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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO DISABILITY DISCRIMINATION ACT

MRS H. OWENS, Presiding Commissioner
MS C. McKENZIE, Associate Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON THURSDAY, 4 MARCH 2004, AT 10.30 AM

Continued from 3/3/04

MRS OWENS: For the benefit of the public transcript, I'd like to resume the draft report hearings of the Productivity Commission's inquiry into the Disability Discrimination Act. The purpose of the hearings today is to discuss the draft report with participants who have made submissions to the commission and provide them with the opportunity to place their views on the public record. We shall take these into account in preparing our final report to the government.

Today's hearings comprise a series of telephone links, in fact two, with various participants. Public hearings have now been held in Canberra, Hobart, Sydney, Melbourne and Brisbane and telephone hearings have already been held in Melbourne. We'll break.

MRS OWENS: Paul, as you're probably aware, this hearing is being taped for a transcript. I thought I'd just make that clear to you.

MR WATERHOUSE: Okay.

MRS OWENS: I just wanted to ask you, we haven't had a written submission, have we?

MR WATERHOUSE: No. I've been frantically trying to do it over the last couple of days but I've had all-day meetings, so unfortunately I've been a bit held up with it.

MRS OWENS: That's fine. I think we've got plenty to talk to you about anyway. I'll just ask you, would you like to introduce your submission to us or do you want to just enter into a discussion?

MR WATERHOUSE: I could probably try and think up something on my feet in terms of introducing it, but I think at this stage perhaps if we talk, as we did at the briefing earlier in the year, about those sorts of issues and then if there's anything I think we've missed I'll try and dredge it up.

MRS OWENS: Okay, that might be the best way to go.

MR WATERHOUSE: Will I be getting a copy of the transcript, Helen?

MRS OWENS: Yes, you will, and if there's anything on the transcript you'd like to correct later, you can always put in another submission at a later date.

MR WATERHOUSE: Sure, okay.

MRS OWENS: I think what we want to talk about is the access to premises

standard, and I think what I'd like to start with is the whole issue of how you perceive the process for developing the standard. You were involved personally, as I understand it, in that process, and I wondered if you'd care to comment on that in terms of the timeliness and representation of the different bodies and whether you feel your views were taken into account sufficiently.

MR WATERHOUSE: Right. It's a bit of a loaded question, but certainly we've been supportive of the process in terms of both the need to develop a premises standard and doing it through the building access policy committee. To my mind there's no other way that we could actually develop the standard than actually fitting everybody around a table and talking about what needs to go into it. I think that was essential. As you probably already know from the ABCB, the process that we pursued was to have the building access policy committee deciding on the policies themselves, but under that there was a technical working group that was established, and that group sort of debated the technical details and then presented recommendations up to the VAPC. So there was that sort of ability to get a smaller group together and try and workshop some of the approaches.

In terms of the representation, I'm not quite sure how you could get more people around the table. It's a fairly packed table as it is.

MRS OWENS: What about the balance in the group?

MR WATERHOUSE: The balance - to my mind the actual industry representation compared with the other sectors was small if you just looked at industry versus the rest, but I think ultimately the approach that was taken within the VAPC was that it was a consensus decision approach. On these sorts of issues you can never really get consensus, and while arguably there may have been some people around the table who were more backward in coming forward than I was, at the same time I think really you had to have the sorts of balances there.

In terms of numbers, I'll make no bones about it: I don't believe that the premises standard that's come out of that process is what we would like in any stretch of the imagination. I think it's far too costly and I think it's far too onerous in terms of compliance. We always took the position that we'd be waiting for the public consultation process in order to try and redress the balance to some degree, and that's, as you know, what we're currently going through. So we're hoping that there will be a strong representation from people who are on the receiving end of the proposals rather than those who are the beneficiaries.

MRS OWENS: I'd like to come back to these issues that you just raised about it being too costly and too onerous in a minute, but I think there are some aspects of the standard itself and how it's been set up which Cate and I would like to explore with you. Were you personally on both committees, the building access policy committee

and the technical working group?

MR WATERHOUSE: Yes, I was.

MRS OWENS: Did you in that process argue the case for an unjustifiable hardship defence in relation to both existing and new buildings, or were you quite happy to see that applied just to existing buildings?

MR WATERHOUSE: No, we argued for both, because to my mind, assuming that there's never going to be a situation whereby a new building doesn't qualify for an unjustifiable hardship claim, it doesn't take all eventualities into account. We tried to put it forward that new buildings were covered by unjustifiable hardship, and we were told that, because new buildings have to comply with the BCA, that would mean that unjustifiable hardship for new buildings was automatically extinguished.

MS McKENZIE: Because the BCA doesn't have an unjustifiable defence across the board?

MR WATERHOUSE: No, it doesn't, but it does have alternative solutions, and that allows building owners who find that a deem to satisfy approach is too costly or too technically difficult for their particular site, it gives them an opportunity to pursue a different alternative. What we've ended up with in terms of the current changes is a situation whereby in order to get an alternative solution approved, unless you've got a building certifier who's willing to go out on a limb and make a decision that could be overturned subsequently in the Federal Court, you're going to have to go through the administrative protocol process and get a different determination through that means, and that has no certainty.

So even if you decide to go down that track, you wait until your case is heard by the building access panel, and you get a decision made. There's no guarantee that that will actually not be challenged subsequently by somebody with a disability, and there's no guarantee that the Federal Court will take any notice of it whatsoever.

MS McKENZIE: Yes, the Federal Court might say the decision was wrong.

MR WATERHOUSE: Precisely. So there, in that sort of circumstance, where you do have something that's too costly or technically different for a new site to do, you don't actually have an unjustifiable hardship opportunity and the alternative solution may end up leading you into court anyway.

MRS OWENS: But if there had been an unjustifiable hardship defence, there still would be a degree of uncertainty about whether you could actually claim unjustifiable hardship because there's quite a few criteria that are being balanced off in that unjustifiable hardship defence from related benefits and costs and heritage

requirements and so on, so you're still not going to be that certain about - well, heritage doesn't really apply for this, does it, but there are other factors, and you're still not going to really be that certain about how those would have been weighted in any case.

MR WATERHOUSE: True. Look, I think that actually opens the door for discussion on unjustifiable hardship in itself.

MRS OWENS: Yes.

MR WATERHOUSE: Ultimately there seems to be a lot of concentration in discussion about unjustifiable hardship or benefit to the community. Obviously we've got a concern that there could be cases where you go and claim a situation of unjustifiable hardship and your claim is overturned on the basis that the building that you own may have a library operating from it or may have a doctor's surgery or something, so therefore because there's a community benefit, a perceived community benefit, even though to do the renovation yourself - and just taking new buildings out of it for the time being - will actually involve undue hardship for you to make those changes, at the same time you don't actually have that opportunity to claim or you won't necessarily be successful in claiming unjustifiable hardship because of the community benefit that's perceived. Now, to my mind, if an owner is having to pay for an upgrade to a building and they're not actually getting a benefit from themselves and if that upgrade is likely to put them into financial difficulties, whether there's a community benefit or not to the building itself, it seems rather unfair to put the owner through that particular financial stress just because there's a perceived benefit for others in the community.

MRS OWENS: You just said there might be no benefit to the owner, but I mean, they're not going to do unless there's some benefit to them. They're not going to do a renovation unless they perceive that there's some benefit to them in doing it. They're not going to expend the money.

MR WATERHOUSE: No, that's not always the case. What's being proposed is a trigger for existing buildings of 50 per cent over three years. If you renovate 50 per cent of your building within a three-year period - and it's not defined what that 50 per cent is, but pretty much we've been told that it's just the floor space overall - you have to upgrade the entire building. Now, it doesn't matter whether you've done the work yourself or whether somebody in a tenancy has done the work, so if a tenant moves out - if you've got a two-storey office block in the suburbs and the top-storey tenant moves out or the bottom-storey tenant moves out, the rest of the building will have to be upgraded because 50 per cent of your property has already been captured just by one tenant moving out.

MRS OWENS: So you're saying that in that circumstance, there would be no

benefit at all to the building owner?

MR WATERHOUSE: Upgrading the entire building?

MRS OWENS: Yes. They mightn't have wanted to do it right at that point but there might be still some possible benefit from having a newly renovated building.

MR WATERHOUSE: But if we're talking about it in terms of unjustifiable hardship, the building owner is not going to be in a position to charge more rent because the building is renovated. They're not going to be able to charge more rent because their building is more accessible. The rent is determined through market forces. So in terms of benefit, yes, they may have a more accessible building but if they've got nobody coming into that building who has a disability and if there's no direct transaction that they're involved with, then I would argue that they probably don't have a benefit from it, but they're still having to pay the costs of it.

Now, if you look at a suburban library example, say you've got the library downstairs but in order to provide access, you're going to have to make a number of changes, the tenancy upstairs changes over, the trigger will require them to do the whole building. Again, the community benefit aspect of having the library there will be seen as reason to refuse an unjustifiable hardship claim, and yet in that sort of scenario, the owner can't turf the library out and say, "Sorry, we can't afford to have you here," because they've got a contract, they've got a lease, so - - -

MRS OWENS: The community use of the ground floor may or may not be a factor because there's a whole range of factors. That's what I'm saying. You don't actually know how those are going to be weighted, because one of the factors is the economic viability of the project, so if it's no longer liable, basically you would be able to claim unjustifiable hardship, I would presume.

MS McKENZIE: It's a balancing - - -

MRS OWENS: It's a balancing act.

MR WATERHOUSE: Sorry, I do understand it; I was just talking about one of the natures of it. As you say, there is no indication as to what the weighting is likely to be, so you don't know beforehand whether you're going to be able to get that unjustifiable hardship. You've got to go through quite a torturous process of using the building access panel to get advice on whether it's occurring and there's still no guarantee that that will actually hold up in court if it's challenged.

MRS OWENS: When we started talking alternative solutions, the point I was making is even if you had unjustifiable hardship, that still does mean that there can be some uncertainty going that route anyway.

MR WATERHOUSE: Sure.

MRS OWENS: But what you've got, by having alternative solutions, it's another way of giving you a bit of a let-out, but the alternative solutions actually might be a more innovative solution.

MR WATERHOUSE: Yes, frequently they are. I mean, the BCA doesn't allow alternative solutions that let you off the hook. For example, the requirement in the upcoming premises standard is that a hundred per cent of restaurants will need to be accessible.

MRS OWENS: Yes.

MR WATERHOUSE: Now, any restaurant that is not a hundred per cent accessible, there's no alternative solution to that. You can't have a different configuration of a hundred per cent. So any restaurant that is not fully compliant with that when they renovate - and I've been told they do that every three years or so - they will either have to cop the costs or they will have to go through the access panel process to try and get some sort of determination to say it's okay not to provide full access to that. So because there's not a flexibility, you're actually going to have to drive a lot more cases through the administrative protocol process than you normally would have to do.

MS McKENZIE: Can I ask a question: you know the Building Appeals Board or whatever the equivalents are in the various states, can they exempt from BCA?

MR WATERHOUSE: I'm not sure about that. You might have to talk to the ABCB about that one.

MS McKENZIE: Because if they can, that could create a really unfortunate situation where they exempt some building from the BCA which includes the standard, but under the DDA, the standard would continue to apply.

MR WATERHOUSE: I don't know if they do exempt; I suspect they probably don't. It actually raises another issue which we've been thinking about recently which is that with the premises standard coming in, in the absence of any other sort of benchmark, we're not entirely sure what's going to happen, with an existing building that hasn't been renovated, when somebody takes them to the Federal Court and complains about the lack of access. What's to stop a magistrate or the judge taking the premises standard and using that as a benchmark, even though the building hasn't actually been renovated at any time in the recent future? We're not sure what the legal process is likely to be in that sort of scenario, but we do have a concern that it could actually result in the benchmark being applied, even though really the

premises are meant to be dealt with under the general provisions.

MS McKENZIE: That's an interesting question. I mean, the court might say, of course, "These are standards only for new buildings" - or where there's major renovation, that's the other alternative of course - "so we will look at some lesser access requirement because this is, after all, an existing building."

MR WATERHOUSE: Yes. I mean, it's not where there's major renovation; it's any renovation that triggers the BCA.

MRS OWENS: But if there's no renovation at all, I can't see how the judge can then say, "Well, there should be. Delrayne could renovate."

MR WATERHOUSE: If there's no renovation, all the premises are still captured by the general provisions.

MRS OWENS: Yes. It just then becomes covered by the general provisions.

MS McKENZIE: Yes, so it might be a question of indirect discrimination, for example, that the person in the wheelchair, if they want to get to the building, are required to go up these steps or whatever; it's not accessible.

MR WATERHOUSE: Yes, but there's no other benchmark that they can compare against for the moment, so how will the decision be made in terms of it and will somebody turn to that and say, "This is a benchmark. We're taking into account that it hasn't been renovated, but this is what the society says you should be applying, so therefore we're going to apply this." There have been cases in the past, and one of them was certainly overturned - but there was a case I think in the ACT where somebody injured themselves running through a glass door in a school. In the initial court case the judge actually held up the Australian standard that was in place at that point and said that the school was liable because they weren't compliant with the Australian standard. Now, the school had been built 30 years before and the glass had been installed when the school had been built and there was a different standard in place. But the judge still held that up as, "That's the standard. This is about safety. You should have that standard in place. You need to replace your glass."

While that was overturned in an appeal, I don't know what the ability to appeal a Federal Court decision is. I assume you can go to the High Court.

MS McKENZIE: You can go to the Full Bench of the Federal Court, which is just more judges, and then you can go to the High Court, and it would be an expensive process.

MR WATERHOUSE: Precisely, and you're still going to have to pay lawyers.

You're not necessarily going to get the barristers' fees back, and I think some of them charge a few thousand a day, so is going to be quite costly to overturn the decision that was made against the benchmark that wasn't actually designed for the buildings that haven't had renovations. So it's something we're sort of looking into because it has certainly caused us a little bit of concern, but I haven't been able to get proper legal advice on that, so I'm not sure how it stands.

MS McKENZIE: But, hang on, just going back to existing buildings for a second, isn't the trigger for the BCA to apply 50 per cent renovation over three years? Isn't that how it works?

MR WATERHOUSE: Yes.

MS McKENZIE: So in fact you've got the same problem there, haven't you, because you might have 50 per cent which is new building, but you've still got another 50 per cent which is existing building, so the accessibility requirements would have to be applied both to the new bit and to the existing bit?

MR WATERHOUSE: Certainly the existing part of the building obviously would be covered by general provisions and the renovated part would be covered by the premises standard. But, yes, you still do have uncertainty about the part that hasn't been renovated.

MS McKENZIE: But doesn't the whole of that standard apply once you've got your - - -

MR WATERHOUSE: Sorry, you're talking after the 50 per cent?

MS McKENZIE: Yes.

MR WATERHOUSE: Sorry.

MS McKENZIE: So what I'm saying is that you've got in a way the same problem as you've been talking about, because once you've done your 50 per cent renovations you still have, say, 50 per cent of your building which is unrenovated.

MR WATERHOUSE: No, 50 per cent of your building within three years triggers the rest of the building to be upgraded.

MS McKENZIE: That's right. In other words, you have to make the existing building accessible.

MR WATERHOUSE: The entire building, yes, and that's within a three-year period. So if you have half of your tenants change over within a three-year period,

you've got to upgrade your entire building regardless of when you'd planned to upgrade.

MS McKENZIE: Assuming that the tenants have renovated.

MR WATERHOUSE: No, the thing is when a tenant comes in, usually that tenancy, depending on the building and the use of the building, is renovated to suit the incoming tenant. So you'll put in walls and you'll put in corridors and doorways and all that sort of thing to cater for the new tenancy, and so when that happens the areas related to that also get caught up and you end up with the 50 per cent of a three-year period.

MRS OWENS: Can I ask you, Paul, when the standards were coming in or when they were being drafted, you got some concessions, didn't you, so that new building owners wouldn't have to face excessive costs? For example, in the code as I read it only 50 per cent of entrances have to accessible for smaller buildings, those less than 500 square metres, that sort of concession. Are there any other sorts of concessions, or wouldn't you see that as being a concession?

MR WATERHOUSE: I think it's a concession for a small building. So if you've got a building in a strip shopping area that would be a concession. But the thing was we argued for the principle entrance and 50 per cent of all other entrances, and the reason was that you have issues of topography. If you've got an existing building in Sydney, for example, chances are that if it's on half a block you've got half a dozen different entrances at a number of different levels, and making all of those entrances accessible with a level landing on the side if you're going up into a ramp and all those sorts of things could prove very costly for an existing building owner.

We weren't given that concession, and the reason we weren't was that there was a concern from some around the table that providing the topography as a reason not to provide 100 per cent would encourage building owners to make new building entrances deliberately inaccessible. I don't believe that for a moment. I think ultimately when a standard is in the building designers will attempt to design so that they come well and truly within the standard. They're not going to go out of their way, when they have to make the whole building accessible anyway, to find ways of actually providing little access barriers. But that was the rationale given as to why we shouldn't get a concession on that.

So, yes, it is a concession for a smaller building, and I think for a strip shop it's very important, but the issue of topography has not actually been given any credence in terms of all entrances.

MS McKENZIE: But you don't think that goes all the way to replacing or being a fair substitution for the lack of an unjustifiable hardship defence?

MR WATERHOUSE: Sorry, say that again?

MS McKENZIE: You don't think that goes far enough to make up for not having unjustifiable hardship as a defence for new buildings as far as the standard is concerned?

MR WATERHOUSE: You mean that concession?

MS McKENZIE: Yes.

MR WATERHOUSE: No, because larger buildings aren't given that concession. So, as I said, it's fine for your smaller buildings, but for your larger buildings you're captured whatever happens, and for existing buildings in particular.

MRS OWENS: Were there any other concessions?

MR WATERHOUSE: There were some exemptions that were listed. Section D3.4 has a number of exempted areas. Our concern with some of them is that there's a list rather than a process of actually deciding what should be an exempted area, and our concern is that a number could very easily have dropped through the gaps and will be required to be accessible by default. But that did provide some exemptions, so things like a plant room are no longer going to be required to be accessible, commercial kitchens aren't required to be accessible, areas like that, hazardous material areas.

In the premises standard itself, or in the RAS of it, there are two options being costed. One is for passing spaces to be nine metres apart in corridors; the other one is for those passing to be 20 metres apart. The 20 metres was the position of the administrations and was seen to be a concession between the property sector and the disability sector, but our position was that putting in passing and turning spaces was pursuing some for principle rather than there was a demonstrated need for it, so we don't see it as a concession per se. In terms of other concessions, it would be a bit difficult to go through the whole standard obviously and identify them.

MRS OWENS: You don't have to go through the whole standard. What I'm trying to get at is there was some effort to make a few concessions to deal with the fact that you weren't getting unjustifiable hardship on new buildings.

MR WATERHOUSE: It wasn't really discussed along the lines of unjustifiable hardship for new buildings; it was discussed in terms of the individual technical issue. So really the decision was made early on in the process that the BCA alignment would automatically remove unjustifiable hardship for new buildings and so it never really became part of the ongoing discussion when these sorts of things

were being put forward. It was merely, "What do we do about this technical provision? How do we approach it for the amended BCA?"

MRS OWENS: We discussed this I think when we saw you, but what are your views about the impact on competition of not having unjustifiable hardship for new buildings?

MR WATERHOUSE: The effect on competition?

MRS OWENS: Yes.

MR WATERHOUSE: I can't remember what I said last time we discussed this.

MRS OWENS: You said something - do you want me to put words in your mouth?

MR WATERHOUSE: You might drop me a hint.

MRS OWENS: You said something like new building owners would only have a limited chance to pass on the higher costs and the existing building owners may not necessarily have to incur the same sorts of costs, or at least not until they renovate, so it could have a competitive effect.

MR WATERHOUSE: I'm not sure if that's what I was trying to get at. Essentially, new building owners will - obviously, the costs will be factored into the development, so they will pay for - - -

MS McKENZIE: So they will be passed on?

MR WATERHOUSE: Yes. They may pay more for the development itself, but the costs will be factored in and they'll and deal with it in other areas. They'll make changes in other areas to try and compensate for them.

In terms of passing the costs on, this is a very difficult area because ultimately the rent is not determined according to what the property owner decides they'd like to collect that week. It's determined according to a whole lot of market forces and I don't understand it very clearly, but I think there possibly would be an attempt to pass some of it on. I don't know how successful they would be. With existing buildings, your rent is already set and your ability to raise rent just to be able to make a building accessible is negligible. Ultimately your average tenant is going to say, "Sorry, it's got to be accessible anyway. We're not paying more for it just to be accessible." So there I think existing building owners will have to absorb the costs themselves. The other thing is that anybody who decides that they don't want to do the changes so they'll try and sell their building, anybody coming in new will assess the cost of the existing building according to what changes need to be done in order

to bring it up to code and they'll take that off the sale price.

So an existing building owner, once the changes come in, automatically is going to be paying for the proposed changes whether it's because they can't claim additional rent once they've made the changes or whether they're just trying to sell the building off and they end up paying for it in due diligence.

MRS OWENS: The use of alternative solutions - - -

MS McKENZIE: You've talked about the difficulty of the panel and not knowing - even if the panel makes a decision, not knowing whether that decision will stand up in court.

MR WATERHOUSE: Yes.

MRS OWENS: Do you think that will actually deter or discourage the use of alternative solutions and hence discourage innovation?

MR WATERHOUSE: I don't know how much it will discourage it. The reality is that almost every commercial building in the country is built with alternative solutions in one place or another. There are almost no major buildings that are built entirely then to satisfy. Part of that reason is that they are trying to introduce innovative new ways of doing things, make the building appear a little different, that sort of stuff. To some degree it will discourage either renovation or the use of innovation and the reason is that the building access panels are likely to see a number of cases appear before them very quickly and that will ultimately lead to development assess delays because if your council is not going to make a decision on your application and it goes to an access panel, you've got to wait until the access panel actually has the time to review your case and provide comments or come up with a suggestion.

So I think that whole administrative protocol, while in principle it's a good idea to provide a circuit breaker and allow for some facilitation of some of the more difficult issues, at the same time unless it's managed really carefully, I can see that it will lead to significant delays in development itself. That in itself is probably going to be a discouragement to any form of innovation but I think there will still be some sort of pursuit of alternative solutions just because there are going to be some sites where you can't do anything but use an alternative solution in some areas. To design for the particular site you're going to have to make decisions about how to apply the BCA and develop the building effectively.

MS McKENZIE: So those delays that might occur at the building access committee stage, they will presumably involve some additional cost, will they, to the - - -

MR WATERHOUSE: Significant costs. One of the other forums I'm involved with is a group called the Development Assessment Forum and we're talking there about trying to harmonise DA processes around the country to remove inefficiencies and get consent authorities pursuing leading practice. It has been estimated that harmonisation across the board, I think it was considered to be a $1.8 billion saving to government and industry if it was introduced.

MRS OWENS: When you say "harmonisation" harmonisation of what, the administrative practices and - - -

MR WATERHOUSE: The process, yes. It's not all of it becoming centralised but each individual state and territory pursues a reform that moves towards to leading practices that are similar so you're not having to do 15 different things in 15 different councils.

MRS OWENS: So the access panels would use similar criteria and similar - they've got the protocol but similar processes and so on and have an adequate size and fast enough turnaround, are you talking about those sorts of administrative arrangements?

MR WATERHOUSE: I think the access panels are likely to end up having slower turnaround times just because of the number of cases that are likely to occur, unless you've got a lot of different access panels hearing a lot of different cases in which that may have to be the solution. I can see that they're going to get delayed because they're going to get bogged down with individual cases, particularly in the early stages where they're trying to come up with case law for it. Those development delays do cost money to a developer, the opportunity costs, insurance costs, wages, people sitting around doing nothing or constantly going down and trying to argue it through a panel or through a court. So, yes, it does costs the developer quite a bit of money to try and get something determined through such a process.

Our concern - and obviously we can't say it's definitely going to happen until something actually gets introduced - is that the access panels could result in the same sorts of delays and therefore the same sorts of costs.

MRS OWENS: But you said that currently most new buildings are now using alternative solutions. They would have to go to somebody, wouldn't they, to be approved?

MR WATERHOUSE: At the moment building certifiers are signing off on them.

MS McKENZIE: Okay.

MR WATERHOUSE: So you actually get certification of the alternative solution because they understand what's required and they can say, "Yes, this looks like an alternative solution, we'll approve it." That's under attack in some states and territories, the role of private certifiers, but I won't go into that in this forum. But the problem with the access changes is that there is so much uncertainty about the access changes themselves and there's so much potential for somebody who makes the decision and approves the development to be taken to court as well if that decision is wrong that I can't imagine your average building certifier wanting to risk their professional indemnity premiums and making a decision that is anything beyond deemed to satisfy.

So in the first stages you're going to have a situation whereby if it comes through and it's a deemed to satisfy they will go, "Yes, that's okay. We'll let it through," but if it comes up and it's an alternative solution they'll say, "No, sorry, I'm not going to make a decision. I will put it to the building access panel." That's where you're going to end up getting the backlog and where you're going to end up getting the delays.

MS McKENZIE: Which is quite a rational response actually.

MR WATERHOUSE: Look, I wouldn't blame them at all because I'd want to protect my PI as well. But if it happens it's obviously going to be a headache for anybody who is trying to put a development through.

MRS OWENS: So the trick is to actually make sure that these panels are of an adequate size and that they can deal with the workflow that you're expecting will go through?

MR WATERHOUSE: Through alternative solutions I think you're right, that will be the trick for it. For existing buildings our concern, and what we've been arguing about for some time within the BAPC - our concern is that there is a drive in the development of the premises standard to introduce something that's a high benchmark for new buildings and with the expectation of, "Well, existing buildings can go through the administrative protocol." But the problem is that if the administrative protocol is getting every existing building going through it or even a sizeable proportion of existing buildings going through that process because the benchmark for new buildings is being set too high for existing, we're not doing ourselves any favours in terms of the overall impacts and the overall provision of access.

Those sorts of on-flow costs haven't been factored into the RIS. So the RIS looks at the costs of the actual implementation of the access to premises to proposals - - -

MS McKENZIE: Yes, but that's because the standard won't apply to existing buildings, I assume that's how it - - -

MR WATERHOUSE: The problem is, it does. It applies to new work and existing buildings before they're captured.

MS McKENZIE: Yes.

MR WATERHOUSE: And it does look at existing buildings, so the RAF takes that into account, that it is affecting existing buildings as well, but it's not looking at it in terms of, "Well, this is going to be the impact if it has to go through an administrative protocol," or, "This is going to be the on-flow impact of increasing the costs on the construction industry." If you have a large increase in the cost of building buildings through the access provisions, that automatically will see a significant increase in construction costs. Now, that in itself could be a disincentive for anybody who is likely to be needing to renovate at some point. They must just go, "Well, I'll put it on the backburner," because it's a lot easier than facing those additional costs. If that happens, you will see a downturn in the construction industry.

We did a back-of-envelope calculation and I don't know how much water it holds necessarily, but if you take the $2 billion that was predicted as the upper figure for the range per annum, the non-residential estimated construction in Australia in 2005-2006 is going to be $16.3 billion across the country for non-residential. Now, if you took the 2 billion and just assumed it all went to commercial, that's an increase of 12 per cent on construction costs. The construction industry had major problems when the GST was introduced which was introducing a 10 per cent increase, so it's things like that where there are flow-on impacts that haven't been explored in the IRS itself or at least not in any - I don't know if that one has, but some of the others have been looked at in a basic sense.

MRS OWENS: Paul, I want to clarify this flow-on impact. You're saying that the incentive is going to be, in the case of existing buildings, to go the administrative protocol route and then hence go to an access panel. Is that what - - -

MR WATERHOUSE: I'm saying any existing building that cannot entirely deem to satisfy or that it is pursuing unjustifiable hardship, they will have to go through the protocol process because I can't see a council, particularly after Cooper v Coffs Harbour City Council, wanting to go out on a limb and make a determination on something that could ultimately backfire and see them in court as well. Likewise, I can't see a certifier wanting to do it.

MRS OWENS: So you're saying they're going to have to try and find alternative solutions and then they've got to get that ticked off?

MR WATERHOUSE: Either they're trying to find an alternative solution that gets approved or they claim unjustifiable hardship, and in both cases they will have to go through the protocol process to get it approved.

MRS OWENS: Yes. Those sort of additional costs from the delays et cetera haven't been factored into the regulatory impact statement?

MR WATERHOUSE: As far as I'm aware, no, because I don't think the protocol is seen by some as actually having that sort of impact, and I think the expectation is the protocol process will build up a whole lot of case law and so therefore within a short period of time, everybody will know what's allowable and what's not, but the problem is, you've got to go through that short period of time, and that short period of time could end up causing delays for a large number of owners.

MRS OWENS: You're saying it might be a short-run problem but at the same time, by going through those processes, there might be benefits to offset some of those additional costs, and I'm thinking of benefits like the greater certainty, that you could assume that there would be greater certainty and then - - -

MR WATERHOUSE: From the protocol?

MRS OWENS: Yes, using - - -

MS McKENZIE: There would be some sort of body of knowledge developed - - -

MR WATERHOUSE: Over time, yes, there probably will be, but again we come to the situation whereby that body of knowledge has no legal standing. That body of knowledge, actually there is no compulsion upon anybody to take any notice of what is actually developed in that circle. Now, I would hope that your average magistrate is sensible enough to take notice of that and make decisions accordingly, but there is nothing in the DDA saying that you have to take account of what the building access panel says, and there is nothing being introduced that will require that.

MRS OWENS: Can I just interrupt there. I mean, surely you would have to be a very brave individual to decide to put in a complaint if you know that the builder or the developer has gone through this process and the protocols being used, they've gone to the access panel, isn't it going to actually reduce, if not eliminate the need for complaints?

MR WATERHOUSE: Not necessarily. Hopefully it will, but again it just depends on the premise of the decision; if they think that the decision has been flawed, they will make a complaint. If they think that a concession on access or an agreement that there could be a claim for unjustifiable hardship - if they think that that decision is

wrong, then there's every chance that they will challenge it. So it really comes down to an individual interpretation as to whether something does comply with the performance standards of the BCA, in their case of an alternative solution, or whether a building is likely to be able to qualify for unjustifiable hardship in terms of the renovation of it. Yes, in an ideal world, I think a decision would be made by an access panel and that would be it, but I don't know that that's necessarily going to be the case. But the thing is, to get to that sort of level, you still have to go through the torturous process of actually getting the case heard in the first place.

MRS OWENS: But just on balance, would you rather have the protocol and that process or not have it?

MR WATERHOUSE: As I said earlier, I think the protocol itself in theory is an important circuit-breaker. I think there is something like that needed. We're not trying to throw the baby out with the bathwater. Ultimately, the Property Council believes that there does need to be improved access.

MS McKENZIE: There's got to be some kind of protocol because otherwise you have no idea whether your alternative solution is going to be an equivalent one to the actual deem to comply provisions.

MR WATERHOUSE: You do have to certify as willing to sign off on it, but it's a question of whether the certifier is willing to sign off on it. I agree, there does need to be some sort of process that way. I think that how it's applied is going to be something that we all need to look at and we need to work out how many building access panels there are likely to be and how they're going to be pursued. I think that using the access panels as a justification for setting higher benchmarks is wrong because ultimately you will end up with a backlog whether you like it or not, because you will set the benchmark far too high for people who are renovating. But in itself, like others around the table, we agreed in principle with developing an administrative protocol because there does need to be some sort of circuit-breaker. As I said, we're just concerned that if too much is put through the protocol process, we could end up with significant costs and significant delays and we don't think that's reasonable in setting a benchmark for new buildings and new building works.

MRS OWENS: So just coming back to our inquiry, this is one standard where at least there is a protocol of this type. Maybe we could be thinking constructively about suggesting that the arrangements should be reviewed; it's not just a matter of reviewing the standards but reviewing the operation of the protocol and the access panels after X number of years with the view of ensuring that there's an administratively efficient process in place.

MR WATERHOUSE: I think in anything like this, there should be a review automatically. The problem is, if you say, for example, that they should be reviewed

within five years, a lot of the problem will occur well and truly before that five-year period and - - -

MRS OWENS: It doesn't have to be five years, it could be three years or two years.

MR WATERHOUSE: Sure, I just plucked the year limit out of the air, but what I'm saying is that introducing the review at that point or even a couple of years before then may be too late in terms of cutting down on the overall workload or helping to facilitate it and I think there does need to be some thought at this stage on how the protocol is going to be applied. I mean, there are concerns at an administration level about how it's going to be applied and about the requirement that there only be building access panels, that until they've been up and running you can't have access experts. Some of the administrations are unhappy about that because they'd much prefer to accredit a whole series of access experts who have been trained in what the requirements are and what constitutes compliance and that obviously would be a much easier process for everybody concerned.

But at the moment protocol says, "You've got to have a building access panel, you can't have access experts at this stage." So therefore it is setting itself up at this point to be sworn-proof work.

MRS OWENS: You're raising some issues about short-term administrative issues that need to be monitored and I think you're building up almost the worst case scenario about how it's going to work and the fact is that you're supporting on balance having the protocol and supporting, I think, having access panels. So maybe it's a matter of construction really thinking about how it could be made to work as well as possible.

MR WATERHOUSE: As with all the other aspects of the proposed changes we will be putting a submission in and we will try and explore some of those things there. But in terms of painting worst case scenarios, yes, to some degree I probably am, but at the same time the main reason for that is that everybody else is painting best case scenarios. It's the same with most of the discussions at BAPC level, it's the same with most of the debate out in the community. People are thinking of benefits, benefits and there are only people like myself who are actually getting up there and saying, "Well, hang on a sec and let's look at the cost side of it because the cost side is an important factor."

There is too much focus at the moment, from my perspective, on generic statements about how 18 to 20 per cent of the population have a disability and they will all be benefited by the premises standard. That is not true. Individual features will benefit different sections of that community, but the whole premises standard will not cater for the 20 per cent of the population who are disabled. For example, we have got nothing in there to deal with people who have bipolar disorder and

people with mental and intellectual disabilities are a sizeable proportion of that 20 per cent. So it is a furphy to say we're benefiting the 20 per cent of the population who are disabled and their carers and people with prams and people with trolleys and all that sort of thing. It doesn't quite work that way, particularly when you consider, for example, one of the arguments put forward has been that the proportion of people over 80 is much higher in terms of being in wheelchairs than in other age groups and that there will be a benefit as the population gets older.

The point is that people who are 80 and in a wheelchair are highly unlikely to be wanting to access your average office block and yet they're a proportion of the sector that we're having to introduce ramps and lifts and unisex accessible toilets and all that for - - -

MRS OWENS: Paul, can I interrupt. We've just had an announcement by government that they want to see older workers stay in the workforce. We might well see people over 80 in wheelchairs in offices in the future.

MR WATERHOUSE: I think they do want to see more people who are older staying in the workforce, but I don't think they're thinking of 80-year-olds in wheelchairs.

MRS OWENS: Who knows.

MS McKENZIE: I'm not sure about that.

MR WATERHOUSE: We will go and talk to Peter Costello and find out about it.

MRS OWENS: Cate and I are going to be in wheelchairs in offices and annoying everybody when we're 80s.

MR WATERHOUSE: Is that personal choice or because you need to work?

MRS OWENS: Does it matter?

MR WATERHOUSE: The thing is it's more about - again, I pick the example to try and illustrate the point - it's more about where the features are required and how much of the population is actually going to be benefited by those particular features. I have been told and I don't know how true it is, but that hearing loops, for example, only benefit people with certain types of hearing aids.

MS McKENZIE: It depends on the hearing loop, I think.

MR WATERHOUSE: But that's the thing, we're not saying which hearing loop you should be using, we're just saying "hearing loops" or FM receivers or infra-red

receivers. So we're not actually specifying that you use a hearing loop. If you put in a particular type then it doesn't benefit people who have hearing aids with T switches, then we're actually not doing what we're setting out to do. But it's too difficult to regulate to that level and I'm not proposing for a moment that we do regulate to that, but to say that, "We put all these things in and therefore anybody who has got a hearing impairment will benefit," that's not the case.

MS McKENZIE: Yes, that's true.

MR WATERHOUSE: There has been too much of a focus on the large 20 per cent numbers rather than looking at, "Well, you've got X proportion who are in wheelchairs, you've got Y proportion who have hearing impairments, you've got this proportion who have vision impairments," and looking at what the benefits to them are across the board.

MS McKENZIE: You're right, different features would benefit entirely different groups and sizes and classes of people. I mean, hearing loop will benefit a certain class of people with disabilities. A ramp will benefit arguably a much larger class, not just the people with disabilities but also those who were simply frail and unsteady on their feet because of age or whatever reason and mothers with children in prams. So you're right, the classes vary according to what the feature is.

MR WATERHOUSE: Yes. The point is that when you're doing an assessment of the costs and the benefits, you need to look at it on that level, not on the generic level and the costs have all been talked about, particularly in public forums and the like, as being 20 per cent with a disability, $26 billion to provide access for them, $15 billion worth of benefits. There needs to be, from our thought, more analysis of whether this particular feature in a childcare centre, for example, is really necessary or whether the proportion of people who are likely to be benefited by introducing that particular feature is really going to be entering those sorts of facilities. There needs to be some sort of analysis done on targeting the actual changes for the benefit of the community that's going to be using those premises and I don't think at the moment there has been any consideration of that.

MS McKENZIE: That analysis has to be done carefully. It has got to be about "who might potentially use" not just "who might use" because, of course, if something is inaccessible, it's not going to be useable, so you get a circular argument.

MR WATERHOUSE: Sure. I think time does need to be put into doing that sort of analysis and there will need to be assumptions made. I don't know that it is entirely a circular argument because if somebody put the time and effort into doing that detailed analysis it would be useful for informing decisions.

MS McKENZIE: Yes.

MR WATERHOUSE: But the problem is that without that analysis we're making decisions on very generalised, very basic information and those decisions will apply across the board, whether you've got a two-storey office block in Dubbo or a 40-storey office block in Sydney, whether you've got a one-storey shopping centre out in Wentworthville or a two or three-storey shopping centre out in Perth. The sorts of changes that are being introduced are going to affect all of them. So it's things like that we're just saying there needs to be some analysis of the actual implications from an individual level, rather than just looking at it as a 20 per cent figure and being done with it.

MS McKENZIE: Can I ask another question, and it's about BCA and it's updating - - -

MRS OWENS: No, before we get onto that, I still want to get through this discussion on analysis. Has the Property Council done its own analysis of benefits and costs?

MR WATERHOUSE: We've done an interim analysis, that's basically me looking at it and trying to work out what the implications are likely to be. We are at this stage hoping to try and commission somebody to do an analysis properly but obviously time and resources are going to be a big issue in this.

MRS OWENS: Are you going to feed this into this process that's going on now in terms of providing comment on the standard?

MR WATERHOUSE: It's engineered to feed it into our submission process, and bring those arguments up to the front, but obviously we've got just under two months to provide submissions, so really it just depends how long the analysis is likely to take and what sort of resources we have at our disposal and at the moment I couldn't tell you what that is.

MRS OWENS: While we're talking about this, during the RIS process were you given an opportunity to provide your views on these estimates at that time?

MR WATERHOUSE: During the development of it at BAPC level?

MRS OWENS: Yes.

MR WATERHOUSE: Yes, we put forward comments, a lot of our comments weren't taken on board. A number of things such as, for example the analysis of a shopping centre - the shopping was taken to be a one-storey shopping centre rather than a multi-storey, and so they said that there was only a point one per cent increase in costs for somebody renovating a shopping centre.

MRS OWENS: That was based on a case study wasn't it?

MR WATERHOUSE: That was a case study, yes, but the problem is that most of the shopping centre owners have very few one-storey shopping centres. So if you look at your major operators, all of their shopping centres are two, three, four storeys because it's too costly to build outwards when you can build up and get more floor space. So you actually build more storeys than just the one storey so our concern is that that isn't representative of what's actually out in the market place.

MRS OWENS: But looking at the RIS I don't think they were trying to paint the case that that was represented, if it was just one of the 20 case studies for new buildings and I don't know I haven't looked at all the case studies but I presume there were other shopping centres that were used in the case studies as well as office buildings.

MR WATERHOUSE: No, there weren't.

MRS OWENS: Was that the only shopping centre?

MR WATERHOUSE: Yes, but we set particularly a criteria as to what was representative of the community, and we put forward that for shopping centres it had to be a horizontal spread shopping centre. They assumed that meant a one-storey, so the assumption for all of the shopping centre analysis was that it was a one-storey shopping centre and that was it. That's why they came with such low figures, we told them that they were wrong, that that was not what we were putting forward and that that was not what it should be calculated on - they refused to change it. So, yes, we put forward views but those views weren't always taken into account.

MRS OWENS: What about their assumption about the installation of lifts and the difference that makes to the estimates?

MR WATERHOUSE: In terms of?

MRS OWENS: They provided estimates based on putting in traditional lifts but they also then downgraded the estimates on the assumption that for two-storey buildings you could put in a staircase lift in some circumstances. Did you have any views on that?

MR WATERHOUSE: Yes, look in some circumstances you can, the problem is that there's a limitation on where you can actually use those sorts of lifts. Particularly in terms of how much traffic there is within the building. So while the wider variety of lifts was a concession to us, I guess in terms of providing more opportunity, realistically a lot of areas where you would want to be able to put those

sorts of lifts you wouldn't actually be allowed to do so because the population within the building would be too great. For example if you had a particular area within a theatre - you're retrofitting a theatre, you wanted to put a chairlift to get somebody in a wheelchair up to one of the accessible theatre spaces - seating spaces - because it's in a theatre you would not actually be given approval for using that sort of lift and you would have to put in a class 2 lift, even though nobody else is going to be using that lift because it's specifically to get somebody in a wheelchair up to that level, because of the traffic with in the building you wouldn't be given approval to put it in.

MRS OWENS: While we're doing this; with the overall measurable net benefits and costs, under the base case that reached the conclusion of minus a net cost of 13.3 billion.

MR WATERHOUSE: Yes.

MRS OWENS: And then said, "Well, by the way there's a lot of substantial unquantified benefits." Did you have a view on how that was all treated in terms of the balance between the quantifiable and the unquantifiable benefits and costs?

MR WATERHOUSE: Well, to tell you the truth we did, but there's only so much you can say before people just keep on calling you a nay sayer. Ultimately, I've got a concern about the emphasis on intangible benefits. I mean, anybody can go out and say something is a benefit, if you can't demonstrate it quantifiable, then it's your word against theirs. The disability sector has talked a lot about how there are a lot of intangible benefits and so on. I notice in your report you talk about social capital, it's all - without trying to offend - a bit motherhood. It's saying there is a benefit but it's not actually exploring the benefit reasoning, why it should be applied or why it shouldn't be applied. In your report, if I may, there was a comment about the social capital, page 184,185. It talks about how "the potential for social capital to promote economic wellbeing is increasingly recognised. Greater amounts of social capital in a country can help reduce transaction costs, disseminate knowledge and information and promote cooperative and socially-minded behaviour."

On a macro policy scale that may be the case, on a specific - looking at it, ultimately there's been racial discrimination legislation in for 20 years, and there's still racial vilification occurring. There are still people who are painted in the media as being from a particular ethnic group, and stereotypes about how they perform and all that sort of thing. Likewise, the comment on - that you've got below it - the contribution maybe direct or indirect including reductions in crime and violence. Being a little bit facetious, I can't see how including ramps in buildings is going to reduce violence and crime. All it's going to do is provide more amenities for people with disabilities to enter buildings, so I can't see the link between the talk about social capital and some of the impacts that are being discussed within the report.

Likewise the intangible benefits - ultimately it can be talked about long and hard, and people can say, "Yes, there are intangible benefits," but until somebody actually sits down and goes, "Right, these are what the benefits are, this is how they're provided by introducing these changes. This is what they mean to us in terms of access within the community." Until that happens, it really is just a nebulous statement.

MS McKENZIE: I suppose the real difficulty is that it's much easier to say this will be the cost that we're going to incur, it's much more difficult to try to quantify some of these values.

MR WATERHOUSE: Sure, but at the same time for example the comment I made earlier about increase to construction, and the impacts on that, I can't quantify how many businesses are going to say, "Well, we're not going to renovate," and how many construction companies therefore have to say to their subbies, "Well, sorry we can't employ you anymore." I can't quantify that, it's an assumption as to what may occur.

MS McKENZIE: So they're intangible costs which are also being taken into account.

MR WATERHOUSE: But they're not taken into account in the RIS. There's talk about intangible benefits, but there's no talk about flow-on impacts in terms of industry, in terms of introducing these costs. That's the concern, that it seems almost as though in the RIS that intangible benefits are put there to justify the fact that there's a $13 discrepancy. To my mind that's not really what the RIS is all about. Our ability to change those sorts of sentiments in the middle of a BAPC is fairly limited. Ultimately, on a number of different issues I was a dissenting voice, I was listed as a dissenting voice and that's all that happened. The provision went through with Property Council's dissension. So me jumping up and saying, "Hang on a second, you've got to quantify these intangible benefits," - you know, I'll have no success in doing that.

Our feeling was that when the RIS came forward really we needed to encourage people to respond to it and that's what it came down to, that really there was only so far we would actually be able to change the minds of the APC and the minds of the consultants in terms of what they were putting into the RIS itself. Our challenge was to address a lot of those comments at the RIS consultation stage and so that's what we're going to have to do.

MRS OWENS: I'll hand over to Cate.

MS McKENZIE: I just want to ask you a bit about the BCA and its updating. I understand it's updated every 12 months, or every six, every 12 month is it?

MR WATERHOUSE: Every 12 months now. It used to be six.

MS McKENZIE: Yes, okay. The standard is going to be reviewed, I think, every five years or at least the first review will be made in five years. Is that right?

MR WATERHOUSE: Yes, I think so.

MS McKENZIE: So is there any chance that the BCA is going to get out of kilter with the standard because it's reviewed more regularly?

MR WATERHOUSE: There is but the argument is that the BCA won't be able to reduce access therefore it won't lessen the provisions of the standard itself.

MS McKENZIE: But if it does get out of kilter that makes it impossibly difficult for developers, certifiers, and everybody else to actually know what the regulation is.

MR WATERHOUSE: It does and it doesn't. I mean ultimately if the BCA is set at the premises standard level in 2005, say, and then in 2006 more features are introduced to the BCA or updates are introduced, those updates will still have to be compliant to a degree with the premises standard. So in other words you can't actually introduce something that will lessen the access within the BCA and therefore undermine the premises standard. So if you're complying with BCA 2006 and the premises stand at reference BCA 2005, 2006 won't actually be less access than the premises standard. It will in fact be more. Your average developer won't go to the premises standard; they'll go to the BCA.

So therefore you can assume that if you're compliant with the BCA, whichever edition it happens to be, that the BCA itself is going to be compliant with the premises standard because of the agreement that it would not undermine or reduce anything that eventually goes into the premises standard.

MS McKENZIE: It's a bit confusing because if a complaint is made, of course what the complaint will look at is the DDA standard itself.

MR WATERHOUSE: Of course.

MS McKENZIE: Yes.

MR WATERHOUSE: But the thing is that if a complaint is made and you've built a new building at the end of 2006, the complaint will compare BCA 2005 with what you've done and BCA 2006 will be as good if not slightly better than BCA 2005.

MS McKENZIE: Okay, so in effect the only changes that would be made to the

BCA would always consistent with that.

MR WATERHOUSE: Would be consistent or would improve upon the premises standard. The thing is that if you're complying with the BCA of any particular year, automatically you'll be complying with the premises standard because each year any changes will have to meet the same standards or go better than what's in the premises standard itself.

MRS OWENS: But what happens if they go better? I'm just trying to think this through. If the BCA actually tightens up on the premises standard in some way, does that lead to some uncertainty out there among builders or developers? Because they might technically then be complying with the access to premises standard but not complying with a beefed up BCA in terms of access. Where does that leave them?

MR WATERHOUSE: Basically it means that if you're complying with the beefed up BCA, as I said, you'll be compliant with the premises standard. If you're developing and you're building a building in 2006 you won't go to the premises standard to work out what you need to do.

MRS OWENS: You'll look at the BCA.

MR WATERHOUSE: You'll go to the BCA. If your building was renovated in 2005 and the BCA changes in 2006 that's immaterial. You don't have to do anything to get to the new level.

MS McKENZIE: Yes, because you're not doing any building work.

MR WATERHOUSE: Precisely.

MS McKENZIE: Yes.

MR WATERHOUSE: So you are protected according to the premises standard because you comply with that in 2005 and just because the BCA has moved beyond the premises standard that doesn't actually mean that you're going to be in breach of the BCA because you're not actually undertaking any new work.

MS McKENZIE: It's just not a very sensible situation to have where you've got what purport to regulate the same thing turning out to be different.

MR WATERHOUSE: Of course but unfortunately building regulation is a state issue and DDA is a Commonwealth issue. We're never going to resolve that problem. The situation that has been put forward is really the best way of doing it because ultimately you do still have that assurance. It's just that you know that any changed BCA ultimately will go beyond what the premises standard requires itself.

I can't see the ABCB wanting to do any changes in terms of access to the BCA before an additional review because I think the industry is going to have enough problems with what's been put forward as it is.

I can't see the ABCB wanting to push the envelope any further than it has to. So I think it's more of an academic argument than necessarily a real impact. But even so, even if there are changes, ultimately you'll still have that protection and as I said, the DDA itself will only be referred to by HREOC and the Federal Court or by anybody who is trying to make a complaint. It won't actually be referred to by the developers because they'll be going to the building code where that is their building regulation; they have to comply with that.

MS McKENZIE: I mean it would be better if for example that a change to the BCA like that would be the trigger for a review of a standard.

MR WATERHOUSE: But every year the BCA changes so you'd be reviewing it every year. It's taken us quite a period of time actually to get to the level we are with the premises standard. I can't see that being an effective way of doing it. If the Productivity Commission wants to go and recommend that all state governments be abolished and that everything becomes centralised you may find some sectors that actually support that. I'm not saying whether we would or not but you may find some.

MRS OWENS: We could solve many problems if we did that.

MR WATERHOUSE: Perhaps it would but you may have a number of disenfranchised state politicians after you.

MRS OWENS: It actually goes a little beyond our terms of reference for this particular inquiry.

MR WATERHOUSE: I suspect it might.

MRS OWENS: Just slightly.

MR WATERHOUSE: But realistically we've got to face facts that we've got building regulation at a state level and disability discrimination at a Commonwealth level. It's the only way we can really align it. The big question mark really in terms of the local application or anything like that is with local councils and whether local councils - because in some states they can actually determine what level of regulation occurs within their boundaries - whether they're likely to increase the features if they don't think they've gone far enough.

I don't know whether you guys have looked into that side of it, and I did see

something about states not going beyond the premises standard, but realistically I think most of the states will consider that it goes far enough when it's finally introduced.

MRS OWENS: When is that going to be, have you any idea?

MR WATERHOUSE: It's meant to be 1 May 2005.

MRS OWENS: Do you think it will get there?

MR WATERHOUSE: Look, I don't know, it depends how many submissions there are and how many changes there are. I believe the intention is for the changes to be recommended to the attorney-general towards the end of this year. But it really depends how much dispute there is. If a lot of responses come back and say, you know, "This will bankrupt us," that may encourage the ABCB to change some of the provisions. If the comments come back from the disability sector to say, you know, "This will essentially keep us in boxes," then the same process applies. But it's too difficult to say how long it's going to take. It depends also how the ABCB decides to process it.

I mean if they decide to do most of the recommendations themselves and then just put them up to the BAPC as something that we need to approve, that may be a faster process. It is unlikely to be accepted by the BAPC as the right way to go because I think the vested interests around the table, and yours truly who is included in that, would like to have some say in what goes forward. But in terms of keeping to a tight time frame that may be the only way to do it. The other potential impact is the election and ultimately if an election is called towards the end of this year that will actually halt the process insofar as decisions can't be made. We can do some fine things to it but the ABCB won't be able to recommend to the attorney-general anything that he has to make a decision on if they be in caretaker mode.

Ideally May 2005 will be the date. In reality it's probably likely to be 2006 unless there's a decision to introduce it at an earlier stage - let me just turn that off.

MRS OWENS: I just had a couple of small points because I think we've held you up longer than we intended to.

MR WATERHOUSE: No, that's okay.

MRS OWENS: We've got another participant waiting, that's all. But one was about representative complaints; my recollection when we talked to you earlier was that you had some concerns about representative complaints. I wonder if you would like to repeat those on the transcript.

MR WATERHOUSE: You're talking about organisations.

MRS OWENS: Yes.

MR WATERHOUSE: Yes, look, we do. Basically our concern is that it opens up an opportunity for somebody to go around and say, "I am representing X organisation and we represent this particular disability sector and we think your building is not accessible, so therefore we're going to make a complaint about it." Our concern is that that equates to, to coin a phrase, essentially disability vigilantism, in that it's not that somebody is actually trying to enter a building and finding that there's a barrier, it's the fact that somebody has appointed themselves to go around and work out which buildings have barriers and to lay complaints. Now, if you're bringing in a process whereby building owners will be upgrading their building automatically with Building Code changes, to allow that sort of approach I think will be contrary to the spirit of the DDA and will cause more problems within the industry in terms of application of the premises standard itself.

MS McKENZIE: So in other words, if a representative organisation were to lay a complaint, it must be where a specific person is discriminated against basically.

MR WATERHOUSE: That would be my thought, yes. Ultimately, if somebody goes to the Physical Disability Council and says, "I need you to put this complaint in because I don't have the funds to do it, that's a slightly different issue," but if the Disability Council decides, "We're going to put this complaint in because we've decided that building should be accessible and it's not," that isn't actually to my mind what the DDA was supposed to be achieving. That's pursuing a principle rather than realistically attempting to access the building.

MRS OWENS: The other point I wanted to ask you about, which might actually in some ways be related to the last one, is to what extent do you expect builders and developers to rely on using building upgrade plans with respect to existing buildings, because I was just thinking that could be somewhat of a protection perhaps to these sort of complaints.

MR WATERHOUSE: Yes, it could be, but it depends how much weight is given to the building upgrade plan. HREOC have said they will take them into account but even HREOC have not said that they will consider them a protection in themselves. I can't really answer that in terms of numbers. I'm just not sure. I'm not sure what sort of knowledge there is about the upgrade plans at the moment and I'm not sure how much willingness there is to expend the time coming up with a plan in order to deal with access issues, so it's a bit hard for me to comment on. I agree that building upgrade plans are possibly a way of staggering the process and planning for it effectively but in terms of an official estimate of how many people are likely to do it, we just don't have those sorts of figures.

MRS OWENS: Thank you for that.

MS McKENZIE: Thank you very much.

MR WATERHOUSE: Just before I go, one thing I did want to raise with you - and again, apologies about the submission, it is on its way - - -

MRS OWENS: Have we covered the sort of things you wanted to cover?

MR WATERHOUSE: Yes, in the main. The issue of costs, we've looked at, flow and effect, they were certainly important things. There are other things that I think are just probably better dealt with in the submission itself. But there is one thing I wanted to flag which was evidence; there's a recommendation that the burden of evidence not be on the person making the complaint. We would strongly counsel against that recommendation.

MS McKENZIE: Can I just say that it's not quite as broad as that. The only bit that we've changed as far as evidence is concerned is in indirect discrimination cases, and one of the requirements for indirect discrimination - there are three - is that there's got to be some kind of requirement or condition imposed by, in this case, the operator or owner of a building; another is that that has got to be a requirement or condition that the person with the disability can comply with - leaving out for a minute any comparisons because we've suggested that they be dropped - and then the last requirement is that that requirement or condition is reasonable, and it's that one that we suggested we should change the burden of introducing evidence, on the basis that it's very difficult - the question of whether a requirement is reasonable or not, all the technical reasons why it might have been imposed, normally are just not available to a complainant.

MR WATERHOUSE: I guess the reason I'm concerned is that all three of those conditions could actually be applied to buildings, insofar as somebody doesn't have a ramp, they're indirectly discriminating and so on.

MS McKENZIE: Yes.

MR WATERHOUSE: Now, the comparison I was going to make here is with public liability insurance. In public liability there have been big problems because the onus for an insurance complaint is actually on the defendant rather than on the prosecution to prove that they're innocent. So if I go into a building and I slip over, I have up to three years to put my complaint in, so I wait for two and a half years, put my complaint in; by that stage, the management of the building may even have changed. They may not have the records because I didn't make a complaint at the time, so therefore it hasn't registered on their books. All of a sudden, I hit them with

a complaint that they were negligent because they didn't have a sign up, identifying that the floor was being mopped. They can't prove that they didn't have the sign up at that particular point in time; they're found negligent, even though they may have done everything they could to deal with negligence, but they just don't have the records and they can't prove it.

My concern is that by removing the burden of evidence from the complainant and putting it on to the defendant, you may end up with the same sort of situation, whereby somebody puts in a disability access complaint that they have been aggrieved, but they don't actually have to put forward a properly reasoned case to explain that they have been aggrieved. All they need to do is to make allegations and the owner has to defend themselves against those allegations. That, to my mind, will actually cause some concerns along the lines of the public liability. The problem is that it's going to shoot insurance prices up through the roof because there's no way you can protect against that. If you actually have to demonstrate that you haven't been negligent and you go out of your way to demonstrate that you haven't been negligent or haven't been discriminatory, it's a very difficult thing to do because ultimately it's objective.

So my concern is that by removing that requirement to provide evidence and to demonstrate a case, you could actually end up having a lot of people getting captured who shouldn't really be captured but they just couldn't prove that they hadn't been discriminatory.

MS McKENZIE: I think there's still a certain amount that the complainant must show. I mean, in practice the truth about indirect discrimination cases is that many of them fall simply because the complainants don't have the proof. The only people who really have it are the respondent, and it's very difficult to get that proof out of the respondent.

MR WATERHOUSE: Maybe talk of subpoenas or something is the way to go around it. It may not be the intention, but the way it read just to me opened up at bit of a Pandora's box on the other side. I understand the problems for people with disabilities and I'm not saying that they should put up or shut up; I'm just saying that there has to be some responsibility on them to prove their case, because otherwise you can get serial complainants just going to any building and putting complaints in on the basis that they may be awarded costs.

Now, those costs aren't always because somebody has actually suffered losses. Sometimes it's because they may have suffered embarrassment and so therefore they're awarded costs, so somebody goes around and collects $3000 every time they actually lay a claim that they've been embarrassed because they've been turned away. That's a nice little earner for somebody to pursue, without necessarily there being justified reasons for doing it. So that's why I'd caution against that particular

recommendation, or suggest perhaps that it be reworked to be a little bit less ambiguous. I just wanted to make sure that was mentioned before we finished up.

MS McKENZIE: All right, yes.

MRS OWENS: I think in this situation we are not talking about waiting three years to be able to prove or disprove something either. It's different; there are time limits.

MR WATERHOUSE: Sure.

MS McKENZIE: 12 months basically is it for lodging a complaint.

MR WATERHOUSE: Yes, but I thought there was actually talk within the report as well of removing that statutory time limit.

MS McKENZIE: No, that was just to go to court. We recommended basically doubling, pretty much doubling, the period of application to the court from 30 in effect to 60 days.

MR WATERHOUSE: Right, okay.

MRS OWENS: Anyway, thank you very much, Paul.

MS McKENZIE: Thank you very much.

MR WATERHOUSE: That's okay. I hope it was helpful.

MRS OWENS: It was very helpful.

MR WATERHOUSE: Again, apologies about not getting a submission in but I am working on it. There's just been a number of things falling at the same time. I'll get something to you as soon as I can.

MRS OWENS: We look forward to getting it, thank you.

MRS OWENS: Terry, I really do apologise for us running so late, but we spent a lot of time talking to our last participant. So I'm sorry about that. I hope it hasn't held you up too much.

MR HUMPHRIES: No, look, it's fine and, you know, if there are opportunities to talk to people that have got something to contribute, I think we should all value that. So I have no problem with that at all.

MRS OWENS: Thank you for the two submissions we've received, which I think have raised a very interesting issue in relation to Commonwealth employment for us. We're very happy to talk to you today. So thank you for that. Thank you for putting it all in writing for us. I'm not sure how much you want to go over the case and how much we should go over the case, because we're not a review body.

MS McKENZIE: It's really process. We look at process.

MRS OWENS: Yes, as Cate says, we're really interested in the process that you encountered and what we can learn from that process in terms of our recommendation. Would you like to open up the discussion? I just point out that all this discussion will be going on to a transcript and you'll be getting a copy later, and the transcript will be on the public record.

MR HUMPHRIES: Okay. So is what I've provided you in writing going to be part of the transcript?

MS McKENZIE: Not, of the transcript but it's a submission that has been made to us and that goes onto our web site.

MRS OWENS: So that is on the public record already.

MR HUMPHRIES: Okay.

MRS OWENS: I gather there was no confidential material in that. You didn't mark anything as confidential, and when nothing is marked as confidential it just gets processed as a submission for public consumption really.

MR HUMPHRIES: Yes, certainly. There are some issues there that I mentioned to Patrick the other day that I guess I would like to express my feelings on, but they would be things that I would want to be considered to be not for publication.

MS McKENZIE: There are, I suppose, two ways of doing it. One is to make part of the hearing - to close it and make it confidential so it's not published. The only trouble about information that we treat as confidential is that we won't be able to use it.

MRS OWENS: We can only use it as background information.

MS McKENZIE: We can use it as background but we couldn't then use it as a submission we could quote, for example, in support of some conclusion or recommendation we're making. Obviously there are some things about the case that are going to be public anyway because it's gone to the courts.

MR HUMPHRIES: Yes, that's right.

MS McKENZIE: You can't disclose what was said in conciliation obviously, but anything that's gone to the court you can talk about without any difficulty at all.

MR HUMPHRIES: No, these are broader issues, I guess, than the case itself.

MS McKENZIE: So could you raise them in a more generalised way? Is that possible?

MR HUMPHRIES: Yes, sure.

MS McKENZIE: If you could do that, then it will help us and we could then rely on them if we want to make findings or recommendations about them.

MR HUMPHRIES: Okay.

MRS OWENS: We could start doing that, and if you still felt at the end of our discussion there were some other issues that you wanted to raise in confidence we could do so. I'm always a bit reluctant to do that, because we like to do as much as we can on the public record. That's why we have these public hearings. But let's just see how we go, Terry.

MS McKENZIE: We might look at it again at the end and see whether there are things that we just can't understand, for example, unless you give us some of the confidential aspects.

MR HUMPHRIES: Sure. So where would you like to start?

MS McKENZIE: Do you want to tell us the issues in a general way that trouble you and then we might have a discussion.

MR HUMPHRIES: Sure.

MRS OWENS: You have got a number of recommendations in your second submission to us that we received this month, and we can talk about those

recommendations later. But you've raised some issues about just the fact that employment in the Commonwealth public service for people with disabilities has been declining, and we noted that in our report. Then you've discussed the issue in relation to your own wife's case, and we're particularly interested in just your views about the processes that you encountered.

So there are the views about the Commonwealth can be doing as an employer, there are the issues relating to the processes going through the Human Rights and Equal Opportunity Commission and the court, and then you discuss our finding 5.1, where you say we've made no recommendation. But we did say something on the issue of employment being a significant issue and we did float the idea of having a positive duty which we floated as a request for information. So we didn't ignore that; we actually made that into an important part of our report in one of our chapters, but we didn't recommend at that time because we wanted to see what the response to that idea was.

So how about we go back to - the statistics, I think we have acknowledged that the number of people with disabilities has been declining, and we had a discussion earlier this week in Brisbane with a representative from the Department of Family and Community Services, who also noted that on the transcript and talked about his own department. We will also be referring to that material in our final report, because it does raise a question about what is going on at the Commonwealth and how effective has the Commonwealth disability strategy been in recent years. I don't know if that strategy was in place when your wife was employed by the Commonwealth.

MR HUMPHRIES: She was employed between the beginning of 1993 and mid-1995. But one of the issues that really concerns me is that I guess there are various processes within the public service that are set in place to protect people, and yet it appears that processes, depending I guess on who you have to deal with, aren't necessarily followed properly. It was interesting that under cross-examination Ros Irwin, who was one of the respondents to the claim of discrimination, when quizzed on the issue of the proper probation processes that went into place - and there's actually a booklet that's put out by the public sector recruitment area that talks about what the proper protocols are for putting a person through a period of probation, what's required and what the duties and responsibilities of both parties are. Basically her response was, "Look, I was the manager. I'll do what I like."

It was that attitude that seemed to pervade the entire examination of her response to Nerilie's request for equipment, a whole lot of different issues. The legal processes that you go through with appeals and everything like that - it's just one of those processes that every time you turn around half your case disappears every time it goes to appeal because of some technicality of the law. What seemed to be more important to the Commonwealth in this case was not the issue of discrimination; it

seemed to be an issue over how much work the case could generate for the Australian Government Solicitor's office.

I looked at the model litigant policy and I looked at the number of different areas of responsibility that they have, and basically the four sectors are they have to act with integrity - well, they didn't, because they kept telling lies. They kept just misrepresenting the truth. It was incredible. In Nerilie's case they kept referring to this incredible talking computer that was purchased for Nerilie. They didn't purchase the computer; they got an old computer that had been disused, taken out of service because it was no longer functional. The keyboard none of the staff could help Nerilie with because you couldn't read the letters or numbers any more because they were worn off, and the little raised keys on the F and the J that a blind person would use to centre their fingers on the keyboard had been worn off. A keyboard is only worth 10 or 15 dollars.

MS McKENZIE: But in addition, what occurs to me is do they supply the rest of their staff with keyboards of that age?

MR HUMPHRIES: Yes. Everyone else had good quality computers and fairly new ones because they'd been through a process of replacing equipment. What had happened was they'd decommissioned this computer and replaced it with a new one. That computer was sent away and it was rebirthed and sent back to Nerilie as a talking computer that they'd purchased for her. They didn't purchase anything. They didn't purchase the software. They didn't put any effort into providing a proper piece of equipment that worked properly, and they gave her about an hour and a quarter's training instead of quite a number of days, which would have been necessary.

So there were things like that. They said they bought her a certain program and she used it. They didn't buy it, she never used it. They were making up that they bought a computer for her and supplied her a computer for the entire time she was there - different things like that - which were totally incorrect. She was with the department basically for two years and had a computer supplied by the department for a period of about six weeks in that entire two years.

MS McKENZIE: I assume all those things were raised in the court.

MR HUMPHRIES: Yes. But it's just issues that go on and every time you come back, they come back with the same lies and the same issues, even though you have dealt with them previously. They just don't leave them alone.

MS McKENZIE: Can I ask you too: what I just don't understand is that this whole processes for the Commonwealth was extremely costly.

MR HUMPHRIES: Yes.

MS McKENZIE: It must have cost them huge amounts in legal fees and time.

MR HUMPHRIES: I've worked it out at probably between three-quarters of a million and 1 million dollars it has cost the taxpayer through the whole process.

MS McKENZIE: So would it not have been better to reach a conciliated solution where the relevant computer program or training was given? That would have been much less expensive.

MR HUMPHRIES: That was the point a couple of the commissioners actually made. For the provision of a few services, this could have all been avoided, and Nerilie would actually have a working life and not be a recluse that sits at home frightened to leave the house. It is bizarre that it actually got to this stage. The other thing was that during the process of the case the Commonwealth tried to claim unjustifiable hardship for not providing a $2500 monitor for the computer that she could actually see. We have got a computer at home now and she sits down and types on the computer all the time. She's got no problem working with a computer. She's really good at it.

MRS OWENS: I presume, Terry, that the Commonwealth didn't win on the unjustifiable hardship defence.

MR HUMPHRIES: No.

MS McKENZIE: No, they didn't.

MR HUMPHRIES: But again it's like Wednesbury unreasonableness. For goodness sake, how many times do you want approach that and in how many different places under appeal, and spend how many different hours wasting the courts' time? Again, every time I looked around at this and I looked at how they were framing their defence, what they were doing and how much time they devoting to it and how many hundreds of pages their submissions were, it looked so much like they were there trying to squeeze every last chargeable hour out of it.

MRS OWENS: Do you think though, because of the timing, it was being mounted more as a test case because the Commonwealth didn't want to establish certain precedents?

MS McKENZIE: Floodgates approach.

MR HUMPHRIES: Yes. When we originally put the complaint together, the first people that Nerilie and I contacted were the Disability Discrimination Legal Service in Redfern in Sydney. Via fax, we sent backwards and forwards the complaint and

framed it all and got it in place. In fact, they even approached the Commonwealth with a view to try to conciliate the matter prior it being heard by HREOC.

So we were dealing with these people, and out of utter frustration of not knowing what on earth was going on after having won the case and then having it appealed, then sent back for rehearing, and all these sorts of things, I contacted the solicitor that I had been dealing with at the Disability Discrimination Legal Service. She had since moved on and is working for one of the ombudsmen. I said, "Look, I don't understand what is going on," and I explained my frustration's about the amount of time they had spent on it, why was this happening, and she said, "To be honest with you, my opinion is that the Commonwealth is trying to use this case as a deterrent to other people with disabilities making claims against them." That was her opinion. I work with a solicitor and you guys probably have legal qualifications as well.

MS McKENZIE: I do. Helen isn't a lawyer.

MRS OWENS: I'm an economist.

MR HUMPHRIES: Okay. Fair enough, but within the legal profession you don't generally - unless you find some sort of a crazy maverick - tend to find people from a legal background making statements like that unless there is really some sort of foundation to it.

MRS OWENS: No.

MR HUMPHRIES: I found it quite interesting that she would come out and say that when in fact most solicitors would be very reserved in their comments - "Well, it's quite a possibility" - but this was actually her opinion of what was happening. Now, that has since been backed up. That's the other issue, the backing-up of that, that I would rather speak off the record on, because there has been an allegation that has been made by somebody of fairly high profile and I would rather talk to you privately about that.

MRS OWENS: All right. We will leave that to the end and we will go off the record.

MS McKENZIE: We might hold that to the end. We'll deal with all the public stuff first.

MR HUMPHRIES: Yes, certainly.

MS McKENZIE: The court experience obviously was stressful, costly, time consuming and destructive, I assume. Is that a fair summation?

MR HUMPHRIES: Yes. It was very difficult. The Australian Government Solicitor at one stage accused my wife of taking - I made a gesture in the court and he was claiming that she was taking signals from me. For goodness sake, she couldn't see me. She's blind. It's just stuff like this. The Australian Government Solicitor stands up and says to the court after this, "I'm going to bring forward a witness who will say that Mrs Humphries can see more than she says she can see." Now, the Commonwealth already sent her to an eye specialist and had her eyes tested. That's number one. Number two, he had his list of witnesses in. Amongst those list of witnesses was not an ophthalmologist, so there was no one actually qualified to say that, and thirdly, he never produced a witness.

This is the sort of nonsense that we listened to, along with the rantings and ravings of Wednesbury unreasonableness when you get to the Federal Court under appeal and things like that. When we went to the Federal Court, the judge that was hearing the matter there got so frustrated with the amount of time that the Commonwealth spent trying to argue the facts of the case. Now, if anyone wanted to get up and argue the facts of the case it would have been me because I was just so angry over the misrepresentation of the facts of the case. The point was, we were before the Federal Court; we were arguing over points of law as to whether or not the decision had been correctly applied.

MS McKENZIE: Yes.

MR HUMPHRIES: We weren't there to argue the facts of the case, and this is all they did. In the end, the judge got so angry and so frustrated with the whole thing, when we got up to make our submission on points of law we were basically cut short and that was the end of it. It was so pathetically done. I think that there have been a number of things, tricks of the trade if you want, that have been done through the whole process, at every point along the way, both before HREOC, before the Federal Court and before the Federal Magistrates Court, that have really led to this case fizzing out in the end basically. I mean, we won in the end, but it fizzed out.

I guess it is that that really makes me wonder what sort of a commitment the Commonwealth really does have towards the effective working and operation of the Disability Discrimination Act. On one hand they are enacting it as an act of parliament, and on the other hand they are trying to undermine it with every ounce of strength they've got when they're fighting Nerilie. The whole thing that really frustrates me is that they never bothered to investigate what happened. It's like, "We don't care what happened. We just want to go to court." It was that attitude and the ferocity with which they actually defended it and the lies they told, and the wasting of so much time and so many resources.

At the end Nerilie has ended up with $12,000, which is next to nothing. Her

life is ruined; she can't work. There isn't a day goes by that it doesn't consume my thinking time, and I know it frustrates and really hurts her. She feels emotionally very damaged over it. I took her out to the shops the other day and she just stayed in the carpark. She doesn't usually go into the shops at all. But she's commented to me, "It's six weeks since I've been outside the house."

When we were younger and the kids were younger, I'd ring up home from work and she was never there. She was always out with the kids in the stroller and they were downtown and they were here, there and everywhere - an incredibly social person and a person who was always out and about and doing things, now to somebody who stays at home. We have one friend that comes around and visits and that's about it, and we don't have visitors, we don't go visiting people. This is a life that is completely ruined by a deliberate act of discrimination that's basically gone unpunished and unrecognised.

The judgment of discrimination was on requiring Nerilie to do a group of competencies, and that was it. I mean the fact that they wouldn't buy her a computer that she could use and be part of a - that didn't happen because of this appeals process and because Hillary Charlesworth forgot to put in the causal link in her decision. All of a sudden the whole case just fell to pieces. I guess that's the other point with it too, initially when the DDA started you could represent yourself, and that's what we had to do, we couldn't afford a solicitor, blind citizens couldn't afford to support us with their solicitor, and we weren't - I think Larry Lichen was in London doing his masters at the time or something like that so we had no-one, we had to do this ourselves.

I've got no legal experience whatsoever. So I'm in there running the case because she was not in any emotional state to do it, and I believe it's been that, and attempting to provide that accessibility to the act - and to remedy some of the act - that really led to out downfall because if we'd had a solicitor there I'm sure that the solicitor would have directed the commissioner to consider certain facts and consider the causal links and all that sort of stuff. I didn't even know what a causal link was at the time, I had no idea of the fact that I had to point it out.

So it's a lot of those issues of accessibility to justice through the act that have been the downfall of it and yet I passionately believe in the fact that we should be able to access it without having to have barristers and solicitors there to - I don't know it seems to be very difficult if you start to get third parties involved because they don't live it day-in, day-out, they don't understand all the facts and all the details and the emotions that go with it. It's very hard for someone else to come along and just put your case for you.

MS McKENZIE: I mean there are some suggestions we made that might help. We've obviously suggested - we've recognised that disability discrimination legal

services might need more resourcing, and they of course provide advocates at the moment in a very limited way. We've heard submissions from Victoria Legal Aid which talk about the guidelines in respect of DDA matters which are quite strict, they require public interest and that's quite difficult for individual complaints. So that's another matter we will thing about.

MR WATERHOUSE: Hillary applied for Legal Aid for the first hearing and we weren't able to get Legal Aid.

MS McKENZIE: Yes, the guidelines are really narrow in respect of that. The other thing that we've asked for information about is whether representative organisations should be able to make complaints and also whether HREOC itself should be able to initiate complaints or maybe bring an application to court.

MR WATERHOUSE: Yes.

MS McKENZIE: Because what you're really saying is that this matter - your concern might be a systemic issue not just relating to Nerilie.

MR WATERHOUSE: No, exactly right. I think Nerilie has copped the brunt of it in an attempt by the Commonwealth to try and discourage other people with disabilities from making the same claim, but I think there is a systemic issue involved in this, and it's certainly one area that I would love to see addressed.

MRS OWENS: Terry, when you said that your wife was denied Legal Aid, do you know what the grounds were for her not getting it? It was just the limited resources?

MR WATERHOUSE: Yes, they said that there was limited prospects of success, I think was the terminology that was used, and yet we went in there with no solicitor against two government solicitors and we won. So, to me the case was fairly strong. One of the comments that came back from HREOC was, "This is a really well documented case, this has really been well presented and well put together," so you get comments like that and then Legal Aid turn around and say "No, your prospects of success are very low and we're not going to fund it." It's just one of those crazy things that just - to go and represent yourself you run the risk of missing different points, and I guess as we've been through the process over the years and been through a couple of appeals, I've started to see where all the chinks in the armour are, the questions I didn't ask at that hearing, the questions I should have asked.

The nonsense that went on was unbelievable. The witnesses that the Commonwealth put up were some of the shonkiest witnesses you've ever come across. Some of the things they had to say were bizarre and luckily I was able to counter a lot of those because they were simply shonky witnesses - their expert witnesses. So there were just so many issues with it that just seemed to be so hard to comprehend that you

could go through this process for so many years. I kept thinking all the way along, "Why don't they get it? Why don't they understand what I'm talking about?" That, to me was the frustration and I guess that it comes back to that issue of (a) they appeared to have no interest in really knowing what had happened, the interest was in getting it into court and keeping it there as long as possible. It was just so obvious from the way the thing was run from beginning to end through all the different processes, and I guess when I look back now I can understand that the reason they didn't get it was because they weren't interested.

MS McKENZIE: It's of concern as well - this is a publicised case - what that might make - just putting aside for one moment whether what they did was deliberate or not, but a disabled person reading a case like that may feel a bit worried about applying for employment with the Commonwealth.

MR WATERHOUSE: Right.

MS McKENZIE: Particularly if they were going to be looking for some kind of reasonable adjustment.

MR WATERHOUSE: Exactly, and I think that you said "putting that other issue aside," but I mean, that just backs up that issue totally. It may be in a sense why we've seen a decline in participation levels in the public service, it very well may contribute to that. As one of the other people that made a submission, a gentleman by the name of Trevor Oddy, had similar sorts of experiences to what Nerilie went through in terms of just the general type of treatment, and the treatment when you complained about what was happening to you.

In the public service you've got this process of appeal, if you don't agree with the decision that your superior makes, you can appeal that decision to a higher authority. Nerilie appealed a decision of Ros Irwin to Ros Irwin's boss - he just folded. It was well know within the office, he basically did what she wanted, so she not only had control of the people under her, she had control of the person above her as well, so you got that sort of issue. This comes back to again, I think, and I've alluded to it in my submission to you, that I think that the Public Service Act, in that it protects or doesn't allow for the accountability of public servants - for their actions - I think in a sense it does protect people who would take advantage of that situation of where a person is in charge and where a person can even abuse that responsibility and where you end up with bullying and that sort of thing in the public service. I really do think it's a major problem and I think in a sense, the Public Service Act impedes the proper operation of the Disability Discrimination Act and probably the Federal Industrial Relations Act as well.

I think they really need to look at that. I know this isn't an issue you are dealing with. You're just dealing with the DDA, but when another act of parliament impedes

the DDA, I think at least it's something that you could possibly make comment on, particularly when there is that significant decline, a 40 per cent decline in employment in the public sector over a 10-year period. That's a massive decline over 10 years. If part of it is the Public Service Act not allowing for accountability, that's a pretty sad indictment on it.

MRS OWENS: So can you point us to where it doesn't allow for accountability, is there some specific provision in that act?

MR WATERHOUSE: I don't know, look, I'm not even sure what it is. My understanding is that if you're a public servant and something happens because of what you've done and the Commonwealth is sued, for example, we are named as the respondents - The Minister - because he was responsible for the department. We named the three people who meted out the discrimination, and we named the department. The only respondent was the department when it went to court, The other three didn't become respondents, they were there just as witnesses. One of them has now been promoted within the public service, the other two have left the public service.

There's an issue with one of them that, again, I'll talk to you at the end, the thing off the record. So yes, it's really frustrating that somebody is personally responsible for making a personal decision to do something which was (a) against their rules and regulations within the public service, and it was against the Disability Discrimination Act and yet they don't have to accept any responsibility because the Commonwealth stands up and takes on that responsibility and I think it's that and my understanding is, from talking to someone at HREOC the other day, that emanates from the Public Service Act. In what form, where, how, I'm not sure. But I understand that's the general procedure with what happens unless it's a criminal matter and then I think there's individual responsibility given then, I think, but even that may not be correct.

MRS OWENS: Regardless of the act, there may be some ability to educate public servants and the staff of government departments about their responsibilities under the DDA. Maybe more could be more done. Maybe things have been happening since your wife was employed under the government disability strategy but we'll have a look at that there may be more that could happen there so people are aware that there is this act and that there's certain requirements under the act for them to behave in a certain way. That goes beyond just making adjustments for people which I have to say is a bit unclear in the act but it also goes to issues of harassment and so on as well. So maybe we could have another look at that just to see how clear it is in the Commonwealth Disability Strategy that each department needs to take responsibility for getting the message across to its employees.

MR HUMPHRIES: Yes, providing the proper training.

MRS OWENS: Yes.

MR HUMPHRIES: Look, I totally agree. I think that's a really, really important part of the whole process. I think education is brilliant. I was involved with an employer who was finding work for people with intellectual disabilities around about the time that Nerilie started with DEET and in that employment I was able to place a number of people under a program - I can't think of the name - but it was a placement with Commonwealth public service providers to place a person with any sort of a disability under that program - no it was intellectual disability, that right, it was IDAP, the Intellectual Disability Access Program.

I found employment for people within DEET and within, at that stage, Social Security and I worked with all of the local places to work on education about the issues and then finding people suitable employment. The funny part about it was, DEET was administering the program and DEET were also providing the other program which was the workplace modifications program where there's $5000 available - and I think it's just been increased to 10,000 - but there was $5000 available for equipment and modifications to the workplace to facilitate employing somebody with a disability.

So DEET is administering these programs. When I placed people with Centrelink - which was then Social Security - Centrelink nationally had an atrocious record for employing people with disabilities. But locally here in this area, fantastic. These people worked for Social Security; they got promotions; they transferred to different sections; and it worked out brilliantly. Everyone was delighted and these staff were great. They took on board the information; they helped the person adjust; they were accepted into the workplace, et cetera, et cetera.

The people who I placed with DEET had similar problems to Nerilie. The difference was that because they were working under this employer - the employer that I was working for was providing a workplace officer who came in and assisted them to learn the job and stayed for a little while - they were able to nip it in the bud and stop them from having to endure some of these things. But they still copped some of the discrimination. So here we have a department that's meant to be administering, meant to be training other departments in how to look after and assist disabilities, and they're the worst.

MRS OWENS: How long ago was this experience, Terry?

MR HUMPHRIES: This was back in 1992, 93.

MRS OWENS: It may have changed since then.

MR HUMPHRIES: Yes, there have been some significant changes and

departments have been broken up since then.

MRS OWENS: Yes.

MR HUMPHRIES: But I mean that was the experience that was happening back than. I mean that education process was the responsibility of the department that seemed to perform the worst in terms of discrimination.

MRS OWENS: Can we come to your recommendations that you made in your second submission. One of them was that HREOC develop employment standards under the DDA and there has been of an attempt to do that and I have to say it fell in a bit of a hole.

MR HUMPHRIES: That, I think, is the problem. It was a bit of an attempt. I know that there was a lot of work put into it because if you look at the annual reports you can see that there were committees formed and there were employer groups looking at it, but in the end every year it seemed to get harder, and less effort went into it and it's just about fizzled out. But I think it's just so important and I think that maybe we've got to look at the experience of other countries. I know there's reference to programs in the United States employing people with disabilities but I just think that there needs to be some strategies put in place because without the strategies we're going nowhere and we're going to see the participation figures decline further and I think they should be increasing and in particular within the public service.

I think the public service should have their own strategies that they have in place maybe separate to those of the private sector.

MRS OWENS: They do have a Commonwealth Disability Strategy.

MR HUMPHRIES: Yes, but has anyone read it; does anyone know what it says; and does anyone take any notice of it?

MRS OWENS: This is what I was saying before, maybe there's room for more education and training about it but that's what we'll have to find out.

MR HUMPHRIES: If there's a strategy and, yes, certainly I mean we can educate people better, we can provide all that sort of stuff, but if there's no requirement for people to turn around and make the effort to actually employ people with disabilities and try and make it a workplace that's inclusive of people with disabilities then if you're going to leave it up to the do-gooders to get in there and do something because it's the right thing to do, unfortunately there's not too many people around who are prepared to put in the effort and energy to do that.

I remember years ago where my wife worked there were quite a number of women in the office because there were strategies to have more women employed and that worked. There were a lot of Aboriginal people working in the office and I must say, probably out of all the people I worked with they're probably still my best friends. It worked fantastically for those people and gave them opportunities they would never have. Maybe there's got to be some sort of a strategy that is prescriptive that says, "Look, you need to employ X number of percentage of people with a disability because this is the national average of people able to work who have a disability, therefore this should be reflected in our workforce, therefore you must have," I don't know, that strategy people might shoot down in flames and say it won't work or whatever.

But we've got to have something that is a little bit more prescriptive of what needs to be done and not just leaving it up to people's good nature, "Look, that sounds like a great idea. Isn't that great information? Let's go and do it." Because I think if it's left up to that it's just not going to happen.

MRS OWENS: I think in the early days of the Commonwealth Disability Strategy there were more prescriptive provisions that were later dropped.

MR HUMPHRIES: Yes, and I think that's probably when we saw the nosedive in the participation rate.

MRS OWENS: Unjustifiable hardship, you say that the Commonwealth should have no access or at best limited access to the provision of unjustifiable hardship and this is in the context of employment I presume you're making that comment.

MR HUMPHRIES: Sorry, what was the last bit of the question?

MRS OWENS: This is in the context of employment.

MR HUMPHRIES: Yes. As I said in the introduction and the background, I'm coming from the perspective of having worked with Nerilie, seeing what this whole process has done to her, and looking then at the legal process that followed through the Disability and Discrimination Act, both seeing it from the perspective of being with HREOC and then also seeing it from the perspective of the Federal Magistrates Court. To have that issue even raised, I mean here they are spending three-quarters of a million dollars plus fighting this case and they're saying unjustifiable hardship for not buying a $2500 computer monitor.

I mean that's insanity to even bring it up much less stand there and argue it for half an hour. It's beyond me to understand how they can do it. I guess it's my distrust of the Commonwealth and the Australian Government Solicitor's Office that they won't get on this bandwagon again and just use it as a time wasting money wasting exercise

to try and derail the proper processes of considering somebody's experience of discrimination. I guess when I referred to their either none or limited - I mean there could be a situation where somebody may be talking about physical access to a building and it may cost $1 million to modify the building. I think in situations like that then maybe there might be some alternative to looking at that, I don't know. But I think generally speaking when it comes to most situations in employment I think that should not be an avenue that's even open to them.

MRS OWENS: Have we finished the comments you want to make on the record at this point, Terry?

MS McKENZIE: They're all my questions, I think.

MRS OWENS: I've run through my questions. Do you want to go off the record now?

MR HUMPHRIES: Yes.

MRS OWENS: Okay, we'll go off the record.

MR HUMPHRIES: Thank you for all your time and for the opportunity. I really do appreciate it and I wish you guys all the best with it because I think it's really important. I guess my major concern is that with the attitude they've got I hope they listen to the recommendations you guys put forward because I think they're just incredibly important.

MS McKENZIE: Thank you very much.

MRS OWENS: Thank you. I'll just close the hearings if you'd just bear with us for a minute, Terry, because you're our very last person at this round of hearings. So I'll just let you know what we do from now on. We'll be redrafting our report, submitting it to the government at the end of April this year, it's then up to the government to release the report and respond to it. As a participant at the inquiry you will receive a copy of our final report when it's released. So thanks for talking to us today and your submissions and comments have been very useful for us so goodbye and thank you.

MR HUMPHRIES: It's a pleasure.

MS McKENZIE: Thank you.

MR HUMPHRIES: Thanks a lot. Bye.

MRS OWENS: For the benefit of the public transcript, public hearings and teleconference hearings have now concluded. Further information about the inquiry and hearings can be obtained from the commission's web site. I now close the proceedings.

AT 1.13 PM THE INQUIRY WAS ADJOURNED ACCORDINGLY

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