committee is saying is that VCAT does not do what is being proposed here in one sense because VCAT has made a deliberate decision to keep out employment. The committee is saying that it does not know how it would operate if employment was included in this body. That is why it went for the 2A approach, which had recognition that there has to be something done with the employment jurisdiction but how would it sit with all the other hybrid of things that VCAT is currently doing?

CHAIR: Will you expand on your opening statement that the Law Society was adverse to the Workers Compensation Commission being included in a super tribunal, as it were?

Mr CATANZARITI: The view of that committee, as I understand and as it was related to me, is that the current workers compensation system is working extremely effectively and there is absolutely no need from a consumer's perspective or from a legal perspective to change anything. It is working, it is not broken; there is no issue. The committee does not see any real advantage in interfering with the workers compensation system as it is currently working.

CHAIR: Are you saying that no additional advantages would flow to the operation of the workers compensation system by combining something that is working as effectively as it is?

Mr CATANZARITI: That is so.

Mr DAVID SHOEBRIDGE: In the opinion of the Employment Law Committee what would happen to the Industrial Relations Commission under option 2A?

Mr CATANZARITI: I think it is set out on page four. It would like to see the District Court employment law—occupational health and safety, for example, has just been transferred to the District Court.

Mr DAVID SHOEBRIDGE: In large part.

Mr CATANZARITI: Yes. It would see that you would have the Supreme Court as the appellate jurisdiction but a lot of the stuff—that is, employment law, common law, contracts, everything that goes down there—could all go into the 2A model. So you would have specialist people or a division that would actually understand employment law.

Mr DAVID SHOEBRIDGE: That would be a division within this administrative tribunal?

Mr CATANZARITI: Yes.

Mr DAVID SHOEBRIDGE: Would it be intended that there be jurisdiction to deal with common law contractual-type employment disputes?

Mr CATANZARITI: Yes.

Mr DAVID SHOEBRIDGE: Would it be the view that those would be determined by commissioners or by judicial officers?

Mr CATANZARITI: We have not drilled down to the structure, but the current people who have got the title of commissioners within the Industrial Relations Commission are not addressed by the actual approach. We would see specialist people who understood industrial relations dealing with disputation and the like. Certainly we would recognise that somehow the judges would need to be accommodated in whatever is occurring.

Mr DAVID SHOEBRIDGE: I could not understand from your submission if the judges who are currently in the Industrial Court would be judicial officers within the commission, within an New South Wales Civil and Administrative Tribunal [NCAT], or if they would be transferred to the employment division of the Supreme Court. As I understand it there will be one judicial officer heading an employment division in your model but I am not sure what happens to the balance of the judicial officers.

Mr CATANZARITI: What we have said is that we do not know what the workloads will be like if we got our modified version, which was to include the District Court work, into the body; that could allow a number of those judges in the Industrial Commission to have Supreme Court judicial office status within this new body.

Mr DAVID SHOEBRIDGE: None of the other State administrative tribunals have picked up employment law—Victoria basically handed it over federally and the other States have not picked up employment law. I am wondering how that division would sit within an administrative tribunal?

Mr CATANZARITI: We acknowledge the novelty of that because that is why we see it is not simply a matter of looking at VCAT or the Queensland version; we have a particular problem that we are addressing—the driver is the current workload of the judges of the Industrial Relations Commission. We have come up with a modified 2A and suggested that we try to absorb as many of them as we could. If we took the District Court jurisdiction back within this new body that would certainly take some of the work. We do not know until it operates how much work will be available but whoever is transferred we would like them to have the right status.

Mr DAVID SHOEBRIDGE: Does the District Court jurisdiction you are referring to there include occupational health and safety and common law contractual work?

Mr CATANZARITI: Yes.

Mr DAVID SHOEBRIDGE: Probably a simpler option is retaining the current commission and putting some of the employment work into the current commission structure. So you give the current judicial members of the commission that District Court jurisdiction and maybe give them some discrimination jurisdiction?

Mr CATANZARITI: Some of our committee members would say that model would also be available. There was not a united view in terms of the different aspects—we represent the broad church, to use that expression. Some would say enhancing the existing system but if that is not going to work then do option 2A in our submission.

CHAIR: Unlike your position on the Workers Compensation Commission, which you say should stand alone because it works very effectively the way that it is, you are not suggesting that for the Industrial Relations Commission? You are suggesting that the work of the Industrial Relations Commission be absorbed in some way into a new super tribunal?

Mr CATANZARITI: That is certainly the view of the Employment Law Committee.

CHAIR: Is the reason for that because you do not see it operating as effectively in the work that it does in the same way as you do with the Workers Compensation Commission?

Mr CATANZARITI: I think part of that is also because we are looking at the reality of the amount of work that currently exists within the structure. Effectively there are two models. Obviously the model just suggested is one way of ramping up the commission by transferring more work into it—

The Hon. SHAOQUETT MOSELMANE: Would you not agree that rather than having the Industrial Relations Commission go into a super tribunal it would be better to expand the powers and authority of the Industrial Relations Commission, given the history, expertise and knowledge it has built up over almost a century, and have other matters that the commission would be able to deal with brought into it?

Mr CATANZARITI: My views are as expressed by the committee and the committee's view is set out in the submission; it is leaning towards 2A as the preferred model.

CHAIR: Would part of your response to the Hon. Shaoquett Moselmane's question be that all the tribunals that presently exist have an expertise, so that the Industrial Relations Commission having an expertise by itself is not sufficient for it to continue to stand alone?

Mr CATANZARITI: The answer to that is not straightforward because in the case of the Guardianship Tribunal there are very strong views that it sits in a very special category. It is the view of the elder law committee, unlike the view expressed by the employment law committee, that it would not work to absorb the Guardianship Tribunal even as a division. It has a very peculiar nature the way it operates. The consumer reaction to the Guardianship Tribunal appears to be that it is working very effectively. They do not see how that can be consolidated effectively.

CHAIR: But the expertise of the Industrial Relations Commission, in your view, is not sufficient by itself for the commission to continue to stand alone.

Mr CATANZARITI: I think the view of the committee—and I speak on behalf of the committee—as expressed is that they are of the view that it could fit within a division.

Mr DAVID SHOEBRIDGE: As I understand it, the intent is to retain that expertise within an employment division of an NCAT. That is the committee's view, is it not?

Mr CATANZARITI: That is correct.

Mr DAVID SHOEBRIDGE: If I understand the model—and it is a little opaque to me, to be honest—the current commissioners would move across. I am just trying to read your submission. At 2.1 on page 4 of your submission, under "Comments specific to Option 2A", the third dot point states, "Creating an Employment Division consisting of a former judge of the IRC to head IRC commissioners".

Mr CATANZARITI: Yes.

Mr DAVID SHOEBRIDGE: What does that mean? I thought that meant having a former judge heading the IRC commissioners.

Mr CATANZARITI: The reality is that the majority of the IRC commissioners have been dealt with in the Fair Work system. That point does not necessarily mean that those who have not gone to Fair Work—it does not require all the Fair Work commissioners to transfer into this new system.

Mr DAVID SHOEBRIDGE: Unions NSW said that one of the great benefits of the current system is the dual appointment of commissioners as both Federal and State, having jurisdiction under both the Federal Work Place laws and State industrial relations laws, and said that that meant you could particularly have flexibility in regional areas. Would that be the intent of this employment division?

Mr CATANZARITI: There are only now a few commissioners who are left in the State system. The majority of them have been transferred to federally, we are talking about, in terms of numbers of people doing State work. When we use the term "dual appointment" in fact if you look at who they really are, I do not have the names in front of me but I could come back to you with those on that. The majority of the work has actually now gone to the Federal system.

Mr DAVID SHOEBRIDGE: There is no doubt that a great deal of that work has gone to the Federal system, but there are still significant amounts of work in the State system under the public sector workers and also private referrals, which is what Unions NSW said. Many enterprise bargaining agreements have specific referrals to State commissioners to deal with disputes under their agreements. Unions NSW was very clear that it wanted to have the capacity to have those dual appointments. I am wondering what the position of the Law Society was.

Mr CATANZARITI: There is but we are not talking about a vast number of people. That could still be done within our option 2A. It is not all of them.

Mr DAVID SHOEBRIDGE: That is why I am asking.

Mr CATANZARITI: It is not all the commissioners currently there being transferred across because when you look at it the majority of them have been transferred, entirely their workload, to Fair Work. Only a small amount of them are doing the dual appointment stuff.

Mr DAVID SHOEBRIDGE: I am curious about the employment division in the Supreme Court. Would that be intended to be populated by the existing judicial members of the court, or how do you envisage creating that division in the Supreme Court?

Mr CATANZARITI: That would be our preference but we acknowledge that that may not be the reality. Our preference would be to try to use the judges and their skill sets in that division as well.

Mr DAVID SHOEBRIDGE: Would it be possible to maybe put some additional thought to the structures you are talking about, given the novelty of them and that they are not found in any existing model, perhaps on notice?

Mr CATANZARITI: Certainly, we can come back with a submission on that.

The Hon. SCOT MacDONALD: I have two prongs to my question. One is you fear a loss of expertise and you mentioned it on page 2 of your submission. If a consolidated tribunal has the appropriate lists or divisions, will that not overcome a lot of your concerns about loss of expertise, if the right appointments are made? In particular, if the divisions are there would that not overcome your concerns?

Mr CATANZARITI: The committees have expressed caution in relation to that, instead of absolute opposition. They just want to make sure that the right sort of skill sets are maintained in whatever structure emerges.

The Hon. SCOT MacDONALD: If the framework is right, hopefully we should overcome most of that. I am trying to appreciate your concerns about the CTTT and its arbitrariness and lack of consistency and transparency. A few comments have been made that if it becomes more judicial like a lot of that will be overcome, you will not have the problems where some of the appointees, the tribunal members, maybe do not have a legal background, but if the super tribunal or a consolidated tribunal comes into being a lot of that will hopefully be overcome. Just reading your submission, I get the impression that maybe you have not thought about all that very minor stuff that a lot of the CTTT does where a high level judiciary officer might not be appropriate. You mention a figure of about $10,000. A lot of the 60,000 odd matters that the CTTT handles are quite minor in matter, the broken window on a rented residence or a dispute with a landlord. How do you see all that being accommodated?

Mr CATANZARITI: As I understand it from the property law committee and the business law committee, they draw a distinction between the very low level stuff and they would not want that swamping any consolidated tribunal. It may be an argument that says the low level stuff is kept quite separate from the more complex matters. The business law committee was very concerned about the simpler and the more complex matters and how it should operate. The property law committee was very concerned about strata title matters and matters which were becoming more complex, expert matters, et cetera. At the moment it was their view that the CTTT was not operating and simply transferring the existing CTTT as part of consolidation would not achieve the outcomes.

The Hon. SCOT MacDONALD: So you are worried that all that little stuff will still continue to swamp it and not be handled properly if it got merged into a consolidated tribunal. That is something for us to think about.

Mr CATANZARITI: There are significant concerns by those two committees—and I speak on their behalf as distinct from being a practitioner in that area. They are very strong views that have been conveyed to me in relation to the current operating of the CTTT.

The Hon. PETER PRIMROSE: Like your elder law and succession committee, I am also a great fan of the Guardianship Tribunal. I do not understand why it is different to the other tribunals in terms of the expertise it has or the fact that it has a client group who believe that it is unique and provides a particular service that should stay out of some form of amalgamated tribunal. Can you expand on some of the rationale that the committee used?

Mr CATANZARITI: I might preface it by saying that I understand that VCAT is looking at the Guardianship Tribunal of New South Wales at the moment and forming a preliminary view, as I have been told, that they think we are better than their system.

The Hon. PETER PRIMROSE: We are.

Mr CATANZARITI: They think that what they have done probably does not work and the system that has been created through the Guardianship Tribunal is very effective. I am advised by our elder law committee that they have serious reservations that simply putting the Guardianship Tribunal into some division would not work. They say that there is a lot of flexibility that the Guardianship Tribunal has in terms of the way it approaches regional issues. It is on the road when it needs to be on the road. It has a whole lot of practices in place which they do not believe would work necessarily in a consolidated tribunal.

The Hon. PETER PRIMROSE: So to get it right, consolidation means generalisation in the view of the committee and a loss of expertise and flexibility. Presumably that would apply to all existing tribunals.

Mr CATANZARITI: That is right but some tribunals are working effectively and some are not.

The Hon. PETER PRIMROSE: In the view of the Law Society, which tribunals in New South Wales can afford to lose flexibility and expertise?

Mr CATANZARITI: Flexibility and expertise—

The Hon. PETER PRIMROSE: I am simply trying to understand what makes the Guardianship Tribunal different. If the reason for them not going into some sort of consolidated tribunal is because of the loss of flexibility and expertise, which other tribunals is it appropriate for them to lose expertise? Presumably their client group would have some concerns about them going into a consolidated group. Which ones therefore is it appropriate to amalgamate?

Ms MOORE: I think the elder law and succession committee had pointed out that it depends on what your priority is in making these decisions, and they are saying that you can look at it from the sense of efficiency, resourcing questions and the benefits of a consolidated tribunal. On the other hand there are drivers of specialisation and expertise, and they point out that it might be different depending on which area you are looking at and in their opinion they are saying that it is different for the Guardianship Tribunal.

The Hon. PETER PRIMROSE: I again ask, because you are advocating a particular model 2A: Which other tribunals is it appropriate for them to lose expertise and specialisation? I am trying to look at the unique character of one. For example, the Mental Health Review Tribunal. Is it the view of the Law Society that it is appropriate for it to go into an amalgamated tribunal?

Ms MOORE: That is one that our committees did not look at in particular. We can take that question on notice and see if we can find a view for you on that particular tribunal.

Mr DAVID SHOEBRIDGE: Give us one tribunal that is good for amalgamation that has in any way a meaningful amount of work before it.

The Hon. PETER PRIMROSE: Which ones should go in? Just one.

Ms MOORE: Mr Catanzariti has already looked at the views of the employment law committee, which is dealing with that practical issue about the Industrial Relations Commission and that is one area.

The Hon. PETER PRIMROSE: Give one other. I just want one other than the employment related committee.

Mr DAVID SHOEBRIDGE: Which has a meaningful amount of work.

CHAIR: That is something you want to take on notice.

The Hon. PETER PRIMROSE: I would just like one other tribunal.

The Hon. SARAH MITCHELL: I have two relatively quick questions. The first relates to the appropriate oversight within the department, at 1.1 in your submission. The government solicitors committee talk about the need for consideration of an appropriate oversight department within the Government. I am not sure if you have had the opportunity to look at the submission that was put in by the ADT but they raise some concerns with the possibility of the Attorney General's Department being the oversight department because of it predominantly court service history. Do you have any views on that?

Ms MOORE: The government solicitors committee did not express a view on which particular department should have oversight and I do not think they would feel it their place to do so although obviously I am not on that committee; I am just a member of staff. There was one committee that was in favour of the Attorney General's Department having oversight and I believe that was the property law committee because it felt that having that oversight in the same area as the responsible area for court-based policy also had benefits for tribunals.

The Hon. SARAH MITCHELL: Would it be possible to find out, and again take it on notice, with the government solicitors committee and perhaps have a look at the ADT submission and get their thoughts. I would be interested to read that. The second question is a bit more simplistic. A lot of the messages that were coming through, particularly in the submissions that we have had so far and the witnesses yesterday, were about not losing sight of the reason why we have tribunals and keeping integrity in the system and access to justice. Again that was something that the business law committee brought up in your submission. They said they think that if you were to have the one-stop shop approach you will generally be in a position where it is a simpler service and it would facilitate access to justice. Do you have any further comments on that?

Mr CATANZARITI: We are comfortable with one-stop common registries and the things that come with that. The Business Law Committee took an economic rationalist approach in relation to those issues. It could not see the need for multiple registries and multiple staffing of the administrative back-end when they could be brought together.

The Hon. SHAOQUETT MOSELMANE: In relation to option 3 that you describe on page 4 as being the most radical, Unions New South Wales agree with the possible position you are making and that it is an eclectic mix-and-match. I would like you to elaborate on what you mean by "most radical" in the context of option 3? The other question is; we have various other submissions that relate to appeal panels being built into any super tribunal that may be established in the future and there was one recommendation that even if the Consumer, Trader and Tenancy Tribunal [CTTT] was kept on its own that it should have an appeals tier within it as well. What is your view?

Mr CATANZARITI: On that second point, that is so. The Property Law Committee is of that view—there needs to be an appeal mechanism. That first answer is related because there is a lot of criticism of the current way it is operating. It is not a consolidation issue. It is about the CTTT delivering what it is supposed to be delivering. In one sense you could have an inquiry limited to the CTTT and whether it is delivering the justice that is required. A number of committees have expressed that view—that there is a lack of contentment from the consumer.

The Hon. SHAOQUETT MOSELMANE: We heard that yesterday.

Mr CATANZARITI: The CTTT is problematic. In relation to option 3, apart from the Business Law Committee which goes straight to the efficiency model, that is to consolidate everything and create option 3, the Employment Law Committee took the view that "not yet" was ultimately their option. They suggest you would implement 2A and see how it operates. There would be synergies, various groups would work and it is possible down the track there might be a view that says: Now they are working a particular way you can bring a further consolidation.

The Hon. SHAOQUETT MOSELMANE: How is it most radical? I asked that question in the context of the comments made yesterday by his Honour Judge Kevin O'Connor, President of the Administrative Decisions Tribunal, and he preferred option 3. You are saying it is most radical.

Mr CATANZARITI: We are coming from five different committees' perspectives that have got various views about the efficiency of their systems as they currently operate and who are worried that everything under one umbrella would not necessarily achieve the outcomes they want. In practice it may be a big surprise and it may work having separate divisions and separate skill sets in a model prepared in that way.

Mr DAVID SHOEBRIDGE: I accept you are presenting five committees' views, there is divergence in the views and it is a challenging position. One matter I find difficult in the overall submission is early on you say retain the CTTT as a standalone tribunal, yet the two key submissions on the CTTT from the business and property committees say it is not working, it is not delivering the outcomes we want, It has a lack of consistency, it has excessive flexibility, and it is not dealing with the complex legal problems we have presented to us. Yet here you are before a committee which is looking at changing tribunal structures and you say leave it alone, do not put it into this new super tribunal. I am trying to work out how those two streams of thought fit together.

Mr CATANZARITI: The work of the CTTT is enormous in terms of the amount of work that currently exists there. There is a concern that there would be a swamping of any super tribunal by merging in the CTTT. That is consistent with saying the CTTT as it currently operates is inefficient. Consolidation may not be the answer; it is a restructuring of the CTTT.

Mr DAVID SHOEBRIDGE: Why not restructure within a divisional structure in a new administrative tribunal? Why not create the structure you think would be appropriate within a division and move the work of the CTTT into a structure which better deals with it and has within it an internal appeals structure which produces some of the consistency—why not do that?

Mr CATANZARITI: I acknowledge that is a possibility in a restructure of the Consumer, Trader and Tenancy Tribunal [CTTT] but the focus of those two committees was on the current way that it was operating

and a concern that it would pollute the whole change process. It would have to be handled carefully and a lot of work done with the CTTT.

Mr DAVID SHOEBRIDGE: It is almost as though you are saying there are so many problems with the CTTT that if you bring that workload into this new super tribunal you bring those problems into the super tribunal: Is that your submission?

Mr CATANZARITI: Frankly, that is what our committees were very concerned about.

Mr DAVID SHOEBRIDGE: Do we not have an obligation to grasp the nettle and fix it rather than say let us come up with a tribunal here but ignore the major case load of administrative work in New South Wales and leave the CTTT alone? Do we not have an obligation to fix it?

Mr CATANZARITI: We have an obligation to fix it and that would be the view. But the committees were saying there are a number of drivers in this reform agenda. The issues with the Industrial Relations Commission and other groups can be managed fairly quickly and done effectively. The CTTT is a much bigger process and a lot of work has to be done and two of those committees were concerned about the swamping of the CTTT in the overall review.

Mr DAVID SHOEBRIDGE: In all the submissions we have had—viewing it from the need of consumers, litigants and citizens—I cannot recall a single submission complaining about how the current Industrial Relations Commission [IRC] works yet there is a wealth of submissions from professional groups, user groups and individual litigants about the CTTT. Why would this Committee, in the light of all that, focus our attention on an area that we are not getting complaints about? Why would we not address the key problem?

Mr CATANZARITI: We say there are two different issues: One is consolidation and one is a tribunal that is not working. We have no difficulty with a tribunal that is not working effectively being reconstructed, but it does not mean that consolidation is the answer to that question.

The Hon. SCOT MacDONALD: Can I ask you a general question about appeal. You have mentioned a few of your bodies and they have different pathways for appeal. Yesterday we had some good discussion about what was working well for appeals and the Administrative Decisions Tribunal [ADT] seemed to have a good model, while others are less satisfactory, less accessible and more complex. If all this came together do you have a view as to what would be the best model for appeals: One that is simple and affordable but still does the equity task?

Mr CATANZARITI: We would like to come back on that question with a submission.

The Hon. SCOT MacDONALD: It is difficult because you have a number of existing structures and the Committee is asking you what do you think would be the best of that bunch for an improved model for appeal?

Mr DAVID SHOEBRIDGE: The Tenants' Union, and others, yesterday said an internal appeal on both merit and law within any tribunal would be an advance. They see the absence of that in the Consumer, Trader and Tenancy Tribunal [CTTT] was producing a lack of consistency. We also had the CTTT say they were very concerned that if there was an internal merits appeal within their jurisdiction they would be swamped by appeals. The CTTT said there needed to be some kind of constraint, some kind of limitation, on appeals. Then there was a concern from the Tenants' Union that an appeal on a question of law from the CTTT went to the district court, yet there was still a capacity to have judicial review in the Supreme Court. That was producing two appeal streams, enormous complexity and additional appeals through to the court of appeal and they were critical of the appeal process going through the district court. The Tenants' Union were urging a process of appeal directly to the court of appeal from any new administrative tribunal. Could you consider those issues and take them on notice?

Mr CATANZARITI: Yes, we will consider the issues and take them on notice. Considering the volume of work in the CTTT I think there would be concern that if there was a right of appeal direct to the court of appeal, the court of appeal might get swamped on appeal matters.

Mr DAVID SHOEBRIDGE: There are two points: First is what, if any, threshold would exist within an internal appeal and what would be the nature of the internal appeal; and the second point is where that appeal

would then go to. I think that criticism about going to the district court and having two avenues of review, one through a statutory appeal to the district court and one through judicial review under the Supreme Court Act, creates complexity. Could you take that on notice?

The Hon. SCOT MacDONALD: Just a supplement to Mr Shoebridge's questions; one of the mechanisms I thought was appealing is you had a capacity in the merits review to not trigger a full review of the case. The merits review came down to one or two points.

Mr DAVID SHOEBRIDGE: You have to establish error.

The Hon. SCOT MacDONALD: Maybe you could include that in your thinking as well.

CHAIR: Should the Mental Health Review Tribunal be considered for amalgamation or should it continue to stand alone?

Mr CATANZARITI: We have not received any submissions from our committees on that. We will take that on notice.

Mr DAVID SHOEBRIDGE: You said that your business law division was approaching their submission from an economic rationalist point of view. We have had a couple of people approach it from an economic rationalist point of view and we have other submissions that say you have to be wary of that and you need to make sure that tribunals remain accessible, that they have flexibility and they are adaptable. What are the key principles the Law Society say we should be looking at when we go through the restructuring process?

Mr CATANZARITI: Your question was predicated on a Law Society answer. The problem the Law Society has is that we are governed by committees and we do not have a direct answer which is the Law Society position on that question. The committees are divided in relation to that view with the Business Law Committee taking very much an economic perspective, as one would expect.

Mr DAVID SHOEBRIDGE: On something as fundamental as what principles we should be applying to reviewing the administrative tribunals in the State there—seriously—is not a Law Society view on what principles should be underpinning that review?

Mr CATANZARITI: There is a tension between the committees on that point; I would have to take that on notice.

The Hon. SHAOQUETT MOSELMANE: The question I have is not in relation to the options. On page 7 item 2.4 comments of Business Law Committee in relation to the CTTT. You say: "A party may not be advised that a matter has been rescheduled." In pointing out the shortcomings of the Consumer, Trader and Tenancy Tribunal [CTTT] you say that a party may not be advised that a matter has been rescheduled. It is as simple as that. Why would the CTTT not advise the litigants that a matter has been rescheduled? Is that a big failure in the system to fail to advise the litigants that their matter has been rescheduled? Is that a glitch in the system? Can you explain it?

Mr CATANZARITI: I have been told by the Business Law Committee and Property Law Committee that has been happening. It is a silly thing but apparently it has been happening. It is not a one-off.

The Hon. SHAOQUETT MOSELMANE: What has the Consumer, Trader and Tenancy Tribunal done about it if it has been referred to the CTTT simply as advising the litigants of the rescheduling of their matter?

Mr CATANZARITI: I do not know the outcome of those, but these are based on numerous experiences practitioners have had with the CTTT and problems that are continually occurring.

Mr DAVID SHOEBRIDGE: In regard to the regulation of professionals there is a view within one of the committees of the Law Society about having health professionals separately regulated within a division of a new tribunal. What about other professionals, for example, lawyers, accountants and the like? Where should the regulation of those professionals be determined? Should it be a standalone division or should it be part of a general professional regulation division which might also pick up the health professionals?

Mr CATANZARITI: No, we do not think it should be in a general division of professionals as a group because it would require an enormous amount of skilling of the tribunal members within the particular expertise of the rules that apply. So what applies in the legal system is a whole lot of solicitor rules and barrister rules and the people involved have to understand all of those systems. It would be very hard to be multiskilled and then look at another group.

Mr DAVID SHOEBRIDGE: The same could be said for physiotherapists, osteopaths, dentists—they all have their own individual rules.

Mr CATANZARITI: And they will continue to have their independent rules.

Mr DAVID SHOEBRIDGE: A separate division is not then retaining the original tribunal powers, if you take it to that degree, because they have all got separate rules and peculiarities.

Mr CATANZARITI: But at the moment the way it works, just taking the legal side, in the Administrative Decisions Tribunal in the legal division there are about 20 or 30 cases a year and it is a question of making it work effectively. Rather than having them under the one umbrella these other tribunals are sitting outside. It would be better having everything within a special services division and putting in the right skill sets because the lay members on some of those things do not have to have the level of expertise on the rules; they are looking at other interests on public interest.

Mr DAVID SHOEBRIDGE: So there is scope for having a professional services division where you bring in the expertise on the individual rules together with perhaps a more generalist member who gives some consistency to the overall approach?

Mr CATANZARITI: Yes, that is right.

CHAIR: Unfortunately time has run out for this section. We thank you both for your input; it is very important to us. I think you have taken some questions on notice and there may be some other questions that we were not able to get to. We will be very grateful if you could respond to those by 14 January.

(The witnesses withdrew)

JANE ANNABEL DARLING NEEDHAM, Barrister, Junior Vice President, New South Wales Bar Association, and

INGMAR TAYLOR, Barrister, Industrial Law Section, New South Wales Bar Association, affirmed and examined:

CHAIR: Would you like to make a short opening statement?

Ms NEEDHAM: Firstly, I would like to say on behalf of the Bar Association that we are grateful for the opportunity not only to make submissions but also to appear here today on this important issue. In particular, we are pleased to hear, from what we have heard today and from what we understand from yesterday, that the Committee is very much focused on access to justice, which is, of course, a main focus of the aims of the Bar Association. In providing our submissions to the Committee the Bar consulted widely through its membership. It received a number of submissions and set up a working party of some seven members, chaired by myself, and Mr Taylor was a member of that committee. The membership of that committee spanned specialisation such as the Legal Services Division of the Administrative Decisions Tribunal, the Industrial Relations Commission, practice in the Consumer, Trader and Tenancy Tribunal and other tribunals and general commercial property and other specialisations. Together we were able to put together the submission that you have before you today.

In preparing that submission we spent quite a lot of time focusing on the principles which should be considered when considering amalgamation or consolidation of tribunals, and we set those out in paragraph three. Importantly, we see that the independence and status of tribunals need to be preserved. Tribunals are not second-class courts, they fulfil a very important function, albeit at a lower level generally than courts, but they are really the first place that people can turn to when there is an issue, without going to the full expense and trouble of a court hearing. We consider it extremely important that any new tribunal or tribunals be adequately resourced, and we have suggested that some kind of consolidation or streamlining of tribunal administration, even if this Committee makes a recommendation which is short of full amalgamation, would, we think, deliver some cost savings and certainly a streamlining of the processes which people need to undertake to have their voices heard.

Thirdly, any changes should, as I am sure is part of the way in which the Committee is approaching the matter, not be change for change's sake but in order to improve inefficiencies and coherence, always be with a view to access to justice. We have expressed a hope that any existing rights of parties to legal representation be preserved and respected. We think that the role of lawyers in this State is an important one in access to justice, and while a number of our submissions deal with tribunals in which legal representation is not an automatic right, as far as I understand it there is no tribunal in which legal representation is banned outright or not encouraged. We would trust that that ability to assist the people of New South Wales be preserved.

Another important factor is the range of expertise which we have in our existing tribunals. In some way this is reflected in the various divisions of particular tribunals, and we have made some general suggestions about how this can be modified in some way or amalgamated but without losing the very valuable and important expertise that the members of the tribunals have gained to date. Finally, we have advocated for concentration of function rather than any other one particular factor as being particularly important, and quite a lot of discussion at committee level focused on the different functions of particular tribunals. The Administrative Decisions Tribunal, for example, has a mixed function: it has original jurisdiction and it has review jurisdiction.

The Consumer, Trader and Tenancy Tribunal, of which there has been some discussion in the earlier sessions with the Law Society, has a broad range of mixed functions. While we consider that the Administrative Decisions Tribunal generally undertakes those mixed functions quite effectively and efficiently, the CTTT varies in the way it discharges those functions. For example, there are complex matters of fact and law in the home building and the strata title divisions of the CTTT and there are the very everyday immediate matters of landlord/tenant relationships, and those are very different functions. In our view the CTTT is struggling somewhat to deal with those different functions.

There are also individual private rights. As I have said, the CTTT deals with those; the Administrative Decisions Tribunal deals with those in its retail division aspect, and also the industrial rights in the Industrial Relations Commission. Then there are the disciplinary functions which are spread over a range of tribunals. That is one area where we are of the view that there could be some very effective consolidation. Finally, there

are the collective industrial rights—part of the Industrial Relations Commission jurisdiction, which is very specialised and which we consider is also being dealt with particularly well at that level.

In broad outline we have made a number of suggestions. We have not been able both in the time and with the lack of specificity in the issues paper—and I am not being critical when I say that; it was a broad invitation to comment on the number of particular models—but we have made some suggestions and you have all read those and we are very happy to answer any questions that you may have about those particular suggestions.

CHAIR: What is the association's view with regard to the Guardianship Tribunal and the Mental Health Tribunal? Should they be amalgamated or kept separate?

Ms NEEDHAM: There does not seem any reason why they should not be amalgamated. I have not appeared for many years before the Mental Health Review Tribunal. I have appeared in recent years before the Guardianship Tribunal. I think that each of those is one where lawyers, certainly barristers, do not appear terribly regularly, so it is difficult to be anything more than anecdotal. But while each of those have a very specific role and a very specific way of dealing with that role—for instance, the Mental Health Review Tribunal often goes to the patients and the Guardianship Tribunal often deals directly with persons who may or may not have lost capacity—those particular specialisations are important. We see no reason why, properly managed and adequately funded, those functions should not be part of a division of what we would call NCAT.

CHAIR: The issue is to keep the expertise there?

Ms NEEDHAM: Yes.

CHAIR: What about the Workers Compensation Commission?

Ms NEEDHAM: I think I may need to defer to Mr Taylor on that.

Mr TAYLOR: I do not have personal experience but I am aware that the view that has been expressed by members of the committee is that the Workers Compensation Commission is an important discrete area that would not readily come into a larger tribunal. It has standalone arbitrators which have particular skills and it has processes which are such that the view is that it is working well as it is and there would not be any need to consolidate it into a larger tribunal.

CHAIR: That is the association's view: that it continue to stand alone?

Ms NEEDHAM: Yes, I think that is right.

The Hon. SHAOQUETT MOSELMANE: Paragraph four of your submission states that the opportunity to consolidate tribunals should be grasped, in particular because it is an opportunity to enhance access to justice. You referred to that issue in particular in your opening submission. Some stakeholders are worried that a consolidated tribunal will have the opposite effect. Can you elaborate on your point of view?

Ms NEEDHAM: I think the opportunity to consolidate tribunals gives possibly a unique opportunity to this Committee to enable streamlining of processes. At the moment, as I understand it, the Administrative Decisions Tribunal's registry computer system is standalone, as is the CTTT's, as is the Guardianship Tribunal's and the like. They all use different forms. The experience of the association in the implementation of the UCPR—the Civil Procedure Act and the Uniform Civil Procedure Rules—is such that adoption or adaptation of those procedures and forms would work well at a tribunal level. That would mean that a person who, say, had a dispute which could either be litigated in the CTTT—one of their trader jurisdictions—possibly in the Local Court or possibly in the Retail Leases Division of the Administrative Decisions Tribunal—you could easily conceive of a matter that could spread over those three divisions—would only need to file an application. Perhaps not in the Local Court but certainly the application would be the same. You would fill out the form and work out where it needed to go.

The Hon. SHAOQUETT MOSELMANE: It simplifies the process.

Ms NEEDHAM: Yes. The other thing that occurred to me—so it is probably my view rather than the association's considered view—is that having some recourse as there is in the United Kingdom model would

provide for regional registries of tribunals. That is not common. I understand that the Consumer, Trader and Tenancy Tribunal has regional registries, but I am not sure that many others do. That would be a huge benefit to persons in regional areas, who are required either to lodge electronically or to have an agent lodge in Sydney for a number of different tribunals. Certainly, the Administrative Decisions Tribunal, of which I was a member until recently, has its only physical existence in Sydney. For our regional residents that would be a huge advantage.

The Hon. SCOT MacDONALD: One of the recommendations the Committee will have to make—and we have talked about it with nearly every other witness—relates to appeals. We will need to make recommendations about the model for appeals, the pathway, at what level they should be and whether a merit appeal should involve a full review of the case or the matter or be confined to whatever is in dispute. You may wish to take this question on notice. Does the Bar Association have a preferred common appeal model? I recognise that this is a difficult question.

Ms NEEDHAM: It depends on the tribunal. I think we have dealt with that briefly. Of course, the difficulty is that it all differs so much. The Consumer, Trader and Tenancy Tribunal was mentioned earlier. It has a system of rehearings, which from personal experience I believe does not work very well. Then there is an appeal to the District Court on matters of law and then the ability to engage the Supreme Court jurisdiction on procedural fairness and the like. One of the difficulties is that you have someone who is aggrieved by a Consumer, Trader and Tenancy Tribunal decision turning up in the District Court and English may not be their first language. The judge might ask where is the question of law arising out of the decision because he or she has no jurisdiction to do otherwise. There is a very strong case for an internal appeal—

The Hon. SCOT MacDONALD: Before reaching the District Court or the Supreme Court?

Ms NEEDHAM: Yes. The Administrative Decisions Tribunal has an internal appeal panel. Again, that is engaged by a question of law. However, there is leave to extend to the merits and that leave is granted on various grounds, which are obviously set out in the case. I think that is a good model for a tribunal, particularly if it is a consolidated tribunal. An internal appeal structure is quite a useful way to go. The problem with unlimited merits appeals is, quite frankly, that they are a bit easy and people will appeal, particularly in a no-cost jurisdiction such as the Administrative Decisions Tribunal.

The Hon. SCOT MacDONALD: Perhaps you can take that question on notice and refine it a little.

Ms NEEDHAM: Of course.

The Hon. SCOT MacDONALD: That is a key point on which the Committee must make a recommendation. You articulated well the concern about swamping of a consolidated tribunal by relatively minor matters. You have referred a couple of times to the United Kingdom experience. Do you know how the super tribunals, or whatever they call themselves, handle large volumes of small matters and still retain a super tribunal of some working substance?

Ms NEEDHAM: I do not. I can take that question on notice.

Mr TAYLOR: I do not either. However, you might be referring to that part of the submission where we referred not to a super tribunal but to a super registry. One of the things that our submission has identified is that each tribunal has certain special skills and certain special roles. You would not want to lose those by amalgamating such that you end up with a tribunal member specialised in one area having to deal with things outside that area. That has a negative effect both on outcome and the respect that people have for the body itself. But that criticism does not flow to the registry. It might well be that there is a capacity, in a sense, to disaggregate the function of the tribunal as a decision-maker and the function of the registry and to consolidate the later more fully than the former.

The Hon. SCOT MacDONALD: I understand from that that we must maintain those divisions.

Ms NEEDHAM: Yes. I want to make a comment about the Consumer, Trader and Tenancy Tribunal being an example of an amalgamated tribunal that is not dealing with the jurisdictions it has been given. Our submission focuses on maintaining what the tribunal does relatively well, which is to deal with a huge number of very small claims—I think it is 60,000-odd—with conciliation and without lawyers. I know there are criticisms of that jurisdiction, but it gets through an enormous amount of important but individual bite-sized pieces. That is why a good argument can be made for keeping that part of the jurisdiction separate because of its

specialised nature. It could be an exception to the appeal structure that the Committee has asked us to consider because of that.

Mr DAVID SHOEBRIDGE: Does the Bar Association have any position about autonomy of divisions in a consolidated tribunal? Would you provide autonomy by having a particular judicial member as the head of a division with autonomy as to process and hearing form, but then have some unified structure at the appeal level? Is there any more articulated position on that structure?

Ms NEEDHAM: No, there is not. However, there was quite a deal of discussion at the committee level about the way the Administrative Decisions Tribunal does it. It has uniform hearing processes with a judge as the head. We have suggested that any consolidated tribunal should properly be headed by a Supreme Court justice to give it parity with the other arms of the courts—the Supreme Court, the District Court and the Industrial Court. That model of operating would allow specialisations to be maintained and provide that streamlining of process that we think would work more appropriately.

Mr DAVID SHOEBRIDGE: In response to Mr MacDonald you focused on internal appeals, which is an important question. If you had an internal appeals structure would it then be an appeal directly to the Court of Appeal?

Ms NEEDHAM: We have not considered that or made any specific recommendations. However, there should be a further appeal mechanism, whether it be to a single judge of the Supreme Court or to the Court of Appeal. It differs from the Administrative Decisions Tribunal.

Mr TAYLOR: I think it depends on who constitutes the internal appeal panel. If you are talking about a new tribunal that among other persons has one or more judicial members then it would not be appropriate for a decision made by an appeal panel including a Supreme Court judge to go before a single Supreme Court judge. It would have to go to a court of appeal. A different type of tribunal where the internal review was not constituted by a judicial member would probably ordinarily be considered appropriate to come before a single judge on questions of law in the first instance.

Mr DAVID SHOEBRIDGE: Your submission refers to an employment and professional services commission. Can you expand a little on what jurisdiction that would have, how it relates to the current Industrial Relations Commission and how it fits into the overall administrative structure?

Ms NEEDHAM: I will deal with that broadly and then hand over to Mr Taylor because that is his area of expertise. The reason for not including the anti-discrimination jurisdiction as the issues paper suggested with the Industrial Relations Commission was that there was too much of a disconnect between them. Only about 60 per cent—and that is an anecdotal figure—of claims are employment based.

Mr DAVID SHOEBRIDGE: We heard from the Administrative Decisions Tribunal yesterday that that figure is a bit less than 50 per cent.

Ms NEEDHAM: My anecdotes are wrong. We do not believe there is enough of a connection to move that jurisdiction across to the Industrial Relations Commission. It seemed to us that the professional discipline was more suited to that. We felt quite strongly that the way in which professional disciplinary litigation is handled in New South Wales at the moment is particularly fragmented and could benefit from consolidation.

Mr DAVID SHOEBRIDGE: Is that both health and other professions—nurses, physiotherapists, lawyers and doctors?

Ms NEEDHAM: Yes.

Mr TAYLOR: Even barristers.

Mr DAVID SHOEBRIDGE: I called you lawyers.

Ms NEEDHAM: Lawyers go to the Administrative Decisions Tribunal and generally speaking a judicial member—whether that be a judge or a deputy president of the tribunal—sits in a panel of three. The doctors go to the Medical Tribunal, which is headed by a District Court judge. In each example the panel includes lay members who are members of the profession of which that person is a member. I do not know

enough about the other health professionals, but there is no reason that a competent judicial member of a tribunal should not be able to deal with the differences between nurses, physiotherapists, chiropractors, doctors and lawyers. It seems to us anomalous to have such different treatment of professions when we are talking about professional discipline. There is that extra element of professional discipline of protection of the public that in our view would attract the jurisdiction that is given to the Industrial Relations Commission because it has that judicial flavour.

Mr DAVID SHOEBRIDGE: And there would be a capacity in that model to have some lay members on those tribunals to add the individual professional expertise?

Ms NEEDHAM: Yes, I think there would have to be.

Mr TAYLOR: I refer to the specific issue of the professional bodies being consolidated with the Industrial Relations Commission and the Industrial Court. I understand that four of the current seven judges of the Industrial Court are members of the Medical Tribunal. Justice Haylen is the head of the Legal Services Division of the Administrative Decisions Tribunal, which deals with lawyers.

Mr DAVID SHOEBRIDGE: So they are doing it already?

Mr TAYLOR: Yes, albeit seconded off to different tribunals. There seems to be some real capacity to draw them together. On the one hand, the Bar Association's submission identifies an opportunity to draw like work together. On the other hand, the submission says that it is important that the roles of the Industrial Relations Commission and the Industrial Court be maintained as bodies that are not part of a super tribunal. The submission contains a number of reasons for that, but there are two primary reasons. First, continuing that model allows the commission and the court to continue to be hybrid bodies that are both a tribunal and at the same time a court of superior record. Therefore, industrial disputes can not only be conciliated and arbitrated but also there are judges who can immediately move into enforcement and judicial roles to bring the full armoury of industrial law to resolving industrial disputes.

That takes me to the second aspect. The Bar Association submission states that whilst 85 per cent of the workforce of New South Wales is now in the federal jurisdiction, there remains a very important 15 per cent that under current law is in the State jurisdiction. We are talking about people in respect of whom if there are major industrial disputes can have significant effects on the economy of this State and service delivery to individuals. I refer to nurses, firefighters, police officers, local council workers and the like. We have seen industrial action in Victoria by nurses and the ramifications of that on the important services delivered by the State. It is seen as important that there be a body that continues to be able to bring the skills and the respect that the judges of that place have in resolving those disputes.

Mr DAVID SHOEBRIDGE: Are you saying that, if we are thinking about change, we should take into account the nature of that jurisdiction and the risk for those essential State services being disrupted if we lose the dispute resolution skills in the current Commission?

Mr TAYLOR: I think that is right. The Commission was created 110 years ago in answer to major industrial disputation and so long as there is a State Act which means that an important part of the workforce of this State is governed under State law, there needs to continue to be a body which has got not only the statutory power but the skill to deal with those disputes effectively and it is the view—as I understand generally expressed—that the judges of the Commission and court have that capacity.

CHAIR: Presently we have a whole series of tribunals, each of which has an expertise and everybody agrees, if there is a supertribunal we have to maintain that expertise. But that is merely stating a self-evident fact. Let us take the disciplinary bodies, how do we maintain that expertise without just replicating what we have now under a new name? Let us get into some detail—with the disciplinary bodies, how would you suggest that that would be done?

Ms NEEDHAM: It is a very difficult question.

CHAIR: That is the important question, everybody can theorise but we have to get down to detail.

Ms NEEDHAM: Firstly, as pointed out in our submission, one of the difficulties with it is that the legislation conferring jurisdiction in relation to legal professional discipline is about to go national. We are not

sure of the implications of that but that needs to be brought into account. One of the benefits of bringing the disciplinary matters into either a consolidated division of the Industrial Relations Commission or wherever it goes, is that there would be maintenance of expertise. The arrangements that are already in place would continue, where people who are valued and respected members of particular professions are appointed part-time members of tribunals and the judges who hear these matters gain expertise in professional discipline. In my view there is no reason why the judges of the Industrial Relations Commission cannot very quickly grasp the subtleties of the particular disciplinary matters—they are already doing it, as Mr Taylor has pointed out. But the current lay members—perhaps I should call them professional members—of the particular tribunals, could be brought under the one umbrella and it may be that some of them may be able to sit on other professional bodies.

CHAIR: But at the end of the day that is not much of a change really, is it?

Ms NEEDHAM: I think it is.

CHAIR: As far as the lay members are concerned?

Ms NEEDHAM: Not as far as the lay members are concerned but just to remove them would lose that expertise. The benefit conferred by the suggestion of the Bar Association is that firstly, there would be one tribunal where you could go to complain about your nurse, physiotherapist or doctor and I am sure that there are cases where people have a broad range of disciplinary issues. I should backtrack and say "complain" is not correct, because usually these matters are brought by the professional bodies themselves. Secondly, there would be a unity of administration which is not currently in place. While there would be some initial set up costs and of course teething difficulties—and I mentioned JusticeLink in that context with the court system—there would be the economies of scale and we would hope, the streamlining of scale, that comes with it.

Mr TAYLOR: One of the issues that arises with judges of the Industrial Court also being members of other tribunals is that those other tribunals are headed by someone who is not the President of the Industrial Court. Administrative difficulties arise where those judges are required, at short notice, in different places. If there were one body, it would be much more likely that the judges could be allocated in an efficient manner. There can be divisions within a tribunal wherein some judicial members, for example, may sit either at an appellate level or are members of a panel when they are sitting in a certain division. They can bring both their judicial skills—which cut across all areas but may be particular skills in a particular professional area—to bear when they are sitting in a different division. We believe there can be administrative efficiencies in avoiding the situation where judges are not being fully utilised, by bringing them together in a tribunal of that nature.

The Hon. SARAH MITCHELL: In your submission you talk about the Administrative Decisions Tribunal and how they have a balance between part- and full-time members and you say that it is inappropriate. Picking up from the discussion earlier in relation to having the expertise of certain members who could be part-time, I want to draw on that further and get your view as to what you think the appropriate balance would be between part- and full-time members, in a larger sense, in a tribunal.

Ms NEEDHAM: I think the lay members necessarily need to be part-time, however there is a real argument for full-time members of tribunals who are not necessarily the president, as in the Administrative Decisions Tribunal where Ms Hennessy is a Deputy President and she is the only other full-time member. I think with the current system—and I am speaking of the Administrative Decisions Tribunal because that is the one I am most familiar with—people drop in and out. There is a real lack of administrative support because the assumption is that if your main business is elsewhere, you will effectively subsidise the Administrative Decisions Tribunal by doing all your non-sitting-in-a-tribunal work there. And it perhaps leads to, in a practical sense, the Administrative Decisions Tribunal work taking a slightly second position in the practitioner's timetable. Giving the tribunal the benefit of more full-time members would not only increase consistency of decision-making—and certainly in a larger tribunal there would be more need for that—but also it would benefit the work done by particular members, because that would be all that they would be doing. At the moment there are only two full-time members. Every other member at a judicial or deputy presidential level is part-time and needs to fit in tribunal work around other duties. My view is that it does make it very difficult.

The Hon. SHAOQUETT MOSELMANE: Throughout your submission you say that the system in New South Wales is extremely complex and fragmented and you make the argument that there is a case for consolidation of a multitude of smaller tribunals but you say, at point six of your submission, but "not to create a 'supertribunal'." Yet, in your conclusion, you still do argue for the possibility of one tribunal.

Ms NEEDHAM: What we are arguing for or pointing out, is that it would not be appropriate just to say: You are a tribunal, you can go here. I think there needs to be a concentration on function, the role that a particular tribunal plays, the way in which historically it has been set up and administered and rather than saying like goes with like, really focus on the question: will consolidation of this tribunal into a larger tribunal assist the access of the people of New South Wales to that tribunal? Generally speaking, the answer I think would be yes but in particular cases I think the answer is no and that is why we have advocated against the concept of the supertribunal, as in, everything goes in one basket.

The Hon. SHAOQUETT MOSELMANE: Your preference would be for a combination of different tribunals under one umbrella perhaps?

Ms NEEDHAM: Yes, generally speaking that is the case but there are exceptions to that. The Industrial Relations Commission, because of its more judicial and hybrid nature, is in a different basket. The minor jurisdiction in the Consumer, Trader and Tenancy Tribunal we think should be an area of specialisation outside the balance of it and professional discipline, because of the protection of the public aspect, would be better dealt with at a slightly higher, almost quasi-judicial level than other tribunal work in New South Wales.

The Hon. SHAOQUETT MOSELMANE: While we are discussing the Consumer, Trader and Tenancy Tribunal, there have been arguments for an appeal system to be built within that tribunal and I think you may have heard us ask that question before. What is the view of the Bar Association?

Ms NEEDHAM: It is that there needs to be something different. The rehearings seem to be fairly ad hoc. They are at the discretion of the Chairperson, as far as we can see. Whether the appeal process should go so far as to be an open appeal on the merits, we do not think that is a particularly good option either because, as I have said, it is a non-cost jurisdiction. If there is no cap or restriction on appeals, you are really saying: you get two goes. There needs to be formality of decision-making but for areas in which there is a specific path one can take where there is error, that leads to difficulties when that path is straight to the District Court.

The Hon. PETER PRIMROSE: I refer you to paragraph 31 of your submission:

> The association believes the loss of the specialised conciliation and arbitration skills of the Judges which would occur if the judges were appointed to the Supreme Court as contemplated by one aspect of Options 2A and 2B and Option 3, would seriously undermine the effectiveness of the tribunal.

Then in section 32 you say, if an option such as 2A, 2B or 3 is adopted, the Industrial Relations Commission loses its status as a Court. I wonder if you could talk to those matters?

Mr TAYLOR: Section 56 of the Constitution Act requires that if the Industrial Court were to be abolished, the judges of that court should be appointed to another court of superior record. The abolishment of the Industrial Court is not recommended by the Bar Association but the association acknowledges, the options paper included an option which would effectively mean that only the Commission or alternatively, we can call it tribunal functions, would continue in a new supertribunal. In that circumstance, it will be necessary that each of them should be appointed judges of the Supreme Court. The point of the submission was to say, if that were to occur, the Bar Association is of the view that they should not be solely judges of the Supreme Court and no longer available to deal with the important role of conciliation and arbitration. As judges of the Supreme Court under that alternative option, they should then be made available, seconded—whatever the expression is—to whatever tribunal has the jurisdiction that is granted under the Industrial Relations Act 1996.

Mr DAVID SHOEBRIDGE: Picking up on some of the issues about full-time and part-time appointments, I think there were two parallel discussions happening, one being about lay members on professional disciplinary matters, which strikes me as a distinct element, they are almost in there as jury members of the professional's peers and therefore, you would want a rotating, part-time structure.

Ms NEEDHAM: Absolutely.

Mr DAVID SHOEBRIDGE: As distinct from the balance of the tribunal membership, where you would want to have that stability and certainty.

Ms NEEDHAM: Yes, to a point. The Administrative Decisions Tribunal in anti-discrimination matters also sits as a panel of three with a judicial member and two non-judicial or lay members sitting as members of the community and as people who have some expertise in disability or other areas that are relevant to the matter

being heard. The tribunal there too would benefit from continuation of that lay member role and having part-time lay members. There would be no point having the same lay members sitting on every antidiscrimination matter.

Mr DAVID SHOEBRIDGE: The Pecuniary Interests Tribunal has a distinct jurisdiction primarily in relation to local government councillors and misconduct in the local government sector. Given it has a kind of protective disciplinary jurisdiction, might it not also fit somewhat more neatly within that professional jurisdiction you were speaking about as much as the Land and Environment Court?

Ms NEEDHAM: Yes. We have recommended the Land and Environment Court because it is really a stand-alone.

Mr DAVID SHOEBRIDGE: Funny planning stuff.

Ms NEEDHAM: Yes. One of the members of the working party had a particular knowledge of that and that is why that one has crept in. Yes, it is a particular body that could, if need be, go along with either professional discipline or the Land and Environment Court.

Mr DAVID SHOEBRIDGE: Would it be possible to look at that on notice and expand?

Ms NEEDHAM: Yes.

Mr TAYLOR: Mr Shoebridge, on the idea of part-time and full-time members, it is certainly my view when it comes to collective industrial matters that full-time members are an important aspect. When you are dealing with individual rights, a person will come before the tribunal and is unlikely to come before the tribunal again. If you are dealing with collective rights, having full-time members who know the parties and the industrial history is an important part of the conciliation and arbitration system, which I think would be negatively affected in any move that saw part-time members being involved in the resolution of collective industrial rights.

The Hon. SCOT MacDONALD: I want to confirm and clarify my questions on notice. They are: Can you bring back to us any anecdotes, if you like, on how people handle the swamping? I asked you about the United Kingdom. If you hear of examples in Victoria or elsewhere, that would be fine. I realise it is a generalised commentary you will come back with and it will be difficult to refine it. The other question relates to Mr Moselmane's questions on the appeals. Could you come back to us with good, standard ideas on appeals?

Ms NEEDHAM: Yes. Also there is the local government and Pecuniary Interests Tribunal question as well. So I think we have three questions.

CHAIR: The Committee thanks both of you for appearing before us this morning. Your evidence has been both informative and valuable to the Committee's deliberations. You have taken some questions on notice and the Committee may send you further questions. We would appreciate a response to those questions, if possible, by 14 January 2012.

(The witnesses withdrew)

(Short adjournment)

PAUL JOSEPH HUGH McDERMOTT, President, New South Wales Society of Labor Lawyers, and

PHILLIP BONCARDO, Treasurer, New South Wales Society of Labor Lawyers, sworn and examined:

BEN KRUSE, Convenor—Employment Law Committee, New South Wales Society of Labor Lawyers, affirmed and examined:

CHAIR: Welcome and thank you for appearing today to assist us in our deliberations. Would you please state your full name and occupation?

Dr McDERMOTT: Paul Joseph Hugh McDermott, I am a barrister and senior lecturer in law enforcement at the Australian Graduate School of Policing and Security.

Mr BONCARDO: Phillip Boncardo, I am a tipstaff.

Mr KRUSE: Ben Kruse, I am a trade union industrial officer with the Australian Services Union and a lawyer. I am here as the Convenor of the Employment Law Committee for the New South Wales Society of Labor Lawyers.

CHAIR: Would any of you like to make a short statement?

Dr McDERMOTT: I will, Mr Chairman. Firstly, I thank you and the members of the Committee for letting us give evidence today and for taking our submission. I would like to explain very briefly our membership. It is not a particularly well-known society outside of Labor lawyers, but we make up and consist of a membership that covers the judiciary at Federal and State levels, as well as New South Wales barristers and solicitors, legal academics and law students. As such, we probably have the most diverse range of legal practitioners of any group that would be appearing before you. The main focus of the society is to promote substantive and procedural law reform in New South Wales.

I would like to draw the Committee's attention to, first, the recommendations that we have made in our submission. There are a number. What we are arguing is the consolidation of New South Wales tribunals where the outcome will increase access to justice. We do believe that the tribunal system is a bit bloated in New South Wales but there are certain key elements of it which are specialised and very good and, as such, need to be maintained, while other parts perhaps can be merged and the resources used by certain tribunals used as part of a greater tribunal. Our society does go into that in our submission. If the Chairman pleases, I will pass over to Mr Kruse to make some comments and then Mr Boncardo.

Mr KRUSE: Mr Chair, the focus of my concern is on the potential for this inquiry to result in a restructure of the tribunals in New South Wales that could lead to a loss of specialisation of industrial relations expertise in the State. On reading the issues paper I noticed there was a lot of focus on caseload, essentially numerical issues and financial issues associated with the structure of these tribunals. My concern is that the Industrial Relations Commission, unlike a lot of other tribunals, deals principally with collective matters. So apart from the unfair dismissal and the unfair contract jurisdiction, that tribunal deals with industrial disputes and awards and the regulation approval of enterprise agreements. For every one of those matters that comes before a member of the Industrial Relations Commission, the work, the actual function associated with that tribunal affects thousands of employees and their families and has a major impact on the nature of our society.

It is important that does not get lost in looking at the way we might restructure these tribunals. I have been working in this industry since the early 1990s. The process of settling an industrial dispute involves the development of specialist knowledge about that industry. The Industrial Relations Commission has panels of judges who then supervise the work of commissioners in a way that has knowledge about how these industries' functions. These disputes if they are not resolved can have quite catastrophic social consequences and have a major impact on the economy, not to mention result in employees not getting a fair day's pay and fair conditions for a fair day's work. That is my principal concern.

Awards, of course, is another area where making fair and reasonable conditions through the award conciliation and arbitration process again involves the creation of rights that affect large numbers of employees and again involves real expertise. Enterprise bargaining, a lot of people do not appreciate that in New South Wales we do not actually have a right to strike. In the Federal jurisdiction, of course, a lot of bargaining is just

left to the parties to slog out through a process of serving a protected action notice and getting out and sorting it out on the ground. In New South Wales, because we do not have a right to strike, if there is a dispute, almost immediately the dispute comes before the tribunal and is subject to the process of conciliation and then arbitration to resolve these issues between employees and employers.

The New South Wales Industrial Relations Commission is the site in New South Wales where the interests of employees and employers are met in a way that obtains generally a just outcome for everyone. I am really concerned that if that institution is deconstructed, if it is removed, if its powers are broken down, it has the potential to have really serious negative social consequences. For example, if we lost the specialisation of that tribunal and those types of laws were merged so that there was not much distinction, say, between the way in which discrimination laws and industrial laws were dealt with, one of the concerns that I have is that you might see an individualisation of the actual laws themselves and the outcomes. Discrimination laws are great for sorting out individual injustices and human rights issues but, quite frankly, they are hopeless at resolving collective matters such as pay equity issues or award concerns.

There are already some signs that this Government has sought to impact negatively on the independence of the New South Wales Industrial Relations Commission. We have seen the public sector conditions of employment amendments essentially remove the freedom of judges to award conditions of employment and rates of pay that are fair and reasonable and effectively substitute the role of the Government Executive to impose government policy on employment outcomes. I am really concerned that we not see this process associated with a further stripping away of the judicial independence and that we do not lose sight of the fact that we need a tribunal that can deal with the collective concerns of workers in our society.

Mr BONCARDO: Mr Chair and members of the Committee, the issues paper expresses an overarching concern that there has been a decrease in work for the Industrial Relations Commission [IRC] and the Commission in Court Session generally. One of the principal contentions we make in our submission which I would like to emphasise this morning is that there are a raft of matters dealt with currently by other tribunals that are qualitatively similar to those currently dealt with by the IRC and the Commission in Court Session, those being antidiscrimination matters pertaining to employment in the employment context in the Administrative Decisions Tribunal [ADT], professional and disciplinary matters which we submit are qualitatively similar to the professional disciplinary matters currently dealt with by the IRC in relation to police, public servants and State Rail Authority employees, and also general employment law matters such as breach of employment contract matters that perhaps are substantially restraint in trade cases which are currently heard by the Supreme Court in the Equity Division. Such matters—if there is a genuine concern that the commission and the Commission in Court Session do not have sufficient work—could well be amalgamated and fall within the jurisdiction of the commission.

We note that the incorporation of transport appeals as well as public servant employment matters has been a success and has increased the commission's workload to almost pre-WorkChoices levels. We submit that there is no reasoning if the concern of this inquiry is to rationalise and to seek efficiencies that matters such as antidiscrimination employment matters, professional disciplinary matters and general employment law matters cannot be consolidated and dealt with by the IRC or the Commission in Court Session. Fundamentally one of our concerns, and it has been expressed by Mr Kruse, is that this inquiry is not a precursor to an overhaul of the industrial legislation as it currently stands. We do not think that is the intention of the issues paper. We hope it is not the intention of this Committee and not the intention of the Government to destroy an institution and a system of independent arbitration and conciliation that has been around for over 100 years and served this State very well.

The Hon. SCOT MacDONALD: I refer you to page 6, recommendation 4, in relation to the Fair Work Act and its interaction with the Industrial Relations Act. I am trying to get my head around that. Does the Fair Work Act accredit the New South Wales Industrial Relations Act in some of its functions and is the Fair Work Act going to be rolled out through the New South Wales bodies? That is the first part of my question. Are you saying there that you fear a consolidated tribunal will not be in a position to carry out some of those functions of the Fair Work Act?

Mr BONCARDO: I think the principle point is that the Fair Work Act specifically requires a means for parties to nominate a third party to be conciliator and arbitrator of industrial disputes arising from agreements made in the federal system. The point we make is that the Industrial Relations Commission has been nominated by various industrial parties as a third party dispute resolver and potential arbitrator in some situations. We submit that is reflective of the high esteem in which the Industrial Relations Commission is held

and also the expertise it exercises in this area. Our point principally was that the Fair Work Act does afford the Industrial Relations Commission that jurisdiction and the tribunal should be cognisant of that in terms of what the Government proposes to do with the Industrial Relations Commission. There is that jurisdiction there and it is being utilised; that is recognition of the expertise of the Industrial Relations Commission.

The Hon. SCOT MacDONALD: Your concern is that under a super tribunal it will lose some of that expertise, knowledge, aura or those sorts of things that a Fair Work body in Canberra would be less inclined to use as an arbitrator? Can we overcome that with good divisions, good lists and retaining personnel?

Mr BONCARDO: One of our submissions is that in the event—and we do not think it necessary at all—that this Committee were to consider it appropriate to amalgamate the Industrial Relations Commission within some sort of overarching structure that the current members , the lists and the specialist divisions should be retained in such a tribunal. Our principal submission is that there is no reason to abolish the Industrial Relations Commission.

The Hon. SCOT MacDONALD: You would prefer the Industrial Relations Commission to stand alone?

Mr KRUSE: We do. If I can add, there are some quite significant substantive differences between the way in which the Industrial Relations Commission conducts its work and Fair Work. For example, in New South Wales the Industrial Relations Commission regularly holds hearings in regional centres in New South Wales. That is really important for the local government jurisdiction and for a range of State Government jurisdictions. The Industrial Relations Commission sends conciliators and arbitrators out into regional New South Wales and has a significant presence in regional centres. That is something that Fair Work does not really do—it is very much focused on capital cities.

Dr McDERMOTT: Can I just supplement that? One of the concerns that a number of people have raised is rural areas. Fair Work Australia just does not do the work out there much. I come from a country background and that is a concern for me as well. Something that needs to be kept in mind in whatever tribunal structure we do end up bundling together is that you have employees, small business people and government departments in those country areas that may be really impacted by this. We would hate to see that happen because it is hard enough being out in the rural areas as far as services go. I imagine that is a concern that will grow.

The Hon. SCOT MacDONALD: In my mind I have a vision of the Industrial Relations Commission going off and doing its formal work but, if I understand you correctly, you are saying it does a lot of other arbitration and conciliation work, in possibly a little less formal framework, and that it would be difficult to bring that under a tribunal? Is that a fair reflection on what you are saying?

Mr KRUSE: I think what is important is that the structure of the Industrial Relations Commission retains the capacity for special judicial officers to deal with that level of work and then, in turn, supervise. Work that is done at commissioner level is really important. Whatever response the Government adopts, it would be a poor outcome if that line of expertise through the tribunal structure was lost.

The Hon. SHAOQUETT MOSELMANE: You are supportive of the Industrial Relations Commission remaining as it is but from the positions in the alternative, if there were amalgamations, you would prefer option 1. Is that the position of the NSW Society of Labor Lawyers? Also, I am not astounded but happy with the forthright position you have taken at point 2.3 of your submission where you express your concerns about the possible results of this inquiry. I ask you to elaborate on that point but, first, what is your answer to the first part of my question?

Dr McDERMOTT: I will answer your question regarding point 2.3. Option 1 is our preferred option. We think that is the most sensible option. Basically we think the transfer of other key elements of discrimination law to the Industrial Relations Commission in its present form is good. Obviously the Industrial Relations Commission has got smaller in regards to the work it is doing but there is a great resource there that can and should be utilised. There is also a significant amount of expertise there. If we are going to talk about rationalising tribunals to make them more efficient then I think it is a very good idea to go forward with option 1. It certainly would also assist with regards to access to justice for the people of New South Wales. Yes, that is the answer to the first part of your questions.

Mr KRUSE: In terms of the potential negative impacts from these types of changes, my concern is that the Industrial Relations Commission has this predominant function of dealing with collective issues. We would not want to see the creation of a new tribunal then become associated with a stripping away of employment rights from workers and the changing of industrial laws associated with the functions of that tribunal. That is what is of concern. That is happening now. I certainly have concerns that that not occur as part of the restructure of the tribunals.

Mr BONCARDO: Can I just say that that concern flows in part from the occupational health and safety bill that was passed last year and comes into effect on 1 January. Members would be aware that that bill actually stripped away from the Industrial Relations Commission in Court Session its jurisdiction to deal with anything but the least serious occupational health and safety issues.

The Hon. SHAOQUETT MOSELMANE: Putting those concerns aside, do you see a case for the possible amalgamation of some tribunals and not necessarily a super tribunal?

Dr McDERMOTT: In our submission we have talked about that as an option. We all practise in these areas so the reality is yes, there are some tribunals that are a bit light on and there could possibly be an amalgamation. If you look at some of the disciplinary tribunals for different professions, as was mentioned earlier, I think that is a possibility. I think the police promotional decisions and things like that as well, pushing them together into a tribunal.

Mr KRUSE: We have already seen some positive steps in bringing, for example, the TAB functions and public sector appeals functions into the Industrial Relations Commission. So that type of consolidation of functions into a tribunal that is focused on employment law issues would certainly be positive. What we do not want to see is employment laws concerns dissipated into a super tribunal that then looses the ability to exercise expertise about industry matters.

Mr DAVID SHOEBRIDGE: I refer you to the figures appearing on page six of your submission about 146B disputes. Does that refer to 436 individual disputes run in the Industrial Relations Commission or is it 436 agreements with a 146B referral?

Mr BONCARDO: I believe this was sourced from the 2010 report of the Industrial Relations Commission and I believe it is a reference to the number of disputes lodged. I have to make a correction there, it should only be 59, not 436—that is an error on our part. It is in relation to the number of disputes lodged, which is no way—

Mr DAVID SHOEBRIDGE: So where it says 436 it should say 59?

Mr BONCARDO: Correct. That is in no way a reflection of the number of enterprise agreements in the federal system, which have nominated the Industrial Relations Commission as a dispute resolution—

Mr DAVID SHOEBRIDGE: Is there a source from where you could get that?

Mr BONCARDO: Probably have to ask Fair Work Australia.

Mr DAVID SHOEBRIDGE: One of your points is that there is this other work that the Industrial Relations Commission is doing that is enormously valuable and it is given those powers because it is respected?

Mr BONCARDO: That is absolutely correct. The fact of the matter is that parties to federal workplace agreements are not necessarily just nominating Fair Work Australia for third party disputes; they are going out of their way to nominate the New South Wales Industrial Relations Commission.

Mr DAVID SHOEBRIDGE: If you could supply the figures for the number of agreements that nominate the New South Wales Industrial Relations Commission the Committee would be grateful.

Mr KRUSE: Sure.

Mr DAVID SHOEBRIDGE: I understand from your evidence that collective rights and dealing with collective issues do not fit neatly within an administrative tribunal that is otherwise about individual rights. Is

the main tenor of your argument that collective rights are important, they are highly prized and they do not fit well within a broad administrative program?

Mr KRUSE: I think it is fair to say that it is a different type of work or different type of focus. A lot of the administrative matters deal with individual concerns, human rights issues that are again focused on the individual, whereas the process of settling industrial disputes, making awards and approving enterprise agreements involve looking at entire enterprises and often entire industries, with the rights of tens of thousands of workers in the balance—

Dr McDERMOTT: And employers.

Mr KRUSE: —and employers. I suppose I come to it from a worker's perspective but that is why the process of conciliation, which is relatively informal, is necessarily so important in achieving any outcomes.

Mr DAVID SHOEBRIDGE: Do you know of any international or Australian examples where you have one administrative tribunal dealing with those collective rights and also the individual rights—a sort of generalist tribunal?

Mr KRUSE: For example, a group in an organisation I have worked for has recently done a tour to look at comparative industrial situations in Europe. In England, for example, pay equity concerns are dealt with through essentially a process of administrative law and discrimination law matters and they fail because the laws and the structures do not have the capacity to look at these matters from a collective view point and therefore do not pick up the appropriate comparators.

Mr DAVID SHOEBRIDGE: The proposal that you have put forward is basically to split discrimination work: you put employment related discrimination work down in the Industrial Relations Commission and keep the balance of discrimination work in the Administrative Decisions Tribunal or some other administrative tribunal. We have had a number of people make submissions contrary to that. Others have said that discrimination should be kept together and retained as a discrete body of law because it is important of itself. What is your response to that?

Mr BONCARDO: I make the point that the commission already deals with what are effectively discrimination matters in its jurisdiction under section 210 and section 213 of the Industrial Relations Act, which relate to discrimination in relation to industrial rights, if you want to term it that way. So the commission has expertise in that area.

Mr DAVID SHOEBRIDGE: But the number of those cases is a fleabite compared with the number of cases that are being dealt with in broader discrimination?

Mr BONCARDO: Certainly, but there is that expertise, knowledge and jurisprudence that the commission is well familiar with. These are effectively discrimination matters in an employment context and in our view ought to be dealt with by a specialist employment industrial tribunal.

Mr DAVID SHOEBRIDGE: What about the contract of carriage of lorry owner-driver determination? That seems to me to be quite a discrete class of determination that in some way cuts across the collective and individual and is unique to the New South Wales Industrial Relations Commission? The Committee has not received many submissions on that.. Could you explain the jurisdiction and where it should sit?

Mr BONCARDO: Chapter 6 of the New South Wales Act deals with owner-drivers who are effectively independent contractors. They are not employees and it prescribes investing in the commission jurisdiction to create what I call contract determinations, which may be in relation to an individual owner-driver or in relation to any other discrete part of the transport industry, such as car carrying or road materials.

Mr DAVID SHOEBRIDGE: So we are talking about people who own their own lorry or truck.

Mr BONCARDO: Yes. They are small business people.

Mr DAVID SHOEBRIDGE: They are not employees in the traditional sense.

Mr BONCARDO: Not at all. As you pointed out with the discrete jurisdiction, I am not sure that there is a single jurisdiction anywhere else in the world where independent contractors' terms and conditions of engagement are set by an independent tribunal. It has been noted many a time by the commission itself and also by a recent Federal report by the road transport ministry that in setting such terms and conditions of engagement which allow owner-drivers to achieve what is called costs recovery, which is recovery for investment in their capital assets, running their vehicles and also labour costs, it is imperative to ensure that those owner-drivers are able to operate safely so that they are not compelled to engage in unsafe practices just to maintain costs and the IRC performs a fundamental role.

Mr DAVID SHOEBRIDGE: So these are people who do not have the benefit of employment protections but they tend to be an individual dealing with a single transport entity or a single company. Can you explain how those contract determinations are done? Are they done on an enterprise level or on a class basis?

Mr BONCARDO: They are contract agreements which are done on an enterprise level. For example, Lindsay Fox will have a contract agreement with 10 owner drivers operating at a particular yard—

Mr DAVID SHOEBRIDGE: And that contract determination will set in place the rates and the other conditions that they operate under, is that right?

Mr BONCARDO: It will. It is analogous to an award in that sense. It is a cost recovery instrument fundamentally so that owner-drivers are receiving rates of pay commensurate with their outgoings.

The Hon. SHAOQUETT MOSELMANE: Your fear is that if the Industrial Relations Commission was amalgamated chapter 6 might be lost and those people might be adversely affected.

Mr BONCARDO: Absolutely.

Mr DAVID SHOEBRIDGE: Can you provide the Committee with some numbers, facts and details about that aspect of the commission's jurisdiction?

Mr BONCARDO: Certainly.

The Hon. SARAH MITCHELL: I return to the issue of access of justice, which is obviously something that will be at the core of the committee's deliberations. In your submission you talk about how any consolidation should not lead to a decrease in access to justice, but some of the other submissions we have received put forward the view that if you were to have a one-stop shop approach you would improve access to justice for people, particularly those who might find the current myriad of the system a little difficult to deal with. Do you have any views on that?

Dr McDERMOTT: I think we will all probably have a view on that. From my point of view, I look at the Industrial Relations Commission as an example. It is quite cheap to file a matter there. It is fairly informal. If you then take it and go to a number of the tribunals it is quite different. If you go to the District Court, once again it is much more expensive, much more formal, rules of evidence apply, so it makes access to justice harder. Usually you have to get a senior solicitor or a barrister involved. The Industrial Relations Commission or equivalent, you do not need to. So straight away that is the key issue with regard to access to justice. If you go ahead and make a super tribunal, depending on who runs it, who is in charge, what their legal background is, will depend how formal it becomes. I think that is a concern because if you have the more traditional lawyer who got onto the bench from, say, more of a common law background they will be quite formal. I think that has to be kept in mind as well in regard to access to justice and the procedures they put in place.

Mr KRUSE: The other issue is that, with the exception of the unfair dismissal jurisdiction and the unfair contracts jurisdiction, the vast majority of matters that have been dealt with in the industrial relations context involve collective concerns. They involve applications between unions and employers, often unions and employer associations. So the work that is performed by the IRC is quite specific in that it involves these relationships between representative organisations for both employers and employees. It is not really an issue, the issues of individual access are not as significant for the IRC. It really is a jurisdiction which is better suited to a stand-alone arrangement.

Mr BONCARDO: Can I say something in relation to an individual matter and that is the jurisdiction dealt with by the commission in court session under chapter 7 of the New South Wales Act, which is the

enforcement jurisdiction? For instance, if your employer underpays you by a certain amount you go to the commission in court session. There is a small claims procedure there which is very informal. Conciliation proceeds and arbitration, which is also a very informal process. There is scope for negotiation so that it does not have to go to a formal hearing. One of the proposals raised by, I believe, some of the other submissions which have been made to this inquiry has been that all the commission in court session judges could go to the Supreme Court and there would be some sort of employment list.

Our concern in relation to that, as Mr Kruse expressed it before, is that the Supreme Court is obviously a very formal jurisdiction and rightly so, and the filing fees are a lot more significant. Currently the commission in court session, when it deals with what are effectively underpayment claims of wages and superannuation, has a fairly informal structure, particularly initially because conciliation will always precede any sort of arbitrated outcome, which means the parties can sit around with a very experienced judge often and be told that it is in your interest to settle this matter; it is not in your interest to proceed to arbitration and run a full hearing. That will not happen in the Supreme Court or in the industrial court.

Dr McDERMOTT: It is a money maker for lawyers, not to do my own people in, but the reality is that to sit on both sides and do that deal at the very beginning before it goes on to litigation is far cheaper for both sides and that type of informality, where you have a judge or a commissioner who is experienced and can pretty much say it as it is for both sides is a good thing. That will not happen when you start getting too many lawyers involved or it starts becoming more of a formal process.

The Hon. SARAH MITCHELL: Just further to that, in regional areas, which is something Dr McDermott touched on before, the witnesses from the Bar Association talked about the concept not necessarily of a single tribunal but of a single registry service and sharing resources, whether it is hearing premises or whatever. I know you said that some tribunals or commissions are better at going to regional areas than others. If there was some sort of underlying administrative way to share some of the services and resources, do you think that idea has merit?

Dr McDERMOTT: If it is doing administration, is efficient and it is about giving access to justice to people in country areas and making it efficient, they can get the problem solved, then absolutely. That is really what we are all aiming at, I think.

Mr KRUSE: To be honest, I do not think there is any doubt that the IRC needs improvement in terms of its administrative functions—web based access to judgements, the opportunity to file matters over the web. If you compare the functions that are available through Fair Work administratively and the functions that are available in the IRC, certainly some modernisation could occur.

Dr McDERMOTT: I think it has been looking for its place in the legal system over the last 10 years because obviously the IRC has been cut down more and more so. I think that this might be the opportunity to find a proper place for it and its expertise and to beef up its administration and streamline its processes so it can do the job.

CHAIR: What is your attitude to the Workers Compensation Commission being amalgamated into a super tribunal?

Mr KRUSE: That is an area that I have not practised in for some time but I certainly do not see any difficulty with the commissioners and/or judges of the IRC dealing with matters relating to workers compensation. There is also a jurisdiction associated with unfair dismissals; the injured worker jurisdiction which requires commissioners and judges of the IRC to make determinations about employees' fitness and capacity to return to work. An injured worker who loses their job, who within a period of two years becomes fit to return to work, can make an application under the laws currently for reinstatement to their former position. The IRC exercises those functions. So there is some degree of cross-over in that jurisdiction now and I do not see any difficulty with the IRC tribunal members taking up that role.

CHAIR: I do not know if I made myself clear. The Law Society has a view that the Workers Compensation Commission is operating effectively now and should not be joined into a super tribunal. I am just trying to get a feel for what your society's view is on that issue.

Dr McDERMOTT: After discussions with the three of us, I think we will need to come back to you on that. We will take it on notice and get an opinion and send it back to the Committee.

CHAIR: Thank you.

The Hon. PETER PRIMROSE: Can I maybe ask that you take this question on notice, given the time? You have already alluded to the points of this question anyway. I go back also to the Law Society's submission this morning. On page 4 of their submission they indicate that their employment law committee preferred and recommended option 2A, changing the ADT to the New South Wales Administrative and Employment Tribunal. In your submission on page 29, section 7b, you specifically do not endorse that option. I ask that you take on notice and maybe come back to us with very specific points as to why you would not support option 2A. There are options 2B and 3 and they are linked so it would be appropriate for you to consider that. I am particularly interested in the fact that the Law Society's employment law committee has made one recommendation and you are making a different proposal. Please come back to us with your comments.

Dr McDERMOTT: I certainly will. I am surprised that they endorsed that, after some of the comments we heard from the Law Society.

The Hon. SHAOQUETT MOSELMANE: Concern has been expressed by a number of witnesses that with amalgamation we might lose the skills of various experts and so on, but little has been said that with amalgamation there may be legislative changes to the various Acts and regulations and so on. Can you respond to that, because that issue has not really been brought to the surface by any of the submissions or witnesses? As I said, with consolidation there will be changes to the Acts and the regulations. What are your concerns?

Mr KRUSE: I think I dealt with that in my opining submission. The concern is that the consolidation of tribunals, this process, becomes, if you like, a stalking horse to remove collective bargaining of rights, remove the rights for workers to have decent awards made that create fair and reasonable conditions of employment and that lessen the ability for the tribunal, whatever it might be, but currently the IRC, to effectively resolve industrial disputes. That is something our society will be monitoring very closely as part of this process.

Dr McDERMOTT: I think from my experience certain States went through some major reforms in the last 10 to 20 years in their employment law areas, and you had a situation where in certain States certain Australians had less rights than other Australians next door in the next State. I think that is a bit of a concern for us. Certainly, in one State where I did some work the unfair dismissal jurisdiction was basically abolished and as such a number of employees who had had substantial claims had nowhere to go. I think we are concerned that wherever legislation does change that that does not happen; that there is still access to justice, that there is fair and equal treatment of both employer and employee and that continues.

CHAIR: Keep in mind that the time allocation for this period has almost expired. There is a short question from Mr Shoebridge. Could you give a concise response if possible?

Mr DAVID SHOEBRIDGE: It is about common law employment jurisdiction lying with the IRC. Would you envisage that might be a useful place for that jurisdiction to lie and would it lie through an accrued or associated jurisdiction when another matter is before the IRC or would it be a unique stand-alone grant of jurisdiction within the IRC? A concise answer could be on notice.

Mr BONCARDO: That is definitely an option. The commission in court session could do that. We are not in a Federal jurisdictional sphere and I do not think we need to talk about an accrued or associated jurisdiction. There is no reason why a simple legislative change could not give the commission in court session jurisdiction to deal with those matters and it is appropriate that the commission in court session would deal with such matters.

Mr KRUSE: There is already quite a degree of crossover in the section 106 jurisdiction with the common law.

Mr BONCARDO: One further point in relation to the enforcement jurisdiction, if such matters are dealt with by the commission in court session the ability to conciliate such matters will be available to the parties. So an expert, a judge, will be able to sit down with the parties and resolve the matter as opposed to it being litigated.

Mr DAVID SHOEBRIDGE: Could you articulate that in detail in an answer on notice, how that jurisdiction would work?

Mr BONCARDO: Yes.

CHAIR: We appreciate your input into the deliberations we are conducting. You have taken some matters on notice and there may be other questions we would like to send to you. We would be grateful for a response to those by 14 January 2012. We will try and get the questions to you as quickly as possible and if you could keep that time-line in mind.

(The witnesses withdrew)

SUE WALSH, President, Public Service Association New South Wales,

WILLIAM GRANT MCNALLY, Lawyer, and

JOHN JOSEPH CAHILL, General Secretary, Public Service Association New South Wales, sworn and examined:

CHAIR: Would you like to start by making an opening statement?

Mr CAHILL: Yes. As members of the Committee will be aware we have put in a comprehensive written submission. I would like to make a few comments to speak to that submission. The focus of the association's submissions to this inquiry is the role and functions of the Industrial Relations Commission of New South Wales. The commission is widely respected by both the unions and those other parties who appear in the commission to represent the interests, in most cases, of the Government of New South Wales. The commission is seen as an independent umpire able to achieve a fair and reasonable result for both parties. The commission has an ability to effectively resolve disputes without the need to take industrial action. We mention that at some length in our written submission. This contrasts with the Federal system which places emphasis on disputation and court based enforcement.

The New South Wales commission is flexible and able to respond quickly to determine any application before it. If a consolidation of tribunals is to occur the Public Service Association's [PSA] preferred position is that the separate nature of the commission is maintained and all employment related jurisdictions of other tribunals be incorporated into it. The details about those matters are elaborated upon in our written submission. This would create a one-stop shop for all industrial and employment matters within the State system resulting in cost savings, the elimination of forum shopping and the elimination of duplication of litigation. I would like to make those opening remarks in support of the written submission we have made.

The Hon. SHAOQUETT MOSELMANE: In relation to page 4, option 3, of your submission, you make the comment that the Committee should approach the question of consolidation from the perspective of the tribunal's users. Can you elaborate on that please?

Mr CAHILL: In the main the tribunal's users are both employers and unions and the commission operates to settle disputes, to make awards, to set conditions, and set wages, if necessary, by arbitration but mainly through conciliation and the encouragement of conciliation between the parties rather than arbitration. The power of arbitration is there. The stick, in effect, is on both parties to come to a conclusion in an amicable way because they know the commission has the power to arbitrate if it needs to. I think the point of what we are saying here is that there are a number of tribunals now that look after employment functions. The thrust of our submission is you could put all the employment related functions into the commission: Bits of the anti-discrimination board, bits of other tribunals that operate and you could put them altogether in the one place.

The Hon. SHAOQUETT MOSELMANE: That would serve your client's interests by amalgamating all those tribunals into one?

Mr CAHILL: Yes, it would. It would be more efficient from the Government's point of view and our point of view in the sense that we go to one place rather than decide which place we go to.

Mr DAVID SHOEBRIDGE: Your union and members are key users of the IRC. What the Committee is aiming to do is not approach this from an ideological view of supertribunals inherently being good but looking at what the best structure and outcome is to benefit the users and citizens of New South Wales. Can you give the Committee your view as a user and representative of those members about how the IRC is currently functioning?

Mr CAHILL: We think the IRC works very well. It works much better in the State than in the Federal jurisdiction. The commission has the power of arbitration and the people are conscious of that power. The onus is on all parties, the union parties and employer parties, to come to an amicable conclusion of the matter because they know if they do not do that the commission can arbitrate. It does not work in the same way in the Federal area. We are pleased with the way the commission operates. No one always gets their way in the commission.

You notify of a dispute and you might win or you might lose but you know you have had your day in court, you have had a fair hearing and a decision is made. What we are trying to do here, given the terms of the reference of the inquiry, is to say if there is to be a consolidation of tribunals the IRC should stay there and if it needs to be changed in any way, or beefed up, you should look at other employment related areas that currently do not live in the IRC that could be brought in.

Mr DAVID SHOEBRIDGE: How many members have you got?

Mr CAHILL: We have 45,000 in New South Wales.

Mr DAVID SHOEBRIDGE: How many applications or disputes do you find yourself taking to the IRC?

Mr CAHILL: I might have to take that on notice.

Mr DAVID SHOEBRIDGE: This is not confession time.

Mr CAHILL: We probably get statistics out of the law notices. It would be a rare day where the PSA was not appearing in the Industrial Relations Commission.

Mr DAVID SHOEBRIDGE: You spoke about putting the discrimination jurisdiction in the IRC. Some people are suggesting splitting the discrimination jurisdiction between employment and non-employment related matters, but the bulk of the submissions have said discrimination should remain as one distinct group and not be split. Do you have a broader view about that discrimination?

Mr McNALLY: Could I speak to that? It was a matter that we did discuss among ourselves for a long time. The view we formed is that the distinction between the various discrimination cases—those related to employment and those that are not—is so little in terms of any significance that they should all stay in the one house and should all go to the Industrial Relations Commission if they go.

Mr DAVID SHOEBRIDGE: What about the Worker's Compensation Commission? Probably the bulk of submissions have said the Worker's Compensation Commission works well as it is and key users are satisfied with it and wary about moving it. Do you have a view about the Worker's Compensation Commission?

Mr McNALLY: I was a worker's compensation barrister in 1961 and it has always been the same. It is a jurisdiction where predominantly lawyers appear. Admittedly a lot of union members are referred from unions to the lawyers. After that happens the union, relatively speaking, has little involvement with it. The union member becomes the client of the solicitor. The feature that the Worker's Compensation Commission has that distinguishes it from most other State jurisdictions, other than Supreme Court or district court that hear injury cases, is that a particular member of the commission has to have a detailed knowledge of medicine because you get the conflict between one doctor saying one thing and another doctor saying another thing. More recently there have been a number of appointments made to the commission of people that have had no prior experience of worker's compensation and they find it difficult because of that lack of detailed medical knowledge. In our firm we have a partner who did 75 per cent of the medical course and it is no trouble to him. Anyone who has no medical knowledge cannot handle it.

The members of the commission or the members of the various tribunals that were referred to have no such knowledge. Workers compensation should be distinct from any other jurisdiction, as it is in all other cases, except, of course, in the Federal area where, for instance, seafarers compensation is handled by the AAT and the members that appear there who do not have medical knowledge really struggle with the medical issues. A lot of the issues in those cases are jurisdictional issues.I do not say that the Industrial Commission could not resolve some of the issues, such as self-inflicted injury, deviations of those things, but once it gets to medical it is just beyond any commission. If you look at the practitioners who practice in the area they are specialists and they have a detailed knowledge of medicine.

CHAIR: What about disciplinary tribunals? The medical disciplinary tribunal is an example. They have this expertise as well.

Mr McNALLY: They have expertise but most of the issues there are related to conduct not medicine. I am talking about issues such as whether or not the accident could have caused that back injury or whether they

have recovered from a back injury, or the degree of incapacity. That is not a frequent issue in the tribunals you are referring to.

CHAIR: But medical issues do come up as to whether the treatment was proper treatment or not—very much so.

Mr McNALLY: I am not sure about very much so. I do not have the figures—no doubt you have—but in terms of issues before such tribunals I would not have thought that the medical issue outweighs the issue of conduct.

Mr DAVID SHOEBRIDGE: Do you endorse the current basic structure in those tribunals where you might have a tribunal member, often not a judicial member but some lawyer, who is also supported by lay members on the tribunal who bring the particular expertise from the profession?

Mr McNALLY: Which tribunals are we talking about?

Mr DAVID SHOEBRIDGE: Nurses, doctors, the legal profession in the ADT—probably a slather of professional regulation tribunals.

Mr McNALLY: The question does not clearly sit in my mind. Are we referring to the professional tribunals having expertise in terms of medicine?

Mr DAVID SHOEBRIDGE: As I understand it, the structure of most of those tribunals is that they bring on board lay members who have expertise in those areas of profession, which is the way you deal with that expertise distinct from the way the Workers Compensation Commission does.

Mr McNALLY: That is right. That used to be the way the Workers Compensation Commission operated prior to 1961, but they grew up practitioners and judges who knew the medicine. I do not think—I might be wrong—the medical issue of the Workers Compensation Commission far outweighs any such issues in the medical tribunal in terms of the detail.

The Hon. SARAH MITCHELL: The Government issues paper that was circulated that the terms of reference talks about how the workload of the Industrial Relations Commission has decreased, yet in your submission you say that that should not be overstated. Could you explain a bit more what you mean by that?

Mr CAHILL: Because of what happened with WorkChoices and now the Fair Work Australia legislation federally, it has mean that many areas that were previously governed by the State Industrial Relations Commission have gone over to the Federal system. In recognition of that, the number of judges that now stay in the State commission is less than it used to be: One judge went to the Supreme Court, others have retired and have not been replaced, and the number of conciliation commissioners is also less. Nevertheless, there is still a significant workload there in State Government areas and local government areas and other areas through some of these medical tribunals where the judges of the commission are hearing those sorts of cases as well.

I think two things have happened: the workload has diminished but so has the number of judges and commissioners diminished. But I think if you look at the law list every day you will see just how big the workload is for all those people. What we are trying to say is part of our submission is that the role of the commission should be enhanced not diminished. So you can give them more things to do that are related to employment-related law, which they are already experts in, to boost the commission and to maintain the commission in its current form.

The Hon. SARAH MITCHELL: My second question goes to your membership. If the Committee recommends that we go down the path of consolidating tribunals, what impact if any do you think there would be on the current public sector employees who work within the tribunal system in New South Wales?

Mr CAHILL: That is an extra issue for us. We have been making submissions about how the system should work. We also have a secondary interest, as you rightly mention, in the people who work there who are our members. I think we put in a written submission that if, for example, court registries were to be consolidated there would be a reduction in the number of staff and those staff should be accommodated elsewhere, they should be offered redeployment opportunities or voluntary redundancy or whatever the appropriate thing should be. I would not have thought though that there would be a lot of staff affected by this. Not too many staff work

currently in court registries, and that is the main area you would think that would be cut if there were to be a consolidation of the tribunals. We would expect those people—our members, public servants—to be looked after in the normal way.

The Hon. SHAOQUETT MOSELMANE: The terms of reference ask us to consider what should be done with the court functions of the Industrial Relations Commission should the arbitral functions be consolidated into other bodies. What is your view on this issue?

Mr McNALLY: Our submission is the complete opposite.

The Hon. SHAOQUETT MOSELMANE: I know, but these are the terms of reference we have to deal with.

Mr DAVID SHOEBRIDGE: Not betting against yourself.

Mr McNALLY: That would not work.

The Hon. SHAOQUETT MOSELMANE: Can you elaborate on that?

Mr McNALLY: You have got a system that everyone says has worked very well. You have got seven judges left. More often than not three of those are sitting on a full bench, and sometimes two full benches at the same time. It is not a question of seven people being able to do the work; there are sometimes four. We are down to two commissioners. I do not believe the workload has reduced much at all. Because they are predominantly dealing with public service issues now since the Fair Work Act amendments there is not the commercial incentive to take shortcuts in litigation, because we are dealing with the Government and we are dealing with the union which has a strong conviction about what it is all about. Far more cases run the distance, but, despite that, a lot settle through the conciliation process. Conciliation takes a lot longer than arbitration. Those judges, whilst they might not be doing occupational health and safety prosecutions, are working pretty hard anyway. That is my answer.

The Hon. SCOT MacDONALD: Leading on from that question, have you looked overseas or interstate for any examples of where industrial relations has been consumed into a super tribunal? What are your views on that? I understand it is not in Queensland and not in Victoria but it may be in the United Kingdom.

Mr McNALLY: Victoria never ever had an industrial commission type system at the wages board. I think the first system in Australia was South Australia, the second one was New Zealand and the third was New South Wales. No State has absorbed other functions into their commission, except in Western Australia where they took in the contract of employment function. We have a practice in Western Australia also. Queensland has got a separate system. After an inquiry they rejected abolishing a separate system, a separate commission. So the short answer in Australia is that keeping the commission is consistent with every other State that has a commission. I get confused if I consider what they are doing in the United Kingdom so I prefer not to answer that.

The Hon. SCOT MacDONALD: I hear loud and clear what you are saying but if a consolidated tribunal came into being but there was a very good clear and distinct division, if you like, within that tribunal, does that give you any comfort at all?

Mr McNALLY: If someone could explain the reason for that I might be content, but I cannot see any reason for that. To keep it separate by amalgamating it does not make sense to me.

The Hon. SCOT MacDONALD: I suppose the only answer to you on that would be maybe some of the evidence we heard from people like the ADT where there were savings in the back office; they pointed to savings in services and payroll and that sort of thing. Do you see any opportunities there?

Mr McNALLY: The staff of the commission is pretty small. The office is understaffed. I do not think the cost of running the commission in terms of staff is a significant factor. The facilities might be another matter, but that can easily be addressed.

The Hon. PETER PRIMROSE: Just to continue this theme from Mr MacDonald, we heard earlier this morning that the Law Society proposed to support option 2A as opposed to option 1. Options 2A and 2B of

the Government's issue paper primarily suggests expanding the Administrative Decisions Tribunal to become the New South Wales Administrative and Employment Tribunal. I was wondering whether you could now express your views—or take it on notice—as to why you do not believe that is a good idea.

Mr McNALLY: We have not seen the Law Society's submission so can we take it on notice?

Mr DAVID SHOEBRIDGE: We will give you a copy today.

The Hon. SOPHIE COTSIS: What would be the impact of losing a separate Industrial Relations Commission on your members in rural and regional New South Wales?

Mr CAHILL: I guess it would be the same as for those who are in the city. The Industrial Relations Commission is a specialist tribunal. Our submission says that it should be maintained and it should retain its powers and its power should be enhanced. I fear that if it were swallowed up by something like some other super tribunal its powers would be diminished; you would lose the people with the expertise. At the moment there are judges and commissioners who sit on the Industrial Relations Commission who have backgrounds in law, backgrounds in trade unions, backgrounds in employer organisations and they have specialist knowledge to do those sorts of industrial relations cases. We fear that if the Industrial Relations Commission were to be swallowed up into some super tribunal—I understand why the tribunal wants to do that; I suppose it just wants to expand its own power—that specialist industrial relations expertise would be diminished and people would be sitting on all sorts of unrelated cases who would then come in and sit on industrial relations matters and we would not get the same level of excellence or level of expertise that we get now.

With particular reference to rural and regional areas, everyone has access to the Industrial Relations Commission. As I said before, we are probably at the Industrial Relations Commission every day on some dispute or another, and those things are sorted out fairly quickly by mediation and by conciliation. All those sorts of employment-related issues can be settled. In the background, of course, everyone knows that the matter can be arbitrated if it cannot be worked out, if it cannot be conciliated. So the onus is on both parties to come to a good conclusion. It does not matter if you are in Broken Hill or Tweed Heads or Wagga Wagga or Albury, or where you are, you still have access to the tribunal. The Industrial Relations Commission commissioners will move around the State and they will hear matters in various different areas if that is the appropriate thing to do.

Mr DAVID SHOEBRIDGE: One of the arguments put in a couple of submissions about retaining the Industrial Relations Commission is that it is very useful to have a body that has the arbitral and conciliation powers but also judicial powers so that it can move seamlessly between one and the other when dealing with a dispute. Do you have a position on that?

Mr CAHILL: We do.

Mr McNALLY: That is the advantage of the Industrial Relations Commission. Because you know that the tribunal can arbitrate you try a little harder in conciliation. That is the secret to the industrial arbitration system or the industrial regulation system that the commission provides. In contrast to the federal system, the parties talk and one party gets an order that permits it to go on strike, it goes on strike and closes down an airline and eventually it gets to arbitration, or in the case of the ports dispute happening at the moment it finishes up in court on Saturday and everything stays the same. The fact that we arbitrate makes conciliation work very well. It is a one-stop shop.

Mr DAVID SHOEBRIDGE: Are there circumstances in which a body should have both arbitral and judicial powers that would not fit neatly within an administrative tribunal? Are there circumstances where being able to call on the judicial powers would be useful?

Mr McNALLY: Yes. We had an instance the other day with the public service salary dispute. We were in the commission and the jurisdictional argument raised itself. The next day we were in the court deciding the constitutional power of the court. If that involved two tribunals, that dispute, which was urgent, would have been stood over, referred to the Supreme Court and some months later would have been called on, and at much greater cost.

Mr DAVID SHOEBRIDGE: And it could cause a significant delay in what might be a key industrial matter affecting core government services.

Mr McNALLY: That is exactly right. We were so happy to go the High Court from the Industrial Court in that particular matter, but that is another issue.

The Hon. SHAOQUETT MOSELMANE: What are the key overarching principles that should underpin the Committee's consideration of its terms of reference?

Mr McNALLY: The system works, so why interfere with it?

The Hon. SHAOQUETT MOSELMANE: If it is not broken, why fix it?

Mr McNALLY: Yes.

Mr DAVID SHOEBRIDGE: But in the submission you are primarily talking about the Industrial Relations Commission not the Consumer, Trader and Tenancy Tribunal or other aspects.

Mr CAHILL: That is our main area of interest. We are at the commission every day.

The Hon. SHAOQUETT MOSELMANE: But you do argue for consolidation.

Mr McNALLY: No, we argue that the commission should stay as it is. If there has to be consolidation we have suggested that.

The Hon. SHAOQUETT MOSELMANE: Yes.

The Hon. PETER PRIMROSE: I refer to other non-employment-related tribunals as mentioned on page eight of your submission. Do you have any comments or views about the non-employment tribunals? Are there any lessons or principles that the Committee should take into account when considering what other tribunals should be consolidated into other entities? What should the Committee be guided by? We heard this morning about the Guardianship Tribunal and the Mental Health Tribunal. For example, it was suggested that because of its expertise the Guardianship Tribunal should remain separate. The counterpoint was that all these tribunals have particular client groups and expertise. Which tribunals would you not amalgamate? Do you have any comments on any of those matters?

Mr McNALLY: We did not devote a great deal of effort to that exercise because there are far better qualified people available to express views about that than us.

Mr CAHILL: That is what I was about to say. Our focus is on the Industrial Relations Commission. We do not have a view about whether all the tribunals mentioned on page eight of the submission are amalgamated or left separate.

Mr DAVID SHOEBRIDGE: A number of submissions have suggested that even if we do not amalgamate the decision-making of these various tribunals there are pretty good arguments for having a single registry or footprint for administrative tribunals. That might do a couple of things; it might rationalise some resources and also allow smaller tribunals to have a bigger footprint in terms of registries and offices across the country. Do you have a view about that?

Mr CAHILL: We have two views. The first is about our members who work there. We are not interested in putting people out of jobs. We are not saying that change and efficiencies should not happen or that registries should not be amalgamated to create shared service arrangements as happens in the public service now. However, having said that, we expect everybody to be dealt with fairly and properly and redeployed where possible. That is from the point of view of our members. The second view relates to the issue itself. We are big users of the industrial registry. It is a huge repository of knowledge going back many years. All the old union registration forms are there, along with old discussions, old disputes and old histories. The worry is that if that stuff is put into a super registry it will be lost or not looked after properly. As I said, the industrial registry works very well now and we would be fearful if it were changed into some super Consumer, Trader and Tenancy Tribunal-type organisation.

Mr DAVID SHOEBRIDGE: Your submission suggests that restraint of trade cases could be moved from the Supreme Court to the Industrial Court. Can you expand on that issue?

Mr McNALLY: Mr Keats will make a submission about that.

Mr DAVID SHOEBRIDGE: Will you take that question on notice?

Mr McNALLY: Yes. We did not discuss that in detail.

CHAIR: Thank you very much for your attendance today and for assisting the Committee in its inquiry. You have taken a number of questions on notice and further questions may arise. We would appreciate responses by 14 January if possible.

Mr CAHILL: Thank you for the opportunity to participate and we will provide responses to the questions on notice.

(The witnesses withdrew)

(Luncheon adjournment)

RAYMOND CHILDS, Senior Delegate, Holcim Concrete, and

WAYNE JOHN FORNO, State Secretary, Transport Workers Union of NSW, sworn and examined:

OSHIE FAGIR, Legal Officer, Transport Workers Union of NSW, affirmed and examined:

CHAIR: Would any of you like to make an opening short statement?

Mr FORNO: I begin by thanking the Committee for inviting us to appear this afternoon. I have with me today Mr Ray Childs, a Transport Workers Union delegate and owner driver, who can talk about his experiences with Chapter 6 in the New South Wales Industrial Relations Commission. On my left-hand side is Mr Oshie Fagir who is a Legal Officer with the Transport Workers Union of NSW. He can answer any questions in relation to the options canvassed in the Issues Paper and points 2(a) and (b) of the terms of reference of this Inquiry. You will note that our submissions deal substantively with Chapter 6 of the Industrial Relations Act 1996. In relation to the terms of reference, this might be considered at 2(d) a consequential change which may arise from any proposed consolidation of tribunals. However, for over 10,000 owner drivers, couriers and taxi truck drivers who my union represents, any changes made to Chapter 6 as a result of the consolidation of tribunals will be catastrophic.

It is worth pointing out that no mention was made of Chapter 6 in the Issues Paper, in spite of a great deal of focus being placed on the role of the New South Wales Industrial Relations Commission. Owner drivers are small business people whose livelihoods depend on their trucks and the ability to perform their work. They are predominantly made up of husband and wife teams who are heavily indebted due to the costs associated with the purchase of their truck. Not having work or not being able to recover the costs associated with running a truck is financially crippling for owner drivers and their families, putting the ownership of their family house and truck and thus their livelihood, at risk. The vulnerability of and potential to exploit owner drivers was first recognised in 1959 when the first owner driver protections were placed in the Act in the form of deemed provisions. Since then, Chapter 6 has stood out as one of the few areas of bipartisanship across the political divide.

This can be seen when examining the following Government initiatives: In 1968, the Askin Government commissioned the Willis Report, that found that owner drivers were among the most vulnerable and exploited workers in the State. In 1979, the first specific regulation of owner drivers was introduced into the Act as a response to the Willis Report. This regulation forms the basis of the modern Chapter 6. In 1991 the Greiner Government maintained Chapter 6 as a discrete form of regulation after changes to the Act. In 1994 the Fahey Government further expanded the definition of "owner driver" and introduced a goodwill tribunal. I might add, that two current members of the Legislative Council, the Reverend the Hon. Fred Nile and the Hon. Duncan Gay spoke in support of the formation of the goodwill tribunal. In 2006, the Howard Government specifically exempted and thus maintained Chapter 6 in New South Wales, following the introduction of the Independent Contractors Act 2006, which removed most independent contractor regulations from the States. This shows a degree of bipartisanship in relation to Chapter 6 at both a State and Federal level for over 40 years.

Part 9 of our submission details exactly what Chapter 6 does, which I will not go into at this stage. The important point is that nothing has changed which has led to the owner driver becoming less vulnerable or less open to exploitation since the findings of the Willis Report in 1970. If the protections provided by Chapter 6 were in any way diminished, it would be catastrophic for owner drivers and also for taxi drivers whose terms and conditions are regulated by Chapter 6 as well. In relation to point 2(d) of the terms of reference of this Inquiry, there is an important consequential change that may arise if any changes are made to the New South Wales Industrial Relations Commission and the Industrial Court and we submit that any changes to legislation made as a result of the recommendation of this Committee must incorporate Chapter 6 in its entirety. That concludes my opening remarks. We are here to assist the Committee with this Inquiry and respectfully, we are in your hands to lead us through that process.

Mr DAVID SHOEBRIDGE: Mr Forno, in terms of the number of contract determinations and maybe the number of applications that are before the Industrial Relations Commission that you are aware of, can you give an indication of how many we are talking about?

Mr FORNO: I will answer the first part of that question and I will get Mr Fagir to answer the second part. Certainly, there is any number of determinations. Mr Childs has a contract with the company which is being negotiated at the moment and the underpinning instrument is the Concrete Carters Determination. There is also a Waste Carters Determination, a General Carriers Determination, a Courier and Taxi Truck Determination, one covering taxi drivers and numerous others.

Mr DAVID SHOEBRIDGE: They are the broad sector ones. There are also enterprise-specific ones as well, is that correct?

Mr FORNO: That is correct, yes.

Mr DAVID SHOEBRIDGE: Do you have any idea of how many we are talking about?

Mr FORNO: I will refer that to Mr Fagir.

Mr FAGIR: I think there would be between five and 10 company-specific contract determinations but we can determine that on notice.

Mr DAVID SHOEBRIDGE: Can you give us an idea of just how many individual lorry owner drivers and taxi drivers there are who are covered by these determinations?

Mr FORNO: I would estimate by the determinations across that divide, I would suggest there would be in excess of 10,000 in New South Wales.

Mr DAVID SHOEBRIDGE: Your submission is very strong about retaining the Industrial Relations Commission to deal with the determinations and then to resolve any disputes under the determinations. Can you describe the process that is gone through when you are making a fresh determination or reviewing a determination?

Mr FORNO: There is one possibly on foot at the moment and Mr Fagir can answer that as he has been responsible for handling it.

Mr FAGIR: There are two main avenues to get to a contract determination. One is a normal industrial dispute, if I can put it that way, where an issue spontaneously arises. In resolving that dispute the Commission can make a contract determination and that can deal with a very narrow issue or it can deal with the entire industrial conditions of the affected people. Then there is a capacity to simply apply for a contract determination. You put on an application, draft a determination and pursue it that way. But in terms of the result of the determinations, its force is the same. You can arrive at it through either of those two avenues.

Mr DAVID SHOEBRIDGE: I presume the things the Commission looks at when it is doing that is not just the narrow interests of one individual, as is done in many administrative matters. What kind of things does the Commission look at when it is trying to work out what are the appropriate terms for a contract determination?

Mr FAGIR: It would look at everything. It depends on the scope of the determination but if you are talking about an application for a General Carriers Determination which might cover virtually all work as it stands in the Sydney Metro area, people will turn up and make submissions about everything, from its impact on the New South Wales economy to its impact on individual drivers.

Mr DAVID SHOEBRIDGE: And the commercial viability of a firm, the practical day-to-day work implications of how many hours and the distance lorry owners and drivers would have to drive? Would those kinds of things be considered as well?

Mr FAGIR: Absolutely.

The Hon. SHAOQUETT MOSELMANE: Mr Forno, you refer in your submission and in your opening statement to Chapter 6. What impact would it have on owner drivers if Chapter 6 were to be lost in the amalgamation process?

Mr FORNO: Obviously the difficulty would that the determinations would go but you also have any number of contracts, such as in the concrete industry and some other sectors of the industry, where there are ten year contracts on foot—some are halfway through the term, some are twelve months into the term, some are nearing completion. That would strip the ability of those contractors to be able to negotiate with those companies with the underpinning instrument being the determination.

The Hon. SHAOQUETT MOSELMANE: There has been strong cross-party support for Chapter 6. Do you have fears that Chapter 6 might be lost in the process?

Mr FORNO: In the Issues Paper there was input about the Industrial Relations Act and the New South Wales Industrial Relations Commission, but owner drivers were not mentioned once and I think they have forgotten that in the Issues Paper, to be frank.

The Hon. SHAOQUETT MOSELMANE: There are 10,000 owner drivers?

Mr FORNO: I believe there would be in excess of 10,000 owner drivers.

The Hon. SHAOQUETT MOSELMANE: And that includes taxi drivers?

Mr FORNO: Including taxi drivers. To my mind, taxi drivers are at the bottom of the food chain, unfortunately.

The Hon. SHAOQUETT MOSELMANE: A lot would be from a non-English speaking background as well?

Mr FORNO: Particularly in the taxi industry, yes.

The Hon. SHAOQUETT MOSELMANE: They would seek the support of the TWU in terms of Chapter 6 in particular?

Mr FORNO: Yes.

The Hon. SHAOQUETT MOSELMANE: In relation to Chapter 6, the Federal Government introduced the Road Safety Remuneration Bill 2011 into the House of Representatives at the end of November this year. What impact, if any, would this have on the operations of Chapter 6?

Mr FORNO: If you allow me to quote from that part of the bill, Division 3 Subdivision A10(2):

> (2) In particular, this Act is not intended to exclude or limit the operation of:
>
> (a) the Fair Work Act 2009; or
>
> (b) the Independent Contractors Act 2006 (but see section 14); or
>
> (c) Chapter 6 of the Industrial Relations Act 1996 of New South Wales (and any other provision of that Act to the extent that it relates to, or has effect for the purposes of, a provision of Chapter 6).

I have copies of bill itself and I table that.

CHAIR: By all means.

Mr FORNO: The bill was tabled a fortnight ago. It runs parallel with Chapter 6.

The Hon. SHAOQUETT MOSELMANE: So, not only is there cross-party support but State and Federal support for Chapter 6?

Mr FORNO: Yes, there is no better evidence for that than when the Howard Government introduced the Independent Contractors Act, New South Wales drivers, our owner drivers, were given an exemption to that part of the Act. That exemption remains in force today.

The Hon. SHAOQUETT MOSELMANE: In terms of the overall project before us and consolidating tribunals, do you support the idea of consolidating tribunals and is there room for some tribunals to be consolidated?

Mr FORNO: If we are talking about Chapter 6 and owner drivers, I am happy to talk about that but I am not au fait with some of the other tribunals. I would take the view that the New South Wales Industrial Relations Commission adequately deals with Chapter 6 protecting the owner drivers and if, in fact, there was a consuming of those bodies, you would have to have a judicial arm with full powers to be able to regulate the conditions of owner drivers, as Chapter 6 does today.

CHAIR: What about the Workers Compensation Commission, is that something you would have an interest in, as to whether that should be amalgamated or continue to stand alone?

Mr FORNO: I have not come here today to advance a point of view on those other tribunals. I believe that is for others to make in their submissions. My main concern is with regard to owner-drivers and chapter 6 in particular. If there was a consuming of those tribunals, my view would be there would have to be a body such as to be able to carry the full legal power and clout of the Industrial Relations Commission and at the same time have full regulatory powers so nothing much changes with regard to chapter 6.

CHAIR: Among your membership do you have employee drivers?

Mr FORNO: Yes, we do. That is obviously an interest of ours.

CHAIR: What percentage of your membership would be employee drivers?

Mr FORNO: Around 75 per cent. Around 25 per cent are owner-drivers. I am quite proud to say we represent small business people. For so long in this country they talk about unions not representing the independent contractors. We do and we have proudly done it. This union was founded by owner-drivers. They just happen to have a horse and cart in those days.

CHAIR: From the perspective of those 75 per cent of your members who are employee drivers, is the union's attitude to the amalgamation of the Workers Compensation Commission something you would like to take on notice and come back to us with?

Mr FORNO: I would like to take you up on that suggestion and come back to you.

The Hon. SHAOQUETT MOSELMANE: The loss of chapter 6 would have a direct impact on families and their wellbeing. It would have a direct impact on the individual owner-driver or taxi driver?

Mr FORNO: It is not just about cost recovery. There is goodwill that exists in this State, which has been recognised by numerous governments over many years. Those companies have played a role in goodwill. How do you through an Act of Parliament keep that goodwill going if you consume those tribunals and do away with chapter 6? These people have hundreds of thousands of dollars in their trucks along with the goodwill.

The Hon. PETER PRIMROSE: I am reading through paragraphs 12.2, 12.3 and 12.4 of your submission. Let us assume there is no proposal—and I am not aware of any—to do anything relating to chapter 6 of the legislation. From reading paragraphs 12.2 to 12.4 inclusive, it seems to me your point is that unless you have a specialist employment industrial tribunal, the ability to operationalise the effects of chapter 6 will be watered down. Even if you assume that chapter 6 continues, in fact, from my reading of that, your fundamental point is that it will not be able to operate effectively unless you have something like option one, as you say, of the paper. Therefore, you do not support options 2A, 2B and 3 of the paper. Can you say specifically how options 2A, 2B and 3 as put forward in the paper would lead to your concern in relation to the operation of chapter 6?

Mr FAGIR: An essential point to make in this regard is that process is not everything but it is crucial when it comes to employment and industrial relations. You can have the best legislative scheme in the world but if that is not translated into something that can practically and effectively be accessed it becomes almost literally meaningless. It is crucial that the machinery that delivers the legislation is as practically effective as possible. When we think about, in particular, chapter 6, the administration of that legislation is not a straightforward

matter. It is in addition to all the issues that you deal with in relation to employees—and I probably do not have to go over these here.

You can add a whole other suite of issues relating to the calculation of cost recovery. Sometimes you need to be an economist to work through some of these issues or be a person with substantial experience in the area. That is why we say in particular in respect of chapter 6 you need people with specialised expertise. I could add that the expertise not only resides in members—and perhaps we should have referred to this in a bit more detail in our submission—it also resides in the registry staff and all the other people who help make these things work. The expertise and the issues to be dealt with in that context have very little analogy to dealing with a dispute about a lease or a fridge warranty or whatever it is. They are just totally different things.

The Hon. PETER PRIMROSE: Mr Childs, can you talk about going from the general to the specific how you see the Industrial Relations Commission operating in relation to you and why it is important to maintain?

Mr DAVID SHOEBRIDGE: Or your members as a delegate.

Mr CHILDS: Certainly. I represent about 140 drivers in New South Wales. I do not call them drivers, I call them families, who all have about $300,000 invested. They are very vulnerable. For the 17 years I have been involved in this company, we have changed hands five times. Every time a new foreign owner or a multinational owner comes in they are looking to improve their position, naturally by interfering with our contracts and our rates. I could not count the times we have been down to the Industrial Relations Commission in order just to resolve those disputes either through interpretation or new policies that are put to us. Some of these policies are of cost to us. An example is the introduction of night shift with no guaranteed rate if the work cancels; we get nothing after cancelling a day's work. We resolved those issues through the commission.

These families I represent, currently I have five of them negotiating new contracts in New South Wales. The company tabled a contract they call the National Contract in October. That contract was introduced in Victoria some 12 months ago. They were given 30 days to sign this or the offer would be withdrawn. Through the assistance of the Transport Workers Union [TWU] and the Industrial Relations Commission we are still negotiating the contract. We still have these drivers working and operating. We are hopeful for a reasonable outcome through conciliation and, if need be, arbitration. Without that assistance, there is probably no other way for us to go other than industrial action. That is a thing we have steered away from for a lot of years now. The IRC has been a main instrument in keeping us away from that.

The Hon. SARAH MITCHELL: Do you have any knowledge from colleagues from other States around Australia? We have spoken with other witnesses about what has happened in Victoria and Queensland when they moved into the consolidated tribunal and how they dealt with industrial relations issues. Do you have any views on how other States have done it and any potential tips we could take on board in New South Wales?

Mr FORNO: Mr Childs has been involved in the Victorian situation. As a broad statement, the fact is that if we go back over the decades, as I said in my opening remarks, the other States—Queensland, Victoria, South Australia, Tasmania, the Northern Territory and Western Australia—have nothing like New South Wales. They have these quasi administrative tribunals, I think it is called, in Victoria. Basically if you are in Mr Childs' situation in Victoria you cannot go anywhere because the boss does not want to turn up. It is basically a consultative process in Victoria. It is not a proper cost recovery mechanism. Queensland has nothing. So our owner-drivers, as Mr Childs said, are at the mercy of some of these foreign companies, particularly in the concrete industry. Their vulnerability in those other States is a lot larger than in New South Wales. That is our great fear, that if we lost it in New South Wales it would bring about the results of what is happening in Victoria at the moment. Mr Childs might give an example of his company at the moment.

Mr CHILDS: Yes, certainly. The contract that has been tabled here has been tabled in Victoria some 12 to 18 months ago. The company refuses to negotiate. They will not meet representatives of the drivers in any way, shape or form. They will only deal individually with these people. Sixteen of these drivers have walked away to a great loss of hundreds of thousands of dollars. A lot of these drivers stand to lose their homes because what is offering is simply not a cost recovery document. Unless the company will sit down and negotiate with these drivers, I have grave fears that the industry down there will dissolve for owner-drivers.

The Hon. SARAH MITCHELL: If something like that happened in New South Wales, as Mr Forno said, you would lose the capacity that you have now? If there were a consolidation, you have concerns about that?

Mr CHILDS: We have been well in advance of Victoria with our rates and conditions for quite some time. The proposition that we could amalgamate anything like that and come to a level term is just untenable for us. They are so far behind us.

Mr FAGIR: I make the very obvious point that the Victorian consolidated tribunal has never consolidated an industrial commission for well-known reasons. The closest they have come to dealing with industrial- or employment-type issues is dealing with the LODs [lorry owner-drivers], the owner-drivers and forestry contractors legislation, which has been in place for two or three years now. The employers say this as well as the union and drivers that the system, apart from the limitations of the legislation, in terms of the process is just not working either. A couple of months ago an employer representative said to me—I am probably using the wrong terminology—that they were struggling to get a chairman appointed to their owner-drivers panel within VCAT. As a result of that things just could not be done. They just could not get that most basic step of having people appointed. My point is simply that they have very severe legislative problems but in terms of the machinery operating within VCAT that does not seem to be working either.

Mr DAVID SHOEBRIDGE: This question is directed to you Mr Childs. Can you give some flavour to the Committee of how the commission works, what it means and the type of considerations it addresses? You gave one example about a current contract dispute. Could you cast your mind back to a bread-and-butter contract carrier matter and how the current Industrial Relations Commission works to resolve matters?

Mr CHILDS: About 12 months ago night shift was introduced. Night shift is not a common thing in our industry. Under the legislation of driving hours, et cetera, we can only work so many hours a day and so many hours a week without a break. The company takes on a night shift which might be one, two or three loads and they expect a driver or two drivers to stand down for the day to do that. When they stand down for the day and lose that day's income they turn up at six o'clock and their shift is cancelled. They have not only lost their day's pay they have lost their night's pay with no remuneration because we work on a system that as we cart concrete we get paid for it. We went to the commission in dispute saying that we need some compensation for a call-out to be available. The commission made a strong recommendation to the company that there be a substantial call-out fee guaranteed to us once we forfeit work during the day. That was agreed by all parties in the end and it made a comfort zone for us. We were prepared to either put a driver on that would be paid or we could park our truck for the day and know we would get some remuneration.

Mr DAVID SHOEBRIDGE: In that example the commission brought to that dispute a degree of knowledge and skill about the industry and also had in its back pocket the capacity to make a determination if you would not go away and agree on something sensible?

Mr CHILDS: The important part to me after doing it for so many years is I can get to the commission on very short notice by lodging a dispute through the TWU. We are always in front of a commissioner that is familiar with our industry and it makes the company conciliate with us. Whereas before we get to the commission the company would say, "That's our policy. That's our ruling. That's how it is". Getting in front of the IRC there is forced conciliation. Normally those conversations will make sense and we will be able to go away with a reasonable outcome for both parties.

Mr DAVID SHOEBRIDGE: I assume you have had experiences the other way round where you have put on a blue in the workplace and the company has got you down to the commission?

Mr CHILDS: Absolutely.

Mr DAVID SHOEBRIDGE: And you are forced to see a different form of sense when you get in front of the commission. Would that be a polite description of it?

Mr CHILDS: Yes, it is not uncommon for the company to put us before the commission as well. We may have sought separate rates for special jobs or special circumstances and the company has refused to pay it and gone to the commission. The commission has pretty much said, "Mr Childs, you are being silly. Your contract covers that and you need to get on with your job", and that is what we do.

Mr DAVID SHOEBRIDGE: Behind that is the threat that if you do not comply with the recommendation a dispute order or the like can be made and you can be forced back to work?

Mr CHILDS: To my knowledge in 17 years, neither party has never not gone along with the recommendation of the Industrial Relations Commission.

Mr DAVID SHOEBRIDGE: I suppose that reflects the respect the industry has for the commission's skill and expertise?

Mr CHILDS: Absolutely.

The Hon. SCOT MacDONALD: Can you give me some idea how often you are in the Industrial Relations Commission? Are you there weekly, monthly? How many times a year are you there?

Mr CHILDS: There have been some years where we have not been there. We did a drug and alcohol campaign, dispute when a policy was introduced to us and I was probably there once a month for 2.5 years. We have currently been in there half a dozen times in the past three months over these five drivers. I would say on average it might be twice a year.

Mr DAVID SHOEBRIDGE: That is in your role with the 140 workers?

Mr CHILDS: Yes.

Mr DAVID SHOEBRIDGE: It is not the overall—

Mr CHILDS: No.

The Hon. SCOT MacDONALD: You are just talking about the owner-drivers?

Mr CHILDS: I deal solely with concrete.

Mr DAVID SHOEBRIDGE: Just the 140 lorry owner-drivers in concrete?

Mr CHILDS: Can I add that there are 600 lorry-owner drivers in concrete in New South Wales; Holcim is the company that I represent.

The Hon. SCOT MacDONALD: Perhaps the other witnesses could give me an idea.

Mr FORNO: About twice a week.

The Hon. SCOT MacDONALD: That is for low level conciliation right up to full arbitration?

Mr FORNO: That is correct, yes.

The Hon. SCOT MacDONALD: Is it a fair summation that you are not overly hung-up on a format, style, consolidation or whatever, the main thing for you is that chapter six and its enforceability is retained—the full powers of conciliation and arbitration? The style of it or name of it is not so much a big thing for you but those powers are critical?

Mr FORNO: Was that question directed to me?

The Hon. SCOT MacDONALD: Yes.

Mr FORNO: The full judicial powers of the Industrial Relations Commission and all the attendant legislation and things hanging off chapter six, as Mr Fagir pointed out earlier, the actual machinery to deal with those disputes, determinations and such would have to be contained in those authorities' powers.

The Hon. SHAOQUETT MOSELMANE: Mr Fagir, for the benefit of the Committee can explain the relationship between the industrial court and chapter six?

Mr FAGIR: They go hand-in-hand in the sense that the Industrial court enforces the orders, determinations and everything else that the commission does. Again, the legislation can be great, the commission can be great, your determination can be wonderful but if that determination is breached and you do not have the realistic capacity to enforce it through the industrial court then it means very little.

The Hon. SHAOQUETT MOSELMANE: So the history of the industrial court and the knowledge and expertise that is embodied in this body is significant to chapter six and vice versa. Therefore it is very important to the lorry drivers, taxi drivers and everybody who has understood the system for the past 10 or 20 years or more?

Mr FAGIR: Absolutely. As we explained in our submission, the level of access to the industrial court compared with general court is two totally different propositions. I can go to the industrial court and have a matter heard by someone who knows more about the determination than I do. I do not have to turn up and say as you might in the general system, "This is a contract determination, this legislation created it and this is how we got to this point. This is how Holcim's operation works." All that stuff is already there. You can really get to the heart of the dispute with total legal formality, rules of evidence and all the rest of it but the court is running in a way that is far more accessible than it would be in general courts.

Mr DAVID SHOEBRIDGE: One of the things I take from your submission is that having the ability to arbitrate and create a contract determination but also being able to enforce and impose the terms of a contract determination, so having your arbitral and judicial powers in the same body, can produce efficient outcomes. For example, you might have an application for a breach of a contract determination to enforce the terms of a contract determination and in the course of that it becomes an issue as to the terms of the contract, so you go from the judicial to the arbitral and fix the contract determination. Do you bounce between arbitral and judicial powers in practice?

Mr FAGIR: Absolutely, and bear in mind that the judges who sit in the Commission in Court Session also deal with matters of the commission, if I can put it that way. I can give an example from the last three weeks where a question of law in the enforcement of the general carriers' contract determination was referred to the full bench. In the course of dealing with that particular issue it became clear that there was real ambiguity in the determination itself—I do not think I am saying too much if I say there will soon be an application that will address those issues— and that is likely to be dealt with by one of the judges who explored the issues in the context of the industrial court proceedings.

Mr DAVID SHOEBRIDGE: If you split the judicial powers from the arbitral administrative powers, in those circumstances you could have your enforcement dispute in one court and then you have to reinvent the wheel and start again in an administrative tribunal?

Mr FAGIR: Yes.

The Hon. SOPHIE COTSIS: As a small business operator you have to meet costs and you have a lot of pressure in terms of delivery; a lot rests of your shoulders. How important is it for the Industrial Relations Commission to be able to make a quick and efficient response in determining a dispute to your business and others and to the state of the economy in general?

Mr CHILDS: It is very important. The contracts of determination are set up in three pieces: cost recovery, a wage component and a profit component. It is a very delicate exercise to make sure they all work so that we actually make money out of it. The two times I have been involved in contract negotiations the Industrial Relations Commission has been involved in arbitrating some, and sometimes all, of those issues to ensure that what is on the table is true and correct, and we and the company know they can enforce that if necessary. In essence when we get into these disputes we can resolve them very quickly through the Industrial Relations Commission. We know we can get in front of a commissioner with expertise in the area—some of them know me by name—quickly and the company knows we can. That often leads us to resolving these issues prior to getting in there. It is an instrument that puts us on a level playing field with the company where they need to address us on the same level as them because there is an arbitrator there that will do it for them if they do not.

The Hon. PETER PRIMROSE: Mr MacDonald and Mr Shoebridge raised the issue of whether or not the structure of the Industrial Relations Commission is important. I am hearing from you that it exercises two functions and any change in its structure could lead to those functions being split. I go back to paragraph 12.3 of

your submission about the Commission in Court Session. A change in structure would lead to all sorts of issues about delays in action and difficulties in relation to the operation of chapter six. It would necessarily also lead to a rewrite of the legislation. It is my understanding from what you have said that it is critically important that those two functions stay in the same tribunal. Is that right?

Mr FAGIR: Absolutely, and for the reasons explored. They are not just matters of fairness, equity and access, although they are obviously very important, but there is a real issue of efficiency. You do not want to have—not to reinvent the wheel—to describe the wheel again when you go off to the court and say—

The Hon. PETER PRIMROSE: Let us say that we adopted one of the options in the Government's paper other than option 1, is it your understanding that that would almost invariably involve a split between the Industrial Relations Commission and the Industrial court?

Mr FAGIR: Yes.

The Hon. SHAOQUETT MOSELMANE: How sympathetic are the systems in the Industrial Relations Commission and the industrial court in dealing with people from non-English speaking backgrounds? Has a system been established to facilitate the processes and understandings of people from different backgrounds?

Mr FAGIR: Very much so. In part because the commission has always been accessed by people in that position, unlike other courts such as those dealing with commercial matters where there are millions of dollars involved and barristers and all the rest of it. The commission is used to dealing with people from different backgrounds and with different levels of knowledge of the law, language and so on.

The Hon. SHAOQUETT MOSELMANE: Can you give the Committee an example?

Mr FAGIR: Part of it is a matter of sympathy and expecting that you are going to deal with people who are not Queens Counsel, but in terms of the machinery, interpreters are always on hand and proceedings are conducted in a way that people can understand, which is not always so when you talk about litigation. The registry knows how to deal with people from different backgrounds and with different levels of political ability, if I can put it that way. The entire system is set up to deal informally with things and so is the machinery, the commission registry and the entire system.

CHAIR: Thank you all for your evidence today. You have taken some questions on notice and others may come to you over the next few days. The Committee would appreciate it if you could give your responses to those questions by 14 January.

Mr FORNO: We will give you a prompt response.

(The witnesses withdrew)

PHOENIX VAN DYKE, Team Leader—Tenancy, Redfern Legal Centre, and

NATALIE ROSS, Senior Solicitor, Redfern Legal Centre, affirmed and examined:

CHAIR: Would you like to make an opening statement?

Ms ROSS: Redfern Legal Centre is an organisation you may have heard of or had some contact with. We are a community legal centre of many years standing, a generalist centre which means we provide advice and assistance to people in a wide range of legal areas, although we have a particular focus on some areas of law, tenancy—Ms van Dyke is our resident expert in tenancy—domestic violence—we run a community violence court assistance service—and in our general legal service our focus areas are employment and discrimination, credit and debt and government accountability generally.

Apart from those focus areas, we also provide advice to people in a broader range of areas as well. As a community legal centre we have a relatively small number of paid staff but we have a very large contingent of volunteer law students and lawyers. We also have assistance from law firms that do pro bono work and barristers who do pro bono work. That means that we reach a relatively large number of people relative to the size of the organisation. It also means that we deal a lot with people who are representing themselves in courts and tribunals, because the service we offer in most cases is legal advice, so it is quite limited which may leave the person actually representing themselves after they have received some advice from us.

In a smaller proportion of cases we do provide some representation for people, so we do have some experience in some of the tribunals that you are considering in this inquiry as representing our clients. Our tenancy service has a lot of experience in the Consumer, Trader and Tenancy Tribunal. Our lawyers more generally have some experience across some of the other tribunals that you are looking into. Our clients tend to be people who are disadvantaged either through lack of money, lack of education, lack of English as a first language or people who have a disability. So our focus is very much in our submission on people who experience those forms of disadvantage and what their needs are in accessing tribunals and accessing justice in New South Wales. I suppose the focus we have is very much on their access to justice and the attention, as no doubt you have been talking about, is the accessibility but also the quality and fairness of the decisions that people get. I might just pass over to Ms van Dyke.

Ms van DYKE: I want to add a little bit about the tenancy service. Being in Redfern and among a large block of public housing, we are assisting the most vulnerable tenants, often with multiple disadvantages. Our case work, due to lack of funding—we have been on the same level of funding since 1998 and the rental market has changed a lot since then. So our case work has to be limited mostly to assisting social housing tenants who are danger of becoming homeless and as such we are on average in the CTTT about twice a week. For many years we provided a duty advocacy service with other city services together where we came on the main tribunal day, which used to be Wednesdays. We turned up and assisted tenants who were not represented with information, advice, help them with conciliation, give them some advice on the merit of their case.

But we had to cease doing that because we were never funded for doing that and because we are only funded for three people so we had to stop doing this, which is a big pity because this was a service that was very valued by the tribunal, by members and conciliators alike. It still happens that if I go to the tribunal with a client a member may say, "Can you just help this person as well?" and most of the time I have to say "No, sorry, I'm here with my client." I have been working in tenancy services for 15 years. I have also worked in regional services so I have a bit of an understanding of the issues involved in regional services and the tribunal. I am quite happy to make some comments about what my opinions are about consolidation in regard to regional services as well.

CHAIR: Can you tell us about the centre's experiences in dealing with tribunals? Keeping in mind our terms of reference, what key reform issues would you see as being important from your point of view?

Ms van DYKE: I think one of the key issues that we would like to see addressed is the way of appeals. Now you can put in a rehearing application to a tribunal; you have to do it within 14 days. It is a decision that is made on paper, so people who we assist who have low literacy, for example, have got a hard time understanding it if they do not have assistance. Sometimes it is hard for us to know how to formulate it to get a successful rehearing application in. So the appeal is on three grounds: the decision was not fair and equitable, the decision

was against the weight of evidence, and significant evidence is now available that was not reasonably available at the time of the hearing.

Housing is a very emotional issue for people. They come out of there and they think that something just happened that does not seem right to them and they want to appeal. People who have low literacy often are very emotional about the subject; then having to write a successful submission to have a rehearing granted, it is pretty impossible. There is a time pressure on it. In my opinion it would be useful that, whether there is a consolidation or not, an appeals panel will be introduced, that people can come back and represent themselves before a panel of members and can appeal a decision that was made.

CHAIR: Do you believe your clients would be assisted in having a consolidation of tribunals?

Ms van DYKE: If the specialisation will be maintained. The social housing division, which is the division we mainly deal with, we give advice on the phone to all tenants but the ones that we represent, because of the limited resources are social housing tenants, I think there are special issues for social housing tenants which require a certain understanding that may not necessarily be required if it was a generalist tenancy service or any other tribunal. I have read the submission by Housing NSW where they say that the creation of a social housing division was a failure. I would tend to agree with that; I think it may have been a failure because it is a division in name only.

The Hon. SCOT MacDONALD: I think you have probably stolen a lot of my thunder. I was going to ask you about appeals because we have been wrestling with it. Well done to you for getting to one of the nubs of the issues we must deal with. We will put our minds to that but it is obviously an issue. You feel the rehearing, if that is the right word, is not satisfactory. That is something that keeps coming up in the Committee and we will be dealing with it. I want to ask about point 5, which I do not understand: "We recommend that any amalgamated or reformed tribunal have legislated assistance requirements similar to those in sections 29 and 30 of the Queensland CAT". What is the legislated assistance that Queensland gives?

Ms van DYKE: I will let my colleague answer that.

Ms ROSS: My understanding is that under the legislation that applies to the large tribunal that they have in Queensland an onus is placed on the tribunal in terms of making active efforts to assist parties to understand the procedure of the tribunal, what their obligations are in bringing or defending the proceedings. I think it is important that the legislation, if we go down that path, have something similar because courts and tribunals obviously have to be very careful about their neutrality between the parties and are understandably reluctant to go too far in the direction of being seen to assist one party more so than another. But in the case of particularly people like our clients who struggle to even fill in a simple form or struggle with legal concepts and legal terminology, for them to have any hope of representing themselves successfully they need to have people who can have both the patience and I suppose feeling that they have the right, that it is their duty to provide quite a lot of explanation without diminishing that neutrality but to help people understand in an active way, probably particularly at the registry level rather than at the decision-maker level.

The Hon. SCOT MacDONALD: So these are always unrepresented people, they do not have a solicitor, they do not have anybody in their camp as they are working their way through the system—pre advice, registry, even appearance, all through that pathway giving some sort of appropriate assistance.

Ms ROSS: Yes, and often it is even getting the forms filled in because, if any of you have, I do not know if you have had any experience of the court departments—

The Hon. SCOT MacDONALD: I struggle with forms.

Ms ROSS: Whenever you see unrepresented people in the courts, they wander out not knowing what has happened, not having understood what was said to them, not having understood the directions that were made. Most of the time they are entirely lost. So it is actively trying to avoid that. A lot of people are undone because their paperwork is deficient. I note that the review that was done into the Victorian tribunal and the report that was done of that review recommended that the tribunal have like a self-represented advocate service as part of the tribunal, that there be some staff dedicated to helping self-represented people through the process, which is probably worth considering as well.

The Hon. SCOT MacDONALD: This is a big thing in housing. I have not heard that before in the Consumer, Trader and Tenancy Tribunal [CTTT], where the dispute is over a car or washing machine that has been faulty. It is a big thing in housing?

Ms ROSS: It is not just in housing, I think it is in the general division as well. For example, the last time I represented a person in the CTTT it was a young man with bipolar disorder who was in a dispute with a private educational institution over the fees which amounted to $15,000, that is a significant sum for somebody with a disability and on a pension. It is not limited to the housing area.

The Hon. SCOT MacDONALD: Where I am trying to get to in my mind is if there is a consolidated tribunal but it has divisions—strata, consumer affairs etcetera—that service is available everywhere.

Ms ROSS: Yes, there would be unrepresented people in those divisions regularly.

The Hon. SHAOQUETT MOSELMANE: At point 5.4 Accessibility, in the first line you say:

> Equal access to tribunals should have a focus on substantive and not just formal equality.

Can you elaborate on that?

Ms ROSS: It goes to what we have been discussing. It is not enough to say we treat everyone equally because equal treatment will not necessarily help someone who is not familiar with the legal world. They potentially need extra assistance to put them on a level playing field with their opponent.

The Hon. SHAOQUETT MOSELMANE: What would you introduce to address that inequality and put them on a level playing field? What would you introduce in a tribunal, what systems would you introduce?

Ms ROSS: Some systems that the tribunals use already go towards this in terms of having simple application forms that you can fill out in handwriting and you do not have to use particular wording to get the matter before the tribunal. That is already done and is important. Where we would like to see a bit more done would be down the path of more active services for people representing themselves as was recommended in the Victorian review of their tribunal. There is someone that people can go to and ask questions and get detailed help from, particularly about procedure, which is where people often come unstuck. They have questions about what do I say, when do I say it, who is going to listen to me and when and why, and what do I do if I am not happy with what is happening? There are a myriad of questions that people are likely to have. Depending on the tribunal they are not likely to get a lot of answers from registry staff along those lines because the registry staff do not feel it is their role and it should not be their role to do that. Some people whose task it is to offer that help to unrepresented people would be best practice. Presumably that might be one of the advantages of a consolidated tribunal, in that it may have the resources to set up something like that up.

The Hon. SHAOQUETT MOSELMANE: In response to a question asked by the Chair in relation to consolidation you said, "as long as it retained its specialisation". With the specialisation comes complexity and legalise and that may not serve your constituency. Could you elaborate on what you mean when you said as long as specialisation is retained?

Ms van DYKE: Let us go to the social housing division which I call "the division". There are differences that private tenants do not encounter, for example in regard to rental rebate and the appeals process. One of the examples that happened a couple of months ago was I requested an adjournment from a tribunal member because I had requested a summons of documents. The reason why I had requested the summons of documents was because the tenant, who was a social housing tenant, had appealed the decision that had a direct impact on this hearing and the social housing provider had refused to hand the file to the Housing Appeals Committee. I tried to summons the file as documents in the file were relevant to our hearing and also to the appeal. A tribunal member who understood the system would have understood that this tenant has a right to an internal appeal especially as the outcome of the internal appeal may influence the hearing. This particular member refused the summons of the documents, refused to adjourn and terminated the tenancy.

I put in a rehearing application which was granted and we had a rehearing. I could summons the documents in the end. We are a small service of three people and we had to put in a rehearing application and attend another hearing which costs $300-$400 per hearing to the tribunal—not to mention our service and the

other party. If it had been somebody who had specialist knowledge of the Housing Act, how social housing works, then this would have been avoided.

Ms ROSS: Can I add to that? In the situation of a tribunal where it is common for one or both parties to be unrepresented it is particularly important to have decision makers with a degree of knowledge and expertise in that area because it may be that neither of the people appearing have that knowledge nor expertise so cannot give that to the decision maker. In your standard court proceedings where people are legally represented the lawyers put to the decision maker the relevant law, precedent and their interpretation, and the decision maker is likely to be a lawyer of long-standing with an associate to do research. In a situation where you have people—maybe on both sides of the dispute—without the expertise or knowledge of a lawyer there is no one to inform or educate the decision maker about the matter. To get a good decision in that circumstance you need someone who knows a lot about that area.

The Hon. SHAOQUETT MOSELMANE: Is this where the need for appeal comes from?

Ms ROSS: It is not just that. It is about the tribunal members, whether in tenancy or amalgamated with the guardianship tribunal or mental health, all these various areas where there is specialist areas of law a tribunal would benefit from someone who is familiar with that area. The appeals are a separate issue which affect quality of decision making among the tribunal and that is certainly important when you have uninformed people presenting a matter and a decision made by a person who is also not that well informed. In that situation having an accessible appeal process is obviously necessary.

The Hon. SHAOQUETT MOSELMANE: Within the same tribunal?

Ms ROSS: Yes. We are focusing on the accessibility of an appeal. An appeal to the supreme court is not an option if it is a dispute of a few thousand dollars. In reality it is no appeal and for most of our clients that is what it is.

Mr DAVID SHOEBRIDGE: That issue about the rebates and the potential retrospective removal of rebates by Housing New South Wales was a matter addressed by the Tenants' Union. In their submission they said it can have a substantial impact on a public housing tenant in terms of 10s, 20s, even more, thousands of dollars and they spoke of only having an internal administrative review within the department. Can you tell the Committee your experience of that aspect of the law?

Ms van DYKE: Yes. I am not a lawyer. I need to say that. The cancellation of rental rebate has an enormous impact on people because they become homeless because they get a notice of termination. They are also not able to seek social housing again because they have been unsatisfactory as a former tenant with a huge debt. Right now all I can do is appeal internally and then to the Housing Appeals Committee who will make a recommendation but the recommendation is not binding. Housing can accept it or not. In the tribunal that means if there is a Housing New South Wales client service officer that says the tenant has $10,000 rent arrears that is not questioned. The rent arrears may have occurred because a neighbour or former disgruntled partner called Housing New South Wales, which is the experience we have had, and said: This person has got a new partner living with them and has not reported it or this person has been working. In one of the cases that we had the disgruntled former partner set up a Facebook page making out like the person is a sex worker and inviting people to contact her. Housing said: You are working, you are earning money so there is a rental rebate cancellation. It caused quite a lot of distress to this woman who was pregnant at the time—which was why the former partner was disgruntled. It took a lot of work and advocacy to go through the appeals process. The onus is on the tenant to prove that they did not do anything. It is not on Housing New South Wales to prove, as it is usually in law where the accuser has to prove it and have evidence. In this case the tenant has to show the evidence that they have not done what they are accused of and it has an enormous impact. As a non-lawyer all I can say is it is not fair.

Mr DAVID SHOEBRIDGE: Do I take it from that if we were looking at administrative powers this is an administrative power that would more properly sit within a properly structured tribunal rather than in the back-office of a department?

Ms van DYKE: Yes.

Ms ROSS: They are what we would call high impact decisions. At the moment the kinds of decisions that are reviewed by the Administrative Decisions Tribunal [ADT] are relatively narrow and from our

perspective on Government accountability and the effect that the decisions have on people's lives there should be an independent external review.

Mr DAVID SHOEBRIDGE: Could I ask one further question about tenancy and the CTTT? We have had many people come and say an appeal provision in the CTTT, as a minimum, would be a good start. There is a dispute about the extent of that appeal remedy. The concern from the CTTT was if you allow an appeal remedy they have 60,000 cases and they will be overwhelmed. Other people say a reasonably open merits review would decrease dissatisfaction and allow for more integrity in the original decision making. Do you have a view about what threshold would be appropriate for an internal appeal? Should it be merits and law or should there be leave: Do you have a view?

Ms van DYKE: I think there should be a merit threshold. I want to come back to this as I do not think we mentioned it in our submission: If there is a duty advocacy service in the tribunal then the number of complaints and possible appeals would be lowered because as part of duty advocacy advocates do inform and explain the merit of the case. A person may still be disgruntled and upset that they lost their case but they had somebody explain to them that maybe they did not have a strong case and why.

Mr DAVID SHOEBRIDGE: That is going back to that Queensland model, putting the two-fold statutory provisions in: one is, say, the tribunal when hearing the case has to be satisfied that people have some basic understanding, but putting in place the obligation on the registry and the tribunal structure to give information before they go into the tribunal. Is that what you are talking about?

Ms van DYKE: Yes.

Ms ROSS: And also have having the advocates available.

Mr DAVID SHOEBRIDGE: Just on that duty advocate position, do you picture them being employees of the registry or would you picture them as maybe being separately responsible—responsible maybe to the Attorney General—so as you do not get conflicts?

Ms ROSS: Yes.

Mr DAVID SHOEBRIDGE: You do not have one litigant in the tribunal having an employee of the tribunal effectively running their opponent's case, because I could see how that might create all senses of grievance in the person who is not being represented. How do you picture that working?

Ms van DYKE: I would say it is a bit like the model that is used in the courts with legal aid, for example, doing duty advocacy, or as we at Redfern Legal Centre in the domestic violence we have got court advocates. So I think it should be an independent body. I do not mind who is doing it as long as it is being provided because I think it is an extremely valuable service for all. I think it will help the tribunal to be more efficient. I know, for example, that the tenancy tribunal has conciliators, but when you look at the hearing day they have got four hearing rooms and each hearing room has about six matters in every two-hour slot or sometimes when it is very busy just one hour. So that is 48 parties and two conciliators work a two-hour slot. But it is a lot of pressure on people to make decisions quickly. A conciliator will say to people, "If you come to a consent agreement right now you are walking out and that is it; if not, the tribunal member probably cannot hear it today so you will have to come back". Most people just do everything they can do, to get it done and over with on the day.

Decisions are made that if there is a duty advocate would not happen. I am thinking about a case: *Thurlow v NSW Land and Housing Corporation*. Mrs Thurlow was a Housing NSW tenant and there was a raid on her house and the daughter was charged with possession of drugs. Mrs Thurlow received a notice of termination for illegal use of the premises. In the tribunal she agreed to vacate the premises.

CHAIR: Can I point out that we should not use individual names.

Mr DAVID SHOEBRIDGE: This is a reported case.

Ms ROSS: It is a published case.

Ms van DYKE: It is a published case. She agreed to vacate the premises. In conciliation she walked out of the tribunal and said, "What have I just done? I have lived there for 20 years and I have just agreed to move out". She appealed the decision; it had to go first to the District Court, then it went to the Supreme Court and the Supreme Court said that she did not consent to this—

Mr DAVID SHOEBRIDGE: No informed consent.

Ms van DYKE: No informed consent. This was appealed by Housing so it went to the Court of Appeal but no leave was granted in the end. That is the pressure that tenants are under. Again I can just talk from my experience in the CTTT that this was something that could have been avoided if there was somebody there—a duty advocate—on this day who could have sat down with her and said to her, "These are your options".

Mr DAVID SHOEBRIDGE: I take it from that that what you are saying is more careful and thorough initial proceedings is probably your best remedy for appeals?

Ms van DYKE: Yes.

Mr DAVID SHOEBRIDGE: Getting people prepared and having a proper hearing at first instance is far better than having a remedy on appeal?

Ms van DYKE: Yes.

CHAIR: And that is important whether the tribunals are combined or not?

Ms van DYKE: That is correct.

CHAIR: In every situation, every tribunal?

Ms van DYKE: Yes. I went through the first consolidation of tribunals when there was a Residential Tenancies Tribunal and it became the CTTT. I was working in a regional area at the time and it was a positive thing—after some teething problems—but it was also a bit confusing to people because generally matters were heard at the same time and so on. I think it is important, but I want to stress again that it is important also that we get the information that is not going to be too confusing for them.

Ms ROSS: I just want to add in relation to the threshold for appeals and whether it is appealed or not, I think it is probably important to have a merits appeal. Particularly for unrepresented people the distinction between an appeal on a matter of law and an appeal on a matter of fact is very difficult to get their head around or formulate, and certainly from the perspective they just want to get their matter looked at.

Mr DAVID SHOEBRIDGE: Would it have to be a substantial injustice or some kind of threshold?

Ms ROSS: I think there should be a threshold with the volume of matters that the CTTT handles, and maybe that is something we can take on notice and provide some more information.

Mr DAVID SHOEBRIDGE: I assume you would also want to have a requirement to establish error; not just a fresh hearing on appeal, you would have to succeed in identifying some sort of error? If you could have a look at that?

Ms ROSS: Yes and we will get back to you.

The Hon. SARAH MITCHELL: My question is more directed to you, Ms van Dyke, and you just touched on it then in relation to regional areas and in your opening statement you spoke about having experience in a regional capacity in your role. In simple terms I would like to hear from you a bit more about how you think it is working in regional areas at the moment and from what you went through last time when there was an earlier consolidation of the tribunals that you just mentioned if you think a further consolidation process—if that is something the Committee decides to recommend—would have a benefit for people living in regional New South Wales in terms of access or it would be detrimental.

Ms van DYKE: I think it would have a benefit, and it was my experience in the last consolidation that there is the possibility of more hearing dates. I was working in Warrawong near Wollongong but we also

represented tribunals in Bega and Nowra where sometimes tenants had to wait a month before there was a hearing. That is still the case. It makes it extremely difficult for tenant advocates as well if they have to travel a long distance to a hearing for just one person. I recently talked to the tenancy service in Port Macquarie who say they have to travel to Coffs Harbour for a hearing that may be at 11 o'clock and then there is no other tenancy matter. But if there is a consolidation it would be possible to put more tenancy matters together on a certain day—let us say have all the tenancy matters in the morning and then have different matters in the afternoon.

The Hon. SARAH MITCHELL: A witness earlier today spoke about the idea of even if it was not called a single tribunal as such, a single registry—sharing the resources, even in terms of the premises and the staff and that sort of thing. So, as you say, you can have a day or two where you deal with a range of issues rather than having to wait, and you would assume they will be more frequent, which of course would be of benefit to those currently waiting a long time. Do you think that concept has merit?

Ms van DYKE: I think definitely it has, yes.

The Hon. SHAOQUETT MOSELMANE: You say that any tribunal amalgamated or not should allow leave for legal representation. That goes basically contrary to the small tribunals where the idea is that you do not have legal representatives in order to minimise the costs. You seem to be arguing contrary to that. Can you elaborate?

Ms ROSS: We are arguing that there should be leave for representation for people who come in certain categories. They are the people that we see who are the least able to represent themselves, even in an informal tribunal. We have a lot of experience with clients who may not be able to read and write at all or who cannot speak English very well, and although tribunals are very good in the provision of interpreters, as distinct from courts, even so it is not quite the same thing. Our other group of clients are people who either have a diagnosed mental illness or whose life experience has been so traumatic and disadvantaged that they have what you might call poor impulse control or do not know how to behave appropriately in a forum like a tribunal and therefore can get themselves into hot water by that inappropriate behaviour and can have their matter dismissed or not heard and so on. I think for some categories of people it is very important that they have access to the possibility of being represented because otherwise there would be very little chance that they are going to get their matter properly in front of the tribunal.

Ms van DYKE: It may not necessarily be legal representation. Tenant advocates normally are not solicitors. The tribunal sees us on the same platform as real estate agents—the landlord is represented by a real estate agent; tenants are represented by advocates.

The Hon. SHAOQUETT MOSELMANE: The other side of the coin is that if you come in with legal representation the other party may be at a disadvantage because they did not have legal representation. So there is that issue of balancing it up.

Ms ROSS: Yes. I think it is probably true, as a matter of fairness, that if one party is legally represented, in most cases—unless the parties are represented by a real estate agent or some other person who regularly appears in their professional capacity—the tribunal is likely to grant the other party leave.

Mr DAVID SHOEBRIDGE: We are focused on the CTTT but I heard you say there are other areas of specialty that your organisation has, one of which was discrimination and another which was employment. Could I just ask you about the discrimination law and your experience in the ADT and the ADB with discrimination law, because there have been some suggestions that discrimination might be going to the Industrial Relations Commission and others have said it should remain in a standalone administrative tribunal. What is your position?

Ms ROSS: I do not agree with moving the discrimination jurisdiction of the ADT across to the IRC because it seems to me to imply that employment is the only significant aspect of discrimination law and the others do not matter or are not important somehow. In our discrimination law practice, which I know is not reflected in the absolute numbers, we have more non-employment discrimination matters than employment.

Mr DAVID SHOEBRIDGE: The ADT said it is about 50/50.

Ms ROSS: I thought it might be more than that on the employment side. Certainly our experience is that more than 50 per cent of our discrimination matters are non-employment matters, so I do not know if there would be any benefit to those people in being subsumed into the IRC's jurisdiction.

Mr DAVID SHOEBRIDGE: What has been your experience in the ADT? How does it work?

Ms ROSS: The Administrative Decisions Tribunal is very different from the Consumer, Trader and Tenancy Tribunal. It is much more common for parties to be legally represented and while the rules of evidence are not strictly applied, it is much more formal. Although people do represent themselves through the Administrative Decisions Tribunal process, it is less common and harder for them. The cases are also legally much more complex, so it is not surprising that more parties are legally represented. My experience as an advocate in the Administrative Decisions Tribunal is that its processes are good in terms of dispute resolution. There is a lot of focus on mediation before the hearing and it invests extensive resources in doing that mediation well and thoroughly, which is not often the case in other jurisdictions. That is a great advantage. The Administrative Decisions Tribunal process is more difficult for people, particularly unrepresented people.

Mr DAVID SHOEBRIDGE: What about the quality of decision-making? How does it compare to the decision-making at the Consumer, Trader and Tenancy Tribunal?

Ms ROSS: The quality of the decision-making is far superior. The decisions are more considered and they result from hearings that have involved much more preparation and evidence. It is quite a different creature.

Mr DAVID SHOEBRIDGE: What about the next step? It is one thing as a lawyer or advocate to see a decision, but it is a different story when one must communicate that decision to a client. Do you get a different response when you are communicating an Administrative Decisions Tribunal decision rather than a Consumer, Trader and Tenancy Tribunal decision? How does the ultimate user—the client—respond?

Ms ROSS: In some ways it is more difficult to go through an Administrative Decisions Tribunal decision because it is likely to be a longer and more complex decision compared to a decision of the Consumer, Trader and Tenancy Tribunal. Consumer, Trader and Tenancy Tribunal decisions are often brief and straightforward and focused on the facts rather than the law. That is a difficult question to answer because the whole matter is likely to be much more complex in the Administrative Decisions Tribunal. It reflects the different approaches of the different tribunals.

CHAIR: Thank you for assisting the Committee with its inquiry. Your input is very important to us. The Committee may want to ask more questions and we would be grateful if we could send them to you and receive a response if possible by 14 January.

Ms ROSS: Yes. Thank you.

(The witnesses withdrew)

(Short adjournment)

GREGORY REGINALD JAMES, President, New South Wales Mental Health Review Tribunal,

JOHN FENELEY, Deputy President, New South Wales Mental Health Review Tribunal, and

SARAH ELIZABETH HANSON, Acting Registrar, New South Wales Mental Health Review Tribunal, affirmed and examined:

CHAIR: Do you wish to make a brief opening statement?

His Honour Judge JAMES: We sent the Committee a letter dated 30 November 2011 addressed to the Director of the Standing Committee on Law and Justice, Parliament House. That correspondence included a submission from the Mental Health Tribunal in which we set out in point form some matters relevant to the issue of consolidation of the Mental Health Review Tribunal with other tribunals. Also attached was a document setting out the current role and functions of the tribunal.

The tribunal has been in formal existence since 1990 and informal existence since two years before that. The tribunal's function is to oversee the involuntary treatment of persons suffering from mental illness in mental health facilities or in the community. Included in that group are persons detained either in a mental health facility or the jail system having been found unfit to stand trial, not guilty by reason of mental illness or to be suffering from mental illness whilst detained in the jail system on remand or for sentence and transferred to the only jail hospital in New South Wales at Long Bay. Our functions are rather different from the functions of almost any other tribunal. We are not an adversarial body; we are inquisitorial, but we have no investigative staff or investigative function under the Act.

The most we can do is at our hearings which, except in one case, are conducted by the part-time members or the presidential members involving a lawyer, a psychiatrist, a person from one of the other caring professions and any other person who is suitably qualified in the opinion of the Government. Our role at the hearings is to try to get the patients the proper treatment that they often need and to look at them clinically to make sure that they require that treatment. That is only a summary introduction to the formalities of our role. We have a very different function to that of the Consumer, Trader and Tenancy Tribunal or the Industrial Commission registrars and the Industrial Commissioners. It is a completely different function to that undertaken by the Guardianship Tribunal which makes orders—sometimes on an adversarial basis—for the appointment of a person to conduct someone else's affairs.

We review the patients and their activities continuously, in the sense that we can be brought in to conduct a hearing at any time and we must hold hearings and reviews within specified periods of time. We even review voluntary patients once a year. That is something we understand the Government is giving some consideration to in the hope that we are able to look at such persons more often than that because, believe it or not, "voluntary" does not mean what it says under the Act. You can be a voluntary patient when your guardian insists that you stay in the hospital and that can go indefinitely. The tribunal's role is not really to monitor legalism but to monitor treatment and to ensure that people are getting proper treatment and that the principles under section 68 of the Act for proper treatment are observed. That is why we say that we would lose a lot and the public would lose a lot, particularly in their perception of the tribunal, if we were to find ourselves merged in something similar to the Victorian Civil and Administrative Tribunal, for instance. Elsewhere, in South Australia, the Australian Capital Territory and Victoria, the tribunals do have functions within the larger body. None of those organisations have the same functions as we do in New South Wales, although in many cases it is similar, but it is only part of what we do and they do not have the perception that we have.

CHAIR: What are some of the functions you have that these other subtribunals in other States do not have?

His Honour Justice JAMES: If you become distressed in the Australian Capital Territory, you can be taken to a hospital and detained but you cannot be treated. For three days at least you will not be treated at all—their Act provides you must not be. You are then assessed by the President of the Australian Capital Territory Mental Health Review Tribunal, but it is an assessment on the papers, it is not done in a hearing, as we do. That assessment usually occurs within the first two to three weeks. The Australian Capital Territory will eventually get around to looking at you in the way in which we do but it will be many weeks after the initial assessment on the papers. They might do the same sort of inquiry that we do, with a psychiatrist able to effect peer review of other psychiatrists but they do not have our breadth of experience. They do not review the forensic patients, as

we do—people who have been found not guilty by reason of mental illness. In Victoria they do to a certain extent with the forensic patients but it is a very different system indeed. South Australia is almost completely different. In early January we could provide you with a breakdown in a document showing the distinctions between the different tribunals if that would be of assistance.

CHAIR: If you could do that by 14th January it would be good. Are these going to be pivotal issues in deciding whether you are part of a wider tribunal, the fact that you have got these additional powers that other bodies that have some of your powers and are part of the bigger tribunal, do not have? At the end of the day, is that going to be a pivotal factor?

His Honour Justice JAMES: Probably not because they are not happy with the idea of being part of a bigger tribunal either.

CHAIR: When you say they are not happy with being part of a bigger tribunal, have they been specific in their discussions with you as to why that is the case, why they are not happy?

His Honour Justice JAMES: Once a year a strange body called the HOTS meets somewhere in Australia to discuss those matters. HOTS stands for Heads of Tribunals and we have full and frank discussions about it. Queensland has, for instance for forensic patients, what amounts to a division of the Supreme Court dealing with issues as to whether a person should be found to be a forensic patient and if so, the disposition of that person. Those hearings can go on for up to a year. In New South Wales although there can be contested hearings at trial, there can also be tested hearings in Queensland. Queensland, with the Supreme Court proceedings I have been talking about, really only does people where there is an agreement.

We would be horrified at the idea of having such lengthy, drawn-out proceedings before someone's treatment and disposition can be settled on with them staying in jail. Western Australia is not dissimilar to that. The Northern Territory has a system of judge-supervised orders, which our Supreme Court simply would not be able to undertake. Appeals from us lie to the Supreme Court on questions of law and their rehearings. That means we do not have to go to the Court of Appeal. All of this means that there is a disparity right throughout Australia. I should point out that in Tasmania everybody seems to know everyone and they seem to do hearings on a more or less one-on-one basis. As far as they are all concerned, the difficulty about trying to integrate with other bodies presents them with conflicts and funding problems.

CHAIR: Does it give them delay problems?

His Honour Justice JAMES: Yes, it does in Queensland.

CHAIR: Specifically because they are part of a wider tribunal?

His Honour Justice JAMES: No, because they are in the Supreme Court.

Mr FENELEY: The important thing we noted in the submission was that whilst these issues came up in the other States, in actual fact, in Western Australia, Queensland, Victoria and South Australia, when they looked at the consolidations they kept the core Mental Health Review Tribunal function separate. They kept it separate because of these sorts of issues we are raising now.

CHAIR: Who are those functions exercised by?

Mr FENELEY: By the equivalent Mental Health Review Tribunal. Given that Victoria considered it, they have kept a separate function for the Mental Health Review Tribunal.

CHAIR: In each of those States?

Mr FENELEY: Western Australia, Queensland, Victoria and South Australia.

His Honour Justice JAMES: On top of which we now have a new Mental Health Commission with which we are about, we hope, to have a fruitful role. We were told prior to the election what would happen would be that the tribunal and the Mental Health Commission would work together to ensure an overall better standard of care and treatment throughout the New South Wales, what is now, Ministry of Health. It will not

help that if we are effectively taken out of Health and put into what would probably have to be DJAG, a Department of Justice and Attorney General-administered supertribunal.

The Hon. PETER PRIMROSE: Before I ask this question I acknowledge you may want to take it on notice to think about it. A number of submissions we have received, for instance the Bar Association submission, have raised the possibility of a single registry service as opposed to a single tribunal as a way to go, similar to the tribunal service created in the United Kingdom. What is your view on that?

His Honour Justice JAMES: I went to the United Kingdom two or three years ago just as they were setting up their new system and met the judge who had been appointed to head the tribunal level of their tribunals. Their registry system is set up remotely from London. I have forgotten which town it is in the north of England. It operates in the same way in which a court system operates. Many of the tribunals are able to run registries in that way. We are not. Our Registrar and our staff work to arrange immediate individual hearings for every patient, civil or criminal. You can ring us in the middle of the night, as people have done, and you will get through to a 24-hour number. We will be able to organise an urgent ECT hearing for the following morning, convening members and having them available to sit by phone, by video or in person at a facility. We can do that, and we do, juggling hearing dates to fit doctors and hospitals. At the same time our registry goes out and gets them to provide to us the reports and the photocopied faxed progress notes for the patient in hospital so that members can see them before the hearing. We have probably the most flexible and effective registry of any tribunal in New South Wales. I would hate to lose that to some tribunal that has to try to organise at counsel's convenience to do a consumer trading matter.

Mr FENELEY: We said in the submission as well that we only have about 25 staff. So it is quite a small group but they work very closely together and they work very closely with our tribunal members, both full-time and part-time members. They are all, over time, trained to be sensitive to the needs of the mentally ill people we are dealing with. You can imagine we are not just dealing with treating teams; we are dealing with patients who are ringing up concerned about matters. We are bringing all those skills together to make sure that we do that in a way that causes the least distress possible.

His Honour Justice JAMES: And their families and their relatives and the victims, all of whom in any one matter, particularly where somebody has been subjected to criminal behaviour, can all be the same people and all ringing up with concerns wanting to juggle the date. For instance, we get classically this week people who are objecting to us having hearings the week before Christmas.

Mr DAVID SHOEBRIDGE: Is that a well-couched complaint about coming here today?

His Honour Justice JAMES: Not at all.

CHAIR: It is necessary for you to be able to react straight away?

His Honour Justice JAMES: And flexibly.

CHAIR: And, in fact, you do react straightaway. You say this is something that is not applicable to most other tribunals?

His Honour Justice JAMES: Precisely, and a big registry could not do it.

Mr FENELEY: It is also a culture of a very small organisation that is responsive to these needs, which you could easily lose if you got subsumed into a different culture.

His Honour Justice JAMES: The best illustration of that, by the way, is one of the things Sarah in particular has to be sensitive about is the birthday or anniversary of the death of someone whose killing produced a hearing for the tribunal. When the families are coming we do not organise hearings on the anniversary of the death. I should point out in terms of figures, we have a budget and expenditure for something in the order of 13,500 hearings—the figures are all in the report—of roughly $5 million. The cost of hearings in the tribunal has over the years been roughly $450 to $480 per hearing, that is with three members being paid and present. We have been able in recent years to reduce it down to $415 while giving a better hearing and getting better reports. We have some 25.4 full-time equivalent staff of whom 6.4 are temporarily funded. We actually have a full-time staff of 18. The others have continued on, thanks to the position freezes within the Department of Health from time to time and we plead to be allowed to keep our staff annually. Originally when the tribunal

started it had 11 staff and conducted 22,000 hearings. We now have a ratio of one member of staff to every 500 hearings. They had one member of staff to every 200 hearings.

CHAIR: And you are still able to adequately deal with your clients?

His Honour Justice JAMES: We are but it is only thanks to staff who are idealistic as well as working for a living, members who serve because they think it is an important concern and they are involved with mental health, and particularly the senior staff who are available on mobile phones night and day. They are only doing it because mental health is a concern for them.

The Hon. SHAOQUETT MOSELMANE: In your covering letter you state:

> Consolidation of the Mental Health Review Tribunal with other tribunals would run counter to the modern trend in mental health policy.

Can you elaborate on that?

His Honour Justice JAMES: When the Mental Health Act 1990 was passed, it represented a change in thinking from the earlier Lunacy Acts. I started in the Supreme Court back at age 18 working for the Master in Lunacy, which was a wonderful title. In those days people were taken out of the community and locked up for their own peace of mind in asylums which were meant to protect them from the community. They received very little treatment. The 1990 Act started to move towards more human rights oriented. By 2007 people were moving to the most basic right in this area, which is the right to treatment. So even if you are unable to consent or have the capacity to consent to treatment you can receive treatment and you must receive it in the community unless the only way you can have that treatment is while you are detained in a hospital. Some forms of treatment do involve your being treated in a hospital because of blood tests and so forth. Clozapine is the classic example. The 2007 Act looked to focusing on the individual and looked to a tribunal that can look to the individual. It was personalised. It meant that within the mental health field people could feel that their own tribunal was looking at them. Put us in a big one and we lose all of that.

The Hon. SHAOQUETT MOSELMANE: What about the idea that has been floated a number of times of amalgamating the Mental Health Review Tribunal with the Guardianship Tribunal?

His Honour Justice JAMES: They have two conflicting functions. The Guardianship Tribunal appoints someone to run your affairs for you, to make decisions for you. They can handle your financial affairs, send you to hospital. They can lock you up in a mental health hospital if the doctors will accept you. They stand in your shoes and act for you. We do not do that. We make orders and principally those orders control the doctors rather than patients. No-one can be treated unless they either consent to the treatment, having the capacity to consent to that treatment, or the Mental Health Review Tribunal authorises the doctor to give the treatment. For that we observe the principle of least restrictive safe and effective treatment. Even with forensic patients it is the same principle. In essence what we are doing when we make orders is authorising the doctors to do that which in law they would not otherwise be allowed to do. They would not be immune from being sued unless they had our order. So we are able to use the procedure to try to get a good standard of care by the individual patient.

Mr FENELEY: The other thing, and I think we are all increasingly concerned about these issues, is as there has been more awareness of mental health issues—we can see by the growth in the volume of our cases that everyone is becoming more and more aware of these things—there is also an awareness of the distinction between the issues that Greg is raising about capacity issues in the Guardianship Tribunal and mental health issues. I think you will find within the two communities there are quite strong views about whether those two things should ever be confused. To say, as people commonly do, that it is all about people who cannot control their own affairs or are not responsible for their own treatment, in actual fact the two communities, who are the carers and I suppose the sufferers of mental illness and other disabilities, would see their problems as being very, very separate. There would be very sensitive issues in being seen to be lumping those two things together.

His Honour Justice JAMES: We do not want to take patients' rights away. The Guardianship Tribunal of its nature must do that.

Mr DAVID SHOEBRIDGE: I fully accept they have quite distinct roles. In terms of having registry staff who are sensitive to the intricacies of a family situation, sensitive to mental health issues and capacity issues, and sensitive to having to pick up multiple parties with multiple and parallel interests, there would be

parallels between that kind of registry work in the Guardianship Tribunal and the kind of registry work in the Mental Health Review Tribunal. I see some parallels there, but I am happy to be dissuaded.

His Honour Justice JAMES: I can understand what you say. If you have a look at the recent report of the Guardianship Tribunal and look at the work their registry and investigative staff do, it is entirely different to the relations with the hospitals and the patients that our people have. In relation to the financial aspect, frankly, if we were to lose the protected estates order jurisdiction we presently have under the Trustee and Guardianship Act to the Guardianship Tribunal entirely I would not lose a moment's sleep because they have staff who can investigate the financial circumstances. But when it comes to relating with the hospitals and the psychiatrists and clinicians, our specialist function means that we are able to do much better even at the registry level, and the difference is enormous when it comes to looking at the difference in staff.

They have more than twice the staff we have and they have half the number of hearings we have. Most of their hearings are of an entirely different nature, adversarial, without turning on the sort of reports that our staff generate. There is the need for that sensitivity. In the context of what we are doing, we do it. We would lose a lot of that specialised function if we were to be merging in with the rather different functions. The Guardianship Tribunal is rather our sister organisation as far as financial and accommodation matters are concerned but under their legislation our determinations trump, as it were, guardianship orders made by the Guardianship Tribunal for the very good reason that ours is such a specialised area that it does not sit well with the guardianship area.

Mr DAVID SHOEBRIDGE: There must be circumstances where you are dealing with a patient who has been involuntarily committed, you are reviewing their treatment plans and determining whether or not current treatment or a change in treatment is appropriate.

His Honour Justice JAMES: Yes.

Mr DAVID SHOEBRIDGE: There must also be cases where at the same time the patient or the patient's representative is challenging their involuntary treatment and involuntary detention?

His Honour Justice JAMES: Sure.

Mr DAVID SHOEBRIDGE: Would there not be cases therefore where there are parallel proceedings in the Guardianship Tribunal and the Mental Health Review Team?

His Honour Justice JAMES: No, because they have no jurisdiction in that area. We come to civil patients in two ways. One is that an order is sought from the community or from a mental health facility that a patient be treated in the community on a community treatment order. Although that is involuntary treatment it is often agreed to by patients that probably do not have full consent. The other area is involuntary treatment in a facility. Now in the community we review the treatment plan proffered by the treating agency, which they have agreed to implement, and the specialist expertise of the panel members, particularly the psychiatrists and those suitably qualified who come usually as psychologists or persons who have worked in the health professions, enables us to treat those community treatment plans very carefully, test them out, see what they can do, see if it is going to work, look at the medication and look at the arrangements for change of medication. It does not allow us to do anything about finances and accommodation.

We can make orders under the Trustee and Guardian Act for protected estate orders to deprive a patient of their control over their estate, but we only do that if the hospital makes the application to us, or the relevant agency makes the application to us, and we have the evidence. We have no evidence-gathering facility. Really what we do is test what we are supplied with. We are an auditing and monitoring body. That applies to the professional material we get from the hospitals and also the social workers. The Guardianship Tribunal is different. They have full contested hearings. They have replaced the old Supreme Court fully contested hearings of having somebody who might be incapable having a committee of management appointed to their estates. In that sense we are happy to let them do that, but the idea of us being seen to be doing that gives us a role that goes well beyond the clinical.

Mr FENELEY: It is worthwhile saying though, Greg —because this is commonly raised with us about the parallels—that we might be looking in a crisis way, in terms of the level of seriousness, at matters that have to be dealt with, and the Mental Health Act has priority in that sense, but it is not uncommon that what happens is, particularly with an aging population, to the person we are dealing with in response to a mental illness today

the treating team might be saying, "There is a host of general, medical and other issues that we cannot deal with under the Mental Health Act. We are going to be separate to you. We are going to be making an application for a guardian to be appointed to make sure all of those long-term life decisions can be made." We certainly see that happening but the difference is I suppose the relative urgency of those two things.

Mr DAVID SHOEBRIDGE: I wonder about the capacity if there is an initial application made, the crisis issues, the treatment plans dealt with, tested and reviewed, then in many cases there will be inevitable further applications about the appointment of the guardian dealing with the estate and property, which end up going to a different tribunal. In some regards much of that is inevitable. Once someone has property in this State it is inevitable that there will be a further set of proceedings in another tribunal. I wonder if looking at amalgamating tribunals or having a registry that dealt with something and then effectively passed it through, I know you like seeing them separate but as a practical administrative thing those matters will pass through but perhaps—

Mr FENELEY: Just ending my answer, the speed with which those two matters work is totally different. We commonly see treating teams saying to us, "When we come to you its immediate." The issues to do with guardianship immediately become more protracted and the culture is quite different.

His Honour Justice JAMES: Months, up to six months later. Interestingly, most of the time the Guardianship Tribunal cannot look at those issues until the treatment plan we have looked at has been in effect long enough to see how it works. There are two things of which we are horrified. One is that the Department of Community Services often regards people who are mentally ill, because of that, as a problem as parents. People who suffer mental illness are at terrible risk of losing their children because of the stigma attached to mental illness. They are also at terrible risk with mental illness as being seen to be dangerously criminal—that is, thought to be criminal because they have mental illness. Any analogy between the criminal justice system and the way in which people who have committed serious offences are concerned and mental health is wrong and dangerous. Thirdly, people who are mentally ill, intellectually disabled too we get from unfit for trial, should not by reason of that either lose their rights or be perceived to lose their rights, though they will be if they think that means they are automatically going to be before the body that is capable of appointing someone else to exercise their rights on their behalf.

The present Act used to have a provision that whenever someone came before the tribunal there was a reverse onus provision and the tribunal had to consider taking away their rights to administer their own affairs. At a previous inquiry to this I spoke strongly against the idea. The tribunal now, if there is a basis for doing so, will decline to consider it and let it go to the Guardianship Tribunal if it is anything that requires investigation or deep analysis because we do not have the capacity to do that and we would frighten people terribly if we did. We have enough trouble with people being frightened about the idea of being dragged before a legal tribunal. Patients do not like it. Some patients can call on us early if they wish; others are horrified at the idea of being placed before a tribunal. There are times that I think that the patients think we are like the tribunal of public safety that used to exist in revolutionary France at which you could be dragged before the tribunal and then taken out and guillotined.

Mr FENELEY: Isn't it also true that of the mental health group that we see it is a relatively small subset of those who have guardianship issues?

His Honour Justice JAMES: Yes.

Mr FENELEY: The thing is that most people who get treated for mental illness maintain their independence in relation to the management of their own affairs, and that is even true with forensic patients.

His Honour Justice JAMES: Including patients who are detained in hospital; as much as possible they should retain their rights. Often when you are detained in a hospital and you are on a pension there is no reason for there to be any apprehension about you being unable to manage your own affairs. The hospital will assist you. Of course they assist you to some extent by taking a large proportion of the pension for hospital expenses, which means you have not got much left to do much about. Where there is a property issue it is easily enough dealt with. But the Guardianship Tribunal does have an important role to make decisions for the sort of things we cannot make, like some kinds of surgery and some of kinds of accommodation functions.

The Hon. SARAH MITCHELL: I have two questions. My first question relates to forecast workloads, which is a matter within the terms of reference of this inquiry. I note from your earlier comments

that you have made a comparison over the years that your workload has increased quite significantly. Would it be fair to anticipate that you would assume the same thing would happen in future years as well?

His Honour Justice JAMES: We hope not. That is why we have given the Committee the reports. This is our latest annual report, which has only recently been tabled. It sets out a timeline as well. We are in no position to forecast how much community mental health care is likely to improve the lot for the mentally ill in New South Wales. The Federal Government has made loud announcements about additional money going into community mental health care, particularly in remote and rural areas, and there has been a lot said about early intervention. We would all be happier with patients able to live happy lives in the community. At the moment although the community facilities are vastly overstretched and under resourced, they are not as overstretched and under resourced as the hospitals. We are actually short of hospital bed accommodation for people who can come in, be assessed, medicated appropriately and returned to the community quickly. The hardest part at the moment is people being able to get into hospital.

Mr FENELEY: Probably just in the forensic area where we have had something like a 40 per cent growth in cases over about a four-year period, because of the changes in the forensics provisions Act which saw—

His Honour Justice JAMES: I should explain that. When I was appointed I had left the Supreme Court after a serious of eye problems and I did a royal commission in South Australia. I came back to New South Wales and was asked to do a review of the then forensic patients system. Under that system, which had existed since almost time immemorial in New South Wales, a person found not guilty by reason of mental illness was detained at what was referred to as the Governor's pleasure. That meant that that person could only be released either conditionally or unconditionally into the community by the Governor on the advice of the Executive Council. That had long been abolished elsewhere. I made a series of recommendations to the Government concerning that. Because the effect of that was that people would be detained forever the lawyers were not asserting mental illness defences. What they would do if someone was killed was plead them guilty to manslaughter by reason of diminished responsibility, they would take a sentence, when in jail be found to be mentally ill and go to the jail hospital, they might lose parole but they would not be detained indefinitely, which is what would happen. In consequence of the change the tribunal now has power to make the determination but only where satisfied that it does not present a significant risk of serious harm to anyone.

In consequence of the change our numbers have gone up dramatically. Just as in another area where patients, their lawyers, their family, anybody else have the right to appeal to the tribunal immediately they are admitted to a psychiatric unit. That is the way in which we can sit a full panel of the tribunal, including a psychiatrist, to determine if the patient's care is appropriate—that is for civil patients. Those numbers have gone through the roof too. We are not sad about that because frankly it is a very much better thing for a full panel rather than a single lawyer to look at patients and it is a very good thing for forensic patients who are mentally ill to be dealt with appropriately and treated in the new forensic hospital, if we have enough beds. But, yes, we do expect that that is likely to continue. Frankly, if we were given our permanent positions and if we could expect the same sort of increase as we have had in patients, staff ratios I think we would be feeling absolutely terrific but all that happens year in and year out is that we keep beavering. I should point out too that the staff are astonishingly qualified. Sarah has an honours degree in psychology and has just recently completed law. How many do we have with degrees in psychology or equivalent degrees?

Ms HANSON: Three in psychology.

His Honour Justice JAMES: Three psychologists work in her team alone. That is staff who studied part-time in the job as well as being idealists. We could also invite you to our plush accommodation. One of our members, Dr Peter Shea, is the former medical superintendent of Gladesville Hospital. We use the old detention ward at the hospital as our offices. Downstairs we have the old seclusion cells that have been refitted for lawyers with video screens so we can do video hearings. Peter Shea explained to me, "You can't lock people up there indefinitely". I said, "But its all right, Peter, they are not people, they're lawyers." We are very happy about that.

The Hon. SARAH MITCHELL: One thing that seems to be coming through from many of the witnesses we have heard from in the past day and a half has been in relation not only to access to justice but also in terms of not overlooking the integrity of the tribunal system and the reasons why certain tribunals were originally established. In your submission on page 3 you talk about how you have a very favourable perception within the mental health sector and within the patients you deal with. Clearly you have concerns, but can you

elaborate a bit more? If you were to be swallowed up by a larger tribunal, that that perceived favourability would be lost and the integrity of what you do—

His Honour Justice JAMES: Precisely. That is exactly what we would lose. We are seen by the patients as the bastion between them and the psychiatrists. Often that is not right because our job is to try to get the psychiatrists to give the patient the care, rather than standing between the patient and the psychiatrist. But certainly if we go into anything else, particularly with the Guardianship Tribunal, that can deprive people of their rights, and the patients see that their specialised role of looking after this is gone.

The Hon. SCOT MacDONALD: You have probably presented the most compelling case for standing alone for all sorts of reasons as you have talked about. Then you look at the financial summary and you are running at about a 10 per cent budget deficit compared to revenue. Forgive my accounting background.

His Honour Justice JAMES: We had hoped you would not raise that and we will tell you why.

The Hon. SCOT MacDONALD: Maybe you should not have given it to us.

His Honour Justice JAMES: We will tell you why. When the Mental Health Commission was announced we had our budget slashed by over $600,000 on the basis that when the new commission is in you will be able to get the extra money from them. In fact, except for taking over the mental health inquiries from the magistrates, we are operating well within budget. We gave an estimate as to how much it would cost for us to take over the mental health inquiries from the magistrates, which we have now had for just on two years—

Mr FENELEY: A year and a half.

His Honour Justice JAMES: —something like that. We estimated the figure as roughly $650,000. The amount that we are short is just on $650,000. We only receive from the Attorney General's for taking over the work some $400,000. The rest is natural increase. We are expecting to get that back from the Mental Health Commission if it ever gets any money. So practically speaking we are working very well indeed within the budget as it had existed. The Department of Health will not be at all pleased with me for telling you about their device for us to be able to dig money out of the new Mental Health Commission, but we are within budget. If you compare that report with earlier reports you will see that we have stuck almost precisely on budget at least in the past five years or so since I have been there.

The Hon. SCOT MacDONALD: I suppose the only supplementary question we can ask is: even if you could preserve all those things, all those features, functions, roles, speciality of the Mental Health Tribunal, are there any back-office savings within that $2.8 million of goods and services?

His Honour Justice JAMES: Yes, there is. I have been trying to effect that saving for some considerable time without success. I offered to go part time so I could cut my own wages, and I am still waiting for that proposal, which I have been told has been approved, to go to Cabinet. That would allow some saving but I cannot think of anything else, frankly.

Mr FENELEY: We are just a very small organisation. We have only 22 staff, which is not much to work with. That is split between the two teams, the civil and the forensic teams, so it is difficult to see that we could be much lighter on than we are.

Ms HANSON: Already our IT is run by the Department of Health so a lot of those back-room services are actually done by the Health Department, for the tribunal.

His Honour Justice JAMES: Our rent is very cheap, considering we occupy the ward and the seclusion cells.

The Hon. SHAOQUETT MOSELMANE: In our issues paper we presented three options. I am sure you would have seen those three options. You make a good case as to why your tribunal should stand alone. But we will be deliberating as to how best we can consolidate these tribunals. Perhaps if you could assist as to whether any of these options would get near what you would prefer, if not obviously the stand alone, but your option B, if you like.

His Honour Justice JAMES: I do not think so in the sense that option B is just about as disastrous as option A.

The Hon. SHAOQUETT MOSELMANE: So none of the options—option 1, option 2 or option 3 in our issues paper—is preferable at all to you.

His Honour Justice JAMES: In every one of the other jurisdictions there are some tribunals that have to stand outside a VCAT or an ACTCAT because of their specialist function. That is what we want.

CHAIR: If you were forced into a situation where you had to choose—

The Hon. SHAOQUETT MOSELMANE: That is what I was trying to get at.

CHAIR: If you had to choose—

His Honour Justice JAMES: Choose between which?

CHAIR: Between—

His Honour Justice JAMES: A combined registry?

CHAIR: The options that are there.

The Hon. SHAOQUETT MOSELMANE: Option 3, which is the NCAT option. If your tribunal was to be combined it would combined with the Consumer, Trader and Tenancy Tribunal, the Guardianship Tribunal, the Mental Health Review Tribunal, and another two or three tribunals. I am not sure whether you have seen this document.

His Honour Justice JAMES: I have seen it but I am trying to remember the options off the top of my head. So one is the full combination?

The Hon. SHAOQUETT MOSELMANE: Yes, and that is the NCAT.

His Honour Justice JAMES: The second option is?

The Hon. SHAOQUETT MOSELMANE: The second option is option 2B, which relates predominantly to employment and professional discipline. It basically is within option 3.

His Honour Justice JAMES: The only one that would have been at all feasible would be as has been suggested, some sort of arrangement with the Guardianship Tribunal, and that will not work for the reasons we have said.

Mr DAVID SHOEBRIDGE: One of the critiques about the separate small tribunals that we have in New South Wales is that with the benefits of specialisation and flexibility also come long-term developments of idiosyncratic hearing practices where the processes within that tribunal step outside the mainstream of legal processes or tribunal processes and over time can develop unfairness or inappropriateness. What checks and balances do you have in place to ensure that that does not happen?

His Honour Justice JAMES: The first is that our Act requires a judge or former judge to head the tribunal, and requires the deputy presidents to be judges or former judges or persons who might be appointed to be a judge. For the purposes of forensic hearings, it has to be a judge or former judge sitting as president for any release or unconditional release of a patient. Because of the combination, you will have a Supreme Court judge or a very senior District Court judge presiding over the tribunal and responsible for the conduct of the hearings. The hearings are specialised in their very nature. We are an audit and monitoring body for the psychiatrists and the hospitals. So we test their evidence, we make them produce reports, we inquire into, we ask questions orally. The way in which we conduct hearings is more like an investigating magistrate in the continental system than it is an adversarial hearing or the traditional Australian tribunal model.

The AAT and the ADT models would not work at all. We do not want people who are mentally ill trying to present cases. Their lawyers have the opportunity to test things and to come back to us and to convene

hearings immediately. Our structures involve four development nights a year and a continuing performance review process of each member, legal or otherwise. Members are appointed under the Act for no longer than seven years, in practice for four years subject to an internal performance review, which involves firstly having one of the two deputy presidents attend the hearings and also we review the tapes, including the video tapes, of hearings. Each hearing is recorded. There are also the appeal provisions. There are also some very enthusiastic young solicitors working in the Legal Aid Commission or retained by the Legal Aid Commission who will happily appeal at the slightest suggestion of the tribunal acting inappropriately.

Mr DAVID SHOEBRIDGE: Where does the appeal lay?

His Honour Justice JAMES: In the Supreme Court.

Mr DAVID SHOEBRIDGE: And there is no internal appeal process.

His Honour Justice JAMES: No, there is no appeal from the tribunal to the tribunal internally.

Mr DAVID SHOEBRIDGE: In terms of the class of clients or patients that you are seeing, what is their realistic prospect of having a Supreme Court appeal? I would have thought that would be a tiny minority of cases.

His Honour Justice JAMES: There is a tiny minority of appeals actually brought. In fact, there is a very high prospect of getting the appeal up if you want to. It is a rehearing appeal. If legal aid grants legal aid and all they need for that purpose is to be of the view that the result might differ, then you can happily go off to the Supreme Court pointing to error of law below. It is much easier, for instance, to run an appeal from us, though much less often done, than to run an appeal to the Court of Appeal or the Court of Criminal Appeal from the District Court.

Mr DAVID SHOEBRIDGE: But the relative ease of the test on appeal and the relative paucity of actual appeals might suggest that there is the fact that you have to go to the Supreme Court, the costs and the consequence and the complexity for those people, may be a deterrent to people exercising that.

His Honour Justice JAMES: It might be but remember these are all people who have lawyers and legal aid lawyers. The mental health advocacy service within the Legal Aid Commission grants free legal aid to everybody for many categories of our work and we are increasingly pushing to give legal aid and have a lawyer on site for each hearing, particularly when we are getting it extended to ECT. If they want to appeal we are delighted. Frankly, if we get second-guessed by the Supreme Court for doing an inadequate job, we are delighted. The cost is not in the appealing; it is the running of the case in the Supreme Court.

Mr DAVID SHOEBRIDGE: That is exactly the point, that the cost to run a case in the Supreme Court is very substantial. I have seen—

His Honour Justice JAMES: But it does not cost the client anything. The Legal Aid Commission does it.

Mr DAVID SHOEBRIDGE: The client often is not in a capacity to give instructions about an appeal, therefore the guardian takes on the appeal in the Supreme Court and I imagine it would be difficult to get a guardian to take on the potential cost implications of an appeal in the Supreme Court.

Mr FENELEY: No, in actual fact these cases come on very quickly and they are dealt with within a day or two in the Supreme Court. The way the Act is structured, particularly with civil patients, legal aid will take the case on on the basis of instructions from the person because the Act says they can assume that they can give instructions.

His Honour Justice JAMES: The guardian is not personally liable.

Mr FENELEY: And they do not necessarily get the guardian involved.

His Honour Justice JAMES: Although they get tutors—they must have a tutor or a guardian if they are a forensic patient—often that person is appointed from the Attorney General's list of guardian ad litem who

have an indemnity. The Legal Aid Commission has done a deal with the guardian so the guardian is not up for any costs.

Mr DAVID SHOEBRIDGE: I have seen a case of a tutor who is facing some $30,000 on an appeal—

His Honour Justice JAMES: Who?

Mr DAVID SHOEBRIDGE: —to the Supreme Court.

His Honour Justice JAMES: Heavens, get them to contact us. Who was it?

Mr DAVID SHOEBRIDGE: We are not at liberty to discuss individual names.

His Honour Justice JAMES: Let me explain. There was one case brought by a primary carer who determined on his own legal stance to do it his own way. He did end up with an order for costs against him, particularly as this was not the first time he had brought the appeal. We get contact from that gentleman on an average of once every couple of weeks, or we used to. He has stopped recently or at least toned it down a bit. We go to enormous trouble to arrange for him, we go to enormous trouble to allow him to put his submissions and so forth. Unfortunately it all ends up in the public arena on a somewhat different basis to the basis on which we had spoken. We release copies of our voice files and so forth and it still gets covered. You cannot look after everybody by this system.

Mr FENELEY: Could I also add perhaps as a suggestion as to one of the reasons why you may not get all that many appeals in this area? Despite the fact that our experience is that appeals are brought on very quickly, legal aid is very responsive, and the Supreme Court acts very quickly to deal with them in a way which I would imagine reduces the cost enormously, by comparison to some other forms of litigation. The other thing is the way the Act is structured. One thing is that people are entitled to have legal representation at our hearings, which is not always the case in other forums, and the second thing is that there is not just one hearing. Because the tribunal revisits matters, people who are involuntarily detained are required to be reviewed by us on a regular basis and can request discharge at any time and have yet another appeal to us against the superintendent's refusal to discharge.

Mr DAVID SHOEBRIDGE: So often by the time you might be considering a review you have had a look at the merits anyhow, is that what you are saying?

Mr FENELEY: Precisely.

His Honour Justice JAMES: And patients get a lot better, if some of them can.

Mr FENELEY: Parliament quite wisely built into the provisions saying that a patient can request discharge and the tribunal will review it. Of course, if a person keeps doing that there is a provision which says you can limit how often they can do it; otherwise you might spend your entire time in review, which would disrupt their treatment. But it is a good provision. It is a very flexible provision. I would like to add, having not done as many hearings as Justice James, but having done many hundreds of hearings, most of our involuntary patient hearings end with a good feeling as between the patients, the treating team and us. There are not many that end on very bad terms.

His Honour Justice JAMES: The doctors are always complaining that our hearings might interfere with the therapeutic bond between the doctor and the patient. We go to an enormous amount of trouble, and all the members do, to try to make the patient as comfortable as possible because we are not of the belief that tribunal hearings are cheery comfortable things for people to have and we do not want to disrupt their treatment.

Mr DAVID SHOEBRIDGE: There are no circumstances within which magistrates do any work within the Mental Health Review Tribunal?

His Honour Justice JAMES: Not sitting magistrates, no. We do have former judges and former magistrates who sit on the tribunal as legal members of the tribunal, not presidential members.

Mr DAVID SHOEBRIDGE: Never in their capacity?

His Honour Justice JAMES: No, magistrates no longer sit at all. The former judges, unfortunately, by the time they get to us they tend to die. Justice Marla Pearlman AM has just died. We have another former judge dying at the moment. I go out and shamelessly twist arms to get judges to sit on the tribunal after they have retired and watch them and monitor them very carefully.

Mr DAVID SHOEBRIDGE: You had better hope they do not read this transcript.

His Honour Justice JAMES: I am happy for them to read the transcript. Part of what we do has to be open and accountable to everybody. The Mental Health Review Tribunal could be regarded as a mystery back-room terribly oppressive body. What is important is that everyone should know what we do, that our hearings are public, even if they are conducted in hospitals and jails. They should see what we do and its advantage to the individual as well as to the system.

CHAIR: On behalf of this Committee I thank you for attending this afternoon and assisting us with your input. It will be of great help to us in our deliberations. There may be some questions that will be sent to you. We would very much like your response to those.

His Honour Justice JAMES: We do not close down except for 23 December until 4 January.

CHAIR: We hope the date of 14 January will be a suitable date.

His Honour Justice JAMES: We can do that. If there is anything else please do not hesitate to contact us by phone, that way we can respond quickly. If you would like us to sign or check the transcript we are happy to do that. It can be emailed to us electronically and we can work on it with track changes.

(The witnesses withdrew)

NICHOLAS KEVIN FRANCIS O'NEILL, Chairperson, New South Wales Nursing and Midwifery Tribunal, affirmed and examined:

CHAIR: We would like to welcome our last witness for the day, Mr O'Neill, chairperson of the New South Wales Nursing and Midwifery Tribunal. Thank you for coming to assist us with our deliberations.

Mr O'NEILL: I appear partly as chairperson of the Nursing and Midwifery Tribunal of New South Wales but I was the first deputy president and then the president for 10 years of the Guardianship Tribunal of New South Wales. That ended on new year's eve 2004. It is almost seven years since then. I have in the recent past been a joint-author of a book that involves guardianship and financial management and consent for medical treatment: the issues that that tribunal covers. I am fairly familiar with what it is up to these days.

CHAIR: Would you like to start by making an opening statement?

Mr O'NEILL: I would like to do that. I would ask you to consider the notion of the purpose of tribunals. They are different from courts and they were established because there was a need for a kind of judicial decision making process to occur in circumstances different from where courts operate and where the decision makers were not necessarily lawyers. It allows evidence gathering and decision making processes to develop that were not only procedurally fair but better suited to the subject matter and the circumstances in which the decision making was required. In that sense tribunals are very different from courts. That, I think, is an important element of what this inquiry is about.

The tendency with the creation of supertribunals is for relegalisation and for them to be become more court-like because they tend to be run by judges who are in a period of their careers where they have come out of courts into tribunals and go back again to the court system. Tribunals are also cost effective and efficient for the purpose. I would like to spend a moment on giving you the three examples I refer to in my submission. The Nursing and Midwifery Tribunal, which I currently chair, is an occasionally meeting tribunal, and is there for public protection by ensuring the professional competence, conduct and capacity to practice of nurses and midwives. In order to do its work it does need nurse and midwife members, in fact two on a panel of four. It uses less formal procedures than courts but it does make its decisions based on reliable evidence without being bound by the technical rules of evidence. Nevertheless, it gives detailed written reasons for every decision it makes and there is a right of appeal.

The Guardianship Tribunal has a completely different purpose. It is there to appoint guardians and financial managers in a situation when first the incapacity of the person the subject of the hearing is demonstrated, and secondly their need for a guardian or financial manager is demonstrated. If the need is proven it then becomes an issue of what orders should be made, who should be appointed and what functions they should be given. In those circumstances it is important and significant to the success of the Guardianship Tribunal that the professional and community members with professional and real world experience of people with disabilities play an active part in forming the orders for that tribunal. Of course it operates in terms of reliable evidence and it also provides written reasons for every decision.

The Mental Health Review Tribunal I do not have to tell you much about, you have just heard from Mr Greg James QC, supported by at least one deputy president. There again you need a lawyer, a psychiatrist and a suitable community person. You need people with different skills and experience to form the tribunal to make those decisions about who should be held in a mental health facility, under what circumstances, for how long, and who should be subject to a community treatment order. You can see that there are different purposes, different personnel required, different criteria from courts to be applied, and different kinds of evidence. The key issue is that when the facts are established you next need people with the expertise and experience to decide where to go from there. In the case of the Nursing and Midwifery Tribunal if a conduct finding or an impairment finding is made against the nurse or midwife then what are the appropriate orders to make? Should that person be suspended; should they be deregistered; should their registration be subject to conditions and if so what conditions are going to be useful for them; and what conditions are going to work? You need the professional members on the tribunal to deal with that.

Also the three tribunals I have referred to are mature bodies in the sense that they are well established. The Guardianship Tribunal began operations in 1989, the Mental Health Tribunal in 1990, the Nurses Tribunal as it then was in 1992, and that compares at Administrative Decisions Tribunal of 1998.

There are a couple of matters I want to raise about the Nursing and Midwifery Tribunal—special issues. It has, as do other tribunals in the health area, an important relationship with the relevant council, with the Nursing and Midwifery Council, in terms of informal advice and assistance to professional standards committees and panels. There was an involvement in past training and since I have put in my submission a request has been received to assist in the development of a new training program for the people who will make up the membership of the panels, committees and professional standards committees.

The Nursing and Midwifery Tribunal is very cheap to run and it should be borne in mind that the health professions pay all the costs of the tribunals, committees and panels. It is not contributed to by Government. From my understanding, after a quick reading of the submissions made to you, there is not a lot of support coming from those health professions that have made submissions to the suggestions that have been made that you are required to look into.

The experience elsewhere, as I mentioned earlier, is re-legalisation when you develop a super tribunal. It has happened in VCAT, I have seen it happening in the West Australian State Administrative Tribunal and it is certainly happening in QCAT in Queensland, and that is contrary to the reasons for the tribunals. Once you have judges they are people who have had a successful career in applying the laws and the processes of the courts and they find it easier to redevelop in that direction. So there is a loss of the differentiations that the tribunal is able to deal with.

There are also diseconomies of large scale that occur in all big bureaucracies, and I submit to you that a change in the health tribunal area and indeed in other tribunal areas will cost more. My understanding is that in this area of the health tribunals the situation ain't broke and, with respect, it doesn't need fixing. Those are my comments and I am very happy to answer any questions that you or your colleagues may have.

CHAIR: You referred to the diverse backgrounds of those who comprise your tribunal. Would not those diverse backgrounds also be suitable for them to be members of a number of different tribunals? You have three on your tribunal, is that correct?

Mr O'NEILL: Four.

CHAIR: What are their backgrounds again?

Mr O'NEILL: Two have to be members of the nursing and midwifery profession, and that is a very broad profession and it is the role of the council to make the appointments of the particular members for each particular case and they are very careful to choose people with appropriate experience for that case. So if it is a mental health issue they tend to have mental health nurses; if it is midwifery obviously they have midwives; if it is a conduct matter, say, involving the area of particular kinds of wards they tend to have people who have got experience in those wards and who understand what the proper standards are and that sort of thing.

CHAIR: And the other two?

Mr O'NEILL: The first one is the presiding member who is either the chairperson or a deputy chairperson of the tribunal and they are appointed by the Government through the process of interview, ministerial recommendation to Cabinet and up to the Governor—

CHAIR: But with diverse expertise?

Mr O'NEILL: They all have to be lawyers with a minimum of seven years experience, but they come from different backgrounds. The current group on my tribunal, all of us have very substantial tribunal experience and one in particular has very considerable experience on health tribunals. The third group who are nominated for each case by the council are a group of lay people—people who are lay to nursing or midwifery—who are on a list provided by the Minister.

CHAIR: So these are people who because of their backgrounds will be suitable for a whole range of tribunals, would they not?

Mr O'NEILL: They could be appointed, yes, of course.

CHAIR: You also spoke about the cost. You said the bigger it is it is going to be more costly. You have made that statement but can you be specific about that? In specific terms how do you arrive at that result?

Mr O'NEILL: I can refer to it specifically in relation to the current health tribunals who use rooms for their hearings that are used for many other purposes by the health councils for their own meetings, for their committee meetings, for their impairment panels, for their professional standards committees, and because the tribunals are occasional, the busiest one that sits in the city is the Nursing and Midwifery Tribunal; the others have a few cases a year and some even go for a whole year or two without a case.

CHAIR: So there is a sharing of premises?

Mr O'NEILL: The sharing of premises, the sharing of all of the computer resources, the sharing of personnel—

CHAIR: But would that not happen where you had a consolidation of tribunals? Would you not also have a sharing of premises and computers and all of these other things that you are referring to?

Mr O'NEILL: Yes, but I doubt whether you would get it as cheaply as at the moment, because you must bear in mind that at the moment the health professionals pay for all of this, not the Government.

CHAIR: It may well be cheaper.

Mr O'NEILL: I doubt it. My experience with government agencies tells me that it would not be cheaper, and that is the reason for making the statement. I do not think that the super tribunals are cheaper in the other States and Territories than the tribunals that they replaced, to be perfectly honest.

CHAIR: Have you done an assessment of that cost?

Mr O'NEILL: Not closely. I was looking at this matter some years ago when I was president of the Guardianship Tribunal because VCAT was developing at that stage. But you cannot compare apples with oranges because there is a different hearing structure in Victoria; they tend to sit single members, which is something that New South Wales has maintained the proper quality on.

CHAIR: You have been able to preside over apples and oranges because you have been the presiding officer of a couple of tribunals with different complexities and so on?

Mr O'NEILL: Yes, but there are some differences. Because the Guardianship Tribunal in New South Wales has a substantial hearing preparation arrangement which does not exist in other States and Territories and is very different from the Nursing and Midwifery Tribunal where people simply come and present their cases, there is no substantial hearing preparation so a small staff only.

The Hon. SCOT MacDONALD: Just for my edification: If there was a consolidation these professional courts—and they are their own professional courts really in some ways, the nurses, the pharmacist and whatnot—they are paying for their own judicial system internally within their own registration, licensing and all that sort of thing, so $50 a year of whatever is grabbed out of the pharmacist's licence is put aside for these potential cases. That would be an issue a consolidation process would have to put its mind to. Am I reading that right? Which professional bodies are we talking about—nurses, pharmacists?

Mr O'NEILL: Yes, doctors, dentists, nurses, midwives, psychologists, podiatrists, physiotherapists. There are 10 at the moment and there is going to be Aboriginal medicine, traditional medicine, Chinese medicine and two others joining next year. The medical tribunal is differently structured because it has a District Court judge sitting, but they provide $600,000-plus a year for that privilege, and I see from their submission that they want to continue that process, the medical council wants to continue that process.

The Hon. SCOT MacDONALD: I suppose it is only a little matter but how is that administrated—that it comes out of the podiatrist's annual licence?

Mr O'NEILL: There is the Health Professions Council Authority, which is paid for by all of the councils out of the fees that are gathered for the registration. So there is a national registration system, and that

pays money to the State for the councils, and the councils pay for the tribunals and the professional standards committees and the impairment panels and the assessment panels.

Mr DAVID SHOEBRIDGE: I assume that the principal concern that you are normally addressing in your tribunal is the protection of the community. Is that probably the primary concern?

Mr O'NEILL: That is the orientation of the legislation and that has been constantly restated in the Court of Appeal and elsewhere, that it is not punitive in nature.

Mr DAVID SHOEBRIDGE: Protective.

Mr O'NEILL: It is protective of the public to ensure that only those who are appropriately qualified and appropriately behaved practice.

Mr DAVID SHOEBRIDGE: But that is the same essential test that you find for psychologists, for dentists, for lawyers, for traditional medicine, pharmacists, physiotherapists—that core issue about protecting the community, protecting consumers is a common theme in all of these jurisdictions, is it not?

Mr O'NEILL: Yes.

Mr DAVID SHOEBRIDGE: Can you not see an argument that where you have got that common thread, that common test, that you have it determined by a common body where you bring in the necessary professional expertise to flesh out the tribunal depending upon the nature of the professional concern before you? There is definitely a common theme there, is there not?

Mr O'NEILL: Certainly, and as the Health Care Complaints Commission submission to you pointed out—and I may have even mentioned it in mine—there are a lot of common appointments. One of the deputy chairs of the Nursing and Midwifery Tribunal is in fact the chair of about five or six of the other tribunals. I am a deputy chair of the Pharmacy Tribunal. So that already exists, it is already in place, and it works informally; it does not have to be formalised. Secondly, and I think it is very important that the councils continue to appoint the professional members and I do not think it matters whether it is the chair of the tribunal or the council who appoints the lay member off the list provided by the member for each particular sitting, but I think it is very important that the council of the profession has the input into who sits on the cases, and they tend to develop. As I mentioned in my opening, there is a training program now being developed to have people who are nurses and midwives as part of their professional training, if they wish to do it, to learn how to become members of panels and eventually tribunals.

Mr DAVID SHOEBRIDGE: One of the concerns that you hear about the multiplicity of small tribunals is that it is next to impossible to have an overview of it and to have a clear statutory oversight of such a multiplicity of small tribunals, particularly some that only sit once every 12 or 24 months. Do you agree that that is a concern when you have that multiplicity of relatively small tribunals?

Mr O'NEILL: No because when it is necessary for one that does not sit very often usually it is chaired by a person who sits regularly enough anyway and the chairperson of such infrequently sitting tribunals tend to sit on other tribunals, so it is not as if you have got an inexperienced chair. You certainly have inexperienced members of the tribunal sitting because they do not sit in relation to other professions, but you do need the professional input to understand what the standards of practice in the profession are.

Mr DAVID SHOEBRIDGE: Can you not see the argument that if the concern is to protect the community that having the core of the tribunal, if I can call them the judicial or presiding members of the tribunal, having some consistency there applying a consistent set of standards in terms of protecting the community across all of these health regulations may provide some greater level of comfort to the broader community if there is a consistent test being applied rather than a series of ad hoc tests in relatively modest tribunals?

Mr O'NEILL: What I have been trying to say is that in reality what you are putting actually occurs.

Mr DAVID SHOEBRIDGE: But not through any design?

Mr O'NEILL: People have been appointed for many years to a number of tribunals. I know of one in particular who has been appointed as chair of a number of tribunals. Those tribunals are busy enough to keep her going, but she is also a deputy on the Nursing and Midwifery Tribunal. As I said, she gets experience that way. I am the deputy on the Pharmacy Tribunal and I have sat on a couple of cases there as well. I was appointed to that tribunal about two years ago.

CHAIR: Are you saying that that is effectively by design?

Mr O'NEILL: In practice it is by design. Both before the national scheme and after the national scheme, tribunals have been cooperating in that regard and the councils—or the boards as they were then called—were happy to have as chairs people who were chairs of other tribunals because they sit only occasionally and there are no problems with clashes.

Mr DAVID SHOEBRIDGE: Some may view that kind of structure where people who are known to an existing tribunal are appointed to another tribunal and through their contacts appointed to yet another tribunal as a clubbish atmosphere involving a small group of people being cross appointed. In some ways that does not provide the kind of open scrutiny that might exist with a standalone tribunal or a broad grant of jurisdiction within an existing tribunal.

Mr O'NEILL: First, the chairs and deputy chairs must be appointed by the Governor, which guarantees the process. It is managed by the Minister responsible for the legislation. In the recent past that has been the Attorney General and different Attorneys General have chosen different pathways. They are responsible for making recommendations to Cabinet and Cabinet makes a recommendation to the Executive Council and the Governor. At the moment all of the health professional tribunals, except the Medical Tribunal, have been the subject of advertisements, to which we have all responded. We will be interviewed and then a recommendation will be made to the Attorney General. He will then consider those recommendations and make his recommendation to Cabinet and on it goes.

That is the process that was always used with the Guardianship Tribunal. I was on the tribunal for 15 years. I was appointed on the recommendation of the late Virginia Chadwick after being interviewed along with other people—it was an open advertisement—and I was appointed as president by Minister Longley and then reappointed by other Ministers. The Guardianship Tribunal always advertised and it followed a process. Recommendations were made to the Minister and passed on to Cabinet. It has been an open process.

Mr DAVID SHOEBRIDGE: But, at the end of the day, given the way you describe the current system consistency can be achieved across these various boards only if the same people are appointed. You are saying that consistency results from having common appointments. Therefore, if that small club of people is broken up the consistency will be broken up.

Mr O'NEILL: I have not been saying that that is the only way to achieve consistency. The people appointed are perfectly capable of reading and understanding the established law and applying it in a consistent way. I am saying that in reality the issue that you are concerned about and the argument for having a single tribunal is not valid because, as the chairman said, the current arrangements ensure that that occurs because of the appointments made across a number of tribunals. The law is fairly clear and as long as you have chairs and deputy chairs who are capable of understanding and applying it we will get the right result. I must say that I am impressed by the quality of my colleagues. The law is applied according to the particular facts of the case. Sometimes what might appear to some people to be marginal differences in fact make a real difference to the nature of the order that is made.

The Hon. SHAOQUETT MOSELMANE: Could the reasons you use to argue your case for the Nursing and Midwifery Tribunal to remain independent—that is, its specialisation, skill and so forth—be applied to the Mental Health Review Tribunal, for example, and other specialised tribunals? Could they not all argue that they should continue to stand alone on that basis?

Mr O'NEILL: I refer to the point I made about the mature organisations that exist. I think Greg James QC would have explained this to the Committee. I did not hear all of his submission. The Mental Health Review Tribunal has a substantial organisation and it operates in particular ways that are different from the way the Guardianship Tribunal operates. It also has a very large organisation and a burgeoning workload. Both tribunals have very large workloads. The workload of the Guardianship Tribunal has increased partly because of the ageing of our community and a regrettable result of ageing is dementia. They are very substantial

organisations in their own right. The Guardianship Tribunal is very busy day in and day out. The Mental Health Review Tribunal runs its processes in a different range of ways because it must go to mental health facilities et cetera.

However, they have two very different ways of doing their business. That is the point I am trying to make about why tribunals were developed separately and why it makes sense for them to operate separately. If you put them together, you run the risk not only of losing the differentiation but also of creating large-scale inefficiencies. There would be an inability to appreciate the importance of the differences that often mean very different hearing structures are required. The hearing rooms used by health tribunals are very different in shape from those used by the Guardianship Tribunal, which uses a table. Health tribunals are rather more court-like in structure, although we do not have elevated benches and that sort of thing.

The Hon. SHAOQUETT MOSELMANE: His Honour Greg James made the point strongly that the Guardianship Tribunal and the Mental Health Review Tribunal are different institutions. Do you agree with him—

Mr O'NEILL: Yes.

The Hon. SHAOQUETT MOSELMANE: —that effectively these types of tribunals cannot be amalgamated with any other tribunals? Are you saying that they must stand alone?

Mr O'NEILL: I cannot say that they cannot be amalgamated because you will immediately point to the other States. Mental health has tended to stand out. I submit to the Committee that it would unwise and unnecessary in New South Wales given that this is the largest jurisdiction, partly because of the population, to amalgamate them because they are working very well separately and there are very big risks. A report produced by a former president of the Victorian Civil and Administrative Tribunal gives some hints about substantial concerns with regard to that issue. I agree with him [Mr Greg James QC] that they should remain alone and it would be unwise to amalgamate them now.

The Hon. SHAOQUETT MOSELMANE: Would those issues override the reduction in costs, improved efficiency and so forth that would result if they were amalgamated?

Mr O'NEILL: I would like to see the evidence of the efficiencies. I am not aware of any being put to the Committee. I have not read every submission, but I have not seen any material that demonstrates those efficiencies.

Mr DAVID SHOEBRIDGE: One potential advantage suggested in some submissions relates to a broader tribunal structure providing greater reach with hearing facilities and registries. If the Consumer, Trader and Tenancy Tribunal, for example, were part of a larger structure it could have registries and hearing rooms as far away as Tamworth and multiple facilities in Sydney. It would provide a greater geographical reach for a tribunal and it could get to where it was needed. Do you see any benefits in that regard?

Mr O'NEILL: In terms of which tribunal?

Mr DAVID SHOEBRIDGE: The Nursing and Midwifery Tribunal.

The Hon. SCOT MacDONALD: And others.

Mr DAVID SHOEBRIDGE: I am not limiting it to that tribunal.

Mr O'NEILL: I am not pretending to speak for the other health tribunals, and that is the reason I am being careful. The Guardianship Tribunal already has a very successful process. Of course, it does not like using court premises in particular because of privacy issues in country towns. A person with dementia might be observed going to court and questions could be asked. People might see them and wonder what is going. There is a tendency to use different locations so that it is not a court-like environment.

Mr DAVID SHOEBRIDGE: Such as tribunal hearing rooms rather than the courts?

Mr O'NEILL: Yes, but they could just as easily make arrangements to use them when they are not being used by other tribunals.

CHAIR: Where are your registry facilities?

Mr O'NEILL: I was just getting to that. We have not found it very difficult to conduct most of our hearings in Sydney. We are very happy to take evidence over the telephone from witnesses. However, when a large number of witnesses from one country town are required to appear in person for cross-examination we have a policy of going to that location. We do not want the hospital to be affected because people have to fly to Sydney. We are very careful about the impact on health services. We do not do it often, but we have done it. I have been involved in trips to Tweed Heads and somewhere else on the North Coast when a number of people had to be called for cross-examination. Normally hearings can be conducted in a way that is very fair to the nurse whose career is on the line by cross-examining people on the telephone.

CHAIR: Where is your registry?

Mr O'NEILL: It is in the Health Professional Councils Authority. Some of the staff of that authority carry out the registry job.

CHAIR: Is it a registry for other tribunals?

Mr O'NEILL: No.

CHAIR: Is there any reason that it could not be a registry for other tribunals?

Mr O'NEILL: No. What I have been trying to get across is the idea—and I think it is made fairly clear in the Health Professional Councils Authority submission—that the staff of that organisation are deployed on an as-needed basis to do the various jobs and the tribunal is, in a sense, a small addition to that. That is the way the rooms are used as well. We have rooms that are satisfactory and with the proposed renovation they will be more suited to the process of hearings. The rooms will be satisfactory for the conduct of Health Professional Councils and in particular the four that are coming on shortly. As I said earlier, there is a lot of mixed use. The rooms that are designed for use by the tribunal are available for others when tribunals are not using them. Tribunals do not sit every day because they are not that busy.

CHAIR: Thank you Mr O'Neill, your input is valuable to us in our deliberations. There may be some additional questions that may be sent to you and we would appreciate a response to those, if indeed there are any, by 14 January.

Mr O'NEILL: Thank you for the opportunity to speak to you.

(The witness withdrew)

(The Committee adjourned at 5.03 p.m.)