REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE No. 1

INQUIRY INTO SERIOUS INJURY AND DEATH IN THE WORKPLACE

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At Sydney on Tuesday 2 March 2004

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The Committee met at 9.00 a.m.

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PRESENT

Reverend the Hon. F. J. Nile (Chair)

The Hon. J. C. Burnswoods
The Hon. D. Clarke
The Hon. C. E. Cusack
The Hon. K. Griffith
The Hon. P. T. Primrose
Ms L. Rhiannon

GREGORY BALIOL PATTISON, General Manager, Workplace Solutions, Australian Business Ltd, sworn, and
CHELSEA MARIE HAMPEL, Policy Adviser, Australian Business Ltd, affirmed and examined:

CHAIR: I welcome everyone to this fourth public hearing of General Purpose Standing Committee No. 1 which is inquiring into serious injury and death in the workplace. The Committee will be holding its final hearing later this month. At today's hearing the Committee will hear from some of the groups that have been strongly criticised by earlier witnesses and representatives of employer groups, and WorkCover will be providing evidence to the inquiry. The Committee will also hear about the new Australian Capital Territory legislation regarding industrial manslaughter from a representative of the Australian Capital Territory Office of Industrial Relations. As with previous hearings, I ask witnesses to try to minimise their mention of individuals, where possible, except if it is essential to address the terms of reference.

Parliamentary privilege, which applies to parliamentary proceedings including committee hearings, is not intended to provide a forum for people to make adverse reflections about others. If it becomes necessary at times I might stop witnesses if their evidence about another person is not necessary to address the issues in the terms of reference. At all times the Committee will try to be sensitive to balancing the needs of witnesses and the need for procedural fairness. The Committee has previously resolved to authorise that the media broadcast sound and video excerpts of public proceedings. Copies of the guidelines governing the broadcasting of proceedings are available from the table by the door. I point out that, in accordance with Legislative Council guidelines for the broadcasting of proceedings, members of the Committee and witnesses may be filmed or recorded. People in the public gallery should not be the primary focus of any filming or photographs.

In reporting the proceedings of this Committee the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee. Witnesses, members and their staff are advised that any messages should be delivered through the attendant on duty or through the Committee clerks. Under the standing orders of the Legislative Council, evidence given before the Committee and any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of the Committee or by any other person. Mr Pattison, in what capacity are you appearing before the Committee—as a private individual or as a representative of an organisation or business?

Mr PATTISON: As a representative of the organisation.

CHAIR: Do you wish to make a brief opening statement prior to Committee members asking questions?

Mr PATTISON: Yes, I would.

CHAIR: Ms Hampel, in what capacity are you appearing before the Committee?

Ms HAMPEL: As a representative of the organisation.

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

Ms HAMPEL: No, I do not.

CHAIR: Mr Pattison, would you like to make an opening statement?

Mr PATTISON: Australian Business Ltd is a broadly based employer organisation. Our 19,000 members and associate members are mainly New South Wales based and operate in a diverse range of industries. Our membership ranges from small enterprises to large national organisations. Our submission to this inquiry was made as a result of our direct activities in the provision of services to our members as well as feedback from our members via our various committees and regional councils—in particular, the occupational health and safety committee of the Australian Business Council.

This inquiry occurs against a backdrop of events that have been widely reported in the media. As we have indicated in our written submission, we are unable to comment on those matters directly. However, these events give rise to more general issues that are also addressed in the terms of reference. I think they can be broadly summarised as: Does WorkCover do a satisfactory job for victims and their families in the case of serious injury or fatality? Are the penalties imposed as a result of serious injury or fatality collected and, if not, why not? While the adequacy of the fines and/or penalties is not directly addressed in the terms of reference, this issue has been raised in evidence to the inquiry. Is WorkCover doing its job with respect to serious injuries and fatalities? That question also leads to this more general question: How good a job is WorkCover doing with respect to the improvement of workplace safety, be that by the application of penalties or by education and advice?

After reading the evidence given earlier to this Committee by WorkCover executives I have established that it has been recognised that there have been instances in which WorkCover could have—and we would say should have—done a better job for those who have been seriously injured and for the families of those who have died as a result of industrial accidents. For our part, we welcome this recognition by WorkCover and the actions that have been and are being taken to improve the level of support that is provided. At the same time I think it has to be recognised that these matters, in particular, those involving fatalities, involve multiple jurisdictions. Consequently, the recently signed protocol between WorkCover, police, the Director of Public Prosecutions and the Office of the Coroner is, in our opinion, an important development that we hope will ensure better and co-ordinated communication with and support for those who are affected.

On the question of penalties, we note that a number of parties who have already appeared before the Committee, including representatives of the trade union movement, have spoken positively about the New South Wales occupational health and safety legislation. Our constituency has more likely described the legislation regime as tough—not in relation to the objective of making workplaces safer and reducing workplace injuries, but tough in relation to the absolute liability that falls on employers and the difficulty that many of them face in trying to establish what is a safe system of work and what is not. We would say, therefore, that the issue is not one concerning the adequacy of the legislative framework; rather, it is one of application. We would also say that there needs to be some caution when examining specific events and drawing broad conclusions from those events.

When I was preparing for today's hearing I took a look at the WorkCover web site and the authority's press releases concerning the outcomes of occupational health and safety prosecutions. In the period from about mid-2000 to February 2004 there were 22 press releases concerning convictions for companies and directors, with reported penalties ranging from $50,000 to $322,000, which are not insignificant fines. I think it is worth remembering that occupational health and safety legislation provides that directors and managers can be held accountable. The 2002-03 WorkCover annual report also shows that WorkCover received $4.478 million from occupational health and safety prosecutions that year—$1.15 million more than in the previous year. It is my understanding that WorkCover receives a moiety of 50 per cent of fines. If that is true, fines paid in 2002-03 were nearly $9 million. In our view, that is not indicative of some general failure or inadequacy of the law or its application. However, as the WorkCover chief executive officer stated in evidence to this Committee on 17 February, the purpose of prosecutions is both punitive and preventive. He said at that time:

> The aim of a prosecution is to punish offenders and to deter them and other potential offenders.

We have some concerns as to the timing of WorkCover prosecutions. Let us go back to the earlier survey that I mentioned. If we were to assume that WorkCover makes a press release at or about the time of a decision, it would seem that WorkCover takes a long time to launch and conclude prosecutions. Of the 22 press releases that I looked at, the shortest date between the period of the incident and the tribunal decision was 2.2 years, the longest was 6.1 and the average was 3.7. So it seems to us that, while the punitive objective of prosecutions is being met, the preventive element is substantially reduced when it takes so long between the event and the decision. Mr Renfrey from the Police Association expressed a similar concern in his evidence. His concern was that WorkCover issues summonses so late in the two-year period that others who may wish to intervene and who have the right to intervene do not have that opportunity.

A suggested solution at that time was to increase the time limit. We would argue that the answer is not to increase the time limit but to improve the speed with which WorkCover determines whether or not it will commence proceedings. Prevention is an important aspect of the WorkCover role. It is our understanding that the industry team structure within occupational health and safety operations encompasses inspectorial, educational and advisory roles. Feedback from our members suggests to us that employers are, at times, reluctant to engage with WorkCover as an adviser-educator because the hat that a WorkCover representative might be wearing at a certain point in time might not be clear to them. There are probably arguments for and against splitting WorkCover's inspectorial functions from its advisory and educational roles. However, on balance we recommend that this split should occur. In concert with our colleagues from the trade union movement we encourage the continued use of employer and employee organisations and other community based organisations as important conduits for the continuing education of employers and employees on occupational health and safety matters.

I shall now comment on the collection of penalties and their adequacy. WorkCover has given evidence to this Committee that the collection rate for penalties is 88 per cent in dollar terms. We really have no idea how that collection rate compares to collection rates in other New South Wales jurisdictions or with other States. Perhaps that is something the Committee may wish to pursue. It would be our presumption that 88 per cent probably is a good result. As we said in our written submission, regard has to be given to the processes and accountabilities involved and to what extent accountability lies with WorkCover and to what extent accountability lies elsewhere.

As to the question of adequacy, there have been calls for the introduction of a new crime of industrial manslaughter. We are opposed to the creation of a new offence of industrial manslaughter. We would argue that the current law is adequate. It provides for substantial fines and potential imprisonment for offenders. Even though there has not been, if you will, a successful prosecution for industrial manslaughter or for manslaughter arising out of an industrial event, there have been four matters referred to the DPP, as I understand the evidence, one of which has actually proceeded to court, albeit that matter was concluded by the judge, we would argue as evidence of the fact that this possibility exists and in fact is being pursued. Thank you, Chairman.

CHAIR: I have some general questions. We have heard evidence in our hearings that the cost of implementing good safety practices outweighs the cost of a possible fine imposed by breaching occupational health and safety laws. What is your response to this and do you think that the cost of providing safety equipment is excessive? Do you think that business owners would be more likely to pay the higher cost associated with providing safety equipment if the penalties for breaching occupational health and safety laws were higher?

Mr PATTISON: It would be my experience with our constituency that employers are mindful of their obligations; that they take the steps they believe they can take. I think to simply categorise the decision making as "It is cheaper to cop a fine", to use the vernacular, than to do that which you should do, I think is to sell employers generally short. In my experience employers do take the proper steps where they can. In terms of increasing or changing the equation, I really do not believe that the answer is to increase the penalty regime. There may be a question within the law as to the extent to which penalties are applied in some circumstances. There is certainly scope within the current law for quite substantial penalties, up to well over $800,000. That obviously depends on the facts surrounding an individual case and goes to the question of how the courts apply the principles that they use.

CHAIR: Obviously, employers could supply the safety equipment but in some cases the employees may not use them. Do you have any examples of good employers who have a good safety record? What strategies do they employ to encourage their employees to adopt good safety practices and use safety equipment?

Mr PATTISON: There are no specific examples that I can point to but if I could respond in this way: We do regularly get feedback from our members where they express frustration at times because they have provided the right equipment and it is, in fact, not used. One of the continuing issues in this area is the balance between the obligations of the employer and the obligations of the individual for their own safety and the safety of their work colleagues. That is a continuing matter, one that certainly causes frustration to parts of our constituency.

CHAIR: Do you have any ideas on what employers should do to encourage employees to use the safety equipment?

Mr PATTISON: The normal steps of education, induction, making sure it is available and certainly the issue of the extent to which one might broadly say, "This is the way we do things around here." I have certainly attended enterprises where a safety culture has been very much embedded in the business. I am thinking of one of our member companies I visited in Western Sydney. We were going from the ground floor to the first floor and the manager we were visiting made sure that I and a colleague of mine actually walked up the stairs next to the handrail and had hold of it. That organisation has well and truly embedded the safety culture. It is something that has to be worked out.

Again from my experience in industry—and I have worked in industrial environments and been in businesses where, unfortunately, there has been a fatality and I have been in a business where there has been a very serious injury—getting that sort of mindset embedded is really solid, hard work over a period of time. It does not happen overnight.

CHAIR: Obviously, you have problems when you have young apprentices who are just starting and who are new to all those procedures. Sometimes that is where accidents occur.

Mr PATTISON: Young people in the work force is a particular challenge—people getting used to the industrial environment or the work environment. I think we would all recognise that young people who are not familiar with the workplace do need particular attention and care, yes.

The Hon. DAVID CLARKE: You spoke about the lapse of time between an alleged offence occurring and prosecution—I think you mentioned an average of 3.7 years, up to six years. Why do you assume that that is tardiness by the WorkCover Authority? Why could it not be other factors, for instance, delays in the court system? Do you have any specific details as to the reasons for this time lag?

Mr PATTISON: I do not. I was simply working off available public information. I would expect that the WorkCover Authority would be able to provide you with more detailed information than I am able to provide you with.

The Hon. DAVID CLARKE: Unless I am wrong, you have all ready drawn a conclusion that the WorkCover Authority is, in effect, dragging its feet, but you do not have any other factors to substantiate that assumption.

Mr PATTISON: I think that we are certainly drawing a conclusion and we are saying that that would appear to be the case. If there is evidence to indicate that conclusion is wrong, then I would happily receive it.

The Hon. DAVID CLARKE: Why could it not just be as much the case that it is a delay in the court system? Why do you assume, without any other information, that it is a delay of WorkCover rather than a delay in the court system?

Mr PATTISON: If you look at the 6.1 years, by implication I guess I would draw that inference. There is a period of limitation under the occupational health and safety legislation that says WorkCover has to commence proceedings within two years. I think on the balance of probabilities, if you will, we have drawn the conclusion that the role of WorkCover is contributing to that. It may not be the only factor but we would conclude that—and from feedback that we receive generally—these matters take some time to come forward.

The Hon. DAVID CLARKE: They do take some time to come forward, but would it be true to say that really you have no facts to come to the conclusion that it is a delay of WorkCover rather than the court system or, for instance, the response of employers in supplying material that may have been requested by WorkCover, as another possibility?

Mr PATTISON: There may be multiple reasons, yes.

The Hon. DAVID CLARKE: So you do not have any specific evidence on any of these reasons?

Mr PATTISON: No, I only have the available public information from which we have tried to draw some findings.

The Hon. DAVID CLARKE: What is that public information?

Mr PATTISON: From the WorkCover web site. We have done some analysis of press releases available on the WorkCover web site.

The Hon. DAVID CLARKE: And what does that analysis show?

Mr PATTISON: As I said, of the 22 matters I looked at, it showed an average time between the date of the incident and the date of the press release and I think I said in my evidence, assuming that the press release occurs at or about the time of the decision, that the average time for those 22 cases, between the date of the incident and the date of the press release was 3.7 years—the longest was 6.1 and the shortest was 2.2.

The Hon. DAVID CLARKE: How does the period between an offence occurring and the issue of a press release show that there has been a delay by the WorkCover Authority in proceeding with prosecution?

Mr PATTISON: Again, as I said in my evidence, we are making an assumption. One of the assumptions in this particular piece of data is that the press release occurs on or about the time of the decision. As to the specific date on which summonses are issued, we do not have that information and perhaps WorkCover can better inform the Committee on that. Our conclusion may be wrong and if it is, I am more than happy to change our opinion on the basis of that evidence.

The Hon. DAVID CLARKE: If we had some more facts we both may be able to come to a more definite conclusion, I guess. Thank you.

Ms LEE RHIANNON: You spoke about how the regime is quite tough. You acknowledged there are different attitudes but, as an employer body, you thought that it was pretty tough. We have heard evidence, not just from you, but also from others, including union representatives, about how most employers do a good job but there are a few rogues. One issue raised with us relating to our terms of evidence was the tragic deaths of these young men. We were told that the cost of the scaffolding is less than the actual fine that has been imposed. What is your response to that? Do you think that that area is tough enough? Should fines be higher and, as an employer body, is this something you have addressed?

Mr PATTISON: Not specifically, to answer the second or final part of your question. I go back to my earlier response to the chairman with respect to that. It is our experience that employers, in our knowledge, do not do those sums, if you will. Whether or not some do it, we are not really in a position to comment, but generally in our experience employers take their occupational health and safety responsibilities seriously and pursue them with quite a degree of diligence. The other issue that I think falls within that is that there is scope under the current legislation—I think the maximum fine is $825,000—so there is a question as to whether or not the full potential of the law as it exists is being applied.

CHAIR: It could be that the courts are not imposing sufficiently high fines or penalties.

Mr PATTISON: As I understand, WorkCover launches the prosecution, it does not make the decision. So, others are involved in this process other than the authority.

Ms LEE RHIANNON: So you think if those higher fines were used, that could be an incentive?

Mr PATTISON: It could be, yes.

Ms LEE RHIANNON: We have heard evidence that after on-the-job death or serious injury some company directors put their company into liquidation and then form another company and continue in the same line of work without paying the fine. Is this something that Australian Business Limited [ABL] has addressed to stop that happening? Have you done any research or work on this issue?

Mr PATTISON: Not directly. I think our knowledge of the occurrence would be the same as anybody else's—what is available in the public arena and the general assertions you hear from time to time. I would say however that I participate in our occupational health committee, I participate in and attend regional council meetings and other meetings of the organisation, and the general mood, if you will, of our constituent committees and council is one that would reject using those strategies to avoid obligations.

CHAIR: Would you reject a director or a company that is practising those tactics as a member of your organisation? Would you take that into account at some point, their company record or their personal record?

Mr PATTISON: I am not aware of that, and I would have to check the constitution of the organisation as to what powers may or may not exist for council to cancel a membership. A personal opinion would be that perhaps the people who join organisations such as ours, it is a bit of a self-selecting group and perhaps the people who may be inclined to those sorts of strategies are not likely to join organisations such as ours. That would be just an opinion, I do not have any hard evidence to support that, but that is an observation having been with the organisation some 13 years.

CHAIR: They would be companies who would like to avoid any examination of their behaviour by anybody?

Mr PATTISON: Perhaps.

Ms LEE RHIANNON: Equally, if they did join, would you have any means so you would know that they were one of these companies that went into liquidation and then reformed themselves? Would you have any means of finding out? It sounds as though you probably would not.

Mr PATTISON: The way it would become known to us is that there would need to be a continual change in some sort of membership characteristic. Memberships would be cancelled and re-established, changes in trading names, those sorts of things. Again, without having surveyed it, I am not aware that that is coming up in our membership profiles at all.

The Hon. CATHERINE CUSACK: Can I clarify, I did not hear you properly before, in relation to the role of WorkCover as a regulator and an educator, did you say it should be split or kept together?

Mr PATTISON: It should be split.

The Hon. CATHERINE CUSACK: How would you see that operating?

Mr PATTISON: Having made the assertion, now comes the difficult question. I think in the simplest terms it would be preferable, we would argue, to have a clear function within WorkCover that is engaged in the advisory and educational activities and that the people involved in that are clearly identified as being involved in educational and advisory activities as opposed to those who are in inspectorial and enforcement roles. So, there is clarity in the mind of an employer as to the basis on which they would be engaging with that WorkCover person. A simple example, it is a little bit dated, but a member of ours some years ago had a WorkCover officer attend their office because the officer had asked for a bit of help on a matter. He duly provided that person with about an hour and a half's engagement, support, advice and discussion and on the way out the door the inspector then identified some minor issues and issued five PIN notices. That inspector has not been invited back or would find it difficult to get assistance from that business in the future. I think having some clarity about those things is likely to improve the level of engagement between business and the authority, and at the end of the day surely the objective is about prevention and getting that engagement.

The Hon. CATHERINE CUSACK: Do you think a WorkCover inspector having an advisory role at the moment might lead to some inconsistency in the way the regulations are implemented? By that I mean it must be a conflict for a person going there in a supportive role and deciding at what point does he need to implement the regulations.

Mr PATTISON: One can but imagine, but I would imagine if I was in that role I think there is an inherent conflict built into the job and it must be extremely difficult, I would have thought, for WorkCover officers to balance those dual roles.

The Hon. CATHERINE CUSACK: Can I also ask about the construction industry, in which a number of these accidents have occurred. We talked about costs, but there is the issue I suppose too of competition, being forced into competing with companies who might not be doing the right thing and ending up with a price advantage over those companies that are spending the time in looking after their apprentices' health and safety. Would you like to comment on that? It seems like a construction industry type issue to me and it must cause some frustration to the good guys.

Mr PATTISON: We do not have a particularly large membership in the construction industry but I have engaged in discussions with some people who are our members in that industry. I think Andrew Ferguson referred to the frustration too in his evidence. They are extremely frustrated by those who may not be doing the right thing, are gaining an unfair advantage, and if we go to the worst outcome, which is that there are industrial accidents, if these organisations are not doing the right thing they are ultimately in some respects being cross-subsidised by those who are. It is my belief that the vast majority of those businesses that comply want to operate on a level playing field.

The Hon. CATHERINE CUSACK: So, it would be in the interests of business to do something about the rogue operators, if I can call them that?

Mr PATTISON: It would be in the interests of business if something could be done about the rogue operators, yes. Where that accountability lies may be another question.

CHAIR: One of the main reasons for this inquiry has been the high increase in accidents, particularly deaths, and we have evidence that death in the workplace takes place once every 43 hours in New South Wales. Has your organisation—and you mentioned the various levels, the executive, council—ever formally discussed the extent of this problem and discussed what could be done in the industry itself?

Mr PATTISON: There are certainly discussions on improving workplace safety. I would have to go back and check.

CHAIR: Particularly workplace deaths?

Mr PATTISON: We would tend to deal with that in the context of a general discussion on the need to improve workplace safety rather than deaths themselves.

CHAIR: But your organisation would be aware that it has become a major concern?

Mr PATTISON: Absolutely. There is no doubt that our committees and our advisory groups do consider and talk about things that our current. There is general discussion on even more recent events that have been in the media.

Ms HAMPEL: I am the co-ordinator of the OH&S policy committee at ABL, and that committee comprises representatives of member organisations. At the last committee meeting it was requested that ABL provide to all members the report that the National Occupational Health and Safety Commission puts out on a fortnightly basis. The shorthand for it is the fatalities report. It is a breakdown of which industries fatalities have occurred in and a breakdown of sex and age, and that sort of thing. That committee has requested that it receive that report as soon as it is put out by the national commission. I think that demonstrates their interest. While it does not look at specific cases it obviously shows trends and patterns.

CHAIR: So you are monitoring that issue?

Ms HAMPEL: Absolutely.

CHAIR: Even though you were very negative about any concept of industrial manslaughter, these deaths are what is triggering this concern with the employees and the unions. I know that you said you do not agree with it, but do you see any possible value of industrial manslaughter legislation as distinct from what we now know as manslaughter and have you had any opportunity to look at what is happening in the Australian Capital Territory [ACT]? Has your association talked to your ACT equivalent and is there any feedback on their legislation?

Mr PATTISON: We have members and an office in the ACT. Clearly we have been monitoring developments in the ACT. Our local people are working with the WorkCover authority down there with respect to educational programs and advisory programs on the recent changes. We do monitor those things. I think we would want to reserve our position on how the law might best be applied until we see the outcome of the ministerial expert panel that is currently working on a number of questions and on which we expect to see a report. I understand they will be reporting to the Minister in about May.

CHAIR: Were you involved in any way with negotiations or consultations on the ACT legislation or did you simply oppose it?

Mr PATTISON: I understand there were some broadly based discussions with employers generally in the ACT. We did not oppose it. I think our engagement was within the broad umbrella groups of employer bodies in the ACT, working with the ACT authority.

CHAIR: You admitted you are concerned about some of these companies that do not do the right thing. If there was industrial manslaughter legislation, would that force those companies out of business, because it was too big a risk to cut corners if they could be charged with industrial manslaughter, so they are will go out of business? Could that happen?

Mr PATTISON: That calls for a conclusion. Perhaps that could happen. On the other hand, one might argue if people are inclined to operate outside their obligations, will people operate outside their obligations whatever the legislative regime that is in place? I find it very difficult to respond to that in any definite way.

The Hon. DAVID CLARKE: I want clarification about the period between an alleged offence and prosecution. When you spoke of the time period to prosecution, did you mean to the time that the court has dealt with the matter?

Mr PATTISON: That is what I was saying, yes.

The Hon. DAVID CLARKE: Do you have any details as to when WorkCover instituted the prosecution proceedings?

Mr PATTISON: In relation to those cases, no.

The Hon. DAVID CLARKE: Yours is an employer organisation?

Mr PATTISON: Absolutely, yes.

The Hon. DAVID CLARKE: You would understand that good safety practices are in the interests of your members and that there would be savings for them?

Mr PATTISON: Yes.

The Hon. DAVID CLARKE: With that in mind, what sort of programs does your organisation have in place to inculcate a culture of workplace safety?

Mr PATTISON: Australian Business Ltd has a number of initiatives. Our affiliated industrial organisation Australian Business Industrial has been running a WorkCover-assist program

for the last two years. We were advised earlier this week that we have further funding for another year. That is a broad-based activity around the State of seminars and educational programs. For the last 2½ years we have also been running the largest, I think, small business premium discount scheme pilot in New South Wales, which has engaged about 700 companies.

The Hon. DAVID CLARKE: What is the purpose of that scheme?

Mr PATTISON: It is to have a small businesses adopt and implement appropriate processes, procedures and approaches to workplace safety. The reward for companies is that it will lead to 10 per cent discount on their premiums. We have a small occupational health and safety team who are providing services, both on a fee for service basis and in an advisory capacity over the telephone. Our publishing operations also produce a web-based subscription service on workplace occupational health and safety. Last year we launched and continued to provide an employer's occupational health and safety tool kit, which has been fairly well received in the marketplace. We have a number of programs in place and we are quite active with them.

CHAIR: We have come to the end of the time allocation for your evidence. Thank you for your attendance and attention.

(The witnesses withdrew)

DAVID HALDON RUSSELL, Senior Advisor, Australian Industry Group, sworn and examined, and

MARK ANDREW GOODSELL, Director, New South Wales, Australian Industry Group, affirmed and examined:

CHAIR: Mr Russell, in what capacity are you appearing before the Committee?

Mr RUSSELL: As a representative of the Australian Industry Group.

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

Mr RUSSELL: Mr Goodsell will make the opening statement on behalf of the organisation.

CHAIR: Mr Goodsell, are you appearing before the Committee in your official capacity as a representative of the organisation?

Mr GOODSELL: Yes, I am.

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

Mr GOODSELL: Yes. The Australian Industry Group and its members support this inquiry and its objectives and we support the improvement of safety in workplaces in New South Wales. The demographics of our membership have been set out in a written report. I will not go over that. I will make the point that our members are concentrated mainly in the manufacturing, engineering, construction and labour hire sectors of the economy. They are traditionally medium-to-high risk type sectors. Those employers are extremely conscious of their obligations to their employees to provide safe workplaces and, amongst all employers, probably provide as much if not more than most employers in terms of resources, management time, etc, in managing that obligation.

Very recently New South Wales has introduced quite fundamental reforms to the occupational health and safety [OH and S] legislation, which applied to larger companies two years ago and to smaller companies within the last year. It has not been in place for a very long time and does represent a substantial change from the OH and S obligations that were previously provided under the 1983 Act. The data on workplace injuries and fatalities in the last eight years where it is most available indicates quite clear downward trends in both fatalities and major accidents in workplaces. We think that overall trend is indicative of both improvements in the art of legislation in this area and a bit more detail where it is needed and a greater awareness by employers of their obligations—not only of their legislative obligations but, we would say, of public expectations in relation to health and safety.

New South Wales has the highest penalty of any State for breaches of its OH and S Act. From reading earlier evidence to this Committee, there is a suggestion that many unions agree that we have quite good safety laws. I think that any reform process or calls for reform need to be reviewed within that context. In general, we would say that it is a process of enforcement and the application of the existing laws, not modifications to the existing laws, which is the real issue. On reading the terms of reference of this inquiry, I think you would come to the conclusion that they are also focused on that issue. Safety in the workplace is a difficult issue conceptually to deal with in 2004. It goes well beyond fatalities and major injuries. It is about creating an environment where the inevitable risks that arise from hazards in workplaces are managed to a level that is acceptable.

Given all the other limitations and issues that bear upon companies, including the fact that they are there to make a return for their shareholders and, some would say, have a clear obligation to provide ongoing secure employment for their employees, they have all sorts of pressures on them. One of those pressures is to provide a risk-free or risk-managed environment. The gravity of the consequences of a particular unsafe practice or method of work is not necessarily linked to the inherent risk of that particular unsafe practice or work method. It is possible that a serious breach of safety may not result in any injury, illness or fatality. Equally, it is possible that a minor breach, in objective terms, could lead to a fatality. So it is a difficult concept.

We support the risk management approach that is inherent in the 2000 Act, and we did so as an organisation after consultation with our members and through our policy-making bodies, not without some vigorous debate about whether it was an improvement and it was easier or harder to comply with than the previous regime. Our opening remarks are framed within the reality that the art of legislating in this area is still being tried, in a sense, and the most recent major reform on OH and S legislation is very young. Indeed, we do not have any substantial statistics on which to judge the performance of that legislation. All we have is a lot of anecdotal evidence, if you like.

Turning to the more specific points considered in our submission and requested by the terms of reference, we are not in a position to comment on the performance of WorkCover on the two specific cases. They did not involve members of our organisation and we are not across the detail. However, I am sure the Committee would like to hear our views on some of the other terms of reference. I made the point earlier that New South Wales has very high penalties for breaches of the Occupational Health and Safety Act—up to $850,000 for a repeat offender that is a company. There is some considerable agreement that these penalties are tough and that agreement comes from across the board. A lot of the issues are about whether the penalties are being applied. Is the weight of that size of penalty really giving the maximum leverage in the field?

Despite the level of fines, there are statistics in very recent years that New South Wales is not doing as well as some of the other States in safety performance. So we have an instant ambiguity. Despite a lot of attention and despite the level and gravity of fines—and I can assure the Committee that managers of companies are very well aware of the potential fines that are available in the OH and S Act—there is an issue about the performance of New South Wales workplaces. You could draw the conclusion that the penalties issue is not directly related to the performance under this new legislation. In our experience, it is not an issue about the attention of management to the serious things that could happen to them or their company if they breach OH and S. The real issue is the availability of the right skill sets, the practical means available and the practical knowledge about the means available to companies to deal with their obligations.

In our written submission we have gone into more detail about the nature of those obligations, but risk management can be a very difficult concept. This may be an unfair way to describe it but, in one sense, it is legislated perfection. Certainly the duty to ensure health and safety in the workplace is very close to strict liability. Overlaying that, we have the concept of risk management, which is a never-ending process of ferreting out every hazard and applying a system to identify the potential risk arising from those hazards. The legislation goes into quite a lot of detail in giving the message to employers that this is an almost never-ending task. If you are a manager and you are aware of that, you have to build that into your processes in your day-to-day operations. Most managers, most companies are trying to do that. What they need is practical assistance for what that little ambiguous but very strict concept means to them as an operating entity on a day-to-day basis.

In that environment, we think compliance will be improved more by the education of those at the workplace—including, particularly, management—about practical ways in which they can meet those obligations than by further enforcement. In our submission we make the point that this area is always regulated by a mixture of enforcement and compliance, and that there is a cyclic affect to some extent about the mix of those two. Our view is that, with recent legislation introducing a very complex management technique into the legal obligations that employers have, we cannot have too much education on the ground to help companies deal with that.

We welcome WorkCover's attempts in recent years, with the introduction of that legislation, to take a more proactive approach on the education side. We believe there are some case studies in different sectors where the education approach has borne fruit. In particular, I am aware that the most recent statistics in the agricultural/forestry type area show a remarkable decrease in the level of accidents in that sector. That sector has been targeted, as one would expect, by WorkCover for an intensive education program. So, generally, it is not that companies do not realise that bad things can happen to them; it is not that they do not realise they have a legal and moral obligation to provide a safe workplace; it is just that modern techniques of such compliance to the standard required are very difficult, and companies need all the help they can get to help them meet the requirements.

I turn to another technical area covered in previous evidence before the commission, that is, in relation to the timelines for prosecutions. We have a concern, reflected to us by our membership,

that anecdotally they feel that WorkCover or the prosecuting arm of it uses all of the two years that it has to prosecute. That is to say, they use up all that time before launching a prosecution. I am aware of statistics that confirm that concern. Of the most recent 20 or 30 prosecutions, more than 90 per cent were launched between 22 and 24 months after the event. WorkCover probably has a range of reasons for that. I am not sure that WorkCover would be happy with those facts. That is probably a question best put to WorkCover. But, our members—and our submission is based on anecdotal evidence given to us by our members—are of the view that they appear to get prosecuted very close to the two-year limit.

That has a number of effects on them, but there are two major ones. In terms of legal process, justice delayed is justice denied, and the ability of a company to garner resources to properly prepare a defence is compromised by that kind of delay. Companies are not static organisations. These days, within two years half of the company's staff could have moved on to their next career. Consequently, the company's ability to hang onto its corporate knowledge about what actually happened in that event is compromised if the prosecuting authority waits two years before commencing prosecution and the company is almost two years down the track before it knows it has to mount a defence. The alternative is to act on spec: to make sure you get from everyone who is leaving your establishment a statement relating to a possible prosecution. That is the first element.

The second element is probably more general. In terms of prosecutions and penalties being part of the performance improvement model upon which the legislation is based, we think that the longer the delay between the event or the behaviour and an ultimate successful prosecution, the less effective that is. That is, as I said, because people move on, and the company probably sees itself as being a different company from the company it was before. There are a couple of reasons why that is not an optimum position. If this Committee could do something about addressing that issue, I think the process could be improved to reduce the delay in prosecutions.

There is a related phenomenon—again anecdotal—that companies feel why are not always informed upfront that a prosecution may result from the process. They are told they are being investigated, and they suspect that a prosecution is being commenced, but they are not always being told that is the case. Again, that is based on anecdotal experience. That is the feeling of companies about what is going on, but it is hard for them to prove one way or another whether those are the thoughts inside WorkCover's head. That is, at best, an image or perception problem that WorkCover probably needs to manage with the people that it is dealing with.

In relation to the issue of WorkCover liaising with victims and families, I would make the general point that everybody in a workplace is affected when there is a death. I would not for one minute suggest that anybody suffers worse than the families of the deceased person, but it should not be lost on the Committee that in some cases workplaces themselves are like families in that you have a lot of people who have known each other for a long time. So any kind of fatality in a workplace affects a whole range of people at that workplace, including the management, colleagues and the people who dealt with the individual in the course of their work. We support the system providing support for families through that period. There may be some argument that that support should extend to the whole organisation, but we certainly support any improvements that can be driven in relation to support for families.

However, there is in our mind an issue about whether WorkCover should be the agency that provides that support, because it is also the agency that could be prosecuting that workplace. For the employer, there is a sense of conflict of interest. But the feeling may also be coming from the employee's side or from the family of the employee that the same agency that is, in an independent or neutral sense, trying to provide them with some comfort is also pursuing the "baddy". I do not know whether that is the kind of image that the supporting agency ought to carry with it. So, whether that supporting role should be carried by some other agency I think is a question that needs to be looked at.

It does raise a wider issue that was raised in the previous evidence: WorkCover's dual role. This is a matter that we have raised in other submissions on legislative reforms made to parliamentary committees. There is a real difficulty on the ground with WorkCover's dual compliance and educative roles. Our members see WorkCover as a great source of information that can help them solve their problems. As I said at the outset, they really need all the help they can get to know what is what on the ground. The fact that WorkCover is also the prosecuting agency locks away that information to some

degree. Employers cannot access it to the degree that it probably should be accessed. Perhaps there need to be two organisations, or two divisions within one organisation, with two separate objectives. Certainly, the objective of the educative arm ought to be explicitly about improving the latent level of knowledge about risk management and the latent skill level in the workplace. I know there are other difficulties with the split model, but we appreciate this opportunity to get the issue back on the table because it is of concern on the ground.

In relation to the collection of fines, we understand that between 80 and 90 per cent of debts resulting from fines are collected, but they are collected through the State Debt Recovery Office. Does the uncollected level of fines represent a serious undermining of the whole legislative framework driving safety? I suppose we are all in supposition mode on that question. We would say we do not believe it is. But we would welcome any improvements that can be made in the co-ordination of the State Debt Recovery Office and WorkCover. Although it is our members who are being fined, at the end of the day, once the system has made its decision it ought to be executed efficiently, and we ought to get that argument out of the way as efficiently as possible.

Finally I address an issue that we are not sure relates directly to the terms of reference but which has come up and we would like to address in this forum. It is the issue of industrial manslaughter. We think the Committee ought to be a little bit concerned about addressing this matter at this time and through this process. The statistics, as we have said, have been showing quite consistent reductions in injuries over a number of years. There seems to be an ambiguous approach from those who promote industrial manslaughter as to whether it is really about punishing evildoers or whether it is part of the promotion of occupational health and safety. We think the evidence is probably a bit weak on the latter, as to whether it really will make much of a difference in promoting occupational health and safety beyond the punitive measures that are already in place. We think it is dangerous in the absence of a specific proposal.

From reading the evidence of both the families and the unions given at previous hearings before the Committee, there seem to be a wide range of notions about what industrial manslaughter is. We acknowledge it as an important issue, but it is a bit difficult to address it in the abstract. At one end it may be no more than codification of what already exists. At the other end, the proposals that did not get up in Victoria represented a major shift in the law. It is difficult to get your head around a concept that can have that much width to it.

There are other issues that also bear on that. One is the tool kit available to employers if they are to be faced with a new legislative or legal pressure on their thinking about safety, assuming it made a difference. There are a whole range of other ambiguities still out there in relation to managing safety. The status of drug and alcohol testing, almost every time it is raised, is disputed by unions, and there is a brawl about that issue. The people are on sides different to those they are on in this debate. The unions are saying, "Oh, no, we don't have to go that far," whereas employers are saying, "We understand the legal obligation is that we do go that far." So we have a reversal of positions when it comes to that.

The status of people in relation to unfair dismissal for not wearing safety equipment and things like that is still ambiguous. Interface with discrimination law, employing people with disabilities or poor safety records, how do employers stand in that regard? Then there is the issue of corporate culture. If you identify a company as having a poor corporate culture in relation to safety, and there is industrial manslaughter law hanging over the consequences of that, how would you get good people into that corporation to change it? We think there are practical issues that really need substantial debate. Finally, there are other influences on corporate culture. Indeed, in Australia, in unionised workplaces the unions are one of the substantial influences on corporate culture. I suspect they would probably say that it is one of their objectives to influence corporate culture. So why would they be excluded from a legislative framework that wants to address the consequences of corporate culture?

We at the Australian Industry Group understand public expectations about occupational health and safety, particularly fatalities, have demonstrably risen in the past few years. In the past three to four months, at both the State and national level, we have discussed being seen to be taking more responsibility for occupational health and safety. One of the things frustrating these kinds of debates is that everybody is telling everybody else what they should do. We think one of the things

that we employers can do at this time is put our hand up and say, "We know we are responsible under the law, and we want to be more visible about what we are doing." We have participated in all of WorkCover's initiatives, such as the Premium Discount schemes with which WorkCover assists. We have a small business initiative through WorkCover with out membership at the moment, and one targeted on labour hire. We are taking it very seriously as an organisation. As I said at the outset, our members, by the nature of their business, have to take it very seriously because we are at the pointy end of managing it, on the ground.

CHAIR: Thank you for that introduction and the submission. I note that in your opening statement you said that there had been a decrease in serious injuries and fatalities. Over the longer term, going back to 1996-97 until 2002, there was a decrease. In fact, one of the reasons for this inquiry is an increase that stimulated some concern. Do you agree there was a recent increase?

Mr GOODSELL: I understand there are statistics that show an increase, and that is why I put it in a different way. New South Wales has not done as well as some of the other States. One of the issues is that there are different measures. I am aware of other statistics indicating that traumatic injuries, as opposed to long-onset injuries, have led to fatalities and since July last year we have been doing better than we were. There are different statistics. Transport deaths are sometimes counted as workplace deaths and sometimes not. The numbers are not so great that these things cannot influence them on a year-to-year basis. That is why we prefer to take a broader view and ask whether we are doing as well as we can. Probably not; more still needs to be done. However, we cannot drive the policy on the basis of a one-year increase or decrease. A small increase should not hurt us and we should not crow about a small decrease if it happens next year.

CHAIR: You mentioned your concern about the impression that WorkCover waits almost until the end of the two-year period before launching a prosecution and that that puts the employer at a disadvantage. Are you certain there is no notification prior to the prosecution that WorkCover is considering a prosecution?

Mr GOODSELL: In some cases there probably would be. At that stage it would probably be notification that it is intending to prosecute. The clear message from our members was that the prosecutions were not launched and, therefore, they were not sure it was going to happen until the two-year period had elapsed.

CHAIR: Therefore, the company would not be prepared to put a great deal of work into trying to defend itself if the prosecution did not go ahead. That could make it difficult to get statements from other employees—people could have left and so on.

Mr GOODSELL: Part of it may be the fault of companies for taking it too lightly. That is the danger with anecdotal information. We need more transparency for the companies' sake.

CHAIR: The committee has heard evidence about an increase in the use of labour hire companies and that that has resulted in lower safety standards and a lack of accountability or responsibility for safety. Is that a genuine problem?

Mr GOODSELL: Labour hire has certainly created a shift in the structure of some industries. I do not think it has led to a lowering of standards in the sense of the expectations of people in the workplace about what safety measures should be implemented. There are some ambiguities from time to time about responsibilities. That is one of the reasons we suggested to WorkCover a specific program to address labour hire. It is not so much that people do not accept that a standard must be upheld, there are genuine issues about where the responsibility lies for meeting the obligation that no-one disagrees exists.

CHAIR: You mentioned that companies have experienced problems with employees who will not follow the safety regulations, even refusing to wear safety helmets, and the comp anies have dismissed or tried to dismiss them. Can you explain that?

Mr GOODSELL: It is age-old problem and an enormous frustration to companies that some employees engage in civil disobedience. If they find things uncomfortable or inconvenient to wear, they will not do so. There is also the alpha-male effect with younger males, who do not think they

need protective equipment because they are tough. The problem is that the law provides that the employer must work his way through those issues. At the end of the day, the Act contains some protections—employees are supposed to use protective clothing if it is provided and must not misuse it. However, the only sanction available is disciplinary action, and companies are increasingly resorting to that. It is not easy, because it does not always fit into the co-operative culture companies are trying to develop with employees.

The Act provides that employers must consult with employees, and they can raise some of these issues in that consultation process about safety equipment not being convenient or comfortable and so on. It is difficult for an employer to sort the wheat from the chaff when he has that strong legal obligation. That is another overlay adding to the ambiguity. As a general rule, employers are probably being more aggressive on that issue. Very recently there have been more definitive decisions out of industrial tribunals about the employers' rights. However, procedural fairness, length of service and so on must be considered before dismissing someone for not wearing protective clothing. Employers have an absolute duty on one hand and rubbery, mitigating circumstances on the other. It is a difficult situation to manage.

CHAIR: Have there been cases of employees deliberately ignoring the safety regulations more than once and employers unsuccessfully trying to dismiss them?

Mr GOODSELL: Companies have lost unfair dismissal claims that they have pursued on the basis of safety breaches. Perhaps they have lost on legitimate grounds relating to procedural fairness and unfair dismissal laws. However, it is still an ambiguity that must be dealt with.

The Hon. CATHERINE CUSACK: Can we have some examples provided on notice?

Mr GOODSELL: Yes.

The Hon. DAVID CLARKE: You mentioned alcohol as a factor in workplace injury. Is it a significant factor?

Mr GOODSELL: The Alcohol Summit referred to alcohol being a factor in between 5 per cent and 10 per cent of workplace injuries.

The Hon. DAVID CLARKE: You indicated that you felt that in this area there was less than enthusiastic co-operation from unions in wanting to resolve this issue.

Mr GOODSELL: There have been a couple of disputes in the public sector in New South Wales about the introduction of drug and alcohol testing. BlueScope, previously BHP, at Port Kembla had a major dispute with the introduction of testing. Some places have it as a result of agreement. However, there are legitimate issues about testing for use or impairment. Interestingly, that issue is based on workplace safety, certainly more than productivity or any other issue at the moment, and the unions' and employers' positions are reversed. The unions say that we should not be absolute and the employers feel they must be because the law provides that they must be aware. A percentage of the population are drug and alcohol users. If we draw our work force from that population that is a risk factor employers are obliged to take into account. How do they do that? The great fear on the part of employers is that if they know something happens, if they have had incidents that sensibly suggest that alcohol is being used or may have been a factor, and they do nothing regarding testing they are exposed and caught.

The Hon. DAVID CLARKE: Is drug consumption a significant factor?

Mr GOODSELL: It is. However, as a society we are probably less able intuitively to comprehend the nature of that problem.

The Hon. DAVID CLARKE: Is it becoming increasingly a problem?

Mr GOODSELL: I am not expert enough to say I know that it is. However, 20 years ago it was all about alcohol and alcohol testing in the workplace. "Drugs and alcohol" is the more commonly

used term now. It is a reflection at one level of the recreational use of drugs being more accepted in a generational sense.

The Hon. DAVID CLARKE: But it is a negative factor as far as you are concerned.

Mr GOODSELL: The fact that an employer is legally obliged to think about and do something about it if it could be a hazard or risk in the workplace is a worry.

The Hon. DAVID CLARKE: You said that statistics indicate that New South Wales is not doing as well in safety performance. What do the statistics show in that regard?

Mr GOODSELL: In general terms, when one compares this State's incident rate, which is probably the best indicator—it is certainly fairer than absolute numbers because New South Wales has the largest economy—to that in the other major States, objectively the rate in New South Wales should be lower.

The Hon. DAVID CLARKE: It is not.

Mr GOODSELL: It is higher.

The Hon. DAVID CLARKE: What is the reason for that?

Mr GOODSELL: I do not know, but I suspect it probably has something to do with a mixture of the legislative changes—many have been dumped on employers—and, without it being a pejorative remark, WorkCover's ability to continue its dual role of enforcement and education given those massive changes. There are probably some other issues within WorkCover. Everyone agrees that the regulatory regime is strong enough; it is simply not being applied in the way it should be.

The Hon. DAVID CLARKE: You mentioned a period of approximately 22 months or thereabouts from the date of an alleged offence to the prosecution. Do you mean the institution of prosecution proceedings by WorkCover or the resolution of the matter by the court?

Mr RUSSELL: It is the summons being issued.

The Hon. DAVID CLARKE: Do the statistics indicate a delay between the date of an alleged offence and notification to WorkCover? That could be a relevant factor.

Mr RUSSELL: We do not have that information. WorkCover could provide that information. However, that is possible.

The Hon. DAVID CLARKE: If there were a long delay between the offence and notification to WorkCover that would be a significant factor to take into account.

Mr RUSSELL: One would need to take it into account. WorkCover instituted a new notification timeframe on 1 September 2003. It requires most instances to be notified within 48 hours. WorkCover would be able to provide information about compliance and what measures have been taken to enforce it. Employers are becoming more and more aware through those increased or more onerous responsibilities in regard to notification and their obligations. We make a point of communicating that to all members in briefings and circulars.

CHAIR: The committee heard evidence about one case in which WorkCover was never advised.

Mr GOODSELL: That happens, but it is rare. It is difficult for a fatality or major workplace accident to go unreported. The other thing is that the statistics, the anecdotal evidence from members, we are not sure what timeframe that has come from, but some of it is very recent. The actual evidence that I am aware of, of WorkCover's issuing of summonses is in the last four or five months, since October last year, which is after this new reporting regime.

The Hon. DAVID CLARKE: What was that statistic again—four or five months?

Mr GOODSELL: I think it was from October until January—October last year.

The Hon. DAVID CLARKE: What does that represent?

Mr GOODSELL: That is prosecutions instituted—summonses instituted since October last year.

The Hon. DAVID CLARKE: Are you saying that is showing that there is an average of five months?

Mr GOODSELL: No. I have seen a list of 20 or 30 summonses issued and all but 3 of them were between 22 and 24 months after the incident. But they are very recent, and they are after this new reporting regime was put in place.

Ms LEE RHIANNON: I put this question to Mr Pattison so you probably would have heard it before, but I would like to also ask you, as you represent employers. As you would be aware the inquiry has heard evidence that after on-the-job deaths and serious injuries, some company directors put their company into liquidation and then form another company and continue in the same line of business without paying the fine. Is this an issue that the Australian Industry Group is working on? Is it something that you monitor—employer companies—in terms of their joining your group? Is it anything that you are taking up so that we can reduce this problem?

Mr GOODSELL: It is not an issue that has been brought to our attention as an organisation as a major issue for our members. I know from reading the transcript that a lot of the evidence about this is from this Committee and other instances—a lot of the evidence about this comes from the construction industry and there may be issues in that sector. We interface with the construction industry at a certain level. Our members are mainly engineering-type companies, specialist contractors who are involved in things like lifts and airconditioning, and some of the major construction companies. The barriers to entry in those sectors are probably higher than they are in other sectors, and we have low barriers to entry. You can probably have an issue about companies coming in and out. But in terms of us as an organisation, it has never been put to us as an issue that we need to be concerned about as an organisation. It has not been raised and also would be difficult for us in the current way that information about what has happened to companies is made public—it would be difficult for us to know whether an application for membership of ours fell into that category, so we have not addressed it.

The Hon. PETER PRIMROSE: On pages 16 and 17 of your submission, you address the issue of phoenix companies and you talk about corporate governance measures rather than, say, industrial manslaughter legislation being the appropriate mechanism. Can you tell the Committee what type of corporate governance mechanisms you would be recommending for dealing with these companies?

Mr GOODSELL: The issue seems to be that the system does not know how to—has not found a way of effectively pinning a fine on an individual because they are able to duck out and come back in another form. I suppose we are not aware how much effort is being put into having an alternative regime of fines that would chase the individual. I do not believe our members would have a problem if that regime was made more strict. Not being an expert in corporate law, I am not sure how you do it, but it would seem to me that the logical thing is to make it difficult for that person to reappear in a position of responsibility. I think under the corporate law there are mechanisms available to prevent people from becoming directors, et cetera. If that is the problem, I would have thought you would explore the limits of that area to address that problem.

The Hon. PETER PRIMROSE: I think the concerns also relate to the fact that their family and kids, aunts and uncles suddenly appear as directors, yet the same work continues.

Mr GOODSELL: If we know that is going on we have done something about it. If we believe that that is the issue, then our view is that is something we ought to concentrate on and be fairly innovative about—how we address that issue.

The Hon. PETER PRIMROSE: It is not anything that you have actually turned your mind to at the moment?

Mr GOODSELL: We make a lot of submissions and turn our minds to a lot of things but, no, not on that issue; that has not been on. But if it is something that the Committee would like some more input on, we are quite happy to do that.

The Hon. PETER PRIMROSE: It might be interesting.

CHAIR: We discussed alcohol and drug testing. Would it help companies if it was somehow mandatory by State law—that is, not something negotiated by each company with its employees—that they are required to do that by law?

Mr GOODSELL: Certainly more clarity about the conditions—leaving aside whether it is required—under which they can do it would help. It is a very problematic area at the moment. Companies do not test to fine people, they test to deter, but on the employee's side there are obviously fears about privacy and things like that. There are very great ambiguities in the overlap with privacy legislation, et cetera. Employers have been told what they cannot do, but there is not a lot of clarity. Whether it is legislated that they can do it or whether it is an agreed code of practice, certainly much more clarity about the conditions under which they can do it is needed. Importantly, if that clarity defines the circumstances under which they cannot or should not do it, what protection is there for them under the occupational health and safety law if there are consequences flowing from that?

The Hon. CATHERINE CUSACK: Can I ask for a list of examples of that? Is that possible?

Mr RUSSELL: The mining industry has a tripartite approach to drug and alcohol testing where it is supported by employers, unions and the Government in its various regulatory forms. That has been fairly successful in the mining industry.

CHAIR: That could be a model?

Mr RUSSELL: There are certainly things to learn from it.

The Hon. CATHERINE CUSACK: Just in the areas where you said there is a challenge—I think you said that privacy can be a barrier.

Mr GOODSELL: Privacy and discrimination.

The Hon. CATHERINE CUSACK: Do think it would be possible to get some examples of areas that underlining safety?

Mr GOODSELL: Sure. In relation to mining, we are not directly involved in that sector, but we are indirectly involved. What appears to help them is that there is a shared view of the risk. People do not want to work in mines with people who are affected by drugs and alcohol. In other sectors it is not quite so clear that that is a risk but in mines I think they have gone a long way because everybody is in the same boat and they all share that view. It is not really a union/employer issue so much as a—

CHAIR: Safety issue?

Mr GOODSELL: Yes. They really do—it is a shared understanding.

The Hon. CATHERINE CUSACK: That is the point at which you probably are getting towards a safe workplace, but it does not often happen.

Mr GOODSELL: Yes. That is the problem. I conclude by saying that the whole issue about managing safety, whether it is in a big company or a little company, basically is where there is a level of care that people do get hurt. Some management systems are a surrogate for creating that care.

CHAIR: I thank you for appearing as witnesses, for your co-operation and for your submission.

(The witnesses withdrew)

(Short adjournment)

PENNY MAUREEN SHAKESPEARE, Director, Office of Industrial Relations, Chief Minister's Department, Australian Capital Territory, sworn and examined:

CHAIR: In what capacity are you appearing before the Committee—as a private individual, or as a member of an organisation?

Ms SHAKESPEARE: I am representing the ACT Government.

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

Ms SHAKESPEARE: I will, thank you.

CHAIR: If there is any evidence you want to give in camera, we have that facility, at your request. The Committee would normally agree with that—that is, evidence to be heard in confidence.

Ms SHAKESPEARE: Thank you.

CHAIR: Would you like to make an opening statement?

Ms SHAKESPEARE: I am appearing today to provide the Committee with information about recent industrial manslaughter laws that have been passed in the Australian Capital Territory. The Crimes (Industrial Manslaughter) Amendment Act 2003 came into operation yesterday—on 1 March. The legislation, which implements a government commitment made prior to the last Australian Capital Territory election to introduce industrial manslaughter laws, was introduced after a period of extensive consultation with the Australian Capital Territory community. We commenced drafting the legislation in 2002 after a process of consultation with the Australian Capital Territory tripartite Occupational Health and Safety Council, which includes representatives of employers, unions and other interested bodies such as the National Safety Council.

The legislation was introduced in November 2002 and was then referred to the Australian Capital Territory Standing Committee on Legal Affairs, which held a public inquiry into the bill, with public hearings such as this, and reported back to the Legislative Assembly in September 2003. The majority of the members of that committee recommended that the legislation should proceed at that time. The legislation was then formally debated and passed in November 2003 and it commenced operation yesterday. The new Act amends the Australian Capital Territory Crimes Act to include two new manslaughter offences: firstly, an offence for employers who cause the death of a worker, that is, new section 49C of the Crimes Act; and, secondly, an offence for senior officers of an employer where the senior officer causes the death of a worker, that is, new section 49D of the Crimes Act.

The new offences contain the same elements of the pre-existing general manslaughter offence in the Crimes Act, in that a person must cause the death of another person recklessly or negligently to be found guilty of the offence. The main objective of the legislation is to allow corporate employers to be prosecuted for manslaughter where those employers had caused the death of a worker. Prior to the enactment of the industrial manslaughter laws, it was difficult in the Australian Capital Territory to prosecute a corporation for a criminal offence such as manslaughter because corporations do not have a physical presence. Without a physical presence it is difficult to show that someone has committed a criminal offence.

Prior to the new laws coming into effect the general manslaughter offence in the Australian Capital Territory Crimes Act applied to anybody who recklessly or negligently caused the death of another person, and that could include an employer. However, due to common law principles regarding the attribution of liability to a corporation for the actions of its officers, this made it quite difficult to prosecute corporations. Under these principles it had to be established that the person within the corporation who had caused the death of the other person was also the directing mind and will of the corporation. This is much more difficult to establish for a larger corporation where the directing minds and will of the corporation generally will be a board of directors. In a larger corporation there will be many layers of management between senior directors, that is, senior decision

makers, and the people involved in the day-to-day running of the business who are in contact with workers.

The Australian Capital Territory is gradually adopting the national model criminal code, which includes new nationally agreed principles for attributing criminal responsibility to a corporation. These provisions in the Australian Capital Territory criminal code apply to all new offences created after 1 January 2003, so they apply to the new industrial manslaughter offences. These principles allow a corporation to be prosecuted for a criminal offence if, for instance, it can be established that the corporation and its senior managers allowed a corporate culture to develop that encouraged people to breach their health and safety obligations. The industrial manslaughter legislation does not impose vicarious liability on individuals.

An individual senior officer could not be prosecuted for manslaughter under the new laws simply because he or she is a senior officer of a corporation that had caused the death of one of the workers. For a person to be found responsible under the senior officer offence provision, that person would need to have directly caused the death of a worker. So there is no vicarious liability for individuals at all under the legislation. The legislation also introduced additional penalties specifically for corporations, in keeping with the intent of the bill, which was to allow effective prosecutions of corporations for workplace deaths. These additional penalties include: the ability for courts to order that the corporation publish details of the offence, requirements for them to notify their shareholders about the offence; and the ability of courts to order a corporation to undertake specified community service-type projects.

I suppose that the Australian Capital Territory Government is not expecting that legislation to be used frequently as there are few workplace deaths in the Australian Capital Territory. The intention of the legislation is to act as a deterrent. The introduction of these penalties and new legislation to increase penalties under the Occupational Health and Safety Act followed a review of a compliance model for occupational health and safety that was conducted with both employers and employees. Everybody recommended that there needed to be a range of serious penalties to act as a deterrent right through to education and voluntary compliance measures for inspectors. This is just one part of the Australian Capital Territory Government's approach to improving health and safety. It will be accompanied by other activities, such as education and information for employers.

CHAIR: We discussed this issue of industrial manslaughter with other witnesses. Yesterday the Committee was told that the two major problems in assigning criminal responsibility to corporations is aggregation and identification. It was suggested that the Australian Capital Territory legislation does not fully address those issues. Is that correct? If not, how does the legislation address those issues? I know that you have already touched on this issue.

Ms SHAKESPEARE: The legislation does not impose aggregation responsibilities on employers. The approach taken by the legislation is rather to use the model criminal code provisions. I can provide Committee members with a copy of those provisions.

CHAIR: What do you mean when you refer to the model criminal code?

Ms SHAKESPEARE: That is the code that has been developed nationally through the Standing Committee of Attorneys-General.

CHAIR: You used that as the basis for the Australian Capital Territory code?

Ms SHAKESPEARE: We have taken the criminal responsibility provisions in the Australian Capital Territory criminal code from the national model criminal code.

CHAIR: Are you the only jurisdiction to have done that? No other State or Territory government appears to have done that.

Ms SHAKESPEARE: The Commonwealth Government has also adopted the national criminal code. I suppose that both mechanisms are using these criminal responsibility provisions and also aggregation, which I think is the model that has been followed in the United States of America

and Canada. They both achieve the same outcome. It is how you attribute liability to a corporation for the acts of its agents and employees.

CHAIR: When you referred to the United States of America, were you referring to environmental legislation? No industrial manslaughter legislation has been enacted in America.

Ms SHAKESPEARE: There is a capacity for United States corporations to be prosecuted for manslaughter and murder offences. There have been examples of that happening in the United States for workplace deaths.

The Hon. DAVID CLARKE: As I understand it, Australian Capital Territory legislation allows a corporation to be prosecuted for the manslaughter of an employee in that organisation. Is that right?

Ms SHAKESPEARE: That is right.

The Hon. DAVID CLARKE: Let me give you an example. The wife of an employee who visits her husband on an industrial site dies as a result of the negligence of the corporation. Does the legislation allow for the prosecution of that corporation for the death of the wife who was visiting on that site?

Ms SHAKESPEARE: No. In that situation, if somebody had caused the death of that person, the wife, as a bystander at that workplace, the general manslaughter offence would apply. Industrial manslaughter offences only apply to deaths that occur in the course of employment or engagement to perform work as a contractor.

The Hon. DAVID CLARKE: Yes, that would have applied to the employee. The reason you brought in the new offence of industrial manslaughter is because the existing legislation was not very effective. Getting back to my question, why does the legislation not cover the wife who goes to visit her husband on an industrial site and she dies as a result of gross negligence sufficient, had it been the husband, to invoke industrial manslaughter?

Ms SHAKESPEARE: It does not at the moment. That is the intention of the Australian Capital Territory Government, though. The rest of the fatal offences in the Crimes Act will be reviewed this year and next year to extend those corporate criminal responsibility provisions to them.

The Hon. DAVID CLARKE: Do you believe that is a bizarre consequence of this legislation? Why should the law not be amended so that corporations can be prosecuted for manslaughter generally?

Ms SHAKESPEARE: The Government's position is that it should. We have a small Government and we have to take our legislation projects and prioritise them.

The Hon. DAVID CLARKE: Are you saying it is the Government's view that the legislation should be further amended so as to provide manslaughter by a corporation of any death, whether it is an employee or not?

Ms SHAKESPEARE: That is right and that is the ultimate goal. There is a process of review going on at the moment for other fatal offences under the Crimes Act.

The Hon. DAVID CLARKE: And similarly, if somebody shopping at a shopping complex dies and a corporation is held responsible, at the moment that corporation cannot be prosecuted for manslaughter. You are proposing amendments to the legislation to cover that situation as well, are you?

Ms SHAKESPEARE: Other areas of the Australian Capital Territory Government are working on those now. The equivalent of the Attorney General's Department is doing that.

The Hon. DAVID CLARKE: Has the Australian Capital Territory Government made a decision in principle to widen the legislation to cover these other situations that I am talking about?

Ms SHAKESPEARE: The decision is that it will progressively apply the criminal code to all criminal offences in the Australian Capital Territory.

The Hon. DAVID CLARKE: What is the time frame in regard to that? Was there any reason for the push for situations dealing with the death of an employee and not the deaths of shoppers or for the wife who visited an employee working on an industrial site?

Ms SHAKESPEARE: Yes. It is because most people are now employed by corporations, so that was considered a priority for work-related deaths.

The Hon. DAVID CLARKE: But the large percentage of the population are not employed by corporations. I am talking about deaths that do not arise out of workplace injuries. In other words, most people will visit a shopping complex and, at the moment, a corporation cannot be prosecuted for manslaughter if a shopper dies. Why the haste in getting it through for employees and not for the community as a whole?

Ms SHAKESPEARE: As I said in my opening statement, it is possible to prosecute a corporation. However, the common law principles for attributing liability to a corporation make it very difficult to sustain a successful prosecution. As far as I am aware, there has only ever been one effective manslaughter prosecution of a corporation in Australia.

The Hon. DAVID CLARKE: And that is why you have made it easier for corporations to be prosecuted for manslaughter of an employee but why has not the Australian Capital Territory Government made it easier to prosecute a corporation for any death that it is responsible for?

Ms SHAKESPEARE: Yes, I see your point. The decision was that because most people are employed by corporations it was a priority to have the criminal code apply to workplace fatalities. However, as I said, there is also an intention to apply the corporate criminal responsibility provisions in the criminal code to all fatal offences, and that will happen over the next two years.

The Hon. DAVID CLARKE: Would not the priority to cover women and children who go into shopping centres and other areas be of equal importance?

Ms SHAKESPEARE: I am sorry, I cannot comment on that.

The Hon. DAVID CLARKE: Has the Government made a decision on that question?

Ms SHAKESPEARE: As far as I am aware, the general agreement is to apply the model criminal code to all criminal offences but it is happening over a staged period of time.

CHAIR: The witness is the Director of the Office of Industrial Relations, she is not representing the Attorney General.

The Hon. DAVID CLARKE: I understand that.

The Hon. CATHERINE CUSACK: I am aware of the case but not the outcome where the demolition of Canberra Hospital resulted in the death of a girl. What was the result of that or is the matter still ongoing?

Ms SHAKESPEARE: Some charges were laid, but I think the prosecutions were later dismissed. I would need to follow up on that.

The Hon. DAVID CLARKE: Prosecutions for what offence?

Ms SHAKESPEARE: I will take that on notice.

The Hon. CATHERINE CUSACK: Does this legislation apply to public sector employees?

Ms SHAKESPEARE: Yes.

The Hon. CATHERINE CUSACK: For example, a nurse in a public hospital?

Ms SHAKESPEARE: It probably would not apply to a nurse. There are two offences: one for an employer, so that will not apply to individual public servants, and then there is the senior officer offence. A senior officer is defined to include a Minister and a senior executive in the Government, so fairly senior public servants would be covered by those provisions.

The Hon. CATHERINE CUSACK: Hypothetically, if a nurse were to die of a preventable accident where there had been clear advice right up the line that these steps would have improved the situation and those steps were not taken for whatever reason and a death occurred, all the way up to the Minister, they would be covered by the legislation?

Ms SHAKESPEARE: Yes. Again, people would only be charged with manslaughter if they have recklessly or negligently caused the death of another person. All of the other elements of manslaughter that normally apply, apply to these offences as well.

The Hon. CATHERINE CUSACK: Does it cover a situation involving co-workers, where a co-worker may have contributed to or caused the death?

Ms SHAKESPEARE: No, there is no offence for co-workers. In that situation, if a co-worker has caused the death of another person, they could also be charged with a general manslaughter offence. Industrial manslaughter is primarily about people who engage other people—employers or principal contractors.

The Hon. CATHERINE CUSACK: The employment relationship seems to be a very tricky issue in the construction industry, especially with smaller businesses where people may be working for cash. Is it difficult for you to work out how to capture those employment relationships in terms of establishing which company would be responsible?

Ms SHAKESPEARE: It probably was not all that much of an issue. The Government decided that it wanted to have as broad an application of the legislation that it could because these are serious offences where you are talking about the death of somebody else. Essentially, you need to make sure that the person who has been prosecuted is the person who had control over the circumstances that led to the death. It is not limited by the employment relationship, so it is not just going to apply to people who employed people directly; it also covers people employed under contracts for services as opposed to contracts of service. Where a principal is engaging somebody else to perform work for them as an independent contractor or an outworker, or even as a volunteer, if the way they direct you to perform that work causes the death of that person, they can still be charged.

The Hon. CATHERINE CUSACK: What does "reckless" mean?

Ms SHAKESPEARE: I can read out the definition, which is section 20 of the Australian Capital Territory Criminal Code, "A person is reckless in relation to a result—in this situation the result is death—if the person is aware of the substantial risk that the result will happen and having regard to the circumstances known to the person it is unjustifiable to take the risk." Recklessness is where you know there is a risk that the outcome of what you are doing could cause the death of that person and you are aware that that could be the result of your actions but you take that unjustifiable risk anyway with that person's life.

CHAIR: You said earlier that the senior officer could include a Minister?

Ms SHAKESPEARE: Yes.

CHAIR: Has there been some debate in the Australian Capital Territory as to the role of a Minister of the Crown and whether he or she could be prosecuted for manslaughter? Was that debated in the Legislative Assembly or was it not a problem?

Ms SHAKESPEARE: I do not think it was a problem. It was, I suppose, assumed that if the Government was going to impose these standards on employers, there was no reason why the standards should not apply to themselves as employers.

CHAIR: Usually it would be the head of the department who is responsible but the Minister is above the head of a department and the legislation states "Minister".

Ms SHAKESPEARE: I suppose it recognises that even though people are employed by departmental heads, Ministers can still have a lot of control over how those people perform their work.

CHAIR: There was no opposition by Ministers in the Australian Capital Territory?

Ms SHAKESPEARE: No.

CHAIR: I note you have a 20-year penalty and 2,000 penalty units. What is the value of a unit in the Australian Capital Territory?

Ms SHAKESPEARE: We have two different penalty units. For individuals the penalty unit is $100 so the maximum fine is $200,000 for an individual. For a corporation the penalty unit is $500 so the maximum fine is $1 million for a corporation.

CHAIR: I note the reference to outworkers in the legislation. Does that cover outworkers working in their own home under contract?

Ms SHAKESPEARE: Yes.

CHAIR: Do you see any problems in enforcing that if an accident occurred in the home without supervision, without a foreman or a manager?

Ms SHAKESPEARE: I imagine in that circumstance it may be more difficult to show that it was the person who engaged the outworker's actions who caused the death. You really need to look at it on a case-by-case basis. If it was the work methods imposed on that outworker by the person who engaged them, you might be able to establish that they caused the death to a sufficient criminal standard to prosecute them for manslaughter, but if the accident was caused by the way the worker had set up their work in the home and the principal had no control over that, it would be much more difficult to establish the manslaughter elements.

CHAIR: Has the Australian Capital Territory ever had a death of an outworker?

Ms SHAKESPEARE: Not that we are aware of.

CHAIR: This legislation only came into effect last November so you have not had sufficient time to assess its effectiveness. What procedures do you have for monitoring the legislation? You said that one of its main purposes is to act as a deterrent. What procedures do you have in place to monitor whether the legislation has had any effect or whether, in five years time, there is the same accident or death rate and nothing has changed?

Ms SHAKESPEARE: The Government monitors its own performance through participation in national benchmarking projects, but we also have the tripartite Occupational Health and Safety Council, which meets four times a year and provides advice to the Government on how legislation is operating in practice and recommendations for change. We see that that process would continue to monitor the effectiveness of the legislation.

CHAIR: You do not have anything more detailed, like a unit in WorkCover or some other body that has been set up?

Ms SHAKESPEARE: In the ACT we have two areas that deal with health and safety. There is my area, which is responsible for establishing policy and legislation, and we have ACT WorkCover, which is responsible for enforcing the legislation and providing education to employers and

employees about their rights and responsibilities under the legislation. Monitoring of the legislation is a function of my team rather than ACT WorkCover.

CHAIR: The other matter that has been raised by other witnesses is the role of the police in the ACT. Do they now have a major role in investigating and carrying through prosecutions for industrial manslaughter?

Ms SHAKESPEARE: Yes. Because manslaughter offences are crimes under the Crimes Act they would primarily be investigated by the police.

CHAIR: I assume there was a great deal of consultation with them as to whether they were equipped, whether they had the ability, to carry out this new role? Was there any reaction? Were they enthusiastic about this role?

Ms SHAKESPEARE: No. The elements of the offence are pretty much identical to other manslaughter offences, and in the past the police have not had any difficulties with manslaughter investigations.

CHAIR: I assume in the past where there has been a death in the workplace police have been involved and have investigated?

Ms SHAKESPEARE: That is right, and I think that is probably the case for most serious accidents, whether they be in the workplace or otherwise.

CHAIR: Will there be any increase in their role under the legislation to what they were doing in investigating accidents prior to the bill? Has it increased their responsibility and is there any higher evidentiary burden placed on them to prove manslaughter?

Ms SHAKESPEARE: The first question, no, I do not think that there are additional functions for the police in investigating accidents. This legislation will only impose additional functions on police where there are fatal accidents. We do not have that many fatal workplace accidents in the ACT. We have a small workforce—we have about 300,000 people in total, so about half of those people are in the workforce—and we also have, I suppose, a different makeup for our workforce in that we do not have a lot of heavy manufacturing or blue collar industries. Most of our fatalities are in construction and in government utilities, but again there has probably only been about 20 fatalities in the ACT since self-government.

CHAIR: Twenty?

Ms SHAKESPEARE: Approximately 20.

CHAIR: Since when, what year was that?

Ms SHAKESPEARE: 1989. The second part of your question was?

CHAIR: The basis of evidence to prove manslaughter.

Ms SHAKESPEARE: There has been no increase in the law or change to the evidentiary status of manslaughter. You have to prove there was a death, that the person charged, whether it be an employer or individual, had caused the death or substantially contributed to the death consistent with other legislation in this area, and that the person's conduct had been reckless or negligent to a criminal standard.

The Hon. DAVID CLARKE: All the ingredients are the same as those applicable in the common law?

Ms SHAKESPEARE: That is right, to general manslaughter.

CHAIR: We heard from other employer groups that they do not support industrial manslaughter. What was the situation in the ACT with the employers to the news? I assume the unions were supportive of the proposal?

Ms SHAKESPEARE: Yes, the unions supported the proposal quite strongly. During our consultation with the Occupational Health and Safety Council, which includes four different representatives of employers, I do not think you could ever say those representatives actively supported the legislation but they agreed with the model that we introduced and did not have many concerns except for one organisation. The Master Builders Association, the Canberra Business Council and the public sector employer representatives on the Occupational Health and Safety Council were reasonably happy with the model we developed, particularly because it did not include vicarious liability for individuals. The ACT Chamber of Commerce and Industry was more vocally opposed to the legislation. So, there was some employer opposition but we also had a fair bit of support for the legislation that was developed.

CHAIR: Are there any particular or new defences to an industrial manslaughter charge other than the normal criminal law defences?

Ms SHAKESPEARE: No, just the normal criminal defences under the criminal code.

The Hon. PETER PRIMROSE: We have heard some evidence about what are called phoenix companies. I wonder whether you have turned your mind to that and how that is dealt with under the legislation?

Ms SHAKESPEARE: The ACT Government is constitutionally limited in its capacity to deal with corporations under the ACT Self-Government Act 1988, which is a Federal enactment. The ACT Legislative Assembly cannot make laws about corporations. We can make laws about conduct by corporations where it can be characterised in this instance as a work safety law but we are fairly limited in what we can do about the ability of those sorts of corporations to operate. We are subject to the Federal laws there. However, the ACT Government strongly supports making changes to the Federal Corporations Law to prevent companies from being able to operate, particularly when it can be demonstrated that they have unsafe work safety record, and we are making submissions to the Commonwealth about that.

CHAIR: Is there any progress you know of from the Commonwealth point of view? Sometimes it can be difficult to get the Commonwealth to move.

Ms SHAKESPEARE: There have been recommendations through the Royal Commission into the Building and Construction Industry about phoenix companies and their ability to operate and that sort of thing. So we are progressing our views to the Commonwealth through that process, the response to the Royal Commission into the Building Construction Industry.

CHAIR: You have no idea of what the response will be from the Commonwealth, what priority it is giving to this?

Ms SHAKESPEARE: I understand the Commonwealth has set up a working group that is being co-ordinated by the taxation office to look at the recommendations of the royal commission.

CHAIR: That is in progress?

Ms SHAKESPEARE: Yes.

Ms LEE RHIANNON: There has been speculation that the introduction of industrial manslaughter legislation will result in some companies leaving to set up their operations in another State. Was there any such trend in the ACT?

Ms SHAKESPEARE: We have not noticed any companies leaving yet but, as I said, the legislation only started operating yesterday. During debate and in the lead up to debate by the Legislative Assembly on the legislation quite a few employers did email members of government saying that they would think about moving interstate. But for some people—like the Belconnen

Leagues Club—it would be difficult for them to do that anyway. No, we have not noticed anything although some employers did indicate that that was a possibility.

CHAIR: It would be easier for them to just move over the border—not interstate by just over the border?

Ms SHAKESPEARE: Since the passage of the legislation in November last year until yesterday we have had a lot of consultation with employers. We have provided information sessions and training about the law and we have managed to get the message across to employers that if you are meeting your health and safety obligations the legislation does not impose any new obligations. If you are taking a proper risk-management approach to health and safety at your workplace you have nothing to fear from these laws.

CHAIR: It gets back again to how the courts use the legislation. There has already been criticism in New South Wales that the courts seem to be lenient in the level of fines, and so on. Have you any anticipation that if it is a 20-year penalty that a person could get 20 years or would it be more likely one year or two years?

Ms SHAKESPEARE: Those are maximum penalties and it is up to the courts at their discretion to decide which cases deserve maximum punishment, but the penalties are intended to be there as maximums and there will be lower penalties available to the courts in cases that were perhaps not so culpable.

CHAIR: Have you anticipated what you think those penalties might be based on? How do the courts in the ACT work on other matters of murder and manslaughter in the criminal law? No-one gets 20 years, even for murder, now.

Ms SHAKESPEARE: No. There has not been any work done on anything like that. It is to be left to the courts.

The Hon. DAVID CLARKE: Ms Shakespeare, am I right in saying that the ACT has always had the capacity to bring manslaughter charges against any officer of a corporation employing individuals? Is that right?

Ms SHAKESPEARE: Yes.

The Hon. DAVID CLARKE: So, in other words, you can institute a prosecution for manslaughter of a fellow employee of a deceased worker?

Ms SHAKESPEARE: Yes.

The Hon. DAVID CLARKE: Or manager of a deceased worker, of directors of that corporation, or the managing director of the corporation? In other words, you have always had the capacity to bring a charge of manslaughter against any officer of a corporation? Is that correct?

Ms SHAKESPEARE: When that person has caused the death of another person recklessly or negligently.

The Hon. DAVID CLARKE: That is right, or you could have a situation where several people could be charged with manslaughter of the one individual? So, you could have a situation where a fellow employee and a manager and a director—all three—could be prosecuted for manslaughter of the one individual, is that right?

Ms SHAKESPEARE: Yes.

The Hon. DAVID CLARKE: How does the amendment of the law to allow prosecution of corporations differ from bringing prosecutions against any individual, any office bearer, any director of the corporation? In practical terms what is the difference between the two?

Ms SHAKESPEARE: These laws allow prosecution of the corporation itself as a separate legal entity to its directors and officers.

The Hon. DAVID CLARKE: Yes, I understand that, but what is the practical effect? The practical effect is that the corporation is the sum of everybody in it and a corporation would be charged because individuals somewhere along the line have been responsible for those ingredients necessary to found that charge of manslaughter. That being the case, in practical terms what is the benefit in having amended the law to allow corporations to be charged when you could charge all the directors and the managing director together for manslaughter now?

Ms SHAKESPEARE: The penalties under the new provisions would be applied to the corporation itself, and those can be quite high financial penalties—financial fines of $1 million—plus other orders, community service projects up to $5 million. Because corporations are separate legal entities they hold assets. As a corporation their directors do not hold them. This is supposed to be a deterrent to corporate employers.

The Hon. DAVID CLARKE: Surely the deterrent of a director going to gaol for 20 years is going to be more of a deterrent than a corporation of which he is director being fined $1 million?

Ms SHAKESPEARE: Yes, but we have large corporations. If I could perhaps use an example: a corporation may buy some machinery that its employees need to run. That machinery is provided with safety guards. If the corporation and its directors decide they want to speed up production and a way of doing that is to remove the safety guards from the machine, the decision to do so may emanate from the directors and their policy—they want production to be quicker—but the person who took the machinery guard off would be the supervisor on the floor. That is the person who would be held responsible when the worker dies as a result of the safeguard being taken off the machine, not the director who is ultimately responsible for that decision.

The Hon. DAVID CLARKE: No, sorry, is not the situation that if it can be shown it is a direct consequence of the directors making that decision to remove the safeguard, under the old law they could be charged with manslaughter?

Ms SHAKESPEARE: If you can show that it was directly their decision. If it is the corporate culture that has been developed in that organisation that we routinely ignore our safety obligations or you allow a culture to develop in your organisation that means that your staff ignore safety precautions, then the corporation itself is responsible.

The Hon. DAVID CLARKE: Corporate culture is created by the directors and the management, is it not, so who is responsible for corporate culture? The officeholders, the directors are responsible for corporate culture. Can I ask you this question—

The Hon. JAN BURNSWOODS: Can she answer the question you have just ask first?

The Hon. DAVID CLARKE: Well, I put it as a statement, but I will ask for your comment on that.

Ms SHAKESPEARE: Would you please repeat the question?

The Hon. DAVID CLARKE: Would you agree that the culture of a corporation is the culture that has been instituted by the directors and management?

Ms SHAKESPEARE: Yes, generally that is the case.

The Hon. DAVID CLARKE: Has the Australian Capital Territory Government attempted prosecutions for manslaughter against the directors, chairman or manager of companies or corporations?

Ms SHAKESPEARE: No.

The Hon. DAVID CLARKE: Why not?

Ms SHAKESPEARE: I would have to get advice from the Director of Public Prosecutions.

CHAIR: Would you take that question on notice?

Ms SHAKESPEARE: Certainly.

The Hon. DAVID CLARKE: The Australian Capital Territory Government has come to the decision to amend the law on the prosecution of corporations because you say there is a defect in the present law. Yet there has never been an attempted prosecution of any manager, managing director or director of a corporation. As no evidence or statistics are available, what is the anecdotal evidence that you based changing the law upon?

Ms SHAKESPEARE: I suppose the evidence that led to that decision was the fact that nowhere in Australia, except for Victoria in one case, has there ever been a successful prosecution of a corporation for manslaughter.

The Hon. DAVID CLARKE: Have you ever tried to get a prosecution for manslaughter in the Australian Capital Territory?

Ms SHAKESPEARE: I would have to refer that question to the Director of Public Prosecutions.

The Hon. DAVID CLARKE: There is a difference between a successful prosecution and trying to initiate a prosecution in the first place. Would you provide information to us as to whether the Australian Capital Territory has over the past 20 years endeavoured to initiate a prosecution for manslaughter against a managing director, chairman, director or manager of any corporation?

Ms SHAKESPEARE: I will get that information for you, but it will be since 1989.

CHAIR: Since self-government. The major test will be how effective it is as a deterrent, which you said is the main objective, and whether any means other than prosecution for industrial manslaughter could be used as a deterrent. I suppose that is the option facing New South Wales.

Ms SHAKESPEARE: Yes. The Australian Capital Territory Government has decided, and the Legislative Assembly has agreed, that it will be a useful deterrent. We will have to judge it against our performance over the next number of years. It has the additional benefit of raising awareness of occupational health and safety obligations of employers. We have been inundated with people seeking information about their actual health and safety obligations. In particular, individual employers and small corporations were completely unaware that they could be charged with manslaughter if they caused a fatality at work. The information sessions we have been holding for employers over the last couple of months have been very well attended. We have had hundreds of employers turning up at the seminars and we have explained to them how to implement proper risk management strategies to make sure that they are meeting their health and safety obligations. As well as acting as a deterrent, it has had the useful side effect of raising people's awareness about occupational health and safety obligations.

CHAIR: Was the passing of the legislation treated in a sensational way by the Australian Capital Territory media?

Ms SHAKESPEARE: I think so. I think it has been treated quite sensationally not just by the Australian Capital Territory media but by the media generally.

CHAIR: What were the headlines in the Australian Capital Territory?

Ms SHAKESPEARE: When you look at what is in the legislation itself, it does not impose new health and safety standards or additional obligations on employers. It is really about allowing corporations who are employers to be prosecuted more effectively. It has been taken a little bit out of context.

CHAIR: When you say it was dealt with sensationally, how did the media present it—that bosses could be put in gaol?

Ms SHAKESPEARE: As I said before, there were quite a few employers who, without an accurate understanding of the legislation, thought that they were going to be held responsible whenever a death occurred at a workplace. We have had to do quite a lot of work with employers to explain that is not the case. If a death is caused by, for instance, another worker who turns up to work affected by alcohol or drugs—which is another issue that we have had coming up time and time again through employers—the employer will not be held responsible because it is not the employer's reckless or negligent conduct that caused the death, it is somebody else's conduct. After we have presented the information to businesses over the last couple of months, people have a better understanding of the legislation and are not so concerned about it now.

CHAIR: Is your office responsible for the educational aspect, explaining the legislation and advertising in newspapers?

Ms SHAKESPEARE: We are assisting the Australian Capital Territory WorkCover with that. It is a joint effort.

CHAIR: Have notices been sent to companies about the education-type programs?

Ms SHAKESPEARE: Yes, we have made fact sheets that have simple questions and answers about the legislation available to people on our web site and we have sent out information directly. As I said, we have held information seminars for employers throughout Canberra in different areas.

CHAIR: Do you supply education kits or is it all on the web site?

Ms SHAKESPEARE: It is on the web site. I can leave a copy of the questions and answers.

CHAIR: Any information you have would be helpful to the Committee.

Ms SHAKESPEARE: I have brought a copy of the legislation, the explanatory statement, the Standing Committee on Legal Affairs report on the bill, provisions from our criminal code that are relevant and the questions and answers.

Documents tabled.

CHAIR: Thank you for your attendance and for sharing the information with us. As you have been intimately involved in the process, we appreciate hearing from you first-hand.

(The witness withdrew)

GARRY JAMES BRACK, Chief Executive, Employers First, affirmed and examined:

CHAIR: In what capacity do you appear before the Committee, as a private individual or as the representative of an organisation or business?

Mr BRACK: As the representative of a business organisation.

CHAIR: Do you wish to make a brief opening statement prior to taking members' questions?

Mr BRACK: I have some material to present. But, if Committee members want to ask questions, I am happy to deal with this in any fashion you would like.

CHAIR: Then we will have the opening statement by you. Were you intending to provide to the Committee a submission from your organisation?

Mr BRACK: I can provide you with a written submission in confirmation of what I am about to say.

CHAIR: Thank you. If you would proceed now with your opening statement. If you have any other documents that you want to table, would you identify those when you table them.

Mr BRACK: I have prepared a rather lengthy piece of material, but I am happy to handle this in any way you like. I know that we now have 40-odd minutes in which to deal with my evidence, so I am conscious of the timeframe.

CHAIR: How long would it take for you to go through your prepared material?

Mr BRACK: Despite my experience in doing these things, I am never a good judge of that, I am afraid.

The Hon. JAN BURNSWOODS: How many pages is it?

Mr BRACK: They are slides rather than pages—something short of four million slides, I think! There are quite a lot. Perhaps I can start to deal with the issues.

CHAIR: Would you start, and members of the Committee might interrupt to ask a question.

Mr BRACK: Thank you. I understand this matter is about "industrial manslaughter", if I can use that terminology. It does deal with particularities of a couple of cases. I do not propose to go to those cases. I am more concerned with the policy issues surrounding them. Of course, the terms of reference go to WorkCover's handling of its responsibilities under the Act concerning those two particular issues, but I think my purpose here really is to look more broadly than those two particular issues and to try to set this matter of industrial manslaughter in context with the Occupational Health and Safety Act. The WorkCover Authority has run a series of seminars for small business in particular. I will take some quotes from those seminars. We have deliberately gone along and taped them so that we have heard the message:

> Nothing much has changed, looking at the legislation now compared with the pre-2000/2001 Act and regs.
>
> You're probably doing it already.
>
> It's easy. All you have to do is fill out a few check lists.

Of course, our understanding of all this is somewhat different. In one particular case decided recently by the commission the judge said—and, for the sake of the reporter, I can provide this later as I am reading it verbatim:

> This is one of those cases where a defendant, which on any view has an impressive approach to safety, has identified a risk, has devised a policy which, if adhered to, would have prevented that risk from materialising, has trained staff in the work and the applicable safety policy, and has also monitored compliance with the policy.

> Despite all this effort, the steps taken failed, identifying an obvious weakness in the applicable policy, a serious risk to safety materialised and serious injury has resulted. Why the forklift driver and injured driver, both well experienced in the work in question did not adhere to the applicable policy, was not clear on the evidence.

That was one case. I recite that essentially because the court said say the approach is impeccable but nonetheless the employer was fined $120,000, discounted to $78,000.

CHAIR: Could you identify the case?

Mr BRACK: I cannot, because I did not write it in when I typed this in. But I can indeed do that subsequently.

CHAIR: If you would provide that later, we would appreciate that.

Mr BRACK: I shall. So I say: an impeccable approach to safety acknowledge, but then the fine comes nonetheless. That is fairly significant in the overall scheme of this legislation.

The Hon. CATHERINE CUSACK: Why was the fine discounted?

Mr BRACK: For a variety of reasons: one, because of an early plea of guilty—and you get about a 25 per cent discount if you plead guilty immediately, upfront; two, you may get a discount because of your prior record; and then there may be a variety of unspecified factors that lead to a discount. In this case a $120,000 fine was discounted to $78,000. One cannot tell on the face of the decision how many dollars were attributable to one item and how many dollars were attributable to another item. They simply aggregate the discount.

Just looking at all the employers I deal with—and I have personally run over 70 briefings for employers, predominantly our members, but a dozen or so of those briefings over the past 18 months have been essentially for non-members of my organisation—you do not come across employers who articulate the view, "I do not want to have a safe workplace." The mythology that employers are out there killing their workers with gay abandon or cutting corners does not come across in the discussions that I have with them. Perhaps you might say, "You would not expect it to." Certainly, I do not. But we just do not have that kind of experience with them. They are concerned for their employees. I was talking to a builder in Cowra just recently—after the tragedy in which a young man fell through a roof structure—and he said, "I don't send my apprentice up there on the roof. I go and do the dangerous stuff myself." Given he is a corporate structure, the corporation is as liable for what he does as it would be if he did indeed send the apprentice up there, irrespective of whether there was induct ure or otherwise. Nonetheless the attitude there was not, "I risk my employees' lives," but rather, "I know there are things in this industry that are dangerous and I try to ameliorate the risk by the way I do the work."

In the end, for employers to get the right sort of safety standards, the safety standards have to be deliverable and they have to be practicable. They have to be capable of being implemented. That is a theme I will come back to repeatedly. According to WorkCover, the legislation is supposed to be in plain English and simplified. WorkCover says, "It's easy. Just fill out the check lists." But, in reality, it is absolutely complex and onerous. If you understand the detail—and few people who simply read the words actually understand the complexity involved in its implementation—it is complex to implement. It is more onerous in New South Wales than the duty of care in other areas of law.

So New South Wales occupational health and safety law is more onerous than it is in all other States of Australia, it is more onerous than the accepted international occupational health and safety standards, and it is more onerous than the common law standard. If you look at the accepted international standard, essentially the requirement is to take reasonable care in relation to foreseeable hazards, and to do what is reasonably practicable in order to ameliorate or eliminate. They interpret "reasonably practicable" much more easily, softly, leniently than they do in New South Wales, and indeed much more so than in Australia generally. So overseas there is a different approach to the way these terms are utilised.

In New South Wales you have an obligation to deliver almost absolutely perfectly safe workplaces. I say "almost absolutely" because the record over time is about 91 per cent success in prosecutions in New South Wales. Compare or contrast that with 72 per cent in the United Kingdom.

Out of the other 9 or so per cent are a bunch that are lost because the documentation is inadequate. So there are only something like 2 to 4 per cent of cases where there might be a successful defence mounted. In most cases there is a plea of guilty—not because always the employers think they are guilty, but because, on the face of the legislation, it is almost impossible for employers to defend their position. Some, of course, you would say do not deserve to be able to defend. That is unchallengeable. But in a lot of cases they would say, "I do deserve to be able to defend, but on the face of this law I cannot."

The duties of an employer are expressed in the Act as, "To ensure the health, safety and welfare of employees at work." "At work" is pretty widely defined. So somebody on a construction site is "at work". An inspector from WorkCover on a construction site carrying out an inspection is "at work" at that time. Somebody working from home is said to be "at work" by WorkCover whilst they are working at home. So all of those things are "at work". And, of course, so is doing work in the conventional factory. "Ensure", as in ensure the health, safety and welfare, is interpreted by the courts as "guarantee, secure, make certain". There is no flexibility about the word "guarantee". It means absolute. But there are some defences in the Act that I will come to.

The duty extends to ensuring that there is safety and no risk to health from the premises, if they are controlled by the employer; plant and substances used in the workplace; and work systems in the working environment of employees. So "ensure" includes the requirement also "to provide such information, instruction, training and supervision as is needed to ensure employees' health and safety." "Such", in that context, essentially means "always enough". So, if you said, "I had a supervisor" they might get you for not having two. If you said, "The supervisor was around the corner" they might say, "You did not supervise them." Or if the apprentice was left on the site and told, "Don't touch the switchboard. It's live. You just sit there, wait till I get back," and he sticks his screwdriver into the switchboard and incurs some injury, the employer gets done because the supervision was inadequate, or the instruction was inadequate.

That "such" is a fundamentally important word, as are "as needed to ensure", again meaning to guarantee health and safety. In order to work out the information to provide, the employer is obliged by the legislation to consult all available authoritative sources. There is no information about what is an authoritative source. In the negotiations about this legislation we asked WorkCover to identify the authoritative sources, but it refused. We asked why and were told that WorkCover might miss one. Employers are then left in the position whereby they must work out the authoritative sources. That drafting of the law was designed to maximise the ability to prosecute. We know that is the way the legislation was drafted—it was confirmed by someone on the drafting committee.

When the employer obtains that information, his or her responsibility is to identify hazards, to assess risks, to eliminate or control those risks and to provide information to others. Even if an expert is consulted in the workplace, if that expert fouls up, misses something or advises an employer to do x and he or she does so and that turns out not to be adequate, the employer is done because he or she failed to provide that expert with enough information, instruction and so on to allow him to carry out his job without any failure.

Ms LEE RHIANNON: What do you mean by the word "done"?

Mr BRACK: Successfully prosecuted.

Ms LEE RHIANNON: How often does that happen?

MR BRACK: Often enough. I will provide a case shortly.

Ms LEE RHIANNON: I would like a number.

Mr BRACK: A small number. The problem is that the employer is always liable. Whether they are prosecuted is in the hands of the gods, and the gods are in WorkCover. If they feel like prosecuting, you get done.

Ms LEE RHIANNON: It is emotive language and you have indicated it does not involve a large number.

Mr BRACK: If the issue is relevant to the case, the employer is successfully prosecuted and cannot adequately defend the charge. Whether talking about enough information, supervision, training or instruction the law is available to ensure that an employer cannot successfully defend a case. I can cite any number of cases in which those issues are relevant.

The Hon. JAN BURNSWOODS: If we talk about statistics that must be put in the context of cases in which prosecutions are not mounted.

Mr BRACK: If you look at the structure of the Act, the employer is always at risk. Whether the inspector decides to let the employer off on that occasion—

The Hon. JAN BURNSWOODS: I said "prosecution".

Mr BRACK: I thought you said those not prosecuted.

The Hon. JAN BURNSWOODS: Yes, but the decision about whether to prosecute is not made by the inspector.

Mr BRACK: No, it is made by WorkCover; that is true.

The Hon. JAN BURNSWOODS: It may be better to be a bit calmer.

Mr BRACK: With the greatest of respect, I have dealt with this legislation to a much greater extent than honourable members. I have looked at the decided cases in great detail and I am acutely aware of the liability of employers. They walk out of their premises at night, lock the door and say, "Phew, one more day has passed without my being in trouble." That is not because they know they can comply but, rather, because no-one came around on that day. You may think I am not being calm, but I am telling you the way the legislation is structured.

The Hon. JAN BURNSWOODS: How many prosecutions were launched last year?

Mr BRACK: About 416, which is twice the rate in the United Kingdom, 42 times the rate in Alberta, Canada, and many more than in the United States of America.

Ms LEE RHIANNON: How many people are dying in those areas? This is essentially what we are getting down to. Do we not have the highest rate of workplace deaths?

Mr BRACK: Of what? Compared with what?

Ms LEE RHIANNON: Compared with other developed countries.

Mr BRACK: No, we do not.

Ms LEE RHIANNON: What about compared with Canada and the United Kingdom? Our rate is higher.

Mr BRACK: We cannot tell the figure in the United Kingdom because the published figures are not the real figures. There is no comparability in the way figures are published around the world. For example, we exclude truck drivers who are killed on our roads because in the first instance such a fatality is reported to the Roads and Traffic Authority. The authorities in the United Kingdom exclude a number of incidents. They say their rate per 100,000 people is 12. At the relevant time ours was 78. If one were to look at the raw figures one would wonder how they managed to get the figures so low. They achieved that because of the things they exclude. We know that their figure is not 12 compared with our figure. We cannot work out the actual figure because we cannot get to the nub of the data. They do theirs using surveys and we do ours by aggregating workers compensation claims. They survey a population and make a guess.

The table published in the Industry Commission report a few years ago suggested that our rates were the highest. That report stated that the data had been provided by the International Labour

Organisation [ILO]. We approached the ILO and asked for the source of the data. They said they did not know the source of the information. They could not provide a source and stated that they had not provided that information. There is a myth that we are the worst in the world. In fact, we are within the average range. Obviously everyone would like to see a decrease. Like every developed country, we have seen significant decreases in the number of fatalities over the past three decades or more.

The Hon. CATHERINE CUSACK: I ask members of the committee to listen to Mr Brack. The passion he is expressing is very reflective of the passion felt by many businesses. We have listened to the passion of the trade union movement on this issue. That does not mean that there is not equal passion on the other side of the argument. I do not think he should be criticised for that.

CHAIR: Honourable members of the committee are free to express their views. However, the witness is the witness and he can present his evidence in any way he wishes.

Mr BRACK: I am happy to entertain the debate.

CHAIR: It is Mr Brack's job to ensure that the committee gets the message.

Mr BRACK: Indeed. The employer can recruit an expert, but if he fails the employer still wears the liability. If an employer does not have the internal resources and brings in an expert, he or she is still completely liable. If the expert fouls up, the employer might sue under common law for that failure. However, the prosecution comes back to the employer. An employer must also ensure that non-employees are not exposed to risks in the workplace in the same way they must with regard to employees. As I said, "ensure" means virtually absolute. The employer must guarantee, secure and make certain. The courts have handed down some key decisions. These are critical decisions because they indicate what the courts think about these things. The Industrial Relations Commission is the court of record.

The court has stated that a failure to provide a safe workplace is not the same as a failure of a duty to take care at common law where the standard of the duty is that of the reasonable and prudent man. Here the standard is absolute: if there is a failure subject to section 53 of the prior Act, now section 28 of the Act, however understandable the failure might be, liability is absolute. Subject to the defences, liability is absolute. Another decision stated that if the risk is both present and capable of being known to be present then liability is absolute subject to defences provided by section 53, now section 28. If it is present—a question of fact determined by the judge—and capable of being known to be present—again determined by the judge—it is irrelevant whether the employer knew. If it was capable of being known the employer is in trouble. The court also stated that the concept of reasonable foreseeability—part of the common law test—is not apt to be applied in relation to the duties owed under the Occupational Health and Safety Act. It is not the accident itself that constitutes the offence but, rather, the failure of the employer to ensure—meaning guarantee—that employees are not exposed to risks while at work. That is clear.

Partridge Plumbing, a husband and wife firm, was engaged by a retirement village for what was described as "reactive plumbing", that is, repair and maintenance. Justice Cavanaugh took Mr Partridge to be to some extent in control of the maintenance of plant and responsible for ensuring its proper maintenance and safety. The particular piece of plant was a thermostatic mixing valve [TMV], which is attached to a bath tap to control the temperature of the water going into the bath to ensure it does not exceed a certain predefined temperature. Mr Partridge carried out the maintenance to the manufacturer's specifications, which he consulted. He also consulted and followed the code of practice. He relied on the code for installation, maintenance and servicing of TMVs. He had also done the TMV training course to ensure that he did the job correctly. Numerous parts had been replaced as required. No specification was given requiring periodic replacement of an internal element of the TMV called a thermoscopic element, which is part of the mixing valve. At one point of TMV failed suddenly when an elderly comatose patient had been placed in a shallow tray bath. In evidence the nurse said that she noticed the patient was turning pink. The patient could not talk. As a result of the failure of the TMV scalding water flowed into the bath and the patient was badly scalded and subsequently died.

During the WorkCover investigation the defect in the element was not detected by the mechanical engineer engaged by WorkCover to investigate. It was discovered later by a WorkCover

appointed expert metallurgical engineer using a high-powered stereo microscope. The metallurgical engineer discovered two pinprick holes in the thermoscopic element that were invisible to the naked eye. The plumber was charged with failing to monitor the TMV when performing his maintenance, failing to apprise himself of information regarding the expected lifespan of a TMV and failing to advise the village of the need to replace it as appropriate. There was no information in the code of practice about replacing or changing the element. There was also no information, as I understand it, in the manufacturer's literature or in the code of practice provided by WorkCover. However, the judge said that Mr Partridge had an obligation to discover that information, to work out what the serviceable life was and to advise his client accordingly.

Ms Rhiannon, I take you back to the question. This person was expected to know what was ordinarily not in print. Is it then reasonable in those circumstances to say that that employer failed? The judge acknowledged that it was a small business and that any significant fine would be difficult to pay. However, she said that it was a serious matter and Mr Partridge should have established that information and, accordingly, fined him $40,000 discounted to $30,000. The retirement village was also fined. As a result of those things I asked the rhetorical question: is it easy? They are probably doing it already and I say that it is not. I have quoted that decision to employers across the State and their mouths hang open. They cannot believe that that is the nature of their liability.

The Hon. PETER PRIMROSE: Are you saying that at present employers have the same level of responsibility as, for example, motor vehicle offenders?

Mr BRACK: Do you mean if they speed they are liable?

The Hon. PETER PRIMROSE: Strict liability applies to motor vehicle offences.

Mr BRACK: Do you mean in relation to speed?

The Hon. PETER PRIMROSE: Strict liability applies.

Mr BRACK: If you can give an incident as an example I might be able to respond.

The Hon. PETER PRIMROSE: The same level of strict liability applies to employers as applies to traffic offenders—there is no mens rea. Is that what you are saying?

Mr BRACK: I do not make any comment on the Motor Traffic Act, I must say, because I do not know. I will not go there. But I am saying that under this Act—

The Hon. PETER PRIMROSE: But if you speed, it does not matter for what reason you speed.

Mr BRACK: I accept that.

The Hon. PETER PRIMROSE: So what I am saying is that there is an equivalence between the motor vehicle Act—

Mr BRACK: If you are talking about speeding, then I can understand your proposition.

The Hon. DAVID CLARKE: But only for some offences, not for other vehicle offences; only for speeding.

CHAIR: Let us not be distracted. Let us get back to the issue.

The Hon. PETER PRIMROSE: Mr Chairman, I think that is an important point. I am trying to gauge equivalences in terms of statutory provisions.

Mr BRACK: I must say I reject the proposition that there is equivalence here. We are dealing with much more significant issues, I think.

The Hon. PETER PRIMROSE: I see.

The Hon. CATHERINE CUSACK: Can I clarify whether that was Judge Trish Kavanagh you are referring to?

Mr BRACK: Yes.

The Hon. JAN BURNSWOODS: While we have an interruption, perhaps Mr Brack could tell us if we are going to have time to ask questions.

CHAIR: I am going to stop him in a moment and then we will go to questions. I am watching the clock.

Mr BRACK: Okay. Let me proceed. There are harsh sanctions in this legislation, higher relatively—well, higher absolutely—than any other State, higher than New Zealand, higher than the USA, and higher than the UK, on average. There is no maximum fine in the UK but on average our fines double what they have in the UK. So we have a reputation for being both prosecutorial here and for imposing large penalties against the backdrop of legislation which is very difficult to address for employers. We have four times the prosecutions of the UK, 42 times those of Alberta, Canada, which is relevant because I think the Minister for labour from Alberta, Canada, was invited out here to the Safety Summit a year or so back and addressed the summit by saying, "Be tough on employers. That is the way to get results. We are tough on employers in Alberta, Canada." The answer is that they have a much more reasoned and reasonable approach in Alberta, Canada. I will not deal with the details but when I put in a submission you will see the comparable figures for here, the UK and Alberta, Canada and indeed the other States.

If you look at workers compensation data, over time the number of claims is coming down but the cost of claims is going up. So if one just takes the cost of claims as the indicia of poor performance, we would say that employers are doing a poor job but in fact, over time, since the late seventies, the number of claims—and like the developed world, generally—has been coming down, but the cost is still going up to dramatically. Prosecutions over the past four or five years—422 in 1998-99 and $3 million worth of fines—and I am rounding here; 1999-2000, 500 prosecutions and $6 million in fines; 2000-01, 404 prosecutions and $5.4 million in fines; 2001-02 455 prosecutions and $9.5 million in fines; and the most recent figure I cannot remember precisely, but it is something like 416 prosecutions and $13.4 million worth of fines. Less than four years ago, we had $3 million, now we have $13.5 million or thereabouts. So the fines are going up dramatically in all of this. Ensure is the toughest standard in the world—guarantee, secure, make certain—made tougher still by the fact that if you comply with the regulations, that is no defence to a prosecution, but if you fail to comply with them, that can be used as evidence against you of a breach. With the code of practice, if you fail to comply, you can be prosecuted for all of that.

CHAIR: You covered that in your opening presentation—those terms.

Mr BRACK: Yes.

CHAIR: This might be a good point for us to ask some questions.

Mr BRACK: Can I just deal with the next bit about liability under this Act because it is crucial. If any employer is prosecuted, even if they are not a corporation, section 28 provides two defences. I am paraphrasing, but one says that compliance was not reasonably practicable. Virtually nobody succeeds in that defence as a statement of fact. The second defence is that I had no control over the causes and therefore it was not reasonably practicable to make provision against them. Virtually nobody succeeds with that defence. If you are a corporation and a corporation is taken to have contravened a provision of the Act, then each director and each person concerned in the management of a corporation is taken to have contravened the same provision. That means—is deemed guilty. They have reversed the onus of proof. You are deemed guilty. They reversed the onus of proof and you get to try and prove one of these two defences—the section 26 or the section 28 defences. The section 26 defences are almost impossible to prove and, by the way in this context, a manager is every person concerned in the management of the corporation. WorkCover believes that that goes down as far as a supervisor on the basis of its prosecutions to date, whether successful or otherwise.

One might ask rhetorically are there exemptions in section 26 for large corporations that have sophisticated occupational health and safety management systems, plan for the worst case, and have very high standards but not perfection? The answer is that there is no exemption. For small businesses with no resources and do not have the expertise and do not have the money to get in the expertise, there is an impossible burden and there is no exemption for them. Not-for-profits and charities—people volunteering their efforts on the board of directors—there is no exemption for them, but curiously enough local councils that are incorporated, the people on the council, are exempt. It just seems incredible to me that they should be exempt but nobody else gets off the hook. Perhaps it implies that all government Ministers should be exempt from the outcome of this legislation.

There are two defences to section 26. The first one of those is: I was not in a position to influence the conduct of the corporation in relation to the breach. Frankly, in practice, unless you are overseas for a couple of years at the relevant time, it is almost impossible to get off. The second defence, which is crucial, is that: I was in a position to influence the conduct of the corporation and I used all due diligence to try and make sure it did the right thing. That term is not defined in the Act; therefore, you go to the ordinary dictionary definition, if you like, of those words. But in a prosecution in the pollution control area, Justice Hemmings interpreted those words in other legislation as meaning "somewhere between due diligence and perfection".

I could refer you—we will not have the time—but I could refer you to a book by Wendy Thompson in which she has this massive explanation of what "all due diligence" means and no employer—no employer—could handle that definition. She used to be the manager of WorkCover's prosecutions branch, and the consulting editor on the publication is Francis Marks, who is otherwise known as Mr Justice Marks of the Industrial Relations Commission. It is impossible to establish all due diligence; therefore it is impossible to get off under that defence. That compromises the first defence which means that most of these defences are impossible to get off. If we go back to the question of industrial manslaughter and if you insert a provision into this legislation—and that is what is being debated at the moment, inserting a new crime or criminal offence—it says "breach of duty causing death". It is impossible under this Act not to be in breach of duty. Even the best companies in the country with massive resources are still being prosecuted for things that go wrong. So that will mean in the end that plumber will be on the way to gaol, and a whole host of others besides. I can deal with many other things, but time is short. Thank you for listening.

CHAIR: The other material, you will put that in your submission?

Mr BRACK: Yes.

CHAIR: That is, other case histories and so on?

Mr BRACK: Yes, thank you.

The Hon. PETER PRIMROSE: Following what you just said, did the person in the case, the plumber, are you saying that that person died as a result of the action? Are you answering "Yes"?

CHAIR: You need to speak for the *Hansard* record.

Mr BRACK: Yes. The answer is "Yes".

The Hon. CATHERINE CUSACK: Can I ask you about the builder who I think was from southern New South Wales and who made the comment in relation to the death of the boy who had fallen off the roof, "I would never have sent an apprentice up onto the roof. I would have done that work myself." I just wondered if that indicated that there is a group of employers out there who, if you like, are the rogue employers who are not doing the right thing. The gentleman you talked to was clearly disappointed that that boy had been put in that situation. I guess the problem is how to do something to deal with the rogue businesses, without causing all this onerous disadvantage which constantly seems to be hitting the good businesses?

Mr BRACK: Whether this guy is a rogue or not, I do not know. I mean, I have read this stuff as you have, but I do not know the particular facts. I have deliberately talked to people involved in

that particular case. There are prosecutions obviously in train, so we cannot talk about the minute detail.

The Hon. CATHERINE CUSACK: Yes. We can perhaps talk about the hypothetical rogue business then?

Mr BRACK: Let me talk about what might happen on this site. Somebody looks at the netting and says, "Is it in place?" Unless they are actually up on the roof, they may not actually see that it is connected properly or fastened properly. I happen to know that in a hypothetical case it was inspected several times and they came to the conclusion that it was okay. Now whether the facts I read are indeed the facts, I do not know. There would be some competition about what they are in hypothetical and in real cases. But I think there are practices that grow up in industries which turn out to be completely unsafe, and then people say, "Why did she do that?", because you are confronted by the particularity of those circumstances when you say, "Hang the employer."

Maybe there are cases where you might be justified in saying that and maybe there are others. There was a case where a guy wanted to get to his bobcat. It was behind a crane. The keys were in the crane, so he jumped into the crane to move the crane and ran it over the embankment. The employer got fined because of the bad work practice of leaving the keys in the crane. Now that, in the end, winds up being an employer who fails to do what the judge said they ought to have done, but the industry practice essentially was to leave the keys in the apparatus. When the accident occurs, everybody has the bright idea—why were the keys there? There are hundreds of those kinds of things where you know after the event that what you did was stupid, and whether you say they were culpable and short-cutters and rogues, that is for someone else to judge.

CHAIR: You have emphasised how the terminology of the occupational health and safety legislation is hard to define, to be clear as to its meaning, or that all the meanings are impossible to meet. What is the solution to that? You have to use English language to draft legislation?

Mr BRACK: With respect, what the legislation says is, if you are a corporation you are deemed guilty. Nowhere else do they deem you guilty. You are not deemed guilty in the criminal law. There is a presumption of innocence. Here there is not. There is no presumption of innocence. You have got to try to defend yourself and the defences themselves are appropriately structured so that effectively you cannot do it.

CHAIR: Now it should be the other way—to prove that you have committed an offence?

Mr BRACK: That is right, which is what happens around the world.

CHAIR: I am trying to be clear about what you are proposing.

Mr BRACK: That is right. The reason I raise that is because if you insert industrial manslaughter in there, somebody is deemed guilty like nowhere else and they have to try and defend themselves. Maybe in a particular case you might say, "Those rogues deserve to get done and to have the book thrown at them", but in the criminal courts every day of the week there are people like that, and they are not treated in this fashion. So here we have an ideological proposition, with respect, in the legislation. Employers are—it is a crude word and I will not use it here—so therefore they deserve to get done, irrespective. I do not accept "irrespective". I accept that there are employers who should get done, but they should have an opportunity to try to defend themselves adequately and should not have a manslaughter provision going into this legislation against that backdrop.

Ms LEE RHIANNON: Mr Brack, the way that you have been using the term "rogue companies" is like any company where somebody has been injured or dies. We have been using the term "rogue companies" and "phoenix companies" in the sense of those companies—I imagine that you are well aware of them—that go into liquidation, reinvent themselves, but effectively continue in the same line of work under a different name. Has the federation taken on this issue because it brings many of your members into disrepute?

Mr BRACK: With respect, it does not bring many of my members into disrepute at all.

Ms LEE RHIANNON: Okay, we will leave that point aside. But in trying to find a bridge between yourself and some of the different people who have given evidence, some of the union people spoke many times about how there is just a small element of rogue employers and that most employers are out there trying to do the right thing. They have acknowledged that. You are saying that employers are doing the right thing. Can you acknowledge that there are some that use this method because the law is not able to capture them and they are able to get away with it? Is your federation doing anything to capture or deal with this issue?

Mr BRACK: I do not accept the proposition that if you go into liquidation you are therefore automatically a rogue. In my conception of this stuff—

Ms LEE RHIANNON: Can you avoid paying the fine and continue in the same line of business after someone has died or been injured?

Mr BRACK: It would depend on the facts. I will not generalise. I reject your proposition that if somebody goes into liquidation that person is therefore automatically a rogue, even if he or she starts up a new business. That person may be a rogue if you believe that he or she was properly prosecuted and found guilty. We are confronted with a situation in which we are debating the appropriateness of the law. You may say that the law is absolutely appropriate and employers should be deemed guilty and left to their own devices. With the greatest respect, I reject that proposition. Therefore, I look behind the decision to see whether I think the employer was, in ordinary, every day parlance, a rogue. If an employer was cutting corners, putting people's lives at risk and did not care about them, I would agree with you. If, on the other hand, an employer was like the plumbing firm—a husband and wife with no money and a tiny business—a stereomicroscope is what would be needed to find out whether there was something wrong. You would then impute guilt to that company because it did not investigate something that was not made available to anybody anywhere. With the greatest respect, I think that is bad law.

CHAIR: You might not be happy with anything, but would you be happy if the manslaughter law was included in the Crimes Act, where there is a presumption of innocence? Is that the place where it should be?

Mr BRACK: That is the first step. The crime of manslaughter is included in that Act and people can be prosecuted. As all of you would know, the Tesco principle is the issue, and the controlling mind of the company. However, that is not an issue with small businesses. You can get to the controlling mind of the company because, essentially, only one person makes all the key decisions. So you can probably get to that person. It seems to me that what the unions and Labor want, come hell or high water, is to declare the directors and management guilty, irrespective of whether management had in place massive policies, practices and sophisticated systems, it trained everybody, and it had in place procedures and goodness knows what else. If somebody is killed, they want to get the directors and the managers. With the greatest respect, I reject the proposition that that is a reasonable approach. If you want to get them, take them under the criminal law of manslaughter and see where you get to.

CHAIR: If industrial manslaughter provisions were included in the Crimes Act, where there is a presumption of innocence, you would not have such a strong objection?

Mr BRACK: No. There may be employers who deserve to be prosecuted in that context, provided you do not then manipulate the law and the whole notion of industrial manslaughter or, as they call it in the United Kingdom, corporate killing, to make it even more chilling. What the unions want to do is manipulate the criminal law so as to declare people guilty. But coming back to your point—

CHAIR: Before they have been found guilty?

Mr BRACK: That is right. Alternatively, they want manslaughter by gross negligence and they want to be able to aggregate a series of unrelated prior events inside the company. They want to be able to say, "Those prior events, where we aggregate them, amount to a culture of gross negligence." Even though none of them was actually manslaughter they say there is a culture of gross negligence. Even though they could not find the parties guilty of manslaughter, just looking at the

facts of the instant case, they want to be able to aggregate history together with the instant case and then find people guilty. I reject both those propositions as purely manipulative.

The Hon. JAN BURNSWOODS: But your answer to the question that was asked by the Chair was yes?

Mr BRACK: With all the qualifications I just put in, with the greatest respect.

The Hon. JAN BURNSWOODS: What do you think of the Australian Capital Territory legislation that we just heard about from the Director of the Office of Industrial Relations?

CHAIR: Are you aware of it?

Mr BRACK: I am, yes. I think the Australian Capital Territory legislation is problematic, but not as problematic as the environment in New South Wales. If you look at the Canadian legislation—

The Hon. JAN BURNSWOODS: I am not clear what you mean. You said that legislation is not as problematic as the environment in New South Wales.

Mr BRACK: They do not have the reverse onus of proof in the Australian Capital Territory. In some parts of the State—

The Hon. JAN BURNSWOODS: You referred to the environment in New South Wales, but we do not have legislation.

Mr BRACK: Yes, but we are in the middle of debate, the end of which may see a new offence inserted into the Occupational Health and Safety Act, or the Crimes Act, despite the undertakings that we were given by the Premier and the Minister.

The Hon. JAN BURNSWOODS: What do you think of the legislation in the Australian Capital Territory?

Mr BRACK: I reject the detail of it, but there may be some detail that we could work out. I do not know whether you are familiar with the Canadian law. They do not call it industrial manslaughter, but it is their law about industrial manslaughter. If you read that you will find that it inserts many more checks and balances of the kind that you would be much more likely to find in Europe and North America than you would find here. There is not the same ideological determination to get employers.

The Hon. JAN BURNSWOODS: From the point of view of your organisation are you saying that there would be a possible way forward that might be like the Australian Capital Territory legislation?

Mr BRACK: No. I said there are problems with that which I would reject, and that you should look more closely at the Canadian legislation.

CHAIR: Do you have you a copy of that?

Mr BRACK: I could provide it to you.

CHAIR: What term do they use?

Mr BRACKS: I refer to the Canadian bill but we would need to work out what stage it has reached.

The Hon. JAN BURNSWOODS: In which province?

Mr BRACK: It is Canadian—the national Parliament. It might be difficult to paraphrase it easily but, essentially, it defines "representative" and then "senior officer" of the company so that you

get to the board, if you like. Then it states that if an individual, or multiple people commit an offence, it would be taken to be an offence if you aggregate those things—multiple failures, if you like, by individuals. It states:

> Everyone who undertakes or has the authority to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person or any other person arising from that work or task.

That is a critical statement because it is fundamentally different from the way the law is cast here. Here it is cast so that employers are hopelessly done on the face of the legislation.

The Hon. JAN BURNSWOODS: By referring to the word "here" do you mean by that what we have in New South Wales at the moment?

Mr BRACK: I am referring to where we are at.

The Hon. JAN BURNSWOODS: It seems to me that what you have said provides a bit of a hopeful sign. You suggested that, from the point of view of your organisation, it would be possible to come up with legislation that might contain some elements of the Australian Capital Territory legislation—and this would be in the Crimes Act—that might produce some degree of agreement?

Mr BRACK: We are not opposed to existing criminal law. That is the start point. You would be even more aware than I am that politics is a funny animal. If we go beyond that we would have to hold fire on any of it until we saw the colour of the words on the piece of paper. So if you are asking whether we are satisfied that there is already a crime of manslaughter in the Crimes Act, the answer would be that we are. There may well be people who could be prosecuted appropriately there. But we are not talking about that proposition.

The Hon. JAN BURNSWOODS: No. I originally asked you about Australian Capital Territory legislation. You said that you obviously had some reservations about that, but you also seemed to be agreeing that there could be room for some extension of the provisions in the existing Crimes Act to pick up the serious problems we are dealing with.

Mr BRACK: Yes. Having been around this place for long time, I know what the words "some extension" could mean. It could mean that something was wonderful or that something was diabolical. My answer is: I am not prepared to make any concession.

CHAIR: You do not want to be quoted?

Mr BRACK: No.

The Hon. DAVID CLARKE: You referred earlier to undertakings that you had been given by the Minister and the Premier. What were those undertakings?

Mr BRACK: That there was no need for additional legislation and that there would be no additional legislation.

The Hon. DAVID CLARKE: In respect of what matter?

Mr BRACK: Industrial manslaughter.

The Hon. DAVID CLARKE: Who gave you that undertaking—the Minister or the Premier?

Mr BRACK: Both.

The Hon. DAVID CLARKE: Was that a verbal undertaking, or was it given in writing?

Mr BRACK: It was given verbally.

The Hon. DAVID CLARKE: Did you make a note at the time it was given to you verbally?

Mr BRACK: Yes.

The Hon. CATHERINE CUSACK: When was it given to you?

Mr BRACK: On a number of occasions but I cannot tell you the actual dates.

The Hon. DAVID CLARKE: Approximately when was the last occasion that such an undertaking was given to you?

Mr BRACK: In the Premier's office, at a luncheon.

The Hon. DAVID CLARKE: How long ago was that luncheon?

Mr BRACK: Maybe a year.

The Hon. DAVID CLARKE: Was that undertaking given by the Premier, the Minister, or both?

Mr BRACK: On that occasion it was given by somebody who was asked to answer the question. Nobody demurred from that. On other occasions it has been stated separately by the Minister and the Premier.

CHAIR: Prior to the last election, which was over a year or so ago?

The Hon. DAVID CLARKE: Was it an undertaking that was given to you on more than one occasion?

Mr BRACK: That is so.

The Hon. DAVID CLARKE: So there could be no doubt in your mind?

Mr BRACK: Absolutely no doubt.

The Hon. DAVID CLARKE: There was no doubt in your mind that there was no need for any changes to the legislation in that regard?

Mr BRACK: That is right.

CHAIR: Thank you. You said earlier that you would table some papers. Will you also table your submission?

Mr BRACK: I have some slides that I did not deal with, so I will incorporate them.

CHAIR: Will you supply those documents to the Committee? Do you have any other documents that you want to table?

Mr BRACK: No, but I will give you a copy of the Canadian legislation.

CHAIR: Thank you for presenting your case so passionately to the Committee.

Mr BRACK: Thank you for the opportunity.

(**The witness withdrew**)

(**Luncheon adjournment**.)

JONATHON DENNIS BLACKWELL, Chief Executive Officer, WorkCover New South Wales,

JOHN STUART WATSON, Acting General Manager, Occupational Health and Safety, WorkCover,

PHILLIP CHISHOLM REED, Acting General Manager, Corporate and Governance Committee, WorkCover, and

BERNADETTE JUNE GRANT, Director, Legal Group, WorkCover, on former oath, and

RICKY BULTITUDE, Inspector, WorkCover, sworn and examined:

CHAIR: Mr Blackwell, I will hand over to you to commence the hearing with an opening statement and your presentation.

Mr BLACKWELL: Thank you for the opportunity to be present again. During the course of this inquiry to date there has been some criticism of WorkCover. We are always looking to learn. Some of the criticisms have been justified but I do not believe that the majority of them have been justified and it is good to have an opportunity to set the record straight in relation to some of the issues that have already been discussed by this Committee. We would like to make a presentation today that is split into a number of parts and I ask that we do it in those chunks so that members can ask questions at the end of each one.

CHAIR: I have been advised that some of the earlier witnesses are actually present in the public gallery and I welcome Mrs Jardine and Mr and Mrs Rees to this hearing.

Mr BLACKWELL: A prime function of WorkCover New South Wales is the prevention of injury and death in the workplace and we take that very seriously. That is the reason most of us work for this organisation. We take our responsibilities very seriously and we have some presentations in relation to that. The first of the presentations will be by John Watson, who has already given evidence before this inquiry. John has a background as an inspector for 20 years in WorkCover. He is currently Acting General Manager of the Occupational Health and Safety Division. He will make the first part of the presentation, which will deal with the broad roles and responsibilities of the inspectorate.

Rick Bultitude has 10 years experience as an inspector. Rick has personally investigated a whole range of incidents, including fatalities. He will take you through the process that we engage in when we investigate a serious incident or a fatality. I suggest that there may be some questions that you might like to ask him at the end of his presentation. Mr Chairman, I suggest that after John Watson's presentation there is a break for questions and after Rick's presentation there is a break for questions. After that I will talk about some of the service improvements that we are making. We do believe that we can improve our performance in some of these areas and I will be talking about the service improvements that we have in train or we have already achieved.

Then there are some individual cases that I would like to go through. As you have pointed out, I am aware that some of the relatives are present today but we do need to set the record straight in relation to what WorkCover has done in relation to some of those cases where I do not think the full story has been given, so I would like to have the opportunity to go through those. I suggest we do those one by one and then any questions that come out, we can talk about during that process. I will start by asking John Watson to talk about the role of the Occupational Health and Safety Division.

Mr WATSON: I am pleased to have the opportunity to address the Committee this afternoon. The first thing I want to do is talk to you about the role of the Occupational Health and Safety Division just broadly. The division, through its inspectorate and other staff, conduct targeted industry-specific compliance programs and verification programs. We have to verify the nature of licences and the like. We also consult with industry to build their capacity in implementing occupational health and safety management within their workplaces. We particularly drive employers to fulfil their responsibilities under the occupational health and safety legislation.

We certainly do target investigations, incidents and complaints to rectify any system failures. We carry out quite a large number of investigations and deal with complaints that have come out of

workplaces in New South Wales. We also, of course, support legislative change, development and review, so we have quite a body of work that goes on there. I thought it would be helpful for us to talk a little bit about how the inspectorate is structured and how it works.

You can see on the left-hand side of the screen is the industry teams and the country teams that are listed there. The figure in brackets is the number of inspectors in each of those teams. There are a couple of things worth noting. The country south and the country north team at the bottom of that list of teams have a number of regional offices—nine in country south and eight in country north—to provide services to regional New South Wales. Additionally, we have a group of inspectors that are assigned to specialist areas, such as hazardous substances and the like. They provide technical assistance to the field inspectorate as we undertake investigations. You can also see that our scientific and testing laboratories at Thornleigh and Londonderry also provide assistance to the inspectorate on detailed investigations.

An example of how our industry team or country team interact is the construction team. You can see a number of locations within the metropolitan area. We have some staff at Gosford, some in the city and some at Parramatta. There is interaction in respect of how we deal with the construction industry and deliver the service to ensure consistency across the State. There is quite a co-ordinated effort between the country south and country north teams and the particular industry teams, in this case the construction team, about the sorts of things we address and how we address those things within the workplace. For example, if we are dealing with falls from heights, we have a co-ordinated approach to that. The current blitz is being run across the State in a uniform way. Again, you can see the 17 regional locations that actually provide the information.

I will talk now about the two roles we have: the advisory role and the enforcement role. I know that the Committee has already received evidence about this. One of the primary roles of the inspectorate is to provide assistance, education and advice about how to deal with occupational health and safety issues within the workplace but also workers compensation issues and industry management issues. We do that through carrying out workplace visits, face-to-face in the workplace with employers. This is where some of the confusion comes about with respect to the mixed role of the inspector because we are in a workplace occasionally providing assistance and advice and on other occasions we are there enforcing legislation.

We do certainly have a role in providing assistance at regional offices but also at seminars, field days and the like. A good example of the seminar programs we run is the recent seminar program we ran in respect of small business during last year that we will be continuing in a workshop way this coming year. That addresses the need to build the capacity of small businesses, recognising that small businesses have limited resources in respect of how they address occupational health and safety in the workplace. We want to build their capacity and show them how they can do that. The WorkCover inspectorate provides assistance in that way. We distribute a lot of publications, codes of practice and those sorts of things. Some of that work is done by inspectors in the workplace where they actually attend the workplace and provide publications that are appropriate to the issue that they are dealing with.

We also participate in industry working groups and working parties to deal with specific issues. That might be a working group that is put together to develop a code of practice. We have a consultative group that does that and we work through how the code of practice should be formulated to deal with the issues and we provide a very practical document so that industry can implement the changes that need to be implemented. We also deal with issues that come up from time to time. Sometimes they are legislative implementation issues that we need to deal with and we work on working parties, such as the electrical working party, to resolve issues related to electrical safety.

With respect to the enforcement role of the inspectorate, you can see that the inspectorate has powers to issue notices requiring employers to remedy issues within the workplace. These are usually referred to as improvement notices. We also issue notices to prohibit activities. Where we see it as an immediate danger to life and limb, we use a notice to prohibit a particular activity, stop the use of the particular area or use of a piece of equipment or a particular chemical. We have the power to issue a prohibition notice to do that.

We issue on-the-spot fines, normally known as a penalty notice, for a range of penalties dealing with matters in the workplace there and then by serving on-the-spot fines. We issue notices requiring employers to provide us with information about their workers compensation coverage. We have the power to request them to provide details of their policy and produce that to the inspector. The other thing, which is quite a key role in our enforcement power, is the investigation of incidents and accidents. My colleague Rick Bultitude will go into detail about how we do that. It certainly is a key role in investigating the extremely complex and detailed investigations we undertake, resulting often in prosecution action before the courts.

It is worth talking about balancing the advisory role and the enforcement role of the inspectorate. Clearly, you can see that inspectors carry out both these roles, and I have spoken to you about those. Only when an inspector is in a workplace can we know what the appropriate response to an issue would be. It is important that we do not get to a situation where we have an enforcement-only inspector and there are issues in the workplace that need to be dealt with by providing advice and assistance and we are not able to do that. At the moment we can provide this broad-range response to particular issues. That is a favourable position to be in. Until we are in the workplace it is unclear what the appropriate response needs to be, and you can see we provide assistance and advice not only to employers but also to safety committees, safety representatives within the workplace and also union representatives when they are present. We carry out enforcement activities—the role I have just outlined, the serving of notices, penalty notices and investigation of prosecutions.

The role goes on, and I will talk a bit more about this if I may. The inspector is only supplementing in respect of the advisory activities. The other activities of WorkCover include a large information service, the WorkCover assistance service, where we provide assistance through a telephone call centre. That is backed up by technical expertise within the inspectorate when a particular inquiry may not be dealt with sufficiently by the answers on the database. That is referred to a technical expert within the inspectorate to be dealt with straightaway. Out in the private sector there are a large number of private consultants who provide assistance as well in respect of occupational health and safety matters. The balancing of the enforcement role and the advisory role within the workplace is extremely efficient in that we do not have a number of members of staff attending one workplace. We can do all with that through the one visit. So, inspectors are able to respond to issues as they identify them within the workplace and they are not referring them off to somebody else. I note that in other States and Territories around Australia inspectorates are constructive in exactly the same way as we are in respect of their role and how they deliver their services within the workplaces.

We come to inspector numbers and how that works. There is no nationally agreed formula about how many inspectors is the ideal number. There is no ratio or national formula. The national commission of occupational health and safety has not dealt with this issue at all or given any guidance in respect of this. There is no ideal formula. The WorkCover inspectorate in New South Wales is the largest inspectorate in Australia, and we maintain that. We have a legislative framework that puts an onerous responsibility on employers in New South Wales to provide a safe place of work to deal with the issues they create. So, where they have an undertaking and that undertaking has been carried out and within that undertaking certain risks emerge, the employer has to deal with those risks that he has created in the workplace. It is an onerous responsibility that is placed on them under the Occupational Health and Safety Act, particularly that embodied in section 8. The model of the inspectorate is aimed at securing compliance through a strategic advice and enforcement approach. We try to build that capacity I talked about earlier within workplaces and the people who are there to assist in the development of systems of work—safety committees and OHS advisers, and so on, and within the union movement—to build the capacity for individuals to bring activity to bear on issues that emerge in workplaces—those issues that result in the failure of systems and those tragic incidents that are the subject of discussion of the Committee. So we are really about driving compliance in how we do our work.

It is important to get a sense of how we are funded. WorkCover is funded from a 4.1 per cent levy on employers workers compensation premiums. If we increase the size of the inspectorate, the levy needs to be increased. So, it is very much an employer premium size of WorkCover discussion. WorkCover actively reviews the inspectorate numbers and the structure of the inspectorate on an ongoing basis. I think I mentioned last time I appeared before the Committee that we have an annual intake of inspectors in about the middle of the year, and that is when they enter their extensive program of training.

Mr BLACKWELL: That is the end of John Watson's presentation. I wonder whether there might be some questions in relation to that?

The Hon. CATHERINE CUSACK: What is the annual budget of WorkCover and what happens to the revenue from fines?

Mr BLACKWELL: The annual budget is $170 million.

Mr REED: The fines awarded last year were $13 million. WorkCover normally gets 50 per cent of any fines awarded.

The Hon. CATHERINE CUSACK: How is the revenue allocated?

Mr BLACKWELL: That goes into our consolidated revenue.

Mr REED: Straight into our funds, WorkCover funds.

The Hon. CATHERINE CUSACK: What about the other 50 per cent?

Mr REED: That goes to the courts themselves.

The Hon. DAVID CLARKE: Mr Blackwell, you said the size of the inspectorate is tied to the size of the levy charged?

Mr BLACKWELL: That is not quite correct. What we are basically saying is the way WorkCover gets most of its money—it does have revenue streams from fines and so forth—is from a levy on the premiums paid by employers. If we were to increase our work force either in the inspectorate or in the workers compensation side of the business, we would have to consider raising the levy to enable us to do that.

The Hon. DAVID CLARKE: So there would be two ways of doing that. If there was a crying need for more inspectors, one is to increase the levy, or for the Government to come forward and provide the funds necessary for those additional inspectors?

Mr BLACKWELL: That would not be the way it currently works. There are a number of sources of funds. First, we could increase the levy, we could find some internal efficiencies, we could move resources, we could do whatever. One of the options would not be for us to go to Treasury and say can we have more money?

The Hon. DAVID CLARKE: That is not one of the options?

Mr BLACKWELL: That is not one of the options.

The Hon. DAVID CLARKE: Why is it not one of the options available?

Mr BLACKWELL: Because the way WorkCover is funded is through a levy on the premiums.

The Hon. DAVID CLARKE: But the Government has the power, if it believes it involves the safety of workers, for instance, to make the decision to provide additional funds for additional inspectors?

Mr BLACKWELL: I assume that it could.

CHAIR: You advised that in 2002-03 WorkCover inspectors conducted 200 investigations of construction sites. To what extent does this cover the number of accidents that occurred? In other words, are inspectors investigating all accidents or did they have insufficient staff?

Mr WATSON: It is not a case of insufficient staff. The incidents that happen throughout construction sites are reviewed by the inspectorate as to whether a full investigation is warranted and whether breaches of legislation are able to be pursued before the courts before we conduct a full investigation. All matters notified to us are reviewed to establish trends in any industry in respect of emerging hazards or incidents that are occurring. So, we can address those through a broader approach, the preventative programs we develop—falls from height, electrical safety, those sorts of matters.

The Hon. IAN WEST: You talk about the current WorkCover blitz that was occurring regarding heights. Are you aware of a serious injury yesterday on a building site in Cleveland Street Surrey Hills and are you aware that the worker injured did not have a WorkCover framework ticket and his employer did not have a proper workers compensation policy? Can you advise us as to whether or not WorkCover ever visited this particular site before the accident?

Mr WATSON: We are aware of this incident and we had an inspector at the scene before the police attended the site itself. On this occasion we attended to the site prior. We have a full investigation going on into that matter, the details of which probably we should not discuss at this moment because clearly we have to establish whether we are going to proceed to court with particular matters. The investigation is in its preliminary stages but we have an inspector well and truly allocated to that matter.

The Hon. IAN WEST: I notice that Mrs Jardine is here today. She gave evidence earlier to this inquiry that the employer of her husband, who was killed, did not have a workers compensation policy.

CHAIR: Would it be better to hold that question? We are going to have a segment on the case and we will ask all questions in that segment.

The Hon. IAN WEST: Fair enough. Could I ask, in the blitzes you undertook in enforcement, do you have a forward plan as to those blitzes and can you give us an idea as to how those forward plans are put into action—the number of employers each inspector is required to see and to have meetings with?

Mr WATSON: We certainly do have a forward plan of activities we undertake to address particular issues, whether it be asbestos removal or whether it be electrical safety or falls from heights, as we currently have a blitz going on. We plan those forward. A project plan is developed with particular targets in mind in respect of the nature of the employers we want to target in this matter and we develop that along with performance indicators of what we see as the potential outcome of the blitz. Those blitzes usually have a component of a communications strategy as well which also includes press releases and the like. Depending on the nature of the matter we are dealing with, some activities have a number of components throughout them—that is the information provision—and then moving forward through to the more enforcement activities and compliance activities within the workplace more specifically.

The Hon. IAN WEST: So, in your construction blitzes can you tell us how many construction sites there are in the central business district [CBD]?

Mr WATSON: I have not got that figure to hand immediately, no.

The Hon. IAN WEST: How many inspectors do you have in the CBD doing the blitz?

Mr WATSON: Within the Sydney metropolitan area all 49 inspectors within the construction inspectorate are involved but I should point out that the blitz is not limited to Sydney. The blitz is across the State so we have inspectors in regional offices as well conducting blitzes.

The Hon. IAN WEST: How many sites have you estimated there are in the State of New South Wales?

Mr WATSON: I do not have that figure to hand.

The Hon. IAN WEST: Can you take it on notice and find out?

Mr WATSON: Yes, sure.

CHAIR: Obviously the CBD now has many high-rise buildings and big office blocks with lifts, and we are seeing high-density buildings in the suburbs as well. What role do inspectors have involving lifts, which are potentially dangerous if they are not operating efficiently?

Mr WATSON: These are lifts within a construction site?

CHAIR: No, lifts within buildings, the passengers just ordinary residents.

Mr WATSON: We have responsibility for plant provisions within the occupational health and safety legislation, and where there is an incident involving a lift at a workplace, we would deal with that under the occupational health and safety legislation. There is an Australian standard that covers the operation and maintenance of lifts. It is an industry-enforced standard so there are industry provisions that cover that.

CHAIR: So who is responsible then, the owner of the building?

Mr WATSON: The owner of the building, the owner of the lift is responsible for the safe operation of the lift.

The Hon. JAN BURNSWOODS: In relation to the role of inspectors, I guess you are aware of an incident that occurred on Saturday at a demolition site at St Peters, where are a WorkCover inspector was subject to considerable abuse and threats of violence? I understand that the employer concerned has previously threatened a WorkCover inspector. I also understand he has had an apprehended violence order taken out against him by a member of Parliament and he has a dubious record. He currently operates under the name of Eugene Benson but he previously operated under the name of Marco Lazio. If an inspector has to go on his own to a site where complaints have been made and this man is the boss, given his record, it seems that one of the issues is the role of WorkCover to ensure the safety and wellbeing of its own inspectors.

Mr WATSON: Yes.

CHAIR: I ask the Hon. Jan Burnswoods to avoid naming individuals.

The Hon. JAN BURNSWOODS: This man has operated in the past under a different name, which is relevant to the Committee's questions about phoenix companies.

CHAIR: We would have to call on that person to appear before the Committee.

The Hon. JAN BURNSWOODS: I only have that case. I do not have other cases where I was going to name people.

CHAIR: I do not know whether WorkCover had been briefed that the Committee would ask questions about this matter.

The Hon. JAN BURNSWOODS: It only occurred on Saturday 28 February.

CHAIR: The question may be taken on notice.

Mr WATSON: I am aware of the matter that occurred over the weekend. Without making any comment about the specific matter or the persons involved—I think that is important—we have an investigation going on in respect to that matter with a view to establishing whether there have ever been any breaches of the legislation. The Occupational Health and Safety Act provides protection for inspectors as they carry out their duties. From time to time when inspectors are challenged in an aggressive way we examine whether there have been breaches of the legislation, obstruction of duty and so on. We have in the past prosecuted matters relating to that. In respect of supporting our own

staff, we have critical incident and employee assistance programs. Staff are provided with that immediately if they come into contact with this sort of event.

Given the number of workplaces that we visit, it is very much an unusual event. Inspectors are trained how to deal with it. They go through training in managing aggression that is brought upon them. As well, we support inspectors when they wish to report matters to the police. We support them with their manager accompanying them to the police station and assisting in the provision of a statement. We go through quite a process. Secondly, we do not just walk away from the work site. We revisit the work site and request New South Wales Police to accompany us to ensure that there will be no breach of the peace in respect of the way in which we carry out our duties.

The Hon. JAN BURNSWOODS: You have not really dealt with the point where it seems an issue that the inspector was sent to a site by himself where the employer was known to have a record and, although I may be wrong in saying this, had previously been fined but perhaps had not paid the fine. This person was known to display abusive behaviour and to threaten violence.

Mr WATSON: I am reluctant to comment in respect to the particular matter given that we have ongoing investigations. In general, we provide inspectors with training on how to deal with issues and how to assess situations in respect of the potential for aggression towards them. Secondly, we provide them with a mobile phone and we have on duty 24 hours a day 365 days of the year a duty officer, who is a senior manager, to assist inspectors in the field to deal with issues as they arise.

The Hon. JAN BURNSWOODS: I understand that there is an ongoing investigation. Perhaps I could put the question on notice as to whether there are unpaid fines and whether this person has been prosecuted.

Mr WATSON: Certainly.

CHAIR: Of course, we are always careful not to do anything that may hinder a successful prosecution of an individual.

The Hon. JAN BURNSWOODS: I accept that, Mr Chair. The information could be provided, if the questions are able to be answered.

CHAIR: What proportion of breaches of the occupational health and safety legislation are uncovered by WorkCover inspectors during inspections compared to notifications following an accident or reporting by current or former employees? Have you collated those figures or are you able to obtain them for us?

Mr WATSON: If I could clarify the question, did you say the proportion of notifications we receive?

CHAIR: The proportion of the breaches of the occupational health and safety legislation. How many of those breaches are identified by your inspectors following an inspection as distinct from attending after an accident or responding to a report from employees?

Mr WATSON: I will have to take that question on notice.

CHAIR: What proportion of their time do inspectors spend in the field compared to doing paperwork in the office? Do all of the 301 inspectors work in the field or does that number include people, such as yourself, who are not inspectors in the field?

Mr WATSON: As to the last part of the question, the establishment of the inspectorate is 301. There are some inspectors who are not in the field. At the present time it does include myself in my substantive position as director of service delivery. In respect to how much time inspectors spend in the field compared to doing paperwork—

CHAIR: Administration.

Mr WATSON: Administration is a broad term. Essentially the nature of the administration that inspectors do now is very much computer-based, that is, the entering of information about the inspections they undertake, the notices they serve. That is done on computer to streamline that task. The other proportion of work they do when they are not actually in the field is preparing copious reports into investigations they are conducting. The reports can run at times to seven or eight large ring binders, to give you a sense of what an investigation report looks like when it is completed. It is quite a large and complex investigation. Inspectors spend some time in the office preparing, writing and collating those reports. As well, witnesses attend our office to be interviewed within a secure environment. Often we tape interviews in those environments as well.

Ms LEE RHIANNON: Mr Watson, in response to an earlier question from the Chair you said that many of your inspectors had industry experience. To clarify that answer, just about everyone has industry experience but not everyone has occupational health and safety experience. Did you mean that they had been occupational health and safety practitioners in industry?

Mr WATSON: No, not all inspectors have been occupational health and safety practitioners before they join us. Some of them have come straight from a position with a private employer, a construction company or a manufacturing company.

Ms LEE RHIANNON: In the occupational health and safety division, what percentage of the top 10 of senior management, from you down, have had experience in industry as occupational health and safety managers?

Mr WATSON: I would have to take that on notice. I do not know the percentage off the top of my head.

Ms LEE RHIANNON: I would appreciate that. In previous evidence you spoke about the training that inspectors undertake and how much of that training involves input from industry. Who conducts the training? Do inspectors train other inspectors?

Mr WATSON: It is a combination. As I indicated earlier, the inspectorate is trained through a process of undertaking a Diploma in Government Administration—Workplace Inspection. That diploma has now been picked up across the country. Members might be aware of a newspaper article about the Victorian inspectorate going back to school. They have started to do this in Victoria following our lead for a number of years. The inspectors undertake a series of training modules which are presented by industry experts, subject experts and inspectors within the New South Wales inspectorate. They then do field activity with another inspector in a buddy situation so that they get a sense of how other inspectors operate to be able to deal with the issues in the workplace.

It is a very different job to any other job that is undertaken, and quite different to being a consultant in the occupational health and safety field. As we have spoken about already this afternoon, inspectors have an enforcement role. That role is a difficult and complex one to deal with. People need to be taught how to deal with that and how to manage the sorts of issues we have spoken about, such as aggression towards inspectors. They undertake a variety of training: inspector training the inspector, industry training the inspector, legal practitioners training the inspector in how to collect evidence correctly, our technical experts training inspectors in taking samples and custody of samples, and so on.

Ms LEE RHIANNON: Do you think there is a cultural shift in that the inspectors are moving to an understanding that it is performance-based legislation, not just prescriptive legislation?

Mr WATSON: Absolutely. We have actively gone through a process of ensuring that the inspectorate understands how to administer performance-based legislation.

CHAIR: We will move on to the next section, otherwise we will run out of time.

Mr BLACKWELL: I will ask Rick Bultitude to take us through the next part. Rick is an experienced inspector and previously led our construction team. He has personally investigated issues or instances where there have been fatalities and severe injuries. He would like to take us through the investigation process.

Mr BULTITUDE: I thank the Legislative Council General Purpose Standing Committee for the opportunity to present before its members this afternoon. I am here to give the Committee an overview of the investigation process undertaken by WorkCover New South Wales in relation to a work-related death occurring within the workplace. Notification of a fatal workplace accident is generally received from one of the emergency service agencies through WorkCover's 24-hour emergency phone service, generally via the police or ambulance service. When the information is received the emergency service agencies take immediate action to provide assistance to affected persons, preserve the scene for investigation purposes and secure witnesses. WorkCover, or the after hours duty officer, records all information surrounding the accident. We then forward that information on to the inspector who is dispatched to the scene. On occasions it may involve more than one inspector and support by technical specialists, engineers and other experts within the WorkCover Authority to assist in the investigation process.

WorkCover senior management, the legal group, and the media officer also informed that a fatal accident has occurred. As I said before, an industry team inspector is contacted and briefed on the information surrounding the accident. The investigating inspector departs to the workplace well-equipped to commence investigation. Investigation resources in the possession of the inspector include notebook, mobile phone, camera, measuring equipment, sampling kit, personal protective equipment, notice books and investigation notices. Upon arrival at the scene, the immediate priority of the investigating inspector is to ensure that the scene of the accident is made safe and that no person, including the inspector, is placed at risk.

In assessing the state of the workplace the inspector liaises with relevant people at the workplace, including the emergency services, the controller or occupier of the premises, health and safety representatives, relevant employees who may also be at the workplace, witnesses and any other persons of interest. Safety at the workplace is achieved through issuing appropriate stop work notices, otherwise known as prohibition notices and/or improvement notices to the occupier, the employer or others present at the workplace. It is important to note at this point in time there is close co-ordination between New South Wales Police and the investigating inspector in securing the scene of the accident and the immediate sharing of information, such as witness details and factual information about the accident.

Whilst at the workplace, the investigating inspector will make contact with WorkCover management to brief them on further information that arises out of the initial investigation. An interim report is produced and then formal contact is made to the WorkCover workplace fatality unit and an experienced inspector is allocated to assist the inspector in the investigations. Whilst at the workplace the investigating inspector will commence the formal investigation of the accident. This occurs through a number of activities: First, the taking of photographs, sketches and measurements and the recording of other relevant information about the scene. It may also include details about particular pieces of plant that might have been involved in the accident and/or hazardous substances.

The second is recording of relevant information about the workplace, the nature of the business, the location and/or address, witness details, and details of the contractual arrangements at the workplace if more than one employer is working at that place of work. The third is the taking or seizing of relevant items that are related to the accident—such as contracts, policy and procedure documents, personal protective equipment and pieces of plant and equipment. Fourth, if the accident scene needs to be preserved beyond the initial visit to the workplace, perhaps because it is a matter of a technical nature and requires further investigation on the part of WorkCover, then the inspector may issue a non-disturbance notice, which secures the scene. Fifth, if appropriate, the investigating inspector may commence taking witness statements there and then.

Following initial attendance at the workplace, a case conference is held between the WorkCover investigating inspector, the solicitor and the police to discuss facts relating to the investigation. The future direction of joint investigations is reviewed and agreement is reached on progressing the compilation of a report for the coroner. The new WorkCover counselling and liaison co-ordinator will establish contact with the family to offer support services and information on the investigation process. As an interim measure, that responsibility now falls to team managers to make contact with the family and to explain the investigation process and offer the services of the Salvation Army should that course want to be taken up by the family.

Based upon a review of the first evidence obtained by the investigating inspector, and following discussions with the legal officer, formal interviews are conducted with witnesses, safety representatives, supervisors and/or line management, technical specialists, and finally company representatives of those organisations that are under investigation. If required, individuals may be compelled to give a statement to the inspector. The investigating inspector and the solicitor prepare a report to the coroner to assist in providing information as to how the accident occurred and what systems of work may not have been in place at the time of the accident. The report for the coroner may also provide information on what could have been done to prevent the accident.

The investigation file is reviewed in order to determine the evidentiary value of information obtained during the investigation. The inspector and solicitor evaluate the evidence taken during the investigation against relevant sections of the occupational health and safety legislation to identify potential breaches. The inspector provides a brief of evidence for WorkCover management and ultimately to WorkCover's legal group, with recommendations regarding prosecution action. Relevant breaches of the Occupational Health and Safety Act 2000 or of the Occupational Health and Safety Regulation 2001 are identified. The solicitor reviews the file, prepares charges in consultation with the inspector, and ultimately those charges are laid before the Industrial Relations Commission of New South Wales.

As I have previously said, I have investigated a number of work-related accidents in the ten years that I have been a WorkCover inspector. It may be of some interest to Committee members to hear about a couple of those incidents that I have investigated during that time. One matter that particularly sticks in my mind involved a 15-year-old boy who was on work experience, assisting a plumber to remove some rusted gutter from a 4-storey block of units on the northern beaches of Sydney. There was no safe system of work in relation to undertaking that work. The contractor relied on his balance and the balance of the young worker to prevent them from falling from the perimeter of the roof whilst they were removing rusted gutter. Ultimately, the child fell approximately 10 metres and sustained substantial fractures to his leg and back.

I attended the scene shortly after the incident occurred and liaised with police. Initially, I issued a prohibition notice to the contractor, to prevent him from doing any further work, and took relevant details at the scene. Some time after the accident I attended the hospital where the young child was, in the presence of his parents, to obtain a statement. Later I interviewed the contractor, and his son, who was his partner. They were extremely distraught because the child also happened to be a family friend and was placed with the contractor as a favour to the parents. The child, a promising footballer, had his career ruined. But also the friendship was ruined. As I said, the contractor was distraught, but he was also ignorant of his obligations in relation to the Occupational Health and Safety Act. When he went to do that work he provided the appropriate scaffolding for the building—scaffolding that would have prevented the accident in the first place. But he was ignorant of the relevant code of practice for safe work on roofs at the time. So part of my role was advise and educate that person—because it was one thing for him to be contrite, but he did not understand what his obligations were, and certainly did not know the systems that could be employed to prevent an accident like that occurring. Although he was prosecuted, and a fine was imposed, education and advice were provided as a consequence of the investigation.

Another investigation that I conducted as an inspector involved the fatality of a foreman of a building company, also on the northern beaches of Sydney. He was attempting to land some bundles of timber that were being transferred by a vehicle loading crane onto the first floor. It had rained that morning. In the process of going to the edge of the slab he attempted to grab hold of a concrete block wall that divided the balconies. The concrete block wall gave way when he grabbed hold of it, he lost his footing and slipped and fell into a bin below, incurring head injuries. This was a tragic event which I and the other inspector who assisted in the investigation could not fail to be affected by. We spoke to the deceased's wife. We interviewed those who witnessed the accident. We interviewed the company representative, who was a personal friend of the deceased.

There were substantial system failures, not the least of which was that there was no system in place to prevent this person falling when undertaking this activity. Subsequently, notices were issued to the company to remedy its system of work in order to prevent an incident like that occurring again in the future. The legislation is there to be complied with, a serious breach was disclosed by the

investigation of the matter, and it was prosecuted before the Industrial Relations Commission, which imposed a substantial penalty.

I think it is important for me to emphasise to the Committee that inspectors are passionate about the job they do. They take their job seriously. They apply the standards that are set for employers and the legislation that is in place in New South Wales, the Occupational Health and Safety Regulation and the codes of practice. They seek not only to remedy unsafe situations that they come across but also to improve standards of health and safety in whatever industry they are dealing with in the medium to long term. They do that through the implementation of effective intervention strategies, as well as by responding to serious incidents and dealing with complaints in the workplace. A critical component of that is that there must be effective consultation mechanisms within the workplace, so that when inspectors visit a workplace the first thing they will do is make themselves known, and then see what consultation mechanism the employer has within the workplace, because employees have a legal right to be consulted on those matters that affect their health and safety.

CHAIR: Thank you for those examples. We appreciate that. Do you want to proceed with the submission?

Mr BULTITUDE: I think the remaining part of the presentation will be delivered by Mr Blackwell.

Mr BLACKWELL: Should we pause for questions here?

CHAIR: Yes, we will pause there for questions.

The Hon. DAVID CLARKE: Mr Boltitude, in the case of fatal workplace injuries, are the police required to report those incidents to the WorkCover Authority?

Mr BULTITUDE: There is a protocol between NSW Police under which we are contacted, yes.

The Hon. DAVID CLARKE: So they are required under the law to advise you, or is it just a protocol?

Mr BULTITUDE: There is no legal obligation on the police, but there is a formal process in place that has been negotiated over some time. Because the police and the Ambulance Service are the first at the scene, arrangements have been put in place that they will contact WorkCover. They have been provided with details in relation to our emergency service, and that contact occurs as a matter of course.

The Hon. DAVID CLARKE: Is the employer required under the law to advise the police?

Mr BULTITUDE: No. Under the law the employer is required to advise WorkCover.

The Hon. DAVID CLARKE: But not the police?

Mr BULTITUDE: No.

The Hon. DAVID CLARKE: That seems an unusual situation.

Mr BULTITUDE: I do not believe so, because WorkCover is charged with the responsibility of administering the legislation that is in place as it applies to health and safety in the workplace. So the obligation that is placed on employers, should they have a fatal accident occur in their workplace, is to inform the regulator.

The Hon. DAVID CLARKE: You do not believe there should be a requirement on the employer to advise the police as well?

Mr BLACKWELL: I would assume the police would be advised by the Ambulance Service, which would normally be called to the site of any fatality.

The Hon. DAVID CLARKE: What if it were a situation where the employer has taken the injured person or deceased direct to the hospital, so that the Ambulance Service was not called? As far as you are aware, there is no legal requirement for the employer to notify the police?

Mr BULTITUDE: Not as far as I know, no.

The Hon. DAVID CLARKE: What is the situation in regard to non-fatal serious injuries? Is there a requirement of the employer to advise the WorkCover Authority in that as well?

Mr BULTITUDE: Yes, there is.

The Hon. DAVID CLARKE: Is a certain period of time set to do that?

Mr BULTITUDE: Certain matters are defined in the legislation as non-disturbance occurrences, and in those cases the employer must notify WorkCover immediately. In matters, where the employee will lose seven or more days off work, where the employers become aware that that is likely to occur they then notify us.

The Hon. DAVID CLARKE: Are there any workplace injuries in respect of which the employer is not required under legislation to advise WorkCover?

Mr BULTITUDE: WorkCover now has a notification process in place, and information is provided to WorkCover by insurance companies. So there are obligations placed on employers now, where they have a work-related injury, to notify the insurer. Ultimately, that information will be provided to us.

The Hon. DAVID CLARKE: To clarify that: there is no obligation on an employer to advise WorkCover directly of an injury to an employee, but there is a requirement that they must advise the insurance company.

Mr WATSON: There is a requirement for them to ensure that we are notified, and the notification system that we have in place is through the single notification system, which is part of the implementation that was done last year. That provides for employers to notify us directly if there is a legislative responsibility under the occupational health and safety legislation: that they ensure that they notify us of matters where there is a seven-day absence.

The Hon. DAVID CLARKE: The insurer?

Mr WATSON: They notify us through the insurer, which is then notified to us automatically.

The Hon. DAVID CLARKE: What if there is no insurer?

Mr WATSON: Then they are required to notify us directly.

The Hon. DAVID CLARKE: Is the insurer required to notify you upon receipt of notice of an injury?

Mr WATSON: Yes. It is done as part of a transfer of files between insurers and WorkCover.

CHAIR: In your presentation you referred to the new counselling and liaison co-ordinator. The word "new" caught my eye. When did that set-up take place?

Mr BLACKWELL: If I could deal with that in my presentation.

CHAIR: I note it is referred to in the next overhead.

Ms LEE RHIANNON: Mr Boltitude, you made reference to the sad case of a young student who was injured. I understand that a Department of Education and Training publication advertises that

students who are injured have the same entitlements as a worker injured under workers compensation laws. Explain how this is the case when the student has not been receiving a wage? Also, if a student sustains an injury that leaves him or her permanently disabled, what compensation does that student receive?

Mr BULTITUDE: I am not able to answer your question. But I will take it on notice and provide an answer.

CHAIR: Perhaps again that is a question for WorkCover generally.

Ms GRANT: Perhaps I could respond to the question.

CHAIR: Do you want to do that now?

Ms GRANT: A student who is injured would not be a worker but would be a person present on premises, so the department would have the normal common law duties of care for occupiers, or students. So there could potentially be a civil claim against the department for injuries sustained. We would probably look at the situation as a potential breach of the occupational health and safety legislation in terms of the department being an employer of persons and it being a workplace, and the students being non-employees at the workplace. We may look at that situation with a view to prosecution. But each case would be looked at on its own facts. In terms of individual students, I would suspect that they would look to common law remedies in respect of any injuries sustained.

CHAIR: Mr Boltitude, we have heard evidence about the dual role of WorkCover in education and in inspecting workplaces. In your role as an inspector, have you ever felt any tension between your dual roles—one of trying to give advice, and the other of potentially charging a person with a breach? In previous evidence we were told of a case where a company asked an inspector to come and give the company some advice. The inspector gave the advice, but also noticed a breach and consequently issued a penalty notice. The witness claimed that would now make that company very reluctant to invite a WorkCover inspector to come and give advice for fear that the inspector may do the same thing again. Do you feel that tension in your roles?

Mr BULTITUDE: To be honest, I do not see that as a conflict. An inspector's statutory role is to ensure that the employer is meeting his or her obligations according to the legislation. An inspector has a number of ways to ensure that has occurred. He or she bases his or her action on the level of risk in the workplace. In some cases, the provision of advice or information may be all that is required. If workers are at risk the inspector is obliged to take action and issue notices to ensure the problems are addressed. We often say that we use a combination of advice, information and enforcement activities to secure compliance. That is what we do when we enter the workplace. The level of application is based on the workplace, where risks exist and who is at risk or not at risk. WorkCover inspectors undertake a number of activities outside of the workplace to provide advice, and that works well.

CHAIR: Obviously, if you did see a breach you could walk away and not take action.

Mr BULTITUDE: Yes.

The Hon. JAN BURNSWOODS: I would have thought a coroner's inquest would be the norm. I noted that you said that interviews are conducted and a solicitor and inspector prepare a brief and the coroner then decides. How often does the coroner decide not to hold an inquest and what is the time frame?

MR BULTITUDE: I cannot answer that question.

Ms GRANT: Whether an inquest is conducted is a matter for the coroner. WorkCover would normally prepare a brief of evidence, as do the police, which is forward to the coroner's office. The coroner reviews that material to determine whether to hold an inquest or forward the papers to the Director of Public Prosecutions [DPP]. If an inquest is held, it is a matter for the coroner's office to decide when and where it is held and the commencement date.

The Hon. JAN BURNSWOODS: Would a coroner's inquest be the norm?

Ms GRANT: There are many occasions when they are dispensed with because it is clear from the evidence in the WorkCover and police briefs what was the manner and cause of death. The coroners may still hold an inquest because they have various educational functions that they may wish to explore through the course of an inquest.

The Hon. CATHERINE CUSACK: Do most comply or do you find something wrong in most workplaces you visit?

MR BULTITUDE: I have been with WorkCover for about 10 years, during which time I have been involved primarily with the construction industry. The majority of construction site workplaces have areas of non-compliance.

The Hon. CATHERINE CUSACK: What happens when you come across someone who has no idea? You must encounter such cases.

MR BULTITUDE: Certainly.

The Hon. CATHERINE CUSACK: They are required to know of law, but are they required to be accredited in any way?

MR BULTITUDE: There is an obligation on employers. That is the focus of the legislation. They must train, supervise, instruct and inform their employees. They have a combination of responsibilities to their employees within the workplace. Depending on the type of activity, there may well be a need for more formal training. Certainly there is a need to train employees in the workplace.

The Hon. CATHERINE CUSACK: You advise them to do that; you cannot force them to do it.

MR BULTITUDE: We can issue notices. People are required to hold competency certificates for some activities undertaken in the workplace. People who are new to the construction industry must be provided with a formal construction induction training course. There is also a formal requirement on employers and principal contractors to site induct new employees. However, there is also a generic obligation.

The Hon. DAVID CLARKE: If an employer, of his own initiative, contacts you and seeks your advice on whether he is complying with requirements, do you seek to prosecute him after giving the advice or do you give him a warning notice?

MR BULTITUDE: It is a quantum leap from providing advice to prosecuting. If the employer is seeking advice we provide it, generally over the telephone. If employers want assistance about whether they are meeting statutory obligations, our response would be to advise them about the number of well-qualified consultants in the industry who can do that work. If we attend a workplace with the intention of undertaking an inspection, the level of enforcement activity will be based on the level of risk involved.

Mr BLACKWELL: I refer to some of the service improvements, some which have been in place for a little while and some of which are new. The issues raised recently as a result of fatalities have drawn our attention to the need for additional work. I believe we have responded to that need. Some of the measures are new initiatives and some involve confirming and documenting current practice.

The committee has obviously heard about the need for relative-support services. WorkCover accepts that. We believe that in the past, in the main—this has not always happened—inspectors have kept in touch with relatives and let them know the progress of investigations. When the case is transferred to the legal branch, the solicitors are also generally in contact with relatives to let them know about the progress of their case. Because that has not been co-ordinated or documented, it has fallen between the cracks in some instances. We acknowledge that and we are ensuring that it does not occur again. In particular, there is an issue in relation to counselling for relatives. Previously, the

general manager wrote to relatives providing some options regarding counselling services. We need to have much more active involvement. We have moved to ensure that relatives are contacted and that counselling services are made available if they are required. Of course, not all relatives want it. We are looking at independent providers because, as has been stated, it can be difficult for families to have counselling from someone involved in the investigation. We also understand that. Options will be available for families.

We have developed a comprehensive workplace fatalities response and established an agreement with a counselling service provider—in the interim that is the Salvation Army. It has taken up the reins while we establish something more long term. We are providing information to frontline managers—that is, team managers—about how to activate these services. They are now contacting relatives when a fatality occurs. We have created a position to co-ordinate counselling and information provision to relatives. That is a new initiative. It is something that perhaps we could have been done better previously. That position will not only co-ordinate the counselling services and support for families but also ensure that families are well aware of the progress of the investigation, the legal process and so on. The committee has previously been provided with a copy of the information guide for families dealing with a workplace death. It has been recently revised.

The fatalities protocol has been developed by the various agencies involved at the scene of an accident. A ministerial task force was established in late 2003 to develop the protocol. It was developed by WorkCover, NSW Police and the DPP in discussions with the State Coroner. Guidelines have been developed for investigation and prosecutions of workplace fatalities and serious injury. It includes keeping families informed of progress of investigations. This will set existing arrangements in concrete. Police have always been the first or second group at the scene, after the ambulance officers, and they have involved us. The police have collected evidence and had control of the site and then handed it over to us. We have always worked closely with the police. The protocol is now in a written form and it confirms current practice.

The workplace fatality investigation unit, which comprises a group of solicitors, predates the parliamentary inquiry. It began operations on 30 September 2002. The initiative came from the New South Wales Safety Summit held in July 2002. The unit provides close liaison between the solicitors and inspectors dealing with fatalities. Those solicitors deal only with fatalities. Their prime role is to work closely with the investigating inspectors. The investigation process can be extremely complex. As honourable members understand, legal processes are involved in prosecution and evidence must be gathered. That can be evidence about the state of the equipment, hazardous substances and statements from a range of people. That cannot be done quickly; it takes time. It involves a lot of work such as tracking down witnesses and so on. It is a long process. The idea is that the fatalities unit will assist the inspectors to ensure that they gather all the evidence and speak to the appropriate people. When we take a case to court, we know we have a chance of winning.

In the past WorkCover has not taken a significant interest in the recovery of fines. The view was that the State Debt Recovery Office was responsible for that activity. That is not unreasonable; that is its job. At the same time we recognise that families will have an interest in the collection of fines and the outcome of court cases. That is a new initiative and one which is necessary and which we support. It is a very important measure. We perhaps could have done better in the past.

Many views have been put to the committee about whether the legislation is adequate to deal with fatalities. The Minister has asked four senior counsel to provide advice on this issue. We have a list of the questions that have been put to those counsel and we can provide their names. They will be reporting within the next month or so and giving the Minister some advice.

CHAIR: What date was that set up? When did that occur, roughly?

Mr BLACKWELL: Approximately one month ago. They have been selected for their expertise in occupational health and safety and industrial law, and we are awaiting their information.

CHAIR: They will make a report to you, or to the Minister?

Mr BLACKWELL: They are reporting to the Minister. The Minister has asked them to provide a report to him.

CHAIR: So WorkCover will not be involved in that directly?

Mr BLACKWELL: It would be difficult to say that we would not be involved at all but the remit that has been given to the four senior counsels that they are to advise the Minister, not WorkCover. That is the end of my presentation.

CHAIR: We will have some general questions, but I think it is very important for the Committee to hear WorkCover's responses to the actual cases that we are required to examine.

Mr BLACKWELL: Do you want me to do that now?

CHAIR: I think that we should, while we have time. At any other time, we can ask general questions.

Mr BLACKWELL: Certainly. Perhaps if I take them one by one?

CHAIR: Yes. Take one, and deal with any questions, and then move on to the next one.

Mr BLACKWELL: Certainly. The first in the cases was Dean McGoldrick, and that of course was part of the terms of reference of this Committee. With all of these cases, I do not intend to go into details of injuries or how the accident occurred because I do not think it is appropriate: I know that the relatives of some of the people who have died are here today, so I would like to stay away from that. What I would like to talk about is what WorkCover has done about the particular incidents, to set the record straight, because I think in some cases that has not quite been done. Dean McGoldrick died on 1 February 2000 and on 15 June 2000 a brief was forwarded by WorkCover to the Coroner. So an investigation took place and within four months a report went to the Coroner.

On 4 July of the same year we were informed by the acting deputy State Coroner that an inquest was not being proposed, as it was unlikely that anything further would be revealed other than what was in the report that WorkCover provided to the Coroner on the accident/incident anyway. So there was no inquest. A summons was served against John Poleviak on 13 December 2000 and charges were laid. Regular contact was maintained with Mrs McGoldrick by Rosanna Parmagianni, which I think that was mentioned by Mrs McGoldrick in her evidence, and also by the team manager of the construction team, Les Blake, who also was in contact. A decision was made in late February 2001 to proceed against both the company and the director in that particular instance.

Metal Gutter Facia Services was fined $20,000 by the Chief Industrial Magistrate. As we have already indicated, it is our view that all fatality cases should be referred to the Industrial Relations Commission as opposed to the Chief Industrial Magistrate. My view is that that should not have occurred at that time; it should have gone to the Industrial Relations Commission, not the Chief Industrial Magistrate but that has now been resolved. The ruling of the court was that if the company could not pay the fine within 28 days, the co-defendant, who was John Poleviak and who had been charged as well as the company, as a director was required to pay the fine personally. The registrar of the Local Court approved of the company paying the fine by regular monthly instalments and the matter was referred by the court to the State Debt Recovery Office [SDRO] in 2002. The court did not pursue John Poleviak for the fine upon no payment being made by the company.

When the court became aware of the non-payment, the matter against John Poleviak was reopened on 28 October 2003, and the State Debt Recovery Office issued a court fine enforcement order to Mr Poleviak for the unpaid fine. He was given one month to pay the fine. The SDRO is presently seeking payment of the outstanding fine.

The Hon. IAN WEST: I understand that there was an agreement with Mr Poleviak's wife to pay $200 a month.

Mr REED: I think you received evidence yesterday from the State Debt Recovery Office and they had advised your about what activity they are undertaking at the moment. It is not something that WorkCover has been involved in. We are tracking the matter. We are in contact with the State

Debt Recovery Office, but the action is being taken under the Fines Act by the State Debt Recovery Office.

The Hon. IAN WEST: Action is being taken under the Fines Act, but what you are saying is that you have no input into the fact that some $7 million of the $13 million recovered comes to yourselves by way of moiety?

Mr REED: No, that is not what we have been saying. In relation to this particular matter, we are now—through the development of this protocol between the State Debt Recovery Office, the courts and WorkCover—keeping a more active view on the recovery of fines, but we have no capacity to influence that decision beyond discussions with the State Debt Recovery Office and the courts because the Fines Act covers those recoveries. The courts in the first instance when we enter into an agreement, if the fines are not paid, hand them over to the State Debt Recovery Office to enforce. We are now monitoring that, and I think it was pointed out earlier that that is one of the initiatives that we have now accepted a greater responsibility in.

The Hon. IAN WEST: In that protocol that you have talked about, are you in a position to tender the document to us?

Mr REED: It has been provided to the Attorney General's Department, who are responsible for the courts administration, for them to sign with a view to it then going to the State Debt Recovery Office for them to sign. So at this point it is a document that is moving between those administrative areas.

The Hon. IAN WEST: So there is no document?

Mr REED: No. There is the document that we have referred to in our evidence as being a protocol we are developing that has been drafted and that has been provided to the Attorney General's Department. The draft has also been provided to the State Debt Recovery Office and we are asking them to formally sign it. We have formally requested that they sign it.

CHAIR: You could provide a copy of the draft?

Mr REED: At this stage, it is a draft.

CHAIR: Yes, and indicate that it has the status of a draft?

Mr REED: Yes, we can provide a draft.

CHAIR: Obviously, the Attorney General may change it.

The Hon. IAN WEST: Even though it is a draft, I would have assumed that there would have been some incentive for you to be liaising with the State Debt Recovery Office, irrespective of whether it is under the Fines Act or any other Act, in regard to recovery in relation to prosecutions that you undertake.

Mr BLACKWELL: I think that, given the level of recoveries that clearly have been in existence for some time—around about 80 per cent—there was not an immediate issue for us in relation to that. Clearly there is an issue, though, in relation to relatives knowing what the recovery rate is. We now understand that and we are making efforts. That is the reason why we are making efforts to talk to the SDRO about this, not out of a financial incentive.

The Hon. DAVID CLARKE: Mr Blackwell, the authority received a report from the Coroner on 4 July 2000 and a summons was issued on 13 December.

Mr BLACKWELL: Yes.

The Hon. DAVID CLARKE: I am sorry: the summons was served on 13 December. When was the summons actually issued?

Ms GRANT: It would have been some few days before then, I would have imagined.

Mr BLACKWELL: A week or two before then?

Ms GRANT: It could have been a week or two.

The Hon. DAVID CLARKE: What are the steps that WorkCover went through from the time it received the report from the Coroner to the time that a summons was issued? What is the procedure that would have been followed?

Ms GRANT: The legal group would have received an investigation file, which is distinct from the coronial file, and throughout those few months would have been liaising with the relevant inspector about the necessary evidence that would need to be in place before we filed a summons.

The Hon. DAVID CLARKE: So this would have been basically the collection of evidence necessary for the brief, as it were, to proceed?

Ms GRANT: That is correct.

The Hon. DAVID CLARKE: So this would be the normal time sequence that would be involved in a matter of this nature?

Ms GRANT: Not all of it. There were a few months, from July to December, to file a process here. There can be longer periods of time depending on the circumstances. You might have a very complicated factual circumstance which would require technical issues to be sorted out and various experts' evidence to be obtained, and that can prolong the investigation phase and the date before which proceedings can be commenced.

The Hon. DAVID CLARKE: And you feel that due diligence was followed in proceeding with this particular prosecution?

Ms GRANT: From my review of the file, I would say yes.

CHAIR: We might proceed to the next case and whatever time remains we might use to ask questions on any of the cases.

Mr BLACKWELL: I will move to Anthony Hampson who was mentioned in the terms of reference for the inquiry too. This incident occurred on 19 June 2001 and the defendant was Garry Denson Metal Roofing Pty Ltd and Garry Denson himself. This was the same company that was involved in the case of Joel Exner. On 19 June 2001 Anthony Hampson sustained two broken heels and injuries to his back and right shoulder when he fell from the roof of an auditorium building at the Gosford High School. Mr Hampson was undertaking the replacement of roof sheeting as an employee of Garry Denson Metal Roofing Pty Ltd at the time of the accident. WorkCover did not receive a notification of the accident in the prescribed form within seven days after the incident, which is clearly supposed to happen.

WorkCover first became aware of the accident on 29 October last year when the Construction, Forestry, Mining and Energy Union [CFMEU] sent a letter to our Minister. An improvement notice was issue to Garry Denson Metal Roofing Pty Ltd on 14 November, which was approximately two weeks after the notification which we received. A notification form was then received from the company in relation to the accident.

After we contacted them, they finally notified us of the accident. Prosecution charges have been filed in the Chief Industrial Magistrates Court—that was on 16 February this year—and against Garry Denson Metal Roofing Pty Ltd, and Garry Denson himself. The first return date in the Chief Industrial Magistrates Court is Monday 8 March 2004. In related matters, Garry Denson Metal Roofing Pty Ltd has one prior conviction in the Chief Industrial Magistrates Court for $5,000. That related to Mr Fuller, which was another incident that has been raised in this Committee meeting. In relation to the Joel Exner fatality, the deceased's employer, J. B. Metal Roofing Pty Ltd, is related to Garry Denson Metal Roofing Pty Ltd. Both companies were contracting on the site of the Exner

fatality to Australand Pty Ltd. Effectively in relation to Anthony Hampson, we were not made aware as we should have been by the employer in relation to this issue. We were subsequently alerted by the CFMEU and subsequent to that we laid appropriate charges in relation to his employer.

The Hon. IAN WEST: Have you asked the Department of Public Works and Services why they had not informed you the accident?

Mr BLACKWELL: At the time of his accident—I have to take part of this on notice, perhaps—but at the time of the accident, the only person under the law at the time or the only people who should have notified us were the employer, not the occupier.

The Hon. IAN WEST: Why not the owner-occupier of the premises where the accident occurred?

Mr BLACKWELL: That was not under the provisions of the law at that time. It has been changed since then. Bernadette might be able to tell us exactly when.

Ms GRANT: I think we need to be careful about discussing these matters because they are before the court.

CHAIR: Yes, that is right.

The Hon. DAVID CLARKE: Mr Blackwell, the situation here is that the long delay between June 2001 and October 2003 had nothing to do with the WorkCover Authority?

Mr BLACKWELL: That is my view.

The Hon. DAVID CLARKE: You would then submit that the authority followed due diligence in proceeding with the prosecution in this case after it became aware of that incident?

Mr BLACKWELL: Absolutely.

CHAIR: Just following up that question, are you also planning to prosecute for breach of the Occupational Health and Safety Act as well as for failure to notify of the accident, without compromising the cases?

Ms GRANT: Yes. There is a time limitation with respect to notification. We are virtually prosecuting for the notification breach under 251A and we are prosecuting the director because he is deemed to have breached the same provisions pursuant to the operation of section 50.

CHAIR: So you are covering both areas.

T**he Hon. PETER PRIMROSE:** I understand that the previous fine of Mr Denson was about $5,000? Was that paid?

Ms GRANT: Yes.

Mr BLACKWELL: It has been paid.

The Hon. PETER PRIMROSE: I refer to Mr Pullman. Are you aware of an incident involving another matter?

Mr WATSON: We are aware of Mr Pullman. That matter is currently under investigation. We have actually interviewed Mr Pullman. At this stage that is probably as far as we can discuss the matter.

The Hon. PETER PRIMROSE: Was that reported appropriately and in accordance with your protocols?

Mr WATSON: No, it was not reported.

The Hon. CATHERINE CUSACK: Is the two-year period taken from the day of the accident or the day of notification?

Ms GRANT: With notification provisions I think it is two years from the date or six months from when WorkCover becomes aware, whichever is the later.

The Hon. CATHERINE CUSACK: So in relation to this incident you became aware later?

Ms GRANT: Yes.

The Hon. CATHERINE CUSACK: You were then working to a six-month time period.

Ms GRANT: That is right.

The Hon. CATHERINE CUSACK: You were unable to conclude the matter in the two-year time period.

Ms GRANT: We filed on 16 September.

The Hon. CATHERINE CUSACK: Mr Hampson was receiving workers compensation payments. Is there any relationship between WorkCover and the insurance company? Does the insurance company not want to ascertain whether an accident occurred before it starts making these payments? Is there not some relationship with WorkCover to verify that?

Mr BLACKWELL: The insurer clearly was notified in this case that an accident had occurred. It has its own processes for verifying that a worker is injured—in other words, medical certificates and those sorts of things, and a statement from the employer that a worker is injured at work. So it would have conducted its own investigation into that, if you like. It might not have been an investigation but it would have had its own process of determining whether something had occurred at work and whether it was a compensable injury. That is clearly what it did.

CHAIR: It did not advise you though?

Mr BLACKWELL: What occurred relation to that at that time was that the insurers notify us of all claims, but those were in the consolidated files, if you like, which come to us in a mass of data. So to say that it did not notify us is accurate in the sense that it did not put up its hand or ring us up and say, "Did you know about this?" In a sense we did know. We were being informed by the insurer of those compensation payments to Mr Hampson. So, technically, we were aware from the compensation side of things, but there had not been a notification, as there should have been, by the employer directly to us in those days of the accident occurring.

The Hon. CATHERINE CUSACK: What is the point then in the insurers giving you that advice?

Mr BLACKWELL: In relation to the information that they give us, it is information that we require to run the workers compensation side of the scheme, so that we understand what payments are being made in aggregated data, if you like, so that we can then run the whole scheme.

CHAIR: You might need a system so that you can crosscheck names against your records.

Mr BLACKWELL: We now have a system of dual notification. When an employer does notify, he has to notify both us and the insurer at the same time.

The Hon. CATHERINE CUSACK: So that would not happen again?

Mr BLACKWELL: That was not happening at that stage.

The Hon. CATHERINE CUSACK: And it would not happen now?

Mr BLACKWELL: No, it could not happen again.

The Hon. PETER PRIMROSE: I have a more general question about prosecutions. Under the Act as it stands at the moment, or under any other common law principles dealing with occupational health and safety, is there a statute of limitations?

Ms GRANT: The Act provides for limitation periods. So it is not governed by any general rule. Generally, it is two years from the date of the incident. In the case of coronial proceedings, generally it is two years from the Coroner's findings, provided an appearance of an offence is present in the findings. In respect of notifications, it is two years from the date of the incident, or six months from WorkCover becoming aware, whichever is the later.

The Hon. PETER PRIMROSE: From my limited knowledge it sounds as though two years is a short period compared to other areas of the law. Is that true?

Ms GRANT: Personal injuries is three years.

The Hon. PETER PRIMROSE: I do not ask you to read the minds of legislators. That is our problem. I have enough difficulty doing that at present. Could you conceive of any reason why the two-year statute of limitations would be applied?

Ms GRANT: That is really a policy matter for the Government.

The Hon. DAVID CLARKE: It used to be unlimited. There used to be no time limitation.

Ms GRANT: I believe that that is still the case.

Mr WATSON: There has always been a limitation even under the factories Act and the construction Act.

The Hon. DAVID CLARKE: What was that limitation period?

Mr WATSON: Two years.

CHAIR: Were heard evidence from other witnesses to the effect that WorkCover launches its prosecutions almost on the eve of the two-year period. Is that true? Is there any reason for that? Does it take that long to collate all the material, for example, witnesses' statements and so on?

Mr BLACKWELL: We have talked about the complexity of gathering evidence, interviewing witnesses and so forth. Some of the files that go from the investigation, from the inspectorate to the legal team, are quite thick and extremely complex files, as they have to be for these sorts of circumstances. Clearly, a number of these cases are contested in court and we have to ensure that we have the proper evidence and so forth. Having said that, it is our view that we can do it more quickly than we have in the past. We can and probably should get the filings done well within the two-year period as opposed to shortly before the end of the two-year period. When I was present this morning I heard evidence from one of the employer groups that companies were unaware as to whether or not there was going to be a prosecution at the end of an investigation. I will ask Rick Bultitude to answer that question. Directors are actually the last people who are interviewed by the inspectors in relation to their investigative process. So they certainly should understand that there is a high possibility in most cases of a prosecution proceeding.

Mr BULTITUDE: I should tell the Committee that the process of the investigation follows the hierarchical structure. Generally, we interview the injured person first. Then we interview witnesses, front-line management and, ultimately, those concerned in the management of the corporation. When we get to final interviews, we interview directors of companies or those that set the direction of those companies. Generally there is an inquiry on their behalf as to where the matter goes from there. At that point in time the investigation concludes. Generally there is a discussion between the investigating inspector and that person that the investigation is complete, the file will now be reviewed, the inspector will produce his summary recommendations and that summary and recommendations will be provided to senior management within the organisation and to legal for a

review. They then understand what process follows from that point onwards. So they aware of what is occurring because we are interviewing company directors at that point in time when the investigation is concluded. They are certainly aware of where it may end up.

The Hon. CATHERINE CUSACK: Then there could be a delay of over a year before you proceed with a prosecution.

Mr BULTITUDE: I am not in a position to comment on what happens at that point in time. From the inspectorate's perspective, we conclude the investigation; that investigation is reviewed by management, by the inspector's immediate supervisor and team manager; and that file is then provided to legal.

Mr BLACKWELL: I think we all accept that it is a lengthy process—in some cases it is too lengthy. We are certainly looking at speeding it up.

CHAIR: You might give the employer more direct notification that there is a strong possibility of prosecution. Some employers claimed that they were not certain, after discussions with you, whether there might be a prosecution.

Mr BULTITUDE: That is certainly the outcome that is put to them, but it would be remiss of us as inspectors to prejudice anything by saying that a matter will or will not proceed, until such time as it is reviewed by those in a position to make that decision.

The Hon. CATHERINE CUSACK: So the employer does not know at that stage whether he will be prosecuted?

Mr BULTITUDE: While no certain decision has been made.

The Hon. CATHERINE CUSACK: I accept that.

Mr BULTITUDE: But they are certainly informed of the two outcomes and about the fact that we have undertaken a full investigation.

The Hon. JAN BURNSWOODS: I would like to clarify one issue. I understood the timeline. On 16 February charges were filed in relation to Mr Hampson and Mr Denson. Can you tell me whether those charges for the prosecution relate to a safety breach, or do they relate to a notification breach?

Ms GRANT: It is a notification breach.

The Hon. JAN BURNSWOODS: Is that because of the answer you gave earlier to the question about the statute of limitations that was asked by the Hon. Peter Primrose?

Ms GRANT: Yes, it is.

The Hon. JAN BURNSWOODS: If this matter had been picked up earlier, it would have been possible, but it is now not possible to take up the breach of safety?

Ms GRANT: The limitation period is six months.

CHAIR: Mr Blackwell, will you deal now with the next case?

Mr BLACKWELL: The next case relates to Joel Exner. Again, this is the subject of active work on behalf of WorkCover, therefore we are somewhat limited in what we can say in relation to it. Joel Exner died on 15 October 2003. We have a brief that is currently with the Coroner. We provide a brief in all these cases to the Coroner. Our investigation file is recommending prosecutions against J. B. Metal Roofing Pty Ltd, Joel's employer, and a number of other parties who are on the site. You would understand that some of these issues are quite complex. There are a number of employers, subcontractors and so forth. In this instance charges are likely against a number of entities that are present on the site.

Mr Exner was employed by J. B. Metal Roofing Pty Ltd. Australand Holdings Ltd had contracted J. B. Metal Roofing Pty Ltd and Garry Denson Metal Roofing Pty Ltd for the metal deck roofing work. J. B. Metal Roofing supplied the employees for the work and Garry Denson Metal Roofing supervised the work. J. B. Metal Roofing is a company that is run by the son of Garry Denson. A number of notices were served on J. B. Metal Roofing on the day of the incident and a number of improvement notices were issued to Australand Holdings. These notices have all been complied with. The chief executive officer of Australand has been interviewed by WorkCover and the site is being visited on a regular basis. There have been ongoing concerns in relation to this site.

We have instigated a program of very close observation of that site and we are visiting it several times a week. In relation to other Australand sites where issues have been raised, shortly after Joel's death WorkCover inspectors visited five other Australand Walker group sites to determine the level of compliance with occupational health and safety. No work had at that stage commenced at those sites. A total of five improvement notices were issued to Australand and other contractors at two sites in Glebe and Belrose. The notices were issued for matters including access and egress, inadequate foundations and unsafe scaffolding. As I said, our report has already gone to the Coroner. It was sent to the Westmead Coroner's court on 19 January this year. The Coroner will review the matter once the police brief has been received. He is yet to receive the police brief and I believe that it is expected on 19 March. Clearly, the Coroner will await that brief before he deliberates on that issue.

CHAIR: There are two more cases that we would like to cover before this Committee hearing concludes.

The Hon. DAVID CLARKE: An important question relating to the Hampson case just became clear. As I understand it, you successfully prosecuted the employer within the time for his non-reporting of the original injury. Are you saying that the employer was then able to rely on his non-reporting of that issue to successfully avoid prosecution for the substantial breach that caused the injury in the first place?

Ms GRANT: If you are referring to the prosecution, I answered the question and said that the limitation period had expired. That was because of his non-notification.

The Hon. DAVID CLARKE: Is this not a bizarre situation? A person who has substantially breached the safety regulations can rely upon his non-reporting to avoid the limitation period. Is something not out of kilter? This seems to be a serious matter.

Ms GRANT: It is a serious matter. That is why we have launched a prosecution for non-notification.

The Hon. DAVID CLARKE: That is right. However, the more substantial issue is the breach that caused the injury in the first place. Has this been tested in court to see what is the court's interpretation of it?

Ms GRANT: The two-year limitation period?

The Hon. DAVID CLARKE: No, the fact that an employer can rely upon his non-reporting to avoid the limitation period.

Ms GRANT: The two-year limitation period is very clear. We could not, as prosecutors, who have a duty to the court, institute a prosecution that we know to be wrong in the law. That is why we have chosen the prosecution that we consider to be within the law and in accordance with the material that we have before us.

The Hon. DAVID CLARKE: Do you agree that there is a very serious anomaly?

Ms GRANT: I would accept what you are saying, but in terms of us prosecuting for offences under the legislation, we are doing what we can do.

The Hon. DAVID CLARKE: Have you sought to bring that forward to the Government or to the Minister, to point out this very serious anomaly which allows employers to avoid a prosecution for a breach of safety because they breached another provision of the Act in not reporting it within the time?

Ms GRANT: I think those are very valid matters and I will take them on notice and come back to you.

The Hon. DAVID CLARKE: What is the penalty for non-notification?

Ms GRANT: I do not have that at my fingertips.

The Hon. DAVID CLARKE: Approximately?

Ms GRANT: It would be about $55,000.

The Hon. DAVID CLARKE: What could the penalty have been if he had been found in breach of the substantial issue of breaching the safety regulations?

Ms GRANT: The penalty for a corporation for a first offence is $550,000. That is the maximum, but that would have been brought in the Industrial Relations Commission [IRC].

CHAIR: Our Committee can make recommendations about that matter.

The Hon. DAVID CLARKE: The employer in this situation certainly did rather well. He faced a maximum fine of approximately $55,000 for not reporting—breach of non-reporting—but had he been found guilty of the substantial issue he could have been fined, I think on a first offence, $550,000?

Ms GRANT: The company.

The Hon. DAVID CLARKE: The company, yes.

CHAIR: We will move on to the next case, Mr Blackwell

Mr BLACKWELL: The next case is Geoffrey Jardine. Geoffrey Jardine died on 3 July 2002, having suffered fatal injuries whilst working on a construction site. WorkCover's report to the Coroner was sent to Westmead Coroner's Court on 14 January 2003 and the Coroner dispensed with holding an inquest on 14 April 2003. Prosecutions were filed in the IRC on 27 February 2004. There are a range of files that have gone in for prosecutions there and a range of defendants. One of the issues that were raised in earlier evidence in this inquiry was in relation to alleged forgery of documentation. Those allegations have been forwarded to the police for possible action under the Crimes Act. There was an insurance issue which we were going to cover in relation to Mr Jardine as well. Bernadette can answer that.

Ms GRANT: From my knowledge of the brief, there was not clear evidence of an employment relationship between Mr Jardine and Mr Wilson. Mr Wilson has been prosecuted on the basis of his obligations as an employer to non-employees at his place of work. From our view, there was insufficient evidence of an employment relationship.

CHAIR: There was no evidence of the relationship?

Ms GRANT: There was insufficient evidence of an employment relationship between Mr Jardine and Mr Wilson.

CHAIR: So it could be verbal, but there is no document?

Ms GRANT: No.

The Hon. IAN WEST: Was that at any time relayed to Mrs Jardine?

Ms GRANT: I have spoken to Mrs Jardine.

The Hon. IAN WEST: At the time?

Ms GRANT: No.

The Hon. IAN WEST: If it was that there was an employment relationship, would it not be normal, where it was that the employer is uninsured, for WorkCover to give advice to the relatives of the deceased as to their rights under the Uninsured Liabilities Scheme?

Ms GRANT: In terms of the information that goes to families, Mr Blackwell has addressed in part changes to the processes and what will happen in the future. I cannot say what information was provided to Mrs Jardine at the time in terms of workers compensation entitlements.

The Hon. IAN WEST: Could I be so bold as to say nothing. But you are saying to me now that in the future in cases like that of Mr Jardine, the relatives would be not only counselled by the Salvation Army but would be advised as to their rights under the Uninsured Liabilities Scheme?

Mr BLACKWELL: Can I answer that question? This is a question that we have had on notice anyway and I mention that we are providing all of the answers to those questions today, so that will be dealt with then.

The Hon. JAN BURNSWOODS: In relation to the question I asked before but which Mr Clarke followed up, you said you had referred the issue of forgery to the police. I assume that is the filling in of the sheet and so on. With respect to the allegations as to whether a hard hat was or was not placed next to the body and so on, and the statute of limitations, which would expire in July, could we be in a situation where some of the allegations surrounding that incident need to be concluded and a prosecution or something launched within the next three or four months?

Ms GRANT: We have commenced prosecution proceedings in which that fact will be a relevant consideration.

The Hon. JAN BURNSWOODS: That was filed on Friday?

Ms GRANT: Yes.

The Hon. JAN BURNSWOODS: Do they cover all of these matters?

Ms GRANT: Yes, they do. We have to be very careful about what we say, but that fact is part of the prosecution brief and one of the matters that was taken into consideration in filing the proceedings.

The Hon. JAN BURNSWOODS: I understand that the driver of the machinery left the country a few days after the incident. Has WorkCover followed up with the Department of Immigration or anyone else the legal status of the person who was driving the machinery?

Ms GRANT: I cannot say, and again we should not discuss too much of this, but that person has made a statement to WorkCover and to the police.

The Hon. DAVID CLARKE: I want to clarify something. Did you say that it has not been established whom the late Mr Jardine was working for?

Ms GRANT: There was insufficient evidence of employment between Mr Jardine and Mr Wilson. There is a prosecution against Mr Wilson under section 8 (2) of the Occupational Health and Safety Act.

The Hon. DAVID CLARKE: We know that he was there, doing some work for somebody and was to be paid by somebody. Have we established who was to pay him wages for being there and performing the work that he was performing on that day?

Ms GRANT: There is a question of whether he was a contractor or an employee.

The Hon. PETER PRIMROSE: Is Mrs Jardine entitled to receive the lump sum benefit of $285,750 payable to dependants following a workplace fatality under section 25 of the WorkCover Act 1987, given that her husband was not covered by a workers compensation policy?

Mr BLACKWELL: We will have to take that on notice.

The Hon. PETER PRIMROSE: And if she has not received it, can you advise why? Can a WorkCover inspector stop an employer working if they do not have a valid and current workers compensation policy?

Mr WATSON: No, we cannot.

The Hon. PETER PRIMROSE: Can I ask why?

Mr WATSON: The provisions of the Workers Compensation Act do not provide for us to prohibit work being carried out on the basis of not holding a workers compensation policy. We certainly can serve notices in respect of seeking information about whether or not a person does hold a policy and if we are not satisfied with that information, then we refer that matter to our workers compensation investigation branch.

The Hon. PETER PRIMROSE: I think that may have to be another matter for us as legislators.

CHAIR: We will move on to Mr Rees' case now.

Mr BLACKWELL: Mr Rees died on 19 September 2002 while he was carrying out demolition work in Newcastle. Inspector Dall, one of our inspectors, carried out an investigation into the incident and on 29 July 2003 a report to the Coroner was sent to the Newcastle Coroner's Court. The matter was listed for mention on 19 November 2003 and on 18 February 2004 before Coroner Morahan in Newcastle. The matter is next listed on 7 April 2004. In other words, this case is currently being considered by the Coroner. Sergeant Quinn is the Police Prosecutor assisting the Coroner and will be considering manslaughter charges against the engineer at the site, Bill Porter, once the report from the independent engineer is obtained. The investigation file has been forwarded internally to our legal group.

CHAIR: I have some general questions. Regarding your answer to the Committee regarding WorkCover supervision of the Newcastle BHP site during August-September 2002 when Mr Rees was injured, could you advise what is meant by the statement, "During Inspector McMartin's leave of absence, the site was serviced on a needs basis by other inspectors." On how many days was there supervision while Inspector McMartin was away and can you provide the names of inspectors who visited the site and the days on which they visited?

Mr WATSON: Could you just repeat the last part of the question?

CHAIR: Can you provide the names of inspectors who visited the site and the days on which they visited? The answer implied that other inspectors visited the site?

Mr WATSON: Can I indicate that the intent of the answer is that there were other inspectors who did visit the site. We do not have inspectors upon sites every day; on that particular site we do not have an inspector there every day, but there were other inspectors who visited that site and carried out investigations, complaints and other matters related to the site.

CHAIR: Can you provide their names and the days on which they were there?

Mr WATSON: We could probably provide that. I will take that on notice.

CHAIR: In answer to why WorkCover had not contacted Mr and Mrs Rees since the death of their son, you answered that the contact details were provided to their son's partner as next of kin. Is it not important to offer assistance and advice to parents and other close family members as well as partners of a deceased?

Mr BLACKWELL: I think there was an assumption there that the information would be passed on to the parents. That did not happen, I believe, so there is an issue for us there to look at how we involve next of kin, if you like, in terms of parents. It is something we need to review, yes.

CHAIR: Obviously, next of kin officially would be the priority because that is a legal matter?

Mr BLACKWELL: That is correct

CHAIR: But you will consider contacting parents in other cases.

The Hon. DAVID CLARKE: Whom was the information passed on to?

Mr BLACKWELL: Mr Jardine's de facto.

The Hon. DAVID CLARKE: So it was passed on?

Mr BLACKWELL: Yes.

CHAIR: To the partner of the deceased, who was the official next of kin.

The Hon. DAVID CLARKE: And you assumed they would then pass it on to any other relatives?

Mr BLACKWELL: That is correct.

CHAIR: And whether that person was listed somewhere as next of kin—

Mr BLACKWELL: I am sorry, I got the names wrong. It was Mr Rees' de facto. Could I correct a statement I made earlier. It was in relation to the appointment of senior counsel. I said that they had been given their brief a month ago. In fact, the advice was sought from them in November of last year, so they have had some time looking at it. They are expected to report on 31 May this year. Their names are Peter Hall, QC, Professor Ron McCallum, Adam Hatcher and Adam Searle.

CHAIR: Are they looking at the particular issue of industrial manslaughter and whether the current criminal law covers it?

Mr BLACKWELL: The broad spread of what they looking at is whether the current legislation is adequate.

The Hon. CATHERINE CUSACK: Can you just name the organisations they represent?

Mr BLACKWELL: They are senior counsel.

CHAIR: They are individual barristers, members of the Bar Association.

Ms LEE RHIANNON: I have some questions about other cases that were mentioned by witnesses. Can we move on to those now?

CHAIR: What other cases do you still have?

Mr BLACKWELL: I still have some other cases. I do not know if they are the same.

CHAIR: Proceed, please.

Mr BLACKWELL: David Selinger is a young man who was a guest attending Fox Studios—an issue which has been raised at this Committee meeting—on Monday 15 July 2001. He was killed when temporary chain mesh fencing panels utilised by Sydney Fringe Festival fell on his body during a severe windstorm. It was a very severe storm on that day. On 21 September 2001 the coroner's report and a brief was sent by us to Glebe coroners court. On 4 October 2001 a letter was received from the coroners court informing that the coroner had not made any final decision but was presently of the opinion that this is a matter where an inquest may properly be dispensed with.

On 4 June 2002 a further letter was received from the coroners court stating that the matter was to be set down for hearing from 1 October 2002 to 3 October 2002. The hearing was subsequently adjourned and a site inspection took place at Fox Studios on 25 November 2002. On 14 February 2003 the coroner concluded the inquest and published her findings. The findings contained several recommendations directed to the police, the State Emergency Management Board, the management of Fox Studios and the Department of Fair Trading. No recommendations were made regarding breaches of the OHS Act or in relation to WorkCover, and no prosecution has been commenced.

Motion by the Hon. Jan Burnswoods agreed to:

That the hearing be extended until 4:30 p.m.

The Hon. PETER PRIMROSE: I am uncertain from what I read about this case in the media and hearing the evidence here as to the reasons given for not proceeding with a safety breach. I understand from what you say that that was not suggested in the coroner's findings, but presumably there was some discretion on your part as to whether to proceed or not. Can you give us the reasons why you chose as a matter of law or policy not to proceed with a safety breach?

Ms GRANT: This case falls within a description of what we call public safety issues. While every site in Sydney is potentially a workplace, you do not generally prosecute for every single incident that occurs on every site in Sydney. This unfortunate fatality occurred when a young boy attending a recreational activity at the Fox Studios site just happened to be near this fence when a wind gust, believed to be up to 100 miles an hour, caused the fence to collapse onto him. On a very strict approach one might say there had been a breach of OHS legislation but the view was taken because this was more of a public safety issue that we would not be commencing prosecution of an employer in the circumstances. WorkCover sits on an intergovernmental working party which is looking at the issue of public safety and how best to deal with recreational incidents.

The Hon. CATHERINE CUSACK: Had the safety Act not been breached, the fence would not have fallen over.

Ms GRANT: Well, that is a question of fact. Obviously, circumstances took place at the time where there was a severe wind storm—it was 100 miles an hour, I believe.

The Hon. CATHERINE CUSACK: Putting aside the windstorm and putting aside the death even, the way the fencing was secured was in contravention of the safety Act—not technically, it was in contravention of the Act.

Ms GRANT: No, that is not correct. I think we are drawing conclusions about what the facts might establish. Certainly a fence fell over from where it was placed, it collapsed, and fell onto the young boy, but whether or not that translates to an offence under the OHS legislation is another thing, the OHS legislation in part being directed to employer and employee safety. It also addresses the safety of non-employees at workplaces but the view was taken in this case that this fell more generally into a case of the public safety issue and not one that would ordinarily be prosecuted under the OHS legislation.

The Hon. DAVID CLARKE: So, there may be room for prosecution but it is not something in the ambit of WorkCover to do?

Ms GRANT: Yes.

The Hon. DAVID CLARKE: It may be some other public authority but it is not your responsibility?

Ms GRANT: Generally public safety is subject to a whole-of-government approach as to how best to deal with it.

The Hon. PETER PRIMROSE: Are you aware of what legal action was initiated in relation to that matter, given that it was a public safety issue?

Ms GRANT: I am not aware of what other action has been taken by other agencies and I am not aware of what action was taken by David Selinger's parents.

CHAIR: Is that something that the police would take up?

Ms GRANT: I believe the police would only be interested in offences under the Crimes Act and I am not aware of any breach of the Crimes Act.

Ms LEE RHIANNON: You said the view was taken that it was not a Workcover matter. Is that why this matter has run into problems, that from the beginning that assumption was made and therefore it has been handled in a way that has not brought credit on WorkCover? I understand in open court counsel representing the deceased's family commented that the WorkCover inspector's conclusion was that it was not a foreseeable risk and that the coroner put on record that she did not agree with the recommendation of WorkCover's inspector. So, was this assumption made from when the accident occurred that it was not a WorkCover matter and therefore it was handled in a way that has not been seen as a workplace injury?

Ms GRANT: I would not like to say that WorkCover did not do its job, because I think that would be unfair criticism. In this case the WorkCover inspector took a certain view and proceeded along that path. The police independently undertook their own investigation and produced that material at the inquest which assisted the coroner in coming to certain findings and making certain recommendations to other agencies which did not include WorkCover.

The Hon. DAVID CLARKE: In other words, you would say it was too many links removed from having any major relationship with the WorkCover authority or the legislation under which you operate?

Ms GRANT: Too many links might be putting it a bit high but we would say it was some distance from what we would normally regard as coming under our legislation.

The Hon. DAVID CLARKE: So you assume there might be some other public authority who would deal with safety issues where the public is but it is not your authority?

Ms GRANT: It certainly concerns us when somebody dies in these circumstances but we do not necessarily see our role as prosecuting every death on every site in Sydney, because that would be inappropriate. That is why we are party to this intergovernmental, whole-of-government agency approach.

The Hon. DAVID CLARKE: You would also say that the time you took to establish whether WorkCover should be involved in this was a reasonable period, that you came to that conclusion within a reasonable period, that you followed due diligence in coming to that final decision?

Ms GRANT: Yes. Our inspector undertook an investigation that was presented to the coroner and this was supplemented by the police inquiry.

The Hon. IAN WEST: On that particular case, I understand you were saying that the fencing fell over. Were there also unsecured fencing panels that blew over involved in this particular fatality?

Ms GRANT: I believe on the day, because of another activity on the site, they moved some temporary fencing over to allow greater access, and it was that fencing that was leaning that fell over when the wind hit it because of an abnormal wind storm.

The Hon. IAN WEST: Is it possible that the WorkCover inspector who inspected that matter was not a fencing expert?

Ms GRANT: I cannot comment on that.

The Hon. IAN WEST: Can you take that on notice?

Mr BLACKWELL: Yes, we can certainly take that on notice.

CHAIR: Although the fence was not erected, it was actually leaning, so it was not a matter of installation.

Mr BLACKWELL: I think it is a little unrealistic to expect that we would have fencing inspectors on standby to look at particular issues.

Ms LEE RHIANNON: Are you aware that when the police were undertaking their investigation and doing their videotaping of it, some more fencing fell over and fell on the officer in charge, and this was on the videotape that was presented in court? If it had been that officer or a worker on the site or a security person who had died rather than this little boy, would WorkCover have handled it differently?

Ms GRANT: If it had been an employee in an employment relationship on the site we may well have, but it is a very difficult question to answer because you have to look at the facts. That is what I am saying, in the particular facts of this case it would be wrong to suggest that WorkCover did not take the issue seriously. We undertook an investigation and we were party to the coronial inquest and assisted the coroner's inquiries as well as the police.

Ms LEE RHIANNON: I was not doubting that you took it seriously. I wondered whether it had been handled correctly, that is all.

Ms GRANT: In terms of the investigation and the presentation of the material to the inquiry, I believe it was.

The Hon. IAN WEST: Did I hear correctly that it was suggested by the general manager that it may have been that you did not have a specialist fencing inspector available to attend a fatality?

Mr BLACKWELL: The issue I was trying to raise is that we do not actually have specialist fencing inspectors. As you have already heard in evidence, our inspectors are expected to look at a whole range of work sites, whether they be construction, fencing, whatever it might be. So, whilst we have a construction team, for example, where we would expect people to have a good knowledge in relation to construction-type investigations, we do not necessarily go down to the level of specialisation in fencing or some other areas.

The Hon. CATHERINE CUSACK: Are you saying the inspector might have made a mistake?

Mr BLACKWELL: No, I am not. I cannot make that comment at the moment because I have not looked closely enough at that case.

CHAIR: The point is, it was not a question of the construction of a fence, these were panels leaning against a fence. That is different to a fence collapsing, I assume?

Mr WATSON: That is correct.

CHAIR: Can we move on to the next case?

Mr BLACKWELL: The next case I have here is Mrs Welsh. On 30 June 2001 Mrs Welsh died. She was struck by the trailer of a truck. The date of the incident was 30 June 2001. Preliminary investigation was undertaken on 3 July 2001. At that stage the matter was being dealt with by the New

South Wales Police as an incident that occurred outside the workplace. In other words, as I understand it, the truck was moving off a construction site and the police were dealing with it as a road safety matter. WorkCover would normally defer to the police in these instances. Mr Welsh made representations to WorkCover following this and regular contact was maintained with Mr Welsh. The inquest was dispensed with by the coroner on 25 February 2002.

Prosecutions were initiated on 12 June 2003 in the Industrial Relations Commission against C. J. and S. J. O'Keefe Building Pty Ltd for breaches of the Occupational Health and Safety Act 1983 and a deemed a breach by the director of the company, Christopher John O'Keefe. Following several directions hearings the trial has now been set down for 7 June 2004 for five days and a senior counsel has been briefed for the prosecution. Further mention is listed for 26 March 2004. It would be fair to say that in this case there was an initial investigation where it was thought that this was an accident being dealt with by the police and it was a police issue given that the accident occurred just outside the building site. John Watson might like to take up the story from there, because we certainly had another look at that later and decided to prosecute in this matter.

Mr WATSON: As information became available to us it was clear that this was a matter that fell within the activities of the principal contractor on the building site. As such, we initiated a full investigation which has resulted in these prosecutions. I should add that we have been in close contact with Mr Alan Welsh on a number of occasions and Mr Welsh and I have spoken a number of times about the progress of the matter. Mr Welsh is aware about the matter being heard in June this year.

CHAIR: When was the prosecution launched or commenced?

Ms GRANT: On 12 June last year.

The Hon. DAVID CLARKE: When did you come to the decision that the matter fell within the ambit of the WorkCover Authority?

Mr WATSON: We came to that conclusion when we received representations from Mr Alan Welsh. It was clear from our construction manager's face-to-face discussion with Mr Welsh that the accident had not occurred at the spot that was first indicated to us. It had occurred closer to the construction site; indeed, it had occurred on the footpath. That really is a matter that we believe should have been under the control of the principal contractor.

The Hon. DAVID CLARKE: Was Mr Welsh there when the accident occurred?

Mr WATSON: I do not believe he was.

The Hon. DAVID CLARKE: As a relative how did he establish this information when investigators and others did not?

Mr WATSON: I am unaware of the detail of that matter. I would not be able to answer that on behalf of Mr Welsh.

The Hon. DAVID CLARKE: Had Mr Welsh not pursued this matter, we could now be in a situation where there is no prosecution at all.

Mr WATSON: We certainly are not in that situation. We received the information not only from Mr Welsh but also from other sources. The union contacted us as well and raised issues with us. This is a matter we would have reviewed given the information that became available to us.

The Hon. DAVID CLARKE: Was the information you got from the union raised before Mr Welsh raised it, at about the same time or after?

Mr WATSON: I think it was about the same time. I do not have the correct chronology in front of me. When we have matters like this we are always open to reviewing our initial decision in respect of whether we should proceed or not and who is the lead agency in the matter. Certain matters fall within certain jurisdictions more comfortably than others. It appeared on the first summing up of the matter that it clearly fell within the Motor Traffic Act and was a matter for the New South Wales

Police. It subsequently became clear that that was not the case. We were happy to review the matter and happy to put in place a full investigation to ensure that breaches of the legislation were brought to account.

The Hon. DAVID CLARKE: After the intervention of the union and Mr Welsh?

Mr WATSON: Yes, Mr Welsh contacted us and we were happy to review it.

The Hon. JAN BURNSWOODS: If the decision hinged on precisely where the incident occurred, did the WorkCover inspector who originally visited the site determine the exact location? In effect, who determined the wrong site that was later corrected by Mr Welsh and the union?

Mr WATSON: It is not really the site that was incorrect, it is the location of the accident in respect of the location of the particular building site. In discussions between the WorkCover inspector and the New South Wales Police we were informed that the police were proceeding with the matter as a motor traffic accident. It became clear later that that was not the case.

The Hon. JAN BURNSWOODS: That was not my question. My question was: Who initially determined that the incident had occurred on the roadway rather than on the footpath?

Mr WATSON: As I indicated, there was a discussion between the inspector and the New South Wales police service and then a discussion with the inspector's supervisor about the information that the police had provided in respect of the matter and their intention indicated to us at the time.

The Hon. JAN BURNSWOODS: Was the WorkCover inspector called to the site initially?

Mr WATSON: The WorkCover inspector did attend the site, as I understand it.

The Hon. JAN BURNSWOODS: At the time of the accident?

Mr WATSON: I think it was two days after the event we attended the site, that it was brought to our notice that it was a matter that was related to our jurisdiction.

The Hon. JAN BURNSWOODS: That is two days after the event?

Mr WATSON: Yes.

The Hon. JAN BURNSWOODS: What was the gap then before Mr Welsh spoke to you?

Mr WATSON: The situation is the New South Wales Police attended the site which, in their view, was a motor vehicle accident. We have discussed already today the arrangements in respect of their notifying us of workplace accidents. This is not one that fell within that area. We were then notified of the matter by the employer and we attended the site a couple of days after the event. We formed the view at that time that the New South Wales police were conducting investigations in respect to the Motor Traffic Act and that is where it fell. We reviewed the matter when we received further information, as I have already indicated in evidence, from Mr Welsh.

The Hon. JAN BURNSWOODS: If the employer notifies you, is that not almost prima facie evidence that the employer regarded it as a workplace accident?

Mr WATSON: No, not necessarily.

The Hon. JAN BURNSWOODS: It seems as though there was to-ing and fro-ing.

Mr WATSON: Let me check whether the employer notified us. I am sorry, we will have to take that on notice. I would like to correct the record. I am not sure whether the employer notified us or we received a complaint. I will take that on notice and provide that detail.

The Hon. CATHERINE CUSACK: Did the police ever notify you? Did the police decide that it was not a motor traffic accident and just drop it?

Mr WATSON: The police did not notify us of the outcome of their action, no.

CHAIR: Do you have any further cases, Mr Blackwell?

Mr BLACKWELL: Yes, I do. The next case was a person called Chun Lin, a student at the University of New South Wales. Chun Lin was killed by a truck which had been parked on a hill. The person who was driving the truck left the truck, the truck rolled down the hill and killed the student. A preliminary. WorkCover investigations revealed that the police were the lead agency because the incident was regarded as a motor vehicle accident. On 29 and 30 July 2002 the Coroner's Court heard the case. The Coroner made a formal finding as to the date, place and cause of death. She terminated the matter pursuant to section 19 of the Coroners Act. She was satisfied that the evidence presented in the inquest was capable of satisfying a jury beyond reasonable doubt that a known person had committed an indictable offence. The Coroner forwarded to the Director of Public Prosecutions [DPP] the depositions taken and evidence tendered during the inquest. In February 2004 WorkCover was advised by the DPP that no action would be taken under the Crimes Act 1900. The case was referred to the DPP by the Coroner, and the DPP has advised us it is taking no action. We are now reviewing the matter as to whether we should commence prosecution.

Ms LEE RHIANNON: In the cases of Lola Welsh, Chun Lin and David Selinger there seems to be the common theme that WorkCover is not proceeding. Is that because they are not employees, even though they have died on a work site? Do you believe there is a common aspect to these cases? Do you believe you need to review WorkCover's attitude when it is a member of the public, not an employee, who dies on a work site?

Mr BLACKWELL: I do not think it is an attitude issue at all. I think it is in relation to jurisdictional issues, if you like. In the first case there is an issue about whether or not we have an involvement in public safety and whether we should prosecute in that case. As to the second issue, it looked as if it was a road traffic accident. If we believe it is a matter that the police should be pursuing, then there is some debate as to whether or not we should be involved. All these cases go to the Coroner. We provide a brief to the Coroner on all of these cases. As to the third case, the Coroner made a decision to refer the matter to the DPP. The DPP subsequently made a decision not to prosecute. That means we would normally wait for the outcome of the Coroner's decision before we take any further action. That is what we are doing in this particular case. I do not believe there is any reluctance at all on the part of WorkCover not to prosecute where we believe we can prosecute and where we believe that we have some reasonable chance of success in terms of prosecution.

Ms LEE RHIANNON: If it were not Chun Lin who died but a labourer, how would WorkCover have proceeded?

Mr BLACKWELL: That is something we have yet to decide on. As I have already said, we have waited for the outcome of the Coroner's report. They have sent it to the DPP, the DPP has decided not to prosecute. The ball is now in our court. We need to determine whether or not we are going to prosecute in this particular matter.

Ms LEE RHIANNON: What is the time line for you to make that decision?

Ms GRANT: I would need to have a series of meetings with the relevant inspector to discuss the progress of the investigation. The investigation now needs to be completed.

Ms LEE RHIANNON: The investigation is not complete?

Ms GRANT: I should qualify those remarks by saying I am not certain as to the state of the investigation. In terms of liaison with the legal people, we will need to go back to the inspectorate.

Ms LEE RHIANNON: Would you take that question on notice and give us the time line as to when it will be completed and when you will make a decision?

Mr BLACKWELL: Certainly.

CHAIR: The Committee can look at the jurisdictional issue about public safety and accidents that occur in workplaces and whether they are police or WorkCover matters.

The Hon. PETER PRIMROSE: Following on from that, I am interested in the issue of, for example, concrete traffic barriers not being placed near a work site and as a consequence someone is killed by a work truck. I do not know where the various jurisdictional issues lie in such a matter and who should take responsibility.

CHAIR: Perhaps that needs to be clarified by the Minister. Do you have another case, Mr Blackwell?

Mr BLACKWELL: Yes, Gary Fuller. This was an incident, not a fatality. Gary Fuller was injured on 25 September 1998 at St Peters. His employer Gary Denson Metal Roofing Pty Ltd, contracting as a roof and wall cladding contractor to Industrial Constructions Australia Pty Ltd. The matter was verbally notified to WorkCover at that stage. On 5 June 2001 the Chief Industrial Magistrate convicted Gary Denson Metal Roofing Pty Ltd following the company entering a plea of guilty. He fined the company $5,000 with costs of $300 and court costs. The court noted that the company had no prior convictions at that stage and remedial steps had been taken after the accident. The managing director of the company was present in court. The company at that time employed 38 people. That fine has been paid.

The Hon. PETER PRIMROSE: Has WorkCover ever appealed a sentence on the grounds of excessive leniency?

Ms GRANT: Yes, it has.

The Hon. PETER PRIMROSE: As an example, in this case Fuller suffered horrific injuries and subsequently committed suicide. A fine of $5,000 was imposed. How often have you appealed a sentence and would you give us examples?

Ms GRANT: We do appeal. I would have to take that question on notice. I cannot give you the number.

CHAIR: You have appealed?

Ms GRANT: Yes.

CHAIR: In more than one case?

Mr REED: Absolutely.

The Hon. JAN BURNSWOODS: Given that we have had a number of discussions today relating to the same group of companies and the same man, in terms of the cases that do not go anywhere because no notification is made or, as Mr Primrose said, because of the small size of the penalty, to what extent does this accumulate in terms of the case now pending?

Ms GRANT: We have to be careful because this defendant is the subject of a couple of matters before the court.

The Hon. JAN BURNSWOODS: I ask the question generally.

Ms GRANT: Generally the court would take into account prior convictions and we would provide that information to the court.

The Hon. JAN BURNSWOODS: In cases where there is an absence of prior convictions because the statute of limitations prevents cases being mounted and the person's failure to notify, I assume that cannot be taken into account by the court.

Ms GRANT: That is the anomaly we spoke about earlier. In other cases there will be prior convictions that would be brought to the court's attention.

CHAIR: In general terms, can you give the court a record of complaints against a company as evidence of their being irresponsible or are you restricted in court cases?

Ms GRANT: In terms of the imposition of penalties, the court takes into account whether the offender is defined as an offender convicted of offences under the legislation. We are limited in terms of informing the court about prior convictions. They have to be convictions under the Occupational Health and Safety (Prosecutions) Act.

CHAIR: Not prior complaints, et cetera, but their record?

Ms GRANT: That may go to someone's credit of course during the course of cross-examination.

The Hon. JAN BURNSWOODS: Both the offence that produced that very small fine and the failures to notify could be taken into account?

Ms GRANT: There are various matters, and we will not necessarily touch on those particular facts. But, generally, if someone's credit is in issue in proceedings, then the prosecutor would be entitled to cross-examine the person.

CHAIR: I still need to get some information on official answers to questions that were put on notice.

The Hon. JAN BURNSWOODS: I have a case that has been raised but has not been mentioned by Mr Blackwell.

CHAIR: I first want to get this answer from the witnesses. We need to clarify how long WorkCover will take to answer the questions taken on notice today, as well as some more questions that have arisen from the evidence given yesterday and today. I am sure we will still have further questions that we have not got to today. What do you hope will be the time span?

Mr BLACKWELL: I think the only answer I can give is that we have tabled today complete answers to the 52 questions previously asked. It has taken a fair amount of effort on the part of the WorkCover Authority to make sure that those responses are accurate. We did that within five or six days. Hopefully, within the next week or ten days, we will be able to answer any further questions that arise.

CHAIR: We are planning to have another hearing on 15 March. Could you work towards that date?

Mr BLACKWELL: Certainly. We will answer as many questions as we can prior to that date.

CHAIR: Our time is up, so if there are any further questions I would ask members to put them on notice.

The Hon. JAN BURNSWOODS: On the second day of the hearing there was discussion about the 20-year-old painter who was killed at a TAFE college in the Hunter. I wonder whether his case should have been in the list of cases that you reported back to us about.

Mr BLACKWELL: We take that on notice. We know about that case, and we are happy to provide a written response. If you frame a question around that, we will provide a response to it.

CHAIR: Without answering the question now, would you frame a question?

Ms LEE RHIANNON: I have a question on notice that relates to page 23 of your document, reference 1.50. I would ask you to take my question on notice again. My question was: Please provide details of the experience of current qualified lawyers. You gave the inquiry details of the director and of the manager, then you say, "The remaining solicitors in WorkCover's criminal law practice have"

and you list six dot points. I notice that those are very similar or absolutely the same as those in a job description on your web site noted as the selection criteria—knowledge, skills and experience. I was after the actual legal experience, not the job criteria. So, in respect of the other legal people, could you take that question on notice again, please?

Mr REED: They do encompass what you would expect we would recruit against, that is, the selection criteria.

Ms LEE RHIANNON: Could I ask that it be answered in a similar form?

CHAIR: The member might put that question on notice, and WorkCover can examine the question.

Ms LEE RHIANNON: I can do that now quickly. Would you answer it for the other legal people in a way similar to the way that you did for the director and the manager?

CHAIR: That is referring to their actual experience, not the theoretical requirements.

Mr REED: We will take that on notice.

The Hon. IAN WEST: Could I put a question on notice, Mr Chair? Mr Watson made reference to some threats against WorkCover inspectors. Could we be given some advice as to, firstly, whether persons have been successfully prosecuted for acts of violence or threats?

Mr WATSON: For obstruction of inspector, I think it is.

The Hon. JAN BURNSWOODS: Mr Chair, can I clarify whether the statistical information that you said in writing the other day you would bring along today is now in this new version?

Mr BLACKWELL: It is incorporated in that response.

The Hon. JAN BURNSWOODS: Thank you.

Mr BLACKWELL: I might mention that there are other documents that we are tabling. I will not go through those, but there are a number of documents that we possess. The first is a document which helps employers deal with inspectors and so forth.

CHAIR: And there are others?

Mr REED: There were questions about the four legal panel. We provided those. And there are additional questions that we are tabling, and that is it.

Mr BLACKWELL: And I think you have a copy of the presentation that we have made today.

CHAIR: I thank you very much for your assistance to the inquiry. It is absolutely vital to enable us to produce our report and recommendations. We appreciate that it does take a great deal of the time of your staff to answer questions on notice, when they are all very busy in their normal WorkCover roles. It is not as if they have spare time. We realise that answering our questions takes them away from other assignments, but we very much appreciate your assistance in answering those questions so promptly.

Mr BLACKWELL: And thank you very much for giving us the opportunity to answer those questions.

(**The Committee adjourned at 4.40 p.m.**)