JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

INQUIRY INTO COURT FEES

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH,
WEDNESDAY, 26 JUNE 2012

Members

Mr P. Abetz (Chair)
Hon Ljiljanna Ravlich (Deputy Chair)
Mr G.M. Castrilli
Hon Robin Chapple
Hon Peter Katsambanis
Hon Mark Lewis
Ms S.F. McGurk
Mr P.B. Watson

Hearing commenced at 10.08 am

MITCHELL, MR ROBERT
Deputy State Solicitor, State Solicitor's Office, sworn and examined:

MISCHIN, HON MICHAEL, MLC
Member for North Metropolitan Region; Attorney General; Minister for Commerce, examined:

The CHAIR: Before we start, I welcome you and introduce the people around the table. You are able to read better than I from this side, but we have Hon Simone McGurk, Hon Ljiljanna Ravlich, Hon Peter Katsambanis, Hon Robin Chapple, myself Peter Abetz, Hon Mark Lewis, John Castrilli, Peter Watson and staff member Steve Hales.

On behalf of the committee, I welcome you to the meeting.

[Witness took the affirmation.]

The CHAIR: You have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Mr Mitchell: I have, yes.

The CHAIR: If you do not understand it, probably no one else will!

Hon MICHAEL MISCHIN: It has been indicated to me that I do not need to sign a witness document.

The CHAIR: Thank you. I am new to this.

Hon MICHAEL MISCHIN: As a member of the house, I have certain obligations in respect of committees.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them. Ensure that you do not cover them with papers or make a noise near them.

Even though this is a private hearing, you should note that the committee retains the power to publish any private evidence. The Legislative Council may also authorise publication. This means that your private evidence may become public. Please note that you should not publish or disclose any private evidence to any other person at any time unless the committee or the Legislative Council has already publicly released the evidence. I advise you that premature publication of private evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would you like to make an opening statement to the committee?

Hon MICHAEL MISCHIN: Not for my part, no.

Mr Mitchell: I might explain my position and outline the reasoning that led others in my office and me to the view that the regulations currently before the committee are valid. I preface my remarks with a comment I made last time I appeared before this committee—I think a number of you were not present at that time—and that is the role of the State Solicitor's Office when it provides advice to departments which it is aware that will be placed before this committee or any parliamentary committee and relied on by that committee. The function of a lawyer can be broadly divided into two—advice and advocacy. When a lawyer acts as an advocate they are putting a position that advances the interests of their client, which does not necessarily reflect their own view of the

matter. Indeed, in court a barrister should not put a submission in terms that suggest it is his opinion. When a lawyer gives advice, and certainly when somebody from the State Solicitor's Office gives advice, they are expressing their own view of the law as best they can, and it is important to appreciate that distinction.

I raise that point because I think there have been some occasions in the past when I have read reports of the committee and wondered whether the authors of the report might have been under the impression I was advocating a position for the executive government rather than expressing my own view. I want to make it clear to the committee that certainly I, and I know others who provide advice in this area, take very seriously the responsibility of providing accurate, comprehensive, reliable advice to the committee.

There have been occasions from time to time when we have taken the view that regulations may be unauthorised. The fines and enforcement fees were an example of that, where I expressed a view that I did not think that they were authorised and the committee ended up agreeing with that, and we saw legislation pass the Parliament last year to authorise those fees.

I note that at some points in the past former members of the committee have disagreed with advice that my office and the Solicitor General have provided as to the appropriate question to be asked when determining whether fees were or were not valid. The committee's report number 32 reflects that difference of opinion. For the benefit of those who were not a party to that process, the difference relates to the question to be asked, and it is this. The view adopted by the committee in report number 32 was that the essential question to be asked was whether the impost could be regarded as a tax. In reaching that view the committee and those advising it relied on cases that deal with section 55 of the commonwealth Constitution, which imposes certain restrictions on what the commonwealth Parliament can do. If you pass a law imposing taxation, the bill can only deal with matters associated with taxation. If you go beyond that, you have an invalid law. History has shown that the presence of that provision has not stopped the commonwealth Parliament from time to time passing laws which the courts have regarded as imposing taxes, and there are a number of examples which could be given of that occurring.

When we approach the question in this state it is important to appreciate a difference between the commonwealth constitutional context and that which applies in the state. We have a provision in terms very similar to section 55 of the commonwealth Constitution—that is, section 46 of our Constitution Act 1899—but it is a very different character. It provides for a rule of internal parliamentary procedure and does not result in invalidity of the law. In most cases, therefore, the question that we have to ask in determining validity will not be whether the law imposes a tax, but whether the regulation is authorised by the enabling legislation. So that essentially reflects an historical difference of approach as to the question that is asked. Sometimes that will lead to the same outcome and, certainly, I and others have taken the view that where reference is simply to a fee being charged for something—court fees are a good example—that will not authorise revenue-generating activity. So it will be necessary to see that the fees allow for recoupment of some portion of the cost of administering the legislation under which the fee is imposed.

There is nothing I can see in the Supreme Court Act, for example, which requires a greater division of the costs being imposed, so long as there has been a reasonable estimate of the costs and that estimate is less than the estimated revenue thought to be generated by the fee, there is some rational basis for the allocation of costs and costs are not so high as to impede access to justice.

In some cases the difference of approach has produced different answers, reflected in report 32, where there were some fees—probate fees are an example where the Probate Office was recovering more than it cost to run the Probate Office. The government has, as I understand, addressed those concerns expressed in report 32 in relation to over-recovery of fees and reduced those fees so that, as I am advised by the administrative branch of the department, none of the fees which are amended by these regulations come close to over-recovering the cost of administering the division to which

they relate. So I suggest even if one adopts the committee's approach in relation to report 32, it cannot be said any of these fees—which in the Supreme Court, for example, is around 25 to 30 per cent of cost recovery for the fees imposed in that area and in the State Administrative Tribunal is around two to four per cent. So you would perhaps apply a greater level of scrutiny if what was being attempted was 100 per cent cost recovery to see that the costs were properly accounted for; but where you are at that level of 20 or 30 per cent, there is a good margin for error before you move into the territory of invalidity.

[10.20 am]

Can I give an example that derives from the principal case in this area? It is the challenge by airlines in around 2002 of fees for landing and navigating aircraft. There were two levels of fee. One was for a passenger aircraft, which was charged a higher rate, and the other was for a general aviation or cargo aircraft, which was charged a lower rate. But they were charged the same rate whether they landed in Sydney or Broome or any other airport in the country. The airlines' complaint was, firstly, that it does not cost any more to land one of their planes at Sydney airport than it does to land a cargo aircraft; and, secondly, the cost per landing at Sydney airport is much less than, for example, at Broome Airport, where there are fewer landings and therefore a higher cost. So applying the stricter test that applies in the commonwealth sphere, they said that is invalid. The Full Federal Court initially agreed with them, but the High Court did not and held, in that statutory context at least, that it was enough that there was a reasonable estimation of costs and allocation of that cost, including by reference to capacity to pay, which might explain the difference between passenger aircraft and other types of aircraft.

The CHAIR: If we can move to questions, does the department have a written policy that details its approach to cost recovery of services? Does it have a written policy for that?

Mr Mitchell: I understand it does, and it is in the annual report.

The CHAIR: Could you briefly outline for us how that policy operates and whether the minister at some stage has officially approved that policy? To save time, perhaps you could provide that policy as supplementary information.

Mr Mitchell: I have the policy here. It is referred to as the pricing policy of services, and it is annexed to the department's annual report at page 112. It talks about how the department aims to strike an appropriate balance between access to justice, incentives to settle and user-pays contributions; that a staged civil fee structure is used, whereby users of the court system make contributions towards the cost as they progress through the cost system, which encourages matters to settle; and, in this way, the pricing structure aims to regulate demand and discourage frivolous use of the civil court system, and this must be balanced against the need to ensure access to justice is not compromised by making it prohibitively expensive. There is a review each year against those three criteria. That review includes a comparison with fees charged in other state jurisdictions. It then notes that on several occasions, fees have been increased in line with the CPI, with some assessment of those costs.

Hon MICHAEL MISCHIN: It also takes into account, if I might add, the hierarchy of tribunals, because the majority of low-level work is dealt with at the Magistrates Court level rather than the District Court and Supreme Court levels, and we try to keep some reflection of that hierarchy of courts so that fees and charges are significantly lower at the lower levels of the court system than they are at the higher levels of the system, in the same way as magistrates are paid lower rates than Supreme Court judges.

Hon LJILJANNA RAVLICH: If I can get some clarification, is there an actual policy, or is it the policy that is contained in the annual report?

Mr Mitchell: As I understand it, the policy document from the department is contained in the annual report. That sets out what the policy is.

Hon MICHAEL MISCHIN: It is based on the Treasurer's guidelines back in 2008, I think.

Mr Mitchell: Certainly the department's instructions to me are that it applies the Treasurer's guidelines in formulating the fees and allocating costs.

The CHAIR: Does this policy comply with the recommendations of the Auditor General in the second public sector performance report 2010 regarding what all agencies should do regarding the setting fees?

Mr Mitchell: My advice from the department is yes; those recommendations will be considered and implemented.

The CHAIR: Is it possible for you to table a copy of the policy that you have been speaking about?

Mr Mitchell: Certainly.

The CHAIR: It is a public document anyway if it is in the annual report.

Hon MICHAEL MISCHIN: It is a public document. I expect that it is on the web page. It can be provided if you like. Rather than handing it up now, we could arrange for a copy of the report to be provided to the committee, if that is more convenient.

[*Supplementary Information No A1*.]

The CHAIR: That would be great, thanks.

Regarding the pilot project at the District Court to examine the feasibility of costing each individual fee—that was referred to in explanatory material for previous instruments to increase fees by CPI, as well as previous correspondence from the committee—can you give us some details about the purpose of the pilot project and its current status? Is it still under way?

Mr Mitchell: I can only say what I have been told by the departmental officers, but the pilot project involved developing a model for the purposes of assessing the feasibility of charging fees on a narrow basis of working out how much it costs to do a particular activity and charging for that activity. I am told that a good deal of work went into that. It was subject to an audit review, and the audit review identified a number of difficulties with the approach or the modelling which had been taken and the assumptions which had been made for that modelling, which even in the context of the District Court meant that there was a good deal more work to do, much less rolling that out to other courts. Having received that audit advice, I understand the department is not intending at this stage to progress that matter any further.

Hon MICHAEL MISCHIN: That is my understanding, yes. The advice that I have received is that the pilot program, which was commenced some time in 2010, I believe —

The CHAIR: I have the figure of 2010 in the back of my head from reading it somewhere.

Hon MICHAEL MISCHIN: There was the engagement of an independent party to review the assumptions, the methodology and the costing model that was built into the District Court model pilot project.

Hon PETER KATSAMBANIS: Will any of this material be made available to the committee? Is there a report or are there any outcomes or findings?

Hon MICHAEL MISCHIN: I will consult with the department about that. I do not see a difficulty in providing the report of the independent assessor if that is of any assistance. It is my understanding, though, that it determined that it was necessary to do that on the basis of assessing each stage of the process and formulating a fee to reflect the cost of that, and that it was going to be immensely resource hungry, and not particularly efficient or effective, and in any event as a matter of policy would result in inflexibility in being able to allocate an appropriate cost to different stages of a litigation process.

[10.30 am]

You would also end up with difficulties in the policy that underlines some of the cost structure, like the hierarchy of courts. You may end up, arguably, with Magistrates Courts being more expensive to litigate in by way of fees and things of that nature if you are looking at a stage-by-stage costing structure than it would be in the Supreme Court. You would also lose the ability to be sensible about the whole process of, say, filing a writ. When you think about it, the filing of a writ and handing a document over the counter involves perhaps just a clerk stamping it, taking a receipt for it and logging it in or whatever the other process is, which may not be particularly expensive, but an awful lot of other stuff gets done after that, such as the raising of a file, monitoring and so on, which may not be quite amenable to an appropriate fee structure. You have difficulties with where to draw the line.

The way that the department has approached it, and has done for many years, has been a far more flexible approach, which is to work out the costs for business areas, breaking down the process into chunks and sliding the fee for those particular things with a view to recovering 20 to 30 per cent of the actual cost of doing that. That allows it to be far more manageable. I understand that the pilot program has revealed considerable difficulties and an enormous amount of resources would need to be applied to something that is essentially pointless other than trying to work out the cost of a particular micro process in the scheme of filing, processing of materials and the course of litigation. I will consult with the department. I will see whether anything is particularly sensitive about it that mitigates against it but as a matter of principle, I do not have difficulty, as presently advised, in providing a copy of the report into the audit process.

[*Supplementary Information No A2.*]

Hon PETER KATSAMBANIS: I would be intrigued to see that. I accept that in a full cost recovery model, a full assessment of the costs and then an imposition of the fees that would flow on at full cost recovery may come up with some anomalies and may end up finding that some lower courts' processes may be more expensive than higher courts' processes. But we are not in a full cost recovery model at all; we are really talking about identifying costs and breaking those costs down to the fees that are charged. I would have thought having that sort of cost breakdown may well have been something that would drive efficiency within the court process itself. If you found that a Magistrates Court was running a process that was far more expensive than an analogous process in a higher court, you might ask the question why. You would not necessarily change it but there might be a very good reason why. I would imagine that would be a useful tool for the department; I do not know. For the purposes of this committee, we hear that there is a heavy subsidy of the court system. We accept that. However, we also hear that fees are set to sometimes reflect cost reflectivity, and other times not to reflect cost reflectivity. Some advice has been provided from your office over time that things like capacity to pay are taken into account. That starts delving into the realm of a tax. Where a fee is set on capacity to pay, there will be a winner and a loser and the loser is a person who is paying more for a particular fee or service than otherwise would be the case. In those sorts of situations, transparency and an obvious policy decision would be very, very important. I am not necessarily sure that that is currently being reflected in the court fees and the schedules of court fees that are published from time to time.

Hon MICHAEL MISCHIN: I wish to make a couple of observations; firstly, about the process. I am not an expert in the mechanics of it and would not pretend to be, so I may be very wrong about this. I would have thought that, yes, an analysis of process is very important in order to cut off the sharp edges and streamline processes and achieve efficiencies. That is a very different exercise though to the one that we are engaged in here, which is to determine an appropriate fee within the bounds set by the enabling legislation that can be set to recover some element of the expense involved on the part of the state in providing that service and how one goes about it. The key, I think, to the starting point is the legal question of whether the fees that are being proposed here are valid. As to quantum, that can be argued at some other stage, but the issue is whether the process that has been engaged in here and the legal question is properly determined.

The committee in the past, as I understand, has taken a particular view of the law based on certain assumptions. I think we need to make plain and understand the legal assumptions upon which the committee is basing its consideration of the validity of these instruments. As presently advised, I do not have difficulty with providing you with that material so you can have a look at whether this alternative that the committee might have in mind or that the department has explored may be a valid alternative way of going about the exercise. However, the real question is whether what we are engaged in at the moment by putting forward these instruments is a valid way of going about it too and consistent with not only Treasury policy, but also government policy and a reasonable approach to the setting of fees that are allowed by the legislation. The focus really from our perspective, at least today—if you want to get experts in the process, that is for another day—is to determine the legal question and whether what is being proposed here is a valid or invalid approach to the problem.

Hon PETER KATSAMBANIS: With respect, the legal issue is relevant, obviously, and it is overriding. The committee's position was relatively clear on that in report 32 and its engagement with the department in discussing these issues over time. The committee's view of the legal position is relatively clear. From the way the Solicitor General explained it today, the legal position that you view is not dissimilar to where we come from at all. There may be some debate around the edges but we are in agreement with a lot of what the legal position is. However, at the end of the day, we are making a determination on fees. It is the financial information from what I have seen so far I am not satisfied is available. We are making a determination at the end of the day on a fee and debating the edges of the legal position does not get us any closer to getting a financial breakdown. I do not want to speak for the rest of the committee but hopefully if we can overcome that view that this is a legal issue, we may get a bit of progress. To me, the breakdown of the financials is critical. Let us have a debate about the legals if there is a debate, but I really do not see it as a legal debate at all.

Mr Mitchell: There are two questions for the committee. One is whether the regulations are valid. If it takes the view that they are not valid, it would express that view. That is really the only area that I can usefully have input into the debate. There is also the question as to whether as a matter of policy the fees are set in a desirable manner. That is not an area where I think I have anything I can usefully or appropriately add. My concern has been that in the past disallowance motions have been proposed or reports have been prepared on the basis that the fees are invalid and that that is a reason for not proceeding with them.

The CHAIR: For us as a committee asking you to come in was not so much that we thought they were over the top, necessarily; we were trying to find what mechanism underlies it so we have a basis on which to determine it. That is the economic thing that Peter was talking about.

Hon LJILJANNA RAVLICH: I refer to the whole question about how the fees are set. For example, in the Magistrates Court—auctioneer licensing, civil; I am referring to an attachment to a letter—

Mr Mitchell: Those are over-recovering by a considerable amount.

Hon LJILJANNA RAVLICH: Yes, they are. Take that one in point—the Magistrates Court, auctioneer licensing, civil, the Sheriff's Office, FER infringements, criminal. I know that they are over; in fact, 363 per cent and 343 per cent over. How are those fees structured?

Mr Mitchell: I understand that the fines enforcement fee was structured to effectively have a penalty element to it; that is, to encourage people to pay their infringement notices, the fees were upped to provide that encouragement. When I looked at the issue, that was something I thought was unauthorised. The committee in its report reached the same conclusion. The legislation passed by the Parliament last year authorises the imposition of that additional amount so corrects that as an issue. I do not have much information about the auctioneers' licences. To determine the validity of the existing regulation you would have to look at it from the perspective of when the fees were first struck and what a reasonable estimate would have been at that time. If it had been proposed to

increase the auctioneers' fees by regulation now, I would have said that that was not authorised because there is an over-recovery.

Hon LJILJANNA RAVLICH: Could you be so good as to take those two and provide to the committee the actual components that make up this 343 per cent and 363 per cent increase? You say there is a penalty component. How much of that quantum is penalty and how much is it for any other line item that makes up that percentage increase?

Mr Mitchell: I would have to get that information from the department. I understand that was before the committee when it dealt with report 32.

Hon LJILJANNA RAVLICH: I have not seen a breakdown of how that increase was come to by the agencies.

[*Supplementary Information No A3.*]

Hon MICHAEL MISCHIN: Are those before the committee?

The CHAIR: This is more for general background to help us understand. It is not specific to this one. It is to help us understand the model.

Hon LJILJANNA RAVLICH: I am not trying to be difficult. I am trying to get some sense of what is considered when these pricing structures are put together to make up a final amount.

Mr Mitchell: I think that will be a historical calculation, and I will have to ask the department for it. My recollection was that a certain component was a penalty component. The committee looked at that in concluding that those fees were unauthorised. Since that time there has been no amendment to the fee. Appreciating that there is an over-recovery, the government had not decided to amend it.

Hon LJILJANNA RAVLICH: That is okay. Just in terms of the value for money audits, which I understand many of the key agencies across government have had, which come out of the Economic Audit Committee report "Putting the Public First", has your agency received an audit?

Mr Mitchell: I do not know.

[10:45 am]

Hon LJILJANNA RAVLICH: Could you take that on notice?

The CHAIR: Is this within the bounds of our —

Hon LJILJANNA RAVLICH: I am just wondering, if they have had an audit, whether they might have looked at the fee structure as a part of that audit—only to that extent, because there does not seem to be any other evidence of how these things are structured. So I am thinking perhaps if they have had that value for money audit—it may well be that fees were not considered at all; I do not know. But I would think that if you were looking at the efficiency of an agency, one of the things you might be looking at is: how do you recover your costs and how do you assist the agency to get additional revenue should the agency need it? I do not know. I am asking the question within that context.

Mr Mitchell: I do not know, and one of the reasons I do not know is that my role is provide legal advice to the department. I do not have any involvement in setting the fees or the administration of the courts.

The CHAIR: That could go to the Attorney General. Are you happy to take that on notice?

Hon MICHAEL MISCHIN: If I could just say, it might be of assistance if the committee worked out what it was after in that rather than the whole value for money audit. Perhaps write to me once you formulate your thinking on it and determined what is relevant —

The CHAIR: We can do that afterwards. That is fine.

Hon MICHAEL MISCHIN: — to the questions that you are dealing with and I will entertain that then. As far as the auctioneering stuff is concerned, that was set by the Department of Commerce before my time and the department had been alerted to the fact of over-recovery. It is not one of the instruments that was proceeded with. With the infringement notices, as Mr Mitchell has pointed out, there was a view to attaching a higher fee to encourage people to pay their infringements at an earlier stage and I think that is where the difficulty arose. So that was validated. That practice of a modified fee qua penalty was validated by legislation that was dealt with last year as part of the package of fines enforcement legislation, the public policy consideration there being one of encouraging people to pay their fines, their infringement notices or other fines, at an earlier stage rather than dragging it out to the last minute, so you are saving money by attending to them diligently rather than down the track. That question did arise and that was dealt with as well.

Mr G.M. CASTRILLI: We are talking about not the legal question, but the financial question. So what you are telling me is that in the pilot program you are trying to identify the cost structures for each activity within the District Court to determine the cost and the cost recovery, but what you are saying is you cannot do it because it is too complex and it is going to cost too much in resources to arrive at a specific cost structure per activity; is that right?

Hon MICHAEL MISCHIN: That is my understanding of what was being attempted there, yes.

Mr Mitchell: Anything is possible but it is a question of the amount of resources that are consumed.

Mr G.M. CASTRILLI: My question is obviously you are looking at a District Court pilot. You have got the overall cost of the District Court and you are trying to break down within each individual activity elements of that court. So you have got the total cost, total revenue. Obviously, you have got a discrepancy of the cost over what the revenue stream is. So what you are trying to break down is the cost of each individual activity bearing in mind that each District Court might have different characteristics that contribute to different cost elements. Every Magistrates Court, whether in the metro area or a regional area, where there is any cross-subsidisation going on there or whatever—there is a whole range of questions. In essence, what you are trying to tell me is that you have not been able to identify what your costs are because it is too difficult or the resources required to determine it are too vast.

Mr Mitchell: Some of the problem arises from the nature of what courts do. Take just a mediation, for example, in the District Court. A mediation might run for 10 minutes if the parties have agreed beforehand. It might run for a few days. It might be held in the Supreme Court at the very beginning of the litigious process. It might be held at the very end in the week before the matter goes to trial or even, occasionally, when the matter is in hearing and it seems settlement might be open. It may run across the whole of that process. There are some costs that you can say the costs of a day's hearing is X and the department do that and account for that in their daily hearing fee. But even that does not account for things such as the amount of time the judge has to read everything before he or she comes into court or the amount of time required to write a judgement afterwards. The one activity will have a tremendous range of costs involved. From my perspective, when you look at the question of validity and how much breakdown you need, my view is it is enough to say here is the cost of administering the civil division of the District Court and we are setting fees that will cover a proportion of that in a way that does not impede access to justice and seems to have a reasonable basis. That is enough. If you go further, I am not quite sure when you stop. An example was given to me by one of the departmental officers: when the new Supreme Court building is completed the rental or accommodation costs of that will be relatively high, certainly compared with the old building, which will continue to be used. He posed the question to me, "Does that mean we have to charge a higher hearing fee if the matter is heard in the new building?" You follow it to its logical conclusion and you end up with these absurd outcomes that obviously could not have been intended. That influences my thinking when I am looking at questions of validity.

Hon PETER KATSAMBANIS: This is not what we are seeking though. With respect, I understand you are not managing the agency. I will just pick up on a couple of examples that you used and I will give you an indication of what we are seeking. You talked about mediation. Okay, some mediations might take five minutes; some might take five days; some might never end. However, in usual procedure there is a mediation time booked. You get two hours booked for mediation. You get half a day set aside by the registrar for mediation. You get three days set aside. As you well know, practitioners, if they get set aside for a day and they finish the job in 10 minutes, they charge for a day. When we are doing an assessment of the costs of mediation, we charge it on the times set aside. When we are looking at how much time a judge took to decide a civil matter as opposed to a criminal matter or the various types of civil matters, at the end of the year we know how many of those civil matters were decided. We know the process—filing, opening up a file, dealing with parties, managing all the flows, having a hearing, judges' time. All that is aggregated. We are just seeking aggregates and we know on those charges, issuing a writ is heavily subsidised. High level information is enough for something like that. It is when you get down to those dropdown charges—photocopying, transcribing services. There is some breakdown of those. Transcribing services—great; we have got the breakdown. But how much of that cost recovery actually related to the service being allocated to the person who paid for it and how much of that cost recovery really has no relevance to the person who paid for the service because it was a transcribing for the judge—for the purposes of the judge? In criminal proceedings we understand that there is good reason why there is lower cost recovery in criminal proceedings. We understand all that. We do not expect breakdowns of minutiae of individual cases. We expect annual aggregates or three-year aggregates or five-year aggregates—some sort of base level that can be reflected back to the individual fee or a subset of the individual fee. You might say these four fees relate to this activity. That is the level of financial information that would be of assistance to me—not a breakdown of each individual case. Again, I am sorry because I know you are not the person responsible for managing the agency and you are here specifically to look at the legal aspects.

The CHAIR: That needs to be directed more to the Attorney General rather than to the —

Hon PETER KATSAMBANIS: It was just that I was picking up on your own evidence and using that as an example to help us put a fence around what we are looking for.

The CHAIR: I am conscious of the time. We still have not got on to the specific instruments that we wanted to talk about. Can we wrap this up in the next couple of minutes?

Hon MICHAEL MISCHIN: Can I suggest, Mr Chairman, that I think I am getting a better idea of the sort of information that at least Hon Peter Katsambanis is after. If that can be articulated in some correspondence with a few examples so that the department can get a sense of the information that you are after, we will seek to provide that. I confess that my understanding was of a rather different question that was being posed to us based on the assumptions in the thirty-second report being carried over in subsequent dealings with other instruments of this character. So if there has been that misunderstanding, I apologise. I think I have got a better idea and I would not have thought it would be impossible because that is the sort of exercise that I sense the department is undertaking anyway in its assessment of costs. It is looking at business areas and trying to break down, for example, the cost of running staff et cetera for a piece of litigation, calculating on some basis and averaging it out over a course of a year with the number of lodgements, the ones that get to trial and so forth, and having to make some educated guesses, at the very least, as to how that can be broken down in a sensible manner to recover costs. The costing policy is in the annual report, so that is transparent. The Treasurer's guidelines are the ones being implemented. As to the actual number crunching and bean counting that is undertaken in all that exercise, we will take it up with the department.

Mr Mitchell: My understanding from the department is that they tend to cost things to Supreme Court civil rather than Supreme Court civil mediation and so we are getting—no doubt it would be

possible to work out the what the costs of mediation in aggregate were, but the question is whether it is necessary from a legal perspective. I would say not.

The CHAIR: We can take that up in a letter to the Attorney General and follow that through. That is the best way to conclude this side of it.

Hon MARK LEWIS: I am wondering whether these questions are now redundant. Essentially, you have got the wrong—you need your finance manager here, in a way.

Hon MICHAEL MISCHIN: We received a draft set of questions and the focus there was—it has been useful having this because I think we are getting to some level of mutual understanding. As I say, my assumption to a large extent was that we were operating on what we understood were flawed legal assumptions that had been carried through back in the thirty-second report, or contestable ones. I think I am getting a better idea of what you are after and I am happy to provide what I can on that subject.

The CHAIR: Does anyone feel the need to ask further questions?

Hon MICHAEL MISCHIN: If something does occur to you, please let me know. You know where to find me.

Hon MARK LEWIS: It is obvious you have got the information. If you can say there is 20 to 30 per cent subsidisation, then someone has the numbers somewhere. We are just looking for the costing model that sits behind that to see the department has a framework in place which it goes through from time to time. It is probably the finance manager who can put up an overhead that allocates corporate costs, fixed overheads and then functional costs by activity. That is the sort of thing we are looking for—to see whether the department has such a model and whether it uses it regularly in a review process.

Hon MICHAEL MISCHIN: I understand the restraints on confidentiality and the like of the proceedings and you will presumably write to me with more detailed requests and that is fine. Once you have had the chance to consider what has gone on, if there can be some allowance made so we can exchange views with the director general of the department, and to the extent that it is relevant to the Magistrates Court auction hearing regulations, that would be with the Department of Commerce, so I would need to communicate with it if there is interest in the way that came about so that I can get some information from them. I will leave that. If you can advise us and just take that on board.

Hon LJILJANNA RAVLICH: Are you not Minister for Commerce?

Hon MICHAEL MISCHIN: I am. If I am not allowed to talk to my director general about that —

The CHAIR: As a committee we will correspond with you and map that out. I think it has been a useful discussion in terms of where we have narrowed it down to. What we are really after is basically underlining cost issues that drive change and all that. It has been, as you said, a useful exercise and I want to thank you for your time, Attorney General, and also to you, Robert, thank you for your time. Just a reminder, of course, of the issues that go with having a private hearing et cetera. But I think it goes without saying that obviously when we write to you for information, you obviously need to communicate that with people in your department. There are no issues at all with that. We can conclude this hearing.

Hearing concluded at 11.00 am