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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 SYDNEY ON THURSDAY, 19 FEBRUARY 2004, AT 9.05 AM

Continued from 18/2/04

MRS OWENS: Welcome to the resumption of hearings for the Productivity Commission inquiry into the Disability Discrimination Act 1992 which we will refer to as the DDA. My name is Helen Owens and I'm the presiding commissioner on this inquiry. My associate commissioner is Cate McKenzie. On 5 February last year the government asked the commission to review the DDA and the Disability Discrimination Regulations 1996. The commission released a draft report in October last year.

The purpose of this hearing is to provide an opportunity for interested parties in Sydney to discuss their submissions and to put their views about the commission's draft report on the public record. Telephone hearings have been held in Melbourne and public hearings have been held in Canberra and Hobart, and further hearings will be held in Melbourne and Brisbane. When we complete the hearings in March we will redraft the report and submit it to the government by the end of April. It is then up to the government to release and respond to the report.

We like to conduct all hearings in a reasonably informal manner but I remind participants that a full transcript is being taken for this reason and to assist people using the hearing loop. Comments from the floor cannot be taken because they won't be heard by the microphones. If anyone in the audience does want to speak I will be allowing some time at the end of the proceedings today for you to do so. If you think you would like to take up the opportunity, just notify one of the staff members here. Participants are not required to take an oath but are required under the Productivity Commission Act to be truthful in their remarks. Participants are welcome to comment on the issues raised in other submissions. The transcript will be available on the commission's website in Word format following the hearings.

I would like to welcome the first participant today, and we have got two organisations represented: the National Association of People Living With HIV-AIDS and the Australian Federation of AIDS Organisations. Welcome, and could you each give your name and your position with your respective organisations for the transcript.

MR LAKE: My name is Rob Lake. I'm the convenor of the care and support portfolio at NAPWA, National Association of People Living With HIV-AIDS.

MR GODWIN: My name is John Godwin. I'm a policy analyst at the Australian Federation of AIDS Organisations and I might just briefly explain that the federation is the national policy in advocacy organisation in relation to HIV. Its membership includes NAPWA that Rob comes from, as well as the state and territory AIDS councils and the national organisation for injecting drug-users and the national organisation for sex workers.

MRS OWENS: Are you both full-time in these positions?

MR GODWIN: I'm actually three days a week at the moment.

MR LAKE: I'm not an employee of NAPWA, no.

MRS OWENS: Thank you. We received from you yesterday some issues that you wanted to address and we didn't discuss this before we started today but I presume that you want to make some opening remarks based on this list of issues, so maybe we will run through those. I don't know which of you would like to do so.

MR GODWIN: Yes, that's fine. I think we are going to pass the baton backwards and forwards as we go through the list.

MRS OWENS: Yes.

MR GODWIN: I think we've got about eight or nine points.

MRS OWENS: Yes, there are a few. That's good.

MR GODWIN: I think as a starting point we would like to welcome the general thrust of the draft report, of the findings and recommendations. I think we were pleasantly surprised at the emphasis on tighter exemptions on standards, procedural things such as clarifying costs orders, the issue around the onus in indirect discrimination cases. They are all quite progressive measures. I think, to be blunt about it, there was some concern amongst disability advocates that this review from an economic perspective might lead to some winding back of the coverage of the act, but we are reassured to see that the commission hasn't taken that approach.

I think as disability advocates we come at this issue from a human rights paradigm rather than an economic paradigm and we like to see economic issues tested from a human rights perspective rather than the other way around. I think that what the report, in its draft form, says about the benefits of the act to the community as a whole, the contribution to social capital - they are all very positive things and I think we can add to that from the experience of people living with HIV, I guess from looking at the public health impact of the DDA.

In terms of Australia's national HIV response, the DDA forms a part of a bigger package. Australia has had a very successful HIV response and that has come about by using a range of different public health methods such as harm reduction in terms of drug use, education in terms of the broader community and target populations such as the gay community, safety in the blood supply. A part of that broader package has been legislative reform around discrimination and around confidentiality.

So I think if you are going to start talking about the net benefits to the Australian community, although it is somewhat intangible, there is a public health benefit that you can point to, certainly in the HIV sphere, in the hepatitis C sphere and I'm sure in relation to other disability areas. So I just wanted to make that sort of broader point at the outset. It's what we in national HIV strategyspeak call setting the enabling environment for health promotion, that laws around discrimination set a positive tone, allow health promotion with target groups to occur based on voluntary cooperation of communities rather than models of compulsory or mandatory requirements. As I have said too, they think it has just been important to the success of the Australian response.

MS McKENZIE: You said in your submissions how successful that strategy has been and, in fact, that other compulsive strategies adopted in other countries have been less successful.

MR LAKE: Absolutely, and also there have been significant moments where having the act - and particularly in the first few years after the act came in, which was in the middle of the height of the epidemic, and some of that of the discriminatory behaviour, things like - we were talking about the Centrelink case as high profile, particularly within the community of people with HIV and AIDS, and to have such a strong requirement to stop around employment discrimination, and that was a really strong measure. It was confronting some of that public hysteria, some of that employer fears around transmission and that kind of outrageous behaviour that was going on then.

One of the things that we did want to draw to your attention was that there is an ongoing need for legislation like this. It hasn't diminished. Last year the theme for World AIDS Day was stigma and discrimination and that reflected many experiences of people around the world with HIV-AIDS, and in New South Wales there are currently ongoing campaigns around stigma and discrimination. The most recent national research, Futures 3, which is a survey of positive people around Australia found that 11 per cent of people had experienced less favourable treatment in relation to accommodation, 37.7 per cent in relation to health services, 25.6 per cent of people with hepatitis C had less favourable treatment in relation to health services as well, and 22 per cent had experienced less favourable treatment in relation to insurance. So it does continue.

MRS OWENS: Is there any baseline data from earlier? It would be really interesting to compare that with what it might have been 10 years ago.

MR LAKE: That's at some point; of those figures for accommodation 4.5 per cent of the survey sample had experienced discrimination in accommodation in the last two years; 18 per cent in the last two years for health; 16 per cent in the last two years for people with hep C in health, and 15 per cent in the last two years for

insurance. So it is a current issue. We have to recognise it has decreased but it's still significant. That is one of the things we wanted to make reference to around health and insurance particularly as well as the ongoing nature.

MR GODWIN: I think that there is still - although there is increasing acceptance of people living with HIV as part of the community, I think it is fair to say that there are still myths generated because of the association of HIV with deviants in the popular imagination7, with drug use, with homosexuality, and we still haven't gotten over that, and I think that feeds through at a number of levels including service provision in health care and other aspects.

MRS OWENS: Do you think there is potential for this enabling environment that you talk about for health promotion to be jeopardised; for example, if there are measures taken which will provide an incentive for people to hide their HIV or hep C status for whatever reason, say, from employers? Do you think you could actually start to see this reversing?

MR GODWIN: Absolutely. In terms of normalising HIV in the community you do that by ensuring that people feel safe about disclosing their status and so people are familiar with the fact that there are other people with HIV in the community and it's no longer this dreaded disease that you are ashamed of. So any laws we are going to be talking about, proposals around the exemption for drug users later on, I think - any sorts of laws that act as a disincentive to being open about your status could certainly see a winding back in the advances I think we have made at some levels to do with discrimination against people living with HIV.

MRS OWENS: We'll come back to this issue.

MS McKENZIE: We will come back to that.

MRS OWENS: And you have got insurances as another issue which also could be relevant.

MR GODWIN: Yes, very much so. Should we move on to insurance?

MRS OWENS: Please do.

MR LAKE: I think we have previously raised this and we supplied the commission with our submission to the HREOC review of their guidelines, and as suggested by the commission we actually approached the Insurance and Financial Services Association to initiate, I suppose, a relationship with them and have met with them. That was a useful exercise. I suppose it was a preliminary because partly we wanted to use this process and the sort of information that is generated through this process to launch, I suppose, a more significant attempt to get some action and I think it was

referral to the memorandum of understanding with the Mental Health Council of Australia as one model.

MRS OWENS: Yes.

MR LAKE: And we are really pleased to see the recommendations around standards in insurance, because I think one of our comments around the guidelines was that they look fairly good; they have stood up pretty well since 1998 when they were introduced. However, they weren't being used and it wasn't like an industry response to them or adoption of them. So they were just advice that was sitting there really, not being taken.

MRS OWENS: So it was a bit soft.

MR LAKE: Yes, we thought so, and that's the recommendation around the guidelines generally with HREOC, that they are just advice and there is no compulsion to use them.

MR GODWIN: And the very little detail on them as to what the industry actually should be doing. It says you should comply with the law, but does that mean there is very little teasing out in the HREOC guidelines as they stand, but a disability standard or more detailed compacts of memorandums of understanding between different sectors and the industry could provide that level of detail. I think the fundamental problem that we face as a sector is the power of imbalance between the HIV organisations as a group and the insurance industry as a group, and it would be really helpful to have some authoritative body like HREOC or certainly with some form of legislative backing when we are entering into those discussions around what sort of agreement as to a way of working that we can come to. We have forwarded to you, I think, some of the experience in overseas jurisdictions; in the UK.

MRS OWENS: Yes, that was really useful. I hadn't seen that before - and the French experience.

MR GODWIN: Yes, and the French experience.

MRS OWENS: Yes.

MR GODWIN: They are all very recent; in the last couple of years. The British one is still ongoing and clearly they're facing up to the fact that there have been issues around HIV that the insurance industry needs to confront. Times have changed. The impact of treatments needs to be taken into account and they are being reasonably open about it. The problem we face also - to have a sensible discussion with the industry - is that we don't have access to the information, to the data, on which they base their underwriting decisions.

Without that, it's very difficult to have an objective discussion. We can come up with our own data from epidemiologists and the like, but the industry's response tends to be, "Well, we just don't accept that," or, "We're not going to accept data about longevity until the treatments have been available for another 50 years." That's just unrealistic.

MR LAKE: That's simply the case with life insurance - the study we were referring to is a Swiss study that was published last year, which is what's called the HIV Cohort Study. It follows the population of people with HIV in Switzerland over a fairly long period of time. Based on that database, I suppose, they do research into different areas and last year they published some research around longevity, but comparing that with - so what they said was they measured mortality rates on the Swiss Cohort Study from 1997 to 2001 and compared those with the Swiss reference population, so I suppose the general population.

MRS OWENS: Yes.

MR LAKE: They said:

> Patients who were successfully treated with highly active anti-retroviral therapy -

so the combination therapy -

> and who were not also co-infected with hepatitis C, excess death rates were below five per thousand per year and patients with successfully treated cancer have much the same excess death rates, but they are not excluded from life insurance.

MRS OWENS: Yes.

MR LAKE: That was really the basis of the meeting with the insurance industry, to actually say, "Did you know about this? What do you think?"

MRS OWENS: What was the response? Did they know or was it a confidential meeting? Can you tell us about it?

MR LAKE: It's wasn't a confidential meeting. They were aware of it. As John was saying, I suppose, their initial response to it was that 97 to 2001 wasn't a long enough period of time to be making those decisions. We have actually approached research bodies in Australia to look at doing similar sorts of research in a local context and also to get a more authoritative analysis of the research to try and address those concerns, because we can't wait 20 years to make some sort of decision on

longevity.

MRS OWENS: No.

MR LAKE: We should be able to take some of that sort of data as a starting point for at least some better understanding of decisions.

MRS OWENS: You see, if you had a standard, a lot of this - insurers using information, what information they're using, the right to have access to information about how the underwriting decisions were made and so on could all be brought into the standard setting process. I don't know whether you've looked at what the Law Reform Commission has done in terms of genetic testing. There's a very major report that has been put out there. The Law Reform Commission has been concerned about this whole issue of how genetic testing results are going to be used for insurance purposes and in other realms such as employment, and has recommended that there be an Australian genetic - I can't remember what the commission - it was Genetic Commission, with - - -

MS McKENZIE: Human Genetic Commission of Australia.

MRS OWENS: Human Genetic Commission of Australia, yes, would be set up to monitor these things, which I thought was quite an interesting idea. There are different ways you can handle this. We have recommended that standards should be able to be developed across the act, but in other areas where there has been a standard setting process, it has taken forever.

MR LAKE: Yes, absolutely.

MRS OWENS: It's not an easy process. The transport standards has taken how many years, Cate?

MS McKENZIE: All up, probably 10.

MRS OWENS: 10 years.

MR GODWIN: We don't want to be waiting another 10 years for insurance.

MS McKENZIE: No.

MR GODWIN: So there needs to be some interim progress laid and I think across the disability groups.

MRS OWENS: But the potential is there, for example, to have an MOU in the meantime - a memorandum of understanding. You beef up the guidelines and

continue to work on the standards.

MS McKENZIE: But the other thing we've done, at least as far as the insurance exemption is concerned, is to try and tighten it to make it clear that stereotyping - you can't - - -

MR GODWIN: The other relevant factors point.

MS McKENZIE: Yes, that's right. It's not relevant to do stereotyping. It's not relevant to make unfounded assumptions about these matters.

MRS OWENS: I think we said something about using up-to-date information.

MS McKENZIE: Yes, we wanted to use current information. We also said that was an important thing. Really they mirror or resemble very closely the British guidelines. That's pretty much exactly what they're saying.

MR LAKE: Absolutely, yes. The potential for any of these, like either an MOU or standards, is the educative role.

MS McKENZIE: Yes.

MR LAKE: One of the things that happens it that people have stopped selecting, because there's such confusion about. The obligation to disclose is often tied up with these things and once you've done that, you don't actually know what is going to happen with that information; what record it's on and what file it goes into. People are kind of making decisions about health insurance or things like that, whether they go for them or not. Obviously you're aware of the travel insurance - that current discrimination case?

MS McKENZIE: Yes.

MRS OWENS: Yes.

MR LAKE: And similarly there are people who don't disclose so that they can get travel insurance, but people then put their health in jeopardy and also legally they are in a very dodgy position if they try and get these things by failing to disclose. It's on an ongoing, rest-of-people's-lives basis. These sort of things should be able to be dealt with more honestly and more openly.

MS McKENZIE: Is there anything you think we can do, as far as our suggestion for the exemption is concerned, to tighten it further? They were the things that were mentioned, that we've mentioned, the current information, the non-stereotyping, the not making unfounded assumptions. Is there anything else in a general way?

MR LAKE: I suppose one of the things is how it's actioned. One of the things that HREOC does with their sort of one-off exemptions is they are seen as a developmental sort of thing. There is a bit of a negotiation process. They advertise. They say, "So-and-so has applied for an exemption." People make submissions on the basis of that. That might encourage the industry to be a bit more transparent because the question is who is going to monitor the exemption process, because no-one has really to date. It's just sort of out there. The industry claims it and uses it, but there's no record of how it's used.

MR GODWIN: And to justify your use of the exemption for particular categories of insurance by getting a HREOC imprimatur.

MRS OWENS: This is, I think, what the Human Genetic Commission of Australia would have been doing. Maybe there's potential for a commission that had the broader remit than just - - -

MS McKENZIE: Just genetic.

MRS OWENS: - - - genetic testing.

MR LAKE: Just genetics, yes.

MRS OWENS: Because you could stand back and say, "Why just isolate genetic testing? Why not bring in any type of medical testing - - -"

MR LAKE: Absolutely, yes.

MS McKENZIE: Yes.

MRS OWENS: "- - - and ensure that it's being used appropriately."

MR LAKE: Yes. The other thing is that then you're taking - which is, I think picked up in other places in the report and is a strong issue for us - the responsibility off individual complainants to carry that whole process through.

MRS OWENS: Yes.

MR LAKE: Up against someone whose mortgage might be dependent on, or all sorts of things might be dependent on.

MRS OWENS: Yes. While we're on insurance, this material you gave us about the UK and the Association of British Insurers draft statement of best practice on HIV, I got the impression the insurer could require somebody to take a test. They could

request that a test be undertaken. Did I read that correctly?

MS McKENZIE: I think so, yes. I think that's right.

MR LAKE: Yes.

MRS OWENS: Have you got any views on that, whether you think it's appropriate to be able to require somebody to take a test?

MR GODWIN: I think the practice has been to require people to take a test when they're seeking insurance above a certain threshold. I think it is actually difficult to argue against that in terms of the insurers' general position of taking on the risk if you're going for a very high level of insurance, but I think if the insurance is linked to, for example, mortgage rights or income security or those sorts of things - the reason you're getting the insurance is to, you know, participate in the rest of your life - that the arguments for testing are a lot weaker.

MRS OWENS: I think that's where the French have got an interesting idea of setting limits and saying, "Well, below certain limits you don't worry too much."

MS McKENZIE: Then above that there's some sort of automatic life insurance component.

MR LAKE: Almost like a community rating sort of - - -

MS McKENZIE: It's almost like community rating - - -

MRS OWENS: Yes, and then the community rating - - -

MR LAKE: A rating for the general levels of insurance.

MRS OWENS: Yes. A reassurance pool as you can do in health insurance.

MR GODWIN: If you're after a product that's going to give you millions and millions, you can understand the industry's point of view.

MRS OWENS: So there's a lot of potential here to be thinking about - it's not just for HIV-AIDS. It's for any sort of new condition that might turn up. The next thing will be on the horizon and it's a matter of developing a system that's going to work for people in all sorts of potentially new situations.

MR LAKE: Also by making them think about the processes that they use for - I'm particularly thinking about mental illness and things like that, where the discrimination - the new kind that people are exposed to comes as a result of

disclosure. I mean, there are a lot of situations where disclosure and privacy aren't the issue, but there are particular ones where values and attitudes are strong. I think in terms of the educative role of these sorts of things, that's a very good thing.

MS McKENZIE: Have we finished?

MR GODWIN: The only other point I would make in relation to insurance is the starting principle for the UK guidelines is simply to treat each case on its individual merits.

MS McKENZIE: Yes.

MR GODWIN: Which is a pretty fundamental point.

MS McKENZIE: Yes.

MR GODWIN: That goes back to the point around mix and stereotypes that could also be put into the exemption criteria somehow perhaps.

MR LAKE: I just wanted to make one point. One of the things that was raised when we met with the insurance industry was that - I suppose it wasn't described as a luxury product but people choose to have or not have insurance and, therefore, it's different to some other types of product. I suppose the experiences that have come up in New South Wales, particularly around mortgage insurance, was that you can't get a mortgage without mortgage insurance. I think there's a question about how much choice you actually do have and whether or not you take out insurance.

MS McKENZIE: Yes, but that then will dictate whether you can buy a house.

MRS OWENS: But it sort of misses the point, too, because, it's inferring that some people are going to have more choice than other people and is that appropriate, because if your members wanted to take out insurance and then were denied that - - -

MS McKENZIE: They don't have a choice.

MRS OWENS: - - - they don't have any choice.

MR LAKE: Yes.

MRS OWENS: Luxury or not. So it's not really a luxury.

MR LAKE: No. When I say luxury, I suppose the idea that people can choose or not choose to have it and I think that's questionable these days in a range of areas. I mean, if you choose not to do health insurance, you actually pay higher tax. Those

sorts of things as well.

MS McKENZIE: What you say with mortgage insurance is also true. There is a real imperative behind much of that.

MR LAKE: Absolutely.

MR GODWIN: Shall we move on to migration?

MRS OWENS: Migration.

MR LAKE: Okay, yes.

MR GODWIN: This is a tricky one.

MS McKENZIE: We are moving from one difficult point to another.

MR GODWIN: Yes. The position with migration at the moment is that people with HIV are required - well, people are required to have an HIV test if they're applying to get anything longer than, I think, a year's entry permit to Australia and certainly if they're applying for permanent residence.

MRS OWENS: Is this anybody is required to have an HIV test?

MR GODWIN: Everybody, yes. If you come up positive, then it is extremely difficult to get permanent residence.

MRS OWENS: It's not impossible?

MR GODWIN: It's not impossible. There are cases in terms of compassionate circumstances in terms of where people can argue the economic case, in terms of them being able to cover their health costs and matters such as that, where visas have been granted, but they are the exception rather than the rule. The impression that I have is that it has become tighter and tighter over the last decade in terms of being able to actually win your right to permanent residence.

So that's the starting point and where we would be coming from is arguing that there is a need to take into account in making decisions about visa categories, the criteria and the Disability Discrimination Act, the benefits of having within the Australian community people with disabilities as being a positive rather than just a negative. I note that the draft report is suggesting changing the blanket exemption for migration but not to do so in a way that would subject decision-making for visa categories as being subject to the DDA.

MRS OWENS: The underlying policy. We are still thinking this one through. This is a very, very tricky issue.

MS McKENZIE: In a way we haven't gone the next step. We began with the thought, in routine administration we could see no reason why the DDA shouldn't apply, where it wasn't a question of policy or fundamental decision, but just routine administration. For example, not giving someone accessible information - matters like that - and really we haven't yet thoroughly considered the next step which is should the exemption be tightened further in relation to what we have called the policy or decision-making categories. You would say we should tighten the exemption further.

MR GODWIN: Yes.

MRS OWENS: And look at the government's criteria.

MR GODWIN: And look at the government's criteria, and we were looking, for example, at the way Canada approaches the issue, where they are dealing with it more on a case by case basis for HIV rather than saying, "You have HIV therefore the presumption is you're out." In Canada they look at whether you are on treatment or not.

MRS OWENS: Yes.

MR GODWIN: If you are not on treatment then it's not going to be such a cost burden if you don't clinically require treatment. They thought the presumption is you do come into the country. Also if you are a family member the presumption is that that is of some community benefit and you are also presumed to be allowed to enter the country. So it's only for people that are on expensive treatment and they don't have the close family connection where they start presuming that you shouldn't come into the country. So that's a more flexible approach.

MRS OWENS: Have you got the details of that policy?

MR GODWIN: We can forward that.

MS McKENZIE: Could you send it into us? That would be really helpful.

MR LAKE: Can I just raise something - the other thing that we were discussing was if the Australian government, on behalf of the Australian people, has ratified international agreements and through that, have set up the DDA with its objectives about an inclusive environment - where are the boundaries of that and why does having a disability per se make a potential immigrant a less attractive option? That's why, I suppose, when were thinking about the exemption policy - every

Commonwealth government department is obligated to act in accordance with the Commonwealth disabilities strategy and why shouldn't those sort of policy decisions be subject to some of that thinking as well. One of the concerns around the Canadian model is that if someone comes in not on treatment and stays not on treatment, in the long term that is not good for their health. At some point they will need to go on treatment. So you wouldn't want people to be signing a thing saying, "We will never go on treatment."

MS McKENZIE: No, of course not; quite the reverse in fact.

MR LAKE: And HIV is a really good example, but there are lots of other good examples where living in a developed country gives people a much better whole life prognosis about going back to work, about re-engaging, than might otherwise be the case, and given the other objectives of the DDA about an inclusive workplace, an inclusive built environment and things like that, why does the idea prevail that a person with cerebral palsy is necessarily just going to be this ongoing burden on the community?

MS McKENZIE: There is a bit of a vicious circle, I would have thought. I have no idea if this is a real policy possibility, but if, for example, someone is coming in as a refugee and you were coming in from a country which is at civil war and you have HIV, to ask that person whether they have been on a treatment program is basically ridiculous. You wouldn't be able to get one in that country. You would have, in any case, been subject to some dreadful persecution that made you eligible as a refugee, so it would make no sense to refuse that person entry because that person wasn't under a treatment program.

Even worse, it would make even less sense to then require that person somehow to not have treatment here or to actually pay for every single cent of the treatment here, which presumably must be expensive if you have to bear all of it privately, themselves. It would seem to be persecuting them even further actually.

MR LAKE: Yes, and so clearly we really support further consideration of that and at the very least separating out the general work of that department and of the Migration Act from policy decisions about who comes in and who does not. But it suggests that that policy decision about who comes in and who comes out needs to be borne in mind in terms of - if the Australian community supports the DDA and we hope they do and the government is acting on their behalf, why doesn't that then translate to other sorts of overseas obligations that we have for development of those sorts of things as well.

MS McKENZIE: That's very helpful and we will look at this area again, as far as exemptions are concerned.

MR GODWIN: The positive contribution that people with disability can make both to the workforce and to the Australian community generally should be required to be taken into account, not just the supposed economic burden in terms of cost to the health care system; it should be a broader economic understanding of the positive contribution involving people with disabilities in the Australian community.

MRS OWENS: Otherwise it looks like there is a somewhat inconsistent approach.

MR GODWIN: Across government, yes.

MR LAKE: There is probably some parallel to the policies under multicultural Australia in terms of diversity and a diverse community. If we can move onto employment; that section.

MS McKENZIE: Yes.

MR LAKE: Again employment for people with HIV-AIDS and particularly these days, with the current success of treatments, that's a key objective for a lot of people. So going back to work, there are a number of programs to support people in that, and what comes up when people start to do that are employer attitudes and particularly discriminatory attitudes around HIV, and maybe having to explain a five-year break in work and those sorts of things - it's pretty hard to cover up really. So people often have to make choices about where are the sort of jobs they can go for, where they might be, and disclosure and the consequences of disclosure continue to be a problem in that.

The other thing, as an episodic condition, one of the things that is important in workplace accommodation are flexible work practices. So for people with HIV-AIDS maybe "accessible workplaces" has a different sort of meaning than so much about physically or technologically accessible workplaces. It's often about work practice; the flexibility around being able to take leave when you have an episode that means you are going to be sick for a few weeks, and be able to move around that.

I think we talked about this last time, but I think there are parallels around the family friendly policies and carer friendly policies that could be used in this sort of way, but really what we are actually saying is that it is worth having another look at in employment standards, and those would be the sort of issues that we would like to see teased out more within that standard, recognising, I think, the success in standards so far really has been in more technical ones as opposed to human relationships and human resources. So that is a tricky thing, but there are rewards. Industrially there is a lot of work out there that maybe could be called on to inform that process.

MS McKENZIE: One of the concerns that has been expressed by HREOC in submissions to us is that it's very difficult to develop a generic across-the-board employment standard. There are so many individual differences from industry to industry and from employment to employment and so on, but what they have said is that it may be possible to develop very specific standards for certain things, and really it may be possible for this issue, but it is difficult. I don't think we can shy away from that fact.

MR LAKE: Absolutely. I suppose the other thing is, in terms of employment - again draw the attention to the decline in, particularly, the recruitment of people with disabilities by government, both state and federal governments, and particularly people with disabilities who require some form of adjustment. I did some work a few years ago on this and in talking to the New South Wales equal employment opportunity program within government, I suppose their opinion was that what was happening in government statistically was that older public servants who were acquiring age-related disabilities such as diabetes, some of those things - that was really the change that was being noticed rather than the result of any proactive attempts by government to recruit.

The impetus should be back on government to actually be making employment opportunities available to apprentices and to those sorts of programs, given the scale of employer that they are. The other thing we wanted to note was that the ACTU in its 2003 congress amended its policy and made a strong recommitment to the rights of workers with disabilities and people with disabilities to work, and it's a welcome initiative too.

MR GODWIN: Just to add to Rob's points that we support the recommendation around imposing a positive duty on employers, and again that is potentially - a duty to be non-discriminatory - an area where the point around flexible work practices could be taken up by employers showing that they are willing to take flexible approaches to things such as sick leave, et cetera. That could be part of demonstrating that they are carrying out a positive duty.

MS McKENZIE: That could be one adjustment.

MRS OWENS: It might not surprise you to know that there has been somewhat of a backlash from the employer groups on this particular idea, and we are still thinking through what we are actually going to say on this. I mean, there is a spectrum of duties that you could think of. At one end of the spectrum is the idea that we floated in our draft report which is that employers would have a duty to be developing practices and thinking through what they would do in the event that they were to employ somebody with a disability, so it would be thinking ex ante about it - through to requiring employers to make an adjustment once somebody turned up or in terms of their processes, interviewing processes and once somebody turned up on the

doorstep, which is more of the approach that is used internationally, through to what we have probably got in our act at the moment which is there is a duty once there is a complaint.

MS McKENZIE: It's not really. The fact is that there is a continuing prohibition on employers against discrimination irrespective of whether there is a complaint. That's the law, but in practice that only comes to the forefront when there is a complaint.

MR GODWIN: One of the things in terms of the sort of things that might facilitate that, is raising awareness about some different strategies that are already in use - I mean, things like pooling of sick leave - pooling of leave by workers that is used in some organisations so that there's, like, if people don't use their sick leave, it goes into a pool that other people who might need it more, can access. And kind of raising people's awareness about those sort of strategies, because one of the things, I think, around employers' attitudes to employing someone with a disability is the lack of access to good advice - good advice about accommodation adjustment, the sort of different things to do - so it's portrayed as a huge task that often employers feel they have to try and make their way through on their own; whereas if there was a better resourcing program, a bit like Employers Making a Difference, those sorts of things. If there was a stronger profile to those sorts of things, so if someone said, "Okay, I've just either recruited or I'm about to recruit someone. They've told me I need to think about these sorts of accommodations." There are some good places to go, ideally free, and where people can get some credible advice.

MRS OWENS: One of the things we've been thinking about is putting some examples into the act about what sort of adjustments would be required, not just, say, in employment, but we've been thinking about this as an idea across the other areas as well, about making adjustments in education and clubs and so on, and just providing some guidance as to what that might be.

MR LAKE: That would be interesting.

MRS OWENS: The question is how realistic is it to expect employers to be proactive in an ex ante sense. Have you got a view about that, or would you think it would be reasonable to expect employers to make adjustments when the need arose?

MR LAKE: It is a chicken and egg thing, because I mean in terms of the ability to respond, if an employer has given no thought to it whatsoever, they're going to be so freaked the first time someone calls and says, "I need to go to an interview."

MR GODWIN: There are different categories of adjustment, I guess. You know, wheelchair accessibility should be a universal requirement. Other adjustments may be more unique and therefore maybe more of a case-by-case requirement.

MS McKENZIE: But you see what our Duty permitted them to do was they had to be thinking about this from the beginning, thinking about what adjustments might be necessary, then there would be - if they wished, if they wanted to put that into their business plan - they could do some of the adjustments then or at some future time, or even when the person came in the door. But at least they could then factor it into some business plan rather than being faced with the person who walks in the door, and thinking, "Goodness. We just can't cope with this person. We haven't got anything we can do. So what happens next? We'll refuse them."

MR LAKE: It could work as an industry thing. I mean, I'm just thinking about, like, the recruitment industry. I mean, that's often one barrier of getting through, and if the recruitment industry was required maybe to have a code or something about how it advertised, how it conducted interviews and things like that, that in probably one fell swoop would deal with an awful lot of recruitment. Maybe a lot of small businesses don't use recruitment agencies, but probably you would end up, there would probably be an exemption on small businesses and stuff like this anyway, so I know we've had issues that have been raised about, say, how sometimes there's even just standard forms that are used and the resistance to putting them into different formats, the resistance to standard entrance tests and things. So maybe it could be pulled apart a little bit, and given how much recruitment is contracted out by government now as well, some of those things might be - and the other standards will start to bite on - you know, the access premises will start to bite on some of this stuff anyway, reasonably in the not too distant future, hopefully.

MRS OWENS: The next one was health care.

MR LAKE: Health care. Yes.

MRS OWENS: My favourite topic.

MR LAKE: Good.

MS McKENZIE: Apart from the Disability Discrimination Act.

MR LAKE: We didn't raise this in the initial submission, but I suppose it has actually become clearer over the last few months, really, because of some particular cases about the prevalence of discrimination in health care in New South Wales; the poor responses people get from the main complaints body, which is the Healthcare Complaints Commission, and this is why we discussed the notion of a standard in health care and non-discriminatory health care and maybe the need for that. I mentioned before the level of discrimination that people experienced and reported in the Futures 3 paper. I just wanted to quote two cases that are currently being investigated, or being advocated by People with HIV in New South Wales. Very

recently a surgeon at Sydney Hospital refused to perform surgery on a person with HIV-AIDS literally at the last minute. Basically they kind of walked in and then advised that person that the operation was not going to go ahead. They alleged insufficient protective equipment. So the next day, it was actually confirmed that there was plenty, it was fine. There wasn't a problem with the protective equipment, so it was the surgeon's call at that time, and he had made the wrong call, and the person had to go to another hospital and have surgery performed.

MRS OWENS: Was it emergency surgery or was it elective?

MR LAKE: It was cardiac surgery. I don't think it was emergency cardiac surgery.

MRS OWENS: There's still an inconvenience in having to move hospitals at that point.

MR LAKE: Yes, and the preparation, being actually ready to go into surgery. You know, it's pretty stressful to kind of then be told, "No way." The second one was that the neighbours of a patient at Prince of Wales Hospital - they were visiting this person, and they overhead a doctor doing ward rounds talking about his HIV status, asking him how long he had been affected. When the patient returned home, the neighbours actually ostracised him and he is currently having to sell his apartment because of the attitudes from the neighbours. So this issue of disclosure and breach of confidentiality is rife in the health system; that and refusal of service, and I think that's why we see that there may be a need for those standards. One of the things that exacerbates this is that maybe in previous years, there were more specialised areas, so people would go to an AIDS ward. They might go to an AIDS clinic and things, and a lot of those have been dismantled now because of the changes and type of treatment people are needing, so people are going to mainstream wards and there's no guarantee of the sort of training that nursing staff, the doctors and the ancillary staff are having. So again, the educative role of the standard could be important here. There would be similar issues for people with hep C.

MS McKENZIE: The other interesting thing about the case that you've just mentioned is that we raised in our report a question about whether there should be some vilification legislation in relation to people with disabilities, and that in effect seems to be what the neighbours were doing.

MR LAKE: Yes. I'm also aware of a case that's happening at the moment in Campbelltown, of public housing tenants who are having to be rehoused because of vilification from their neighbours, and there has actually been a fairly long history of vilification.

MS McKENZIE: Yes. I think that's very helpful for us in relation to that request for information.

MRS OWENS: I have real concerns about the doctor's behaviour in this instance because I believe strongly that the doctor-patient interaction should always be on a confidential basis, and should not be undertaken in front of other people unless the patient agrees to that, and for that interaction to occur in that way I think is just totally inappropriate.

MR LAKE: Absolutely.

MRS OWENS: And there should have been a complaint to the hospital about that.

MR LAKE: There's also a complaints process going under way with this.

MRS OWENS: You also mentioned that you had concerns about the Healthcare Complaints Commission in New South Wales, but I gather that there have been other problems there in another context.

MR LAKE: That's an ongoing issue. Yes. It's not just around this issue. It's about the capacity of that commission to actually deal with complaints.

MRS OWENS: We're not doing a review into that commission.

MR LAKE: No, let's not do that.

MRS OWENS: Somebody else can worry about that one.

MR LAKE: I think they are. I also just wanted to say that the other thing that we felt around the healthcare standards was that by incorporating requirements around privacy and confidentiality within that, it would add weight to the privacy legislation and the awareness and the use of that as well. It's sort of like having a cross-reference really.

MS McKENZIE: That's a helpful submission. We are going to make it clear, as we said before, that the standards can range over all the areas covered by the act.

MR LAKE: I suppose that you would say healthcare, we assume would be, if there was something that would be cut out, it would be part of the goods and services - you're never going to have a goods and services standard really, so they may be able to sort of identify areas within that sort of area.

MS McKENZIE: Yes.

MR GODWIN: It's also an area where inappropriate compliance for testing comes up as well - use of rapid HIV tests in situations where consent isn't entirely clear, or

where a batch of tests are taken, for example, for antenatal purposes, and there's no specific consent around HIV, and where those sorts of measures are taken from the healthcare worker's point of view because they're concerned about some sort of an infection risk rather than the benefit to the patient. So clarifying those sorts of issues from a disability discrimination perspective through a standard would be very useful.

MRS OWENS: Yes. I'm probably talking out of court here but I believe that there is quite a lot of inappropriate HIV testing going on within hospitals just on a routine basis, which is probably unnecessary and overkill, and adding to health costs.

MR GODWIN: Not from the perspective of the patient's interests, but inappropriately from other perspectives, without having the balance of interests taken into account.

MR LAKE: And those people aren't getting pre and post-test counselling and every so often, one of those tests will be positive, so there are a number of cases of women who have discovered their HIV status at that point, and the emotional consequences of that and there's some research about the impact of how long it takes to actually come to terms with the diagnosis being made much longer because of the nature of the event when status was found out. So can we move on to drug addiction?

MRS OWENS: Drug addiction. Yes.

MR GODWIN: Just a starting point for this is that drug users, medically speaking, are people with a disability, that they have drug dependence and that according to any sort of standard - the psychiatric standards, for example, the American standards, adopted in Australia in relation to defining disability in the context of psychiatric conditions, drug dependence is a disability. Yet there has been very little history of use of the DDA by drug users in Australia, and that's partially because of confusion about the coverage of the DDA. Then along came the Marsden case a couple of years ago, where the Federal Court indicated support for the proposition that drug use was covered by the DDA, so it has been very disappointing that we now see the government proposing a bill that would exempt people who use illegal drugs from the DDA.

MS McKENZIE: The first thing to say about that exemption is that - the proposed exemption, it's not an act yet - it's not done by trying to reduce or limit the definition of disability. So in that sense, although you might want to talk about the exemption on other grounds, at least what it doesn't do is to - drug addition according to Marsden would still be a disability. It's just that the act then expressly would not apply. You see what I mean? It's a somewhat different approach that has been adopted. Instead of actually trying to limit the definition of disability, it is left as broad as ever, but the bill works by exemption, not by trying to limit the definition of disability.

MR GODWIN: Well, I think we'd be arguing that they shouldn't be playing around with the definition of disability at this point. They should be looking at what the concerns are and ostensibly the concerns are employers' concerns about safety risks, and if that is the issue, then we need to deal with that issue in the way we deal with it in other contexts, and that is by looking at the defences that are available under the act, around inherent requirements, around reasonableness in the case of indirect discrimination. There's a long history of case law in terms of disability discrimination, looking at occupational health and safety risks, and how they're taken into account. There is no reason why having an employee who has a drug addiction and may pose a safety risk should be dealt with in any different way to having an employee who is wheelchair bound and who is considered to present a safety risk - you look at what is reasonable in the circumstances and is there an unjustifiable hardship.

MS McKENZIE: Also if it's a safety question there are some exceptions, from memory, in the act which relate to infectious diseases and public health - if there is a query about whether they are too narrow and there should be a broader exemption as far as safety and public health are concerned, then what you would be saying is that should be addressed in that way, not by looking at one specific class of people.

MR GODWIN: And by targeting this specific class of people it's going to have a negative public health impact and that you are further stigmatising and marginalising that group and that's likely to drive them away from treatment services and from HIV and hep C testing and support services. So the proposed legislation will have negative public health consequences, so it's not just in terms of the workplace scenario but the broader impact on the community is likely to be negative. You are not going to get people into drug treatment programs by punishing those who aren't. It doesn't work that way. The government should be focussing on expanding drug treatment services and providing funding support to drug-user agencies to provide peer support, for example, to encourage people into treatment programs rather than playing around with the Disability Discrimination Act.

MS McKENZIE: I suppose the other thing to remember is the exemption is, to my recollection, broad. It doesn't just relate to employment. It relates to every area under the act.

MR GODWIN: That's right.

MS McKENZIE: So it would permit the exclusion of a person with a drug addiction who wasn't undergoing treatment or a treatment program, exclusion from accommodation and from other services, health care, for example, even, which is a bit strange.

MR GODWIN: It just makes them all the more marginalised and the disadvantages that have given rise to their drug use are likely to be aggravated rather than ameliorated. It's just not helpful as an approach.

MR LAKE: Can I just make a point that the other thing that has been really valuable and been used in a number of cases is discrimination against associates in terms of the impact of that on families, partners.

MS McKENZIE: That still applies, from memory. Wait. Certainly it applies - no, you're right. It will only apply if you have had an addiction in the past or presumed to have had one or it's thought you might have one in the future, but it won't apply to people who currently have an addiction or their associates, at that point. I think that's right.

MR LAKE: Okay.

MS McKENZIE: I have to say I'm not quite so sure about that, but I think that is right.

MRS OWENS: I should just make it clear that we are reviewing the act as it stands rather than this bill, but I think what we will be emphasising in our final report and what we focussed on in our draft report is we believe that the legal questions should centre around whether there has been discrimination rather than the nature of the disability. We want to see the exemptions limited appropriately and it's very important with this sort of legislation to ensure that you minimise the areas where there is potential for the legal complications. In the bill there is great potential for legal questions being raised about what is treatment, the nature of the addiction and there are major privacy questions as well, but our final report will be focusing on just getting our principles set out, and I don't know how it's going to fit with the timing of this bill. That may have already been passed.

MR GODWIN: And we are also worried in terms of HIV and hepatitis C discrimination that if an employer finds out or suspects you have HIV or hepatitis C - it doesn't necessarily say that - can they sack you or put you on special duties. All they have to do is say, "I'm doing that because you're a drug user," and they gain the benefit of the proposed - - -

MS McKENZIE: Not if they're wrong.

MR GODWIN: But then the onus shifts back to the complainant to prove that the reality of the discrimination was HIV or hepatitis C.

MS McKENZIE: Yes.

MR GODWIN: And that would be a very difficult thing to do if the employer has said, "It's because you're a drug user and we've got licence to discriminate against drug users, so we're not worried about the DDA."

MS McKENZIE: I'm not quite sure legally that - you see, they would be trying to rely on the exemption. This is assuming it comes into law. So they would have to prove that in fact you were a drug user.

MR GODWIN: No, I think the onus would be on the complaint to prove the discrimination was on the grounds of HIV.

MS McKENZIE: Yes.

MR GODWIN: How are they going to do that? It would be better if the onus was on the respondent, but hopefully we won't even get into that sort of scenario.

MS McKENZIE: What you raise is a general problem about the proof of complaints and we have made some recommendations, particularly in the area of indirect discrimination about that, but you are right, it is always a difficulty where an employer says, "I'm sacking you," but doesn't always explain why - to prove why it is that the employer sacked you and that that is discriminatory. It's a very difficult scenario.

MR GODWIN: It's the sort of scenario that came up in the Carr v Botany Bay Council case which is an HIV and drug dependency case under the New South Wales of the proposed legislation where the first thing that the respondent did was to seek for the complaint to be thrown out as lacking in substance because the person was a drug user and therefore not entitled to bring the complaint. So the concern is a real one.

MS McKENZIE: Yes.

MRS OWENS: We probably should move on because our next participant is here and we have got two more issues to cover. The next one was accessibility.

MR LAKE: I think we just wanted to support the attention the commission has made to the ability of people to access the system, access complaints, particularly the idea of there being at least a shopfront in each state and territory; the suggestion about greater cooperation between HREOC and the state bodies and I think for us, we acknowledge the important role that community legal centres, both the disability and discrimination legal centres in New South Wales and Victoria, the HIV-AIDS legal centre, but also mainstream legal centres play, and clearly the funding and how it's not something that you can fix but they are often the first point of contact for people in starting that process, and they have got waiting lists - all of the things that

bank up to put people off, following through on a complaint, the more they can be addressed the better.

MR GODWIN: And it's increasingly difficult to get legal aid for cases under the DDA.

MS McKENZIE: Yes.

MR GODWIN: It used to be the case that the Commonwealth provided legal aid assistance through the legal aid funding arrangements but it's a lot tighter now and so the burden does fall on community legal centres, but they are dealing with a very broad range of issues with very limited funding. So we support the interim findings on that.

MRS OWENS: I think we are basically saying that the success of the act is going to be partly determined on how much resources go into it, both in terms of the legal aid, legal centres, but also HREOC.

MR GODWIN: And also I might say from a self-interested perspective, advocacy organisations play a very important role in providing support, very basic legal referral as well as education around the DDA to our stakeholders, to communities living with HIV and people affected, carers, et cetera.

MRS OWENS: That brings us to representatives and complaints because you need resources if you're going to do that.

MR LAKE: Absolutely, and we strongly support this recommendation of representative claims being able to be brought by organisations. You asked some questions about who those sorts of organisations should be.

MRS OWENS: Yes.

MR LAKE: I suppose we would suggest that really there be some sort of process to prove a connection. One of the things that is a bit different in the HIV sector is the distinction between organisations of people with HIV and service provider organisations is not as distinct. A lot of those organisations were started by people with AIDS in the eighties and have been very strong advocacy organisations. So there is not a sharp line between the two. I think obviously an organisation which was a representative body should - if it can prove that, can pretty clearly have standing, and maybe it might be like the exemptions that HREOC might say, "This organisation has applied to bring a complaint or to move for an inquiry. If anybody believes that this organisation isn't in a position to take such a complaint can make a comment on that." So that it could be challenged, so there couldn't be any outrageous abuse of that process, but that generally - - -

MRS OWENS: So HREOC could put then a notice in the newspaper and say, "This organisation wants to bring a complaint. If anybody has got any objections let us know within 21 days," or something.

MS McKENZIE: And then they just decide whether or not that the organisation has sufficient interest to bring a complaint.

MR LAKE: Yes. I suppose then the question of resources and the ability to assess comes from there really. Thank you. I think that's enough from me.

MR GODWIN: That concludes our submissions. I thought I would just give you a copy of the Carr case that I referred to about injecting.

MRS OWENS: Thank you very much. So we have tabled that. That's Carr v Botany Bay Council has been tabled. Thank you very much.

MS McKENZIE: Thank you very much. Excellent written submissions and a very helpful discussion.

MR GODWIN: We will forward you the Canadian guidelines on immigration.

MRS OWENS: Thank you. We will appreciate that. We will just break for a couple of minutes.

MRS OWENS: The next matter is Dare To Do Australia. Welcome. Could you please give your name and the capacity in which you're appearing, for the transcript.

MS STEPHENS: I am Judie Stephens. My capacity with Dare To Do Australia - it's just myself, Dare To Do Australia, and I look at laws for people with disabilities. If I don't think they're fair, I attempt to change them.

MRS OWENS: Thank you. I might hand over to you, Judie, to run through the points you've got there relating to Dare To Do Australia. You can give us some background on that and any background you would like to give us on the submission.

MS STEPHENS: Thank you, Commissioner Helen. Earlier when you spoke, you said that when there is discrimination you look to minimise legal contention, so what we do today, we've got to make sure that we don't create a level of - perhaps where people can prove that the act is wrong, that it's very clear. I thought that was a very good comment that you said, Helen.

Dare To Do Australia I created six years ago, when I needed to look at the state government and having care included when a person has an accident and not having to wait for settlement; to get that. The second thing I was very heavily involved in is structured settlements, people that receive lump sums, so that it doesn't waste before them and that they can have a lifetime annuity. We have the legislation in place at the federal level, but yet not the product. I am here today to discuss the importance of choice for people who have disabilities; between bankers, trustees, public and private, etcetera.

My little boy, Jackson, he's my maternal grandson, he's 10. I am 59. I realise the great importance to ensure that people who look after those who have profound disabilities and cannot make choices are respected for all the reasons everybody should be respected, and they can have the common right to choose the professional people around them and organisations. Why I'm here today to address the commission, Helen and Cate, is I'm looking myself personally through Dare To Do Australia to ensure that we change the law so all people may choose their trustees. My submission is from Sydney, so I speak about the Office of the Protective Commission, but in each state and territory there is such an organisation in Australia.

I look beyond what has happened to Jackson and I and the difficulties and imagine there are a lot of people out there who don't have a voice and perhaps I can give them, through you, Helen and Cate, and your commission, choice; the most simple and fundamental right.

MRS OWENS: Good. Thank you for that. I think both Cate and I are very interested in your own story. It actually touched me greatly, I have to say, but I think as we explained to you before we started today, our interest in reviewing this act is in

trying to improve processes and government policies to introduce more flexible arrangements and I think greater accountability. We have got a recommendation in our report, which is recommendation 6.1, in which we say:

> The attorney-general should commission an inquiry into access to justice for people with disabilities, with a particular focus on practical strategies for protecting their rights in the -

well, we have talked about the criminal justice system there, but I'm wondering whether such a recommendation perhaps generalised - - -

MS McKENZIE: Should be criminal and civil justice system, yes.

MRS OWENS: - - - would help in your situation.

MS STEPHENS: Absolutely, and in civil justice. The choices that people have - that you and I have - should be just the same. The people that care, the parents, the partners and the carer - in my case I'm the grandmother, the carer - should be acknowledged, particularly if their decisions don't compromise the person they're caring for.

MS McKENZIE: The sorts of things that you would want such an inquiry to look at would be - just looking at sort of generalising from your experience, if you like, the sorts of things that you want the inquiry to look at, you said, first, would be help for people with disabilities while their cases are still pending; before they get to the settlement stage. That's the first thing, isn't it?

MS STEPHENS: Well, that has already been done. I have had care put in the New South Wales Motor Accident Act. In Jackson's case, his care is approximately up to 5000 a week and I only got what the third party insurer would pay. I, myself, borrowed 350,000 on my mortgage to pay that. If Jackson hadn't had that care, he would have died.

MS McKENZIE: But, you see, there will be many people who wouldn't have the ability to be able to do that. They wouldn't have the house that they could borrow off.

MS STEPHENS: Indeed. That's why we changed the law. That was the first thing Dare To Do Australia did and that has happened in this state. It think it's extremely important that every state and territory addresses that. This is for people who are catastrophically injured, Cate.

MS McKENZIE: Yes. You're right. It should really be something that should be looked at nationally, not just state to state.

MS STEPHENS: Standard.

MS McKENZIE: Yes. The second thing was this question of structured settlements.

MS STEPHENS: Yes. In the UK, Canada and US, a person can receive a structured settlement which, in effect, pays for their care and their rehab for as long as they live. It can be indexed to the CPI or not. In this country it's for the term of your life. I worked with the structured settlement group and treasury in the Prime Minister's Department for about four years on this, until the legislation came through. It simply means that a portion of a person's common law settlement would go into a pension for life, so it's safe from predators, greedy people and also you can't cash it in again, this lifelong pension, without going back to court.

MS McKENZIE: Yes.

MS STEPHENS: So, therefore, it's secured for the person's life; but as yet we don't have the product in Australia and it's a lifetime annuity. That's the product that the insurers would be looking at.

MS McKENZIE: Was that the Insurance Act that was amended to permit that?

MS STEPHENS: It was the Taxation Act.

MS McKENZIE: It was the Taxation Act, because of its treatment for taxation purposes.

MS STEPHENS: Yes. There isn't tax payable on this.

MS McKENZIE: Yes.

MS STEPHENS: When a person receives a settlement, they take out of it income tax, so the amount of money they get, the slab of money, in effect, the proportion of it they needed for care - and Jackson didn't get this, because it wasn't a product. He got the lump sum. For him this is fast diminishing. This year his out costs and legal costs are 700,000. This is a big worry to me.

MS McKENZIE: Taxation is taken out from that lump sum, I assume.

MS STEPHENS: That's before you get it.

MS McKENZIE: Okay.

MS STEPHENS: But once you invest it, if you don't put it in a structured settlement - everybody pays income tax on the interest earned, unless it has a taxation benefit within the product purchased. For example, shares; direct shares.

MS McKENZIE: So the Taxation Act - - -

MS STEPHENS: Has been amended.

MS McKENZIE: - - - has been amended to give this beneficial tax treatment.

MS STEPHENS: That is correct, for structured settlement, and each state and territory is looking at it, so the next step is the product and then it's available by choice. In the UK I've spoken with judges and often a judge will say, "Go away, plaintiff, and look at the structured settlement and come back and give me a reason which you don't want it," and then if he wishes, or she wishes, they can override it and say have a structured settlement. That's in the UK.

MS McKENZIE: These would be helpful things for an inquiry, like the one that we suggested might occur, to look at.

MS STEPHENS: I am very happy to help you both with this in any way I can do so.

MS McKENZIE: The next thing really that you raise is how to make sure that - where there is ultimately a settlement where a sum is given for investment - the people who are in charge of investing that sum, first, are accountable, so that they give enough information about what they're doing and why and give proper access to information to people like the carers for the particular person who is benefiting from that money.

MS STEPHENS: That's right.

MS McKENZIE: Second, that there's some relatively easy mechanism and relatively cheap mechanism that you can go to where that arrangement has fallen down and it's not satisfactory to change it. I have read the decision and your submissions, but irrespective of whether you have succeeded in the court, it would have been really costly to have to go to the court to get that mechanism changed, I would have thought.

MS STEPHENS: Yes, it has cost tens of thousands. Because of what happened in Jackson's case, without going into it, it would be inappropriate to do an appeal. Most people can't afford to go to the Supreme Court in this state and the tribunal cannot overturn this decision. They can only make them more honest in what they do. They can't say, "We'll appoint another trustee or a trustee of choice." Therefore, we need

to change the law so that - like you can change your banker, your hairdresser, your private trustee, provided they work within the law.

In New South Wales the Office of the Protective Commissioner, which is state, they oversee all private trustees, so they do the general annual audit for all people who are unable to handle their own affairs. They are out there, anyway, with all private trustees.

MS McKENZIE: I come from Melbourne and from the Victorian guardianship jurisdiction and there are guardianship jurisdictions in the other states. Certainly in Victoria - the tribunal on which I sit in Victoria - has got jurisdiction over guardianship and administration matters. The administrator of the assets of a person with a disability has to report to the tribunal if there has been an order requiring that. If, ultimately, there are deficiencies or problems with that administration, then the tribunal can, if it considers it in the best interests of a person with the disability to do that, ultimately change the administrator to another.

It seems, reading your submission and the case, that in this case it wasn't the New South Wales tribunal or Guardianship Board that appointed the protective commissioner as looker-afterer, if I can put it that way, of Jackson's assets; it was the court, the Supreme Court.

MS STEPHENS: Indeed. Quite simply, in our case, Jackson and his two brothers received their parents' estate when they were orphaned and the trustee was paternal grandpa. Paternal grandpa went to the Office of Protective Commission and said, "Well, Jackson's got a third. I don't want to do this and I thought that the OPC were going to manage that money." They didn't manage it and Jackson hasn't been the beneficiary of it, I think to the tune of about 35,000 which has been subsequently - so all that money, which was a couple of hundred thousand, never came to help Jackson when he was in need.

I then thought there's something wrong here; this isn't fitting. I accepted them for this, but their purpose was to remove me as Jackson's tutor in the proceedings. The first time an offer was made by the insurer, they tried to force the legal company for Jackson to accept it. They didn't speak to me first. They ignored me. It was a third of what Jackson subsequently got, because we had done our numbers and we had used an actuary to work out the numbers, because solicitors aren't good at that; so we had very good support. I always believe if you need supportive people, you go to people that know their business. Richard Cumpston, in fact, he did all that for Jackson at no cost to him.

MS McKENZIE: Yes.

MS STEPHENS: Because he knew how important it was and it was a great way to

work. He's a Melbourne man.

MS McKENZIE: Yes, I know of him.

MS STEPHENS: A fine man.

MS McKENZIE: Yes.

MS STEPHENS: The next thing that happened was he was offered another amount of money, which was twice as much and they tried to force us to take that and we said, "No. This isn't enough for his needs." Subsequently when we settled on the amount that Jackson got it was enough for his needs, but the OPC were trying to continually remove me, even to the point of having letters edited by paternal grandpa that were going to be written to me and signed by OPC. Things that are very strange in day-to-day life and, when I asked for documents under the Freedom of Information and I read them, I thought, "Oops. This is not good."

MS McKENZIE: But ultimately OPC have control of these assets because of a court order.

MS STEPHEN: That's correct. It'd take a court to undo them.

MS McKENZIE: Yes.

MS STEPHEN: Unless we have legislation that says providing a trustee who is suitable and meets the criteria of accountability as - I mean, if I said I was going to put your money - give it to my friend around the corner, and not a bank, that doesn't fit a criteria of a bank, or in my personal business.

MS McKENZIE: What I am thinking of is that for another helpful subject that an inquiry like we have been talking about might look at is, what better mechanism is there in dealing with these matters than perhaps having to cope with the expense of going back to court whenever there is a problem. Is there some other way? I mean, I understand of course that the court wants to supervise these movements, but - - -

MS STEPHEN: Absolutely.

MS McKENZIE: - - - is there some other way - a slightly less expensive way - that could be devised?

MS STEPHEN: There probably is. I will first go back to the disputes tribunal that has been placed to assist. They have the power to get the OPC to do things, but not to remove them. When I spoke to the person who wrote the law she said to me, "The OPC can take over from a trustee without going to court" - and a big case. I mean,

it's a small - it can be done quite quickly and by agreement, but the reverse can't happen, so once you're in there you can't get out. At the moment Jackson is spending - and you've got the figures in my - well in excess of 100 - up to $180,000 a year. They've had access to Jackson's money all the way along. They knew what he was going to get before he got it, and I don't have a financial plan. I don't have a full financial statement, and I don't even have a little document that says what they'll pay and what they won't - the most fundamental of any accounting. I just pay what I have to for Jackson and go into debt to do it.

What we need to date, Cate, is to have it that people have the choice, and people that are high net worth like Jackson - they pool all the money in together - they don't buy in as individual shares - so it's very hard to know how things are going. When you get all your money together you need to have the balanced portfolio: the shares, the managed funds, the property, the property trust, and you've got the pie - the financial pie. My background used to be finance and insurance, and when something is up the other is down. At the moment, Jackson's money, to my knowledge - and I was told this on 1 October - is languishing. He has no taxation assistance - and we, for 10 months, have lost a lot of the way forward. That we can never get back again.

MS McKENZIE: Yes, so really it's looking at mechanisms for - whether they're a better mechanism for supervising, and I have to say the other thing that did concern me in your submission was that there seems to have been only a couple of times in the last number of years when someone from that organisation has actually come to personally see what Jackson's individual needs might be. I understand that you're his carer and, of course, well qualified to advise, but it does seem to me that there should be more occasions than that - that the investor of the funds should check. There are a number of things obviously that an inquiry might look at because your problem, presumably,might well occur in the other states and territories.

MS STEPHEN: It does, but most people don't have, I guess, the courage to come and talk to commissioners about it because, you see, when you receive a settlement or maybe your rich dad dies, there's a lot of grief in getting to the settlement. It's not all about a bag of money. When you lose someone you love dearly your loss is there. You just need time to get on with your life and you don't want people moving in quickly. The OPC were anxious to be appointed to remove me as Jackson's tutor in the case. They were very anxious to do that. Well, I'm fairly powerful. I wouldn't let them.

To prevent that happening and to look after Jackson my business has gone. I have no business - seven years ago - so I'm just living on capital. That's all okay, but most people can't do that indefinitely, and what happens? They die. They don't get to doing anything because they are so exhausted. I am so fearful of the OPC now that I have accounts to send them - because of their behaviour I don't even like

sending them in, and I suggested that they maybe give me a small kitty that I can draw against instead of my mortgage, but they said, "No. We can give you as much - the word is 'flexibility' or not, and we've giving you none," because you've got to remember, twice I've tried to remove them in the Supreme Court. They don't like me.

MS McKENZIE: It does make it very difficult when relationships are problematic like this.

MS STEPHEN: Precisely, and we have a little group that gets together and I am certainly not the only person.

MS McKENZIE: But ultimately for Jackson's sake - and however difficult it might be - because they are the current people who are investing the funds - at least for the moment - you have to try to get on with them, just for his sake.

MS STEPHEN: Yes, I have to try and get them to make investments for him in his own name, not just put him in the cash fund. I've already said that in letters to them, Cate, but that hasn't happened either.

MS McKENZIE: These are certainly matters that - - -

MS STEPHEN: Portable investments that belong to a person. You see, the OPC works well with pensioners. They get the pension. They might have an addictive problem or a money-management problem, and they give them $30 a day. This is an expensive process, but it works for people like that, but when they get people like Jackson that are getting all their money together, or people who are left a big inheritance by somebody and, because they can't manage it themselves, someone in the OPC - Jackson has been seen twice in six years.

MS McKENZIE: Exactly.

MS STEPHEN: One was an audit, saying they weren't happy with the care, but then they didn't nothing about it because the care is superb, and then the second was a five-minute glance at him and a two-hour talk to me about - not really about planning, but just about what the costs were, and they've gone away with those and that was six months ago.

MRS OWENS: Can I just ask you - you wanted to move the funds over to Perpetual Trustee.

MS STEPHEN: Yes.

MRS OWENS: I gather there are a number of other trustees in New South Wales.

MS STEPHEN: There are. There's national ones. There's the National Bank. There's the state one. All these people meet the criteria and had the annual audit by OPC.

MRS OWENS: So OPC doesn't have to be the holder of the money and have that responsibility to manage the money.

MS STEPHEN: Absolutely not.

MRS OWENS: It could be acting as a regulator - - -

MS STEPHEN: Annually.

MRS OWENS: - - - ensuring that there are appropriate trustee arrangements in place.

MS STEPHEN: That's correct and Perpetual is an appropriate trustee. It's one of them. There are probably about six in this state.

MRS OWENS: So that means that you or the other grandparent could be determining the appropriate trustee based on the cost and the performance and so on and just using the trustee in the same way as we members of the community can allocate funds - - -

MS STEPHEN: Use a bank, accountant.

MRS OWENS: Provided that you and the other grandparent could agree on that.

MS STEPHEN: We do agree on that.

MRS OWENS: And you wouldn't want to change too frequently.

MS STEPHEN: Absolutely not.

MRS OWENS: The commission has looked at workers compensation in each state and most states have got monopoly workers compensation systems out for various reasons, but there is no reason why you need an OPC that is all powerful to actually run the fund - to manage the fund themselves.

MS STEPHEN: Yes, unless people want that.

MRS OWENS: Their role could be to actually ensure that there is an appropriate trustee arrangement in place - - -

MS STEPHEN: They're the guard dog.

MRS OWENS: - - - that are competitive.

MS STEPHEN: And the guard dog.

MRS OWENS: Yes, so I am just wondering whether this review that we are looking at could be thinking about saying that those sorts of arrangements should be considered, and maybe all states need to get together to look at the states' arrangements, because it is slightly - not slightly. It is anti-competitive.

MS STEPHEN: Yes, well, that's discrimination itself.

MRS OWENS: We have a national competition policy and we have a National Competition Council that looks at competitive arrangements within the states, and I am just wondering - it may not be appropriate, but I am wondering whether this is an appropriate area to be reviewed.

MS STEPHEN: I think it could be. I wrote to ASIC and they actually rang the OPC. They said that wasn't the area, under the law, they were able to work with, and they rang them and the state manager spoke to this executive and said that my requests in my particular letter would be dealt with by the end of January. It did not happen. Nothing happened.

MRS OWENS: I think you have raised a very, very interesting issue, and I'm not sure exactly what the answer is, but one is the possibility of the inquiry that we've suggested; another is that it be brought to the attention of the National Competition Council.

MS STEPHEN: The National Competition Council and also in the anti-discrimination - the matter of choice, because when I wrote to the - I rang the person who wrote the law because the Trustees Act was looked at in New South Wales last year. She was under the impression that the OPC could be appointed or removed by agreement, and it's only a matter in say Jackson's case, if the OPC have to agree by law, they just sign it off. You might go to the Supreme Court or the ADT - if they make it that they can do it - and you just sign it off and the appropriate person is appointed. You can't just do it. It's like when you get a new banker. You go and you fill out all the forms. You do your ID again. It all has to be done properly.

MRS OWENS: Yes.

MS STEPHEN: I suggest that it's fundamentally choice and, as you just

mentioned, Helen - - -

MS McKENZIE: I have just been musing. Jackson of course is still a child and I have just realised that probably that's the reason why the Guardianship Board doesn't have jurisdiction because, if the Guardianship Board in New South Wales is like the guardianship section of the tribunal in Victoria and the legislation is the same, then that only applies to adults, not to children.

MS STEPHEN: Yes, over 18. He's 10 years old. The point is that money brings greed and this is really what has happened to us, and because I have irritated by going back twice, I don't have very much power now, so that's why I am coming here to make the difference for a lot of people in all the states. We're virtually victims. I mean, that's the tragedy. We've being victimised and Jackson's money is languishing and there is absolutely nothing I can do at the moment. With, say, Perpetual or a private trustee, what you actually do - they have a system of - you get an account; you sign it off; they pay it, which is a simple way of doing things, you know. They say, "We've got this," and they use technology - they fax or whatever. Jackson has an account recently of $27,000 that they had waited eight months till they told me they had it. Then they asked me should they pay it. I said, "What is it?" and then when I investigated it it wasn't for anything that Jackson owed. Now, that money would have been paid if I hadn't been such a watchdog, and there is another account for a lesser amount that I am checking on at the moment.

MS McKENZIE: One question is choice. The other one is a question of transparency, accountability and information-giving.

MS STEPHEN: There are some people that appoint trustees, Cate and Helen, who actually don't want choice. They say to a trustee, "Just do it. I'm a humble person. Please do it," and it can be done very efficiently and then they do it in a nice cash account and then they just draw what they need. There are some people that want different services. You see the OPC have no investment strategy. They just do it out State Street, which doesn't have transparency, as the judge said in his statement. He was very concerned.

MS McKENZIE: Yes.

MS STEPHEN: It could be Joe Bloggs' company next week, so they're prepared to put all their money with State Street. No complaint about State Street, but that's not what you call a balanced portfolio. You must have your own investments and this is a tragic case of this. I mean, there has been no speaking of property. I said maybe 30 per cent, but if Jackson owns property they don't make the bigger commission. You know what I mean?

MS McKENZIE: Yes.

MS STEPHEN: It's all geared about commission base. Jackson should have property for in my demise, perhaps where he may live and the opportunity of what his needs are in the future. He's a very healthy little boy at the moment. Jackson is quadriplegic, very little speech and visually challenged. Probably he is blind but I don't know exactly, but a great communicator and a wonderful child. That doesn't hold him back at all. We communicate beautifully.

MS McKENZIE: He's very lucky to have you.

MS STEPHENS: Yes, he is. It's the other way, too, and his brothers. We're all very lucky.

MS McKENZIE: Very true. I think that's about as far as we can take it. You've raised some very interesting issues and we will ponder on these further and think how we can handle it in the context of our own report. We haven't got the answer for you today but we will consider it further because you have at least given us a trigger to think about that recommendation that we're making about an inquiry, and we may extend that recommendation.

MS STEPHENS: Yes, and if I may say one last thing.

MS McKENZIE: Yes, of course.

MRS OWENS: Of course.

MS STEPHENS: The law concerning disability and discrimination must be changed to ensure existing and future trustee relationships are flexible so that the most vulnerable people in our Australian society are protected from victimisation and provided with choice. This change will deliver that simple protection and our fundamental freedom to choose. Thanks, Helen and Cate.

MS McKENZIE: Thank you.

MRS OWENS: Thank you very much. We'll now break and resume at 11.30.

MRS OWENS: Our next participant this morning is the Australian Taxi Industry Association. Welcome to our hearings. Could you please give your name and your position with the association for the transcript.

MR BOWE: Thank you, commissioner. John Bowe, president of the Australian Taxi Industry Association.

MR EVANS: Jack Evans, national adviser to the Australian Taxi Industry Association.

MS McKENZIE: Are you happy that we call you John and Jack and if you call us Cate and Helen?

MR EVANS: Yes, please.

MS McKENZIE: It sounds really simple.

MRS OWENS: Okay, thank you, and thank you for another submission to our inquiry. You have been good participants and you came along to the hearings last time so we appreciate that. We have read your submission and you've made a number of salient points which we would like to go through with you but I'll just hand over. If you have any brief initial comments, we would be happy to hear them.

MR EVANS: Thank you. I think - really to just broadly summarise the response we have submitted to you, commenting on the draft report. Initially, I think, we just note in comment that the reliance on the assessment of the industry based on the HREOC comments is probably a little dated. Certainly, our best estimates are that the proportion that the wheelchair-accessible taxis are of the national fleet now is probably quite a bit higher than the numbers that HREOC quoted and we would like to think that the service levels provided to the disabled community are probably not at the sort of tail end of the public transport sector but probably closer to the front of the herd, if I can use that description.

MS McKENZIE: Are there more up-to-date figures than what HREOC has mentioned? Do you have more up-to-date figures?

MR EVANS: Really, yes, we could probably put them together. It's a matter of going around to each of the associations and even, in some cases, trying to go back to the state administrations. In some ways, without trying to duck the issue, I'd say it's probably easier to get answers straight from the state administrations, rather than the associations trying to do it because in some cases, not all, we don't cover all the areas and all the taxis in the area; but if you'd like us to do that we're happy to take that on board.

MRS OWENS: It would be useful. You've got some material here on Queensland, for example.

MR EVANS: Yes.

MS McKENZIE: It would be useful, I think.

MRS OWENS: You are saying that the HREOC information is outdated but we just have to use the information that we've got. It would be interesting to me to see what the trends have been in terms of the proportion of wheelchair-accessible taxis and how much they are being used, and you've made a point in your submission of the proportion of people with disabilities versus the proportion of wheelchair-accessible taxis; but what I'm not clear about is whether the propensity to use taxis is higher for people with disabilities. For some people it will be. For others, they will be just much the same as others in the general community. For example, wheelchair users may use wheelchair-accessible taxis, or taxis more generally, at a higher rate than other people.

MS McKENZIE: So if you had stats about that it would be helpful.

MR EVANS: I don't know that we have.

MR BOWE: State regulators would, certainly as far as New South Wales is concerned. That's my home state. It would have exact figures, the Department of Transport, mainly because they are administering the taxi subsidy scheme.

MRS OWENS: Of course.

MR BOWE: And they are also making available an initial start-up interest-free loan of $25,000 to country areas, to encourage the take up of wheelchair vehicles, just to get them over that initial capital outlay hurdle, and they certainly would have that figure. It gets a little bit blurred if you went to South Australia, for argument's sake. Once you get out of the metropolitan area of Adelaide the local councils run the taxis.

MS McKENZIE: That's very difficult.

MR BOWE: It is. The Taxi Board down there may have a handle on it but I suspect it wouldn't be accurate.

MRS OWENS: You see, our problem at the moment is we have got limited information and quite a lot of anecdotes about people's experience with taxis, about waiting a long time or not being able to get one at all or they pull up at the kerb and see the person with a disability and drive off again. You know, I think we talked

about this the last time we saw you.

MR BOWE: Mm.

MRS OWENS: In Sydney, back in July. So we've got those anecdotes, which I don't think we've highlighted in our draft report proper. I haven't got the appendix with me but they may be there. So we set up a finding which you will probably rightly criticise, that the act has been less effective for the taxi industry. That was our draft finding 5.4. Our problem is we've got quite a lot of anecdotes. People talk to us in hearings, for example, about their problems with taxis. Then we've got some very limited information on the other side to balance it.

MS McKENZIE: It would be very helpful if you could give us some more. That's really what we're saying.

MR EVANS: Well, we'll do our best to put together as much as we possibly can for you.

MRS OWENS: Sorry, Jack. We interrupted you.

MR EVANS: No, that's fine. Please. I think, as I said, we'll do the best we can and we'll try and get it back to you obviously as quickly as we can but in some of the cases, particularly in terms of where, say, wheelchair-dependent people, other disabled people, the general community stand in terms of propensity to use taxis, I just caution that we may not be able to give you too much really good information on that; but we will try to do the best we possibly can for you.

MS McKENZIE: That would be tremendous.

MRS OWENS: It might be a hard ask and I understand that. We also understand you can't give us overarching information about everything, but what you can get we would be very thankful for.

MR EVANS: Okay, then. Well, we will certainly do that. In terms of the broad comments, the other area that we really focussed on was the recommendations relating to the complaints procedures. To put it quite bluntly, there we were concerned that, whilst we appreciate the need for balance, it seemed to us the recommendations were starting to tilt the field far too much against businesses, with potentially quite significant consequences down the track for businesses in terms of how they are able to deal with it. I guess from our perspective we saw, possibly, the end consequence being that businesses basically came to any complaint in a situation where they were effectively guilty until proven innocent, rather than the situation at the moment where obviously, as you have highlighted, the onus is on the complainant to establish their case. I think that's really the summary of our response

to the draft report.

MS McKENZIE: Perhaps I can say something about the complaints problem. A number of disabled individuals and disability organisations and HREOC raised in submissions with us two things, really. The first was the ability of the act to deal with systemic discrimination and that's not really an area where it's terribly sensible to have one person complain. So the recommendations we made were a response to that. The second main area that was raised with us by all of those organisations and individuals was the difficulties that people who, as individuals and often with particular disabilities, like cognitive disabilities or psychiatric disabilities or other intellectual disabilities, have in just trying to be able to do a complaint at all themselves.

So really our recommendations, I suppose, were a response to that. It may well be that you would say that our recommendations are not tight enough, in the sense that they don't have enough criteria to jump over the threshold to go into that special complaint mechanism. That might be an issue that we need to look at more, but that was why we looked at representative organisations on the one hand and HREOC on the other being able to initiate the complaint. I mean, we do recognise that they ought not to be able to do that in every case. Quite clearly this is not going to be a substitute for individual complaints, but you may well be right, that we should look again at the criteria, the limitations on that process.

MR EVANS: Yes. I mean, for example, obviously I think our own organisation and others must be concerned about the question mark about HREOC being both, if you like, the prosecution and also the judge, at least during the conciliation period.

MS McKENZIE: Yes.

MR EVANS: I think most people would find that's a very uncomfortable position to put them in. In our submission, for example, we said perhaps that if you felt you needed to go down that path at the end of the day, then maybe something like HREOC having to establish that it's in the public interest in some way for, perhaps, the attorney-general or someone outside the organisation to help to provide a bit of balance that mightn't be there otherwise if HREOC had all that power invested internally in it. So we certainly appreciate the difficulties of how you do find in the end the recommendations that do deliver a reasonable balance recognising all parties' interests.

MS McKENZIE: Yes. We do understand the need for balance.

MR EVANS: Yes.

MS McKENZIE: Really, I was trying to explain the circumstances which led us to

look at what we can do so that the very vulnerable, the people with serious disabilities - the very vulnerable who really have enormous difficulties in complaining - are just not left without a remedy, basically. But you're right. There has to be a balance.

MRS OWENS: And the other recommendation that you picked up there on, in relation to complaints, that was the issue about awarding costs, and having guidelines for awarding costs and again, we found, as we've gone around, that a lot of people have said that it's a major barrier to them as complainants. Now, we don't want to have a situation where there's a lot of trivial complaints coming through. Again, it was just trying to get some - at least we're basically saying that the HREOC Act should be amended to incorporate grounds for not awarding costs against complainants. So there would be specific grounds set up, which would be clear, but it doesn't mean to say that costs would never be awarded, because that would be a potential problem.

MR EVANS: If I can respond by sort of explaining where our concerns come from. Clearly within an industry like the taxi industry there's a lot of operators out there that are not big organisations, and there's not going to be any in-house expertise in a day-to-day environment about dealing with things like the DDA. So really any sort of complaint that is confronted by those businesses is going to be a major watershed for them, and obviously associations and that are there to help at some level, but they're going to be in a situation where they're going to find themselves starting to tote up costs pretty quickly by the very need to get some outside expertise and advice on what they do from the moment the complaint confronts them. We can see situations potentially developing where there's going to be a lot more expertise in some areas at least with the complainant, as compared with the respondent. As we highlighted one specific instance in the response, in those circumstances you can find that the business's costs can start to escalate very quickly and very substantially. The one we did quote where the case has got as far as the Federal Magistrates Court, the operator's costs are 76,000, I think was the figure we identified. That's probably the worst case that has been experienced in the industry so far, but it's by no means isolated, and there are others where issues have been raised and the costs do mount up.

So whilst we can understand the concerns that are raised, we think, again, that maybe there's a need for a bit more balance in the end in trying to reach a reasonable compromise. Part of what we said about the conciliation process and the conclusions you drew there - we would suggest that that's probably not atypical of a lot of conciliation processes. I myself in my own business ended up going through one where there was a commercial dispute about a contract, and I think it would be fair to say in those particular circumstances, both ourselves and the other party walked away from it, not particularly enamoured with the result, but deciding that it was probably a better situation than fighting on into an uncertain future.

We can anticipate that there will be cases where possibly businesses are sort of encouraged to respond to complaints in, "Let's get it out of the way quickly and minimise our costs by effectively buying ourselves out of the problem." And that was very much part of our concerns about really where we saw the potential of the recommendations on the complaints arrangements possibly leaving us.

MS McKENZIE: Yes. So that, for example, if it's a very small - it's different if it's a big firm. It will still matter, but if it's a very small business, there could be a real costs disincentive to be able to go on, even if you thought you had a case.

MR EVANS: That's right.

MS McKENZIE: And it could make the business unviable, ultimately.

MR EVANS: Our business, the taxi industry, is predominantly made up of what are really very small businesses.

MRS OWENS: Can I just come back to this 76,000 cost issue that you raised in your submission and just raised before? You talk about the case as against a major metropolitan network. I mean, $76,000 is a lot of money, but it's not as if it's a very small group where it potentially could be a very, very serious problem, but you might potentially in some sectors, parts of your industry, have some very small groups or individual players where $76,000 would be - they would have ended up having to pull out before that because otherwise it could really tip them over the edge, I would presume. We've got a recommendation which you have actually criticised, which is our recommendation 11.2, and that was the one where we said that HREOC should develop these grounds for not awarding costs against complainants. I'm just wondering what you would think about that if it actually had awarded costs against complainants or respondents.

MS McKENZIE: Or respondents.

MRS OWENS: So in other words, had proper grounds.

MR EVANS: I think that was one of the suggestions, that maybe what was good for the goose should be good for the gander, if I can use that description. That was one of the points in response that we did make. One of the problems that we do see is, as you've acknowledged, a lot of our industry is very small operations, basically down to a one-person business type thing, leaving aside even something as daunting as a $76,000 bill, and that's the taxi company's own bill, without what happens if they get costs awarded against them from the other side.

MS McKENZIE: You see, what, of course, I don't know about that amount is (a)

whether they're adding in all the costs, starting from the very beginning of the complaint, right through to the court, or whether that's just the court costs. If it's just the court costs, that's a real worry, because this is not the Federal Court, which is a superior court. This is the Magistrates Court which is, if you like, the next court down the hierarchy. It's still a court, but you can anticipate the costs would be less.

MR EVANS: As I understand it, that's the costs of their legal advice through the process.

MS McKENZIE: From the beginning.

MR EVANS: Yes.

MS McKENZIE: You see, that's sort of a bit different. I don't know how long it has gone, how many conciliations there have been and things like that.

MR EVANS: Well, yes. I can't provide those details I'm afraid. It's still $76,000 at the end of the day, and whilst that particular organisation can swallow hard and at least bear it, 95 or maybe more per cent of the industry - - -

MR BOWE: One-man business.

MR EVANS: Would have been just murdered by it.

MS McKENZIE: Couldn't do it.

MR EVANS: They would have effectively had to bail out at some earlier stage in the process. That doesn't, to us, appear fair.

MS McKENZIE: It is something we have to give more thought to, it's true.

MR BOWE: I think the circumstances too is that going to HREOC first and then HREOC not taking any action and allowing the one to go to the Federal Magistrates Court - that in itself is worrying, because the conciliator decided that there wasn't a case to order, that the complainant went around that and went to the Federal Magistrates Court.

MRS OWENS: This was in this particular instance.

MR BOWE: Yes. In this case.

MR EVANS: So in this case the complainant had got a finding out of the conciliation process they weren't happy with and, as their right is, they still decided to pursue it at the Magistrates Court. I mean, it's a very difficult situation. We fully

acknowledge that, and generally in these circumstances, it's only the legal profession that wins.

MS McKENZIE: Yes. That's right.

MRS OWENS: Can we go back to an earlier part of your submission where I think you're acknowledging that - well, you do say on page 2 - you're talking about the inadequacies of the pricing structures and you say that, "Those inadequacies operate as a major impediment to wheelchair-accessible taxi drivers being proactive in responding to bookings," which seems to be implying that they're not always proactive in responding to some of those bookings from wheelchair-accessible taxis - acknowledging that, which is where we've been getting the anecdotes, and saying that perhaps that could be addressed by the development of more appropriate pricing structures by government. You talk about government intervention, so are there any states where pricing structures have been introduced that we could look at, which have gone in this direction, that have led to an improvement?

MR EVANS: Yes. I think Victoria is probably the best example of that. They've got a loading fee that they pay the driver for that arrangement.

MR BOWE: And a running fee.

MR EVANS: Yes. And a running fee.

MS McKENZIE: So is that added to the fare or is it just paid - how does it operate?

MR EVANS: I think it's added to the fare and effectively through the subsidy scheme the state government picks up 50 per cent of it.

MS McKENZIE: Because that was the next part of my question. If it goes into the fare, who pays? Should it be the individual or does it go into the taxi voucher scheme, the subsidy scheme?

MR BOWE: Well, the lift fee is 50 per cent. The running fee is paid directly by the government to the central room.

MS McKENZIE: Okay. So it goes to the taxi company, and then - - -

MR BOWE: And it's disbursed then to the operators.

MR EVANS: It does go back to the operators at the end of the day.

MRS OWENS: So the loading fee is paid by the individual but their subsidy from

government has been increased to cover that higher loading fee.

MS McKENZIE: It's just added to the fare. Is that how it works?

MRS OWENS: Is the person out of pocket?

MR EVANS: Yes. They're out of pocket by half of the loading fee, effectively.

MS McKENZIE: It's added to the fare and then they use their subsidised - - -

MR BOWE: It equates - the way the Victorians do it is different to the way it's done in New South Wales, if I could use that comparison. In New South Wales the driver is allowed 15 minutes' waiting time on the meter and at the current rate of waiting time, it equates to slightly more than the lift fee in Victoria. That's loading and unloading the passenger.

MS McKENZIE: And again that's added to the fare, that 15 minutes' waiting time?

MR BOWE: Yes, it is.

MRS OWENS: So what happens then - I don't understand how it all works but there has been some things in the papers in Victoria saying that there was going to be a cap - perhaps there is now on the taxi subsidy scheme. Will that then effect this question of the extra loading fee, that gets added to the fare? Because if there's a cap then at some point or other that will then be borne not by the government but entirely by the taxi user.

MR BOWE: Again, the difference, comparing two states again, is the criteria for entry. If you go back to the inception of the Victorian scheme, the criteria for entry could be substantiated by a justice of the peace. In New South Wales, your doctor must fill in the necessary application form. It then goes to the Department of Transport, the administrator, within the state, who then judged the doctor's application on the criteria that are laid down. In that way, if you compare the numbers in the Victorian subsidy scheme, they're up - if I can use the figures - round $50 million a year. The New South Wales scheme would probably be - last I heard - about 14 or 15 million. I don't know that they've modified the criteria in Victoria and if they have it would still mean that a person could get their local JP to say that they were unable to use conventional public transport and they would then be admitted to the scheme. They've tried to bring in a plastic card instead of a paper-based docket system down there to control it because it was getting out of - as I understand, the government - as far as the government was concerned, it had control on the issuing for them.

MRS OWENS: I think there were some abuses in the system that had been tied up.

MR BOWE: I think there always will be in those sorts of schemes where - and you get this complicity between two people, you know, and unfortunately that leads to fraud.

MRS OWENS: I think the other issue that we heard about in Tasmania - it was largely in relation to their disabled parking passes, and I think they raised it in the context of getting vouchers as well - was once they get one they can just keep it and there's no system to really get them out of the system if they are no longer incapacitated in some way.

MR BOWE: Yes, they generally issue them in books, and there have been cases over time where the person with the disability has handed the book over to the driver, where in the strict sense of the word they are supposed to write in the figures of the fare off the meter, but again you get this situation one on one, and it probably leads to something that Jack will comment on later; the difficulty with service delivery times, where people make set arrangements with a driver.

MS McKENZIE: That was going to be my next question. You've just raised it. That's good.

MR BOWE: And they set runs and the driver generally has this relationship with the person and you would never get a complaint from a person that generally uses the one driver because they're able to arrange in advance, and if something is going to occur fraudulently, the likelihood would be in those situations where they know each other better than the normal "jump in the cab" and a different driver each time.

MS McKENZIE: There might be a problem of fraud but even now anyone, disabled or not, could choose to have the one driver pick them up.

MR BOWE: Yes, absolutely.

MS McKENZIE: Anyone could do that.

MRS OWENS: I think your submission actually talks about the difficulty that then has with the overall network because if there is a problem then you're saying in the long term you will have more and more people going into these arrangements in groups, and then there's less of the network left just covering the general - - -

MR BOWE: The casual rider, yes.

MS McKENZIE: To cover the casual customers, yes.

MR EVANS: Yes, it is a problem. You can understand at the individual level the

benefits that accrue to say a passenger who does develop a relationship with a particular operator and is keen to use them every time that they want to travel that way. But, as we highlighted, it does have an impact on the overall efficiency of the system and, quite frankly, that applies both to the normal taxi, the traditional taxi operations, as much as it applies to the wheelchair accessible taxis.

MS McKENZIE: And I suspect it probably applies to people without disabilities just as it does for people with disabilities.

MR EVANS: Absolutely.

MS McKENZIE: It's hard to know what to do about that situation, though. People would I think want the ability to choose in that way.

MR BOWE: Technology and the changes - if you move away from disabled vehicles at the moment and you talk about just the Sydney taxi industry, where we have a premium service car - generally it's a silver car - those drivers, as well as having their conventional communication equipment inside, have trunk radios. So there is a network within a network, and people who use them selectively have access to perhaps 200 of these cars, quite apart from the normal network. Now, if the job doesn't suit them, then the driver can offload that back to the network, and this creates very much difficulty in providing a coordinated service because on the one hand you've got a network that's operating 24 hours a day, seven days a week, and you've got this selective band out there that, using the latest technology, can circumvent that and be very selective as to the amount of work they do and what work they do. So that does make it very difficult to control.

MRS OWENS: But the horse has really bolted on that, hasn't it?

MR BOWE: It has, it has. Next week there will be something out that will advance that technology.

MS McKENZIE: And also part of it may have arisen because the nature of people is that they prefer to travel with someone they know.

MR BOWE: Absolutely, yes.

MS McKENZIE: And perhaps - I don't know whether this is the case, but it may also have arisen because the big companies all send people they don't know. If taxis don't turn up, then of course people get cross and will look for another alternative.

MR BOWE: Yes. The booking service doesn't have the power to direct. That is the weakness in the situation. Once the vehicle leaves the owner's home or the depot or wherever, that driver can choose how he operates. The booking service advertises

the booking, the driver has the ability to place himself in the queue for work. He also has the ability to switch it off, so it just makes it difficult.

MRS OWENS: Do you as an industry self-regulate to the extent that you monitor things like response times, waiting times, what's happening with complaints - - -

MR BOWE: Yes.

MRS OWENS: - - - either to the industry itself or complaints that go further? Do you then try and address those problems?

MR BOWE: Absolutely. We have a system where every complaint is logged in New South Wales on a customer feedback management system; compliment, complaint. Complaints are investigated by the particular network or the fleet to which that car belongs. It is then sent on to the Department of Transport for logging and if the complaint is one of the nature of sufficient seriousness it may well provoke the driver having to show cause why his authority isn't cancelled. So it follows a chain, but certainly, yes, every complaint is logged.

MRS OWENS: And do you have information about the sorts of complaints that are coming from people with disabilities? Are they identified specifically?

MR BOWE: We've got the mechanism in process at the moment - as a matter of fact, Jack and I just looked at our statistics before we came here, and whilst there were complaints listed, it was I think very few. Mainly it was perhaps not a complaint against discrimination as such, as a complaint against the standard of the vehicle, the fact that something should have been working and didn't work - airconditioning, for argument's sake, and that sort of thing. But all of those complaints are followed up: why doesn't the airconditioner work? It's reasonable for a person to complain, particularly in this weather. So, yes, they are followed up.

MRS OWENS: The last time I got into a cab in Sydney when they didn't turn the airconditioning on, he said it was because it would drain too much out of the engine and the engine would stall, and it was a day when it was like 35 degrees.

MR BOWE: Yes. You wonder how they can even sit there themselves in the car - - -

MS McKENZIE: I don't know how they weren't melting themselves.

MRS OWENS: And the seat belts weren't working. It was one of those vans; it was a wheelchair accessible taxi I got in, and you couldn't do the seat belts up because they were jammed behind the seat. There was no airconditioning; there was nowhere to put the case where it could safely be stowed. I should have put in a

complaint, shouldn't I?

MS McKENZIE: Well, you have now.

MR EVANS: But most of those sort of complaints would be identified. If you complained about the particular one you referred to, it would be Helen Owens who complained but it wouldn't say Helen suffered a particular disability or anything.

MS McKENZIE: Just the name of the complainant and what the complaint was.

MR EVANS: Yes, and just what it was about.

MS McKENZIE: You see, even a waiting time complaint, even if it came from a person with a disability, just slow response time or something.

MRS OWENS: Unless it was a waiting time complaint relating to a wheelchair accessible taxi - I presume you'd be able to pick those up.

MR BOWE: We deal with those separately. We are under regulations obliged to supply statistics from the network rooms to the department on the service delivery times on a monthly basis.

MRS OWENS: And this is in New South Wales?

MR BOWE: Yes.

MR EVANS: Yes.

MRS OWENS: And have they been improving? Have you got data on that? You see, again this comes back to the data information gaps that we've got.

MR BOWE: Yes. We don't have it as such. It's I suppose commercially sensitive to each network but they must supply it to the regulator, so it would be - - -

MRS OWENS: But the regulator then would aggregate that.

MR BOWE: Yes.

MRS OWENS: We don't want it necessarily by coverage.

MS McKENZIE: No, we just want an average.

MRS OWENS: We just want to know what's happening, what the trends are and has it improved.

MR BOWE: Yes, they would be the ones, but I think generally it's sticking pretty much to the network accreditation standards. They measure phone answering times and all of that sort of thing. I understand the same applies in Queensland and in Victoria, so there have been a lot of reforms in the industry, and there will continue to be reforms. For argument's sake, in New South Wales, as part of a standard pledge to the government, the wheelchair accessible times and the changes that have been made - where a driver who generally has his own book of private bookings, they're called in to show. The private bookings are examined to make sure that that driver is available for the maximum time that the regulations say he must be on the road. So all of those things have been introduced as self-regulation and a commitment to the DDAs.

MR EVANS: But we will see if we can provide some more information on that for you.

MS McKENZIE: That would be helpful.

MRS OWENS: That would be useful because, as I said earlier, when we were talking about what the regulator had before, we were talking more about just the usage of the taxis, but there's also just these indicators of performance, which should be useful, because if we can show that things have been improving - well, since 1992 and then since the standards have come into place, I think there's an interesting story that we can tell.

MR BOWE: Yes.

MRS OWENS: But we can't tell that story without the darn information.

MS McKENZIE: Can I ask - there was an issue that was raised earlier about tactile indicators on taxi doors. Is that still an issue?

MR EVANS: Yes.

MR BOWE: Very much so.

MS McKENZIE: It's still an issue?

MRS OWENS: You expressed some concern that we hadn't raised it in our draft report.

MR EVANS: We would have liked perhaps some comment from you on it. We are putting a further submission into HREOC about the issue and we'll continue to try and negotiate with the stakeholders on that issue, but we thought maybe something

from the Productivity Commission might be helpful in that regard.

MS McKENZIE: We generally look more at process and general issues. That's a very specific one.

MR BOWE: It's been one that has been a worry for the industry right from I guess the draft standards, and it's a safety matter as far as we're concerned. Our offer is that we don't have a problem with tactile numbers on the inside doors but we do have problems with people stepping off the kerb and things like that, particularly, as I say, in a big city such as Sydney, and we think it's very dangerous.

MS McKENZIE: In many cases there will be alternatives - if the taxi has been booked, but it's when you pick it up in the street that it's difficult.

MRS OWENS: But I can't imagine you, Cate, jumping off the kerb to feel the side of the taxi to see what the number is.

MS McKENZIE: No, that's right, and if that's the case, then - - -

MRS OWENS: There's no use in having it.

MR EVANS: Say if the blind community is educated that (a) if you do have a problem you think with a taxi pulling away because it doesn't want to take your fare, there is that thing there. It's almost like the old argument about lighthouses. You put lighthouses on dangerous sections of coast, then mariners look for the lighthouse to identify where they are, so you're putting them in areas of maximum danger, and almost like, you know, the tactile identifier is on the external side of the door. Suddenly it's saying to the blind person, "Reach out to an area where you probably would be better not being."

MRS OWENS: I presume you put this to the powers that be when the standards were being developed.

MR EVANS: Yes.

MRS OWENS: What was the argument for doing it this way?

MR BOWE: The argument has been all the way along, and I still am the representative on the Upton committee - the argument is put forward by the representatives of the disability community, that they have always wanted it there and despite the fact that I brought it up countless times, the safety feature - and I have even demonstrated it in practical terms. I can walk outside this hotel and I can flag a cab down and he can ask me where I'm going, the suburb doesn't suit him so he drives away. I make a complaint, they call him in, denies he was in the street -

my word against his. Same thing applies to a blind person. It's more sensible to have the number in the car, because when the person is in the car if anything untoward should happen then the person - it doesn't matter what seating position they are in - they can identify it and memorise the number and it's a more practical use in my opinion.

MRS OWENS: I do not think I have anything more.

MS McKENZIE: I think I have asked all the questions I wanted to ask. Extra information for us would be most helpful, that is the only other thing I say. We understand that it's difficult. We also have found it very difficult to provide information on this; that's why we're asking you about it.

MRS OWENS: Is there anything else you'd like to raise with us?

MR BOWE: No, except to apologise about not knowing the answer to the question when we met last July in Hobart. It wasn't until I started to dig around that I found the government had given it out to a private individual, and it wasn't the taxi industry at all that were doing it.

MR EVANS: Those special-purpose taxis that you asked about last time.

MRS OWENS: Yes.

MR BOWE: We were not aware of that; that the Tasmanian government had allocated it to a private transport operator who picked what he liked and left what he didn't like.

MR EVANS: Yes, picked the eyes out of the business and the problems came about because those who weren't getting served were waiting.

MRS OWENS: And then didn't care about the rest.

MR BOWE: I remonstrated with the taxi industry, "What are you people doing down there?" Of course they said, "Well it's not our responsibility."

MRS OWENS: Goodness.

MR BOWE: So I'm sorry about not knowing that.

MRS OWENS: No, I think it's understandable. Thanks to you both very much. We're just going to break for a minute.

MRS OWENS: The participants this afternoon are Mark O'Dwyer and Janice O'Dwyer. Welcome to our hearings and thank you for your submission. Could you each give your name and the capacity in which you're appearing for the transcript.

MR O'DWYER: I'm Mark O'Dwyer, and I'm appearing as an individual.

MS O'DWYER: I'm Janice O'Dwyer, and I'm also appearing as an individual.

MRS OWENS: Thank you. I'll hand over to you, Mark. You've got some notes there and you want to raise some comments with us.

MR O'DWYER: Yes, I do. It will take me a few minutes to get to the main issue regarding the discrimination with regard to me gaining meaningful employment, which is the thrust of my comments that I'm here to make today, but to get to that point I'll need to give you some background to my case. I thank the commission for giving me this opportunity to be of some assistance in reviewing the Disability Discrimination Act as it currently stands.

The reality is, as I understand it, being realistic, that any positive changes that may come from this review may be too late to benefit me, basically because I'm now 51 and I've entered a new age of discrimination. But I hope whatever I've got to offer today can assist people in the future who suffer from similar disabilities to what I have and have had. Some background: I contracted hydrocephalus at the age of 16 and I would like to present some background on the events that took place in my life, mainly when I reached my 30s in terms of discrimination that was to set the pattern for my future.

I basically overcompensated and was a high achiever, especially in my late 20s and 30s until I again was struck down with a malfunctioning ventricular peritoneal shunt with infections and shunt blockages. By the way, I didn't tell you how I came to acquire hydrocephalus/aqueduct stenosis at that age of 16; I was raised by my mother and my stepfather who unfortunately took delight in hitting me around the head when the opportunity arose and I've been told medically this is probably and more than likely, but not definitely, the way in which my condition occurred. If this had happened in this day and age he would have been dealt with by the law. He's since passed away, I might add. I might also add that I've forgiven him.

My work career background blossomed and I experienced a period where I was well. In fact, I felt like I had nothing wrong with me except for the fact that I had a shunt inserted in my brain to drain the cerebral spinal fluid that everyone has normally, and functioned at a high level at advertising sales and rose to mid-level management with Yellow Pages Australia, now known as Census, managing branches around New South Wales at various times. As my salary package included a late model motor vehicle and overseas travel incentive each year for both myself

and my wife, based on my performance results - as well as, at that time, a very generous salary - my life and my future seemed assured. It was during a business trip in 1988 to Coffs Harbour that my problems started to occur out of the blue.

Whilst it seems funny now, at the end of the conference I got into my car thinking I was heading home when in fact I was heading for Brisbane. Feeling unwell I stopped and rang my wife and arrangements were made for someone to come and collect me. In fact, they flew up and picked me up and took me back to Sydney. I was then to spend six months straight in Royal Prince Alfred Hospital, where I underwent a series of operations which then was followed by some rehabilitation, which I'll talk about later - a long period of rehabilitation in Woy Woy Rehabilitation Hospital. Most of the patients there in fact were stroke victims. My disabilities were very similar to people who had had strokes.

I had lost my power of speech. I was immobilised and needed a wheelchair to move around. I had developed short-term memory loss severely. I developed Parkinsonian symptoms, a tremor and a condition called blethrospasm, which is constant uncontrollable blinking. Over the next 12 months I underwent a lot of rehabilitation but my former employer - who I might add at that time was very, very good to me, because they continued to pay my salary for the first three months of my illness - were forced to offer me early retirement at the age of 35.

The next year I approached them to see if I might be able to - a year later I in fact approached them to see if I might be able to return to work in some capacity and they made me sign a document that gave up 60 per cent of my superannuation payout, which I might add I was being paid incrementally, and the company was MLC and they made me sign a document that meant that I gave up 60 per cent of my superannuation. I commenced working again two and a half years after I had stopped and I had to sign an indemnity towards the company should I fall ill gain.

I did all this; a risk on my part but my wife and I decided to take that risk. Unfortunately it was at our loss, as it turned out. After six months my shunt again failed and more hospitalisation and more brain surgery followed. In fact, at this time I've had 18 shunt revisions. The disabilities that have come with a number of those shunt revisions have been varied and similar to what I've spoken about before, but sometimes not as severe. I know at this point I should have given up. In fact my wife had decided to eventually move - for us to eventually move to the south coast to retire which, believe it or not, I did not want to do.

I had a constant drive to work and to achieve and I've always had that; in fact I've still got it today. But even though I have now entered a different area, where discrimination seems to occur, now being aged 51, I still know I have a lot to offer an employer given the right opportunity to suit and fit around my abilities and my disabilities, despite the fact that I have now had 18 shunt revisions to correct the

blockages and infections.

It was at this point that I approached Centrelink with a view to re-entering the workforce to utilise my skills in a productive way. Whilst prior to this I had been judged by many people who I came in contact with as being not quite normal, because of the scars on my body, in particular my head, it was Centrelink's own disability officer who I sat in front of in 1994 attempting to gain meaningful employment, where my skills could be utilised and to be rewarded accordingly, that I suffered the most alarming discrimination when he referred me to a Job Network member who dealt specifically with psychiatric disorders, knowing quite well that my condition was a neurological disability.

He sent me to that organisation on the Central Coast called PEP - based on the Central Coast. I was not only offended, as was my wife, but confused and I thought that if this was the only means of dealing with a client with a neurological disorder, then I had no future. After discussion with my wife we decided not to attend the appointment with PEP and to return to some more senior person in Centrelink to explain the situation, which led to me being referred to a general Job Network member, First Contact, on the Central Coast. But they were unable to offer me anything, considering my condition, so it was a catch-22, because my condition required medical assistance - not frequently but occasionally - which my wife gives me with the assistance of my doctor.

This comes as a result of the scar tissue damage that has been caused by all the operations, brain operations that I've had over the years. So from my original disability I've ended up with a number of other disabilities from the original one, being scar tissue damage in the head. Despite my difficulties, I still feel that I can make some meaningful contribution to society because my intellect - and I underline the word "intellect" - has not been damaged or scarred. I would like to one day find suitable paid employment which, if nothing else, would have some impact on my self-esteem which has suffered or fluctuated through the years as the result of the abovementioned experiences and I feel sure it has had a similar impact on disabled people right around Australia who suffer neurological conditions like mine; not to mention the difficult life my wife has had to endure throughout this ordeal. We were forced to sell our home and currently exist on Centrelink benefits; not exactly the plans I had back in 1984 when I joined Yellow Pages 20 years ago.

In summary, I must say the worst experience among many is the feeling of being judged and categorised unfairly as being finished in terms of my working life when, in fact, I intellectually knew and know different. I thank you for your time this afternoon and hope that what I have had to say may assist others who may find themselves in a similar position to me in the years ahead, and hopefully they will not find themselves being judged because they have a neurological condition, the same or similar to mine, of which there must be many - not the least of which are those

caused by motor vehicle accidents and other unfortunate circumstances which can leave the victim of a head injury dealing with very similar problems, as those experienced by me. Thanks for your time.

MRS OWENS: Thank you very much. Janice, do you want to add anything to that from your perspective? You've been going through this as well and I presume because of the need to help with medical assistance during the week, that it would make it very difficult for you to go and find a job, too.

MS O'DWYER: I did go back to work a couple of years ago, but Mark got very sick and it was very difficult for me to stay in my employment because then I was having days off to look after him. So in the end I had to leave my position as well, because I have to administer medication to him three times a week and in that time he's not sort of able to do anything, so I've got to be with him.

MR O'DWYER: I need to be supervised.

MS O'DWYER: When I look for employment myself I've got to stipulate these facts to them as well, which lately in the last 12 months I have had no reply back from any job that I've ever applied for; you just don't hear anything. You don't even get a letter to say, "Thank you for applying."

MS McKENZIE: See, that's important information for us to know because one of the things that the DDA does is to prohibit discrimination against people who are associated with someone with a disability, just like you.

MS O'DWYER: With carers.

MS McKENZIE: That's right, and really, you are a carer in that way.

MS O'DWYER: I mean, we were told once to - actually it was Mark who went to one of these employment places to help you get a job - not to mention about the disability - - -

MR O'DWYER: I was just going to bring that up.

MS O'DWYER: - - - and also for me, when I go for a job, not to mention what I have to do for Mark.

MR O'DWYER: I was just going to bring that up.

MS O'DWYER: I couldn't do that, because as soon as you got the job you know what you've got to do.

MS McKENZIE: Yes. You have to have that flexible employment arrangement.

MS O'DWYER: You do.

MR O'DWYER: They told me - in fact, it was First Contact - told me to fill in my resume - they helped me with my resume - there was a 15-year gap - 14-year gap at that stage and they said, "Just leave a gap."

MS O'DWYER: "Say you were self-employed."

MRS OWENS: And nobody is going to ask you about the gap.

MR O'DWYER: No, and I'm not going to lie. So what I did is, I told the truth and I got no replies. In fact, I've got a real good example. A position appeared in our local paper last year for a temporary position with Centrelink as a customer service officer support or something, part-time.

MRS OWENS: Sounds perfect.

MR O'DWYER: It was perfect for me. So I applied for the position, I put everything on it and I got no reply.

MRS OWENS: You got no reply from Centrelink?

MR O'DWYER: I got no reply from Centrelink.

MS McKENZIE: Not even an acknowledgment?

MR O'DWYER: Not even an acknowledgment. I rang them actually a couple of days ago, to see if they had the record of it - I was just interested to know if they had - and they did have record of it, but they couldn't elaborate any more. He actually started to get a bit suspicious as to why I was asking - but I got nothing.

MRS OWENS: When did you apply for this job?

MR O'DWYER: It's about 12 months ago.

MS O'DWYER: We actually had the date, didn't we? Did you write it down? I think you had the letter.

MR O'DWYER: Hang on.

MRS OWENS: We will draw this particular transcript to the attention of Centrelink.

MR O'DWYER: The First Contact letter was - that was 2002. Was it then? No, it wasn't with them, it was direct with Centrelink. That's 2002.

MS O'DWYER: Yes, that was it, personal adviser, Centrelink. Sorry, it was 2002.

MRS OWENS: The first contact that went to them was 2002?

MS O'DWYER: Yes.

MR O'DWYER: No, there was another one. That's the second one. I'm sorry. Jan's confusing you. The first one I applied for was as a personal adviser and I fitted all the criteria that was within the advertisement.

MS McKENZIE: And that was at Centrelink?

MR O'DWYER: That was at Centrelink and that was through IPA Personnel. I applied for that and I got a Dear John letter; I didn't even get an interview, didn't even get a chance to sit in front of them and give my - - -

MRS OWENS: But you at least got an acknowledgment in reply.

MR O'DWYER: I got an acknowledgment, yes. That was from that one.

MRS OWENS: And the second one - - -

MR O'DWYER: The second one was for the customer service - I've applied for ones that weren't through Centrelink, and I get no replies. When I tell them the truth - and I've decided that I'm going to tell them the truth.

MRS OWENS: You need to tell the truth.

MR O'DWYER: Of course.

MRS OWENS: Then it comes back to bite you.

MS O'DWYER: Yes.

MR O'DWYER: I applied for another position. The police at Tuggerah have got a call centre. I applied for a position with them - because my background is communication, my skills are communication, so I applied for a job with them. I wrote in, sent my resume in, put it together - in fact, I think one of the Job Network members helped me. Again, no reply, no response, no letter back to say, "You didn't get the job" - not even acknowledging receipt of my - and that's government. I'm

assuming it's government, unless they've outsourced the call centre.

MRS OWENS: They may have outsourced that.

MS O'DWYER: Yes.

MS McKENZIE: Nevertheless - well, it depends on what arrangements - it may still come back to government.

MR O'DWYER: But the Centrelink, Jan, I'm afraid the Centrelink one I'm afraid - we haven't got it, no. To try and get back into the workforce I did a TAFE - I did a real estate - because that's where Jan actually got her part-time job, was in real estate, so I did a real estate sales support certificate, and completed that successfully at home.

MS O'DWYER: He sent out letters to all the real estate agents in a certain area - - -

MR O'DWYER: I sent 50 real estate letters.

MS O'DWYER: - - - up on the Central Coast, and out of about 50 letters or so we got - - -

MR O'DWYER: I got about six replies.

MS O'DWYER: - - - three replies we got back, thanking him for the letter and that they'd put him on file.

MRS OWENS: What we don't know is what they were thinking when they sent you back the letter, because they'd have your age and they presumably had some information about your health state.

MR O'DWYER: Yes.

MRS OWENS: Now, what you don't know is whether it was the age knocking you out or the health state, or a bit of both.

MR O'DWYER: I suspect a bit of both. I've become realistic. It scares you when you sit down and write your life story, in a sense - this life story, because I've gone from 35 on top of the world, to 52 almost, and at the bottom of the pile in terms of employment, and it's scary, because it's too late. This is not a dress rehearsal.

MRS OWENS: Yes, that's right.

MR O'DWYER: This is a real deal. So that's a concern, and when I saw the ad in

the Telegraph I guess that's what motivated me to come today.

MS McKENZIE: And you would say without hesitation that finding employment is a problem?

MR O'DWYER: Without any question whatsoever.

MS McKENZIE: As far as the job networks are concerned, you would also say, would you, that there are some real difficulties about them as well?

MR O'DWYER: I think they're a waste of time. My experience - look, I might be being unfair in generalising, but I think to be honest - - -

MS O'DWYER: I think that in a case like Mark's it was all too hard. If it had been a normal person - "normal" as in no problems with their health or not past a certain age, it's an easy person to get employment for. But because he's got this against him, it became too difficult. That's how it made us feel.

MR O'DWYER: It did, and I also know this - I'm realistic to know this: when I sat in the waiting room at the Job Network members, there were people sitting in there who I thought, "You really need help." Do you know what I mean? "You really need help," and they hadn't even - so there is a need for them obviously, because there's people out in the community who do really need help, and they're the ones that I guess they are really there for.

MS McKENZIE: But they ought to be there for you, too.

MR O'DWYER: There should be, to be quite frank with you, somebody who specialises. You see, that gentleman at Centrelink had no understanding of a neurological condition; no understanding whatsoever.

MRS OWENS: It's interesting, because the government has just announced a pilot to provide incentives for certain Centrelink officers to do a job search for people on the disability support pension, as a means of trying to get some people off the disability support pension, who are willing and able to work. I think the government is going to be providing - - -

MR O'DWYER: Incentive for the employer.

MRS OWENS: - - - incentive payments - and to the employer, but also to Job Network - to go out and find jobs. So it will be interesting to see how that pilot - - -

MR O'DWYER: That's happened before.

MRS OWENS: What happened last time?

MR O'DWYER: What happened last time is I didn't get a job.

MRS OWENS: Were you part of one of those programs?

MR O'DWYER: Yes, I was.

MS O'DWYER: That was the one where they said you'd get a job where you were just, like, putting things in envelopes and sealing them.

MR O'DWYER: Yes. That was what it came down to in the end, that they said to me, "Look, Mark, to be realistic you've got" - they said, "You've got to be realistic. You're probably going to end up working in a sheltered" - not a sheltered workshop but a step up from a sheltered workshop situation, and you know, I felt offended again. There are people who have to work in sheltered workshops.

MS McKENZIE: That doesn't take any account of your skills.

MR O'DWYER: No.

MS O'DWYER: That's right. That's what we've found; they seem to ignore that - any of his skills. They seem to think because he's had this disability, he must be affected too.

MR O'DWYER: That's where the judgment comes in.

MS McKENZIE: And also perhaps they just say that any job is good enough.

MR O'DWYER: Yes.

MS O'DWYER: That's right.

MR O'DWYER: And when I've been sick - when I've been at my worst - and I've spent a year and a half in hospital - my disabilities are severe. There's no doubt in the wide world about that - they are severe - but thank God, and please God, they keep passing when they come.

MRS OWENS: And you want to be able to work in the times when you're well.

MR O'DWYER: Yes.

MRS OWENS: And you want enough sympathy from the employer and from Centrelink or whoever you're going through at the moment, so that when you're not

well, account is taken of that.

MR O'DWYER: They cut some slack and say, "Okay, Mark's got to go home" or whatever it may be, or, "Mark's got to be off work for" - see, Mark might need an operation and I'm in hospital for a month - that my job is still there when I come back. You know, I've just read recently about maternity leave and, with great respect, maternity leave has come a long way since I stopped working - maybe there's still further room to go. But why can't they do the same thing for people who are like me - you know, extended sick leave?

MS McKENZIE: Can I ask you about your awareness of the Disability Discrimination Act.

MR O'DWYER: Unaware of it at all. When I picked the Telegraph up and read - actually I forget where it was in the Telegraph - and I just saw the heading and I read it with interest, and then I went to the web site and then I contacted Jenny Flynn, I think.

MS McKENZIE: Yes.

MR O'DWYER: I contacted Jenny Flynn, and I've contacted and spoken to Jenny a number of times prior to today; given me a lot of information, and I was not aware of this Disability Discrimination Act. If I had have been - Jan knows me well enough to know that I - - -

MS McKENZIE: You would have used it.

MR O'DWYER: - - - would have used it, because I'm not one to let - you know, I hate to see injustice to anyone. Now, I'm number one, but if it happens to someone else, the same thing. But if I've got an injustice happening to me, I put my hand up and ask for help and say, "This shouldn't be happening."

MS McKENZIE: The question is, if you don't know about it, then there may be many others who also don't know.

MR O'DWYER: I'm convinced there are others. There have got to be, because I think I'm of reasonable intelligence and there must be people out there who have been more affected than I have been, and they haven't got a chance - and their carers haven't got the opportunity to know, or don't have the information given to them. I know that Centrelink send out these - they've become lately very proactive in sending out little newsletters about what's going on for carers and - mainly carers, isn't it? It's a carer's guide. That's the place where that sort of information should be. A carer's newsletter or something it's called - it's a quarterly.

MS McKENZIE: Yes. One of the things we look at in our draft report is the issue about education in relation to the DDA, both community awareness of it and awareness of it by people with disabilities in particular. So that's why what you say is - - -

MR O'DWYER: I think the perfect vehicle is the Centrelink newsletter.

MS McKENZIE: Yes. I think they're all the questions I wanted to ask.

MRS OWENS: There's only one other issue I'd like to just return to really briefly, and that was what happened to you when you went back into the workforce in your 30s and there was an adjustment done to your superannuation, because one of the other issues we are interested in in this inquiry is the issue of access to superannuation and insurance.

MR O'DWYER: Right.

MRS OWENS: Your comments about what happened to you there I think are somewhat worrying. You did mention the name of the company.

MR O'DWYER: Yes.

MRS OWENS: MLC.

MR O'DWYER: Yes.

MRS OWENS: And I'm unsure how, once you're in a superannuation scheme, they can require you to adjust the terms and conditions once you're in it.

MR O'DWYER: I can explain it. When I retired they said because my condition - they couldn't get a doctor to say that I was totally 100 per cent disabled and unable to go back to work.

MS McKENZIE: Ever?

MR O'DWYER: Ever.

MS McKENZIE: Because they wouldn't know the extent of the illness.

MR O'DWYER: At the initial stage that was the case. However, when I got ill again - anyway, what happened was they then said, "Okay, what we will do with Mr O'Dwyer, we will pay him incrementally parts - - -"

MRS OWENS: This was MLC?

MR O'DWYER: MLC, "We will pay him incrementally." So every six months, or whatever it was, we would receive a payment. During that period - I worked for nothing for three months at Yellow Pages at Milsons Point to prove to them that I could go back to work. Then they got MLC involved and MLC said, "The only way we will let you go back to work is if you were to forfeit" - was it the balance?

MS O'DWYER: Yes.

MR O'DWYER: "The balance of your superannuation," which I did. I had to sign it.

MS O'DWYER: Because I remember Mark and I had a big discussion about it, because it was either he's going to get all this money eventually and stay home doing nothing, or go back to work and try and work his way back up to the level that he was before, which is sort of what we decided would be good for him.

MR O'DWYER: Yes, which is what we - - -

MS O'DWYER: So we had that - we didn't make the decision overnight.

MR O'DWYER: No.

MS O'DWYER: We knew we were forfeiting quite a large sum of money for our retirement.

MR O'DWYER: In fact the general manager and the company secretary were both involved in the conversation at that conference. But, you know, one of the things again that didn't happen, I left - at that time nobody advised us. We had no help.

MS O'DWYER: We had no advisers.

MR O'DWYER: We had no advisers. I don't know if it exists now in the community. If this same thing happened to somebody right now, would somebody from - be it Centrelink or be it a requirement of the company that somebody give advice to someone like us? We didn't know what to do.

MRS OWENS: Of course.

MR O'DWYER: We made the wrong decision, because I got sick again. We didn't know that was going to happen, because at the time I felt well and I started to function. They created a new position for me. They made me training manager, and I started to do training.

MRS OWENS: And then your shunt failed - - -

MR O'DWYER: Then my shunt failed.

MRS OWENS: And then at that point did you then leave that position, because that's the gap in your story - - -

MR O'DWYER: Sorry, it is, yes. I had to leave.

MRS OWENS: So the superannuation that you had built up, what happened to that superannuation? Was what was left preserved or - - -

MR O'DWYER: No, gone, it's theirs.

MS McKENZIE: So you still kept the stuff that had been paid to you.

MR O'DWYER: Yes, we got what we were paid.

MS McKENZIE: And the rest of it you lost.

MR O'DWYER: I lost. They got it. It's theirs.

MS O'DWYER: We never got any more money after that.

MR O'DWYER: Never got anything. Never got another cent.

MS McKENZIE: That's just an extraordinary decision.

MR O'DWYER: That was our understanding of how it was meant to be.

MRS OWENS: It's extraordinary.

MR O'DWYER: I hope it's wrong. I would love to find out that it was wrong, but I don't know how I would go about finding that out. So much time has elapsed.

MS O'DWYER: Yes, because that was in 91.

MR O'DWYER: 91 and 92, and it has changed our life considerably, because we were forced to sell our home. I mentioned that. We were forced to make some pretty serious changes in our life.

MRS OWENS: Yes.

MR O'DWYER: Yes, it has had a huge impact as it would. I know, you know,

that through the passage of time the value of money has changed, the value of things have changed, but the reality is - - -

MS McKENZIE: Still, that would have been a considerable sum.

MR O'DWYER: It was, but I saw it as an - I actually thought - I think I thought I was superman, because I thought I was going to be okay.

MS McKENZIE: But you weren't to know anything else.

MR O'DWYER: No, I was confident. I thought my doctor was a genius, because he saved my life. I might add that Charlie Teo, the well-known Charlie Teo, was the doctor that saved my life. I thought, "Well, I'm right." If it had happened now I would have even been more confident, knowing what he has done.

MRS OWENS: You still shouldn't have to forsake your superannuation entitlements that you built up, and most superannuation policies also have an insurance component, so that if something does go badly wrong you're entitled to an insurance claim - - -

MR O'DWYER: That's what it was. It was the death and disability clause, or whatever they call it. If something goes wrong, as you call it. I think it's called the death and disability clause. That's where I lost, because I didn't - if I had died, Jan would have got the money, but she ended up with me.

MS McKENZIE: I suspect you might think that's still the better - - -

MS O'DWYER: I do. It has gone down on record now.

MS McKENZIE: Too late, it's on transcript.

MRS OWENS: Actually you would like both, wouldn't you?

MS O'DWYER: I would, yes.

MR O'DWYER: It would be nice if life was a bit easier.

MRS OWENS: And you would like your own house too.

MS O'DWYER: Yes.

MR O'DWYER: It would be nice to get that back.

MRS OWENS: Thank you for that.

MR O'DWYER: I hope it has been of some help, and I do hope it helps someone in the future, because it's - - -

MS McKENZIE: It has been of some help, and I also hope that someone else can be helped by this.

MR O'DWYER: Yes.

MS McKENZIE: Thank you both very much.

MS O'DWYER: Thank you.

MR O'DWYER: Thank you.

MRS OWENS: Thank you very much. We will now break and resume at 3.30.

MRS OWENS: The next participant this afternoon is the Marrickville Council. Welcome to our hearings and thank you for coming. What I would like you to do is to each give your name and your position with the council for the transcript.

MR REDMAYNE: Glen Redmayne, Marrickville Council, community worker disability services.

MR FRENCH: Simon French, Marrickville Council, strategic planner.

MR CONNELL: Vince Connell, manager of planning services at Marrickville Council.

MRS OWENS: Thank you. We've got a list of issues that Glen has sent to us two days ago, and I understand you want to make some introductory comments and then we will come back to the issues.

MR CONNELL: Yes. Thank you for the opportunity to speak this afternoon. Just a bit of further context to the points that we have already submitted, I would just like to give a bit of a context to the development issues in the current development assessment issues that we face at Marrickville Council, and then Glen Redmayne would then go into issues that we are beginning to face with the new changes to the BCA and how they relate to DDA issues.

Firstly, just in terms of the context at Marrickville Council - it's an inner city council in Sydney. Its building characteristics are that it's predominantly older building stock. It's quite densely built and populated; a lot of small lots; residential subdivisions; strip shopping centres and older industrial areas. These include many intact varieties of 19th and early 20th century forms which predate the modern accessible building standards. There are also further phases of post-World War II development activity which are greatly intact.

A lot of development that occurs of new buildings is greatly hindered by aircraft noise restrictions, heritage, quite fragmented ownership patterns and, of course, a gentrification pattern that is emerging in our area through an increasing property market. Most of the development that occurs is - roughly 80 to 90 per cent of our development applications involves upgrades of existing single dwelling houses, industrial conversions, shop fitouts and shop top housing.

In terms of our council's approach to the DDA issues, in 1999 we introduced a development control plan number 31, equity of access and mobility. Similar to the recent findings of the commission's draft report review of the DDA, we have experienced that the implementation of accessibility standards for new buildings has been going quite well and it's relatively straightforward with a few issues to be resolved, but we are in fact experiencing major difficulties, more so in the

implementation of these standards for the upgrading and modification of older existing building stock.

We are finding that in many cases the current BCA accessibility standards are almost impossible to achieve in older buildings and that council's assessment officers have been required to make judgment of quite complex development scenarios with a lack of guidance of accepted standards in dealing with the principles of the DDA. Council's DCP also includes a provision for applicants to put forward arguments of unjustifiable hardship as an alternative to complying with the accessibility standards, and we are finding that most applicants in these circumstances are putting forward financial reasons predominantly, and whilst council does have some degree of inhouse expertise in dealing with these matters, and we do have Glen Redmayne, with experience in these issues, participating in panels on development application matters, we are finding that we are dealing with very complex issues and probably feeling a lack of expertise overall in interpreting the bounds of DDA assessment in these types of developments.

We also find with the current New South Wales planning system it is increasingly producing newer development issues such as heritage, insulating, contamination and sustainability performance such as energy and water efficiency standards which are often competing with access and DDA issues, and with no systematic way of balancing these issues we are finding in order to give priority to certain issues there often is a reflection of the current political local community expectations that are often influencing our decision making.

So as an overall assessment of what is happening in our current implementation of the DDA we are finding we are struggling without a lack of clear standards to work to and that we are finding that there is a bit of an issue with equity, particularly in our strip shopping centres in the older building upgrades that tenants are often being asked to implement quite extensive accessibility standards, whereas the owners of these buildings are not being factored into who should be paying for these types of facilities. So a bit of a snapshot of our current assessment, and Glen is now just going to go into the comments that we have made to date and the concerns that we have with the current amendments to the BCA and how they will relate to the DDA issues.

MRS OWENS: Thanks, Vince. Glen.

MR REDMAYNE: Thank you. I guess since we put in our first submission we have obviously had a chance to look at some of the proposals that will obviously have an impact on ourselves and Marrickville and other councils in that respect with the draft premises standard. I guess the first point is just the amount of detail that is required to work through and the point that that makes it rather difficult for all the participants in the development assessment process to interpret and implement and to

understand the full range of impact that that might have. Some of that, I think, is unavoidable given the stage of the process we are in in developing a proposed standard.

However, there is a concern that there will be several documents remaining at the end of the process that people involved in development assessment will still have to wade through; those being certainly the code as it will be aligned with the access to premises standard. There will still be a number of Australian standards related to that. There will be the guidelines on how to interpret the act in regard to the access to premises standard, and there will also be - which is more to the point, I guess, for councils such as ourselves and anyone dealing with existing buildings - the administrative protocol.

The second point is that the proposed reliance on a system of complying with the BCA as a sign-off for compliance with the DDA is a major concern. It highlights a continuing grey area that town planners currently face in applying DDA assessment at the more conceptual development application stage. When a DA is submitted there is often a lack of plan details to adequately assess the full range of BCA and DDA accessibility issues. From my point of view, I guess, certainly issues like changes of level and circulation spaces are two significant issues that would ordinarily be mapped out conceptually at the planning and design end as would be assessed at DA stage.

MRS OWENS: What's DA?

MR REDMAYNE: Development application.

MRS OWENS: Thank you.

MR REDMAYNE: If they don't have the capacity at that point in the process it's extremely unlikely that they will be able to pick them up later on when they have to comply to the building code which is more how to construct it once you have decided what it is that you want to do and that it suits all other planning and zoning requirements.

MS McKENZIE: So just to get this straight in my head, the building code doesn't relate to the development application stage. Is that truly the planning process? Is that right?

MR REDMAYNE: Yes.

MS McKENZIE: And the building code really kicks in once it really is looking at construction?

MR REDMAYNE: Yes.

MR CONNELL: You have to have a basic look at that if the BCA issues - the building and construction issues - at the town planning stage, but it's very much - you try and pick out the obvious inconsistencies with the BCA and try and address those bigger issues, but with the level of detail in plan to assess the BCA requirements really doesn't come till a further stage which is the construction certificate which is all about - as Glen was saying - the real technical details about how to build the building, whereas the town planning development application stage is more - you are really looking at the conceptual level and whilst it has some degree of detail it is not the total degree of detail that often are the actual face of the building application stage or construction certificate stage.

MS McKENZIE: Could you have a situation then where you would have granted a development application because it's at a higher level of generality and once construction gets closer you realise that there are significant BCA breaches and so you would refuse construction - is it a building permit, I assume?

MR CONNELL: It can happen quite often. It's not only, I suppose, BCA technical limits, it's the practicalities of the building once people - and it certainly can be access issues which are highlighted. Until you are getting down to that depth of detail you often don't think of the practicalities of things not working and it's picked out at a later stage and, yes, you do have to potentially revisit the steps that you have been through again to modify that original approval and that, obviously to a developer, is a major cost impost and an inconvenience and it just slows the system down; clogs the system again, yes.

MR REDMAYNE: It's probably highlighted too when you get to that point and you would then start to enter into discussions about what alternatives there might be available to you because the deemed to satisfy conditions, the real detailed technical specs, might not be possible at that stage in the process. So you would enter into looking at, on balance, what are the alternatives that could be provided there, which I don't think that is so much of a problem but in this instance when you have got to deviate from the code that will be a DDA standard you are then entering a further grey area that you would have to make your call on as to whether the alternative solution would be compliant with the sorts of intent of the standard of the code, and to me that is sort of going back to where we are at the moment in many instances.

MS McKENZIE: The standard itself allows for alternatives, doesn't it?

MR REDMAYNE: Yes.

MS McKENZIE: And that has been incorporated into the code, but of course it doesn't apply then.

MRS OWENS: But will the protocol help you with that situation, when the protocol is up and running?

MR REDMAYNE: My understanding of the protocol: one, it isn't mandatory, so it's reliant upon state governments to sign up to the process. There could well be differences across the states but I think there are some in New South Wales that are particular to here because of the way we deal with complaint systems in the planning sector. Also the protocol tends to rely on access panels to resolve those sorts of issues so the scenario, I think, would be if your state signed up to that protocol and if an access panel was chosen to be the avenue by which those sort of alternatives could be assessed, then you would have to refer it to that panel.

Otherwise I would think that you would be in a similar situation to where we are at Marrickville and some other councils where they have existing structures to deal with alternatives inhouse; in effect their own internal access panels. So again you are going back to an area where the assessment of that is based upon - or you don't really have any clear guiding documents to assist you with.

MRS OWENS: But isn't it pretty much the same even now with the BCA because the way the BCA is formulated is you have got a general performance requirement; you have got to have a safe building - something like that. That's not - I've just made that up, and then you have got deem to comply provisions which are all the technical specs, and so if you wanted to have an alternative way of having a safe building wouldn't you have the same problem? In other words, who decides that your alternative solution is going to comply with the BCA? Just putting disability to one side, isn't that still the case in any case?

MR CONNELL: It is, but there does seem to be - it goes back to this grey area that town-planners have in making this judgment at this early stage. That's where we're saying that we try and look at a proposal, try and ensure that a proposal will satisfy the BCA, but we're not 100 per cent sure. What has been suggested for the new draft premises code is that compliance with the BCA is almost - or near to a satisfier of DDA principles.

We're left with this - the campaigners are in a bit of a conundrum because they're saying, "Well, if that's the case, why - isn't it just a kick-off that you comply with the BCA?" But it's not really, because the BCA is more focusing on very technical elements, whereas the DDA, from our understanding, is designed to be looking at much broader social contexts to your decision-making, about whether or not a certain design solution or a building compromise or the imposition of a requirement makes sense from that wider perspective.

MS McKENZIE: So in that sense really, the answer to my question is that with

normal alternatives, under the current BCA, you're still really looking at a set of technical specs, just a different set, whereas with the new disability provisions that are going into the BCA, it's a much greyer area.

MR REDMAYNE: I think that's a fair assessment. I think it's because of the impact that the alternative might have, and I think most approval staff, particularly - and planners, would have a sense of, if there's a different or alternative engineering solution, what the impact would be. It's not so easy to determine what an alternative solution would have in regard to human rights or social interaction. So again, there's a level of hesitancy there, of saying, "I'm comfortable making this call."

MS McKENZIE: What's the way out? I mean, is there any way this - even though the situation, as far as I understand through the new buildings point of view, is better, there is still a substantial problem here.

MR CONNELL: My impression is that you're being asked to - with development applications, to address two things specifically - the DDA and the BCA. I think if you had a DDA standard - and it's saying "these standards", whether they derive from the BCA, but they're saying, "These standards will satisfy the DDA," then I think that would eliminate the confusion that I suppose town-planners face in what is an unquantifiable area at the moment. It's more, I suppose, an effort made by the officers to be more sensitive to those issues.

Our council in particular has strong corporate and strategic direction in these areas, but I can imagine other councils who don't have that direction would be more than willing to say, "Oh, the new provisions, they just say you have to - to sign off on the DDA you just have to comply with the BCA. Let's just tick it off that way," and you're missing the whole point then of the DDA and its wider implications in assessment.

MR REDMAYNE: And I guess that's assuming that those technical specs can actually be achieved in an older structure. I mean, I think that also from our experience that even - although, as you mentioned, the current Building Code requirements are very difficult to achieve in a lot of the existing building stock.

MS McKENZIE: So you're going to be more and more looking for alternatives, and then you're back into - - -

MR REDMAYNE: Yes. One of the mechanisms we're trialing, and I think we've had some success with, if it's clear that the proposal wouldn't meet what you would regard as acceptable standards in regard to accessibility in a physical sense, is we've looked to the operator or the applicant in the DDA process and said, "Well, depending on the nature and function of the usage that you're proposing, we could look at some operational measures or alternatives that, if we have an agreement with

you on in regard to some sort of management plan where they're mapped out, if that's seen to be a workable solution that wouldn't require unjustifiable hardship to convert your whole building, then we would be prepared to sign off on that and link that to your conditions of consent."

MRS OWENS: So what do you mean by "management plan" - having a strategy to deal with changes over time?

MR REDMAYNE: That's some of it, but we recognise that you can really only hold that to the consent that is operating on that operation, and it might not necessarily be a building but it's, I guess, that operator - their business, over whatever time the consent is valid for. So where that has come from, I guess, is looking at the action plan process and modifying that and saying, "Well, what is it that you could achieve from standards such as the Building Code or Australian standards, or perhaps in the future disability standards?"

Those that will be significantly difficult or impossible to achieve without enormous resources, how then can you create a situation whereby the impact of that is lessened so that the discrimination - or the indirect discrimination is lessened. We would work with the applicant to try and map out a reasonable approach to that, and as I say, we would condition that. It's somewhere similar to what we would do in some other systems, I guess, or certainly there's other elements of the process where you would require a management plan to detail how it is that that operation is going to address other concerns - they might be environmental ones, they might be other social aspects, they might be other safety aspects.

MR CONNELL: We do similar management plans with, say, hotel operating hours, brothels, where there's particularly sensitive land use issues where you're close to residential areas and you do need a very strong management policy - we tie that to the development consent, and that's what we're similarly suggesting.

MRS OWENS: Does that work well?

MR CONNELL: It does, but we haven't tested this - there's a limitation for the access imposition because, as we're saying, it's limited to one operator and if that operator goes bust - and the nature of small business is that they come and go, and we've debated this issue about, well, if we're looking at the longer-term upgrading of our older buildings, should this be - the access standards and costs be imposed on shorter-term rental leaseholders as opposed to the longer-term upgrade responsibilities of the owner of a property. We haven't gone down that track.

In our assessment of when, say, for example, someone wants to change the use of the shop, we're always very sensitive from the point of a small business owner - they have quite a lot of financial obligations there - and we have had pressures from

our main street and chambers of commerce and council as well, that we don't want to be creating a substantial amount of impost in smaller business owners because it could affect their viability. So we try, in the application, to pick out those things which - say, the entrance to shops - the bare minimum circulation spaces, where it can be accommodated without extensive cost - we try and go down that path.

But that's a shorter-term solution, which we're happy to keep promoting, but that has its limitations and we have been considering should we be looking at longer-term schemes for building owners where we'd say that - say a 10-year plan, and, "These are the types of standards we want achieved over a certain period of time." That will have its political sensitivities as well.

MRS OWENS: Could you do that now under the Local Government Act in this state?

MR CONNELL: Not that I'm aware. I think it would have to be an entered-into agreement from business owners, I would suggest - a contract or some form of agreement with the council. I'm not aware of any legislative way of making building owners upgrade their buildings to certain accessibility standards.

MS McKENZIE: And you'd also have to have that agreement running with the land, in the sense that if the owner sold the premises during that time, the agreement would have to bind the next owner; it would run with the land.

MR CONNELL: That's correct.

MS McKENZIE: There are, from memory - this is going back into my drafting past now - certainly in Victoria - I don't know whether there are similar provisions in New South Wales in the planning legislation - which permit agreements of that kind to be entered into between the planning authority and the owner, but they only can relate to a certain numbers of things - environmental matters is one, and vegetation and things like that, in Victoria.

MR CONNELL: I'm not aware of that in New South Wales, no. It's just basically a development approval for five years and if it expires, it expires.

MRS OWENS: Glen, you were halfway through your initial presentation. I don't know whether we got to the end of that. Did we?

MR REDMAYNE: No, but it's okay because I think - - -

MS McKENZIE: We just wafted off on a - - -

MR REDMAYNE: No, they're important points and I think they help to capture

some of the difficulties we're experiencing but also some of the potentials to explore for solutions as well. Leading into that, I guess one of the other issues for us regarding the proposed standard as it is, is that it doesn't cover elements that are intrinsic to a building's use. I guess we mentioned that a little in the last discussion. Things like furniture and fittings or how the premises are managed or operated is not something that the proposed standard will address, and that I can see as being potentially problematic.

There are some avenues, I guess, within planning law that you can address that and some of them we've mentioned by the way of having an array of management plans as Vince mentioned with, like, waste management or some other particularly sensitive uses, like brothels, et cetera, we would apply that same logic, but that would be separate to the construction and safety elements that would be required from the Building Code.

It has also allowed us to explore some other avenues within what we're referring to as access management plans, that can lessen the likelihood of a complaint, improve the accessibility of the service being proposed, but not unduly impose renovations or alterations on the operator, as we mentioned, but which would be distinct from the building owner.

Other parts of the built environment aren't covered by the proposed standard at the moment as well, but remain an issue to councils. They're things such as footpaths, parks and recreational space, and also specific event issues like when a festival, a market, an event of some type is proposed of a temporary nature, and there's concerns of how the new standard would operate or cover those elements.

MR CONNELL: Just to give context to that, our council - currently public domains and development that occurs in the public domain is fairly well in the control of our engineers and our engineers - say, for example, if they're building a new plaza or they're doing work in a park, they would aspire to best-practice Australian standards, but I don't necessarily think that their actions are linked to the DDA per se. I think all best efforts are there to ensure good accessibility in public spaces, but as far as I'm aware there's no linkages then to DDA considerations.

MR REDMAYNE: I know the parks section particularly have tried on a number of occasions to try and find adequate guidance for the sorts of things that they would be doing in landscaping and in creating or renovating children's playgrounds et cetera, but have found it extremely difficult to find anything that would give them a clear-cut way of moving forward other than to basically brainstorm some ideas with other people in the council, and put it out, talk to residents and evaluate it over time.

I guess I'm just raising those sorts of things because in many ways they become as important as the actual building, because they are part of the lifestyle of the people

that live in that community and they don't necessarily see that delineation immediately between - well, an access to premises standard, that's only referring to new buildings in this instance. They see the whole built environment and we would like to see a little more work done on where those aspects of access to premises, or the built environment I should say, are moving, so that we can get some clearer guidance to link those various - - -

MR CONNELL: The practical example is when, say, a council is refurbishing its footpaths in a shopping strip, and in aspiring to have the best for the private development of the shops, that there is adequate access into the shops. But the marrying of the footpath construction and the appropriate levels don't always, I think, take place, and I think that's something where there should be interaction of access issues between the public domain and the private developers.

MRS OWENS: So in terms of the act that we're reviewing, is this really implying that the act, or the wording in the act, needs to change to talk about the access to the premises and the built environment? Is there some way that this could be addressed in the act itself or is there some other clause - I'm probably asking Cate this - in the act that would cover the built environment, or would it have to be spelt out? Then once you spell it out, if it's not spelt out now then the potential - we've recommended in our report that the standards should be able to be established in any area covered by the act, in which case it could be possible to develop standards for the more general built environment.

MS McKENZIE: Yes, the answer is I'm not sure. There may be some provisions in the act that talk about places which the public use, but you wouldn't immediately think of a footpath as falling within that, but certainly that might be something we would want to clarify, because it doesn't make sense to have inaccessible footpaths; inaccessible buildings if you can't get to your building because the footpath is not accessible.

MRS OWENS: We'll go back and look at the wording of the act. If that needs to be clarified, then we will try and do - - -

MR CONNELL: I think the public domain is administered under separate acts, but there could be something within the draft premises code that says you should consider how the interface, you know, in the private element - how you adequately deal with the access issues.

MS McKENZIE: But there needs to be power to make a standard like that, so you're right. We will look and see if the power is there.

MRS OWENS: It mightn't just be the interface you might be interested in. I think of the interface as where the building and say the footpath meet, but you might want

to make sure the footpaths are appropriate, the gutters are appropriate, the playgrounds are appropriate and appropriately developed. So maybe there's a way of getting more clarity in the act and clearer standards that could reflect that, because I think you've just raised something that sounds quite important.

MS McKENZIE: Yes, that's a really interesting point.

MRS OWENS: Glen, we will go back to you again. I know he has got a list here in front of him you see.

MR REDMAYNE: Yes, I've just got to find where I am with it. I might need to backtrack a little here.

MRS OWENS: That's fine.

MR REDMAYNE: Yes, we would say that we're supportive of the provision in the draft standard for seeking alternative solutions. I don't see that that's problematic of itself. It's just the manner in which people are vested with the authority to assess that and certainly the guidance under which they would formulate those views would be what we would think requires some attention. Obviously in built-up areas, where most of the built structures already exist, then alternative solutions are going to be commonplace in the nature of the work, as opposed to simply the deem-to-satisfy provisions. In that regard, I guess having a benchmark that the disability standards would provide is important; yet, as mentioned, it would still be difficult to work out exactly how to translate those and their intended outcome into situations that don't easily lend themselves to the full weight of those provisions.

Another aspect that could further complicate that assessment is the measurement of unjustifiable hardship claims within that. We would suggest that private certifiers will also struggle to determine compliance without a clearer understanding of agreed benchmarks within that context. I think I would say generally that trying to make an assessment of unjustifiable hardship is a difficulty for councils that take on a responsibility to look into those issues and, from my experience, particularly the element where you're trying to assess the applicant - well, in this case the applicant's capacity to afford the sorts of changes that would be required - and there is no really easy way to do that. I'm confident that councils don't really have the authority to require that sort of information of people, so you tend to try and - while being consistent in your application it's inevitable that some assumptions are made within that framework that I think would be better if there was some level of guidance provided through the standards or some other mechanism.

MRS OWENS: It's interesting, because a point that Vince made earlier was that people are using the financial reasons as their basis for arguing unjustifiable hardship, and I'm wondering whether it's financial reasons because they have limited

resources, or it's financial reasons because what they are being required to do, particularly for these existing buildings, is really just going to be so expensive. It's probably a bit of both.

MR REDMAYNE: Yes. Again, from my experience, I think when we started this process you would get an unjustifiable hardship claim on just about everything, because we were actually asking for things like entry into a building or adequate facilities within it. Nowadays I don't find that happening so much. More so that it is related to cost issues for access to probably second-storey buildings in some instances, and quite often for accessible toilets to be provided in situations, particularly when there might only be one person working in the premises and it's situated such that you would not expect a lot of people coming through that space from the public. Again then, it's difficult to assess whether the person putting in the application, or the claim, in that instance actually has a capacity to afford that or not. It's difficult to make, but we would generally look at what is required, how important that is in the scheme of the operation and the public's need to use that.

MRS OWENS: So you would be bringing a whole lot of factors to bear in making that decision.

MR REDMAYNE: Yes.

MRS OWENS: Using a bit of judgment and saying, "Well, it's not necessary in this instance, because not many members of the public are ever going to come this way."

MR REDMAYNE: Yes. If it can be established that the cost to do that would be quite substantial in relation to the scope of that development at that point in time.

MS McKENZIE: It's pretty confusing, and perhaps it's my own confusion, but the way I see it is that you've got - it depends on which areas you're talking about. You're talking about unjustifiable hardship in the context of those areas where the standard doesn't apply, because it's an existing building and your fit-out doesn't classify as a major renovation, which would make the bits of the disability standards that have gone into the building code apply, that's one area where anything you require a developer to do might - - -

MR REDMAYNE: I guess where we're at is that at any point where we're looking at a development application it triggers our development control plan, which at the moment requires the full provisions of our DCP which relate to the building code conditions and probably go a little further than that. But in the future what I would see in that situation is that they would just relate to the disability standards. The trigger is more so the development application than whether it's a new or existing structure, so you're still left with a dilemma of trying to negotiate how to apply these standards in relation to an existing structure.

MS McKENZIE: So if it's a major renovation you try to apply the standards or, if you couldn't do that, some alternative resolution.

MR CONNELL: I suppose there's the difficulties in the marrying of the town planning ways of doing things and the building ways.

MS McKENZIE: That's right.

MR CONNELL: We acknowledge the BCAs and ways of interpreting what is a major alteration and the like. We were arguing, in creating our new town planning controls, for weeks and months about what is a major alteration, what's a minor addition, those sorts of things. We just said, "Look, all changes of uses to commercial buildings, you've got to provide the full extent of main accessibility provisions such as access into the commercial premises, potentially the circulation space and a toilet facility." But then we put an "out" clause to say, "Look, through unjustifiable hardship, if you can mount a case to say that through those reasons you cannot achieve those full facilities, then we won't go to the full sort of imposition of that." As Glen was saying, we try and apply a bit of commonsense to different types of applications. For example, if it's just a fashion shop we are not going to go the full hog on toilet facilities and the like, whereas if it's a restaurant we certainly will, where there is an expectation that there will be a high degree of use by the public in using that facility.

MS McKENZIE: You see, the unjustifiable hardship is an interesting thing in that case, and I see why you have to mention it, because that's a case where really the standard wouldn't apply as a change of use. So the main provisions of the DDA would apply and unjustifiable hardship would relate to those, but the strange thing about that is that normally with the DDA unjustifiable hardship would arise when a complaint is made.

MR CONNELL: Yes, we artificially took it to our town planning assessment stage.

MS McKENZIE: You sort of artificially - yes, it's almost like you're doing it at a way earlier stage and you're quite a different person looking at it as well.

MR CONNELL: Yes. I suppose it was trying to pre-empt DDA issues. It was probably the only way we could really, in a meaningful way in the town planning early assessment, get people to start thinking about the implications, the legal implications, of the DDA. We felt that we were taking a more proactive step in eliminating, or minimising, our liability by trying to get people to address those issues earlier rather than down the track.

MR REDMAYNE: Do you want to talk about the building upgrade plans? Was that something that you particularly focussed on?

MR FRENCH: Yes. The protocol document which has been released refers to building upgrade plans, and I think the idea of the building upgrade plan in some ways assumes that a building will be owned by the same person for an extended period of time, so that if someone can't afford something now they might be able to afford to do improvements over a period of some years.

MRS OWENS: Yes.

MR FRENCH: And of course if the building owner or the tenant changes then it makes those building upgrade issues much more complicated. I suppose if the owner of the building changes then it might, in some sense, be necessary to create a new building upgrade plan to suit the capacity of that new owner to upgrade the building. Another issue which we considered was that because a building upgrade plan might detail things which happened over such a long period of time it could become quite difficult for a council to monitor compliance with that building upgrade plan.

MRS OWENS: I was going to ask you about that. How would you actually - - -

MR FRENCH: Yes, so that if a building upgrade plan says certain things are to occur, say 10 years from now, what happens if in 10 years' time those things haven't been done? I just don't know what kind of action council would take.

MRS OWENS: How does council then monitor changes in tenancies or changing owners? There's a big administrative cost in doing all of that.

MR REDMAYNE: I guess where we are going with the idea of an access management plan, that we've termed - and we are playing with that idea at Marrickville - is because it's linked to a single operation or a consent. That life cycle is somewhat different in that it's separate to the building's life cycle but it's related to that type of use. Presuming the operator changed, but they were working within the same consent, that management plan would still be operational and the conditions of it would still apply. But if a new operator came in that was significantly different then they would have to lodge another development application at any rate. So you could then look, at that point in time, as to how relevant that plan was or where it was up to given the newly proposed operation.

The idea, from what I understand, of building upgrade plans relates more to the actual construction or the improvements to the physical environment without taking the elements that make it accessible fully. By that I mean it doesn't really consider what's being done within that space or how accessible that environment will in reality be. It's only considering the relationship between that building and the

technical aspects of the code. I think that's potentially a limitation.

MS McKENZIE: That's quite a limited thing, limiting.

MR REDMAYNE: Yes. As Simon says, it would seem to be particularly problematic to try and monitor and evaluate and keep alive in any meaningful way. Another point we would like to raise concerns the idea of the access panels as proposed in the protocol and just a concern about the processing times of development applications that might occur in that instance.

I raise that because in the situation where most development applications in this instance would relate to alternatives or existing buildings, it's quite likely they would then have to be referred to an access panel. I would assume there are quite significant resources and time delays that would be experienced as a result. At the moment I think they are only talking about "an access panel per state," which I would think would be quite difficult to cope with the potential load.

To give an example, we have a panel meeting looking at difficult development applications once a week. My involvement in that relates specifically to DDA issues. That could easily take several hours a week just in my own time. I think if you multiply that by the councils across New South Wales, and think about the staff hours involved in that, that could have significant delay times to all councils but also to residents, to people putting in the applications and that industry per se. So I think that's something that probably needs a bit more looking into to see how that could actually work. It could be that that's one of the major factors that would be considered before a state would agree to sign up to such a protocol, unless there were alternatives provided.

MS McKENZIE: Because it's resource-intensive.

MR REDMAYNE: Yes.

MRS OWENS: But with your own access panel - council's access panels that you've called access panels - they are in existence now.

MR CONNELL: With the informal thing - - -

MRS OWENS: They are informal but there wouldn't be any delays in those sorts of processes at the moment.

MR REDMAYNE: I guess every time you add a new issue to be assessed it potentially adds a little to the assessment time. That's an existing system that we have within council, and I suspect most councils have some form of assessment for particularly difficult DAs that aren't just going to go straight through.

MR CONNELL: I think some councils have specific - our council has an access community, which is a broader community representation. Some councils put those types of difficult DDA issues to those committees as well, that we, at our council, just try and keep it as an internal issue.

MR REDMAYNE: Some of the problems you experience with that is that it's a community-based committee and the people around it, while they might have some level of knowledge, you can't guarantee that they have expertise in access to that level and certainly not other planning and building issues. It can be a bit problematic to rely on them in that setting. What we would be saying is that there's the capacity within most councils, depending on size, I guess, of creating similar structures. That might be an easier mechanism to go through, providing you can still achieve some level of consistency in outcomes.

MRS OWENS: Would you still set up a state-based access panel and have a choice for people about which process they go through or would this be in lieu of having a single state-based panel?

MR REDMAYNE: I don't necessarily think that having a state-based panel is a bad idea of itself and it could certainly be important for major developments of a significant - like regional importance. If the reliance is on that one panel to have all matters for alternative solutions to be referred to, I can see that that would create an extensive backlog and that the other - - -

MRS OWENS: It would get bogged down.

MR REDMAYNE: Yes. So probably giving people the option of one or the other might be a better mechanism.

MR FRENCH: I think the protocol document may in fact allow for more than one access panel per state.

MS McKENZIE: It's pretty vague about that issue, I think.

MR FRENCH: Yes.

MRS OWENS: Even if there was more than one the potential is there for quite a lot of things to go to the access panel, to the extent that the protocol is used and alternative approaches are used.

MR FRENCH: Yes. I think the protocol might suggest that all building upgrade plans go to one of these access panels.

MRS OWENS: That's an awful lot of work.

MR FRENCH: Yes, especially a council like Marrickville, where so many of the applications relate to existing buildings. We are potentially receiving many building upgrade plans and if all of those then had to be referred to an external access panel then - - -

MS McKENZIE: That means the whole process is extended.

MR REDMAYNE: Yes, because I guess you can't just refer the whole DA to the state panel. You would be waiting on their advice regarding the access element to come back so that you could finish processing that DA.

MS McKENZIE: There could be significant delays.

MR REDMAYNE: Yes. The final point I'd raise is regarding consultation. I think we mentioned this earlier in our original submission as well.

MRS OWENS: Yes, you did.

MR REDMAYNE: We still have significant concerns related to the consultation that's led to the development of these standards in particular, or draft standards. From our experience local government, in New South Wales particularly, seems to have had a very limited input into the process. Although councils deal with these issues on a daily basis many still seem to be unaware that this is occurring or certainly haven't mentioned that they've had any input into the process.

It's suggested that local government has likely been under-represented generally in this regard and that they should be more closely consulted with in the future in regard to the further development of this standard and parts that might lead onto it, if for no other reason than I think that local government is particularly well placed to provide a practical perspective about its implementation than some of the other stake-holders have the capacity to be, simply because of their position.

MRS OWENS: Do you know if any local government representation was used at all, or was local government excluded from the consultation process?

MR REDMAYNE: It's hard to determine who was involved and to what degree and at what level of decision making. I am aware that the Australian Local Government Association had a level of involvement but I'm unsure as to what that level was or at what point. I am unsure as to how they have consulted with their respective state bodies or how the state bodies have then coordinated or collected input from the various councils in each state as well.

MRS OWENS: You are saying that your council wasn't given an opportunity to provide input into the process?

MR REDMAYNE: No.

MRS OWENS: Either through your state body or through the Australian Local Government Association. It will be interesting to see how this all pans out. The standards are almost complete, aren't they, at this stage, as is the protocol? I think the provision is for the standards to be revised on a five-yearly basis, which means if there are problems it's going to be an awful long time before it's revisited, unless we suggest otherwise. That's another option - - -

MS McKENZIE: It may well be an option.

MRS OWENS: - - - these things through.

MR REDMAYNE: Yes.

MRS OWENS: Given the potential which I think you are implying for some teething problems, maybe the standards need to be reviewed earlier. Another issue that was raised with us was the potential for the building code to be changed to reflect the changing circumstances and then what that means for the standard.

MR REDMAYNE: Yes. From what I understand the building code can change much more rapidly than what a standard could.

MS McKENZIE: It does. It's six-monthly or yearly. I can't now remember which.

MR REDMAYNE: Yes.

MS McKENZIE: It was six-monthly at one stage, and it became yearly, or the other way around.

MR REDMAYNE: Yes. I'm not sure how you ensure consistency in that, other than not changing the part that relates to access.

MS McKENZIE: The access provisions, yes.

MR REDMAYNE: I'm not sure of this but it's possible, I guess, that if other parts change more rapidly then they might impact on the access-to-premises element within it.

MS McKENZIE: At least there needs to be some quick mechanism, not perhaps to rewrite whole swathes of the access provisions but some quick mechanism to enable

the standards simply to be brought in line. Even if the wording, for example, of the BCA changes, if they have some new definition. Even if it's just a question of a drafting change, so that the standards can be brought in line with that change.

MR REDMAYNE: I guess in summary we would say that we don't have large issues with the proposed changes to the Building Code that will bring it further in line or will bring it in line with the DDA. It's more about the mechanisms that will be put in place to assist that implementation and the relationship between how that's applied with existing buildings which still has significant concerns for us.

MS McKENZIE: Yes.

MRS OWENS: I know you've got a parking - - -

MR CONNELL: I've just ducked down.

MRS OWENS: We hope you haven't got a parking fine.

MR CONNELL: No, that's all sorted.

MS McKENZIE: The other thing that we have suggested in our report is that the unjustifiable hardship defence be able to be used across the act and as the standard is written at the moment there's no unjustifiable hardship defence applicable for new buildings.

MR REDMAYNE: New buildings, yes.

MS McKENZIE: Do you support that approach?

MR REDMAYNE: Yes. We've actually got a clause in our own development control plan that says we won't consider unjustifiable hardship issues for new proposals, and that's based on the idea that at the point where it's fully conceptual there shouldn't be a need to enter into that argument, but we do consider it relevant in cases of existing structures because the dynamics of that are simply different and require a level of alternative to be entered.

MS McKENZIE: So your argument is, as far as new buildings are concerned, that it should be possible to minimise the cost, by designing the new building in such a way.

MR CONNELL: I think it's also an economic argument as well, that we believe that developers should be able to absorb the costs of whatever changes - even if it is a difficult site and we have found that Marrickville, our particular council area, doesn't have too many extreme geographical limitations and that difficult sites - that the

developer of a new development fully enters into a development site knowing that there are these regulations to adhere to, and there should be no excuse for not keeping to those. So we are definitely harder on bigger developments, as we are on other issues such as energy and water efficiency. We believe they are all costs which are of a greater value to the wider community - sorry, with benefits for the wider community but the cost to be borne by the development.

MR REDMAYNE: I don't think we've had any responses back from that from developers saying that they feel that that is unreasonable. I think for the most part they've understood the logic of that and just gotten on with it.

MRS OWENS: What about a developer who wants to build, say, a very little shopping centre that might apply in your area; that some very small structure which might be a multistorey structure but not very big; just a small shop - I mean, potentially they would have to put a lift in which is going to cost. I'm just trying to think of something that is not a very - we are not talking about a very expensive development.

MR REDMAYNE: There have been instances, certainly with industrial buildings, in Marrickville that have been proposed from new with a mezzanine area that had office situations and because you can't assume what the use of that is going to be at that point, we've required them to make that accessible and we have discussed with them ways in which they could do that and given them some options, but again with new buildings we have generally felt that the cost can be absorbed in different ways, depending on how you actually design it at that conceptual level.

MRS OWENS: So do some smart thinking up front and you should be able to overcome any problems.

MR REDMAYNE: Yes, accommodate it.

MR CONNELL: Of course in existing residences there are greater constraints and we acknowledge that and, I suppose, accept the fact that applying building standards for new developments on existing buildings to the theory, to the letter of the law, is probably a bit unreasonable. We just encourage more creative solutions in the existing developments in those cases.

MRS OWENS: Okay.

MS McKENZIE: I think that's all my questions.

MRS OWENS: As we have been going through your presentations I have been ticking off the list that you gave us and I think we have covered everything.

MS McKENZIE: It's a really good, helpful solution for us.

MRS OWENS: I think we have covered all the things we wanted to do. I don't know whether Simon wanted to say anything else, or do you think your colleagues have done it all for you?

MR FRENCH: I think my colleagues have done it all for me.

MRS OWENS: Okay. Is there anything else you wanted to raise with us?

MR FRENCH: I'm fine. No, that's great.

MRS OWENS: We don't want to get parking fines, so that concludes today's proceedings, and thank you for attending. I now adjourn the proceedings to tomorrow morning and we will be commencing at 10 am. Thank you.

MR CONNELL: Thank you.

AT 5.02 PM THE INQUIRY WAS ADJOURNED UNTIL
FRIDAY, 20 FEBRUARY 2004

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