REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NEW SOUTH WALES

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Thursday 15 December 2011

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The Committee met at 9.00 a.m.

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PRESENT

The Hon. D. Clarke (Chair)
The Hon. P. Primrose (Deputy-Chair)
The Hon. S. MacDonald
The Hon. S. Mitchell
The Hon. S. Moselmane
Mr D. Shoebridge
The Hon. S. Cotsis (*participating member*)

CHAIR: I would like to welcome you to the first public hearing of the Standing Committee on Law and Justice, inquiry into opportunities to consolidate tribunals in New South Wales. There are a number of separate tribunals in New South Wales which exercise decision making, arbitral or similar functions in relation to employment, consumer health, guardianship and remuneration matters. In this inquiry the Committee will consider what opportunities are available to rationalise these various tribunals in order to ensure access to justice for the people of New South Wales and increase overall efficiency and effectiveness of these tribunals. Today we will be hearing from witnesses from a number of these tribunals including the Consumer, Trader and Tenancy Tribunal, the Administrative Decisions Tribunal and the Worker's Compensation Commission. We will hear from representatives of people that utilise the current tribunal system including Unions NSW, Council of Social Service of New South Wales, Housing NSW, the Tenants Union and Affiliated Residential Park Residents Association and Retirement Village Residents Association. The Committee will be holding a second public hearing tomorrow to hear from more stakeholders in this inquiry.

Before we commence I would like to make some comments about some procedural matters that we need to follow. First of all, with regard to broadcasting guidelines: The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing broadcast of the proceedings are available from the table by the door. In accordance with the guidelines a member of the Committee and witnesses may be filmed or recorded. However, people in the public gallery should not be the primary focus of any filming or photographs. In reporting the proceedings of this Committee the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee. Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks who are here.

The Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to Committee witnesses under parliamentary privilege should not be abused during these hearings. I therefore request that witnesses avoid the mention of other individuals unless it is absolutely essential to address the terms of reference. With regard to mobile phones I ask everybody to turn their mobile phones off for the duration of the hearing or put them on silent because they will interfere with *Hansard*'s recording of the proceedings.

MARK FRANCIS MOREY, Deputy Assistant Secretary, Unions NSW, and

ALISHA WILDE, Senior Industrial Officer, Unions NSW, affirmed and examined:

DENNIS RAVLICH, Executive Director, Australian Salaried Medical Officers' Federation,

ANDREW LILLICRAP, Industrial Services Manager, Health Services Unions East, and

GREG THOMAS CHILVERS, Director of Research, New South Wales Police Association, sworn and examined:

CHAIR: I welcome our first witnesses here today. Has Mr Mark Lennon arrived yet?

Mr MOREY: No.

CHAIR: He has a problem with the traffic but he should be here soon. If you consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee please indicate that fact and the Committee will consider that request. If you do take any questions on notice the Committee would appreciate if the response to those questions could be forwarded to the Committee by 14 January 2012. Would any of you like to start by making a short opening statement?

Mr MOREY: Thank you for allowing us to give evidence today. Our submission is a combination of discussions with a number of unions. I know that a number of unions have also put submissions in. Those unions have also been in discussions with us in the formation of the submission we have put in. The main points we want to make in relation to our submission is we still believe there is a significant jurisdiction in New South Wales for employment law. Certainly the jurisdiction covers a substantial number of employees within the State of New South Wales. It maintains a very important role. Secondly, we understand that as a result of this inquiry there will probably be some amalgamations of committees. Our preference is for the Industrial Relations Commission not to be subsumed into another body but for other bodies to be subsumed into it, so it maintains its jurisdiction and the functions it provides as an employment law tribunal. I think that is important.

The other thing that is important about the commission is its ability to interact with the fair work system or national system, certainly in regional and rural areas and areas concerning section 146B in dispute resolution. As we have put in our submission, Newcastle is a good example of where the State commission interacts with the Federal jurisdiction to provide dispute resolution speedily and also covers off where Fair Work Australia does not have an emphasis on regional and rural areas. Finally, the importance we place on maintaining the system of dual appointments and having judges within the body that operate with the Industrial Relations Commission and the supreme court and the dual appointment functions between the State commission and Fair Work Australia which is effective and needs to be continued. That is a summation of the major points we want to focus on.

CHAIR: Does anybody else want to make an opening statement? I will start with the first question. Your submission on page four expresses the firm view that there should be no dilution of the role of the Industrial Relations Commission. You have touched on that in your opening comments. Could you expand on why you have come to that opinion because it is central to your submission?

Mr MOREY: It fundamentally comes down to the fact there are a significant amount of people who are covered by the State jurisdiction in New South Wales. We believe that it is important to have an independent body with judicial powers to make rulings on employment law. A tribunal, or something lesser than that, tends to drift off and move away from precedent, consistency and being able, we would say, to effectively resolve employment disputes—especially large disputes. The commission has a history of effectively dealing with disputes be they individual grievances or with a group of workers. I think the conciliation functions that the commission has undertaken over the years have been a very effective way of doing things. That sits in the context of having a judicial body that is recognised as independent, it is effective and people adhere to the decisions that it makes. Our concern is if there is any movement away from the position which the commission holds it will undermine the whole process of employment law in New South Wales for those people who are

covered by it and it will undermine the effectiveness of being able to deal with those people and organisations covered by that body.

CHAIR: Would it follow from that you are not opposed to the consolidation of tribunals but you seek that to be done under the umbrella of the Industrial Relations Commission?

Mr MOREY: That is correct, Chair. When talking to the commission there is a very rational reason for amalgamating a number of different tribunals into that body. Our focus is having it amalgamated into the commission. It enables the commission to become a central point of employment law for medical, disciplinary, certification of different people, those sorts of things. Unions NSW see that as expanding its ability to deal with employment law situations and we think that is a good thing. The other thing that is important to say about the commission is it has a body of experience and knowledge in dealing with specific issues—and the police union can talk about that—specific matters of employment law that have been built up over a long period of time. There is an understanding of precedence and consistency and maintaining that expertise in the commission is important but it would also enable that expertise to be brought to other tribunals and bring some more legal rigor to the way in which those tribunals are administered and the decisions made.

A quick example: When the Transport Appeals Board was brought into the commission that was seen as a good thing. The Transport Appeals Board previously was a board that sat off to the side and dealt with promotional and disciplinary issues. There was a series of concerns that a number of the unions that were involved who dealt with that body had problems with the consistency of decisions. The decisions did not follow precedent and they were not logical in the way in which they were applied. The benefit we see in the commission remaining and having other bodies brought into it is it brings legal rigor, consistency and a body of expertise to these matters.

The Hon. PETER PRIMROSE: I would like to take up the point on page 18 of your submission regarding options two and three in the Government's issues papers. You state: If either of those options were implemented this could result in an incompatibility between the New South Wales system and Fair Work Australia. I was wondering if you could expand on those concerns relating to options two and three?

Mr MOREY: The main point we were making there is that Fair Work Australia, in itself, does not have a focus in relation to regional and rural areas. There is nothing stopping it doing that but there is no clear statement of intent that it operate in regional and rural areas, whereas the commission currently has a emphasis to provide those services across the State. As the Newcastle example shows it has been an effective body in delivering that as a State body with dual appointments to Fair Work Australia. I think that legally changing the focus of the commission would jeopardise the ability to maintain those dual appointments and it would undermine the ability to possibly have those services in regional and rural areas. One of the strengths of the commission is the ability of it to provide arbitration and conciliation services in regional and rural New South Wales and certainly in Newcastle and Wollongong where there is significant development going on and a significant need for maintaining a constructive industrial environment. Our concern is that if there is a diminution of the powers of the commission the ability to have those services provided may be undermined.

The Hon. SCOT MacDONALD: Just for my understanding, is that work you are talking about there a delegated authority that Fair Work Australia hands down to the New South Wales Industrial Relations Commission? Is there a chain of authority there at the moment?

Ms WILDE: The Federal Act and the regulations include the Industrial Relations Commission as an eligible tribunal for the purposes of dealing with Federal industrial relations matters. In any tribunal that is put in place following this inquiry it would be very important for that continuity to occur. By it being an eligible tribunal we also have dual appointment by many members of the commission to Fair Work Australia, which enables them to hear matters, and particularly, as Mr Morey has already stated, regional areas are very key under that arrangement.

The Hon. SCOT MacDONALD: So it needs to be an eligible tribunal?

Ms WILDE: Yes. The current Federal system makes reference to the tribunal being an eligible tribunal and any change in name of the tribunal would need to be taken up and also included to be an eligible tribunal.

The Hon. PETER PRIMROSE: May I also just clarify, because I am not clear either, are there any dealings that the commission has in regional areas that are not delegated? I am thinking about possibly local government employees.

Mr MOREY: Local government is still a jurisdiction that is dealt with through the commission and the commission plays a significant role in exercising employment law for local councils across the State. In regards to the previous question, 146B, which was an amendment made to the Act I think two or so years ago, enabled it to be inserted into Federal enterprise agreements in their dispute resolution clauses. So that it is a body that can be selected by the parties to resolve disputes rather than having to go to Fair Work Australia. There is an ability under the Federal Act to appoint your own arbiter in a dispute, and certainly in most of the large construction projects in the Hunter region they have a dispute settlement procedure that has the State commission as the final arbiter on any disputes.

CHAIR: I notice Mr Lennon has just arrived. We understand you were held up in a traffic jam. We will take this opportunity to swear you in.

MARK LENNON, Secretary, Unions NSW, sworn and examined:

The Hon. SHAOQUETT MOSELMANE: You say on page three that you have supported the Industrial Relations Commission of New South Wales because it has been independent and fair. Do you feel that the consolidation of that sort of tribunal will mean that it will lose that independence and fairness and, if so, can you cite some examples?

Mr MOREY: I think there is a concern if you remove the current powers the commission operates under. I do not think people appointed to a tribunal subsequent to that would necessarily not be independent or not try to be independent. I think our concern is that the structure that is currently in place, the appointment of judges and commissioners in there and having a legal structure in there facilitates the need to adhere to certain procedures in the way in which evidence is given and the way in which matters are dealt with. The example I cited before, the Transport Appeals Board, from personal experience I know you could go there one day with a certain dispute or an employment problem for a person being dismissed and you would get one decision and you could take the same matter back or a similar matter back three weeks later and you would get a completely different decision.

The emphasis we have is that the experience, the judicial setting and the structure of the commission as such lends itself to ensuring there is consistency of decisions. It relies on a body of law and a body of precedence and if you take that away from it it simply becomes a tribunal and becomes far more arbitrary in the way in which it makes decisions and we think that in the decisions it makes there is room for inconsistency in the way people are dealt with, both on a legal aspect and in a natural justice sense as well.

Mr LILLICRAP: If I may add to that? To give you a very real example of the authority of the commission and how important that is in industrial relations, two weeks ago a group of cleaners at Westmead Hospital had a dispute with their management over staffing. There had been a number of vacant positions for a long time and those positions had remained unresolved; the workload had fallen back on the remaining employees, some tasks did not get done and corners were cut as part of a system of trying to cope with that staff shortage. About 20 per cent of the overall cleaning services workforce were positions that were unfilled—it was quite substantial; it was not just a few.

As a result of that dispute continuing for some time the frustrations built up and industrial action was taken. That involved a vote for a 24-hour strike, and that obviously caused considerable inconvenience both to the hospital itself and the areas not being cleaned during that time, and also to our members who took the industrial action and lost wages over it. The management of the local health district put the matter immediately into the Industrial Relations Commission and that matter was quickly heard and conciliated before Justice Boland. His authority and the authority of the commission were brought to bear on that dispute on all parties. The management agreed to fill a number of positions immediately, with an intention and plan to come back and fill subsequent positions over a period of time. It obviously takes a few months to fill these sorts of jobs and recruit people to them. So that was a positive on that side: that management was prepared to shift ground and fill those positions or at least some of them at this stage.

But the authority came to bear on us as the union. It meant that the recommendation to lift the industrial action was taken very seriously by us and his Honour brought his authority to bear and also the authority of the commission and we took that back to our members and our members lifted that industrial action. So the industrial action was cut significantly short by the authority of the commission—that was just in conciliation. People returned to work later that evening in the five o'clock shift and then later in the 10 o'clock shift. So a 24-hour strike turned into probably a 10- or 12-hour strike, maybe 13 or 14 hours, something like that, all up—considerably shorter than it otherwise would have been. That is the power of the commission; that is the power of its authority in bringing itself to bear on all parties.

The Hon. SHAOQUETT MOSELMANE: On page nine and page 20 of your submission you refer to chapter 6. I know that the Transport Workers Union is also concerned about the issues relating to chapter 6. You refer to chapter 6 of the Industrial Relations Act with regard to injured employees, et cetera. Can you expand on that and how you see consolidation would have an impact on matters under chapter 6?

Mr MOREY: It is a specific area of expertise and, as you say, the Transport Workers Union will provide evidence about it today. I think it is just another example where the commission fills a significant void in dealing with employment law and employment matters specifically for contractors. I do not profess to have any great expertise in the area so I would defer to the Transport Workers Union on it, but it is the ability of the commission, as Mr Lillicrap said, to bring its powers and expertise in a key area for a group of employees who are, for other purposes, fairly powerless in a system, and it provides a skilled negotiation process or arbitrary process to deliver outcomes that are fair for both them and their employees. I think this is another example of dealing with people in the Police Force and those sorts of areas where the commission has long-term experience and expertise in a key area and is able to facilitate the resolution of disputes quickly and consistently because of its power, its status and its ability and expertise to deal with those issues.

The Hon. SHAOQUETT MOSELMANE: In your submission you are strongly in favour of option one. It is curious that the next witness is His Honour Judge Kevin O'Connor, President of the Administrative Decisions Tribunal. He believes that option one is the least attractive of the various options. He says that option three "is the option that I think delivers the most benefit for the people of New South Wales". It is in complete contrast with your position. Can you comment on this divergence of view between your position and that of the President of the Administrative Decisions Tribunal?

Mr RAVLICH: In some respects it reflects the vested interests each of the parties are bringing before the inquiry. But it is important to note that even in the issues paper, and a number of other submissions made to the inquiry make this point, that in a number of the other States where there has been the creation of these so-called super tribunals, none have included the facility or the scope of jurisdiction that the Industrial Relations Commission currently has in New South Wales. For example, in Victoria, which is cited in the issues paper, that industrial relations capacity is undertaken by Fair Work Australia, and in Queensland and Western Australia, where similar inquiries and progress towards consolidation of tribunals occurred, it has always been recognised that the speciality area of employment law is such that it requires a singular institution to undertake it, that part of the gravitas of the decision-making that others have spoken about draws upon that history and the ability to intervene, and a premium must be put on the capacity of that tribunal and that court in its current setting to resolve and prevent matters from proceeding on to arbitral hearings and a legalistic approach to resolution.

The vast majority of matters, as demonstrated by my colleague Mr Lillicrap, can be resolved without recourse to a legal course of action and it allows a seamless continuation of activities in the workplace which has drawn upon the over 100 years of history that that institution brings. We are not opposed to that institution, and clearly over the last number of years that institution has continually absorbed activities; a number of the judicial members now hold dual appointments in relation to the Medical Tribunal, for example, and they have effectively assumed and evolved into a greater scope of activities. Option one lends itself to expanding a measured increase in its activities to become a more comprehensive employment tribunal for the New South Wales community. Whether there are other benefits in consolidating some of the other tribunals outside of employment law I will leave to others to consider.

It is often said that industrial law is not rocket science. I agree because often it is more complicated than that. It relies on a set of historical precedents, customs, practice and employment law that require the expertise of people who have been dealing with particular industries. The fact that the number of operators or businesses seeking recourse to Fair Work Australia have increasingly over the past 12 months exercised the option to rely on the New South Wales Industrial Relations Commission of itself is a vote of confidence in what the commission offers over and above what Fair Work Australia may be able to offer.

Mr CHILVERS: This is a very significant area for the Police Association. Those of us who have been around long enough, and I have, know that section 181B was introduced during the royal commission and when Peter Ryan was the Police Commissioner. It effectively gave the commissioner the power to remove police officers if he no longer had confidence in them. The appeal right at that time was based on administrative law principles. It simply did not work and it was inappropriate. We fought it vigorously and eventually convinced the Government to overturn it. We now have section 181D, which gives us appeal rights before the Industrial Relations Commission, and it works very satisfactorily.

Prior to the commission, among the bodies that had oversight of police were the Independent Commission Against Corruption and the Ombudsman, who still has oversight of minor issues. We had a special tribunal for police recognising the unique nature of policing. The Police Tribunal of New South Wales comprised District Court judges and there were appeal rights on severity to, bizarrely, the then Government and Related Employees Appeals Tribunal. Justice Wood was extremely critical of the fact that because of its generalist jurisdiction the Independent Commission Against Corruption had no understanding of or ability to deal with the matters that were unique to policing. It is a unique jurisdiction and it requires significant expertise. It is recognised not only by the Federal Government but also by governments around the world and even the United Nations through the International Labour Organisation.

Policing is unique and it requires specific expertise. We feel that that resides in the Industrial Relations Commission. We are not talking about administrative decisions; these are very complex decisions being made in a complex area of law that relate to the fundamental employment relationship as well as the police, who have limited access to industrial action. It is a significant jurisdiction and we would be very disturbed if it were somehow watered down and if that expertise were to disappear into a general administrative tribunal.

Mr MOREY: It is not that we are opposed to option three as a concept, which involves putting a series of tribunals with the commission. Our concern relates to expertise and the ability of that organisation to deal with a range of issues. We are not saying it has to be confined to employment law, but it must focus on employment law and have the ability to deal with it. It is the public policy issue of how we move forward and combine different tribunals into one without undermining the ability of the commission to deliver employment services. For example, it concerns us that one minute it would be dealing with employment law and then a mental health issue and then another issue.

In a public policy sense, it would undermine the effectiveness of a range of tribunals. It would make sense if like tribunals are put together in a constructive way that empowered them to get better at what they are doing. On the other hand, if it were simply a dumping ground for tribunals it would undermine their effectiveness. We are not opposed to the amalgamation of tribunals, our concern relates to the way it is done and the range of tribunals that are combined. We must ensure that they are effective and do not undermine each other and their ability to make good decisions.

Mr DAVID SHOEBRIDGE: If we are talking about a consolidated employment tribunal based on the bones of the Industrial Relations Commission, which I think is the position you are putting, what jurisdictions would we look at including? You tentatively mention discrimination matters. I am not sure about your position in terms of workers compensation matters and I have not seen anything about other more general employment contract matters. What are you thinking would be the scope of this employment tribunal?

Mr MOREY: Our position is that it should be as broad as possible, so it should include workers compensation matters. We are somewhat constrained because we have a range of affiliates that have different positions. Our submission is based on the consensus of the affiliates. From a union perspective, it needs to be as broad as possible. As I said, the commission's expertise would assist in other areas associated with employment law, and certainly with regard to bodies with accreditation and disciplinary issues. One of the concerns that we grappled with in developing our submission was that the discussion paper did not have any detail about how the different options would operate. We took a more minimalist approach because we were not clear about what a number of the options actually meant.

Mr RAVLICH: Option one certainly contemplates and some of the submissions to the inquiry make the point that more than 50 per cent of the matters that the Anti-discrimination Board deals with relate to incidents in the workplace or arise out of the workplace or employment relationship. That system also relies on a process of conciliation or mediation being undertaken prior to proceeding to a more legalistic determination of the matters. That is manifestly appropriate and it could sit very comfortably with the current role, function and

capacity of the commission. It has been pointed out that the undertaking of conciliation or mediation by judicial members often adds a degree of gravitas to the process. Other union submissions point out the scope for expanded roles in contract law and others have referred to the recovery of moneys. We have not particularly embraced that the Workers Compensation Commission should be trifled with, and the Committee will be hearing from the commission later today. It has a unique set of circumstances and funding arrangements that might create difficulties in that regard.

Mr DAVID SHOEBRIDGE: If those funding arrangements could be overcome, do you see some rationale for having one tribunal to deal with all of those employment-related matters given that often they are all tied up in the one dispute? It might be a termination, a workers compensation matter and a discrimination claim with a common substratum of facts, and having it dealt with by the one tribunal may create some efficiencies.

Mr MOREY: There is a logic in that approach. Given the different areas in which our officers operate, the matters go all over the place—they involve the Workers Compensation Commission, the District Court and the Industrial Relations Commission.

Mr DAVID SHOEBRIDGE: I know it is not your primary submission that there be a consolidated tribunal that picks up the administrative jurisdiction of the Industrial Relations Commission. However, if the Committee decided to pursue a broadscale administrative tribunal, what would you see happening to the judicial powers that currently reside in the Industrial Relations Commission? I am not asking you to bet against yourself.

Mr MOREY: That is the point I made about the construction of a commission or tribunal. Our fundamental position is that however it is structured it must be a judicial arm that deals specifically with employment law simply because of the number of people currently covered by the State commission. Having said that, we are not opposed to having other aspects of administrative law brought into it. Our concern is the diminution of the power of the commission to deal effectively with employment law. Not wanting to bet against ourselves, that is our fundamental position, our bailiwick and our concern. We understand that there will be some amalgamation, but we are concerned that it not go down to the lowest level. Rather, it should bring other tribunals up to the level at which the commission now operates. The way it is constructed and what is included is a public policy issue. That is our concern: We do not want to see an effective organisation dealing with employment law being undermined.

Mr DAVID SHOEBRIDGE: It is not in the Committee's terms of reference to remove any powers; we are simply looking at where powers should reside. If administrative powers were removed from the Industrial Relations Commission, where would the judicial powers properly reside? Would they reside in the judicial arm of an administrative tribunal or somewhere else?

Ms WILDE: It depends on the final structure. It should be noted that the judicial arm of the Industrial Relations Commission has the same standing as the Supreme Court of New South Wales. I would not like to see any reduction in the status of the court or the importance of the work it does. However, I think it is fair to say that the Industrial Relations Commission has worked very well with both a judicial arm and an arbitration arm. We would not like to see any of that removed either. Perhaps we can take that question on notice and discuss with affiliates the final outcome should there be any kind of consolidation with an administrative tribunal. However, I would suggest that we would not like to see any judicial arm removed. It should be remembered that the judges of the Industrial Court still have the status of judges of the Supreme Court of New South Wales and we would not like to see that removed.

Mr DAVID SHOEBRIDGE: The answer may well be that these judicial powers do not fit neatly with any other body. The key part of your submission is that they should remain in a standalone judicial arm of an industrial tribunal, and that may be the final position.

Mr RAVLICH: Some of the submissions from those representing the legal interests in this matter have identified the issues. I do not purport to be an expert in some of these detailed legal matters. They have identified that as a consequence of that and placing the court in another jurisdictional setting you may introduce barriers to the community in accessing the current scope of resolution. I know that that has caused them some concern and no doubt they will elaborate on that in their evidence.

The Hon. SCOT MacDONALD: I think you have talked about what I was going to raise; that is, the authority of the body and the central premise of its equity with the Supreme Court. It appears very important to

you that the authority of the Industrial Relations Commission be retained along with its expertise. My understanding of your evidence is that that is the central challenge.

Mr MOREY: That is fundamentally it. It has judicial powers assigned to it, but in its conciliation role it also has the ability to address disputes because it has that authority. As Mr Lillicrap said, it can bring pressure to bear on both parties to get a quick resolution of disputes and issues. It is that power and authority that enables the commission to play that role and to resolve disputes quickly equitably for the parties involved.

The Hon. SCOT MacDONALD: My final question is to the NSW Police Association. Am I correct in saying you really do not see your needs being absorbed into a centralised tribunal—you think you have to stand outside?

Mr CHILVERS: No, I think we need to have a tribunal that maintains a specific expertise in policing as the current Industrial Relations Commission and some of their judicial and non-judicial members have. A good example of this is when the Workers Compensation Court was abolished. There are a number of matters still in residual jurisdiction for some of our older police officers and they clearly have been moved to the District Court, but they are heard by only a very small number of judges who have developed an expertise from their time in the Workers Compensation Court. I am getting a bit concerned about them all approaching retirement age.

Mr DAVID SHOEBRIDGE: Most of the police are getting to retirement age at the same time.

Mr CHILVERS: Yes. That is right.

The Hon. SARAH MITCHELL: What is your view on how other State jurisdictions have handled consolidation of tribunals and are there any lessons we could learn in New South Wales from other experiences?

Mr CHILVERS: Certainly in terms of the police, with the exception of Victoria in particular which has tried that approach, all other jurisdictions have maintained specific police focus tribunals to deal with police disciplinary matters and more often than not workers compensation and industrial matters generally or they have part of the appropriate industrial relations commission similar to what we have with the expertise developed in the area.

Mr MOREY: Our understanding is that Queensland has amalgamated a number of tribunals but the industrial function still sits outside that amalgamation. Obviously that would be our preferred position on any sort of amalgamation process. However, as I said, if there is to be an amalgamation, it is very important from our position that tribunals are brought into the commission rather than the commission being put in with other tribunals. That is the emphasis we are very much looking at.

Mr LENNON: Firstly, my apologies to all members of the Committee for being late. As you can see my colleagues are making the submissions, but I wanted to attend. I fully support the submissions made by my colleagues. I will touch on chapter 6 and answer the question from the Hon. Shaoquett Moselmane. The issue with chapter 6 is that it is quite clearly unique and I think it has set a precedent around the country. We now have very unclear lines of employment relationships between what is an employee and what is an independent contractor, particularly in the truck industry; that has been a problem for some years.

Chapter 6 has gone a long way in New South Wales to solve some of the problems around the nature of that employment relationship by setting some minimum conditions in that industry, which has not only benefited the workers but benefited the community by having safer trucking practices and things of that nature. The strength of that section has been recognised by the fact it has had bipartisan support. Going back to the days of the Howard Government's Work Choices legislation they agreed that chapter 6 should remain as a section of the New South Wales legislation because of the effect it had in bringing better conditions and safety to the industry. I would like to place that on record. Again, my apologies for my tardiness in appearance.

CHAIR: Thank you. Unfortunately we have run out of time. Your views are very important to this Committee. There are a number of questions we did not ask and we will send them to you. We would be grateful for your response by 14 January, if possible.

Mr MOREY: We undertake to do that for you.

(The witnesses withdrew)

KEVIN PATRICK O'CONNOR, Judge and President, Administrative Decisions Tribunal, sworn and examined, and

NANCY LOUISE HENNESSY, Magistrate and Deputy President, Administrative Decisions Tribunal, affirmed and examined:

CHAIR: Welcome to the hearing. Would either of you like to make an opening statement?

His Honour Judge O'CONNOR: I will make a short opening statement. Obviously I have written a long submission and attached some papers on the subject. I take you to paragraphs 85 and 86 of my submission. As you know, I am strongly of the view that whatever happens front of house in terms of particular tribunals being amalgamated there should be a common back-of-house service for New South Wales, as is seen in the United Kingdom tribunals service. As we have just heard in a sense through the unions, every tribunal can make a claim that it has something distinctive to offer, some need for special and separate procedures, and some need therefore to be left separate. The real challenge is to work out how there can be broad-based integration of services and resources while identifying and retaining the distinctive characteristics of the incoming tribunals so as to benefit the public. I really think that is the core of this exercise.

One of my senior members was in Victoria in the 1990s within a predecessor structure to the Victorian Civil and Administrative Tribunal [VCAT], and he had a number of observations, which I have a note of here, about the need for a careful planning and implementation process around issues of this kind. Just listening to the last submissions, what strikes you about the submissions as a whole, which I have read, is their insularity. It is as if nothing else has happened in Australia, and there are obviously relevant comparisons to be made in respect of the arrangements in New South Wales. I would have thought the VCAT, Western Australian State Administrative Tribunal and Queensland Civil and Administrative Tribunal structures were all established in a manner that meets most of the concerns that were expressed by the last group of witnesses, and that you will hear expressed over the next two days. I encourage you to bring a national or comparative perspective to what you are doing.

In response to what has just been said, obviously there is a special issue about systemic industrial disputes. That has not traditionally been the work of merits review tribunals. Industrial action leading to strikes and awards affecting entire workforces are matters of a fairly different character; I would concede that. But in Victoria the Police, for example, are simply regulated within the Fair Work Australia structure. It is not as if there is anything essentially different about a remnant State jurisdiction for that purpose. Again, I encourage you to look comparatively at these issues and not simply respond to a series of submissions, many of which are just retain status quo submissions. It is clear from the Government initiative that the Government at least is actively considering changes in this issue. That is a long opening submission.

CHAIR: Thank you. What do you consider to be the overarching principles that should underpin the Committee's consideration of its terms of reference?

His Honour Judge O'CONNOR: It is really the language of the English report of 2001; that is tribunals for users, one system, one service. It is about what is best for the community as a whole. I have been guarded in some of my comments about what might be called the degree of tribunal integration but it seems to me that at least you could get to the point of a common service system and a substantial degree of integration of tribunals. Another principle I have been putting forward, because of the historic circumstances in New South Wales, is to look at the subject in terms of clusters and to see if you can group like types of legal disputes and legal concerns and then work from there to an integrated structure. I also think, as you can see from the paper, that there are objectives to be obtained in terms of the professional quality of the work of tribunals and of tribunal members if you have stronger consolidated business structures in which you can tap their talents across a range of areas of law. I believe the interstate structures demonstrate these points.

The Hon. PETER PRIMROSE: I refer to page 15 of your submission, particularly section 100, which refers to the portfolio responsibility for a new integrated tribunal and warns that the history and culture of the Attorney General's department is as a "court services" department, and that there are different demands for running tribunals. Can you elaborate on that?

His Honour Judge O'CONNOR: I have had a few direct personal experiences of this lately in a relocation. It goes to the point that the service culture in a tribunal is generally one that seeks to respond in a relatively low key and informal way to many of the people who arrive before you with disputes. In consumer tribunal, which I headed at one time, you usually have a builder with little familiarity with the legal environment having an argument with a customer about a kitchen or a bathroom. In that environment neither of them have lawyers and you are trying to promote an atmosphere of informality. You are trying to have hearing room architecture that promotes that style of interaction, as you have here, but which we did not have in our latest fit-out until I asked for it to be re-done. You are looking at values that I would largely call values of accessibility that are not an orthodox part of courtroom thinking and frameworks because the most important function of the court system is obviously the conduct of criminal proceedings and criminal trials, and it may well be that that justifies a more secure, authoritarian style of structure. I am not arguing with that but I think the department historically has been about rolling out criminal courts, to a large extent, and interacting with Corrections and all that kind of thing. Tribunals really go about their business in quite a different way. I am keen to see the positive aspects of accessibility of a tribunal maintained. Similarly, one needs a system of management of cases which addresses that phenomenon and also takes heed of the fact that tribunals generally do not have the support services that you see in courts. So it is much more of a self-help environment for the members, as well as for the users. I would like to see those perspectives honoured in any portfolio arrangements for the future.

The Hon. SHAOQUETT MOSELMANE: My question relates to the matter at page two, in which you say, "I think that the case for merger outweighs the case for maintaining stand-alone specialist tribunals." In many of the submissions we have received, there is a significant fear that the authority of these tribunals and the skills and know-how would be diluted as a result of the consolidation that we are seeking to examine. Is that fear genuine, in your view?

His Honour Judge O'CONNOR: Did you say "genuine"?

The Hon. SHAOQUETT MOSELMANE: Is it justified?

His Honour Judge O'CONNOR: I think it is a genuine fear but I think, on balance, it is not justified. It is a real issue, however, that the specialist features of particular jurisdictions may be washed away. Therefore, one of the great objectives that must be met by the leadership group is to maintain appropriate diversity and appropriately diverse business styles. I believe you are going to visit Victoria and you may be going elsewhere but you will see in the Victorian tribunal significant diversity of business styles. I think there are 17 lists and there are probably 17 sets of procedures at the specialist level. So there is a mix of a common template, to the extent that that is appropriate, supported by specialist templates. And obviously, you have to be very mindful of having as Heads of your lists or divisions, people of standing and ability with the relevant specialist expertise. A supertribunal is a federated structure and the ultimate example is the English structure, which is massive. That is something you need to guard against—the loss of those specialist features. I am conscious that the Guardianship Tribunal in New South Wales, for example, has a specialist way of doing business. They are in the Attorney General's portfolio. I would not want to see their specialist characteristics lost.

The Hon. SHAOQUETT MOSELMANE: On page two you also raise the issue of independence from government in the performance of the judicial function. Do you fear that, in consolidation, there is potential for government to assert control and the independence of the Judiciary may be compromised?

His Honour Judge O'CONNOR: I think consolidation assists in relation to independence because you get a much bigger pyramid, a much bigger administrative entity to deal with, if you are seeking to bring inappropriate political pressure to bear. I think the scale of the organisation reduces in some ways the ability to exercise inappropriate ministerial or political pressure. A small tribunal, housed in a non-Attorney General portfolio under an activist minister, is probably much more vulnerable to political pressure than a big organisation housed in an Attorney General portfolio would be, particularly at the level of attempts to assert intervention. The second area is structural independence and that involves issues such as how to deal with the way in which members are appointed, security of tenure, performance appraisal, issues as to reappointment and how you manage that process. We have seen, both at the Commonwealth and State level in the last few years, a greater separation of ministers' personal views from the appointment process than we once saw. Most governments are now using an expressions-of-interest process and some form of merit selection process, ultimately leading to a recommendation to a minister. There are two issues: one, individual interventions affecting independence and the other, structural independence.

Mr DAVID SHOEBRIDGE: You said in your submission—and your submission is predicated on having a supertribunal or a generalist tribunal, with different divisions. We had a presentation from the Heads of the Australian Capital Territory tribunal and the Western Australian tribunal. Their position was in fact 180 degrees in the other direction. They spoke of the need to have a generalist body so that you do not get idiosyncratic structures developing within a tribunal. They spoke of the benefits of not having divisions and having a generalist structure. Have you looked at the way the Western Australian and Australian Capital Territory tribunals deal with that?

His Honour Judge O'CONNOR: Basically, I would not agree with that, but I would like to see exactly what they said. As you put it, I would not agree because I think you need some primary divisions and if you look at the Victorian Civil and Administrative Tribunal structure, they have three primary divisions with a number of lists under each division. The number of lists adds up to 17—I think it runs something like 10, four, three or numbers of that kind. One of the divisions has a lot, about ten lists. No, I am firmly of the view that you need to maintain a divisionalised structure but the leadership group has to bring a common corporate culture to bear or commonality where commonality is appropriate. But I am sceptical that they run as integrated a tribunal in Western Australia, as you suggest, if you read their annual report.

Mr DAVID SHOEBRIDGE: By all means, have a look at the transcript of the hearing that we had.

His Honour Judge O'CONNOR: I think the Australian Capital Territory is a special situation. That is a small population in terms of the language of this discussion—it has 300,000 people and we are talking seven million here and four or five million in Victoria.

Mr DAVID SHOEBRIDGE: The other aspect of that discussion was in terms of having clear hearing and procedural rules for tribunals. The tenor of the evidence of each of them was that they were against having specific predetermined procedure rules and it was very much in terms of having a case-by-case management of matters when they come in. What has been the experience of the Administrative Decisions Tribunal, in terms of that matter?

His Honour Judge O'CONNOR: We do something similar. We have some differentiation of practice. A professional discipline case involving a lawyer's practising certificate is run pretty much like a standard court hearing or trial and the rules of evidence apply. Across the rest of the tribunal, there are differentiated procedures according to the nature of the matter. You have to be able to give the parties some indication of where we are going, so you cannot have a nonprocedural environment. But we certainly do not use rules, for example, in the way courts do, as a method of regulating our procedures. We generally rely on guidelines, practice notes and specific directions made in a case-by-case way. I broadly agree with that view.

Mr DAVID SHOEBRIDGE: One of the other issues that we are looking at is having efficient delivery of justice, of administrative determinations. Could you provide the Committee with assistance in terms of the time frames for outcomes of the different matters that have been in your tribunal, so that we can have a look at that when we are looking at issues of efficiency?

His Honour Judge O'CONNOR: Yes. Our standard turnaround time at the moment, from filing to disposal, is just over six months—27 to 28 weeks. That is across a highly diverse range of business. The professional discipline categories are slower. Some of the merits review business is quicker. That is the overall statistic but we can provide you with that data. I notice that the Consumer, Trader and Tenancy Tribunal was running at about 17 to 18 weeks. So I think they are all encouraging turnaround statistics. Again, you have to look at the classes of business.

The Hon. SARAH MITCHELL: Some of the submissions that the Committee has received from other interested bodies have suggested that the Equal Opportunity Division of the Administrative Decisions Tribunal should be transferred to the Industrial Relations Commission. I was wondering if you have any views on that?

His Honour Judge O'CONNOR: I am opposed to that. I think what it would lead to in New South Wales is the break-up into two streams of an effective jurisdiction. I have understood the proposal to be that the antidiscrimination employment jurisdiction go across to a rebadged Industrial Relations Commission. As we have said in the paper, 58 per cent of our filings are non-employment filings. What we have provided for 30 years in the equal opportunity jurisdiction in New South Wales is a unified jurisdiction, one that deals with all aspects of public life. It has additional features, such as interdisciplinary multi-member panels and things of that

kind. I have not heard that addressed in submissions. There has been no reference to the use of people, other than specialist commissioners and specialist judges, to hear these cases. On the other hand, I acknowledge that there is always an argument that the whole of an employment dispute should be wrapped up in the one set of determinations, so I can see an argument to the effect that the equal opportunity issues could be disposed of in the one context. But the issues paper and the options paper do not answer the question of what you do with all the cases that are not employment cases. Do you send them off as well, to a new system?

Mr DAVID SHOEBRIDGE: What would the position be? If the Committee was of a view to move and consolidate the employment aspects, it would make sense, on your position, for all those discrimination matters to travel together, wherever they go. Is that your view?

His Honour Judge O'CONNOR: I have the Deputy President, who is head of the Equal Opportunity Division, here and I will ask her to comment in a moment. My basic position is not unlike some of the other positions on this subject. What you have to ensure you achieve is a continuation of the place that the equal opportunity jurisdiction has occupied in the ethos of New South Wales. That includes a number of features: the inter-disciplinary benches, the specialist jurisprudence that we have developed and the features of accessibility and non-court-like management of proceedings that I believe we have achieved. Furthermore, we have an internalised mediation service, which is nothing like the conciliation service of the Industrial Relations Commission. That specialist mediation service is part of the package. Then there are the issues of the linkages to the Anti-Discrimination Board. You have to deal with all those equations in any proposal of this kind.

Ms HENNESSY: It is not quite as clear cut as saying: if the discrimination jurisdiction goes to the Industrial Relations Commission, then every employment issue is able to be dealt with at the one place at the one time. There can be workers compensation issues and there is also the availability of other jurisdictions such as the Human Rights Commission and Fair Work Australia, even for State public servants. We are not actually restricting or saying that this would be the only place any public servant would go to for an employment dispute, there are already other options. It is a big law reform issue, as to how you might tackle that. You are not really solving a problem just by saying discrimination and unfair dismissal can be heard together, even though we have cases in our tribunal where people are both in the Industrial Relations Commission and in the Equal Opportunity Division. It makes sense that they should both be in the same place but that place does not have to be the Industrial Relations Commission.

Mr DAVID SHOEBRIDGE: What about the Workers Compensation, do you find that as well, a crossover between discrimination matters and Workers Compensation matters?

Ms HENNESSY: There is a proportion of our employment matters where people are claiming disability discrimination and they also have a workers compensation case and it is a challenge for us to separate out the issues, whether what is happening to them constitutes discrimination. Again, I think it is a law reform issue, rather than a put-them-both-together-in-the-same-place issue. You do not solve the problem as to how they relate to one another.

Mr DAVID SHOEBRIDGE: Do you keep statistics about that, about matters that have that dual or triple jurisdictional—

Ms HENNESSY: We do not but I can give you a general idea, on notice.

The Hon. DAVID CLARKE: Do you suggest any alternatives to the options that are being put forward in the Government's issues paper?

His Honour Judge O'CONNOR: What is colouring this discussion is really the issue of what to do with the Industrial Relations Commission [IRC]. Option 1 and options 2A and 2B are not options you would automatically think of if you were coming to this subject with a blank sheet. But when I have come to the subject with a blank sheet—which is in those papers I annexed to my submission—my thinking has always been in terms of conceptual clusters. You can see clusters in this area. You can see a merits review of the administrative decisions cluster, which is roughly our General Division and the Land and Environment Court. So you can see that cluster. You can see a kind of statutory insurance cluster, which is motor accidents and workers compensation. You can see a kind of protective or what some jurisdictions call a human rights cluster, which is guardianship, equal opportunity and so on. Then you can see a kind of consumer civil claims cluster, and maybe you put tenancy in there or you put it separate. I have not mentioned professional discipline but you can see that as a cluster—professional discipline and occupational regulation. When you look at the landscape

that is how you see it. I believe all of these could be more or less amalgamated into smaller pyramids where you would get real synergies of benefit in terms of the way you provide services to the community and the way in which you use your membership and run your registries.

The next question is do you bring them all together into the ultimate pyramid. That is how I have always approached the subject. I must say I have never really given any attention to what I call systemic industrial disputes. Historically in Australia that was separate and I have never heard it actively discussed as a tribunal amalgamation issue. The real debate in Australia is about whether you continue with State industrial arrangements or you nationalise them into Fair Work Australia. That is the real issue that is lying at the back of this discussion, it seems to me.

Mr DAVID SHOEBRIDGE: That is thankfully not a matter for this Committee.

His Honour Judge O'CONNOR: No, I know. So you have this oddity of option 1 and options 2A and 2B being put on the table because there is this other problem in New South Wales to address. I suppose I am expressing some reservations obviously about the specialist industrial disputes jurisdiction. I would think you can separate that, at least to a degree, from the mere fact of employment disputes where they are contractual in nature. It seems to me the same arguments do not transfer readily to the second category. That is generally how I have seen it. I have favoured for many years, as you know, the bringing together of all the professional discipline jurisdictions. I have said consistently whether that is a division of the Administrative Decisions Tribunal [ADT] or a freestanding tribunal is a policy decision. But it seems to me the logic of bringing all the professional discipline jurisdictions together is strong.

The Hon. SCOT MacDONALD: Can you identify any risks in all of this in terms of a blowout in times? You talked about 27 or 28 weeks for certain sections and the consumer tribunal doing better with 24 weeks. If we do not do this well or properly, do you see that in six months we could be looking at a blowout?

His Honour Judge O'CONNOR: Yes. It is a major exercise. I do not want to diminish its significance as an administrative exercise. It has to be done well because obviously you are changing existing arrangements which are seen to work, to some degree at least, effectively. You obviously do not want to have a situation of regression; you want to achieve a progressive and positive result. I will skip quickly through the points that were made to me by the member who experienced the Victorian Civil and Administrative Tribunal [VCAT] establishment.

The Hon. SCOT MacDONALD: This is the transition experience?

His Honour Judge O'CONNOR: I can skip through them quickly. He said:

> The commencement of VCAT was carefully planned and implemented. Our first step was the allocation of preparatory funding and the appointment of a CEO to lead an implementation team.

I knew that CEO in my Victorian days; he is an excellent manager. He continued:

> The implementation team consulted with the tribunals—

that is the individual incoming tribunals—

> regarding what procedures could be uniform and what facets of each tribunal's operation require preservation of their own procedures. The tribunals which were moved were merged into a VCAT building.

That was an essential part of the plan, which I have mentioned in my submission. He said:

> It made everyone part of a new tribunal. The various tribunals were moved and absorbed on a staggered basis. A lot of attention was paid to reassuring members and staff of the existing tribunals as to their future and so on.
>
> Staff were provided with a new organisation in which there was a real career structure to those who wished to specialise in tribunal administration.

He is talking about registry staff. He said:

> Members [hearing members] were promised and given longer fixed terms and a depoliticised appointment process, not to mention independent wage fixing and decent training.

> VCAT online—

we are talking 1998—

> was put in place and a default mechanism was established for certain kinds of orders that were being sought by a party so as to avoid coming to a hearing to get those orders.

Those of you who are lawyers would understand what that is all about. They are the real issues, I think, that lie at the heart of getting success through integration. It has to be a carefully managed and professionally managed process.

The Hon. SCOT MacDONALD: A date was picked, whatever that date was. Was the transition period six months or a year?

His Honour Judge O'CONNOR: In the VCAT case I think it was two to three years and it was led directly by the Attorney General, Jan Wade, who had a strong commitment to this initiative and had always manifested, when I have known her, scepticism about the way courts did business. She was something of a missionary on this subject.

The Hon. SCOT MacDONALD: Do you need a Cabinet champion to run it through?

His Honour Judge O'CONNOR: I am sure you do. I believe that strongly.

The Hon. SCOT MacDONALD: Looking back at that Victorian experience and how you view it now, do you think there are recognisable, achievable back-office savings? I believe you mentioned that briefly in your submission.

His Honour Judge O'CONNOR: I am not a finance person. I think the Finance Minister is somehow connected to this reference. You would have thought so. You would think that you can get back-office savings from integration of systems and common servicing of the community, so that they can all go to one place to find out—if there are still some separate tribunals—which tribunal to go to and so on. Obviously, I would think, an amalgamation must have the effect of reducing the number of people at senior levels. If you look at the tribunals at the moment there are numerous senior officers and senior judges in all of them. There have to be savings of that kind. On the other hand, it is important to fund the tribunal in an appropriate manner. One of the tensions you feel in New South Wales is a sense in some of the key tribunals that they feel underfunded. So you should not necessarily assume it is a one-way discussion. The efficiencies to be gained in a degree of integration are obvious. They are the same arguments that apply to any structural integration of like functions.

Mr DAVID SHOEBRIDGE: One of the issues in a super-tribunal would be an appeal structure. I have three quick questions. One, I assume your submission is that there would be a wholly new tribunal created—it would not be either an expanded ADT or anything else but a whole new tribunal. Then you say there would be an appeal division or an appeal structure. Are you thinking of separately appointed members for an appeal division or picking up a three-member tribunal from the generalist division? Lastly, what about appeals on questions of law to the Supreme Court?

His Honour Judge O'CONNOR: That is a huge question. I could give a speech on that. When I became President of the ADT, of course, the thinking at the time was that it was a first stage towards a greater integration. That is reflected in the second reading debate on the bill from both sides of the House. That did not occur. One of the features that was in the ADT which I was curious about was this thing called the Appeal Panel. I had been around policy advisory work in the past where the issue of new tribunals had been under consideration. I must say we had never thought about appeal panels. We had always seen tribunals as places where you go to get a ruling and then if there is an appeal it goes to a single judge of the Supreme Court or in the federal system to a single judge of the Federal Court.

My view is that the Appeal Panel in our business structure has worked. It has allowed us to obtain a degree of sophistication and coherence in the way the members at first instance do their work that might have been missing otherwise. One of the criticisms you hear of tribunals, which was implied in some of the remarks made before me, is the wilderness of single instances. You go in there and, who knows, one member decides a case one way and one member decides it another way when they should have been dealt with consistently. An appeal panel within the business structure of a major tribunal gives you the opportunity to give greater assurance that consistency will apply. I believe that the ADT has got a good reputation in that respect.

The dilemma is how do you implant an appeal structure into a business environment where there are 60,000 to 90,000 front-end filings. The Queenslanders, I think, have answered that. The Queensland tribunal has introduced the appeal element. VCAT has not got that; it is one of the interesting differences. Queensland has put it in. I will not take up all your time but you have to look at its detailed provisions. Essentially it has restricted appeals greatly in respect of what they call minor civil disputes and tenancy matters. Once you do that you have solved a large part of the problem. It is not impossible to appeal but it is very difficult. Then they have opened up the appeal right a bit more widely to what I would call the more traditional jurisdictions appropriate for appeals, which are areas like professional discipline, occupational regulation, maybe FOI and privacy issues, equal opportunity, these sorts of areas. They have considered that question closely. I would draw on the Queensland experience in looking at that issue. I think it is a positive thing. Justice Bell when he did the review of VCAT recommended that it be implemented in the VCAT structure.

Mr DAVID SHOEBRIDGE: My question was a triple banger. The two other aspects are, one, should there be a separate stand-alone appeal division or should the membership of the appeal division be made up on an ad hoc basis by three members of the general division or separately appointed to an appeal division? Lastly, what is your view about appeals on a question of law to the Supreme Court?

His Honour Judge O'CONNOR: Obviously I have no issue with an appeal on a question of law to the Supreme Court. That has been a traditional element of all tribunals.

Mr DAVID SHOEBRIDGE: It should be retained?

His Honour Judge O'CONNOR: I would not want to see that changed. Going back to the other question, in a large tribunal of the kind we are talking about and given the statistical rate at which appeals might arise, in Queensland it looks like it is one in 100 filings. Our rate is higher but I am very interested in the Queensland approach. I think you end up in a situation where probably your key players, like the President and maybe one or two of the Deputy Presidents, sit in the appeal division pretty regularly, like most of the time. But I have never had the view that you should have a completely cut-off appeal division from the first-instance business. I think it is good that people move between the two levels. In terms of the way the legal system has been developed in Australia, I have always been well disposed to what is called the Full Court model as against the Court of Appeal model.

There is debate around having a Full Court as the peak element of a Supreme Court versus the Court of Appeal as the peak element. I have tended always to the view that the Full Court Model is preferable. I appeared in the olden days before the full court of the Supreme Court of Victoria. The Federal Court has retained the full court ideology. I think what it allows you to do is bring your good members at first instance into the appeal division on a reasonably flexible basis and for them that is a change of the work experience. It gives them the opportunity to see how people at the appeal level are looking at issues and it gives them a more holistic view of the work of the tribunal and the work of the division.

Mr DAVID SHOEBRIDGE: So maybe a presiding officer on the appeal panel, the president and deputy president and then the balance being made up—

His Honour Judge O'CONNOR: That is right. The likelihood is that your president and major deputy president would probably sit in appeals a lot of the time and that is what happens in our place, but you want the members of the appeal panel to move between the two levels.

The Hon. SHAOQUETT MOSELMANE: In relation to the question raised earlier by the Hon. Scot MacDonald about costs, you said there would be some possible cost cutting. We have received a number of submissions to the inquiry expressing concern about access to justice for people living in regional and remote communities if tribunals are consolidated. A similar concern arose in the 2009 review of the Victorian Civil and Administrative Tribunal [VCAT]. If a super tribunal is established, how should we ensure we protect rights of access to justice for those who live in regional and remote parts of New South Wales?

His Honour Judge O'CONNOR: I very much agree with those sentiments and it seems to me that is a key element of the establishment of a New South Wales super tribunal. It is one of the criticisms that was made of the VCAT rollout and was addressed by Justice Bell in the review of 2010. New South Wales is a huge State geographically with major population centres distributed right across the State. In some ways it is quite different to Victoria. I think it is a critical issue. There is a bit of a footprint. You have the consumer trading centres in

different country towns. When I was head of that jurisdiction we had registries at Tamworth, Tweed Heads, Wollongong, Gosford and Newcastle. Even when I say that, you can tell there are a lot of gaps. I think that is a critical issue and that is one of the things you would have to address in a planning and implementation process.

The Hon. SARAH MITCHELL: In your submission in paragraph 20 you mention the adequacy of resources for a merged tribunal. I was hoping you could tell us in your experiences, in your current role and others in your past career, what you believe the resourcing issues would be if we were to go down the path of a consolidated tribunal, where the focus needs to be in terms of allocation of resources.

His Honour Judge O'CONNOR: I think the critical consideration is to do with differentiating the business. It clearly costs a lot more for a tribunal to manage and hear a professional discipline case than maybe a small consumer claim. There are also judgements involved in what I have said. I think the perspective that you see in other tribunals arrangements of Australia is that a small consumer claim only deserves a certain quantum of government or public resources given to it. You would understand that the simplest legal dispute on its face can hide the most complex legal questions and a busy litigant can turn a very simple case into something that might go to the High Court, and that is what that famous film is all about. So you have to somehow have a perspective about rationing. You come to the discussion and after all the argy-bargy you say we are only going to give that quantum of resources to those kinds of disputes. Then you have to apply that across your business because clearly there are categories of business that you could not handle at the level of $300 or $400 per matter, which is the sort of average you see in the major tribunals. What that average is telling you is that there is a lot of business going through for almost zero dollars. Once a contest is on foot you are consuming hundreds to thousands of dollars of public resources in dealing with that contest, especially if it then goes to appeal and so on. You have to bring a sophisticated understanding, I think, of what are the appropriate differences between classes of matters and then you have to have a finance and budgetary environment that manages that in liaison with the members and gives relevant information to parties about in a sense how many resources we will spend on your matter. One of the great distortions in the tribunal system, as you probably know—and it is now affecting the courts—is the activity of persistent litigants. They should have rationing principles applied to that and they may cut across rights principles. Most legal systems give you a right to bring a matter and then a right to have a kind of set of procedures applied to it and then a right to appeal the matter and so on and so forth. So these are the significant issues and I am not, how would you say, a technical sophisticate on them but there are my thinking premises before you get to your decisions.

The Hon. SCOT MacDONALD: Is that to discourage vexatious litigation?

His Honour Judge O'CONNOR: It is to assist in discouraging it. We have not embraced it in the land of the law but we probably have to. I would like to look at the issue of up-front rationing principles. We have had people, as you must all know, at our tribunal who file 60 to 80 proceedings. FOI, for example, gives you that opportunity. There is a new bundle of documents every day in government. You could put in a fresh application to look at those documents. The latest Act, the Government Information (Public Access) Act, has got some rationing principles in it for the first time. We have not seen yet how they will work. But the phenomenon of the persistent litigant or the vexatious litigant is a very real one in the world of tribunals. It is one of the very stressful management issues for members and staff who constantly have to deal with these people coming back and back and back.

Mr DAVID SHOEBRIDGE: Have you had a look at the relatively recent Vexatious Proceedings Act? I do not think it applies to the ADT.

His Honour Judge O'CONNOR: It does, I think.

Mr DAVID SHOEBRIDGE: Have you had any experience with the Vexatious Proceedings Act? Has it been effective?

His Honour Judge O'CONNOR: Yes. We hand over trolley loads of files every now and then to the Crown Solicitor's office and proceedings commence in the Supreme Court. Some of our well-known customers have been the subject of vexatious proceedings orders. But I must say when I have read the decisions —there has been a handful of superior court decisions—

Mr DAVID SHOEBRIDGE: I am just wondering—

His Honour Judge O'CONNOR: When I have read the decisions I have learnt how active they have been elsewhere. We thought we had a problem!

Mr DAVID SHOEBRIDGE: I am just asking whether it has been effective at all in removing some of those persistent problems?

His Honour Judge O'CONNOR: Yes, but obviously it is addressed to the absolute worst cases. Yes, I think it is an improvement on the way things were. The decisions that are coming from the Supreme Court are well considered and careful decisions, as you would hope. So I think a little body of understanding is developing. But there is a group below the worst group whom you probably would not take vexatious proceedings order proceedings against but nevertheless you have to have possibly more activist management tools than the procedural frameworks under which tribunals operate have allowed us in the past. So there is a second tier to this discussion.

Mr DAVID SHOEBRIDGE: Do you have a view about cost recovery in terms of filing fees and hearing fees? If so, how do you apply that in the ADT?

His Honour Judge O'CONNOR: That is another difficult issue. One of the basic principles that you see in the creation of tribunals, which goes to access, is that each party bears their own costs, subject to exceptions. So we now have a huge number of decisions on the exceptions. In Victoria it is the same. I think the largest slab of information in the practice book for VCAT is about costs. I think it is preferable that you have a no-costs order principle but you eat up a lot of time dealing with the applications by winners for costs. Therefore, you have to have some—

Ms HENNESSY: Filing fees and hearing fees.

His Honour Judge O'CONNOR: I will go to that. Filing fees and hearing fees, the worry I suppose I have had in more recent times is the movement away from what I guess is another tribunal philosophy and that is low amount filing fees. What we are seeing within the Attorney General's Department in recent times is a push to move the filing fees of the tribunal more into the court model, where as you know those filing fees are quite high, front-end filing fees. I have been resisting that but now I think our appeal panel filing fees are up over $200 to $250 whereas they started out at $100. So again that is an interesting debate. Obviously the argument for higher filing fees is partly to do with cost recovery for the Government but that would be minor. It is also a form of disincentive. But it is a financial disincentive so it may well be it is people who are relatively impecunious and so on who suffer that disincentive. So there is a whole discussion again around those issues but I think it is characteristic traditionally of tribunals to have very low filing fees.

Mr DAVID SHOEBRIDGE: I assume you have the same philosophy on hearing fees.

His Honour Judge O'CONNOR: I am not sure what hearing fees are. Is that like attendance from day to day?

Mr DAVID SHOEBRIDGE: In court you have to pay to set down a matter for a hearing in the Supreme Court.

His Honour Judge O'CONNOR: I have never encountered hearing fees. I know what you are talking about. The Supreme Court does that in commercial matters and things.

Mr DAVID SHOEBRIDGE: In most cases.

His Honour Judge O'CONNOR: Do they? I am not up to date with that. I have never heard of hearing fees in tribunals.

Mr DAVID SHOEBRIDGE: I assume part of your earlier answer about costs is if we were setting up a new tribunal with a no-costs jurisdiction, a set of clear statutory criteria to deal with the exceptions will not be a sensible thing to do at the beginning.

His Honour Judge O'CONNOR: One of the things I like about the Queensland tribunal is that they have a power to fix the amount of costs as part of their costs ruling, which I have started doing lately. I do not have an express power but I have been doing it, and I think you have to bring an end to disputation. A lot of the

standard costs orders, as you know, is costs as agreed or assessed. They all move to the costs assessor and the dispute starts again at the costs assessor. The costs increase. Some of the people, as you know, who are facing big costs orders have lost any sense of proportion or rationality. You wish that you could contain the financial disaster that is facing them.

So I like that Queensland provision where you can just fix the costs orders. Lately we have been looking at VCAT in this respect, and when they make a costs order—I mean, the normal situation is that you are not making them— but when they make a costs order they are using the county court scales in Victoria to assist their thinking as to what the amount should be. We do not have scales in New South Wales. You could, it seems to me, have a look at the question of tribunal scales as some way of getting to a rational conclusion to a costs argument.

Mr DAVID SHOEBRIDGE: Perhaps look at the Federal Magistrates Court structure in that regard.

His Honour Judge O'CONNOR: Yes.

The Hon. SHAOQUETT MOSELMANE: I asked the previous witnesses this question earlier. In your submission you say that you think option 3 delivers the most benefit for the people of New South Wales, whereas Unions NSW, which represents 600,000 workers in New South Wales, clearly perceives option 3 as "an eclectic" mix and match approach. There is a clear divergence in your view and their view. Can you explain or elaborate?

His Honour Judge O'CONNOR: "Eclectic mix and match" is just rough, sort of derogatory, language. It tells you nothing. What I heard today from some of the union representatives is that they are not opposed to an integrated set of tribunals provided essentially it is outside the industrial relations sector. I think it is unfair to speak of what we are talking about as having an eclectic approach to it all, giving rise to a wilderness of single instances or producing a less professional environment than we have at the moment. What we should be seeking to achieve is a level of integration that brings greater professionalism to the delivery of the legal services that a tribunal delivers and also gives greater practical accessibility to people with genuine grievances and real rights to be addressed. I cannot see how that ill serves the 600,000 people that the unions represent. As I understand it, their main concern is the preservation of a satisfactory industrial relations environment. I have said what I have said on that.

CHAIR: Unfortunately the time set aside for this section has expired. We would like to thank you both for being with us and your contribution. There will be no doubt some questions we would like to send to you. We would be grateful if you could give us a response by 14 January 2012.

His Honour Judge O'CONNOR: I was looking for a holiday project.

(The witnesses withdrew)

(Short adjournment)

GREGORY MICHAEL KEATING, President, Worker's Compensation Commission, sworn and examined:

SIAN MARY LEATHEM, Registrar, Worker's Compensation Commission, affirmed and examined:

CHAIR: Would you like to make an opening statement?

His Honour Judge KEATING: In these opening remarks I would like to touch briefly on the following issues: Firstly, to provide a brief background of the establishment and role of the commission, secondly, to inform the Committee regarding some of the unique aspects of how the commission discharges its statutory functions, and thirdly, to identify a number of reasons why we consider it inappropriate for the Worker's Compensation Commission to be consolidated with other tribunals. I should say at the outset that I would prefer to restrict my remarks to the Worker's Compensation Commission rather than comment on the role and possible merger of other tribunals, subject to any questions that the Committee may have.

I will commence by outlining the background of the commission. The commission has been in operation since January 2002. It replaced the former Worker's Compensation Court. The commission was established with the express intention of creating a dispute resolution tribunal that was quick, fair and cost effective. Parties are required to lodge and serve all evidence upon which they propose to rely in the early stages of the dispute. Cases are effectively triaged so those that involve only medical issues are referred directly to an approved medical specialist [AMS] appointed by the commission for that purpose. Where there is a liability issue the dispute is referred to a commission arbitrator. The arbitrators undertake the role that was formerly undertaken by judges of the Worker's Compensation Court. They operate under a blended conciliation and arbitration model. It is unique in the sense that both the conciliation and arbitration functions are conducted by the same arbitrator.

Very early in the life of the dispute, usually within the first six weeks, the parties are drawn together in a telephone conference which is presided over by an arbitrator. The parties to the telephone conference include the worker and his or her lawyer, the worker's compensation scheme agent and their legal representative, the scheme agent represents the interests of WorkCover as nominal insurer and occasionally employer representatives will also participate directly. The purpose of the telephone conference is to explore the possibility of resolution of the dispute on terms that are acceptable to both parties. If the matter is not resolved the telephone conference is used to case manage the dispute in anticipation of the conciliation/arbitration hearing which usually takes place between four and eight weeks later. The conciliation/arbitration hearing is a face to face meeting where again both parties attend usually with their legal representatives. During the first phase of the proceedings the arbitrator will attempt to conciliate the dispute with the view to reaching an overall resolution. If that cannot occur, usually after a brief interval, the arbitration process begins.

The proceedings are sound recorded. Evidence may be called at the hearing but more commonly the legal representatives make a submission on evidence presented in a documentary form. Sometimes an extempore decision will be given immediately after the hearing but more commonly the arbitrator will reserve the decision and deliver a written decision. Decisions are usually delivered within 21 days. Decisions of arbitrators are binding on the parties, subject to appeal to a presidential member. As a result of some recent amendments to the legislation appeals are no longer a full review of the arbitrator's decision but are limited to the correction of demonstrated legal, factual or discretionary error. Although the blended conciliation and arbitration model may appear somewhat unusual most stakeholders agree that it has proven to be successful in practice. Exceptions to the same arbitrator conducting the conciliation and arbitration are almost unheard of.

Now if I may come to some of the reasons why we believe the commission is best served by remaining a stand-alone independent statutory tribunal. The size of the commission and the volume of cases it handles each year in our view militates against consolidation. The commission operates on an annual budget of just under $30 million and processes approximately 12,000 applications per year. The commission consists of the president, the position I occupy, two deputy presidents, the registrar, 18 full-time equivalent arbitrators and a further 18 sessional arbitrators who assist with medical appeals, regional work and some metropolitan work. All members of the commission are Ministerial appointees for fixed terms. The commission also has approximately 100 permanent staff and 140 contracted approved medical specialists undertaking permanent impairment on sessional arrangements. In addition, there are 28 sessional mediators undertaking mediation of common law disputes.

The efficiencies that one would expect to gain through consolidation are already being realised in the commission through the receipt of shared corporate services provided by the compensation authority's staff division [CAS]. Through a shared services agreement with CAS, the commission, the Dust Diseases Board, Lifetime Care and Support Authority, the New South Wales Sporting Injuries Committee, the Motor Accidents Authority and WorkCover we are able to share in a range of functions including human resources, information technology, recruitment, training, budget and finance and a range of other corporate services. Arising from a range of initiatives that we have introduced in the commission in recent years the commission's operating budget has been reduced by approximately 10 per cent, from an operating budget of just over $33 million in 2009-10 to just under $30 million in 2010-11.

We make the point that worker's compensation law is complex and difficult. After the first five years of operation the appeal rate from decisions of arbitrators had reached unacceptably high levels. We identified that one of the major contracting factors was an over-emphasis among our sessional arbitrators on alternative dispute resolution skills and an under-emphasis on demonstrated legal expertise making it difficult for them to write reasoned durable decisions. In 2011, following amendments to the legislation permitting the appointment of full-time members for the first time, we recruited a number of full-time or full-time equivalent arbitrators almost all of whom are experienced barristers or solicitors. At the same time we did not renew the contracts of some 30 sessional arbitrators whose experience was more broadly based in alternative dispute resolution. These changes significantly improved the quality and durability of the decisions in the commission. Appeal rates have fallen dramatically as has the number of successful appeals. We are particularly concerned to ensure that our capacity to recruit and retain highly skilled and experienced specialist arbitrators is not diminished by consolidation with tribunals.

We direct the Committee's attention to the experience of other States such as Victoria, Western Australia and Queensland where the establishment of super tribunals, has not included their worker's compensation jurisdictions. We remind the Committee that the commission is funded through the WorkCover Authority. It is not funded through consolidated revenue. We think that it is unlikely that any consolidation would improve the timeliness of disposal of cases in the commission and it may have an adverse effect. We currently resolve more than 40 per cent of applications within the first three months of the dispute, 90 per cent within six months and 100 per cent within 12 months—excluding appeals. This contrasts with the Commonwealth Administrative Appeals Tribunal where only 68 per cent of workers compensation applications are finalised within 12 months and only 86 per cent are finalised within 18 months. We note that none of the four options canvassed in the discussion paper contemplates integration of the commission into a super tribunal or with other tribunals and for the reasons I have indicated we regard that as appropriate.

Finally, I make the point that the 2002 committee on the office of Ombudsman and Police Integrity Commission report, referred to in the issues paper, was focused on the merging of administrative tribunals with the Administrative Decisions Tribunal and did not consider or recommend merging of the Workers Compensation Commission. Subject to appropriate time to respond to submissions from Unions NSW and from the Amalgamated Metal Workers Union, both of whom made recommendations concerning the commission, those are the matters we wish to draw to your attention.

The Hon. SHAOQUETT MOSELMANE: I hear what you said in your opening statement in relation to your desire to retain the independence of the commission. In your executive summary on page 4 you outline a number of points. As a result of this inquiry there may be consolidation taking place down the track. Having heard what you have said which would be the next best option to being an independent body as you wish to remain? What is the next best option you would choose in terms of the options that we have and our terms ever reference?

His Honour Judge KEATING: The commission is not identified in any of the four options, so we have not sought to identify any of the four options as being of relevance to the commission for that reason.

The Hon. SHAOQUETT MOSELMANE: I understand that, but if the Government was of the view to consolidate, which of those options would you then prefer to be included—I know it is not, as you say, contemplated to integrate the Workers Compensation Commission—which one would you prefer?

His Honour Judge KEATING: I do not wish to avoid the question but I do not see it as appropriate for the President of the Workers Compensation Commission to be making recommendations or suggestions about the merging of the Administrative Decisions Tribunal or the Industrial Relations Commission or other tribunals.

Mr DAVID SHOEBRIDGE: I suppose the question Mr Moselmane has been putting is that if there was a move to merge tribunals, including the Workers Compensation Commission, there are probably two broad options on the table: one is to go within a broad administrative tribunal—a super tribunal, as it is described; the other would be to go within an expanded jurisdiction within, say, the Industrial Relations Commission. I fully accept that neither of those options is your preference but if either of those options was being considered do you have any views about that?

His Honour Judge KEATING: I do not think there are any particular synergies between the role that the commission fulfils and either of the Administrative Decisions Tribunal or the Industrial Relations Commission.

Mr DAVID SHOEBRIDGE: It would not be the Administrative Decisions Tribunal would be a new super tribunal.

His Honour Judge KEATING: Indeed, but, as I understand it, incorporating the Administrative Decisions Tribunal and a range of other tribunals. Because of the size and volume of the commission I think if it was included in any other form of consolidated tribunal it would involve such a standalone stream that I think any perceived advantages of consolidation would not be realised. At the same time, we would, in doing, so lose the advantages that we have of the shared corporate services arrangements that are already in place with the range of tribunals identified.

Mr DAVID SHOEBRIDGE: One option would be obviously that slather of relatively modest other small compensation tribunals. As I think we heard in a submission earlier today, you have a compensation division within a super tribunal, which would pick up all of those bodies, so you would not lose the benefits of the compensation authority's staffing division arrangements, in fact you may well get those benefits together with the other benefits of a uniform registry.

Ms LEATHEM: But WorkCover provide the shared services. They would not presumably be part of any such arrangement.

Mr DAVID SHOEBRIDGE: I think that would be a matter for the finance Minister to determine whether or not WorkCover was to direct resources to the tribunal to cover those costs.

Ms LEATHEM: I am just saying as a matter of practice at the moment all the shared services originate in WorkCover. Presumably there would have to be some alternative arrangements in a new tribunal.

Mr DAVID SHOEBRIDGE: Obviously there would, but I think that is not really addressing the question I was asking which is you have a compensation division within a super tribunal, which would give the capacity to have some specialist administration and some specialist determinations with the overall benefits of a super tribunal. What do you say to that?

His Honour Judge KEATING: I would say it is doable but fraught with difficulty for these reasons: We are administering primarily two statutes and resolving disputes over defined statutory benefits. As I indicated in the opening remarks, with the benefit of five or so years of experience of arbitrators with general dispute resolution skills we have found that that was a less successful model than having experienced, skilled, knowledgeable arbitrators in the field of workers compensation. If we were to be involved in any kind of merger we would, for those reasons, need to retain a very strong dedicated stream of specialist arbitrators to deliver those benefits, funded through WorkCover.

That seems to me not to sit well with blending it with, say, the Motor Accidents Authority, where although there are some similarities in terms of using approved medical specialists to determine impairment levels, the synergies really stop there. I think the expertise is different. They are assessing common law damages by and large; they are not administering the same kinds of statutory benefits that the commission is doing. There may be an opportunity to consolidate some of those medical assessment functions perhaps but I would think that the synergies end there.

CHAIR: While you say it is doable you cannot see any improvement at all as far as the service provision of the commission?

His Honour Judge KEATING: The obvious question is why would you do it? The reason why you would do it is to achieve administrative efficiencies, it seems to me. We are already doing that. We do not have our own human resources capability—that is a shared function with WorkCover.

CHAIR: It is possible you may see a decrease in service provision? Is that a distinct possibility?

His Honour Judge KEATING: Quite possibly. I certainly think that if there is the possibility of cross-vesting of members between two streams I would be strongly against that.

Mr DAVID SHOEBRIDGE: One of the other arguments you use against being incorporated within a broader tribunal is the number of filings, which is about 11,500 or so a year. One of the other tribunals that are being considered in terms of a super tribunal is the Consumer, Trader and Tenancy Tribunal, which in many other States has had similar jurisdiction rolled up within a broader super tribunal. The number of filings in the Consumer, Trader and Tenancy Tribunal is in the order of 60,000. When you are looking at it in the context of overall filings within a super tribunal do you really see the argument about the number of filings being so persuasive, and, if so, how?

His Honour Judge KEATING: Filings can be a crude comparison. Certainly the Consumer, Trader and Tenancy Tribunal is handling a lot more applications than we are. But the complexities of the disputes are less. It is difficult for me because I have never really had very much experience with the Consumer, Trade and Tenancy Tribunal, but from my limited understanding, the nature of the disputes they get is less complex and they are capable of being dealt with far more quickly.

Mr DAVID SHOEBRIDGE: One of the other arguments about having a broader tribunal is an argument that was picked up by the High Court in the matter of Kirk and the concern about having specialist tribunals work out a fairly idiosyncratic way of doing justice, and there is a general benefit in having a broader tribunal more aligned with the mainstream so you do not get idiosyncratic forms of justice. Do you review your practices in the Workers Compensation Commission to ensure you are not getting any kind of idiosyncratic process and outcomes?

His Honour Judge KEATING: There are a number of answers to that. Firstly, unlike a lot of other tribunals we have an internal appeal process, so that there is a capacity for parties aggrieved by a decision of an arbitrator to appeal to a presidential member. That is the first check. The second check is that from the decisions of the presidential members there is a capacity to, with leave, appeal to the Court of Appeal on a question of law. So there are the appeal structures. In addition to the appeal structures we consult widely with the various stakeholder groups. For example, we maintain a user group that is comprised of senior members of the commission, legal practitioners, applicant practitioners, respondent practitioners and the WorkCover Authority. Those are forums that can be utilised to ventilate the sorts of concerns that I think you are referring to, and that seems to operate quite effectively, particularly as we have all the stakeholders at the table—that is, the users, the commission and WorkCover. If the issues involve operational matters we can deal with those; if they involve policy matters then we have got WorkCover at the table.

The other thing I would mention is that I mentioned that we had gone through a reform process and that we had shifted from a larger number of sessional arbitrators to a smaller number of more skilled permanent members. When that was done it was done with the express understanding that there would be a formal evaluation of the effectiveness of those measures. That was undertaken this year, and through a competitive tender process PricewaterhouseCoopers were selected to undertake that evaluation. We have included in the submission a copy of the evaluation report which briefly stated, as confirmed, that the reforms that have been introduced have been effective in terms of improving the quality and durability of decisions within the commission.

The Hon. SARAH MITCHELL: You have just answered one of the questions that I was going to ask. In one of the terms of reference we talk about the current and forecast workloads of the different tribunals in New South Wales. Would you be able to tell the Committee a little bit more about your current workload? I know David just mentioned some of the claims that come in, but how is it operating at the moment and what do you forecast your future workload will be?

His Honour Judge KEATING: The trend in filings is for a slight increase. The increase this year over last is about 6 per cent in terms of general filings. There is a much larger increase in filings in a particular area,

and they relate to the mediation of common law disputes where there is a significant increase in the number of filings. This year over last is about 20 per cent.

CHAIR: The reason for that?

His Honour Judge KEATING: That is a very good question. It is hard for us to discern a reason for that. It is possibly because with the benefit of some experience in the area more and more applicants are able to satisfy the 15 per cent impairment criteria. I know that the WorkCover Authority are concerned about this area and are undertaking their own investigations to try and identify possible causes.

The Hon. SARAH MITCHELL: Just following on from that, in relation to the effectiveness and the time frames in resolving the disputes a couple of witnesses earlier this morning talked about their time frame. Are you able to provide an indication as to how long things generally take with your commission?

His Honour Judge KEATING: I think I referred to it in the opening remarks. About 40 per cent are finalised within the first three months and approximately 90 per cent within six months. I mentioned that I needed to touch on a submission from the Australian Manufacturing Workers Union, and this might be a timely point to do it. They make a point about problems with timeliness in the commission. I do not know where the data has come from but the point is not well made. I could probably refer you to it if you wish, but it is an adverse comment about timeliness in the commission. It is on page seven of their submission where they make the suggestion that the commission is unable to resolve matters before it in less than six months and make the point that it is particularly the case with the liability disputes, leaving workers with no income to support themselves and their families. It is a situation, according to them, that arises often from long-term under-resourcing of the commission relative to its increasing workload. I make two points. One is that their point about timeliness is wrong and is inconsistent with the objective data. Secondly, the commission has never claimed that it is under-resourced. We are appropriately resourced through the WorkCover Authority.

Mr DAVID SHOEBRIDGE: The timeliness figures are detailed on page 31 of your submission. I presume they have come from the registry and are fully dependable.

Ms LEATHEM: That is correct. They are extracted from our case management system.

The Hon. SHAOQUETT MOSELMANE: Your submission notes that the consolidation of the Workers Compensation Commission into a super tribunal would require a significant change to existing funding arrangements. Can you elaborate?

His Honour Judge KEATING: Presumably a super tribunal would be funded through consolidated revenue. That is not currently the case; the commission is currently funded through the WorkCover Authority.

The Hon. PETER PRIMROSE: Can you tell the Committee how other State jurisdictions have handled the process of consolidation of tribunals dealing with workers compensation?

His Honour Judge KEATING: There has not been any significant move to consolidate workers compensation tribunals in other States. I refer the Committee to a very helpful publication about that matter: "Comparison of Workers' Compensation Arrangements in Australia and New Zealand", published by Safe Work Australia in March this year. It gives a very useful summary of how workers compensation disputes are resolved in other States. In Queensland, for example, its equivalent of WorkCover undertakes conciliation of disputes. However, if disputes are unresolved they are referred to the State's Industrial Relations Commission and appeals are referred to the State's industrial court. Western Australia has a system similar to ours; that is, it has appointed arbitrators who conduct conciliations and arbitrations and there is capacity to appeal to the District Court on questions of law.

The South Australian arrangements are reasonably similar to ours. Victoria has a service that conducts the kind of conciliations that we do in the commission. However, in the absence of an agreement, disputes are referred to the Magistrate Court and the District Court. No State has merged workers compensation dispute functions or tribunals into a super tribunal. It would be very useful for the Committee to hear more about the shared services arrangement, which we believe is a powerful reason for the Workers Compensation Commission not to be merged with another tribunal. I invite the registrar to expand on that.

Ms LEATHEM: When the commission was established in January 2002 initially there were shared services provided through the Department of Industrial Relations. I understand that in 2006 that was transferred to the WorkCover Authority. Under the 1998 Act that established the commission there is a requirement that the chief executive officer of the WorkCover Authority provide facilities and staffing to the commission. Of course, that is also supported by a broader shared services agreement of which the commission is party along with the other agencies that the president mentioned in his opening statement. That means we do not maintain within the commission itself any finance, information technology or human resources facilities. That is all done through those shared services arrangements.

Therefore, we have very limited capacity in house, but through that agreement we have very good support across that range of shared services. That is done on a cost-recovery basis, it is calculated in accordance with the shared services agreement and it is based on the Treasury modelling set up in the New South Wales public sector to provide guidance to agencies about those arrangements. A shared services management group meets monthly and all the executives of the various agencies are represented. In addition, there are regular officer-level meetings across that range of corporate services to ensure that all the agencies are working together to deliver that suite of services.

The Hon. SCOT MacDONALD: We all seem to be in furious agreement. It may be a little frivolous, but do you see any value in an elevation from the District Court to the Supreme Court—different coloured robes and so on? Does that hold any attraction?

His Honour Judge KEATING: It is not something to which I have given any thought. It would not make any difference to the way in which I administer the affairs of the commission.

The Hon. SCOT MacDONALD: Can you see any opportunities to improve the Workplace Injury Management and Workers Compensation Act even though that is a little outside the Committee's terms of reference?

His Honour Judge KEATING: We made a number of incremental suggestions to the former Government about improvements to the Act and in the main they were adopted. They principally related to the appointment of full-time members and the review of the appeal arrangements. As I said in my opening remarks, appeals in the commission reached unacceptable levels. That happened principally because the Court of Appeal in the case of *Sapina v Coles Myer Limited* determined that the appeal function within the commission was really a full review of the arbitrator's decision. The importance of that was that when appeals were made from arbitral members to presidential members in effect the case started again. We had to review the entire evidence with a view to determining whether the decision reached by the arbitrator was the true and correct decision. There were no cost penalties for unmeritorious appeals. Indeed, there were additional costs for bringing appeals. As a result, there was a proliferation. The amendment to the appeal provision reverted to an appeal more in the traditional sense in that—

The Hon. SCOT MacDONALD: The costs are borne by the party.

His Honour Judge KEATING: No, there has been no change to the cost provisions. However, the arbitrator's decision may be interfered with only if the arbitrator has made some demonstrated legal, factual or discretionary error.

Mr DAVID SHOEBRIDGE: A number of submissions point out that often workers compensation matters are inherently employment-related matters and can be multi faceted—they can have a discrimination element, a compensation element, an underpayment element and a contractual element. What is your experience in terms of those multi-faceted disputes and how does the commission deal with them?

His Honour Judge KEATING: It is unlikely that we would see disputes that involve underpayment, for example. Psychological injury cases can involve allegations of unfair treatment and discrimination and so on. However, it is only in that restricted range of cases where there would be any kind of overlap of those issues. In those cases the commission is really inquiring into whether the psychological injury has arisen from discipline, promotion or transfer issues. If it has, the commission is required to inquire whether the conduct of the employer in those circumstances was reasonable. If it was, it would be a defence to the application. In that category of cases we are inquiring into the conduct of the employer, commonly over a period of time. That is the only circumstance I can bring to mind where there is that kind of overlap.

CHAIR: So instances of overlapping are very few and far between?

His Honour Judge KEATING: Yes.

Mr DAVID SHOEBRIDGE: Often with a significant injury there is a termination of employment. There may have been some conduct towards an injured worker prior to the termination to which he or she takes offence. The termination of employment might result in the worker having a lawyer or union review the employment and an underpayment of wages or a breach of notice provisions might emerge. Often a suite of disputes surrounds a termination of employment, one of which is workers compensation. It seems odd that you do not get disputes that although you have no jurisdiction clearly involve other elements. What is your experience in being able to resolve all of those issues, perhaps through mediation or the like?

His Honour Judge KEATING: We do not often see cases where those sorts of issues are in the background. We do not often get to know about it.

CHAIR: Theoretically they could occur, but in practice they generally do not?

His Honour Judge KEATING: I do not see it happening a lot, no.

Ms LEATHEM: It is worth noting that in the teleconference and conciliation phase the model allows a worker to present any material or background he or she believes might be useful. There is a high resolution rate. While that is not specific jurisdiction and they might not make any determinations on those issues, it could contribute to a resolution of the dispute.

Mr DAVID SHOEBRIDGE: One of this Committee's goals is to look at the issues not from the tribunals' perspective but from an individual litigant's perspective and to deliver the most effective and efficient resolution of their troubles. Would there be some merit in having a tribunal that has the full gamut of employment-related jurisdiction to deal with all of those issues in one go, from a consumer's perspective if not from the tribunal's perspective?

His Honour Judge KEATING: There may be some merit if one tribunal had the capacity to deal with, for example, underpayment of wages, reinstatement and compensation.

Ms LEATHEM: But that would require significant legislative reform to deliver a remedy in one venue and somehow to merge those different remedies.

The Hon. SHAOQUETT MOSELMANE: Accepting that the Workers Compensation Commission remains outside the consolidated tribunal, do you believe that such a tribunal would deliver quicker, cheaper and more effective services given your experience and knowledge of other jurisdictions?

His Honour Judge KEATING: I think there would be a place for achieving the kind of shared services arrangements that we have been talking about through consolidation of smaller tribunals that would benefit from sharing services. If it were one step back from consolidation, it could offer a range of corporate services through a corporate and administrative services arrangement. I can see the advantages of that.

The Hon. PETER PRIMROSE: Do you have any comments about what overarching principles should be guiding this Committee in terms of the recommendations that it will ultimately make to the Government about whether tribunals should be amalgamated?

His Honour Judge KEATING: That is a large question.

The Hon. PETER PRIMROSE: It is a big issue.

His Honour Judge KEATING: It is important not to lose the specialisation that has been developed in various tribunals. I have read submissions to the Committee from various other tribunals that have made that same point. It is a strong point and it is certainly a strong point for us because we have seen both sides of that coin. We have more generalist mediation and alternative dispute-type practitioners dealing with conciliation but then having to deal with arbitration. That is where that model has fallen down to some extent in our experience.

The move to recruiting members who have demonstrated experience and expertise in workers compensation law has proven to be a much more successful model in our tribunal. That has been independently evaluated and PricewaterhouseCoopers has agreed. The Committee could consider not losing that very powerful range of specialities. It follows that if you merge a range of tribunals but retain very independent specialist streams and if you do no cross-vest members, all you will gain is the shared corporate services and registry arrangements involving training, appraisal of members, recruitment of members and those sorts of things. If I were on the Committee that is one thing I would be concerned about—whether to achieve that objective you need to be looking at large-scale consolidations of tribunals or whether you need to be making other arrangements to achieve those efficiencies.

The Hon. PETER PRIMROSE: A previous witness said in relation to suggestions that a particular tribunal should retain some degree of independence and separateness that their submission was insular and they were arguing that they had some form of unique identity and were not taking cognisance of the various benefits that would be gained. Do you believe you are insular?

His Honour Judge KEATING: Yes, but for good reason. One is that we are able to resolve 12,000 disputes a year in a timely way. Forty per cent in under three months is not a bad effort; 90 per cent in under six months—it is pretty hard to do any better than that, quite frankly, in the kinds of disputes we are dealing with. We have hugely improved the appeal rates and the revocation rates of the decisions of arbitrators. In other words we have brought the commission back to where it started, where the decisions of arbitrators are, by and large, the final decision. We have achieved those outcomes at the same time as having improved our budget by 10 per cent. Last year our operating budget was reduced by $3 million, or about 10 per cent of the operating budget, compared to the year before. We would say yes, it may be insular, but it is quick, it is efficient and it is cost effective. Those are the overriding principles which should guide any tribunal.

CHAIR: Very big overriding principles.

His Honour Judge KEATING: Indeed.

Mr DAVID SHOEBRIDGE: At the core of your submission about maintaining a standalone tribunal, and it is borne out you say by your experience more recently in the PricewaterhouseCoopers review, is the degree of legal complexity within workers compensation and the ability to have specialist legal knowledge to deal with that complexity together with an appropriate structural regime that deals with those disputes. Is that really the core of what you are saying?

His Honour Judge KEATING: It is an important component of it, indeed. It is having that specialisation of members to deal with the disputes; it is having the efficiencies of the shared corporate services arrangements; it is constantly improving the professionalism and expertise of the commission through its members through a range of initiatives such as the formal professional development programs that we operate for the arbitrators, a peer review element—they are given statistical information about how they going relative to their peers on workload and appeals and so on; and we have developed a comprehensive practice manual much like a bench book to guide arbitrators through a whole range of procedural issues and substantive law issues. Those combinations of elements are all factors in the efficiencies that we have gained in the commission in recent times.

Mr DAVID SHOEBRIDGE: I am not saying I do not see merit in the argument but the same argument can be mounted, and is mounted at one level, about discrimination law. The Administrative Decisions Tribunal deals with discrimination law, tenancy law and the complexities of that law. That same argument could effectively be mounted for whole areas of specialist knowledge and if we accept it in one area and in another area we end up with a multiplicity of separate tribunals, which may be the outcome of the inquiry.

Ms LEATHEM: I think the difference with the commission is that we have been in both models so we have actually seen the result of having that more generalist approach as opposed to the more specialised approach, and the proof is there in terms of the appeal rates, the revocation rates and the timeliness data. We are not just speculating; I guess we have been in the position where we have been able to make that comparison between the two different models.

Mr DAVID SHOEBRIDGE: Yes, of course, but some of that could be resolved by having a specialist division. The overarching issue about the tribunal structure seems to me to be one that is still at large in this conversation.

His Honour Judge KEATING: I am sorry; I do not follow the question.

Mr DAVID SHOEBRIDGE: By all means, detailed specialist knowledge to deal with the complexities of workers compensation law would seem to me from what you say to be a prerequisite for having efficient, fast and effective resolution of disputes. That detailed specialist knowledge could be retained by tribunal members within a division of a broader tribunal.

His Honour Judge KEATING: Absolutely, but if you do that, what have you achieved? All you have done is put a roof over a number of separate tribunals and given them some shared services.

Mr DAVID SHOEBRIDGE: And you say your figures and your outcomes and reviews prove that those efficiencies and that effectiveness are already being delivered in your tribunal?

His Honour Judge KEATING: Precisely.

The Hon. SHAOQUETT MOSELMANE: The issue of persistent litigants was raised in the Administrative Decisions Tribunal's submission. How does the Workers Compensation Commission deal with vexatious litigants?

His Honour Judge KEATING: Fortunately for us we are not usually troubled by that. We do have a few persistent litigants, like every tribunal, but they are manageable numbers. Most litigants in the commission are represented.

Ms LEATHEM: Over 98 per cent are represented.

His Honour Judge KEATING: Are legally represented.

Ms LEATHEM: It makes it significantly easier for the staff to manage the small number of people we have who demand more attention.

CHAIR: Do members have any more questions? It seems you have been able to answer all the questions members can think of.

The Hon. SHAOQUETT MOSELMANE: At this point.

CHAIR: That is right. Thank you very much for attending today. We will certainly take into account what you have said. There may well be some questions that we will send to you. We ask you to respond to those by 14 January, if possible.

(The witnesses withdrew)

(Short adjournment)

ALISON PETERS, Director, Council of Social Service of New South Wales, 66 Albion Street, Surry Hills and

BRENDA BAILEY, Senior Policy Officer, Council of Social Service of New South Wales, 66 Albion Street, Surry Hills, affirmed and examined:

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

Ms PETERS: As many of the Committee members would be aware, the Council of Social Service of New South Wales [NCOSS] is the peak policy advocacy body for community services in New South Wales. Our focus is firmly on disadvantaged people in communities. We note the importance of tribunals as an important part of the system that ensures fairness for disadvantaged and vulnerable people. We also make the point that our written submission is quite brief. Some of the matters raised go to particular tribunals. Because we do not provide direct service delivery in the same way as others, we feel that there are other groups that are better placed to comment on the work of particular tribunals and whether or not they are effective or efficient.

The focus of our submission is to urge the Committee and indeed Government to take into account the role of tribunals and particularly their impact on disadvantaged and vulnerable people. The Council of Social Service of New South Wales is not opposed to the consolidation of tribunals where that makes sense. We are also not opposed to the efficient use of resources, particularly those of the community as disbursed by Government, but we would argue that this is not the only criteria upon which this Committee should base its recommendations. We would strongly urge that issues such as access to justice, confidence in the process and the following of administrative law principles are important considerations for the work of this Committee in considering the consolidation of tribunals.

CHAIR: Could you outline the experience of your members and the people they work with in dealing with tribunals and have they been positive or negative experiences, or some of both?

Ms PETERS: We would say that the experience is largely mixed. Our member organisations work in a variety of circumstances with individual clients and groups across the breadth of tribunals in New South Wales. To some extent the effectiveness or otherwise of tribunals can be evaluated on the decisions that are made and whether they favour a particular group. We say that there is an argument about better education—both for tribunal members and indeed the general community—about the role of tribunals to ensure fair access. We are aware that many tribunals deal with decisions made by government agencies in various forms. In some ways decisions made by Government have a disproportionate impact on disadvantaged people and we would argue that because of that it is important that tribunals are a trusted part of the system and that access to those tribunals is easy for people who may not have the means that others take for granted.

The Hon. SHAOQUETT MOSELMANE: In your submission, at the top of page two, you talk of the experience of unmet expectations. Do you fear the same for New South Wales, if consolidation happens? If it does happen, what measures do you think the Government should take to meet to those expectations?

Ms BAILEY: That is comparing the Victorian examples of the President's Review that took place about a decade after the Victorian Civil and Administrative Tribunal was established?

The Hon. SHAOQUETT MOSELMANE: Yes.

Ms BAILEY: We included those examples to raise an issue that the Government needs to take into account: that consolidation needs to accommodate the positive things that some tribunals provide in New South Wales—such as the Anti-Discrimination Board, the Guardianship Board and so on—which is the expertise, the combination of non-legal and legal expertise on the panel and so on. In ensuring that consolidation works, you would need to retain the positive things that already occur in New South Wales. You do not want to destroy those.

The Hon. SCOT MacDONALD: In your submission you recognise an aspect that others have brought up—regional access. Do you get feedback with regional access? I think your point relates to people on a lower income, with less availability of transport and things like that. Is that a concern you have that you would like to see us follow through with?

Ms PETERS: Certainly, the evidence from the review of the Victorian Civil and Administrative Tribunal was that the expectation that there would be greater access for people outside Melbourne had not actually been met. That is the feedback from organisations like the Victorian Council of Social Services of New South Wales. In New South Wales that would be of concern to us. We know that access to government, in its various forms, is more problematic for people outside the Sydney-Newcastle-Wollongong belt. So yes, very clearly that is an element we think would need to be taken into account.

The Hon. SCOT MacDONALD: Exploring that, I think the Consumer, Trader and Tenancy Tribunal has offices in places like Tamworth, Armidale and Tweed Heads. Do we need more of that? Do you need bricks and mortar—somewhere where people can walk into a building—because that is the expensive end of this.

Ms PETERS: I think it would be the case that bricks and mortar would help. People who live outside the Sydney region will often say you can access information and the like over the Internet. That is problematic in some regional areas, particularly for older people who are not connected to the Internet or for people who have lower educational levels. The Internet is not always the perfect solution and sometimes it is the face-to-face contact with someone who can say: This is where you need to go. Having bricks and mortar may be something that is appropriate in that regard. We would say it is less the bricks and mortar and more the people who are in the bricks and mortar that is important. One of our recommendations is that there is a need for education and information to be available in a variety of ways to meet the needs of people, particularly those in disadvantaged and vulnerable communities. Distance is clearly an element of disadvantage, whether that be a physical or a more emotional notion of distance.

The Hon. SCOT MacDONALD: Would you have any suggestions for key performance indicators? We had a good submission from our last witness where they were right on top of their services and they had key performance indicators for the time of response and resolution and that sort of thing. They were more of a court-based type system. Have you got anything in mind there?

Ms BAILEY: When we were looking at our research we were considering, if it is not just about cost, what is it about? Looking at international frameworks, we have referred in general terms to the documentation that exists for those sorts of frameworks, where you would have checklists and so on. What I would put a caveat on is having someone saying, for example, "We have reduced appeals and we have met the hearing deadlines by 90 per cent", and yet the decisions are not accepted or trusted by the parties concerned. It still gets back to what Alison was mentioning about the people in the buildings or the members going out there, that they are appropriately staffed, appropriately skilled and they have the range of representation that exists on things like the Anti-Discrimination Board, the Guardianship Board and the Mental Health Tribunal.

The Hon. SCOT MacDONALD: So for you, it is not necessarily a key performance indicator figure to say that a complaint or whatever has been handled in 40 days, or something like that. That could actually be a perverse outcome, in some ways?

Ms BAILEY: I would not see is it as a lone outcome in the same way that, when you look at the consumer submissions to the Victorian review, the things that they were talking about were the consistency of decision-making, for example. So you need key performance indicators that involve some investigation of consumer satisfaction and acceptance of decisions. There is some indication from international research that if the community does not have trust in the tribunals then people do not abide by the decisions and they lose faith in this system. The Consumer, Trader and Tenancy Tribunal, the Mental Health Commission and so on, while people grumble about them on occasions, they still essentially have the trust of the community.

Ms PETERS: If I could add further, there is another element to this which perhaps we have not addressed in our submission clearly, that is, one of the other measures needs to be about people who currently do not access tribunals. For a large number of people who are disadvantaged or vulnerable in some way, they may just accept decisions that are poor in nature and lead to perverse outcomes without ever coming to this sort of system. We see access as not just about the outcomes of those who actually come before a tribunal or who might seek recourse through a tribunal but also about ensuring that people are aware that they have some capacity to challenge decisions in some way and support to do so.

Mr DAVID SHOEBRIDGE: That comes to a question I was going to ask. Are there particular community groups or segments of the population who are not being served well by the current system where we should be looking to ensure that they are more adequately served by any reform system? I am thinking people of non-English-speaking background, refugee groupings, as well as rural and geographic groupings.

Ms BAILEY: Concurrently with this inquiry the Attorney General's Department, as you are probably aware, is undertaking a review of legal needs of the community. We have been participating in that committee. I do not have my notes from that. Basically I think that would be an appropriate avenue for this Committee to look at the results of that legislative needs review.

Mr DAVID SHOEBRIDGE: I am not asking you to run off five struggling communities that you think we should be looking at. But are there common themes that we should be looking at?

Ms PETERS: From NCOSS's broader work, generally the top five would be the same regardless of the issue, whether it is access to tribunals or access to service provision. Poverty is the overwhelming theme. The poorer you are the less likely it is that you have the resources to understand what may or may not be your rights with respect to challenging decisions. That is one point we make. Aboriginal and Torres Strait Islander people are another who tend not to use these styles of tribunals to the same extent as other population groups. With respect to culturally and linguistically diverse [CALD] communities it tends to be the new arrivals, so refugees perhaps would be one group. In relation to the more established communities, again the issue is largely poverty and other forms of disadvantage. It is not necessarily because they come from a particular cultural or linguistic background. It is more to do with their level of education, their employment status and their income level.

Mr DAVID SHOEBRIDGE: So when we look at tribunals as opposed to courts, one of the key issues we should be looking at is ensuring access to tribunals, for example, through low filing fees. What other things should we be looking at in terms of ensuring access to tribunals?

Ms PETERS: Brendan has spoken about the Attorney General's committee which is looking at legal needs. One of the key things for us is support for people who may wish to pursue other avenues. It is not just understanding that there is support available but having it available in a practical sense. It would be remiss of me at this stage not to mention the NCOSS pre-budget submission, which we just launched, which draws attention to the ongoing need to provide support for community legal centres, for example, so that they are out in the community, wherever those communities are, doing an educative and information role but also having the capacity to take up cases where appropriate.

Mr DAVID SHOEBRIDGE: One of the other themes is the implementation. Different jurisdictions seem to have had different experiences on implementation. One of the themes is ensuring it is done in such a way so as to bring people with you. Do you think involving the community legal centres in that education and implementation process would be a good starting point?

Ms PETERS: It certainly is not a bad starting point. We would say that community legal centres very clearly have an expertise in these areas. Quite often the most disengaged, the ones who perhaps need the most assistance, do not make contact with community legal centres either. They may deal with other organisations first. So it is about an approach where you also educate caseworkers who may be dealing with drug and alcohol issues, mental health issues, children and family issues, et cetera, and allowing them to understand the capacity of tribunals, what they are there for, how they may be able to be accessed by their clients and how they can do that. So they do not have to be experts in what tribunals do but to understand those connections. That would be something we would say is important.

Mr DAVID SHOEBRIDGE: Do you not think having a single tribunal would assist in all of that? One tribunal with one common entry point might make that education task easier rather than having 30, as we do at the moment.

Ms PETERS: Our submission points to this: it is a balance. We would certainly accept that a consolidation may allow, if you like, disparate education programs to be collated so that it is about general principles. We can see some value in that. By the same token, what we also see is at the moment some of the tribunals have particular expertise which may lead to the perverse outcome of less effective decision-making because of a loss of that expertise. The Committee, we would argue, has to take that balancing element into effect.

Ms BAILEY: On the point of how do you access the hard-to-reach groups, again you are probably aware that the Law and Justice Foundation have done an awful lot of research in that area. Again referring to the legal needs committee, they are looking at that. Even though they may be looking at a range of legal needs,

including criminal needs, the experience and data they have produced ought to apply equally well to people accessing tribunals.

The Hon. SARAH MITCHELL: I want to come back to the issue of trust, which you have touched on. In your submission you talk about maintaining public trust so that people have faith in the integrity of the processes of the system. If there were a consolidation into a super-tribunal, for lack of a better term, are there particular ways to ensure public trust or is it something that happens over time with the decisions that are made being seen as feasible by the community?

Ms PETERS: I quickly go into this when we talked about the frameworks and principals the Committee should use. In and of itself consolidation, you could argue, is fairly neutral on the issue of trust. What we have put in our submission is that trust and the maintenance of that trust in the system, trust in particular decisions that are made, need to be factored into any framework for reporting, education and the practice of the tribunals if the Committee were to recommend along those lines. We see that as being quite fundamental to any tribunal, whether it is a specialist niche tribunal or a more generalist tribunal.

The Hon. PETER PRIMROSE: In response to Mr Moselmane's questions earlier you touched on points on pages 2 and 3 of your submission relating to some of the lessons learnt from the Victorian experience of consolidation. Would you be able to elaborate on some of those lessons learnt?

Ms BAILEY: When I was looking at the submissions that were made by the Public Interest Law Clearing House [PILCH] in Victoria and the seniors groups, they centred on the lack of skill of the tribunal members and the inconsistency in decision-making. Even though a decade prior they had been promised greater access, they did not believe that that had happened in terms of access in regional areas. It really got down to the value of the decision-making that was occurring because the members were clearly not supported in covering the range of issues that they need to cover in a consolidated tribunal.

The Hon. SHAOQUETT MOSELMANE: I understand from your submission that you are not opposed to a possible consolidation. However, with consolidation comes centralisation, which would impact significantly on the people you serve in regional and rural areas and particularly the indigenous population and people of non-English speaking background. What would you ask this inquiry to keep in mind so as to ensure that the situation of these communities, which are already poverty stricken, is not exacerbated even further?

Ms PETERS: One thing I would say—and I think this quite often gets lost—is the notion that we can make savings through, if you like, back-room savings so we can consolidate all the accounting, purchasing and the like. While there is certainly some evidence that that can happen, again one of the outcomes of that certainly for a State as geographically diverse as New South Wales is that what it tends to do is centralise those jobs into, frankly, Sydney, as opposed to regional areas as well. In other inquiries NCOSS has pointed to the fact that government jobs or indeed in our case community sector jobs based in regional locations can help the small businesses in town and so forth. So there is that counter economic argument. Again, it is a question of balance. Sometimes it is not always viable to do that, but we are mindful of that.

With respect to particularly hard-to-engage groups—the Aboriginal community is certainly one of those—there are very clearly programs in place that allow Aboriginal communities to work at their own pace in terms of understanding and how they might engage more broadly with the system. We know transport is a significant issue for regional and remote Aboriginal communities, and that goes to things like not actually having access to cars or indeed licensed drivers. So there are some practical barriers. Certainly there has been work done not just in New South Wales but in other jurisdictions about tribunals and indeed courts going to people, rather than people coming to courts. There are a number of practical ways that some of those issues can be dealt with. We do not have any specific recommendations about particular groups around this, but our recommendation is education and information both for the tribunals themselves—how they might engage with particularly vulnerable and disadvantaged groups are appropriate—but also more broadly for the community and that those education programs take into account different understandings and different ways of thinking that particularly groups might have.

The Hon. SHAOQUETT MOSELMANE: The next part of my question relates to what you just said. It also relates to your submission where you talk about protection of individual rights and possibly a loss of administrative justice. Can you elaborate on that?

Ms PETERS: The point I think we were making in our submission is for this Committee to understand that those things needed to be—at the heart of tribunals are the notions of administrative justice, administration law and principles around those. We would argue that they need to be balanced with an effective allocation of resources, which to some extent I think some of the discussion paper that was produced around this inquiry there is a focus on those elements and we just wanted to be clear that NCOSS's opinion is that while that is certainly an element to be considered we would not want to lose the very heart of what many of these tribunals are about.

CHAIR: In your submission you talk about a set of core skills that need to be possessed by tribunal members. Can you elaborate on that?

Ms PETERS: Some of the skills, we would argue, are very much about understanding the context and how to ensure that particularly those who are vulnerable or disadvantaged might relate to tribunals so to some extent people skills. I will refer to my colleague though who has some further information about this.

Ms BAILEY: I am slowing down here because it is quite a complex question. Again, I think I would refer to the international documentation about court and tribunal standards which are a starting point to outline not just the cost efficiencies which, as we were concerned, were the emphasis of these hearings and to take into account those broader issues that the documentation about meeting standards, about having a high level and a continuous improvement model to continually improve the functioning of courts and tribunals need. So I would refer members back to that documentation.

Mr DAVID SHOEBRIDGE: You said earlier that access is not just about bricks and mortar; it is about people. I suppose thinking then about if there was to be a new tribunal set up, one possible solution to that is to have flexible hearing procedures where you can allow the tribunal to go out into communities and have hearings within a community and have that as a core part of their function. Do you know any tribunals that do that well?

Ms BAILEY: I guess the opposite of that is the concern that people in the community and people on various boards have, particularly when they want a representative from the community, is that you need some continuity in having the people involved in similar cases or similar issues and similar pieces of legislation. What is of concern is if you have three or four different people going out at different times and hearing a huge range of cases you lose that expertise. So the lay person on the ADB might only hear five cases a year but that is enough to maintain that continuity in expertise and develop that range of knowledge that is needed. I do not know how you would maintain that if you are having a constant change of members for different types of hearings.

Mr DAVID SHOEBRIDGE: I was not so much thinking in terms of specialty. You may have a specialist division which is a class. I was more thinking about the practicality of getting out among the community and having hearings among the community, as opposed to having them in stand-alone courthouses or facilities where the community comes to the tribunal, actively ensuring you can have the community out there on circuits and the like.

Ms BAILEY: But you could do that now.

Mr DAVID SHOEBRIDGE: I just wondered if you knew of any structures that work well and did that well. I know the Federal Court focuses on that in, say, native title claims. I wondered if you knew of any.

Ms PETERS: As some Committee members might be aware, prior to joining NCOSS I was a trade union official of some 20 years standing. While the Industrial Commission has changed substantially in the four years that I have been out of that world, certainly its mode of operation is very much about being engaged in workplaces where required. The idea of actually going out to do that sort of work was something that the Industrial Commission, as it then was, used to undertake. As I say, circumstances have changed for that tribunal and I am not as up-to-date with it. I would also make the point that it was a well-resourced tribunal that had the capacity to do that. The Health Care Complaints Commission, I understand, also has some capacity to do that and I imagine other tribunals would do their very best. But sometimes the principle of going to where it is most appropriate to hear matters can be undermined by resourcing. So again it is that balancing question.

Ms BAILEY: It would depend on the case load, I would have thought as well—if you have a discrimination board which may not hear enough cases to go to Dubbo, Tamworth or whatever.

Mr DAVID SHOEBRIDGE: The Victorian experience was 10 years on they found it was not getting out to the regional communities, having that kind of access that they had hoped for. Do you think there is merit in building into any model we set up in New South Wales a reference group and a community reference group to be there from the outset looking at access and being a reference point to the community, between the community and the tribunal about access from day one?

Ms PETERS: Certainly those sorts of reference groups can assist in some of those particular matters. Again, though, I would get back to perhaps a reference group that is constrained by the fact that the tribunal does not have the resources, whether that be people, time or indeed money to be able to do that sort of work still would not produce the results that we might all want. I do not think NCOSS has ever said no to having greater and deeper levels of engagement around a whole host of processes but again it is the constraints that might be in those elements that make those valuable or not.

Mr DAVID SHOEBRIDGE: So that would have to come with a genuine meaningful review as to resources as well.

Ms PETERS: I think that would certainly be our view, yes.

The Hon. PETER PRIMROSE: Are there any reasons that it would be unwise to consolidate any particular tribunals? Can you think of any tribunals that you would not consolidate?

Ms PETERS: We do not have a firm view on that. Certainly we have indicated that one obvious concern is the loss of expertise. However, that can also be managed in other ways by having either divisions within a consolidated tribunal or the like. We do not have any particularly strong views about that. For us, what is important is to ensure that any process, whether consolidation, partial consolidation or the like, addressed for us what is the real heart of the issue and that is access and understanding and trust in the tribunal process.

The Hon. SHAOQUETT MOSELMANE: One of my previous jobs was a social worker, particularly for migrants and disadvantaged communities. I found it difficult to access information and pass that information on to those communities to understand. This process of consultation might take two or three years. So all the existing information, the social workers would have to understand the process and the information themselves before they pass it on. Do you have any idea of a strategy that could work in terms of helping those social workers, NCOSS and others to help those migrant communities and disadvantaged communities understand the transition to a consolidated tribunal?

Ms PETERS: Again my colleague Ms Bailey has spoken about the Attorney General's Department's work around access for legal needs. We would say that similar principles would apply. You are absolutely right that it is not about having every individual member in the community understanding what their rights or responsibilities might be, although that would be excellent if that were the case. But it is about understanding where they might be able to go to find out these sorts of things and having people whose day jobs might be as a social worker, a case worker, a migrant community worker, settlement services worker or the like understanding that these tribunals exist and these are the processes by which they might find out information that may be beneficial to the people they are working with and on behalf of.

Ms BAILEY: Our submission to that legal needs review dealt a little bit with those specific issues you raise, because the Law and Justice Foundation does the surveys that say, "Where do you go for information?" I think government and lawyers are way down on the list; it is family, friends, community contacts. One of the things we thought was useful for the legal needs committee to explore were things like a systemic overview of training for community workers and so on to build into their practices, particularly with the person-centred practices, that they apply now in terms of learning how to first identify the legal need, which is not apparent to most people.

Ms PETERS: We have raised our submission to the Attorney General's Department's work a number of times.

Mr DAVID SHOEBRIDGE: We should have a copy of that. Can you give us a copy?

Ms PETERS: We can make our submission available to the Committee if that would be of use. I do not believe there are any restrictions on us doing so.

Ms BAILEY: No. It is an internal departmental review.

Ms PETERS: We can do that.

CHAIR: Are there any other questions? I would like to thank both of you for being with us this morning and giving us your expertise in this area. There may be some more questions that do arise out of the evidence given today. If there are the secretariat will get those to you shortly and would be grateful if you can give us a response by 14 January 2012.

Ms PETERS: It is no different to some of the other time frames we have been working with this week.

CHAIR: You can only do your best.

(The witnesses withdrew)

(Luncheon adjournment)

NATHAN CURETON, Solicitor, Housing NSW, Department of Family and Community Services, and

CATHERINE STUART, Director, Client Service Operations, Housing NSW, Department of Family and Community Services, affirmed and examined:

PAUL VEVERS, Executive Director, Housing Services, Housing NSW, Department of Family and Community Services, sworn and examined:

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

Mr VEVERS: All the comments we make this afternoon we would ask to be taken in the context that generally we think the Consumer, Trader and Tenancy Tribunal works well in most cases for us. We have a good relationship with that tribunal and it meets our needs most of the time. There are two areas where we have a concern. One of which we touched on in the submission and the other we did not. We have a concern about more complex cases particularly where there is illegal behaviour by Housing NSW tenants. We try to respond very quickly when that happens, particularly if a major police raid has taken place because we want to reassure the community around those tenants that Housing NSW will respond very quickly and we want to send a message to all tenants that if they engage in illegal behaviour they will put their tenancy at risk. We do respond quite quickly, quite often the same day or within 24-hours of receiving notification from the police that they found firearms or drug manufacturing equipment or something of that nature.

It can take many months for those cases to go through the tribunal by which time as far as members of the community are concerned there is no connection between the offence that has taken place and the consequences because they still see those people living where they were living before even though they know from the newspapers what had happened. Those proceedings can get bogged down as though they are criminal proceedings even though they are not. They are tenancy related proceedings. We do think there is something of a problem in those cases.

The second area of concern to us is - whether the responsibility lies with the tribunal or the Residential Tenancies Act - when tenants are in rent arrears. Before we take them into the tribunal we will always have attempted to resolve the problem. We are a social housing landlord and we know that we work with people with complex needs. We will go to some considerable lengths to avoid trying to terminate their tenancy but there is a mutual responsibility with our tenants and if they do not fulfil that responsibility then we will seek to terminate their tenancy. When we take it to the tribunal we are serious that is the end of the matter. What then happens under the legislation is that there is a provision that tenants can offer to make an arrangement to pay and the proceedings are finished. That is frustrating for us. That is written into the Act. The landlord can disagree with the offer of a payment but for Housing NSW there is an expectation that we will be a model litigant and we will always agree to make an arrangement—and very often that is what happens. That is something of a source of frustration because we have been through that process and we would like to feel that Housing NSW was treated the same way that other landlords would be treated by the tribunal. Those are introductory comments from us.

Mr DAVID SHOEBRIDGE: If I could get the full picture about that arrangement to pay. If they then breach the arrangement to pay you can bring proceedings about the breach of the arrangement directly back to the Consumer, Trader and Tenancy Tribunal, is that the process?

Mr VEVERS: Yes, we can. It is a cumbersome process and some weeks or months would elapse in which the arrears would be mounting again.

Mr DAVID SHOEBRIDGE: Your concern is that there is a three step process, when you take into account your earlier efforts?

Mr VEVERS: Exactly.

Mr DAVID SHOEBRIDGE: If it is a statutory provision it may be beyond the scope of this inquiry which is looking at where current jurisdictions should neatly be founded. Have you approached the Consumer, Trader and Tenancy Tribunal [CTTT] and do you have a positive relationship with the CTTT when these systemic issues arise?

Mr VEVERS: It is a statutory provision that those arrangements can be made if the landlord agrees. What happens in practice is there is an expectation that we will agree because we are Government and we are a model litigant. We seek to be a model litigant. It is an expectation that has arisen and we have raised that with the Consumer, Trader and Tenancy Tribunal recently.

Mr DAVID SHOEBRIDGE: Is your previous experience with the Consumer, Trader and Tenancy Tribunal when you raise these matters that you have a positive relationship whereby they take it on and adjust their processes?

Mr VEVERS: If I could say something and ask Mr Cureton to say something as well. From the central part of the Consumer, Trader and Tenancy Tribunal we enjoy good relations and we can raise things. Our experience is that members of the CTTT enjoy a considerable degree of autonomy and what may be agreed centrally does not necessarily consistently pan out right across the State.

Mr CURETON: We do have a relationship with the Consumer, Trader and Tenancy Tribunal and meet with them on a bi-monthly basis. One of the difficulties we face is that in practice there is no judicial oversight of CTTT decisions. In theory there is because we can appeal to the Supreme Court or District Court, but in practical terms we do not do that because, firstly, the awards awarded are so small that we would not do that on a cost basis. Secondly, as a model litigant we would not take those technical points on those decisions and the procedures followed by individual CTTT members. In practical terms we cannot challenge an individual member's procedure.

Mr DAVID SHOEBRIDGE: Given that practical issue, if we were minded to set up a fresh tribunal you would like to see an internal appeal process that was less expensive and formalised than going to the Supreme Court?

Mr CURETON: I could discuss that with my colleagues but that would certainly be an interesting option.

The Hon. SHAOQUETT MOSELMANE: Just following up on your comments, Mr Revers, you said earlier that Housing NSW are happy with most of the results from the Consumer, Trader and Tenancy Tribunal [CTTT]. Can you outline some cases where you were not happy with the CTTT?

Mr VEVERS: I think it is in particular where there is criminal behaviour where we feel sometimes that the proceedings seek to establish proof to the point of criminal responsibility when that is not necessary in the tribunal. It is an on the balance of probabilities arrangement and it can be onerous on us, especially when there is legal representation for the tenant that we are taking into the tribunal. It is onerous and very protracted, going on many months.

Ms STUART: How specific do you want me to be? Do you want names and case numbers?

The Hon. SHAOQUETT MOSELMANE: Just a general response.

Mr DAVID SHOEBRIDGE: A case study perhaps.

Ms STUART: We have a case that is still going and I need to be conscious of that. We made the application on the last day of August and it related to illegal activity on the premises. It was adjourned on 16 September to allow for the completion of criminal proceedings that were at that time set down for the end of September. On 4 October we received advice that the criminal proceedings had been adjourned until November. Then in October the Consumer, Trader and Tenancy Tribunal adjourned its hearing waiting for the criminal proceedings to conclude. On 15 November the CTTT proceedings were adjourned to no earlier than 17 January 2012, directions for exchange of documentation were made and there were some indications from the member that by early January the original termination notice that was issued back in August was getting a bit old. That is one example. We have had others like that over the years.

The Hon. SHAOQUETT MOSELMANE: What would be the resolution of that if it is extended over such a long time?

Mr VEVERS: Our view is it is not necessary to determine the criminal proceedings before you determine the civil proceedings and we would ask that the case be considered as a tenancy tribunal matter in a timely way.

Mr DAVID SHOEBRIDGE: I assume the contrary argument to that is that these are people who are facing criminal proceedings and if they have to give evidence in a civil tribunal about the circumstances leading up to the criminal proceedings they might be effectively forced to waive privilege and give evidence about a matter they have been given advice in the criminal proceedings not to give evidence on. I suppose you are caught in the difficult situation of having those competing public policy considerations—the right to silence in a criminal trial—together with some sort of regulated use of public housing stock. Do you see there is another argument to it?

Mr VEVERS: Yes, I absolutely would see that argument. From our point of view we are keen to establish public confidence in our response to tenants who engage in illegal behaviour.

The Hon. SCOT MacDONALD: Can I just follow what you are talking about there in relation to autonomy? Some of the Consumer, Trader and Tenancy Tribunal people are not bound by precedent, if I am following you correctly, is that what you are saying? There is a little bit of variability to this?

Mr CURETON: We are bound by precedent from a higher court, but they are not bound by the decisions of other tribunal members. Certainly there is an expectation that there will be some consistency between decision-makers, but that does not always play out.

The Hon. SCOT MacDONALD: The reason for asking that is, if I understand it correctly, if we go to the consolidated model and the Consumer, Trader and Tenancy Tribunal comes in under the umbrella you will have greater emphasis on consistency, less autonomy and higher legal skills. Would that not be attractive to Housing?

Mr CURETON: That would be very attractive to Housing. Having judicial members at the top, so to speak, would be a benefit.

Mr DAVID SHOEBRIDGE: At some point, if the Committee decides to recommend a super tribunal, we will need to look at the threshold for appeal points and whether or not there should be a reasonable threshold for appeal points, but it seems to me that some of your practice, from what you say, is relatively modest disputes, a relatively modest quantum, but there is a benefit even in those disputes in having some appeal decisions so that you get uniformity imposed by the appeal process and authoritative determinations.

Mr CURETON: That is correct, yes.

The Hon. PETER PRIMROSE: Is there any reason why you would need to merge the Consumer, Trader and Tenancy Tribunal into a larger body to overcome the concerns that you have?

Mr VEVERS: I think per se no. I do not think we are probably terribly well-qualified ourselves to comment on the organisational structure for the Consumer, Trader and Tenancy Tribunal. We can certainly comment on how we experience it, but I do not think we would necessarily know that a change in organisational structure as such would lead to the changes that we would like to see.

The Hon. PETER PRIMROSE: So therefore in relation to 2C in our terms of reference, in regard to the difficulties that you are experiencing, one of the things you talk about, regardless of whether it is consolidated or not, is the importance of technology in innovation in the tribunal setting. Could you elaborate on what types of innovation you think would be important and would be of benefit and where you have maybe seen them operating in other tribunals?

Ms STUART: I can elaborate on that. As a whole the Consumer, Trader and Tenancy Tribunal has a very proactive registry; they are very focused on efficiency, from what we can see. But they also seem to actively look for opportunities to improve access to the Consumer, Trader and Tenancy Tribunal and how they do things. For example, they implemented an online lodgement system some years ago. Housing NSW was involved in piloting that system and after the pilot was successful it was rolled out for all customers. Similarly, more recently, they have implemented an e-connect system that allows emails to be sent to people using the Consumer, Trader and Tenancy Tribunal of hearing notices and so on.

Another area where we are aware that the Consumer, Trader and Tenancy Tribunal has shown innovation is in improving services in rural and remote areas. There are members who travel to rural areas to hold hearings face to face, but in recent years the tribunal has looked at other options for those matters and we are aware that they piloted phone hearings and are some way down the path of using phone hearings now. I understand from discussions with them that they are interested in ultimately using video technology to be able to hook people up from different locations. Those types of innovations are very important. Housing NSW is a statewide operation; we have offices in locations where there are not Consumer, Trader and Tenancy Tribunal hearings necessarily and all those issues about travel in the country apply to our staff in the same way they apply to other people in those communities.

The Hon. PETER PRIMROSE: Are there additional innovations that you have seen work in other tribunals that you might be aware of that you could suggest the Consumer, Trader and Tenancy Tribunal could implement to make their responses faster and more efficient and so on?

Ms STUART: I am not aware myself.

Mr VEVERS: No.

The Hon. SARAH MITCHELL: If the Consumer, Trader and Tenancy Tribunal were to be merged into a super tribunal or a consolidated tribunal what do you think would be the best method of engaging stakeholders like yourselves in the process to ensure that there is still some continuity in services?

Mr VEVERS: I think certainly some engagement between the registry of the Consumer, Trader and Tenancy Tribunal and us would be very helpful. We have that now, so whatever would be the equivalent body of a bigger tribunal we would very much want to engage with the practical matters of the sort that Catherine has outlined, and in particular on the scheduling of hearings—that is quite important for us; you can take a whole day of a staff member's time on a case if it is not well scheduled, and if they are back again the next day it is quite wasteful of resources—and we try and work quite carefully with the registries. But we feel that we could work with any tribunal arrangement that existed.

The Hon. SARAH MITCHELL: Just following up from that, do you think there would be a positive or negative impact on your clients in relation to their access to justice or to the resources for the vulnerable people in society if we move towards a consolidated tribunal?

Mr VEVERS: My instincts would be that providing that there was ease of access to that tribunal the actual organisation of the tribunal would not make a great deal of difference to them.

Mr DAVID SHOEBRIDGE: What is your experience with the cohort of members who form the Consumer, Trader and Tenancy Tribunal in terms of their understanding of the intricacies of the law in your area and their ability to deal with the issues that arise under tenancy law in particular?

Mr VEVERS: Could I comment from a social housing perspective first and then perhaps ask Nathan to comment from a more legal perspective? The Consumer, Trader and Tenancy Tribunal set up a social housing division and we had some hopes that that division would lead to a better understanding of how Housing NSW and community housing providers—we together constitute social housing—operate. In actual fact it probably has not really turned out that way for us. Whilst some of those members have had a greater awareness of us we think sometimes that has led to them in individual cases wanting to question policy in relation to tenancy matters rather than the application of the Residential Tenancies Act.

So the steps, for example, that we might take with a mental health client—of course we have absolute obligations there—those are matters of operational policy not of the application of the Residential Tenancies Act The social housing division we think probably has not helped us a great deal—in fact, possibly slightly the opposite. I think it has probably moved us a bit away from the same practices that would apply to private real estate agents, and we would like to see that converging a bit more.

Mr CURETON: In relation to the members' knowledge of such things as the Residential Tenancies Act, we have found generally it is quite high. It can be varied but generally it is quite high. The area that we would more probably have difficulty with is member knowledge of things like procedural fairness and that sort of thing. But generally the Residential Tenancies Act is quite high.

Mr DAVID SHOEBRIDGE: But in terms of their understanding of how to balance the various competing interests in the hearing before them on questions of procedural fairness that is where you found some potential defects?

Mr CURETON: That is right, yes.

Mr DAVID SHOEBRIDGE: In what way?

Mr CURETON: In terms of giving an equal balance to both sides. We have found that tenants usually seem to have greater access—

Mr DAVID SHOEBRIDGE: Greater leeway.

Mr CURETON: Greater leeway, yes, exactly.

Mr DAVID SHOEBRIDGE: In that regard there seems to me to be almost two competing threads to your discussion about specialisation. There are benefits in specialisation so far as they know the Act and understand the issues but there is a concern that once people become too specialised in the area they start second-guessing your policy decisions.

Mr VEVERS: Yes. I think specialisation from a legal point of view has some strengths. The organisational structure of having a social housing division we felt has not delivered what we thought it might.

The Hon. SHAOQUETT MOSELMANE: Could you articulate the advantages and disadvantages of the Consumer, Trader and Tenancy Tribunal being consolidated into a major tribunal? What would be the advantages and disadvantages to you if that were to happen?

Mr VEVERS: I think it is quite difficult for us to comment on that because we just do not feel we have got the background of knowledge to be able to address that. We have some things we would like to see: greater consistency—we think that with some greater judicial oversight that would be achieved, and we would certainly like to see that; and we would like to see some speedier hearings on the more complex matters, but I do not think we have the expertise to comment on whether one organisational structure or another would deliver that.

The Hon. SHAOQUETT MOSELMANE: But you do not object to consolidation?

Mr VEVERS: We would not object to consolidation, no. Our interest would be how it operates in our tenancy matters.

The Hon. PETER PRIMROSE: I note on page four of your submission you express support for the monetary jurisdiction of the Consumer, Trader and Tenancy Tribunal to be increased. Could you comment further on that?

Mr CURETON: One of the things that we can do is when we have got termination from a tenant they owe us money in rent arrears. We are often finding it the case that they owe money that is just outside the $15,000. It has only recently been put up from $10,000 and we are finding that it is not a one-stop shop for us basically. If we want to we can get termination but if we want to recover the money we have to go to the Local Court.

Mr DAVID SHOEBRIDGE: Given that experience would you see potentially some merit in having the capacity of a super tribunal to order the recovery of moneys in tenancy matters to then allow for the engagement of the recovery machinery like the Local Court has?

Mr CURETON: Yes. I think that would be of great benefit. As I said, it would be one stop rather than a second step.

The Hon. SARAH MITCHELL: I just wanted to talk about the number of matters dealt with by the Consumer, Trader and Tenancy Tribunal. I think the figures we have got here show that last year it was close to 60,000 matters, and some of the other stakeholders who have made submissions to the Committee have said that there is some concern that the matters of the Consumer, Trader and Tenancy Tribunal could potentially

dominate a super tribunal. I wondered if you had any views on the capacity of the tribunal to cope with the Consumer, Trader and Tenancy Tribunal matters as well as giving adequate support for other types of claims and vice versa.

Mr VEVERS: We are only ever engaged on tenancy matters with the tribunal. It would be very rare that it was anything other than a tenancy matter. I do not have any comment on that.

Mr CURETON: The only other tribunal we tend to use on a regular basis is the Administrative Decisions Tribunal in relation to discrimination-type matters. It is not uncommon for us to be there, but at nowhere the frequency of our engagement with the Consumer, Trader and Tenancy Tribunal.

CHAIR: You have more or less covered the matters we wanted covered. Members may have questions arising out of your evidence today after we have looked at the transcript and considered it further. If there are any questions, we will endeavour to get them to you quickly. We would appreciate a response by 14 January, if possible.

Mr VEVERS: Of course.

CHAIR: Thank you for appearing at this hearing. Your evidence has been very valuable.

(The witnesses withdrew)

(Short adjournment)

KAY ELIZABETH RANSOME, Chairperson, Consumer, Trader and Tenancy Tribunal, affirmed and examined:

GARRY WILSON, Deputy Chairperson (Registry and Administration), Consumer, Trader and Tenancy Tribunal, sworn and examined:

CHAIR: Thank you for appearing before the Committee. Would either of you like to make a short statement?

Ms RANSOME: I will be very brief because I am sure members have questions that they want to ask. I will briefly refer to the submission, which has been provided to members. We intended to provide the Committee with sufficient information and detail about who we are at the Consumer, Trader and Tenancy Tribunal and what we do so members have an understanding and a picture of the way we work. We have more information available today. If I may, I will table a couple of additional documents: The tribunal's annual report for the financial year just ended and a new guidebook to the Consumer, Trader and Tenancy Tribunal accompanied by 10 short videos illustrating aspects of the tribunal's work and how we do it. These resources have been translated into five community languages and English with captions for the hearing impaired. Committee members are welcome at any time to attend the tribunal. Our hearings are open to the public and we are more than happy to assist members if they wish to see how hearings are run.

Documents tabled.

In line with the Committee's terms of reference we must look at what tribunals do and their characteristics and whether there is a generic set of features that should perhaps inform the Committee's deliberations in coming up with a model that will suit tribunals for the future in New South Wales. One thing that we must bear in mind is that tribunals are an alternative or an adjunct to the courts. They are not part of the court system, but they have become an integral part of the justice system not only in this State but throughout Australia and in other parts of the world. Tribunals may provide remedies to people that are not available through the court system.

They are intended to be low cost, both to the parties who use them and, importantly, also to the State. They should also deliver justice in a timely way. They must also be accessible. Most tribunals have a fairly simple application process and it is not necessary to have legal representation. Usually there is an obligation on tribunals to provide some form of assistance short of legal advice to parties that use their services to help people through the processes. Those processes are, by and large, informal, although some people rather than using the word "informal" will refer to "relaxed formality", which is an interesting way to describe it. There is usually no pleading and rules of evidence usually do not apply. Some of these things may differ from tribunal to tribunal. Understandably, disciplinary tribunals, which may impose fairly serious sanctions, may attract a higher level of formality than, say, the Tenancy Division of the Consumer, Trader and Tenancy Tribunal, which deals with small claims lodged by tenants and landlords. Tribunals usually have flexible procedures that can be tailored to particular types of cases. Most tribunals have as an integral part of their processes some form of ADR.

Mr DAVID SHOEBRIDGE: Is that alternative dispute resolution?

Ms RANSOME: Yes, which includes mediation, conciliation, expert assessment or some other similar process. The membership of most tribunals is independent and members are usually appointed by the Governor. Another feature of tribunals is that they have some expertise and specialisation. A number of tribunals use lay members and they may sit in panels. This can vary from tribunal to tribunal depending on the subject with which they are dealing. They are tasked with providing fair decisions in accordance with the law. Whatever the structure developed in New South Wales, those are the characteristics that should not be lost in any new organisation.

The Consumer, Trader and Tenancy Tribunal itself is an amalgamated tribunal. It was formed by incorporating two very different tribunals in 2002. One of the features of this tribunal and other amalgamated tribunals, such as the Administrative Decisions Tribunal, that should be a feature of any new organisation is a divisional structure that supports horses for courses. Not every dispute is the same and not every jurisdiction is the same. Divisional practices can help like disputes to be dealt with in a similar manner and the same dispute to be dealt with according to the nature of the issues, the parties to the dispute, the amount of money involved and the general importance of the dispute to the community.

Clearly, there are day-to-day practicalities in bringing tribunals into one amalgamated structure, including different IT and administrative systems, different premises with different accommodation standards and different business practices and priorities. There is another more overarching issue in any new structure; that is, a new culture may need to be developed that will assist it to achieve its aims. As members are aware, our submission does not plump for any of the options put forward in the options paper. As a tribunal we do not have strong views about that, other than to make the point about the characteristics of the tribunals that should be taken through to any new structure.

CHAIR: The Committee's terms of reference ask members to make inquiries about the Consumer, Trader and Tenancy Tribunal's effectiveness in providing a faster, informal and more flexible process for resolving consumer disputes. A number of submissions have expressed criticism of the tribunal, for example, for the time it takes to resolve disputes. Would you like to comment on that criticism? Would you also like to comment generally on your effectiveness in providing a fast, informal and flexible process for resolving consumer disputes?

Ms RANSOME: The tribunal deals with 60,000 applications on average each year. It is the highest volume tribunal in New South Wales and it is second only to the local courts in terms of the volume of cases dealt with by any court or tribunal. In Australian terms it is second only to the Victorian Civil and Administrative Tribunal. We deal with a vast range of disputes across nine divisions in the tribunal. They are quite disparate in nature. There is little in common between an application to terminate a residential tenancy because a tenant has not paid rent and an application for $500,000 related to defective building work.

The tribunal aims to deal with all matters within its jurisdiction in the most effective and timely way. We have developed procedures that are tailored to our specific divisions and in our discussion paper we refer to some specific procedures that we use depending upon the nature of dispute. In our small claims areas—tenancy, small general consumer claims, small home building claims, motor vehicle matters involving relatively small amounts of money—the vast majority of those claims, something like 75 to 80 per cent, are dealt with within four to eight weeks from the date of lodgement.

There are a number of matters that come before the tribunal in two divisions in particular, the home building division and the strata and community schemes division, that raise issues that are of far greater legal and factual complexity than those in other divisions. Those matters take longer. From time to time matters can take longer than either I would hope or the parties would hope, but that happens for a variety of reasons, which sometimes are not within the tribunal's control. In strata schemes disputes parties can be legally represented as of right, which is not a feature of any other division. In large home building disputes parties are generally legally represented, and there is provision for that in the Consumer, Trader and Tenancy Tribunal Act. When lawyers are involved matters can take longer. There are procedures that need to be gone through to gather evidence, particularly expert evidence, that take time.

I cannot sit here, having made an affirmation, and say to you that there is never a case in the tribunal that does not take longer than it should, but I can say that the vast majority of matters in the tribunal are dealt with in as timely a way as is possible and are certainly dealt with within time frames that are, by and large, faster than those in the court. As you are aware, we share jurisdiction with the Local, District and Supreme courts in some matters, particularly in relation to home building disputes. A person can lodge in the District Court or the tribunal and matters get transferred between the jurisdictions. Matters in the tribunal will not take as long as matters in the District Court or Supreme Court, and the cost to the parties and to the State of those matters is less.

CHAIR: Can you be more specific on that? Do you have any statistics? You said there are many matters, more than you would anticipate or want, that are not dealt with in a timely fashion. Those are very broad terms. Do you have any specific information that could assist us?

Mr DAVID SHOEBRIDGE: Page 61 of the annual report that we just received.

CHAIR: Do you have that in front of you as well?

Ms RANSOME: Yes. I can go through it division by division if you like.

CHAIR: No, we have the information in the report we have just received but you might want to give us a thumbnail sketch.

Ms RANSOME: I can give you a selection. In the home building division in matters involving sums under $30,000, 66 per cent of matters last year were dealt with within 16 weeks. In tenancy matters relating to termination of application, 74 per cent of matters were dealt with to finalisation within four weeks. In motor vehicle matters, 66 per cent were dealt with within 16 weeks. Is that the sort of information you are after?

CHAIR: Yes. Is that information and additional information contained in the annual report?

Ms RANSOME: Yes.

CHAIR: Are you happy with the figures in the report?

Ms RANSOME: I am never happy.

CHAIR: I understand that, but overall do you believe your situation is satisfactory?

Ms RANSOME: There is always room for improvement. In any decision-making body there is always room to improve timeliness and the way services are delivered, so while the statistics show the tribunal deals with matters in a relatively timely way that is not the end of the road. We have time standards in place that we aim to achieve in relation to dealing with matters quickly. Sometimes we exceed those standards; sometimes we just meet them, and sometimes we fall just slightly behind. We are always monitoring to see if there are areas where we can improve.

CHAIR: How do the results you have achieved compare with similar tribunals in other States and other jurisdictions? Have you done any comparisons?

Ms RANSOME: We have done some comparisons with other States where that is possible but we are hampered by the information that is available to us and the fact that in the Victorian Civil and Administrative Tribunal [VCAT] and the Queensland Civil and Administrative Tribunal [QCAT] the class of case in a particular division is not exactly the same.

CHAIR: Comparing apples with apples as best you can, how do you suggest you compare?

Ms RANSOME: I think you would be hard pressed to find a more efficient system to deal with small disputes in particular.

The Hon. SCOT MacDONALD: Previous witnesses, if I understood them rightly, said there was merit in a bit of judicial discipline, if that is the right word, but you are saying there is great reward from a less formal structure. My understanding is that if the tribunal got dragged into a super tribunal it would be more formal and it would have a more judicial look to it. Do you see dangers there?

Ms RANSOME: I do not think having a judicial officer in charge per se means that processes would necessarily become more legalistic. They may or they may not; it depends on the judicial officer and it depends on the charter of the new organisation. It would be a shame, however, if that did happen and the informal nature and speed and accessibility of the work that we and other tribunals do—the Guardianship Tribunal, for example—were to be lost in a new structure. I have no belief that that would occur.

The Hon. SCOT MacDONALD: If we prepare a report in a couple of months time we really have to red flag that as something to be wary of and that we do not lose the benefits of being able to deal with the small penny and dimes stuff—I am sorry if that is a bad way to describe it—and make it more complex than it needs to be.

Ms RANSOME: I cannot speak for what has been necessarily the experience in other States through their amalgamated structures, but that may be something the Committee can pursue with those tribunals, such as VCAT and QCAT, to find out what impact the amalgamated structure has had upon some of their less formal divisions. I think the impact can be lessened so long as there are pretty good divisional practices in place.

The Hon. SCOT MacDONALD: Some of the comments made about the tribunal were that there was an aspect of variability and that you did not have the same disciplines of precedents, if that is the right way to describe it, and it might depend a bit on the skills and personalities involved. Would a super tribunal model maybe iron out some of that?

Ms RANSOME: I do not see how that could occur. Decision-making in a tribunal is not precedent setting. It is the same in the Local Court. No magistrate is bound by another magistrate's decision and no District Court judge is bound by another District Court judge's decision. In this State the Court of Appeal is the binding authority. I do not think that simply moving into a new structure will overcome any issues to do with precedent.

The Hon. SCOT MacDONALD: Or variability? Do you have any comment on that? I appreciate that that is hard to define.

Ms RANSOME: It is, and what may be described as variability in outcome by one person may well be described quite differently by someone else.

The Hon. SCOT MacDONALD: In the eye of the beholder, is it?

Ms RANSOME: That is right. One of the issues that all decision-makers grapple with is that their decision can only be based on the evidence before them. As we know, the quality of evidence can be very variable. Indeed, cases that on the face of it seem to involve the same issues and the same facts but have different outcomes can be viewed as inconsistent. I will give you an example. We had a matter earlier this year in the retirement villages division of the tribunal involving whether an operator who owned a number of villages could apportion costs across different villages and the costs be sheeted home to the residents through their recurrent charges. The wording in the Act says, in simple terms, that the operator has to show that these costs can be attributed to the village.

A matter came before the tribunal and the tribunal member made a decision that the costs that the operator was seeking to attribute to a particular village could not be charged because the operator could not show that they could be apportioned in that way. That matter went on appeal to the Supreme Court and the tribunal's decision was upheld. While that was going on an application was brought to the tribunal in relation to another village owned by the same operator. Part way through the process the Supreme Court's decision was handed down and an adjournment was sought by the operator, who came back with further evidence in support of the case. In that case he was able to show, because of the new evidence, that those costs were in fact attributable to that village. In that case a different decision was made because what was before the tribunal was very different evidence about the same issue. So it is very difficult to say there is inconsistency.

Mr DAVID SHOEBRIDGE: But surely one thing a tribunal should strive for, and it should be one of the principles we look at when we consider a tribunal structure, is consistency in outcomes. So there may be some wrinkles and differences in facts which explain different outcomes but essentially the same set of facts should produce the same set of outcomes on a consistent basis in a tribunal.

Ms RANSOME: Absolutely.

Mr DAVID SHOEBRIDGE: There have been a couple of submissions to the effect that the absence of an internal appeals structure in the Consumer, Trader and Tenancy Tribunal, which would give a kind of precedent, means there is a more heterogeneous outcome in your tribunal than in some other tribunals. Do you have a response to that?

Ms RANSOME: There may be a misunderstanding about what precedent is. Precedent is about the law being applied to similar facts in the same way, so a single interpretation of the law is applied to similar facts. It is not about the facts themselves. A situation that turns purely on its facts will have a lot of variables. As I said, I agree with you wholeheartedly: similar facts situations applying the same law should have a similar outcome. There is no doubt about that.

I am not aware of matters within the tribunal where the outcomes are so widely differing, where similar facts and similar evidence have been put forward. The tribunal puts a lot of emphasis on and effort into the training of members through professional development activities. Many of those development opportunities are set out in the information that is attached to our submission. The training is about getting the law right and improving consistency in decision-making.

Mr DAVID SHOEBRIDGE: Do you believe there may be some scope for having an internal merits appeal, rather than just a question of law, so that there is more consistency in approach in how the tribunal goes about its work?

Ms RANSOME: The tribunal is not an administrative tribunal in the same way that a number of other tribunals are. The tribunal is a court substitute tribunal. We deal with civil claims in the same way as the court system does but through a different process. The internal merits review is usually applied to administrative decision-making. In terms of the Consumer, Trader and Tenancy Tribunal, what you would be putting in place is a full appeal on any decision that came before the tribunal.

Mr DAVID SHOEBRIDGE: Not necessarily. There are all sorts of different appeals—

Ms RANSOME: But that is what a merits appeal is, it means that the whole process starts again, that you get another go, if it is not on an error of law.

Mr DAVID SHOEBRIDGE: There are many different ways you could structure an appeal process. You could have it as a review of error, or as a review of fact and law. There are different ways of structuring an appeal.

Ms RANSOME: There are. In a tribunal that deals with 60,000 matters, you would need to be careful of the structure you put in place, so that the appeal structure did not overwhelm everything else. Also, would there be thresholds that would apply? Would it apply to the Tenancy Division? I can see that there would be some arguments against a full merits appeal in Tenancy, where there could be misuse of the system.

Mr DAVID SHOEBRIDGE: I am asking you the question; you are proposing a lot of questions back. I know these are issues for us to consider but I am asking you the question. You have an enormous case load, have you turned your mind to what, if any, merit would there be in an internal appeal process? We had evidence from the Workers Compensation Commission that their internal appeal process was broken and they had to fix it through statutory amendment. Have you considered these issues?

Ms RANSOME: Under the Consumer, Trader and Tenancy Tribunal Act, section 68, there is a process of rehearing whereby the chairperson or my delegate can grant a rehearing. It is a full rehearing—the matter basically starts again.

Mr DAVID SHOEBRIDGE: De novo.

Ms RANSOME: There is a rehearing if it appears to me that the person seeking it may have suffered a substantial injustice. There are limited grounds upon which a rehearing can be granted: whether the decision is not fair or equitable, whether it is against the weight of the evidence or whether significant new evidence has arisen since the decision was made. A number of rehearings are granted on those bases. That is, in effect, an internal appeal process. There are internal appeal processes in the Administrative Decisions Tribunal but that is on error of law. There could be merit in an internal Appeal Division but I think it would need to be carefully thought through in terms of the implications for an explosion in the case load, to make sure that that did not happen.

The Hon. SHAOQUETT MOSELMANE: I move away from internal procedural matters and ask a question in relation to the matter you raise on page 12. You say, "One of the features of the Consumer, Trader and Tenancy Tribunal is that it is not city centric." I also refer to your annual report on page four where you say, "More than 72,800 hearings were conducted at nearly 70 locations in metropolitan and regional New South Wales." If the Consumer, Trader and Tenancy Tribunal were dragged into a consultative structure—to use the language of my colleagues—how would that impact that particular type of service, that you go outside to the regional and rural areas?

Ms RANSOME: The Consumer, Trader and Tenancy Tribunal has a substantial infrastructure ourselves. We have eight registries around New South Wales and other hearing locations. Our regional presence is a feature of the Consumer, Trader and Tenancy Tribunal that I would not want to see lost in any amalgamated structure. Our members are not all based in Sydney but are located across New South Wales. About 40 per cent are located in regional areas—from Bourke to Bega. I would hope that any new structure would take account of that. When the Hon. Justice Kevin Bell reviewed the Victorian Civil and Administrative Tribunal, he spent some

time with us at the Consumer, Trader and Tenancy Tribunal. One of the recommendations that he took back to Victoria was to give the Victorian Civil and Administrative Tribunal a more regional presence. That recommendation has been implemented and I would expect that any restructure in this State would not diminish that.

Mr WILSON: What the opportunity does present is for other tribunals to share that infrastructure. I think that is an important point to consider as well.

The Hon. SHAOQUETT MOSELMANE: That is the other part of my question. Could you explain how this could be retained? That could be a positive argument, where you bring other tribunals into your system in the regional areas.

Ms RANSOME: We already do that. The Guardianship Tribunal uses our hearing rooms and the Commonwealth Social Security Appeals Tribunal uses our hearing rooms in regional centres.

The Hon. PETER PRIMROSE: the Hon. Shaoquett Moselmane and I were reading the same section of your report, the last paragraph on page 12, where you highlight the strengths of the Consumer, Trader and Tenancy Tribunal, including those local services. We have heard evidence from Housing NSW that they had experienced difficulties in accessing the Consumer, Trader and Tenancy Tribunal in some rural locations. Could you explain in more detail how that strength that you outlined, of having local services accessible throughout the State, actually works?

Ms RANSOME: We have a system whereby each of our eight registries has a particular catchment area that it looks after, based on postcode. We have regular sitting days in most of the large cities and towns throughout New South Wales. So we have different hearing locations here in the metropolitan area in Penrith, Wollongong, Gosford and Newcastle and we sit regularly in larger centres like Taree, Kempsey, Coffs Harbour, Port Macquarie, Lismore, Tweed, Bourke—we go everywhere. There are some small towns such as Brewarrina or Wilcannia where we may not get significant numbers of matters lodged at the same time to warrant our going there on a regular basis. The way we generally deal with that situation is by telephone but if there are sufficient matters, we will go to wherever the work is—Griffith, Deniliquin, Wentworth or Broken Hill—it does not matter.

We have a policy whereby, if anybody lives more than two hours from a hearing venue, we will offer them the facility of appearing by telephone, rather than having to travel to the hearing location. In some matters—Aboriginal housing matters in particular—that is not possible because the tenant does not have a telephone, so we will go there. At the moment we are trialling videoconferencing technology, which is Internet based. Our intention is to eventually open up that facility so that we can use videoconferencing technology to provide a faster service to people, particularly in the regional and more remote areas of New South Wales. That is in its infancy, it is being trialled at the moment and we will see where it goes. In relation to the comments that were made by Housing NSW, Housing NSW has never raised with the Tribunal any issues concerning their difficulties in attending hearings and I am therefore not aware of it.

The Hon. PETER PRIMROSE: Could you take that on notice and have a look at their concerns and maybe comment on it?

Ms RANSOME: I met with Housing NSW yesterday and they did not raise those concerns.

The Hon. PETER PRIMROSE: Maybe it is a matter for a subsequent meeting. I think it is a very important issue and certainly part of our terms of reference, the issue of the rights of appeal available from Consumer, Trader and Tenancy Tribunal decisions and I think the questions that were being asked are very important. Could you take that on notice as well, to come back to us with some thoughts in relation to the questions that have been raised as to how we might be able to address that specifically, because it is one of the terms of reference.

Ms RANSOME: Indeed, and in our submission we have made comment that the system of appeal that was introduced in 2008 has certainly led to some unusual outcomes.

The Hon. SCOT MacDONALD: Can I explore the telephone and possible videoconferencing a bit more? Are you aware of any other jurisdiction, such as Victoria, Queensland or Western Australia, doing that?

Ms RANSOME: At the time that the State Administrative Tribunal was set up in Western Australia, I spoke with them and they were certainly looking at using the telephone because the distances that are involved in Western Australia out shadow anything that we have in New South Wales. My understanding is that in Queensland they use the telephone. As far as I am aware, no-one is using video in the same way that we would hope to use it, which is over the Internet, with someone sitting at home with their personal computer. My background is in tribunals and I come from the Commonwealth originally and certainly in the Commonwealth, video is used.

The Hon. SCOT MacDONALD: First of all, I should declare that I have been in a Consumer, Trader and Tenancy Tribunal jurisdiction matter by telephone and I thought that it worked very well. They were hundreds of kilometres away from where I was and I thought it was a fair outcome and handled fairly. I will put that on the table. But that then begs the question that, if you move into this supertribunal process, it is more relaxed. You are sitting there around the table with a cup of tea and the papers in front of you. There is not much formality. Would we potentially lose that, which to me seems a very good service?

Ms RANSOME: It goes back to one of the points I made in opening. A lot depends on leadership from the top, whoever is in charge of the new structure and the culture that is developed in that structure. There is no reason, per se, why it should be lost but it has to be an integral feature that is built into the legislation and built into the operating structure of the new tribunal.

The Hon. SCOT MacDONALD: Out of those hearings by telephone, have you had any requests for rehearings or appeals?

Ms RANSOME: I could not say no, there probably have been, but it is a surprisingly engaged process although you would not think that it would be. In some matters we have had both parties on the telephone. This morning we had someone who was calling in from overseas, because they had moved out of the jurisdiction. So long as there is not lengthy evidence to be given or a plethora of documents to be gone through, in small cases it works very well and it provides people with instant access to the Tribunal and it means that they do not have to travel.

The Hon. SARAH MITCHELL: We spoke with witnesses earlier today about maintaining integrity within the tribunal structure and making sure people still had faith in the system if we were to move towards a consolidated tribunal. You said that the Consumer, Trader and Tenancy Tribunal had 60,000 matters this year. Concern has been shown by previous witnesses and in submissions received by the Committee that if there were to be a super-tribunal potentially Consumer, Trader and Tenancy Tribunal matters could dominate that super-tribunal and there may not be adequate resources for other matters. Do you have any view on that? Are you familiar with how it works in other States?

Ms RANSOME: I will answer that indirectly to start with. I know there also has been discussion in some of the submissions about the United Kingdom Tribunal Service, which is an underlying administrative structure for a range of different tribunals. I think some people have been suggesting that is a possible way to go in New South Wales. Yes, it may well be so that there is an administrative structure that provides all the support. What is in effect in the UK is individual tribunals within a divisional structure. Can I just make a point about the UK Tribunal Service? It no longer exists. In April this year it was merged with the UK Court Service and it is now called Her Majesty's Courts and Tribunals Service. It is enormous. It has 21,000 staff and its operating budget is £1.7 billion. It supports a courts and tribunals structure that deals with 2 million criminal cases, 1.8 million civil cases and family cases and 800,000 tribunal cases. The scale of what they did with that is not quite the same as we are dealing with in New South Wales.

The tribunals that were brought into that structure were all like tribunals. They were all administrative decision-making tribunals. They all dealt with appeals from government decision-makers. They were not the disparate range of tribunals that we have in New South Wales or indeed that ended up in VCAT, QCAT, et cetera. It is a slightly different creature. I think you can make a distinction between an administrative structure that underpins the functions of tribunals, that provides the hearing rooms and staff, that organises the interpreters and recording, et cetera. You can certainly make a distinction between the decision-making function of the tribunal members. Your question was is there a danger in the CTTT taking over. You would have to make sure that the structure was such to support the ongoing nature and work that needs to be done. It comes back to the point I made earlier: it is horses for courses. The decision-making function and the processes that apply to a particular type of matter may or may not be suitable for all. Distinctions do need to be made.

CHAIR: In your submission you state that if your tribunal were to remain a separate tribunal there still may be opportunities for resources and infrastructure sharing. Could you elaborate on that?

Ms RANSOME: It is a little bit like what Mr Wilson was saying earlier and in the question just raised by Ms Mitchell. The tribunal does have a substantial infrastructure in terms of its physical premises and location. We also have out of all the tribunals in New South Wales the most sophisticated approach to technology. We have online lodgement of applications. We have a system in our hearing rooms whereby members make decisions, the decisions get printed out and people take them away with them on the day. That is also done through wireless technology for our members who sit in regional areas. We are looking at a system of electronic filing of documents and viewing those documents in the hearing room. All those things can be made available. We have technology that is adaptable and adoptable so that we can make the basic infrastructure available and we can share—in the same way, I am sure, there are things that other tribunals do that would be of value to us.

CHAIR: Have you sought to explore these opportunities in the past?

Ms RANSOME: We have. As I said before, we make our hearing rooms and so forth available to other tribunals. There were discussions some years ago between myself and the Motor Accidents Authority, the then GREAT, the Transport Appeals Board and so forth. A couple of those tribunals are no longer around. We were in the same portfolio. There is an issue across portfolios, I think, in sharing some of those things but they can also be done through a memorandum of understanding.

The Hon. SHAOQUETT MOSELMANE: I am asking a broad question. I am sure you have had the opportunity to read other submissions.

Ms RANSOME: Yes.

The Hon. SHAOQUETT MOSELMANE: I would like to hear your view on submissions that argue for continuing with the current status of various commissions, for example, that the Industrial Relations Commission and Workers Compensation Commission retain their independence. The argument is that they are effective in what they do and should not be put under a consolidated tribunal. What is your view on those arguments? Do you think if the system is working well there is no need for consolidation at this point? If not, which tribunals do you believe should be consolidated?

Ms RANSOME: I do not know that I am really in a position to answer definitively those questions, I am sorry.

The Hon. SHAOQUETT MOSELMANE: I said generally.

Ms RANSOME: There are clearly a number of very small tribunals in New South Wales that would probably benefit from being co-located in terms of their ability to share resources. One of my other hats is that I have been chair both at State and national levels of the Council of Australasian Tribunals. One impetus for that body being established was to assist tribunals to share information and knowledge, particularly small tribunals who find it very difficult to access proper training for their members and proper systems that they can use. I think there is certainly scope there. As to whether certain bodies should be left outside of any amalgamated structure, that is a policy question upon which I am not really qualified to make a comment.

Mr DAVID SHOEBRIDGE: You described the CTTT as a court alternative. You may have used slightly different language but basically you tried to distinguish the role and functions of the CTTT from the more traditional administrative tribunal. First, would you explain what you meant by that? Secondly, for the benefit of the Committee, would you explain why or if that means you should have a distinct position as the CTTT?

Ms RANSOME: All the tribunal's jurisdiction is civil and commercial. All of its jurisdiction was devolved to the tribunal from the courts, particularly from the Local Court, or remedies have been given for particular disputes that did not exist before, for example, for things like residential parks or retirement villages. The CTTT does not review government decisions. The government is a party in a couple of tribunal matters but only because, for example, in housing it is a landlord. We perform no regulatory or disciplinary function. We do not impose State-sanctioned remedies as are available in guardianship and mental health in the protective jurisdictions.

Mr DAVID SHOEBRIDGE: You are determining existing subsisting rights. The rights you determine are more akin to the rights determined in the Local Court in a type of administrative process?

Ms RANSOME: That is right.

Mr DAVID SHOEBRIDGE: Do you think that means inevitably a separate tribunal? Does it militate towards a separate tribunal because of the nature of the disputes?

Ms RANSOME: It certainly militates towards a separate divisional structure to deal with those types of disputes. In relation to the matters that the CTTT deals with in New South Wales, in other States they deal with slightly different things. VCAT deals with debt recovery. We do not, except in home building. Those jurisdictions are within VCAT, so I do not think you can say it cannot be done.

Mr DAVID SHOEBRIDGE: Housing NSW said it would welcome in any tribunal that had tenancy jurisdiction for it to also have enforcement jurisdiction, much like the Local Court's enforcement jurisdiction. Do you have any views about having a bunch of sheriffs on the books?

Ms RANSOME: A former Sheriff of New South Wales, his term at the tribunal as a part-time member is about to expire. Perhaps we should have kept him on. Enforcement is a very different thing to a decision-making function about whether money is owed or not. I think probably there would be a legal impediment to the tribunal being able to be the enforcer. There may be issues in relation to the fact that we are a tribunal, not a court. Courts enforce, not tribunals.

Mr WILSON: Perhaps you will need to consider the duplication of effort if the Local Court has sheriffs and the tribunal has sheriffs. At the moment I think the process is fairly well recognised throughout the community for debt recovery. Finding the client is the issue. It is not so much the process that is the problem.

Mr DAVID SHOEBRIDGE: Another question is about your current funding sources. What is the current source of your funding? To what extent is cost recovery through fees part of your funding source? With fees comes the equity issue. How do you go about addressing equity and fees?

Mr WILSON: Our funding comes from a number of sources—firstly, from the Rental Bond Board which provides about 50 per cent of our funding. There is also some funding from the property and real estate agent sector and motor vehicles as well. Our fees are about $2 million per year and there is consolidated revenue. The percentage between each one of those is adjusted each year, depending on the amount of work that comes through the previous year in that particular division. If there is a surge in real estate type there is increased funding from the Rental Bond Board, which is adjusted and flows from that perspective.

The other part of your question was in relation to fees. I guess that is a policy decision in relation to accessibility. The higher the fees the less accessible the tribunal becomes. As to the issue about partial cost recovery and full cost recovery, our submission I guess is it is not for us to consider but certainly changing the fee arrangement—we would call it a variable fee arrangement—could change accessibility outcomes. It could also though, in a positive sense, encourage certain different transactions to take place which could result in some savings. An example of that would be, for instance, at the moment if you lodge an application with the CTTT on paper it is the same fee as if you lodged it online.

You could have a different fee arrangement to encourage people to go down a particular path if there were a variable fee arrangement in place. Hearing fees are something I understand were raised previously. That also could be a driver to whether or not an individual would or would not pursue a particular course of action. What I am saying is that the fee structure is about $2 million and our budget is about $27.5 million. Adjusting the fee would have to be quite considerable if you went to a full cost recovery mode. Does that answer the question?

Mr DAVID SHOEBRIDGE: It does.

The Hon. SARAH MITCHELL: Several of the submissions that the Committee received have been somewhat critical of the expertise of the tribunal members within the CTTT. In your submission you talk briefly about the members. For the benefit of the Committee, could you describe how the decision-makers are appointed to the CTTT, their qualifications and the requirements? If we were to move down the path of a

consolidated tribunal, would you anticipate the same sort of qualifications and requirements for members of a super-tribunal?

Ms RANSOME: All members of the CTTT are appointed by the Governor on the recommendation of Cabinet. All members who are presently appointed to the tribunal have been through a merit selection process, which normally involves a written application, assessment and interview. The tribunal has recently been through a significant recruitment exercise with a number of new appointments being made which will commence from 1 January and a number of appointments will expire on 31 December.

That process was conducted in that way. It was application and interview. Any appointment process is—of course, recommendations are made to the Minister and the Minister makes decisions on what recommendations he or she will put forward to Cabinet. In some tribunals, I am not sure in New South Wales but certainly in other jurisdictions, there has been criticism of processes that were not open and transparent. But my personal view is that any appointment process must be open and transparent.

In terms of qualifications of members, the qualifications are set out in the Act. There are selection criteria that we apply for the different classes of membership that members meet. We have 80 tribunal members around New South Wales. It would be fair to say that in any organisation or profession you could not expect all 80 to be exactly the same. There will be some variance in experience and skill level, but there is a threshold that all have to meet. I am aware of the criticism that gets made but I would point out that last year the tribunal dealt with about 130,000 people in New South Wales. We had 60,000 applications, two people on each side and a lot of those had more than two on each side. We had 580 people write to me or directly to the Minister or through their MP to the Minister about some aspect of the tribunal's operation.

Overwhelmingly, those people who wrote were dissatisfied with the outcome of their matter. They did not raise issues about the conduct of tribunal members or about the processes of the tribunal itself. I think part of the issue for the CTTT is that the volume of matters that we deal with, we have dealt with something like, in our existence, 1.4 million people in New South Wales. That is a lot. But the level of complaint, when you look at the figures, is in fact very low, but because of the volume that we deal with it comes to people's attention because the things we deal with are about the everyday aspects of people's lives. They are things about their home, they are things about something that they have bought that has cost a lot of money or something that they have had their heart set on for some time, a new motor vehicle. It is a significant purchase that you make.

They are matters that come with a fair amount of emotion. In fact, one of the most difficult aspects of a member's role in the CTTT, particularly because there are no lawyers, there is no filter between the member and the person. The raw emotion will come across the table. It is a very difficult environment to work in, and members have to have particular skills to work in that environment.

CHAIR: Unfortunately we have come to the end of our time allocation for this section of our deliberations. Thank you for being with us and assisting us in those deliberations. We may have further questions that we will get to you within a short period of time, and we ask that you respond to those questions. We would be grateful if you could get any answers back to us by 14 January.

Ms RANSOME: Certainly.

Mr WILSON: I remind you of the chairperson's invitation, if you would like to come and view our hearings, see how it operates. That is something we can organise.

Mr DAVID SHOEBRIDGE: Do you have a term break at some point?

Ms RANSOME: Our last hearings are next Wednesday, and we resume on 9 January. I know the Committee is due to report at the end of February, so there would be ample time. Our Sydney hearing rooms would probably be the most convenient location for you, although we can certainly make arrangements for you to attend some of our regional locations.

CHAIR: Thank you.

(The witnesses withdrew)

JUDITH ANNE DALEY, Vice President, Retirement Village Residents Association, affirmed and examined:

GARY MARTIN, New South Wales State President, Affiliated Residential Park Residents Association, and

ARTHUR JOHN PLIMMER, President, Affiliated Resident Park Residents Association Central Coast Residents Association, sworn and examined:

CHAIR: Would you like to start by making a short statement?

Ms DALEY: Thank you for the opportunity to speak to you today. Most of the things we wanted to say have been covered in our submission, but on page 7 of the issues paper there are some dot points that I would like to add a bit more information to. The first one of those is that the tribunal is accessible. It is our experience at the Retirement Village Residents Association [RVRA] that there is a huge amount of fear among retirement village residents about taking a matter to the tribunal. Most of them do not have any legal experience, most have no experience in any sort of tribunal or jurisdiction at all, they have no idea how to write a submission and they are literally terrified of having to appear in a tribunal in any sort of formal or informal sense. Some have never heard of the CTTT and they have no idea that they have consumer protection rights to take an issue to that area. So we think that at the very minimum there needs to be a great education campaign to let people know of their rights and explain to them how they can appear at these tribunals.

The next point is that the proceedings are efficient and effective. We have had experiences at the RVRA where matters have been listed for as many as three directions hearings. There have been attempts at mediation and then after all of that they still get listed for a hearing. One particular case that I am familiar with relates to the 2010 budget. They are still trying to resolve that issue and they do not anticipate that they will get a hearing until March next year. We do not think that is efficient or effective. I can give you other examples of those sorts of things. The next dot point on page 7 of the issues paper is that the proceedings are determined in an informal, expeditious and inexpensive manner. But at the RVRA we have become aware that in almost all the recent cases that I have had any knowledge of the operators have attended with legal officers.

If an operator has an employee who has legal qualifications, that person is allowed to appear without any request for permission. The operators are now turning up with legal practitioners from outside their organisation, whereas the residents do not have legal qualifications so we feel we are seriously disadvantaged. In most instances we make an objection and say we are being disadvantaged but the tribunal member has the authority to grant the right to appear, and that happens. So you have probably a single retiree with a laptop who has prepared the submission who is appearing against a whole organisation that has staff, photocopiers, faxes, all sorts of equipment and then they bring in another organisation that has legal knowledge, legal expertise, staff. It is vastly unfair, we feel, in many instances.

The next point was that the decisions are fair and consistent. We have examples where there have been inconsistencies. The matter that Ms Ransome spoke about earlier was one of the cases that comes to mind, but there have been many instances in connection with the interpretation of "replacement and repair" where we have no idea how anyone arrived at the decisions that have come out. In many instances the CTTT is doing a great job but we want the expertise to be strengthened and enhanced and not diminished if there is any amalgamation. We think that the tribunal members need to be able to develop expertise in the different types of villages. There are strata title villages, loan licence villages, loan lease villages. They are run by for-profit operators and not-for-profit operators. So there is a vast range of types of villages. We think the tribunal members need to become familiar with that. We want the tribunal to become quicker, cheaper and more effective, and we hope that that is able to be achieved.

Dr MARTIN: The Affiliated Residential Park Residents Association [ARPRA] is somewhat vastly different to the representative actions for people who live in residential parks across New South Wales, as opposed to people who live in retirement villages, although there is a fine thin grey line that delineates both of those areas. However, it is our belief and our experience as the peak body that represents some 60,000 plus residents in New South Wales that the tribunal, if it was to be absorbed into a super tribunal, we would lose the specialist divisions and we would lose the informal process for our resident members who in the main, during a recent survey of some 5,000 respondents, are aged 70 plus. So we have people attending tribunals for the cost of $5 for an application fee. They are not going into a situation like a courtroom where there is a bunch of lawyers and a lot of legal jargon that they do not understand, and through representation from us who are not lawyers.

We have a wonderful relationship over a number of years with the Consumer, Trader and Tenancy Tribunal by the fact that we actively participate in consultative forums. We run our own forums across New South Wales and try to educate residents on the tribunal process. One of our concerns, as you would have read in our small submission, is that tribunals are about people. They are not about lawyers. We believe amalgamation into a super tribunal would bring about a legalistic manner in a tribunal. That is the experience of our counterparts in Queensland and to a certain extent in Victoria. In Victoria the legislation around residential parks is just developing and here in New South Wales as you would be aware there is a review of the Residential Parks Act in New South Wales.

We have some other concerns that relate to costs. At the moment our organisation has some limited funding from the New South Wales Government—just recently announced. We also have funding mechanisms through our resident members. That enables them to have representation from trained advocates who can speak to residents in a way that they understand the process. Of the residents who have participated in the recent survey that we have conducted as part of our response to the review of the Residential Parks Act 86 per cent of them say that the tribunal process is relatively cheap and cost effective for them and 91 per cent say that with representation by the Affiliated Residential Park Residents Association [ARPRA] the tribunal process is interesting and fair. We believe the amalgamation into a super tribunal would do away with that particular aspect of the experience that those residents recognise.

In 2009-10 there were some 2,400 cases in the residential parks division. This year that number has dropped significantly as a result of our ability to conciliate with park operators and structure long term—three and five year—deals with the park operator in relation to rent increases. I might remind the members that in Queensland when the Queensland Civil and Administrative Tribunal [QCAT] was formed our counterpart, David Paton, from Affiliated Residential Parks Queensland, made a lot of statements in relation to what happened in Queensland in the residential parks division. You have to bear in mind that the residential parks division up there has significantly different legislation to New South Wales. However, the tribunal was to provide all things to all people—that was the statement made by the relevant Minister in Queensland at the time. However, that has not happened. In lots of cases in Queensland there is significant delay with matters being heard, there are inconsistent decisions and the view of the Affiliated Residential Parks Queensland is that it is worse off now under a super tribunal than what it was in the previous tribunals.

In Victoria in *The Age* newspaper on 14 September 2011 had an article entitled *Cracks in the System* by the journalist Adam Carey. It identified the shortcomings in the Victorian Civil and Administrative Tribunal [VCAT] and in one case a resident spent $100,000 in legal fees only to find out that the order given to her by the tribunal was not enforceable, it was only enforceable by the Supreme Court. She stated: After spending hundreds of thousands of dollars in legal fees it is going to be cheaper for me to get the damage repaired than it is to go through the process of VCAT. In summing up we believe that in the residential parks division we have equitable, accessible, independent and just responses to the concerns of those people who live in residential parks in New South Wales.

Mr DAVID SHOEBRIDGE: It is a question to ARPRA and to you, Ms Daley: I am looking at the CTTT performance outcome from their annual report. In terms of retirement villages less than 20 per cent of matters are concluded within the targeted time frame of 16 weeks and it is the same for non-termination matters regarding residential parks. There are less than 15 per cent being concluded within the mandated 16 week time frame. What is your experience in terms of the timeliness of the outcome?

Ms DALEY: I can give you many instances where a matter has been lodged and then they have a directions hearing and then they have another directions hearing—today I heard of one where they had two directions hearing before one particular tribunal member and he directed they split the issues into two matters. Then they had a third directions hearing and they were told by a different tribunal member: You do not have to do that, amalgamate them again. Today they were told they have to go to hearing. This matter has been going on for over six months. I lodged a complaint in about July 2010 and although I had a hearing and outcome in October 2010 my operator did not comply with all facets of it and it has taken me until last week to get another hearing to sort it out. No, they are not very timely. Sometimes they are but they are not always timely. I mentioned in our submission that we have a problem with the way statistics are collated which impacts on resources for the tribunal. For example, our cases are counted as single case: One case even if there is 300 people who live in the village whereas in residential parks if it is 300 people who live in the village it is counted as 300 cases. This has a significant impact on the way resources are allocated.

Mr DAVID SHOEBRIDGE: Do you have a relationship with the CTTT where you can address that with them and say: Effectively this case has 300 complainants, can you give it priority? Do you have that kind of relationship with the CTTT?

Ms DALEY: No, not to that level. Our secretary and president are on a committee that meets with the CTTT. We have tried to bring it up but it has not been seriously considered by the tribunal as far as I am aware at this stage.

Dr MARTIN: In relation to your question, Mr Shoebridge, in our experience the time-frame is somewhat long in some matters but we also understand that most of our matters are applications by a whole park. Recently I did a case where there were 460 applicants, the largest hearing that this State has had in the CTTT for residential parks. We are mindful that when hearings take place for excessive rent matters they are nearly all taking place at the same time because historically rent increases are done around September when the Federal CPI comes out in the pension. There would be a large number of cases going before the tribunal at the one time. We are aware that in most of the locations to fit 400 or 500 applicants in a hearing room is near impossible. Therefore it has to be allocated to a local club or a larger venue to allow all the applicants to participate in the decision making process.

Mr DAVID SHOEBRIDGE: The CTTT has that flexibility in its hearing process?

Dr MARTIN: In most of the cases, given the hearing rooms that the tribunal owns may seat 30 or 40. In other venues, like the local club auditorium and in some cases some court rooms, there is a larger capacity for hearings to take place.

The Hon. SCOT MacDONALD: I want to talk about the evidence of your difficulties with some of these matters that are taking time and the variability creeping into the decisions—is that not of itself an argument to lift the level? Are you getting the justice you are paying for? You have low filing fees and it is pretty accessible but could you not argue that you are getting what you are paying for? Maybe an advantage for the consolidated tribunals is a bit more rigor, discipline and skills within the judicial officers: Would you look at it that way?

Ms DALEY: I am probably not qualified to make a definitive answer on behalf of the RURA but I can talk about my experience when I was working and involved in matters that went to either the Industrial Relations Commission or to the Government and Related Employees Appeal Tribunal and in that jurisdiction the judicial members specialised in particular industries or areas so they were able to identify trends and know if a claim was completely outside the bounds of normality for that area. I think there is a huge advantage in having specific types of villages that I have identified—strata villages, loan licence or loan lease—allocated to members who have specialised in that area. They have a corporate memory and if they have judicial qualifications they would have the authority that goes with that. My personal view is that is likely to have advantages.

The Hon. SCOT MacDONALD: It will not come with a $5 filing fee. Then you are looking at a contribution to a better system. It might be a few hundred dollars for a filing fee or something like that.

Ms DALEY: Yes.

The Hon. SCOT MacDONALD: When the report gets written that is the balance we will strike.

Ms DALEY: I am aware of that. I could say that the financial implications are a big worry for people that live in a retirement villages. Most of them are on a fixed income of some sort. They are either superannuants or part or full pensioners—so they are concerned. If they know in advance what they are likely to be facing they can manage that and make a decision whether to do something about it. At the moment there is a fear that if they take a case to the CTTT and the operator decides they want to appeal the decision that appeal has to go to the District Court. In the Queens Lake Village case that went to the District Court this year the legal fees that were allocated to the residents' side were $65,000. There are a whole lot of reasons why the residents did not end up paying that and some interesting stories about it, but that caused so much stress for the people from those villages who were terrified how much money they were going to owe. If they know in advance they can decide whether or not to participate. It is the hidden whammy that scares them.

The Hon. SCOT MacDONALD: That might get back to Mr Shoebridge's idea of a manageable, affordable and simple appeal level.

Mr DAVID SHOEBRIDGE: Do you have any views about an internal appeal structure within the tribunal, whether the CTTT or another? Your primary appeal right would be within that and it would only go beyond that on a question of law.

Ms DALEY: My personal view would be that it would have to be an advantage over the system that exists at the moment. I am not aware that there is such an appeal process now. With my own matter when only part of the orders were complied with it took me a long time to find out how I could redress that situation and I had to renew the application which I only found out after writing lots of *Yes, Minister* type questions. It took ages for that to happen.

Dr MARTIN: In response to Mr MacDonald and Mr Shoebridge I think one of the failings is not of the CTTT, it is the failure of the legislation that we have to work under that requires the CTTT to make the decisions it does because of the actual legislation. Getting the legislation right will underpin the success of the decisions in our division for residential parks. One of the other things, if I can say this boldly, is that our resident members who are 70-plus are already fearful of going before a tribunal because of the retribution outcomes that they face when they get home—the famous Banora Point where they won in the tribunal only to go back home to find the power and the water turned off.

Our view is that if we have a super tribunal, and we already think the current Consumer, Trader and Tenancy Tribunal is a super tribunal because of its jurisdictional nature, if we have a massive organisation like what we have seen at VCAP and QCAP where—and no offence to those in the room who are qualified lawyers—we have a president of the organisation who is a Justice and there is a legalistic mannerism in which the tribunal then operates, there is no other better way that I can put this, our members, who are aged and 95 per cent of them on a fixed income, at every tribunal that I have appeared before have direct access to talk to the member in an informal way before the tribunal process starts. Most of our members have personally met the chair of the tribunal and have been able to speak in an informal manner.

I put it to the Committee that if we move towards a more legalistic approach we are certainly not going to have Justices being able to have that sort of access to the ordinary person who is applying at the tribunal. In relation to Mr MacDonald's question about you get what you pay for, I think one of the overriding aspects of our members is that they cannot afford a filing fee of a couple of hundred dollars, they cannot afford $500 or $600, and then on top of that they may be paying, like the lady in Victoria did, hundreds of thousands of dollars in legal fees. So I think the access rights to a super tribunal would certainly impede what we do. Again, I think it is the underpinning legislation that we need to get right, not so much the tribunal process.

The Hon. SHAOQUETT MOSELMANE: Just a question in relation to consolidated tribunals. Both of your submissions express concern at the creation of consolidated tribunals. To what extent would the creation of a specialist division of good legislation within a super tribunal address your concerns?

Dr MARTIN: I do not think it would. I think from the information that we have from both VCAP and QCAP that has not been a spectacular success. I think that the members in our division that get appointed to a case—and I cannot speak for Ms Daley's division—but certainly in the residential parks we have found that when a case goes before the tribunal the members that are appointed to hear a particular matter are members with a wealth of experience in residential park matters. One of the concerns that we would have as an organisation in a super tribunal is the rostering system of any member that may get appointed on the day to hear a case where they may not have specific knowledge about our division.

The Hon. SHAOQUETT MOSELMANE: What about you, Ms Daley?

Ms DALEY: Our experience so far has been fairly mixed. There are some tribunal members who have a knowledge of the retirement village industry and who are allocated to that industry, but there has been a particular inconsistency where some tribunal members have said at the beginning of a hearing, "I don't know anything about this Act", which has not instilled—

Mr DAVID SHOEBRIDGE: It comforts a litigant, does it not?

Ms DALEY: It really is terrifying to hear the tribunal members say that. If there were to be a super tribunal our industry would want it to have specialised divisions so that the people who are hearing it, whether they are judicial officers or tribunal members, would become really familiar with that industry and it would not be just a random, scattergun, anyone-can-get-it type allocation. So it depends entirely on the way any super tribunal is structured as to whether it would be advantageous or not.

The Hon. SARAH MITCHELL: In the submission from Dr Martin where you talk about the need for further analysis to assess the strengths and weaknesses of the current system, in very simple terms the impression that I am getting from you is it is not necessarily the way to go to have a super tribunal but rather to address the weaknesses in the current system. Would that be a fair overview of your position?

Dr MARTIN: That is correct. The Affiliated Residential Park Residents Association has looked at the smaller tribunals across New South Wales and I have got no problems with those tribunals becoming part of another tribunal process if they need to be amalgamated but we believe that the Consumer, Trader and Tenancy Tribunal with its current caseload of 60,000 cases is already a super tribunal that, in effect, is doing nine different divisions—the nine different divisions would seem to be the agricultural division in the tenancy area. We certainly feel that the current legislation of the Residential Parks Act, which is under review, will give us an opportunity to address some of the inaccuracies that we come across from time to time in tribunal cases where there are inconsistencies somewhat in decision-making.

However, I agree with the previous witness about precedent. Our residents sometimes feel that because a decision was made by a member in another park that that precedent should take place. However, the fact remains that what facts are put on the table for that case could be vastly different to that case and therefore precedent does not take place. To answer your question in a nutshell: Yes, we believe that any amalgamation of all the tribunals is probably not right for the Consumer, Trader and Tenancy Tribunal and our division. It is simply by looking at strengthening and finding the opportunities that we can alleviate some of the weaknesses in the current system that will give our users a better outcome.

Ms DALEY: I guess I have got an open mind about a super tribunal because I do not know what it is going to look like. Certainly the Retirement Village Residents Association committee has not discussed that. There is a potential for it to be fantastic, but it depends entirely on the way it is structured, and we think the existing tribunal, although it works moderately well, has areas that need to be tweaked a bit as well.

Mr DAVID SHOEBRIDGE: What about costs of the proceedings and maybe cost recovery whether you are successful or not, how is that working in an essentially no-cost jurisdiction? Are there any wrinkles in it or is it working well?

Ms DALEY: I am not aware that there is any cost recovery for lodging a case in the tribunal. I am only aware of the potential outcomes where a budget line item is queried and that budget is then modified, which is quite different to cost recovery. The Queens Lake Village matter that I spoke about, for a variety of complex reasons the operators offered to pay the first $50,000 of the legal fees after they withdrew their claim that they wanted to be reimbursed for costs and then the Retirement Village Residents Association's honorary solicitor ran the case and he made a contribution of $15,000 to make up the balance of the $65,000. That is the only case I know of where there have been those sorts of costs involved, and, apart from scaring us all, no-one else has taken a case.

Dr MARTIN: In relation to our costs, and I assume part of your question leads to the expense to the association and the subsequent resident in going to the tribunal, I am very proud to say that our association is a network right across New South Wales. We have just made a formal announcement of amalgamating with the other only residents association—the Northern Alliance of Park Residents Association [NAPRA]. We will be the largest association looking after residential park matters. The beauty of the informal low-cost way we do business is we have thousands of people who are prepared to do the photocopying and the printing who get together and try to make what we currently have work, and by having the education sessions and those forums that we do on a regular basis—and I know you have already been to one of them up in the Tweed—we have people who ordinarily may find a tribunal process or a court adversarial system daunting, actually becoming active participants and assisting in the outcome that they are seeking. In relation to our success at conciliation, we are proud of our role in conciliating matters for the long term. So the cost to our organisation is very minimal to run cases.

Mr PLIMMER: That is true. As advocates we are all volunteers subscribing our time and it is true that if a resident makes an application that is irresponsible he can incur some costs. We try and avoid that by obviously dissuading him from putting in an application that has no grounds. But apart from that, the resident does not incur any costs, but it may happen if the matter goes on to an appeal to the District Court and there we can hopefully bring in other legal advice to assist us in that case.

The Hon. PETER PRIMROSE: You are the first person in any committee who has quoted Mao Tse-tung and I will not quote anything from him but I will quote you, Dr Martin. In relation to tribunals, at the bottom of page six, you state:

> They ain't broke. They don't need to be fixed. Unity brought about by merger or amalgamation brings about not only diseconomies of large scale but the very real risk of stifling the development of Tribunals.

I know that you have all spoken at length about that but can you talk a bit more about the potential diseconomies in terms of stifling the tribunals, because there seems to be an automatic assumption that bringing tribunals together will be a good thing. You are suggesting that significant bad things will occur for your members as a consequence.

Dr MARTIN: Notwithstanding my philosophical background in using some of those quotations, I wonder sometimes if by doing this analysis of making a super tribunal if we are looking at it from a purely financial budgetary point of view, that somehow by making one big tribunal is going to save money to the State like it was thought it would do in Victoria and Queensland. I think where I am coming from with that quotation is that sometimes we cannot just measure all of that in a pure money scale but from what effect it will have for the users.

I remind the Committee that a tribunal in its function is for the user; it is for my members who are 60, 70 and 80 years of age who are looking for low-cost justice or an outcome that both parties can live with, and I think that the economies of scale in setting up something like this would have a negative effect on the positive outcomes that sometimes everyone wants to overlook, because I believe as a philosopher in any part of human nature we like to complain about the problems but we never really like to talk up the successes of what we have already got, and I think my quotation in that particular context is that by simply amalgamating all this into one big pool will probably do an injustice to what we have already got going, looking at the overall successes of what has been happening with the Consumer, Trader and Tenancy Tribunal in respect of our division.

CHAIR: Thank you very much. There may well be some additional questions. If there are we will send those to you as quickly as we can and we would appreciate a response to those questions if possible by 14 January.

(The witnesses withdrew)

JULIE ANN FOREMAN, Executive Officer, Tenants' Union of New South Wales, and

CARL JAMES FREER, Tenants' Union of New South Wales, affirmed and examined:

CHAIR: Would you like to make a short statement?

Ms FOREMAN: Thank you for the opportunity to address the Committee. I will spend a couple of minutes giving some background about who we are, and then Carl Freer, one of our solicitors, will give an overview of the submission. The Tenants' Union of New South Wales is a peak body representing the interests of tenants in New South Wales—about 1.7 million people or one in four people living in residential rental properties in this State.

We provide support, legal backup, training and policy assistance for the 22 tenancy advice and advocacy services around the State. They take about 35,000 inquiries from tenants each year and assist about 5,000 people each year in the Consumer, Trader and Tenancy Tribunal. We and those tenant advice services operate in four divisions of the tribunal and those divisions take about 87 per cent of all applications. Our legal practice also acts for and advises tenants across a range of tribunals and courts. We monitor relevant Consumer, Trader and Tenancy Tribunal decisions, contribute to tribunal consultative forums and advise the tenant advice services on tribunal and court proceedings. The network we are part of is working all day every day in the Consumer, Trader and Tenancy Tribunal, which is the largest tribunal in the State. We think we have something to contribute to the discussion.

Mr FREER: It is true of many community legal centres, of which we are one, that access to justice is the animating principle. It certainly is for us. It is also probably true to say that of tribunals set up in response to what is perceived to be an inadequate dispute resolution process in the courts. We think that the tribunal does an exceedingly good job of providing access in its day-to-day work. The concern that we address in our submission is access to justice. Of course, the terms of reference and the issues paper also raise concerns about the quality of decision-making by the tribunal. On that score, I have had an opportunity to peruse some of the submissions presented by others, including the Consumer, Trader and Tenancy Tribunal.

I note that the tribunal has used as a metric for the potential measure of dissatisfaction with its decision-making the fact that 0.1 per cent of its decisions have been the subject of some sort of appeal. I do not think that is a very pertinent measure. We had a quick look at the New South Wales Court of Appeal, which is the high watermark of justice in New South Wales, and for the period January to June this year, expressed as a percentage of the matters it heard, 25 per cent of its decision were the subject of further proceedings in an attempt to take a matter to the High Court. Of course, only a relatively small number get past the special leave stage. However, by the tribunal's measure its decision-making is 250 times better than the Court of Appeal's. That is not a useful measure, but it is very difficult to come up with useful measures of the quality of decision-making. Our submission takes one instance or area where we have observed fairly direct and clear inconsistencies in the tribunal's decision-making and sought to demonstrate our concern in that way. On that score, I commend our submission to the Committee.

Often questions of access to justice seem to be a zero-sum game, but that is probably the wrong phrase. There is a tug of war. On the one hand, if you want a system with the quality and all the trappings of the court system, you get the Rolls Royce and no-one can afford it. On the other hand you can have tribunals, which provide plenty of access but sometimes are wanting in terms of quality. We are more optimistic in that we believe that steps can be taken to improve the quality of decision-making without diminishing the access that can be gained to a useful dispute resolution service for tenants and others.

Mr DAVID SHOEBRIDGE: Looking through the prism of your experience of Insight Vacations—your case study about inconsistency in decision-making—you canvass the possibility of having an appeal to the Supreme Court as opposed to the District Court. What is your opinion of an internal process and following that, if someone is dissatisfied on a question of law, an appeal to the Supreme Court?

Mr FREER: We mentioned that in our submission. We think that that would be an excellent and adapted way to provide an appeal mechanism from a decision of the tribunal. I believe that the Queensland Civil and Administrative Tribunal has an internal appeal mechanism. One way to set it up would be to provide for an appeal of wide scope so that it is more than the narrow scope of an appeal to the District Court, and it might even pull in factual matters and things like that at the internal appeal stage. You could keep control of the

floodgate by making it by leave. In that way the tribunal could provide its own internal check on its decision-making. I believe that would be a good way to achieve a better appeal process.

Mr DAVID SHOEBRIDGE: Do you think from your experience that that could be grafted onto the current Consumer, Trader and Tenancy Tribunal without having to remake everything within a super tribunal in terms of tenancy matters, or do you believe that a new tribunal is the best way to deal with it?

Mr FREER: We have been fairly light on taking a firm position about amalgamation in our submission. If it means that substantial change will occur and opportunities will be taken potentially to improve the quality of decision-making, we would say "Please amalgamate and take those steps." In terms of the benefits of amalgamation generally, the Consumer, Trader and Tenancy Tribunal is already an amalgamated tribunal. We do not see that the quality of its decision-making has been materially diminished. I do not see any immediate barriers to grafting it onto the tribunal. Queensland and Victoria have senior judicial members. An appeal panel including those members would be missing from the Consumer, Trader and Tenancy Tribunal as it stands. There could be people who are senior members albeit not judicial members. That might work just as well, but that would be lacking in the current tribunal.

In Queensland and Victoria an appeal from that internal appeal to a court is narrow in scope and often goes straight to the Court of Appeal. I do not think it would be apt if the tribunal has non-judicial members for those matters to go straight to the Court of Appeal. That seems to be too big a leap. It would be more appropriate, as happens in Queensland and Victoria, for an appeal from judicial members to go to the Court of Appeal.

The Hon. SHAOQUETT MOSELMANE: I hope I am not quoting you out of context, but you make some criticism of the Consumer, Trader and Tenancy Tribunal on page two:

> ... the Tenants' Union has observed instances of persistent difficulty in some areas of CTTT's decision making.

At page three you state:

> ... Tribunal members have occasionally exhibited considerable impatience when confronted with considered legal submissions.

Would you like to expand on that frustration?

Mr FREER: Yes. The example I have given is probably the best and most direct and concrete demonstration of the frustration. As I said in the submission, some of those decisions have gone the way of the tenant. So it is not a matter of our being concerned about the particular decision or about the tenant's interests; we are concerned about the quality of the tribunal that is there to resolve their disputes.

The Hon. SHAOQUETT MOSELMANE: How do you suggest that that be improved?

Mr FREER: Improvement can be achieved by ensuring that it is independent, by increasing the tenure of members and by increasing its stature. That would attract senior members of the legal profession or others who are appropriately expert in their areas of the tribunal's jurisdiction. I make all those remarks with great respect to the tribunal. I understand the pressures they function under and the number of decisions they have to make in a small compass of time.

The Hon. SHAOQUETT MOSELMANE: They deal with about 60,000 cases. That is a huge task.

Mr FREER: Absolutely. Ultimately in some senses it comes down to how many resources we throw at dispute resolution in these kinds of cases. From the tenancy perspective a lot of tenancy claims are not small claims at all. You hear remarks from the bench as well when these cases go on appeal that the loss of someone's home is a matter of considerable moment. Sometimes we think the tribunal does not provide a solemn enough and considered enough process for those matters.

The Hon. SHAOQUETT MOSELMANE: If consideration was given to consolidating tribunals, would you like to continue to see the Consumer, Trader and Tenancy Tribunal stand alone outside a super tribunal?

Mr FREER: No we would not. I heard some of the concerns raised by those who came before me and I do not believe that those concerns need be borne out in practice. There are good ways in which to overcome

them. As I have already mentioned, the CTTT is already an amalgamated tribunal. Setting it up in divisions and lists is an appropriate and adapted way that has worked in other jurisdictions at the tribunal level and in the courts, and it provides for appropriate concentration of expertise. We have sounded a small note of caution in our submission about specialisation. In our view it is not an unqualified good. We have quoted Justice Heydon's remarks in *Kirk v Industrial Relations Commission* from the High Court last year.

We think an amalgamated tribunal may help to ameliorate some of those concerns in that the breadth of the jurisdiction may allow for both the concentration of expertise on the one hand and some movement across jurisdictions by some members and the application of fresh thinking and new approaches, which as we have also observed in the submission is something that will probably be lacking when there are very tight criteria for legal representation in the tribunal. You will not have lawyers trying to develop novel arguments to advance their clients' cases. It really comes down to settled positions in the tribunal and that can be both good in that you start to get some consistency and bad because sometimes those sorts of positions are not quite right, gain too great a currency and have too wide an application and other expertise and thinking needs to be brought to bear on the situation.

The Hon. SHAOQUETT MOSELMANE: Ms Foreman, do you have anything to add to that?

Ms FOREMAN: No.

The Hon. SARAH MITCHELL: I was out of the room, Ms Foreman, when you made your introductory remarks so I apologise if I am asking a question about information you have already provided. In the first paragraph of your submission you talk about how you give advice to 16 tenant advice services and four Aboriginal ones across the State. Of the 20 or so that you deal with how many are located in regional communities?

Ms FOREMAN: About half.

The Hon. SARAH MITCHELL: When Housing NSW appeared before us earlier today they said they had had some difficulties in accessing Consumer, Trader and Tenancy Tribunal services in some rural locations. Have you had a similar experience?

Ms FOREMAN: I will let Mr Freer comment as well, but certainly some of the services have noticed a diminution in sitting days and the use of phone hearings, which has its positives and negatives for tenants and people getting access. For regional workers the other problem is just getting to the tribunal itself because they are very small services covering large areas, but that is more a resource issue for our services.

Mr FREER: I recall reading in the 2002 paper about the Victorian experience that an amalgamated tribunal was better able to provide services in the regions. I think it has been true of the CTTT since its amalgamation that it has been able to expand its reach. I see no reason why an amalgamated tribunal would not similarly be able to expand its reach in New South Wales. I know from our engagement with the tribunal on some of its consultative committees during 2010 that they had a reduced ability to run hearings in some areas because the demand fell for a period. Presumably if there was a tribunal of wider jurisdiction there would more likely be other matters arising for it to deal with in those areas and a greater scope or ability for it to sit in those places.

The Hon. SARAH MITCHELL: There was also some talk of experimenting with using videoconferencing as well. Is that something that you would support rather than the phone conferencing method?

Ms FOREMAN: The difficulty for some of our clients is even getting to a centre where that is available. Obviously we assist some of the most vulnerable people in renting situations and some of those in private rental in a remote rural area have to come in a day or two before on a bus. I cannot imagine the videoconferencing would be where they are either. Obviously that technology is better than the phone but more research would be needed to see how well it could or would work.

The Hon. SHAOQUETT MOSELMANE: It has been said that amalgamations lead to loss of members' skill and that super tribunals become too legalistic and as a result minority groups, Indigenous groups and migrant groups would be disadvantaged. What do you say to that?

Mr FREER: On becoming more legalistic, I believe the divisional management of matters that come before a super tribunal would ameliorate a lot of those problems. To the extent that the tenancy division is usefully informal, quick and perhaps unthreatening I do not see that it follows that a super tribunal would bring a diminishing achievement of those kinds of values. I do not see the risk. In some matters the tribunal could do with a little more law. When parties are unrepresented the tribunal can and always will be able to assist them in an appropriate way without flummoxing them with needless legal reference. However, the tribunal itself could do with a greater concentration of its own expertise, which I think may be more possible in a super tribunal with greater stature and standing in the justice system in New South Wales.

Ms FOREMAN: I know we are talking about the amalgamation of tribunals but I can never see things just in their separate state. One of the things the CTTT has said has assisted people in navigating the tribunal, and a super tribunal would be the same if not more so, is the duty advocates that the tenants advice services provide. It may well be worth considering the need to increase the duty advocacy availability because at the moment there is not the coverage there should be.

Mr DAVID SHOEBRIDGE: We got a little package of materials from the tribunal, which I have not read yet, about how they advise potential claimants and participants about their processes and promote them. Have you had experience with this kind of material and do you think it does a particularly good job in conveying that information?

Ms FOREMAN: I think their educational material is excellent. The problem with any organisation, including our own, is the distribution of material and people having access to it. They are always looking at ways to improve access to the CTTT. I saw Kay Ransome on YouTube this morning, which is terrific. I must say that the tribunal is always open to coming and talking to the tenant advocates. It does that regularly and it takes on questions from a bunch of people who can be pretty rough and tumble at times. We have certainly found their attempt to communicate with people to be good, but there can always be more. There are still a lot of people who are not aware of the Consumer, Trader and Tenancy Tribunal. I spent a long time prior to this job working with people in social housing. Admittedly that was three years ago so the awareness may well have changed but they were not aware that they could take their landlord to the CTTT.

Mr DAVID SHOEBRIDGE: There is a matter that may be outside the scope of this inquiry but it was raised by Housing NSW earlier today so I will put it to you. They complained of delays in CTTT hearings in circumstances where police had attended either through a search or a charging at one of their premises. As I understand it they then put in an application to terminate the tenancy by reason of that. They say there is a delay in bringing that on for hearing while the criminal proceedings are going. They would like it to be determined beforehand and they were troubled by the delay. Do you have a view about that? I thought yours might be different.

Ms FOREMAN: We certainly do.

Mr FREER: One person's delay is another's procedural fairness. In our experience, tenant advocates around the State have to argue very hard to stall the tribunal process. It does not happen as a matter of course that the tribunal stays its hand while the criminal proceedings go ahead. There are plenty of cases that go ahead despite the criminal proceedings. In arguing those cases the tenant advocates or the tenants properly equipped refer to some well-established principles in the common law about the ongoing carriage of the civil proceedings in the face of criminal proceedings that revolve around the same set of facts. There used to be a hard and fast rule that it would not go ahead. Now that does not apply so much and it is the subject or argument, which is an appropriate and adapted way to do it, albeit occasionally that will be to the frustration of Housing NSW, who, just hazarding a guess I think are the applicant 98 per cent of the time in relation to illegal use simply because they do not want to use no-grounds notices of termination.

The Hon. SCOT MacDONALD: At page 6 you say:

> Each of these issues can be remedied: at the least, a right of appeal to the Supreme Court of New South Wales from the CTTT ought to be reinstated.

Then it says something more about the Court of Appeal. I am struggling to think why we should not be trying to avoid the Supreme Court of New South Wales and have another layer, some sort of appeals rehearing. A better rehearing process might be available now. Surely we should be trying to stay out of the Supreme Court, I would have thought.

Mr FREER: From our perspective the difference between the Supreme Court and the District Court is much of a muchness. One way or the other, it is going to be prohibitively expensive for the parties, especially in relation to a tenancy matter. Considering the scale of the legal costs, is it going to justify the proportion of those costs compared to the matter at issue, keeping in mind some of the remarks I made before about how important tenancy issues can be. The reason I make that submission is that at the moment it seems that the appeal line of the District Court was an attempt to diminish costs and also to move some of the burden on the courts out of the Supreme Court and into the District Court. What we have observed is that going to the District Court just adds another layer, because the District Court is not the end of the road and a significant proportion of matters that end up in the District Court go further, on judicial review, to the Supreme Court. That is the first thing, it increases the costs in the end, it does not diminish them.

The second thing is, it raises a whole suite of very difficult issues, for even well-advised parties, that arise from the bifurcation of judicial review and appeal. It is something that you see the Court of Appeal grappling with in a whole series of cases through to this year and parties are obviously having real difficulty navigating the situation. I see *Brennan v New South Wales Land and Housing Corporation* quoted in the Consumer, Trader and Tenancy Tribunal submission and the Housing NSW submission—and we also raise it. That is a matter that was the subject of an appeal from the District Court to judicial review proceedings in the Supreme Court, which can also be taken straight from the Tribunal. If you drew a diagram of it, you would end up with the proverbial spaghetti on the page. It is something that the parties and the courts are struggling to grapple with and it has not been to good effect.

The Hon. SCOT MacDONALD: Further to that, we had the Administrative Decisions Tribunal in earlier this morning and if I understood their presentation and submission, they seemed to have overcome a lot of that and they do not seem to have a lot of higher appeals coming out of their work. Why is that? If I understood that correctly, why do we have some tribunals that seem to be handling it and containing the number of appeals and referrals to the Supreme Court and yet we have the sort of Housing NSW situation where appeals are more common and people are getting themselves into difficult and expensive situations. As we review the Tribunal, do you see us being able to pick up some better models there somewhere?

Mr FREER: I have to profess having no expertise and I am struggling to understand the difference between the Administrative Decisions Tribunal and the Consumer, Trader and Tenancy Tribunal.

Mr DAVID SHOEBRIDGE: They have an internal appeal provision within the Administrative Decisions Tribunal.

Mr FREER: If there is another good mechanism internally—which may be the internal appeal mechanism that the Administrative Decisions Tribunal has—then I think it would probably be the case that that would be a pretty good way of dealing with people's dissatisfaction with decisions at the first instance and a cheaper and more accessible way of dealing with that dissatisfaction at the first instance. So to the extent that that marks a difference between the Consumer, Trader and Tenancy Tribunal and the Administrative Decisions Tribunal, I would suggest that might be it.

The Hon. SCOT MacDONALD: Is it more than just the character of what you are dealing with? Housing can be very emotive—nobody is ever wrong. But then the stuff that the Administrative Decisions Tribunal is dealing with has got people's professional future in their hands and obviously they deal with a lot of difficult stuff. What is the difference? Why is one seemingly more prone to going to the higher courts? Is it because of the structure and framework or is it because of the character of what you are dealing with?

Mr FREER: It may be both. In some cases it may also be the extent of the reasons for decisions that the Administrative Decisions Tribunal tends to hand down. I have had reason to read a couple of their decisions lately and they seem to be much more fulsome than you will usually see from the Consumer, Trader and Tenancy Tribunal. So, in that sense, given a clearer understanding of the reasons for the decision, a person who is dissatisfied may be more easily satisfied by it at the first stage.

The Hon. SCOT MacDONALD: To a certain extent then are you not saying that it may be one of the weaknesses of the Consumer, Trader and Tenancy Tribunal—and it is very easy and glib to say that—but maybe one of the weaknesses of the Consumer, Trader and Tenancy Tribunal is the lack of legalism or judicialism in there or even the clothes they wear or the buildings they sit in.

Mr FREER: In a sense, that comes back to some of what I was saying at the start—on the one hand access; on the other justice. And sometimes it seems to be a zero-sum game where, if it becomes more like the courts or what we like to characterise—especially as lawyers—as justice, then you lose some of what it is to have an accessible forum. I suppose it does pick up on some of the remarks I made earlier that, while "legalism" can be a term of abuse, in some respects a little bit more would not hurt, as long as it was in an appropriate and adapted way that meant that people were not scared off.

Ms FOREMAN: The access is also very easy for landlords and a little bit of legalism might assist there too. In particular, I am thinking about the largest landlord in the State—Housing NSW—which brings 9,000 applications a year to the Consumer, Trader and Tenancy Tribunal, yet they only house 17 per cent of all tenants. In the General Division there are 31,000 applications by landlords and they brought 7,500 applications for eviction last financial year. The Consumer, Trader and Tenancy Tribunal made orders in just over a hundred cases. So, I just think that is a little food for thought.

The Hon. PETER PRIMROSE: May I ask you possibly to chew a bit more on that food, because that was my question. I note that on page eight of your submission you suggest that all public housing decisions should fall within the jurisdiction of the Administrative Decisions Tribunal. So, could you possibly expand on that and address that a little bit more?

Ms FOREMAN: Because of the way it is used as a management tool by Housing NSW—I know that Carl has probably done more of the detailed thinking on this and he may like to respond.

Mr FREER: We sought to demonstrate the point by raising one particular example which has to do with rent subsidies. That is an area attended by serious injustice and a lack of proper oversight of the merits of decision-making by Housing NSW, especially with regard to the cancellation of rental rebates. That can have an extraordinarily adverse effect on a person. To begin with, there is the loss of the right to public housing and in many cases it can also involve the levying of a debt of over $100,000. It is the sort of adverse effect that must be overseen much more vigorously than at present. Taking into account all of the decisions of Housing NSW, there would probably need to be some sort of demarcation between matters that went to the Tribunal as a tenancy matter to be determined as a dispute under the Residential Tenancies Act and some of the simple administrative decisions that flow from a power under the Housing Act.

Ms FOREMAN: I can give an example where a neighbour who takes a dislike to someone in social housing might write to the local office of the social housing provider and if it was my neighbour, for example, they might say, "Julie has actually had her partner living there. He works full-time and earns a lot of money. They should be paying more rent." I then get a letter from Housing NSW saying, "Could you please prove that X does not live there? Unless you can prove that we will say that you should not have subsidised rent and that you should have paid full market rent, dated back ten years." Overnight you have a $100,000 debt. It is impossible to prove that someone does not live there.

CHAIR: Is that a realistic example of what could happen?

Ms FOREMAN: That has happened.

CHAIR: For those sums you are talking about?

Ms FOREMAN: Maybe it is $10,000.

Mr FREER: What happens is, Housing NSW will charge a headline rent, which is what they call the market rent and they will rebate it by reference to your income—roughly 25 per cent. On the basis of a bare assertion, they may allege that you have had someone living there for three years. What then happens is, they cancel the rent subsidy, they back date that cancellation for three years and suddenly you have a debt of over $100,000. The giving of benefits is something that ought to be carefully administered but that adds greater weight to the importance of making sure that on each occasion those decisions are made on the merits.

Mr DAVID SHOEBRIDGE: I assume in those circumstances that is an application for a review that the tenant can make from an administrative decision under the Housing Act. The tenant would bring an application for a review of the administrative decision under the Housing Act and that gets allocated to the same informal division that deals with tenancy matters, does it?

Mr FREER: There is no tribunal that deals with these matters. It never goes before a tribunal.

Mr DAVID SHOEBRIDGE: Where is it dealt with?

Mr FREER: You have an internal review, which in most cases the decision is upheld. Then if you are still dissatisfied you may further go to the Housing Appeals Committee, which may make a recommendation.

Mr DAVID SHOEBRIDGE: One of the aspects this Committee has to grapple with is what is not a tribunal and what should properly be considered to be the subject of an administrative tribunal process. We have to grapple with these types of current administrative decisions that are not housed in what we recognise as a tribunal but within an administrative body. I would appreciate it if you could provide a further response about this particular process and if you have a view as to whether or not that type of decision-making should be heard within a tribunal rather than within an administrative process.

Mr FREER: I could respond right now.

Mr DAVID SHOEBRIDGE: You can take it on notice.

Mr FREER: Can I do both—take it out on notice and make a few remarks now?

Mr DAVID SHOEBRIDGE: Yes.

Mr FREER: We think that particularly those decisions should certainly be part of a tribunal process. It has long been a concern for us. I think there is a concern out there that there are plenty of Housing NSW tenants who are unhappy with their landlord and to make it generally subject to review would open the floodgates. We have made the submission perhaps rather boldly in our written remarks that all of it should be subject to review in the Administrative Decisions Tribunal. But our particular focus is on the rental rebate question. If you look at the kind of decisions that may affect a person's life made by governments across Australia, a decision of such extraordinarily adverse effect surely deserves a greater due process, a decision-making process, from which they get written reasons just for starters or a decision-making process where they actually get a hearing in front of what is very obviously a public and independent arbiter about the merits of the case. It does not presently exist.

With passing of apologies to the Housing Appeals Committee, led by Ms Esdaile, who is very accessible and they do what they can in dealing with these matters, with respect to the Housing Appeals Committee I do not think that it has the stature and force of the ADT in assessing the merits and giving binding decisions, which the Housing Appeals Committee cannot. I have encountered several occasions where I have been there in the tribunal and we have said, "These tribunal proceedings which are based on rent arrears said to be something like $100,000 are subject to further review by the Housing Appeals Committee." The Housing NSW advocate said to the tribunal, "We will not take the recommendation of the Housing Appeals Committee no matter what it is. So this matter ought not be adjourned. Our decision is that they owe us the debt and that is it." We won that adjournment, I am happy to say. But that has been the attitude of Housing NSW in some cases.

CHAIR: Thank you both for coming to give evidence this afternoon to assist us in our deliberations. There may be further questions which we will endeavour to get to you as quickly as we can. Subject to your receiving them soon, we ask you to respond by 14 January 2012. We would be most appreciative of that.

(The witnesses withdrew)

(The Committee adjourned at 5.04 p.m.)