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STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE WORKCOVER AUTHORITY AND THE WORKERS' COMPENSATION (DUST DISEASES) BOARD

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At Sydney on Friday 28 March 2014

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The Committee met at 9.15 a.m.

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PRESENT

The Hon. D. Clarke (Chair)

The Hon. S. MacDonald
The Hon. S. Mitchell
The Hon. S. Moselmane
The Hon. P. T. Primrose
Mr D. M. Shoebridge

CHAIR: Welcome to the second day of the inquiry into review of the exercise of the functions of the WorkCover Authority and the Workers' Compensation (Dust Diseases) Board. The hearing is being conducted according to section 11 of the Safety, Return to Work and Support Board Act 2012, which designates this Committee to supervise the exercise of the functions of the authorities. Before I commence I would like to acknowledge the Gadigal people, who are the traditional custodians of this land, and I pay respect to the elders past and present of the Eora nation and extend that respect to other Aboriginals present. Today we will hear from various witnesses, including representatives from the Workers' Compensation (Dust Diseases) Board, Asbestos Diseases Foundation of Australia, Law Society of New South Wales, Construction, Forestry, Mining and Energy Union [CFMEU], and NSW Business Chamber.

In accordance with the Legislative Council's *Guidelines for the Broadcast of Proceedings*, only Committee members 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, you must take responsibility for what you publish or the interpretation you place on anything that is said before the Committee. It is important to remember that parliamentary privilege does not apply to what a witness may say outside of his or her evidence at the hearing. I urge witnesses to be careful about any comments they may make to the media or others after they complete giving evidence as such comments would not be protected by parliamentary privilege if another person decided to take action for defamation.

If a witness has any concerns about the broadcasting guidelines they should speak to any member of the secretariat. During the course of the hearing some questions may be asked that a witness could only answer if they had more time or if they had certain documents to hand. Witnesses are advised that in those circumstances they can take any such question on notice and the Committee would ask that witnesses provide a response to any question taken on notice within 21 days of receiving the question. Finally, any messages from attendees in the public gallery should be delivered through the Committee secretariat.

CRAIG MILTON, Policy Analyst, NSW Business Chamber,

LUKE AITKEN, Senior Manager, Policy, NSW Business Chamber, and

GREG PATTISON, Adviser, Workplace Health and Safety and Industrial Relations, NSW Business Chamber, sworn and examined:

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

Mr AITKEN: Yes, thank you. With more than 290,000 employing businesses in New South Wales, the maintenance of policy and regulatory framework for workplace health and safety that helps to avoid worker injury, sustainably supports those that are injured, and partners with business to bring injured workers back into employment is vitally important. As Committee members would have seen from our submission, we are focused on the overall operation of the work, health and safety and workers compensation framework in New South Wales. We have not touched in detail matters relating to changes in scheme performance. Committee members would be aware that with the compensation scheme now in surplus, a further independent review of the scheme and its performance has been triggered.

We are more than happy to take questions from Committee members on all of those matters, but before we do that we would like to comment on an issue that has been raised in a number of submissions—namely, that the declining rates of prosecutions in New South Wales are in any way inhibiting the key public policy outcome of safer New South Wales workplaces. It is undeniable that long-term trends actually indicate that as the rate of prosecutions has fallen, so too have injury rates. We have some information that we would like to table.

Documents tabled.

The additional information that we are providing is a number of graphs we have tracked from the Comparative Performance Monitoring reports from Safe Work Australia and the WorkCover annual reports, which indicate that we are seeing improved safety outcomes in New South Wales but at the same time we are also seeing a decline in the rates of prosecutions and the imposition of fines by WorkCover. As Committee members will see from the data, there is clearly a long-term trend towards an increase in safety with a reduction in prosecution. Calls for WorkCover made by others to the Committee to increase its enforcement activity and to improve workplace safety are, in our opinion, out of step with the current evidence. In fact, we would suggest that the opposite is the case.

We believe that the changes to the legislation in 2012 and ongoing improvements to WorkCover's regulatory functions have, in the main, got the balance right and are helping to improve workplace safety and the New South Wales workers compensation system. However—and this should always be remembered—these are dynamic systems so there is an ongoing need for improvement in adaptation. WorkCover's increased engagement with small to medium enterprises needs to continue. Information flows both to and from WorkCover need to be more open and regular, and further refinements to workers compensation, so long as they are considered and consistent with the principle of returning injured workers to work as soon as practicable, should be undertaken. However, we emphasise that any change to the current framework needs to be considered very carefully. We would now be happy to take members' questions on any of these matters.

CHAIR: Thank you. In your submission you referred to a WorkCover online service. That is for employers and employees?

Mr AITKEN: Yes.

CHAIR: I will frame the question. Can you indicate what precisely that online service is? You say—it is our understanding—that that facility was closed as it was generating incorrect outcomes. When was it closed? What sort of incorrect outcomes was it generating? You are calling for it to be fixed and reinstated. Would you like to address that issue?

Mr PATTISON: Some time ago there was a significant issue within the scheme around the question of who or who is not a contractor—the whole issue of determining whether somebody is an employee under the terms of the scheme or a contractor. That ultimately led to the then Minister having to put a moratorium on prosecutions or, rather than prosecutions, employers being penalised for not paying their premiums because

people were being deemed to be contractors, not employees or the other way around. To help remedy that problem, WorkCover did two things. They put in a process, which is still in place, where an employer can go and seek a ruling as to whether a person is an employee or a contractor for workers compensation purposes. The second thing they put in place was an online system where you could basically get the same sort of answer. It was not as definitive as the ruling; nor did it give any particular protections to the employer.

Under the ruling system, if you get a ruling and it is subsequently determined that the person who may have been deemed by WorkCover to be a contractor is actually found to be an employee, the employer in those circumstances is protected from the recovery of any past premiums or penalties. In the future they would have to pay the correct premium. The online system did not do that but it provided some indications. A few years ago—I am not precise as to when it was discontinued—it came to our attention because a person who was using it found themselves in a bit of strife. WorkCover did discontinue it and when asked the question why it was giving the wrong answers. We are calling for that to be reinstated because it is a simple system for employers to clarify, get some clarity, on a critical issue these days. Is this person an employee for workers compensation purposes or are they a contractor? It is not a simple question. It does not necessarily line up with the same definitions for tax purposes and people get confused.

CHAIR: You have mentioned that particular area and tax issues. Are there other incidents of dealing with other issues where there has been an apparent conflict in information given through that online service?

Mr DAVID SHOEBRIDGE: You are saying that the definition of "worker" under the Workers Compensation Act is different to the definition of "employee" under the Tax Act.

Mr PATTISON: Precisely, yes.

Mr DAVID SHOEBRIDGE: Therefore you need to get some guidance from WorkCover about what is a worker.

Mr PATTISON: Precisely. That is the issue. This was a simple, useful tool. When it was brought to my attention I used it in the case that we are talking about, and remember what we were dealing with. It was throwing up answers that were consistent with his findings, yet on closer examination WorkCover was saying that these people were in fact employees for workers compensation purposes, not contractors. So whatever the issue is in terms of the system, all we are simply saying is go back and fix it and make it available again because it is a useful tool.

CHAIR: But you are not even sure whether there is on online service.

Mr PATTISON: That online service has now been discontinued. You cannot find it on the WorkCover website.

CHAIR: And you are suggesting that it be reinstated?

Mr PATTISON: Fix it and put it back up.

CHAIR: But fix the issues. Have you raised that with WorkCover?

Mr PATTISON: Yes, we have.

CHAIR: When did you raise it?

Mr PATTISON: That was some time ago.

CHAIR: When you say "some time ago", how long ago?

Mr PATTISON: You are going back over 12 months ago.

CHAIR: Did you get a response?

Mr PATTISON: No, not in a formal sense. No we have not.

CHAIR: Would you like to take that on notice—

Mr PATTISON: Sure, I will see what I can find.

CHAIR: —and find out when you raised it, what response you got and when, and whether you have continued to pursue that issue?

Mr SCOT MacDONALD: I take you back to your opening statement and the document you have tabled. That is almost completely opposite to the advice we got from other submissions and hearings we have had and I think some submissions coming later today. You are pointing out that there is no correlation between prosecution and injuries; in fact, almost an inverse correlation, if you like. Can you perhaps go into that a little more and explain? As I said, we got some very strong evidence that the only remedy for the WorkCover scheme for the future was more prosecutions, more vigorous prosecutions.

Mr AITKEN: I guess we have based this information on what is publicly available, and obviously there has been a reduction in prosecutions. But if you only look at that without taking a look at the wider operation of the scheme, you cannot see that there has been an ongoing improvement. So we suggest that if you just take the reduction in prosecutions without having a look at the overall outcomes, you will get that skewed result. What needs to be emphasised is that workplace health and safety is everyone's responsibility and there needs to be a genuine engagement with employers, employees and everyone else involved to try to get those outcomes that we want. Early engagement is probably a more effective mechanism and when people work in partnership it is a much more effective mechanism to get any outcomes of safer workplaces. Mr Pattison might have some specific points to make on that.

Mr PATTISON: I think the simple answer is that if you have a high prosecution regime you create a situation where employers are reluctant to engage with WorkCover. As a result, you do not get the interactions you need to improve safety. The reduction in prosecutions that we have seen goes hand in hand with a whole lot of other activity that has been going on in WorkCover as well to improve its interaction with the business community. It has tried a number of strategies; over the years it has had a business assistance unit. It now has community relationship officers and a number of other things, all of which are designed, as we understand them, to get greater engagement with the business community so that WorkCover can help them meet their compliance obligations, rather than running around with a big stick and trying to frighten everybody into meeting their compliance obligations. It is our contention that running around with a big stick does not achieve the outcome you are trying to get to, which is safer workplaces.

Mr SCOT MacDONALD: Can I—

CHAIR: You may continue and then I think the Hon. Peter Primrose has something arising out of it.

The Hon. PETER PRIMROSE: Like all Committee members I need to take the opportunity to review the evidence. If I looked at the present statistics and correlations as opposed to causations, I could, for example, conclude that since the introduction of the scheme fewer workers in New South Wales required hearing aids as a consequence of the introduction of the scheme because the evidence shows me that fewer hearing aids are being issued with replacement hearing aids but there is no causation there in regard to prosecutions; it is simply that there has been a legislative decision that replacement hearing aids will no longer be provided. Can you comment? We are talking correlations here as opposed to causations and that is always a dangerous thing when we are looking at statistics?

Mr PATTISON: What do they say—there are lies and statistics.

The Hon. PETER PRIMROSE: And damn lies.

Mr PATTISON: Damn lies and statistics.

Mr DAVID SHOEBRIDGE: This may all correlate with the El Niño effect.

Mr PATTISON: True. Look, we are not statisticians.

The Hon. SHAOQUETT MOSELMANE: It looks good.

Mr PATTISON: Yes. I think the basic thesis is that there has been, as we understand it, a conscious effort by WorkCover to reduce the number of prosecutions. Now if the proposition is pure prosecutions lead to worse safety outcomes, one might expect to see in the statistics some deterioration. That is not happening. That is fundamentally our proposition. There are those who say as a consequence of reducing the prosecutions you should see worse safety outcomes. We are not seeing that.

Mr SCOT MacDONALD: I go back to your submission, which refers to your submission to the Joint to Select Committee on the New South Wales Workers Compensation Scheme. I am interested in the competitiveness of New South Wales and where it is at today. You say that, "Despite these reductions average workers compensation rates still remain significantly higher in New South Wales". Can you talk about that now and what it was prior to 2012 when the legislative changes came in? From your figures we are 1.82 per cent higher than Queensland, Victoria and Western Australia. Can you outline where we are heading; where we would be going if we had not had the legislative change and where that 28 per cent premium increase would put us?

Mr PATTISON: Depending on where you look, the numbers jump around a bit. My understanding is in the hierarchy we are number three. Victoria is down about 1.29 per cent average premium; Queensland is about 1.45 per cent and we are about 1.55 per cent at today's numbers. That is my understanding. I am not quite sure at the moment where Western Australia fits in with that scenario. I make one observation: it is interesting that the three schemes that are at the bottom end in terms of premium are all centrally managed funds and are not privately underwritten, but that is another story. At the time the changes were made we were at about 1.68 per cent so if you put 28 per cent on top of that, that means we were going to head in the wrong direction. Our concern at the time the reforms went through was that that 28 per cent would be necessary—

Mr SCOT MacDONALD: For stability—

Mr PATTISON: For five years, yes, and all you would have done was balance the books without changing anything else in the scheme, so based on my experience—and I have been involved in this stuff now since 1995—the 28 per cent would have been the start of a process and the increases would have had to go on.

Mr SCOT MacDONALD: On top of that 28 per cent?

Mr PATTISON: Yes. I think there is no doubt about that. Look at what happened in the mid-1990s when the scheme went from having a $900 million surplus in 1993 to a $65 million surplus in 1994 and the next year the then Minister announced 40 per cent premium increases and the deficit deteriorated to a point where the underlying average premium rate was 3.3 per cent and the Premier had to put a cap on it at 2.8 per cent while the scheme was fixed.

Mr SCOT MacDONALD: Can I ask about your estimates of those job losses that we were looking at back in 2012? I think you nominated 28,000, was it?

Mr PATTISON: It was 12,600.

Mr SCOT MacDONALD: Sorry, 12,600.

Mr AITKEN: Do you want me to tell you how we arrived at those figures?

Mr SCOT MacDONALD: Yes? Were you getting evidence of interstate competitiveness, employers talking to you about where they might be shifting jobs?

Mr AITKEN: Yes. At the time when those premium increases were being discussed we provided a survey to our members. We got about 400 businesses responding to that indicating that if premiums were to go up there would be an employment impact on their business. When we asked them how that impact would actually manifest itself, one-third said they would have terminations, a few more said they would have natural attrition and others said they simply would not fill vacancies. Obviously the level of impact depended on the size of the business and the size of the premium increase but to get to that 12,600 figure we took all of those businesses that said there would be an employment impact and regardless of whether they said there would be three employees or four employees, we just said that was one position and then we extrapolated it out from there. Based on that 28 per cent increase in premiums we were able to derive the 12,600 number as an

employment impact across the State and while those are not perfect statistics—and we are trying to estimate a potential impact—we did take really the lower bound on that estimate.

Mr SCOT MacDONALD: So it is a fairly conservative estimate?

Mr AITKEN: It is fairly conservative on what that impact might have been.

Mr DAVID SHOEBRIDGE: Thank you all for attending today. Turning to your graphs, if you look at the top two in the graphs, I see a dramatic reduction between 2003-04 and 2006-07 in the number of serious claims. That is when you see the greatest fall, is it not?

Mr PATTISON: Yes.

Mr DAVID SHOEBRIDGE: Whilst there have been some improvements in 2011 onwards, it has been relatively flat since then, would you agree?

Mr PATTISON: The rate of improvement has not been as great, but I do not know that I would say it has been relatively flat.

Mr DAVID SHOEBRIDGE: Compared to that dramatic reduction between 2003 and 2007?

Mr PATTISON: Sure.

Mr DAVID SHOEBRIDGE: When I look at the penalty notices in particular and the prosecutions the period when there is far and away the greatest number of penalty notices and prosecutions is in that period up to 2007, is it not?

Mr PATTISON: Yes, that is when they were higher, and they were higher even before then.

Mr DAVID SHOEBRIDGE: Contrary to your proposition, it looks to me that the aggressive penalty notices and prosecutions between 2004 and 2006-07 have, on one view of it, been in the period where we have had the most dramatic reduction in serious claims per million hours worked.

Mr PATTISON: You could draw that conclusion, yes, and perhaps we should go back and provide some additional information because if you look before 2004-05 you will also find times when New South Wales was prosecuting more matters than all other jurisdictions in Australia combined and collecting more in fines than all other jurisdictions combined and still not getting improvements in safety.

Mr SCOT MacDONALD: Can you provide that information?

Mr PATTISON: I would have to go back and dig it out.

Mr DAVID SHOEBRIDGE: Some greater detail and richer analysis of this is essential. What you would hope was happening—and I am not necessarily saying it is what happened—when this level of penalty notices and prosecutions are happening from an industry regulator, is that they are being targeted at a known problem to try to fix conduct in the workplace and one view of this is that has happened; there was targeted prosecutions and penalty notices and we have seen a consistent ongoing improvement in industry as a result of that.

Mr PATTISON: Again, my observation and I think the view of the business community would be that up until recent times that activity in fact was not targeted and there was a lack of credibility, if you like, in the prosecution process because WorkCover was essentially prosecuting anything that moved. In more recent times it has actually tried to target its activity; it has strategies in place to do that and we applaud them for doing it. As an organisation we are not saying that prosecutions should not occur; we are not saying that penalty notices should not be issued, but they need to be issued with consideration and, as you say, in a targeted way because if you do not, it would be our contention the credibility of the system is undermined and therefore the willingness of people to engage with it and improve their safety is weakened.

Mr DAVID SHOEBRIDGE: We heard from some witnesses last week that what is really required are Chinese walls. There needs to be a part of WorkCover you can go to for advice, to engage with, to get

consensual improvement in the workplace. That needs to be separated from the prosecution arm so that the person you have gone to on Thursday to ask about how you might fix a potential problem in your workplace does not come around on the following Monday and say, "I know you have a defective workplace and I am going to prosecute you." Those Chinese walls seem important.

Mr PATTISON: That model has in fact been used in WorkCover in the past. There was a business assistance unit. We, as an organisation, lobbied quite hard for the creation of that unit. It has since been merged with the inspectorate. We would not necessarily argue against the recreation of a business assistance unit or a specialised arm. I think there is some merit in the prosecution arms and the educational arms being separate.

There is no doubt that there are employers who are reluctant to engage with WorkCover because they fear the consequences. It is an old story, but many years ago a member of ours was asked by an inspector to come and see him to get some advice on matters. As he left, the inspector issued him with five improvement notices. I doubt if there was a conversation between our member and that inspector ever again. It is that sort of image which WorkCover has been working to remove, I think with some success, but it is not yet complete. In the last couple of weeks I have been out talking to members in regional New South Wales. I floated the question to them: "In your opinion, has WorkCover improved its interactions with business?" I got a number of positive nods. That tells me that there is some positive impact. But it is still a work in progress.

Mr DAVID SHOEBRIDGE: I assume that, as employers, you support having a workers compensation scheme in place that ensures that if your employees are seriously injured they have adequate protection. Would you view that as one of the essential parts of the workers compensation system?

Mr PATTISON: Absolutely, yes.

Mr DAVID SHOEBRIDGE: If someone had a very serious injury at your workplace, you would hope that they had sufficient protection, particularly for their medical expenses and their ongoing income loss.

Mr PATTISON: Yes.

Mr DAVID SHOEBRIDGE: I ask you about some of the really harsh thresholds that have been put in place with the new regime. If you have an employee whose foot is amputated as a result of an industrial accident, surely that is a serious injury that means they should be protected for life?

Mr PATTISON: I think it is clear that, as the new scheme has rolled out, there are issues that need to be addressed. As an organisation, we are saying, "Let us address them." The example that you talk about clearly indicates to us that there has to be a better way. In addressing this, we think the fundamental principles underlying the design of the current scheme need to be protected, but let us do it in a way that does not threaten the overall scheme.

Back in the early nineties, the then Government reintroduced common-law journey claims because they thought the scheme could afford it. When they did that, the scheme had a surplus. Not very many years later, Jeff Shaw put premiums up by 40 per cent because nothing else had been adjusted. They are the sorts of things that we are concerned about. We think that work does need to be undertaken within that framework to identify the sorts of issues that you are talking about and to find some solutions.

Mr DAVID SHOEBRIDGE: For someone to have an injury at your workplace as severe as an amputated foot and then for you, as employers, to realise that the premiums you have paid will not protect them for their necessary medical expenses for life, must be quite emotionally draining on employers as well.

Mr PATTISON: Employers expect their workers to be looked after. We talk to members, and they also express disappointment that workers who have been genuinely injured are perhaps not being looked after as well as they might have hoped. We do not disagree with that proposition.

Mr DAVID SHOEBRIDGE: I am interested in hearing about the conversations you are having with your members, from the other side of the record. We hear a lot from unions and injured workers about their repeated concerns. Where are the anxious pressure points for employers about benefits not being sufficient? Where are employers seeing that?

Mr PATTISON: It comes to us as expressions of frustration with the system generally and frustration that claims are not being managed as well as they might be. That has consequences for the injured workers and for the employers. Typically somebody will say that they did not know about the claim or that it has gone to the agent and they do not know what is happening or that the person sitting at home does not know what is happening. That sort of process issue tends to be the main concern.

Mr DAVID SHOEBRIDGE: Do you think if an employee has a foot amputated because of an industrial accident they should be protected for life? It is a pretty simple question.

Mr PATTISON: Prima facie, the answer to that question would be yes. The only question I would have in my mind about that would be: What are the consequences for the scheme generally and how do you balance the whole thing?

Mr DAVID SHOEBRIDGE: You talk about the previous Workers Compensation Advisory Council and how it has been abolished. From your communication with Government about issues in the workers compensation system, do you think there would be a place for a tripartite body, to directly communicate with the Minister rather than having to mediate that through WorkCover?

Mr PATTISON: I should answer that question because the previous advisory council met 80-odd times and I attended about 79 of those meetings!

Mr DAVID SHOEBRIDGE: I know that. That is the reason I asked you.

Mr PATTISON: I do not know whether I should be congratulated or commiserated. As an organisation we did support the discontinuation of the previous advisory council because it had run its course. It was tired. It was too big. When it started it was a fairly small and tight group. There were good information flows from WorkCover, regular meetings with the actuary and engagement from the Minister's office via the Minister's adviser. I think there is a place for a structure like that.

Work health and safety and workers compensation are fairly complex issues. Workers compensation in particular can be difficult to get your head around. Reform and management of the whole scheme, in my view, is aided by an informed debate, not an uninformed debate. There need to be good information flows and good interchange. It is helpful if that gets to the Minister's office.

Mr DAVID SHOEBRIDGE: One part of my question was whether that should happen without being mediated through WorkCover. It would be a separate, direct channel of communication to the Minister.

Mr PATTISON: While WorkCover facilitated the advisory council meetings, my observation was that the Minister's adviser attended all the meetings.

The Hon. SHAOQUETT MOSELMANE: My question is about the compensation advisory council that you want to establish. Could you elaborate on that? Why not just re-establish the Workers Compensation Advisory Council as it was before?

Mr PATTISON: When the advisory council was first created it had five employer representatives, five employee representatives, an observer from the insurance industry and an observer from the Law Society. That was, I think, a good structure. It regularly received input from actuaries and others. In fact, a number of scheme reforms were debated and devised within that group in the early days, going back to the 1990s. Later it became a group of about 16. A number of others joined the group. Our interaction with actuaries and others diminished. Towards the end of its life, it was not uncommon to receive a set of papers which essentially had the header sheets and they were going to be verbal reports of the meeting. It lost momentum and the like.

I think if you are going to have a group like this, it does probably need to be smaller rather than larger. It is our view that the primary stakeholders in this system are the employees and those who represent them—in other words, the people who are protected by the scheme—and on the other side is the people who pay for it, and that is the employers through their representatives.

Mr DAVID SHOEBRIDGE: The experience with all these statutory schemes in every jurisdiction is that over time issues arise and you need to be able to be oversighting them, managing and heading off problems

before they become florid. That really should be the role of one of these committees, I would have thought—to be ahead of the game—rather than playing catch-up.

Mr PATTISON: As I said earlier, these are dynamic systems. You are in an environment where you make a change over here and you get a consequence somewhere else. If you are not monitoring them closely, which is in part the role of the regulator and WorkCover and the nominal insurer, I also think that the stakeholders need to be aware of what is going on. We are sitting here at the moment. As we have noted in our submission, it is some time since the actuarial reports have been put up on the WorkCover website. They are not bedtime reading and not everybody likes them, but they contain valuable information—maybe, for some. But that helps to inform the debate, so you focus in on the right things.

Again, if I go back to the mid-nineties when we first had the problems, it was by having access to that information that we started to understand the main problem with the scheme, as has been more recently, was about the time or how long people were off work and what we could do about that. From there over time we have seen such things as provisional liability, so that people can engage with the scheme faster and the excuse from paying the excess to encourage employers to report issues faster and get people the scheme. They were all things that were discussed and thought about within the advisory council framework.

At times we got support from people, even though we had reservations. For example, with the provisional liability, it was of great concern among employers that it would lead to a new form of people rorting the system by putting in a short-term claim, getting off, and getting back to work, and nobody would find out about it. We were all apprehensive about that but within the framework of the advisory council, we were prepared to give it a go. I think the evidence says that it has worked. Our fears have not been fully realised. I am not saying that there are not people doing that in the system somewhere, but overall it seems to have worked. I think the council fulfilled a useful function in that environment.

The Hon. SHAOQUETT MOSELMANE: My question will be a quick one. I am conscious of the time, Chair. I am seeking some clarification in terms of your graph showing successful prosecutions, penalty notices and prohibition notices. What type of breaches you have identified here as penalty notices and prohibition notices—in particular, what degree? Are they serious breaches or are they minor breaches and as a result you have a discrepancy between prosecution and degree of breaches?

Mr PATTISON: We do not have that data. This is purely from the consolidated data produced by Work Safe Australia. By implication, the less serious matters attract the improvement notices; the prohibition notices apply in a set of circumstances where an inspector goes in and says, "Stop what you are doing now", because there is an immediate threat to safety; and, of course, prosecutions are at the top. There is a hierarchy that all the regulators follow, with various forms of intervention and prosecution at the top.

The Hon. SHAOQUETT MOSELMANE: Are you able to provide us with that information?

Mr PATTISON: No. We do not have access to that. That comes via Work Safe Australia and they are deriving information from the regulators who feed it into the data that they use. We do not have access to it, but I should imagine that WorkCover can give you the details the New South Wales. They will probably thank me for saying that, but anyway.

The Hon. PETER PRIMROSE: Can I go back to the same graph?

Mr PATTISON: Yes. Given the time and given that we have all agreed we are not econometricians, can I put this reasonably lengthy question and give it to you on notice so that you can come back to us? You have presented evidence on incidents and, effectively, prevalence information in terms of the reduction in serious claims.

Mr PATTISON: Yes.

The Hon. PETER PRIMROSE: Your contention originally was that there had been a significant reduction when at the same time that successful prosecution of penalty notices and prohibition notices were low in more recent times.

Mr PATTISON: Yes.

The Hon. PETER PRIMROSE: Mr Shoebridge then pointed out that the most dramatic decreases occurred at the same time from 2004 to 2007 where there were in fact the highest numbers of successful prosecutions, penalty notices and prohibition notices. You told the Committee you will seek to adduce data prior to that.

Mr PATTISON: Yes.

The Hon. PETER PRIMROSE: My question is: Given what seems to be inconsistency there, I am worried, firstly, that we are confusing correlation and causation; that, frankly, we are not comparing apples with apples; but, even if we were not, to what would you attribute the reductions between 2004 and 2007, if not the successful prosecutions, et cetera, as outlined? Can I get you to take that on notice and come back to us with some advice?

Mr PATTISON: Sure. Just one immediate response and we will delve into it. We are also talking about a period when the first national safety strategy was in place and there was a renewed focus around about that time, and some other activities. I think that was probably about the first and second Safety Summit. There was quite a lot of environmental activity focusing on safety as well, but let me see what we can find.

The Hon. SARAH MITCHELL: I just have one quick question. A lot of my questions were related to the advisory council, which have already been asked and answered well. Mr Pattison, you made a comment earlier in your remarks earlier about the business assistance unit that is amalgamated into the inspectorate. Obviously this Committee makes recommendations. Do you feel that the loss of that is this unit is something that your members notice? Do you feel strongly enough about it that you think the Committee should maybe consider that as a recommendation to look at re-establishing a specialised unit within that WorkCover?

Mr PATTISON: I am not too sure that our members would differentiate clearly between an inspector and where the information or this help was coming from. They are certainly looking for as much help as they can get from WorkCover. Having said that, I think there would be a number who would probably feel more comfortable if they knew that the person coming out to help them or to whom they were speaking did not have an inspector's card in their back pocket. I think it is something worth investigating as to whether or not a separate unit will facilitate WorkCover improving or increasing the level of support when we go to businesses and their willingness to engage.

Mr SCOT MacDONALD: Just to finish, I want to clarify who the scheme is funded by, besides the yield. Who funds the scheme?

Mr PATTISON: Employers.

The Hon. PETER PRIMROSE: Again, please take this on notice, given the time. I note in relation to page 4D you talk about the publication of actuarial valuations and other statistics, and I was wondering if you could tell us what type of statistical information you would like to see WorkCover release to better enable analysis? Again, you can answer now or take it on notice.

Mr PATTISON: Let us take that on notice, if we may.

Mr DAVID SHOEBRIDGE: WorkCover did promise to reinstate its quarterly statistical analysis.

Mr PATTISON: I saw that, yes.

Mr DAVID SHOEBRIDGE: I think that has been welcomed by almost everybody.

The Hon. PETER PRIMROSE: They have indicated that they take advice on what type of information should be provided. That would be really useful.

Mr PATTISON: Okay.

CHAIR: I thank you very much for being with us today and for your contribution. It has certainly been very beneficial to informing us in relation to various aspects. If we could have any responses to questions on notice returned within 21 days, we would be very grateful for that too.

Mr PATTISON: Thank you.

(The witnesses withdrew)

MAREE STOKES, Vice President, Asbestos Diseases Foundation of Australia Inc., and Coordinator, Central Coast Support Group, and

EILEEN DAY, Secretary, Asbestos Diseases Foundation of Australia Inc, affirmed and examined:

CHAIR: Do you have an opening statement?

Ms STOKES: Our opening statement is what is in our submission. For the past 20 years we have been supporting people with asbestos-related disease. We are all volunteers doing the best we can for sufferers of these diseases.

CHAIR: In your submission you talk of asbestos disease being incurable and say that it can only be treated with palliative care, as I understand is the case. Later in your submission you talk about other treatments, chemotherapy and so forth.

Ms STOKES: Yes, chemotherapy is available but it only lengthens life a little. Sometimes it does not make the lifestyle any better.

CHAIR: So there is no conflict.

Ms STOKES: There is no cure. It is a death sentence; that is for sure.

CHAIR: You say liability is accepted in these situations, usually within two months. You suggest that there be provisional acceptance in seven days, on the basis that most of the facts are clear-cut. Please expand on that recommendation.

Ms STOKES: The majority of people with mesothelioma will have had it in their body for many years. Once they are diagnosed, it is very rapid and they might only have months. Therefore, it is important for the Dust Diseases Board to pass people for help as quickly as possible. The wives, family and children are in shock when they know their loved one is going to go down very quickly. That is why we hope the board will continue and pass people more quickly.

The Hon. PETER PRIMROSE: Please cite a case, without naming anyone.

Ms DAY: I lost my husband, as did Maree. My husband was diagnosed in 1999 and given six weeks to live. In that time he had chemotherapy and only later did we find out it does not do much good. They clutch at straws. In my role as secretary of the foundation I often speak to people who are deeply shocked. They do not know where to turn or what to do. They worry about the financial aspect of the disease. If they have to have chemotherapy, that can cost up to $25,000 depending on the cycle they need. We try to give them as much support as we can by talking to them and putting them in contact with other families going through the same thing.

Mr DAVID SHOEBRIDGE: Did your husband have mesothelioma?

Ms DAY: Yes.

Mr DAVID SHOEBRIDGE: What was your experience of the time taken to have liability accepted? How did that play out?

Ms DAY: It was probably about eight weeks. He was diagnosed on 11 November 1999 and he went on a pension with the Dust Diseases Board, which was very helpful at that time.

Mr DAVID SHOEBRIDGE: What difference would it have made if provisional liability had been accepted in the first seven days?

Ms DAY: It would have been less worrying. People would know they would get help. They have to have medication and it is quite expensive. They have to leave work so there is no income and they need money from the Dust Diseases Board.

CHAIR: Have you raised the issue of provisional liability within seven days with the Dust Diseases Board?

Ms DAY: No, this is the first time we are bringing it up. We have meetings with the Dust Diseases Board quite often.

CHAIR: But you have never raised this before?

Ms DAY: No, we have only just thought about it.

Ms STOKES: We find people are coming down with mesothelioma at an earlier age. My husband was in his mid-fifties. He went to work one day and never went back. We were left without an income for some time and had to live off savings. If you have a mortgage, you have a problem until you are finally accepted by the Dust Diseases Board. I think it was up to two months before my husband was accepted by the board.

CHAIR: Early acceptance of provisional liability is pivotal in this situation?

Ms STOKES: Yes, it is.

CHAIR: In many ways, it is probably the most important thing?

Ms STOKES: It is, yes, and the fact that the Dust Diseases Board is separate from WorkCover. We feel we need an independent chair on the board of WorkCover.

CHAIR: You say the disease figures have not yet peaked.

Ms STOKES: That is true.

The Hon. SHAOQUETT MOSELMANE: Thank you for the heart-wrenching work you do with people suffering from incurable diseases. You said you need an independent chair. Why do you think the chair should be independent?

Ms STOKES: We need to have someone who can deal with the legal and medical side of things. That person could liaise with people like us and we could talk to our members who are having problems.

The Hon. SHAOQUETT MOSELMANE: Do you feel that at the moment there is no communication?

Ms STOKES: There is not.

The Hon. SHAOQUETT MOSELMANE: You said the incidence of asbestos disease in Australia has not yet peaked. When will it peak? You say in your submission it will peak in 2020. Why?

Ms DAY: At this time it is mostly renovators who are being diagnosed, people who have renovated their houses. We are finding that younger people are being diagnosed. A lot of people will be diagnosed having been at schools, because there is so much asbestos in schools and workplaces. We see that as the next wave.

The Hon. SARAH MITCHELL: Ladies, I wanted to ask you about the part of your submission on medical costs, which is the second point that you make quite strongly. Are you calling for the $50,000 cap that is there on medical expenses to be waived? Can you talk us through why you think that is necessary?

Ms STOKES: Because the cost of chemotherapy and medical costs are going up. That has not been revised since 1987, according to the Act.

The Hon. SARAH MITCHELL: If the Committee were to make recommendations in this regard, if you were to say that it not be removed entirely, if we were to put a nominal figure on it, do you think you could give us—I know it depends on individual circumstances, but $100,000 would be better, $200,000? What sort of scope do you think would be a fairer average cap than the current $50,000, if that is too low?

Ms STOKES: That would be very hard to answer because there are new operations going on.

Ms DAY: New trials and new chemotherapy that is being tested with the trials that are going on like at the Asbestos Diseases Research Institute, and I know some of the trials are $900,000.

Mr DAVID SHOEBRIDGE: Would indexing it be a start so it goes up with inflation?

The Hon. SARAH MITCHELL: Yes, because you did say that it has not been indexed, even if that is something that the Committee felt was within our scope now.

Ms STOKES: You would need to find out from the medical profession.

The Hon. SARAH MITCHELL: There are no figures that are thrown around by your—again, it would depend on individual circumstances. It would be quite difficult.

The Hon. PETER PRIMROSE: It would be appropriate for us to say that there would be an assessment of a realistic quantum, or realistic cap, and that that be—

Ms DAY: Yes.

Mr DAVID SHOEBRIDGE: In respect of the decisions of the Dust Diseases Board, I have not seen any submissions critiquing the final decisions that were made by the Dust Diseases Board. People seem to think it is a fair forum in which to have these matters determined, or would you say otherwise?

Ms STOKES: I really do not understand your question.

Mr DAVID SHOEBRIDGE: In respect of entitlements, medical benefits, the decisions that the Dust Diseases Board is making in respect of liability and the like, I know a lot of it is referred off to independent medical experts. Do you think that process is working fairly, that people who are entitled to benefits are getting their benefits?

Ms DAY: Absolutely. Yes, they are.

Mr DAVID SHOEBRIDGE: Ms Stokes, you said you did not feel there was a lot of communication. Is that with the board as a general rule or are you talking about the chair of the board?

Ms STOKES: The chair of the board, yes. If we had somebody else in there that could liaise with the Asbestos Diseases Foundation of Australia then we could get on to speaking with the members and any of their problems. I find that people get very confused once they have been diagnosed, especially the elderly people who are on pensions because then the Dust Diseases Board money comes in and they get very confused. We need somebody to be able to help in that way. We do the best we can but we need somebody professional.

Mr DAVID SHOEBRIDGE: The different benefits and how they are assessed is confusing. There is the Dust Diseases legislation. If you asked the Committee members this they would probably give you seven different answers about what they are.

Ms STOKES: Yes.

Mr DAVID SHOEBRIDGE: You are saying an independent chair would be a good starting point with that?

Ms STOKES: Yes.

Ms DAY: Yes.

Mr DAVID SHOEBRIDGE: Can I ask you about your experience with the chairs and the independence of the chairs historically? Has it changed?

Ms STOKES: Eileen, you have had more experience with that than I have.

Ms DAY: I do not know.

Mr DAVID SHOEBRIDGE: If you want to think about it and take it on notice and give it to us on notice, that is fine.

Ms DAY: We know that there are employers on the board. We know there are people from the union. We know there is a medical doctor. I understand that each claim goes before the board as a whole and they have a meeting and people are assessed.

Ms STOKES: But it is only once a month.

The Hon. SHAOQUETT MOSELMANE: Is there a liaison officer on the board who liaises with you?

Ms STOKES: No.

Mr DAVID SHOEBRIDGE: You are in no way critiquing the decision that the board makes once a month that seems to be fair and founded on good evidence.

Ms STOKES: Yes.

Mr DAVID SHOEBRIDGE: You are more concerned, as I understand it, about interactions between board meetings and having a good contact between board meetings. What is your experience of that? When you pick up the phone, who do you talk to?

Ms STOKES: We do not, really. We have only got—

Ms DAY: Peter Dunphy and Anita Harris. We talk to Anita about things. If our members ring us up and say, "Look, I need oxygen", I always say to them that they need to get a letter from the doctor and send it to the Dust Diseases Board and they will provide that. Usually they do. But if we had someone there, as Maree said, an independent chair, we could ring up and say this, this, and this, "Can you help us?"

Mr SCOT MacDONALD: Thanks for coming. Did you go out to Warialda for the asbestos issue we had out there?

Ms STOKES: I could not hear you.

Mr SCOT MacDONALD: I am wondering if I met you at Warialda.

Ms DAY: Yes, we did.

Mr SCOT MacDONALD: Relating to that experience, you were saying there seemed to be a lot of uncertainty and lack of information about where to go and there seemed to be conflicting advice about what to do next. Can you think of some recommendations we can make to improve the promotion of the services and there is a little bit of information we have got here. They have got a website, but it does not seem to be used terribly well. What can we do as a Committee to improve the awareness of what the Dust Diseases Board can and cannot do and how they can service the community? In particular, I am thinking of that sort of scenario at Warialda. It was a small remote area. There was a lot of conflicting information. What can we do to service those small areas where asbestos suddenly seems to pop up?

Ms STOKES: "The Asbestos Narratives" is a report that was tabled last week basically on what you have said about people in remote areas and about information getting to them. In this report it states how much the Dust Diseases Board is of interest to all these victims.

Mr SCOT MacDONALD: Who produced that one?

Ms STOKES: The Southern Cross University and it was funded by Comcare. They started up a website for people out in the rural areas so they can get support now. This is a new report that has come out. Also in here are quotes from victims saying how much the Dust Diseases Board has done for them and how much they have got through the Dust Diseases Board. On page 9 you will see quotes from actual victims.

Mr SCOT MacDONALD: Can I supplement the concern I have with this question. There was a lot of conflict when we went out there. People were pointing fingers at each other and at council.

Ms STOKES: That is right.

Mr SCOT MacDONALD: It achieved nothing.

Ms STOKES: That is right.

Mr SCOT MacDONALD: There was a public meeting and there were fingers being pointed and there was anger and there was a lot of fear in the room.

Ms STOKES: Apparently after that the council got their act together, so to speak, and sent reports to us at the Asbestos Diseases Foundation of Australia that they were going to look at that. We did not hear any more about that but we brought it to notice when we went out there that day.

Mr SCOT MacDONALD: Thank you for the work that you did at Warialda. What recommendations can this Committee make to manage that difficult situation of fear, uncertainty and blame apportionment, if you like, at the expense of helping people? Do you want to take that question on notice because we are short of time?

Ms STOKES: We will do that.

Ms DAY: I think we need more education in the schools. It needs to start as children are growing up because usually the children will go home and tell their parents, "This is what we learned at school."

Mr SCOT MacDONALD: That is a good thought.

Mr DAVID SHOEBRIDGE: I remember chewing little bits out of the fibro carton in my backyard. Maybe I should declare an interest.

The Hon. SHAOQUETT MOSELMANE: I note that you are a voluntary organisation. Who supports you? What sort of support do you receive? Could this Committee make a recommendation to support your organisation?

Ms DAY: We get support from the Dust Diseases Board for a helpline operator usually at the point when somebody rings the office and we ask them, "Have you heard of the Dust Diseases Board? They have not. When they ask, "Who are they?" we always say, "If you have worked in New South Wales you should ring the Dust Diseases Board."

The Hon. SHAOQUETT MOSELMANE: Is that sufficient support?

Ms DAY: We virtually support ourselves. We have fundraising activities. We sell raffle tickets.

Ms STOKES: We do not get any government funding, if that is the question.

CHAIR: Do you have a full-time office or a part-time office?

Ms DAY: We have a 9.00 a.m. to 3.00 p.m. office where Jean works. I go on a Wednesday.

The Hon. SHAOQUETT MOSELMANE: How many workers do you have?

Ms DAY: One. We have three widows and one former worker, Barry Robson.

The Hon. PETER PRIMROSE: Are there any issues you experience in accessing equipment or services? You mentioned oxygen. Are there any issues to do with its timely appearance and whether people receive the right amount? Are there any issues that the Committee should know about?

Ms DAY: I had a person named Hans who lives in Dubbo who did not have any support. He did not know he was entitled to have oxygen, a chair or a bed. Through our conversations I was able to help him that

way and to tell him that if he got in contact with his doctor these things could be arranged. The thing is that people do not know. Older people especially find it hard to ring up and to get information. We had hoped that we would be able to start something if clients give us permission. We can then speak to the Dust Diseases Board for clients and find out the information that they need to know.

The Hon. SARAH MITCHELL: You have said that people do not know. Are doctors not telling their patients when they are diagnosed that they can go to the Dust Diseases Board? Is that an issue that we need to look at?

Ms DAY: Exactly right.

The Hon. PETER PRIMROSE: So education and information.

Ms DAY: That is the key.

The Hon. PETER PRIMROSE: What is the best way to get information?

Ms STOKES: I have tried now going to oncology nurses at my local hospital because I come from the Central Coast. I have tried Gosford Hospital which has improved tremendously since my husband was first diagnosed. I think that is the start at the hospitals. We go around to all the doctors' surgeries. We have our members go around and we leave pamphlets in their surgeries. Sometimes people will pick them up. You can go into your doctor's surgery and there is a whole row of them. I often do some work through the Cancer Council itself.

CHAIR: Do you say that people suffering from asbestos disease are attending with their doctors and they are not given any indication?

Ms DAY: My doctor did not know.

CHAIR: Is that a frequent issue that you come up against?

Ms STOKES: Yes.

Ms DAY: Yes.

CHAIR: Has that matter been raised with the Australian Medical Association and other bodies representing doctors?

Ms DAY: I usually go and speak to a lot of doctors at Sydney University. This is one of the points that I try to get across.

CHAIR: That might be a point to take up with the Dust Diseases Board—that it should be in contact with various medical bodies so that those who are attending for treatment are fully aware of what is rightly available to them.

Ms STOKES: That is right.

The Hon. PETER PRIMROSE: You mentioned Dubbo. Are there any issues for people living in those rural and regional areas of New South Wales that are different from the issues for those living in metropolitan areas?

Ms DAY: He was on his own, so he did not have anybody there from whom he could get support. He had to come to Sydney for a lot of his treatment and that was quite horrendous for him. I cannot hammer in enough that education is what we need to be doing. We need to get the brochures in the doctors' surgeries about the Dust Diseases Board to get it out there. I spoke to an elderly person during the week who was 82. I said, "Do you know about the Dust Diseases Board?" He asked, "What is that?"

Mr DAVID SHOEBRIDGE: You pointed him to the website, no doubt.

Ms DAY: He is an elderly man.

Ms STOKES: A lot of them are not computer literate.

The Hon. PETER PRIMROSE: Volunteers do fantastic work in every area of New South Wales, but to rely on volunteers to be the principal source to educate people about a government agency seems to be putting the cart before the horse. Your job as volunteers should be to provide support to get that information out, not being a principal mechanism. That is something we need to address.

Ms STOKES: What has come out in this report too is the isolation of people in country towns and that is why they have set up the private community for people to be able to talk to one another. Then you come to the stage where you have older people who are not computer literate and that is why I have been talking to the people who set up this website. They can only try. That will help people in rural areas.

Mr DAVID SHOEBRIDGE: It seems to me in many ways that volunteer organisations with people like you who have been through an experience play a vital advocacy role. Ensuring that you are properly resourced to do that seems to me to be something at which this Committee should look. If you had one resource request that you think would make your job more effective what would it be? You can take this question on notice.

Ms STOKES: That is a very good question. We will take that on notice.

Mr DAVID SHOEBRIDGE: I just skimmed through the report entitled "The Asbestos Narratives" by Southern Cross University and under the heading "Regional Impact:" it states:

> A regional diagnosis has a number of implications, social, psychological and not infrequently, economic for people diagnosed, their Carers and families. It is clear that travel to specialist treatment centres in Sydney places additional burdens on families already experiencing significant pressure …

Who covers travel and accommodation costs not only for the worker but also for their families? How does that operate?

Ms STOKES: The Dust Diseases Board will reimburse for travel expenses. I do not know whether they cover expenses for people who have to come from, say, Dubbo to Sydney. I really do not know whether they cover that sort of thing. But people have got to know that. We were travelling from the Central Coast down to Royal Prince Alfred Hospital and Concord Hospital for some time—my husband survived longer than most—and we did not even know that we could get those travel expenses. I am going back to 1997 now. Things have improved.

Mr SCOT MacDONALD: I want to ask you again about that Warialda public meeting. One of the things that stressed me—

Ms STOKES: We were all stressed that day.

Mr SCOT MacDONALD: —was that the legal fraternity was there almost on the sidelines. There is no question that people have rights to pursue at common law and tort law, but does the legal profession handle it well? Do they make the job of accessing your benefits easier? We have heard a lot of things about the medical profession but the legal professionals that were there on the day seemed more focused on getting the thing into court as quickly as possible. Was that helpful or unhelpful? Without rebutting anybody's right to legal representation, when should they be inserted into the process?

Ms STOKES: As quickly as possible.

Ms DAY: As soon as they are diagnosed you need to have somebody because if your case has not been heard then the widow will not receive as much compensation as somebody that has had their case fully run.

Mr DAVID SHOEBRIDGE: There is a desperate urgency to get the claim on before the worker dies.

Ms DAY: Absolutely.

Ms STOKES: Quite often people are so traumatised they do not want to even think about that and then they are left without compensation in the end.

CHAIR: Thank you for being with us today. We have found your evidence illuminating and it has given us much food for thought. The Committee pays tribute to you for the noble voluntary work that you are doing. We are impressed, inspired and uplifted when we hear about the wonderful things you do. Thank you very much.

(The witnesses withdrew)

(Short adjournment)

JASON ALLISON, Manager, Chief Workers Compensation Underwriting and Portfolio Management, Suncorp Group, sworn and examined:

CHAIR: Mr Allison, thank you for being with us. Would you like to make a short opening statement?

Mr ALLISON: I shall. Suncorp Group Limited, or Suncorp, operates in banking, general insurance, life insurance and superannuation in Australia and New Zealand. Suncorp has over 15,000 employees and 4,000 of those are in New South Wales. We have nine million customers nationally. Suncorp is the largest personal insurer in Australia. I am speaking on behalf of the Suncorp Commercial Insurance division that operates Suncorp's statutory insurance products, which includes workers compensation and compulsory third party insurances, both being long tail claims businesses.

Suncorp has over 85 years of personal injury insurance experience with trusted brands such as Suncorp, AAMI, GIO and Vero. In respect to statutory classes of insurance, Suncorp's community-focused activity is centred on risk management, injury prevention, social participation and quality care of those with injuries or with a disability. In line with Suncorp's submission to the Standing Committee, I am pleased to appear before you today to articulate key points put forward by Suncorp in our submission.

The economic challenges in Australia provide an opportunity for accident compensation schemes to be designed to drive productivity growth and increase workforce participation in line with: the ageing population will lead to reducing workforce participation and tax revenue base; productivity growth is critical to maintain overall living standards; and the role of State governments to drive productivity growth by ensuring accident compensation schemes are designed to support injured workers to return to work as soon as practicable. This means focusing on social and financial independence as soon as possible after an injury.

The Auditor-General's report identifies a number of risks to the scheme that could be further explored. Namely, these are increases in the work injury damages claims eroding the saving benefits of the reforms, increased scheme costs from the potential unexpected legal challenges to the reforms, and specific industries recording highest incidents of workplace injuries in 2011-12. Suncorp's view is that there are six guiding general insurance principles which design effective personal injury schemes. The six principles are: social outcomes; sustainability; competition; defined and controlled benefits; dispute resolution system; and national consistency.

Suncorp supports initiatives to improve the financial position of the scheme by focusing on reforms that are designed to support individuals in becoming self-sufficient both socially and economically in a timely fashion after an injury.

CHAIR: In your submission you say that the reforms have improved the financial position of the scheme to the tune of $1.8 billion. Do you have any figures to show what the financial position would be had those reforms not been carried out? Has your company carried out any investigation on that?

Mr ALLISON: Not specifically. We have not carried out any specific detail that would identify that.

CHAIR: You do not know where the scheme would be had there not been the reforms? You have no actuarial studies that your company has carried out?

Mr ALLISON: There is a scheme actuary, PricewaterhouseCoopers, which conducts those actuarial evaluations of scheme performance.

CHAIR: You rely upon its studies?

Mr ALLISON: Agents rely on scheme actuaries in terms of performance of the scheme and feedback that we receive for our performance. We have internal tracking and measuring looking at our performance around return to work and those types of measures.

CHAIR: You have internal tracking, but do you have internal tracking on where the scheme would be had there not been the reforms? Would you like to take that on notice?

Mr ALLISON: I will take that on notice.

CHAIR: If there is anything there you might like to send it to us.

Mr ALLISON: Yes.

Mr SCOT MacDONALD: At page 3 of your submission you talk about risks to the scheme. You also mentioned that in your opening statement. The first two dot points are:

- increases in Workplace Injury Damage claims eroding the savings benefit of the reforms;
- increases in scheme costs from potential unexpected legal challenges to the reforms;

On the first dot point, we have heard in evidence and read in submissions that some things are unfair to be on one side or the other of the threshold. Will you talk to us about that and what you see of the risks there in particular?

Mr ALLISON: Specific to that point on work injury damages, there are statistics showing that around 17 per cent of scheme costs are driven from work injury damages. We believe that is an important consideration from a policy design perspective and from a regulatory perspective and specifically an employer perspective, because work injury damages are generated from a negligent act, something happening in a workplace. Therefore, there is a strong onus on workplaces, where these types of injuries are being generated, where there is negligence involved.

Mr SCOT MacDONALD: From my perspective, there is pressure or a point of view that if we just wound it back a little here or there or reclassified something it should be right and we will feel better about it and the injured employee will obviously benefit from it. But what are the consequences for the scheme of those small erosions, if you like?

Mr ALLISON: Without pinpointing what component you are talking about—

Mr SCOT MacDONALD: I have not asked you specifically.

Mr ALLISON: —I think that scheme design principles need to take into account the consequential impact that making any adjustment to policy and benefit may have and that needs to be carefully looked at, whether it is via scheme actuaries or wider feedback.

Mr SCOT MacDONALD: If we had a magic wand and we could erode some of those savings or make those adjustments, is there a mechanism to say that if we reintroduce journey claims then the impact on premiums would be A, B or C? Can you people or PricewaterhouseCoopers identify it to that extent, to that specificity?

Mr ALLISON: It is probably more a question for PricewaterhouseCoopers in respect of those specifics. From a higher order perspective, the types of claims that are inclusive within a scheme, they would be able to do calculations around what the impact is in having those in or out.

Mr SCOT MacDONALD: You could model it, or PricewaterhouseCoopers could model it?

Mr ALLISON: You could model it to say, if they were in or if they were out, what is the potential impact of those on the sustainability of the scheme.

Mr SCOT MacDONALD: I take you to your second point, increases in scheme costs from potential unexpected legal challenges. What is the history there? What drives that thinking?

Mr ALLISON: This is from the Auditor-General's report and bringing that forward ourselves and calling that out on the basis of the example that we are currently running at present, the car pool case, which is one that is specifically looking at definitions around—

Mr SCOT MacDONALD: Impairment.

Mr ALLISON: —workers compensation statistic claims versus permanent impairment from the date of injury. That is being challenged at the moment. That is in the High Court where the hearing is due to start on

1 April. Obviously, the outcome of that may or may not create changes to the cost of the scheme, depending on how that goes.

Mr SCOT MacDONALD: Can you make any recommendation about that, particularly about some of those legal challenges that we either know about or do not know about?

Mr ALLISON: I would not be in a position to make a—

Mr DAVID SHOEBRIDGE: To second-guess the High Court.

Mr ALLISON: Yes, I am not in a position to do that.

Mr SCOT MacDONALD: As an agent, what was the position of Suncorp as that scheme was spiralling into a larger and larger deficit? At one stage it was $4.1 billion, before the administrative changes in 2012. Was there an attitude within Suncorp whether it would or could remain an agent if the scheme continued without these legislative changes?

Mr ALLISON: That is a tricky one to answer. We are acting as a scheme agent on behalf of the regulator. We are paid as a service provider to manage the claims and we would see ourselves continuing to do that, whilst giving feedback to the regulator about sustainability and the challenges that we are seeing in the environment.

Mr SCOT MacDONALD: But you do not recall any discussions about confidence in the scheme back in that period when looking at declining sustainability?

Mr ALLISON: From a meta view, I think there were a lot of challenges with the global financial crisis, going back six or seven years ago, that also tended to create a lot of the deficit issues around investment income and so forth on future payout of claims and those sorts of things. With that and the impact that that had on unemployment at the time, the ability to return people to work in that environment definitely made it a challenge for all parties. It was not necessarily a factor that led us to ask whether the entire scheme would collapse. But it definitely was challenged by its ability to achieve return-to-work outcomes in that environment.

CHAIR: Arising from what you said earlier, you referred to the issue of workplace injury due to negligence. I think you said that it comprises 17 per cent of costs?

Mr ALLISON: Yes.

CHAIR: It is clearly an issue that is important because you raised it.

Mr ALLISON: Yes.

CHAIR: How do we get that down? We heard from the NSW Business Chamber earlier today and it was suggesting more of a carrot approach rather than a stick approach. That is a rough summary. We heard conflicting claims that when WorkCover is out there scrutinising very strongly and prosecuting, workplace injury goes down but we heard from the Business Council and it tended to say something different. What is your view?

Mr ALLISON: The perspective that I take on that relates to work injury damages. Again, as we said, it is a negligent act that happens in the workplace. I would have to take that question on notice to get you the specifics. But I can say that it is not primarily just in the big corporate end of town. There is quite a bit of it in the small to medium employee space and it is difficult to get key messages out to them to ensure workplace safety and injury management. But definitely there is an area there that may require some further investment to build awareness in that small employer space. Referring to feedback, I have just been at the national occupational health and safety summit this week speaking to a number of large employers throughout New South Wales and they were very mindful that they believe a consultative approach with regulators is very important for them and they believe that that achieves good outcomes and keeps all parties collaborating to achieve good results.

CHAIR: Would you like to take that as a question on notice and get back to us with your views on that?

Mr ALLISON: Yes.

Mr DAVID SHOEBRIDGE: Thank you for coming to give evidence and for your submission. Suncorp participates in statutory schemes across the country, and I assume that is workers compensation and the Motor Accidents Scheme, effectively, across the country?

Mr ALLISON: Yes.

Mr DAVID SHOEBRIDGE: In your experience in dealing with claims and the management of claims, how does the cost of dealing with claims under the New South Wales Workers Compensation Scheme compare with other statutory schemes? Is it a more expensive, more laborious process, or is it a more refined and simple process?

Mr ALLISON: Scheme comparisons in terms of our operation, I would probably like to lift it to how we manage claims from the Suncorp perspective. We are big on early intervention when we take specific action on claims, how we profile claims upfront. We have our own set of practices that we will look to drive early return to work, rehabilitation and ongoing claims management and we do not necessarily match that to each of the jurisdictions; we look for what we believe is our own internal best practice, which is, in most instances, separate to what the minimum scheme requirements are for us to manage in those schemes.

Mr DAVID SHOEBRIDGE: But you are legally obliged to comply with WorkCover's guidelines as delegated legislation in New South Wales, are you not, as to how you manage the claims?

Mr ALLISON: In terms of the specific guidelines around certain components we are. I am not the claims manager so I would have to take on notice any specific detail around how onerous is that for us to use those guidelines or are they more beneficial for us using those guidelines. I am speaking more to our approach to injury management, claims management, how we do it as a personal injury insurer to achieve outcomes for injured workers and employers.

Mr DAVID SHOEBRIDGE: Could you take this question on notice and maybe talk to some of the people who are dealing specifically with the New South Wales workers compensation guidelines to establish how effective those guidelines are? Do they work in tandem with your own internal processes or against your processes in that return to work and the efficient management of schemes?

Mr ALLISON: Yes.

Mr DAVID SHOEBRIDGE: Could you also take on notice the relative costs, as you see it, of handling claims in the New South Wales scheme compared with the most comparable? There were, particularly from the report of the WorkCover Independent Review Officer, a number of very specific concerns given about how the scheme is policed by the regulator and the role of WorkCover being both the nominal insurer and the regulator in New South Wales. Can you think of other places across the country where those dual roles are exercised by the same authority?

Mr ALLISON: Off the top of my head, no.

Mr DAVID SHOEBRIDGE: Do you think it works well in New South Wales to have this complete intermeshing of the nominal insurer and the regulator?

Mr ALLISON: I think with that it is a question from a government perspective, if they believe that that department, with multiple accountabilities across regulating and managing insurance business, is an efficient and most appropriate way to do it. It is probably more a question from that perspective. Definitely segregation of accountability in any type of business can be important.

Mr DAVID SHOEBRIDGE: Because of the way in which Suncorp manages its workers compensation matters in New South Wales, before they can terminate the benefits of an injured worker who has been receiving them for at least three months they have to give what is called a section 54 notice. Are you aware of that process?

Mr ALLISON: As I said, I am not the claims manager so technically on claims procedures I would have to take on notice if there is a specific question.

Mr DAVID SHOEBRIDGE: If you could take this specific question to whomever you need to get the advice from, we will give it to you in writing, Mr Allison. Can you advise the Committee about what processes Suncorp has in place to ensure it gets its section 54 notices right, and if there has been a review of Suncorp's use of section 54 notices as to whether or not there have been breaches in the past? Because in his submission the WorkCover Independent Review Officer indicated that that was a substantial area of concern, at least for the past.

Mr ALLISON: Is that specific to Suncorp?

Mr DAVID SHOEBRIDGE: No. Indeed, no-one is suggesting it is specific to Suncorp; Suncorp has not been singled out in any way as being particularly defective in this area.

Mr ALLISON: We will take it on notice and we will get you details on that.

Mr DAVID SHOEBRIDGE: The last thing I ask you about relates to the role of a private scheme agent managing a public fund and the difficulties in that structure where you have public money being run by a series of private scheme agents. Do you think that is an efficient way of running workers compensation schemes?

Mr ALLISON: If there is appropriate regulation in and around it in terms of the way the agents are regulated and remunerated around performance, I think that it is viable arrangement.

The Hon. SARAH MITCHELL: I just want to take you to another area of your submission, which relates to where Suncorp sees the focus should be on workplace safety initiatives. You talk about two groups, being mature age workers and people with a disability. Can you tell the Committee a bit more about why those two groups of workers are areas about which you think there needs to be a bit more interest in the current climate?

Mr ALLISON: If I may I will talk to a high level without quoting a whole lot of statistics around an ageing population—that is well publicised now. But it is a rising concern that the baby boomers are flowing through the population and the ratio of working people to non-working people is continuing to increase; it doubles nearly every 10 years and will over the next three decades. There is a lot of challenge around the ageing workforce: remaining in the workforce, having to stay in the workforce because of retirement funds that have been hit by investment incomes and so forth over the last few years—they are required to work longer—and the actual retirement age federally continues to increase from 65 to 67. So what you find is that that ratio of older workers in the workplace—there is a lot more exposure to the workers compensation schemes and employers as a result of having that higher ratio of workers within the workforce.

Now the number that can create means there needs to be a lot more flexibility in the workforce around what type of roles would be made available to an ageing workforce—whether it is flexible work, alternate lighter duties and those sorts of things. There is also the sustainability of that, but the country needs it for ongoing productivity. There is also a looming challenge, which is one that we face even nowadays, in an insurance sense where you have degenerative conditions in mature age workers that can be aggravated in a workplace. Then you get the challenge of trying to decipher between the degenerative condition—what the component from an allocation perspective is in respect to work as opposed to just a degenerative disease. So that can potentially have a significant impact on the future of workers compensation schemes. We are talking a few decades in advance, but it is starting to happen now and it is something that really needs policy consideration in the longer run.

Mr DAVID SHOEBRIDGE: Have you reviewed the effectiveness of the change in the definition of "disease" that happened in 2012 in New South Wales, which was very substantial in that regard? If not, do you want to take the question on notice?

Mr ALLISON: I will take it on notice.

The Hon. SARAH MITCHELL: Are their similar points to the ones you have been making in the area of people with disability?

Mr ALLISON: Yes, similar to the extent that from a disability perspective there is a lot of encouragement around bringing people into workplaces with disabilities through productivity gaps, and also out of the NDIS et cetera arrangements that will be set-up for carers in and around that there is a distinct exposure, from what I understand, that they will be deemed workers of the injured party or the disabled person. Therefore there is a distinct onus on them to ensure that they are treated like a workplace. There are a lot of challenges around that, with a disabled person wanting to live a life and go and do things and the cost of risk management of their carer to try and foresee all of that. To fulfil all of that can have an impact on cost and could create some superimposed inflation through that scheme.

The Hon. SARAH MITCHELL: That has been raised by others.

The Hon. SHAOQUETT MOSELMANE: On page 2 of your submission you say:

> Supporting those who have a disability and have capacity and their carers … into the workforce would assist in expanding the tax revenue base …"

And on page 5 you say:

> Workforce participation rates for those with a disability are low when compared with OECD average. People with a disability in Australia are only half (50%) as likely to be employed compared against people without a disability.

Do you find there is insufficient support in Australia for people who are injured and become disabled?

Mr ALLISON: That is very difficult to answer from a workers comp—from a personal injury insurance perspective the obvious for us is returning people back to work who have had injury. Sometimes they will have a permanent impairment and then we would look to vocationally rehabilitate them to alternate roles to get them back into work. I could not name companies or industries but there are businesses that are willing to take people who have been vocationally rehabilitated back into the workplace. Suncorp itself does that.

The Hon. PETER PRIMROSE: Following the Hon. Shaoquett Moselmane's question relating to people with disability, in your submission you suggest that current employment barriers and workplace safety issues be refined to cater for this group. Could you take on notice, unless you wish to address it now, what those barriers are and what you would recommend needs to be refined?

Mr ALLISON: Yes, I will take that on notice.

The Hon. PETER PRIMROSE: WorkCover has indicated that it is going to return to publishing its statistical bulletin, which is good, and information is also obtainable through its annual report. WorkCover has indicated a willingness to receive suggestions as to what type of statistical information should be included. Could you take on notice what statistical information you believe should be included in either the annual report or in that regular bulletin that would better enable analysis of the performance?

Mr ALLISON: Yes, I will take that on notice.

Mr DAVID SHOEBRIDGE: I am sure one of the most satisfying things about being an insurer within the area of personal injury is the ability to put that safety net in place and help people when they have been very seriously injured. Would I be right in saying that?

Mr ALLISON: Yes.

Mr DAVID SHOEBRIDGE: I do not think I am telling you anything you do not know, but there is a good proportion of the community who view insurance companies as soulless, bloodless, profit-driven entities that do not really care about the outcomes of those they insure. I am not asking you to agree in any way with that but you would be aware that some people in the community hold that view about insurers?

The Hon. SHAOQUETT MOSELMANE: Silence.

Mr DAVID SHOEBRIDGE: I am not asking you to accept the validity of it but there are some people who have that view.

Mr ALLISON: We believe that we have an onus and a passion for returning people to work. We understand that we are dealing with people's jobs, money, family and everything to do with their lives. This does involve a lot of emotion at times and we work as best we can to manage that through our people with injured workers, employers and other stakeholders to achieve outcomes.

Mr DAVID SHOEBRIDGE: I was putting that proposition forward to get your perspective on it, and I am grateful for it, but surely as an insurer if you are a scheme agent you would like to be participating in a workers compensation scheme that sees people who have been very seriously injured given adequate and proper protection, is that not right?

Mr ALLISON: As you said, workers compensation is a safety net for severely injured and for less severely injured, all aspects of what happens in a workplace in terms of achieving fairness and returning people back to where they were socially, their health and financially back to work.

Mr DAVID SHOEBRIDGE: In terms of fairness, if someone had their foot severed in an industrial accident, completely amputated, that is the kind of serious injury that as a matter of fairness should be fully compensated, should it not, for that worker's life?

Mr ALLISON: In terms of the policy setting around that it is definitely for policy makers to make those decisions.

Mr DAVID SHOEBRIDGE: Suncorp has such a broad coverage across the country, such broad knowledge of personal injury, and has its own values about insuring what is fair. But I am asking your view about the fairness in that situation.

Mr ALLISON: It depends on what you are measuring the data. I think the way we see it is that the policy makers are setting what they believe is appropriate and then we acting as claim managers, whether it is an agent in the New South Wales scheme or as an insurer we will provide requisite feedback to regulators and policy makers around—

Mr DAVID SHOEBRIDGE: The job of this Committee is to review, so please give us that feedback about fairness, for example, when one of your employees as a scheme agent has to call up a worker and say, "I am sorry your foot has been amputated but we are cutting off your benefits because it is not defined as seriously injured."

Mr ALLISON: Again, I come back to that we apply the Act as we would need to and we would exercise every right when we dealt with that injured person, using appropriate communications and support—

Mr DAVID SHOEBRIDGE: I am asking you about your empathetic response to it. I really am getting the values. You say Suncorp has values; I accept that. What is Suncorp's value when you see that kind of result?

Mr ALLISON: Our value again is that we deal with the worker, the employer, their family members and feed requisite feedback that we would provide to regulators around some of the challenges that we see.

Mr DAVID SHOEBRIDGE: I say again that we are here as a Committee to get that feedback. Please give us the feedback. You say, and I accept, that you do not like being seen as bloodless, profit-driven entities. Please give us your empathetic feedback in this situation.

Mr ALLISON: I choose to take that on notice.

Mr SCOT MacDONALD: We have had evidence about prosecutions and what the impact could be on work health and safety. Do you have a view on whether prosecutions are an effective means of improving the workplace? Is an adversarial approach to all of this better than education as an agent and what you see as the outcome to how WorkCover approaches it?

Mr ALLISON: From a Suncorp perspective in terms of acting as an agent and as an insurer our visibility over the prosecutions that happen on the ground is somewhat limited. We have yet to see the statistics similar to yourselves. What I can say is that from feedback, from what I hear from talking to large employers throughout Australia, they believe a consultative approach is a strong way to go. They are fully aware of their accountabilities. There is legislation in place that makes them and their boards very aware of the acuteness of

their accountabilities. They believe working in consultation—and they will still need penalties for the rogue employer and/or there are things that definitely need addressing. Getting that balance right, they believe, is important. Again, it is one for ongoing feedback to see whether issuing lots of penalties is as effective as working in collaboration at the same time.

Mr SCOT MacDONALD: We have heard evidence to the contrary, that prosecutions and right of entry and an enthusiasm for penalty notices is the only means to improve worker safety. I think you have answered that. Do you work with WorkCover as a means of driving down claims and incidents? Do you get involved in education in any way? Do you give feedback to WorkCover about how they might improve some of those education mechanisms, if you like?

Mr ALLISON: We have an annual services plan that we liaise with WorkCover on and within that plan we look at the initiatives that we are doing around awareness, around safety. We do a number of things around training of employers. We have in the order of 200 training programs that we run for some small businesses. We do occupational health and safety audits and interventions. We also look at doing sponsorships as well around safety. For example, we are a sponsor of the National Safety Council of Australia.

Mr SCOT MacDONALD: Just as an example on that audit, do you identify risk? You obviously identify some at risk industries and businesses. So you have nominated agriculture, forestry, fishing. You also identify a type of business, a size of business or the geographical location of businesses where you think an audit and some sort of proactive assistance is warranted?

Mr ALLISON: Those industries identified were from the Auditor-General's report, not specific to Suncorp's portfolio. Our approach to identifying higher hazard clients from a large employer perspective, specifically we do look at ongoing performance reports around how large employers are performing and where we deem necessary we will involve our risk managers to help get involved. We also engage strongly with the insurance brokers who are attached to those accounts and look at initiatives that can be put in play to help get improvement in those workplaces.

Mr DAVID SHOEBRIDGE: This question sounds very simple but I recommend you take it on notice. How many WorkCover guidelines are there that regulate Suncorp's role as a scheme agent in New South Wales? If you could tell the Committee what they guidelines are on notice I would appreciate that.

Mr ALLISON: I will take that on notice.

Mr DAVID SHOEBRIDGE: Self-insurers gave evidence last week that the way the scheme operates to work out an insurer's current work capacity was, in their words, a nightmare. They are effectively having to write mini judgements when they are doing the work capacity assessments. What is Suncorp's view of the work capacity assessment process as a result of the most recent changes?

Mr ALLISON: As with any large piece of legislation that has been passed with pretty wide changes particularly down to capacity assessments, we worked in consultation with the regulator and our claims teams. Our understanding is that they engage closely with WorkCover. Initially establishing some principles in terms of that approach around the best way to apply these and then based on the feedback as these things were rolling out and the various feedback coming from agents there was more definition around guidelines for us to follow.

Mr DAVID SHOEBRIDGE: And there were defective guidelines issued, do you recall that?

Mr ALLISON: I do not recall defective guidelines. As I said, this is an intuitive process to get this roll out of it consistently right in its application and across all agents.

Mr DAVID SHOEBRIDGE: You have described the process. Can you now give a judgement view of the process? Is it, as the self-insurers say, a nightmare, is it terrific or is it something in the middle?

Mr ALLISON: I cannot speak on behalf of self-insurers and from a Suncorp perspective, as I said earlier, I am not their claims manager so I would have to take on notice a more detailed response to that.

The Hon. SHAOQUETT MOSELMANE: I am wondering what your experience or your members' experience is with the impact of the 2012 reforms to workers compensation legislation.

Mr ALLISON: Members to specifically mean employers?

The Hon. SHAOQUETT MOSELMANE: Yes.

Mr ALLISON: Again, I can only speak—I am not necessarily the claims manager but I can give higher level anecdotal feedback that they believe that there has been some distinct behavioural changes that have been evident. An example case was workers in a country area who were permanently totally unfit, were showing up at employers with fully fit for work certificates because they wanted to get in and get the job before the other three people in town presented to try to get a job before the reforms kicked in. In other cases they have people who have been off for 10 years on compensation's back, back to work. They are very anecdotal obviously, and I take those as they come.

CHAIR: Thank you for being with us today and for the submission. If you could give us a response to those questions on notice within 21 days, we would appreciate that. Once again, thank you and we value your input.

(The witness withdrew)

ROSHANA MAY, Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, sworn and examined:

TIM CONCANNON, Partner, Carroll and O'Dea Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales,

CHAIR: I welcome our next witnesses representing the Law Society of New South Wales. Thank you for attending. Would you like to make an opening statement?

Ms MAY: Yes, thank you, Chair. The Law Society extends its thanks to the Chair and the Committee for the opportunity to appear today at this review. The Law Society is the peak body representing the interests of all solicitors in New South Wales. We are both members of the Injury Compensation Committee of the Law Society and both of us here today principally act for injured workers. There are, however, a number of members of our committee who represent the interests of scheme agents, self-specialised insurers and WorkCover, and who have contributed to these submissions.

In 2012 the Government convened a joint select committee which conducted an inquiry into issues concerning the operation of the workers compensation scheme. At the conclusion of the inquiry 28 recommendations were made in answer to an issues paper which was released by the Minister for Finance and Services on Monday 23 April 2012. That parliamentary inquiry was established as one of the next steps in the vital reform of WorkCover. In its report No. 1 dated June 2012 released on 13 June 2012 the joint select committee addressed the background to the inquiry. The terms of reference required the committee to inquire into and report on the New South Wales workers compensation scheme with particular reference to the performance of the scheme in promoting better health and return-to-work outcomes for workers, the financial sustainability of the scheme and the functions and operations of the WorkCover Authority. Of its 28 Recommendations, Recommendations Nos 16, 17 and 26 referred to the functions of WorkCover. In particular, Recommendation No. 16 stated:

> That the NSW Government seek to establish a joint standing committee of the Parliament of New South Wales
>
> - to conduct ongoing oversight of the New South Wales Workers Compensation Scheme by undertaking annual reviews of its operation, management and performance,
> - to conduct an extensive review … of the Workers Compensation Scheme, and
> - with the capacity to engage actuarial expertise to assist it to perform its functions.

Recommendation 17, which I am sure is well known to all of you, states:

> That the NSW Government commence an extensive, detailed review of the New South Wales Workers Compensation Scheme to develop a comprehensive strategy aimed at addressing the long term viability of the Scheme and enhancing the management and administration of the Scheme. In conducting the review, consideration should be given to statutory and non-statutory reforms that reflect the breadth of the Scheme, including, although not limited to:
>
> - improvements in WorkCover's management and administrative systems
> - feasibility of permitting more specialised insurance for certain industries …
> - establishing a centralised information and technology system …
> - feasibility of establishing an independent medical assessment service
> - an examination of workers compensation schemes in other jurisdictions …

The three recommendations ask the New South Wales Government to review the functions, behaviour and powers of WorkCover available to scheme agents under the workers compensation scheme and the guidelines issued to them by WorkCover to achieve better claims management outcomes. Those recommendations were not taken up by government. We therefore welcome this review of the exercise of the functions of the WorkCover Authority. The Law Society in its submission has considered the general, specific and nominal insurer functions of WorkCover set out in sections 22, 23 and 23A of the Workplace Injury Management and Workers Compensation Act 1998.

We have considered our experience of WorkCover's performance against each of the general, specific and nominal insurer functions and our submission addresses our society's opinion and experience of their performance against those functions. That is the conclusion of my introductory statement.

CHAIR: Did you want to say anything, Mr Concannon?

Mr CONCANNON: No, that pretty much summarises what I have to say. Thank you.

CHAIR: In your submission to the Committee you suggest that we look at separating the role of the nominal insurer from WorkCover altogether to avoid issues of conflict of interest. Would you like to amplify on those conflicts?

Mr CONCANNON: The most obvious conflict we see on a day-to-day basis as plaintiff lawyers primarily is that we have, on the one hand, WorkCover acting as the nominal insurer effectively providing instructions to the various scheme agents on how to run a claim and at the same time we have WorkCover also being basically the manager of the fund that pays out the claim at the end of the day. It seems to me that there is a basic conflict in that issue.

CHAIR: Can you think of any examples of how that has manifested itself? That is theoretical but in a practical way how has it manifested itself?

Mr DAVID SHOEBRIDGE: In your submission you give the example about that direct conflict of the Transfield Services case. Would you explain that?

CHAIR: Would you like to amplify on that?

Ms MAY: In *Transfield Services v Humphrey* Mr Humphrey received a work capacity assessment from the insurer. He sought an internal review which delivered to him a result; he sought a merit review from WorkCover. On receipt of his merit review Transfield Services sought, through Supreme Court proceedings, to question the function of the merit review officers, and WorkCover intervened and in the intervention documents also sought costs from the worker. The court directed that there be a stay and the worker continue to receive his weekly benefits. WorkCover was acting as the merit reviewer of the decision made by its agent but was also questioning the authority and the operation of its own function, the merit review officer.

CHAIR: Are there other examples you can point to?

Ms MAY: There are simpler examples than that which I seem to have confused you with.

Mr CONCANNON: It depends on whether you are talking about a conflict in the role as regulator and as insurer for the scheme or whether you are talking about other conflicts that I think are examined in our submission.

Ms MAY: Well, it does not necessarily depend on that—sorry, Tim. I thinks that some simple examples are that in representing injured workers and taking matters to the Workers Compensation Commission either on a dispute or in a mediation of a work injuries damages claim, we are often faced on the other side with the representatives for the insurers saying, "We can't resolve this because we have a direction", or some other instruction, "from WorkCover that says that we must apply this particular methodology to the resolution of this claim", or, "We can't settle a claim, we can't resolve a claim, for example, of permanent impairment", which I know has been discussed here last week.

We often hear from insurer representatives that unless we undertake a particular course of action that is not reflected anywhere within the legislation, and not reflected in any of the guidelines that we can see, which are transparent, they will not be able to make an offer to resolve the claim or they will not be able to resolve the claim. That is clearly an indication that WorkCover is talking to its scheme agents and talking to the self and specialised insurers, or directing them to behave in a way that is contradictory to the notion of the scheme providing benefits to workers. It makes life very, very difficult with that interference.

CHAIR: Have you raised this on any occasion with the WorkCover Independent Review Office [WIRO]?

Ms MAY: Yes.

CHAIR: What was the outcome?

Ms MAY: Mr Garling, who I know is sitting in the room, is very aware of the directions, operational instructions and other informal communications, I suppose they are—maybe they are formal—between scheme agents and specialised insurers. I am not sure that he is actually aware of the specifics of those communications. I note Mr Garling's evidence last week that he is often not kept in the loop, so to speak.

CHAIR: Have you raised this directly with WorkCover?

Ms MAY: Many times.

CHAIR: What is their basic response when you do raise this issue of conflict?

Ms MAY: Their basic response has been, since the reforms, that they will take it on notice and get back to us.

CHAIR: When did they tell you that they would take it on notice and get back to you? You can take that on notice, if you wish.

Ms MAY: I can take that on notice, but let me briefly answer.

CHAIR: Yes.

Ms MAY: I was a nominated representative of the WorkCover legal reference group task force, which was convened first on 21 June 2012. Prior to that for seven years I had been part of a small WorkCover Law Society regulatory and process working group. From 2005 to 2011 I was one of four lawyers nominated by the Law Society to regularly meet with WorkCover and consult over various issues of the scheme. That body was disbanded in 2011 and the task force was started up in 2012 after the reform legislation was passed. We met on about 20 occasions. At those meetings we were charged by our members and our committee to raise issues that affected all sides. We raised these issues then and they were taken on notice. I do not think we ever got resolution of one of them. The last meeting of that committee was on 12 December 2003. It was only convened because pressure was put on WorkCover to convene it.

Mr CONCANNON: I think you mean 2013.

Ms MAY: I am sorry, 2012—no, 2013.

CHAIR: You can take this on notice, but would you like to give us an outline of the occasions that you have raised this issue and what responses, if any, you have received?

Ms MAY: Certainly. I can provide you with minutes of that legal reference group where they are available. When not, I can provide you with reports provided.

Mr DAVID SHOEBRIDGE: Thank you both for coming. Would it be fair to say there are some really difficult legal complexities in working out what is a work capacity issue and what is a liability issue and the inability for lawyers to be remunerated for anything in relation to a work capacity decision and then the potential capacity for some limited funding for liability decisions? Can you explain if you have had any personal experience about that issue?

Mr CONCANNON: Yes, on a daily basis, regrettably, and it does involve a lot of correspondence, for instance, between our office and the WorkCover Independent Review Office [WIRO] because they are not prepared to fund, or they are not allowed to fund, effectively, work capacity decisions. One typical example is the calculation of what the worker's average weekly earnings are which, under the restrictions under section 44, is a work capacity decision. While the decision may not necessarily have referred to it being a work capacity decision, any calculation of average weekly earnings is, pursuant to the legislation, a work capacity decision. It is just one simple example. Any decision that involves—there can be a conflict in circumstances where, for instance, a work capacity decision can also give rise to a nil ongoing payment situation in terms of weekly

benefits. There is a fine line there between whether that is a liability decision or a work capacity decision because the work capacity decision has resulted in a reduction of benefits to zero.

Mr DAVID SHOEBRIDGE: And how is that being resolved? That is kind of crucial, is it not? If it is a liability matter in funding you can contest it in the commission, but if it is a work capacity decision there is no funding and there is that internal review, a merits review, WorkCover Independent Review Office [WIRO] process.

Ms MAY: I suspect how it has been resolved is that a lot of lawyers are abandoning their clients' needs because they are of the view that anything in the nature of a document which describes a reduction or increase in benefits, so the quantum of benefits, a discussion of capacity or ability to perform suitable duties, falls into the nature of the work capacity assessment, which is then the subject of a work capacity decision. A liability dispute document, such as a section 54 or 74 notice, can likewise also be a work capacity decision. It is incredibly complicated. It is incredibly complex. Mr Concannon and I have prepared papers since June 2012 and continually prepared and presented. It is such a complex area of the law that we think it has been abandoned by those people who have been in the profession for a long time.

Mr CONCANNON: I think it is fair to say, though, that there are some lawyers who still, despite not being paid, represent the interests of long-term clients.

Ms MAY: Absolutely.

Mr CONCANNON: I hate to say it, but they do that out of the goodness of their hearts. To be honest, they are potentially risking law cover claims in the process of not being paid. I think that perhaps says something about plaintiff lawyers. Whilst we were painted during the reforms in 2012 as people who are trying to look after our own pockets, I think to some extent the process since 2012 has been that a lot of plaintiff lawyers really are prepared to go out of their way with no prospect of cost recovery to still protect the interests of workers the best they can.

Mr DAVID SHOEBRIDGE: I have had a number of anecdotal reports given to me that there are notices disputing liability under a form or on notice, such as a section 74 notice, saying that the insurer disputes liability in this case and will be paying no compensation. They go to a lawyer and the lawyer looks at it and then has to interpret whether or not they are disputing liability because of a workplace capacity assessment, in which case the lawyer can be of no assistance to them, or if they are disputing liability on other issues, such as whether you are a worker or other legal issues. How do you do with that day to day in practice?

Mr CONCANNON: Arguably we have two different scenarios. If you have got a liability dispute, you go to the commission and you get a grant of assistance from the WorkCover Independent Review Office but on the other hand if it is a work capacity decision then they cannot deal with it and it goes through the three-tier review process that applies to work capacity decisions. You effectively, potentially, have two different forums dealing with two aspects of the same dispute.

Ms MAY: The other complicating factor is that we now have a situation where whether you are receiving weekly benefits determines whether or not you receive medical and treatment expenses. This is the first time in the history of the Act since I have been alive that we have that intrinsic marriage of weeklies to medicals, and that is the complicating factor. If we can restore a worker's weekly benefits and restore where liability is in dispute to a situation where liability is accepted, we potentially are then enhancing a worker's benefits in terms of their medical, treatment and rehabilitation needs. The difficulty in this type of section 74 notice is that one has to apply their legal knowledge to determine whether or not there is a dispute on liability that is capable of being determined by the commission, first and foremost. As to what falls out after that, well we have to take pot luck. We are very fortunate to have the WorkCover Independent Review Office who can assist us through this as a preliminary issue before we can get to the commission.

Mr DAVID SHOEBRIDGE: The Transfield case in many ways highlights the enormous complexity about what is a work capacity assessment and what is a liability assessment. It seems WorkCover itself did not understand the distinction, gave an erroneous direction, and then found itself dragged up to the Supreme Court because, on one view of it or on its own conceded to view, of its inability to understand the limits of its merit review process.

Ms MAY: That is right.

Mr DAVID SHOEBRIDGE: Am I to understand that WorkCover then sought costs from the worker?

Ms MAY: In their application before the Supreme Court they sought costs against the worker.

Mr DAVID SHOEBRIDGE: Let me get this right: WorkCover stuffs up, makes an erroneous direction so the worker and WorkCover get dragged to the Supreme Court and then WorkCover wants to get its costs off the injured worker who was dragged to the court?

Mr CONCANNON: An unrepresented worker as well, as I understand.

Ms MAY: Yes, that is right.

Mr DAVID SHOEBRIDGE: Is that typical?

Ms MAY: I do not think it is typical. It is astonishing.

CHAIR: What was the result of the application?

Ms MAY: It was resolved and went away. The proceedings were abandoned, although I stand to be corrected on that.

Mr CONCANNON: That is my understanding as well.

Mr DAVID SHOEBRIDGE: WorkCover has power in its ability to do merit reviews and determine whether money it is responsible for as nominal insurer is paid out. Do you think that is a conflict of interest that ought to be removed from the scheme?

Mr CONCANNON: Absolutely. That is one of the most fundamental conflicts of interest we have.

Ms MAY: It is also creating an unnecessarily complex level of bureaucracy. The complaints to the 2012 joint select committee were that there was too much red tape, and that was reported in the recommendations of the committee. Nothing has been done about the red tape; we have more of it. If you read the guidelines to work capacity assessments or reviews and the setup WorkCover has given to the Merit Review Service within WorkCover, it is as if they have created a mini-tribunal within the bureaucracy. No-one who is not a lawyer—and even some lawyers—can navigate that.

Mr DAVID SHOEBRIDGE: I do not know if you saw the evidence of WorkCover but it was that there was an average delay of four months before determining the merit review process. What impact does that delay have on your clients, in terms of their benefits and general wellbeing?

Mr CONCANNON: The benefits are effectively stayed whilst the review process is underway, so the claimant is effectively out of pocket for the period of the delayed decision.

Mr DAVID SHOEBRIDGE: In the WorkCover Independent Review Office evidence it was said that benefits were irredeemably lost because of the delay. Please explain that.

Ms MAY: Absolutely, because there is no stay on a decision once it is made. If you seek a review, the decision stands. For most people who have received work-capacity decisions and seek reviews, benefits have been reduced to nil, so they receive nothing from three months after the work-capacity decision is issued until such time as an alternative decision is substituted or reviewed and changed. The delay is on average four-and-a-half months and not four months—we have learned from the Merit Review Service it is 140 days, and that is what people are being told over the telephone. So, after three months a person has 30 days to seek an internal review from the insurer and within 30 days they give their review. Then the person has 30 days to seek a review from the Merit Review Service and it has 3½ months. Ostensibly it is six months that the worker has no benefits and is forced on to Centrelink. It is a cost-shifting exercise.

Mr DAVID SHOEBRIDGE: Even if they succeed at the merit review, there is a limited amount that can be back-paid, so there is a potential area of a permanent loss of benefits. Is that right?

Ms MAY: Unless they get a decision backdating it and restoring benefits—which I do not think is possible and there is no limited back pay.

Mr DAVID SHOEBRIDGE: Could you take that on notice?

Ms MAY: Certainly.

CHAIR: That would be an extraordinary situation, would it not?

Ms MAY: It seems extraordinary, except that is what is happening to 6,000 or 7,000 people. When you see the numbers of people who have sought internal reviews, merit reviews and reviews from the WorkCover Independent Review Office, very few people are able to navigate the review process.

Mr CONCANNON: The more concerning thing is how few people see us as lawyers. I suspect that is because it is too hard. They see the five- or six-page diatribe with 50 or 60 pages of attachments and think it is too hard and so give up. I suspect that is the case with the vast majority of people who receive these work-capacity decisions.

Ms MAY: You have to remember that work-capacity decisions to date are really issued for those people who have been in the scheme for some time prior to October 2012 or January 2013, whichever date applies. People who have been in the long tail of the scheme and reliant on benefits for some time suddenly have this issue come up. They may make intermittent contact with their lawyer, but most of the time until now they have been told there is nothing that can be done and a lot of them have gone away. It is an extraordinary situation but one that is occurring regularly.

Mr CONCANNON: We are dealing with workers who have ordered their affairs over a number of years based on the assumption that they will continue to receive benefits, probably until aged 65, only to have the rug pulled out from underneath them.

Ms MAY: This even applies to people who have had awards and determinations from the commission or the court going back many years and who have been told essentially at some point—and if you consider an unsophisticated worker with English as a second language—they will get the payment and medical expenses paid for life. Now they are being told they will get nothing and there is nothing that can be done for them about this new decision because of the way the legislation applies. They are simply being moved on to another system.

The Hon. SARAH MITCHELL: On the final two pages of your submission you raise four matters for consideration by this Committee and I take you to the fourth one:

> In any event the investigation and enforcement of work health and safety obligations should be removed from WorkCover and invested in a separate independent body.

Please give the Committee some guidance on how the body should be established to take over that function.

Ms MAY: We say WorkCover can only manage one function not many. We believe the investigation and enforcement of work health and safety obligations should be removed to an independent body, probably under the board, that is specifically charged with the investigation and enforcement of the work health and safety legislation. We will take on notice as to how we see that operating as we will discuss it with our committee.

The Hon. SHAOQUETT MOSELMANE: Why is there a lack of communication between WorkCover and the various participants? What is causing the communications breakdown or barrier?

Ms MAY: WorkCover.

Mr CONCANNON: We cannot surmise what is in the heads of WorkCover but we suspect there is an inherent lack of trust in certain stakeholders and perhaps lawyers are amongst those they have an inherent distrust of. I am just surmising.

Ms MAY: As I said we had a relatively comfortable relationship with WorkCover. It was not perfect, but at least there was regular contact and consultation.

The Hon. SHAOQUETT MOSELMANE: The lack of communication is not just with lawyers but with other stakeholders.

Ms MAY: It is with community stakeholders as well. The Legal Reference Group included members of the WorkCover Independent Review Office, the Bar Association, the Australian Lawyers Alliance, self and specialised insurers and insurers. My impression was that everyone was frustrated with the lack of consultation. While we were regularly sitting in meetings in 2012, guidelines were being worked on elsewhere by another committee or part of the task force. We asked whether we would get an opportunity to look at them and were not given that opportunity. When we complained about the lack of consistency between the guidelines in terms of their message, their adherence to legislation and various other issues, we were told that was being dealt with by another committee and to hand over our issues and they would come back to us, which has never happened.

The Hon. SHAOQUETT MOSELMANE: As you know, we will be making some recommendations. What, if any, specific recommendation would you like us to take on board that relates to having these communication barriers removed or creating a channel of communication between WorkCover and stakeholders?

Ms MAY: In WorkCover's general and specific functions, they are charged with ensuring efficient operation and communication and consultation with stakeholders, as they see fit. I think they have to be held to account. I think there has to be a methodology of how WorkCover operates to perform its functions. They are far too broad. Essentially, one looks at them and one says, "Oh, they have to provide advisory services if they see fit." Everything is "if they see fit". They clearly do not see fit. I think that the functions probably have to be minimised and scrutinised to take away that ability to make a choice or decision as to what they do. There should be no doubt about consultation. There should be stakeholder and general community consultation.

Mr CONCANNON: I think for a start there should be a reinstitution of the legal stakeholders group that went into stagnation towards the end of last year. It has not met since.

Ms MAY: But that sort of group will not meet unless there is movement and proper consultation, an exchange of ideas and an answer given.

Mr DAVID SHOEBRIDGE: There needs to be an informed meeting.

Ms MAY: That is right.

Mr DAVID SHOEBRIDGE: Not a meeting that is happening over here while the real work is being done somewhere else.

Ms MAY: Certainly. As an example of that, on 14 November 2012 we were distributed the first iteration of the guidelines that had been completed and gazetted. We did not know they had been gazetted and we were to bring comments to the meeting on 15 November. We had over 200 pages of documents to read. That is not consultation. People who are involved in workers compensation now are engaged, passionate, on both sides of the fence. They are very concerned to see that the scheme operates effectively, that WorkCover operates openly and transparently, and that there is fair and effective communication between those stakeholders. We received the guidelines in the afternoon and the meeting was at 8.30 on the 15th.

CHAIR: Did you raise this?

Ms MAY: Of course we did. I did, robustly.

CHAIR: What was the response?

Ms MAY: The response was that we were to go away and compile a list of the anomalies that we were not able to come up with in the 24 hours or less than 24 hours that we had and bring them along to the next meeting.

CHAIR: The next meeting being?

Ms MAY: The next meeting was on 13 December 2012 when we were presented with another document, a draft charter for the legal reference group, which would facilitate legal stakeholder communication. The concerns about the guidelines were deferred on that occasion.

The Hon. SARAH MITCHELL: I have a question that follows on from what the Hon. Shaoquett Moselmane was saying and some of the responses you have both just given. You say the stakeholder reference group exists in your submission but it sounds like it exists in name only. You say you have met frequently. Can you provide us with a time line since 2012 of when you have met so we can raise those issues and consider them? You can give us that information on notice.

Ms MAY: Certainly. I think that is consistent with the question from the Chair initially.

The Hon. PETER PRIMROSE: I think you have already addressed a lot of this, but I want to put it to you in case there is something else. On page 4 of your submission you say, "... the role of WorkCover in the development of subordinate legislation in the form of guidelines needs to be carefully reviewed". I know we have been talking about this. Is there anything else that you wish to say in relation to that?

Ms MAY: I would like to reflect on Mr Macken's points from last Friday. I agree with Mr Macken where he said every time the word "guidelines" appears in the Act it should be highlighted and only a guideline that is in compliance with the responsibility that is given in that part of the Act should be responded to by WorkCover. Secondly, there has to be consultation because we know from history that WorkCover do not get it right. They do not get it right for all sorts of reasons. They do not get the interpretation of the legislation and this piece of legislation in itself is the most complex piece of legislation we have ever had in New South Wales in workers compensation. I have worked and I think Mr Concannon has worked since the 1926 Act. That is not to say that we are nearly 100 years old, but we have had experience across all Acts that have been relevant amongst this Committee's lifetime.

Mr CONCANNON: I think a good start would be to go back to stage 1 and get rid of all the guidelines that people do not know are not current and start afresh. If you have to issue any guidelines, only do so if they are absolutely necessary. As Ms May said, under the 1926 Act, which had been in place since 1987, there were no guidelines. We were dealing with a simple piece of legislation. Now we have got two pieces of very complex legislation plus any number of guidelines. I think there were at least 70 at last count. Not only that, we have also got these documents called Operational Instructions sent by WorkCover to the insurers that we do not know anything about. We only hear about it inferentially.

The Hon. PETER PRIMROSE: I have implemented sunrise clauses in organisations so that as of a particular date anything that has not already been approved or reapproved ceases to be operative. Is that something that could happen?

Ms MAY: That is something that could probably be considered but we have guidelines that were issued in 2006 and there is no way of finding out from the WorkCover website, we believe, whether they are still relevant but we do not know because WorkCover has not, despite our requests, provided us with a list of current operating guidelines and they are changed so often.

The Hon. PETER PRIMROSE: This is a critical area and I know others have questions, so could I get you to take on notice any specific recommendations that you would be looking for us to take on in relation to precisely this matter and, in your view, what should we be recommending?

Ms MAY: Certainly.

Mr DAVID SHOEBRIDGE: The Goudappel case is currently before the High Court. As I understand it, WorkCover is running the argument that there is a Henry VIII clause which allows the regulations to amend the statute and the legislation.

Ms MAY: Yes.

Mr DAVID SHOEBRIDGE: That sounds like a remarkable concept, that the laws that are passed by Parliament can be amended by regulations. Is that what is being put forward?

Mr CONCANNON: Yes, as I understand it. They have given up on their attempt to rely on the Act so they have implicitly accepted that the legislation was wrongly drafted in the first place and did not achieve what it was intended to achieve. They are trying to fix that, not clarify it by putting the regulation in several months later.

Mr DAVID SHOEBRIDGE: In other words, the legislation that was passed by Parliament was found by the Court of Appeal to give a class of workers—

Ms MAY: Injured before 19 June.

Mr DAVID SHOEBRIDGE: —injured before the legislation the right to a certain set of lump sum benefits?

Ms MAY: That is right.

Mr DAVID SHOEBRIDGE: The Court of Appeal said yes the legislation gives workers those rights?

Ms MAY: It preserves those benefits. That is right.

Mr DAVID SHOEBRIDGE: Then the Government, no doubt in close consultation with WorkCover, passed regulations and WorkCover now say those regulations effectively retrospectively amend the legislation or have the effect of overriding the legislation to remove those benefits?

Ms MAY: That is right.

Mr CONCANNON: Correct.

Mr DAVID SHOEBRIDGE: Do you know any other area of the law in which these kinds of Henry VIII clauses are retrospectively removing rights?

Mr CONCANNON: I cannot think of any.

Ms MAY: I do not know of any, but I suspect that is a matter for the Government. I have heard perhaps that is the way business has been done in the past, but you would know better than I. It seems extraordinary.

Mr DAVID SHOEBRIDGE: As lawyers, can you advise people about their rights when the statute says one thing one day and then regulations can be passed that remove those rights the following day? What sort of pressures does that put on lawyers who try to operate under the rule of law in New South Wales?

Mr CONCANNON: We cannot advise them, quite simply. In many cases we are saying, "Ring me back after the Goudappel decision." We have been doing that for quite a number of months. We have told them since April last year, "Wait to see what the Court of Appeal says." We are continuing to have to tell them to wait, potentially for another week, until the High Court hands down its decision. It is all very unsatisfactory.

Ms MAY: More to the point, there are many, many thousands of workers who are being deprived of benefits because no-one can tell them what the state of the scheme is and how it affects them. That is what is most detrimental. This is a beneficial scheme and we are unable to say if benefits apply to a certain class of worker or to any class of worker.

CHAIR: You have answered everything to the satisfaction of members of the Committee. Thank you very much for being with us. We much appreciate your input. We would appreciate if you can endeavour to get a response to us within 21 days of receipt of the questions on notice. Thank you very much for being with us today.

Mr CONCANNON: Thank you.

Ms MAY: Thank you.

(The witnesses withdrew)

ELIZABETH EMILY WELSH, Barrister, Member of the Common Law Committee of the New South Wales Bar Association, sworn, and

ANDREW STONE, Barrister, Member, Common Law Committee, New South Wales Bar Association, affirmed and examined:

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

Ms WELSH: Yes, thank you. The New South Wales Bar Association is pleased to have the opportunity to appear before this Committee. The bar has been involved in workers compensation claims for a very long time in representing the interests of both workers and employers. Our members have seen firsthand the effects on the lives of injured workers when injury has prevented their return to work. The system prior to June 2012 provided a fair and open system for resolving disputes. Each party had the right of legal representation and the decision was made by an independent arbitrator on the merits. The costs of the scheme were regulated; they were not a burden on the system.

The 2012 amendments have created a system in relation to work capacity which excludes lawyers. A recent survey of our members taken at the annual personal injury conference of the Common Law Committee disclosed that of those who regularly practice in the field of workers compensation law, only 12 per cent have undertaken any work in connection with claims for weekly benefits under the new scheme. Much of that will be unpaid work because it relates to work capacity assessments. There is no doubt that once the transitional arrangements have had their full effect legal protection for the injured in the system will be virtually gone in relation to claims for weekly benefits of compensation.

If the primary object of the amendments is to assist people in returning to work that object can only be scrutinised by adequate monitoring of what happens with each and every claim. If these people are simply going from workers compensation benefits to Centrelink benefits or living off the charity of family members the system is failing in its primary objective. How is this being monitored? What programs has WorkCover developed to meet the special needs of all the individuals who must now represent themselves in the system? This should not be a system for the brutal termination of a worker's rights.

The WorkCover Authority has never accepted any responsibility for the problems which arose leading to the 2012 amendments. In drafting and implementing those amendments the authority has acquired added responsibilities. In addition to its previous functions as administrator, monitor, investigator, prosecutor and nominal insurer it has assumed the additional roles of Legal Aid provider and decision maker. The potential for serious conflicts of interest is obvious. In the present context it is impossible for an injured worker to have confidence in the system when the organisation which is vested with responsibility for reducing the scheme's liabilities is also deciding whether to fund a claim or review an insurer's decision. As barristers we owe a duty to each of our clients, secondary only to our duty to the administration of justice. Its performance requires a thorough understanding of each case. With no-one to act in such a role, workers are being severely disadvantaged.

Mr STONE: If I could briefly add a couple of discussions points for the Committee's consideration. The first is—and this is not something we often comment upon—in WorkCover's other role as an accident investigator we are an end consumer of those investigations. When we are looking at the rights of people to pursue common law actions one of the starting points is—because these are things not investigated by police—what investigations WorkCover does, and they are of an incredibly variable standard. You see some very good and very thorough WorkCover investigations and you see WorkCover investigations where, through the use of a piece of machinery, they have not properly tested the machinery. They have relied upon the employer's own mechanic to test it for them. They have left it for three weeks before they get the supplier, who is a regular supplier to the employer, out to test it. I see some shockers. There is a very variable standard and a good question for the Committee might be: Where is there some occasional independent audit of the quality of the work that they do?

My second point is that tucked in amongst the bonfire of red tape—I am trying hard to avoid saying "bonfire of vanities"—the Federal Government announced last week something that fundamentally affects this group of discussions which is that it would be reopening access from State-based companies into Comcare. If you thought you could not design a compensation system worse than the New South Wales one I invite you to look at the Federal one, not as a model but as somewhere not to go. But the opening of that poses a real

challenge to the New South Wales scheme because the more you siphon low-cost white collar cases out of the New South Wales scheme and leave it with the blue collar cases, the more expensive the New South Wales scheme becomes proportionally to the income it is deriving. If WorkCover has not told you what its contingency plans for that are, what it thinks its leakage might be and how it thinks it will affect the New South Wales scheme, there would be some very good questions for it.

My third point is having read the transcript from last week we thoroughly endorse that Mr Garling and his independent review office need independent funding. You cannot go to the person you are regulating to ask for your support. We have seen examples in the past where a Director of Public Prosecutions falls out of favour with the Attorney General and all of a sudden half his staff members disappear. That cannot be allowed to happen here. He has to be genuinely independent. If you are going to pull the lawyers out of the system and stop us representing people, he is all that is left and he must have the resources to do what he has to do.

Finally, I invite some discussion at some point, in that let us just not talk about what was taken away in 2012 because there are still some real injustices within the system created back in 2002 and the decimation of common law rights for those whose lives are truly wrecked by their employers by sometimes quite brazen and wanton acts of negligence. That is not a subject that should be lost sight of.

CHAIR: How has the Bar Association found the consultation process with WorkCover?

Ms WELSH: Luke Morgan is the delegate on the common law committee who attends the meetings Roshana May was speaking about. I have not spoken to Luke directly about that in the past month or two but the consultation process for the bar is precisely the same as for other members of that group. So the same problems with short notice, for example, but otherwise the group does meet. What can effectively be done is that they are not being given adequate notice.

CHAIR: Would you take that question on notice?

Ms WELSH: Yes, I will speak to him and we will report back to you about it.

Mr STONE: I think the tenor of the response is going to be similar to what we had with the Motor Accidents Authority. The problem is not going to the meeting and talking to people; it is whether anything is ever coming of it. They are good talkers; it is the listening and the actioning part that frustrates the hell out of us.

CHAIR: Do you get a promise of a response, for instance, and then no response comes?

Mr STONE: I will take that on notice and come back to you with specifics rather than generalities.

CHAIR: Yes, some detail.

Mr DAVID SHOEBRIDGE: I refer to common law rights. As a lawyer, when you look at what has happened with the retrospective loss of statutory benefits as a result of the 2012 reforms, how does that impact on the advice you give to workers about the potential to crystallise their rights with a common law settlement and to have a known amount of money?

Mr STONE: The starting point for this is that there is a fundamental gap between what the injured worker wants and what WorkCover wants for them. WorkCover has a very institutional drip mentality that you dole out to people: you never let them anywhere near a lump sum. What most individuals want and, in particular, those who have really serious injuries and who will be with the system for a long time, is some independent determination and some freedom. They want the lump sum and to move on so that they are not having to ask permission every time they want to do something. That is where people come at it from and it is so different from the way WorkCover comes at it.

Going back to 2002, the way they changed the system then was to say, "Well, you can have your treatment expenses and subsistence wage and stay on the workers compensation system forever" or "You can have common law rights but the common law rights are limited purely to your loss of earnings." For example, if someone is a quadriplegic who requires $6,000, $8,000 per week in care they can never cash that out and take their earnings because they have got to stay on the treatment expenses within the system and live off the subsistence wage even if that means they cannot support their family; they can never own their own home. They

give that up the day they are put into the wheelchair, even if the employer's negligence is flagrant. People want out of the system and the system does not make it easy for them to get out.

Ms WELSH: The experience since the 2012 amendments is that for a client with a common law claim, not necessarily against the employer, arising out of an incident one or two things generally has happened by now. Either their benefits have been cut altogether or, in some cases—it is not many—they have received an earning capacity assessment that says they have a zero earning capacity. So suddenly they are receiving some protection in respect of 80 per cent of average weekly earnings for some time. The retrospectivity means that those people are weighing up the value of their common law rights against those entitlements; but other people are in a very difficult position because they have no support from the workers compensation insurer anymore. You cannot tell somebody that they have the security or benefit of having some ongoing assistance, which is what people have had traditionally. They know they will have to go to Centrelink or live off their family. It has created an uncertainty and real winners and losers, but without a real distinction between the two in many cases.

Mr STONE: No longer does anyone get the protection of a court award. Instead, you get the protection of an insurance company's internal processes and whims. That is just such a huge gap.

Mr DAVID SHOEBRIDGE: Even workers who previously thought they had the protection of an award from the commission or court have lost the benefit of that with the 2012 reforms?

Ms WELSH: That is right.

Mr STONE: Yes. You have given insurance company claim staff the power to override judicial determinations.

Mr DAVID SHOEBRIDGE: The Transfield Services case was raised by the Law Society in its submission regarding an issue of jurisdictional ability of WorkCover to put a stay on an insurer's decision about work capacity assessments.

Ms WELSH: Yes.

Mr DAVID SHOEBRIDGE: That found its way to the Supreme Court, and there are issues about how that litigation happened. As you understand, if that issue gets to the Supreme Court and the issue at stake is about work capacity assessment, is there any legal bar for you giving legal advice and remuneration in those circumstances?

Ms WELSH: Possibly not, but I would not be able to say because I have not looked at it as closely as the Law Society obviously has. I just know that there are a lot of jurisdictional issues still floating around about the Workers Compensation Commission, and obviously that is probably the issue. If something can be dealt with by the commission, a lawyer can be paid for the work they do; if it cannot be, that means there is no entitlement to recover fees. A case of Lee was decided last October that determined that the commission had no jurisdiction in the claim for weekly benefits after 130 weeks. I suspect it might take up a similar kind of issue.

Mr DAVID SHOEBRIDGE: Could you take on notice that if there is a dispute about whether it is a work capacity assessment or jurisdictional dispute and that finds its way to the Supreme Court and then the Supreme Court finds it is a work capacity assessment, what is the situation with rights to legal representation and remuneration in those Supreme Court proceedings?

Ms WELSH: I imagine that no-one would be paid for it, unless there was a Suitors' Fund certificate or something like that.

Mr DAVID SHOEBRIDGE: Would you take that on notice?

Ms WELSH: Yes.

Mr STONE: Yes, happy to.

Mr SCOT MacDONALD: I have a question about your last point 17, "The Bar Association maintains its position that an injured worker should be entitled to legal representation in all stages of a dispute." Do you

not see any role for unrepresented mediation at least in the early stages? Why do we need legal representation even at those very early stages?

Ms WELSH: I would say that it is most important that if you want to get a dispute resolved quickly to have that at the early stage otherwise that injured worker has no ability to advance their own interests. They are not going to understand the issue properly. They will be met with an insurance company that may have a medical report that, on a superficial level, is something the worker cannot argue about—but it may be a poorly reasoned report. There may be some fundamental issues with the insurer's decision and legal representation at that stage would get straight to the heart of it.

Mr STONE: The other point to remember about legal representation is the great service it does in calming down the client. It is not just that we are there building up the client's case; we are there explaining to the client what they cannot have, what they cannot do, the way the system works. A very large part of our role across the variety of different forums in which we appear is to educate our client about what can and cannot be achieved and to bring expectations back to a more realistic level. In part, it is part of that educative service that assists and facilitates dispute resolution.

The Hon. SHAOQUETT MOSELMANE: Following up on that question regarding legal representation, out of curiosity, at what stage is the injured worker no longer entitled to legal representation? Is it in the initial stage? What stage of the process?

Ms WELSH: It depends on their claim for statutory benefits. They are not entitled to legal representation at any stage if it is in relation to something called a work capacity assessment. The way a workers compensation claim works is that a worker lodges a claim form, the insurer has to go through a list of indicia as to whether the claim should be accepted. The first is whether this is an injury in the course of the employment. The second is, in major areas, is there any incapacity. Those two issues would trigger a dispute in which a lawyer could be involved. But once you get beyond those issues to what sort of work can this person do, which is the issue that every case for weekly benefits gets to fairly quickly, unless it is a very clear case, no lawyer can be involved at that stage. All that happens is that the insurance company makes a decision, sends a letter, "We've done work capacity assessment. You're not entitled to any more workers compensation." That injured worker, irrespective of their educational or cultural background, then has to go back to the insurer themselves to seek a review and then they can to WIRO if they have a complaint, but WIRO sends them back to the insurer. Then they can go to WorkCover. They have to do all of this themselves. I do not know if any of you have seen the workers compensation legislation—I nearly brought my practice up here—but it is six inches thick. I mean I struggle these days to find anything in it. It is almost as bad as the Tax Act. That is probably a cliché because you hear people say that a lot, but it genuinely is and they have absolutely no chance of doing it themselves.

The Hon. SHAOQUETT MOSELMANE: If you were to make a recommendation, what would it be?

Ms WELSH: It would be that workers be entitled to legal representation on issues of work capacity. Whilst we support and endorse the independence of WIRO, by the time a dispute gets to WIRO it is no longer about the merit of the person's case; it is about whether the procedure that was followed by the insurer or WorkCover Authority was proper. It is no longer concerned with the merit. If you want to actually get a dispute resolved on the merits, it has to be at that earlier stage, and that is where the absence of legal advice operates so unfairly for these people.

Mr STONE: The second part of the recommendation is to allow merits review of the work capacity decisions. An insurance company is allowed to make a decision by sending you off to the tame doctor who receives a string of work from them, who sees the world their way and who has been picked because the insurer knows in advance what their opinion is going to be. Why not just give them a rubberstamp? Why even make them go through the hoo-ha of making someone attend an appointment? We all know what the outcome is going to be in the majority of cases. The reason they have picked the doctor is that they know what the outcome is going to be.

Mr DAVID SHOEBRIDGE: Do you think there should be an independent list, a pool, and if there is an issue that needs a medical determination then the insurer should have to go to a pool? That would remove the ability of the insurer to choose the individual doctor. They would simply go to a pool of independent experts.

Mr STONE: Even there, you would have to remove the link that has the insurer writing the regular cheques to the doctor.

Mr DAVID SHOEBRIDGE: That would happen if they did not have that relationship with an individual doctor. If there is a statutory fee for the service and there are 35 doctors that provide that particular service then, potentially, and I hate to say it, WorkCover or some independent body could randomly allocate the doctor rather than having the insurer choose the doctor. That might actually break what seems to me to be a conflict of interest where the doctor is on a drip feed from the insurer.

CHAIR: Are you suggesting that it work both ways—that there be an independent panel not only for insurers but for injured workers as well?

Mr DAVID SHOEBRIDGE: Particularly on issues of work capacity assessment an independent panel would be far better than having it just as the choice of the insurer.

CHAIR: For both sides?

Mr DAVID SHOEBRIDGE: Yes, the worker is often not entitled at all.

Ms WELSH: I would not promote anything that eroded the benefits of an adversarial system because the adversarial system does get to the issues and does expose the weaknesses of alternative arguments. So the overwhelming view, of course, being barristers but leaving that to one side, is that that is the way you get to the truth. I come back to the question from Mr MacDonald about mediation and doing something at an early stage. I think this is responsive generally to the questions so far. I am not sure, because barristers are not involved in work capacity processes, whether those multiple decision-making processes ever involve a face-to-face meeting with the worker. Is this something that is done on paper? Do they even meet the person? How do you do it? It has to be a victory for bureaucracy as opposed to looking at the true merits if no-one is actually sitting down with these people to try to understand their position.

Mr DAVID SHOEBRIDGE: It is a paper process.

Mr STONE: Let me come back to add, in relation to the suggestion from Mr Shoebridge that there could be a panel of doctors, that I like the idea of an independent panel of doctors but I am deeply concerned about the idea of letting WorkCover pick them. The words 'independent' and 'WorkCover' together I have some real issues with. I will give you an example from the motor accident sphere, where it was an improvement because we had the medical assessment service. One of the things that has been done to at least start to improve the independence of that panel—although I think they have only done this for the ones who do reviews not the ones who do first-instance decisions—is that they have said, "If more than 80 per cent of your medico-legal practice is for one side or the other then you are not in the middle enough for us". In other words, they have tried to get doctors who both sides use for private medico-legals.

There is a reason that there is a group of doctors out there who are only ever used by plaintiffs for the injured for medico-legal work and there is a reason there is a group out there who are only ever used by insurers for medico-legal work. The insurer ones are all embittered, cynical and do not believe anyone should ever get anything—words like "lazy", "fraud" and "malingering" just roll off their tongue. You could equally say that on the plaintiff side the doctors used are a soft touch who want to believe whatever they are told and will ascribe anything to a motor vehicle accident or a work accident if the person in front of them says so. They are the two opposites of the extremes of human nature, and they just fall into plaintiff medico-legal and defendant medico-legal work. It is about trying to find people who are actually prepared to go down the middle of the road. One of the great difficulties is that the further you take the system away from accountability the less the restraint on what people say. We have effectively stopped cross-examining doctors in court proceedings now across a variety of fields, and that emboldens them in the opinions they write for the people who pay them. Good cross-examination does wonders for getting a doctor back to the middle of the road in their next few reports.

CHAIR: You mentioned independence. Speaking of independence, are you happy with the way that the WorkCover Independent Review Office [WIRO] works? I know that you have called for sufficient funding and support to be made available, but I am setting that aside.

Mr STONE: I would be very reluctant to say that, if you are sitting down to design it from scratch, that would be what I would pick as being the bulwark against evil occurring. That is no criticism whatsoever of the office; it is just not what you would design if you were trying to do this fairly. Having said that, thank God he is there.

Ms WELSH: Could I say something about that? I would say that it is far too soon to make a call on that. The Goudappel case in the High Court has held up a lot of cases because of the sheer uncertainty about whether or not and the degree to which these amendments are retrospective. Also our experience is that a lot of people were not put through into the new regime under the transitional provisions until the last minute. There may have been many reasons for that. So there are an enormous number of people who will have been cut off since the annual report was done. We have only had one report. We really need to look at the next one and the one after that to be able to say how effective it is as a mechanism for review.

Mr DAVID SHOEBRIDGE: We have now heard from both the Law Society of New South Wales and the New South Wales Bar Association about the impact of the Goudappel case. What sort of impact has that uncertainty had on the scheme from your observation?

Ms WELSH: A massive one, because all the people injured under the legislation as it was before June 2012 who have made a claim for lump sum compensation will be waiting to find out whether they can make another one—that might get them over the threshold for a claim for modified common law damages; it may put them into a category for some special protection under these amendments or it may entitle them to some additional lump-sum compensation. Nothing can happen until there is a result. Do you know that it is going to be heard on 1 April?

Mr DAVID SHOEBRIDGE: I have to say that we had WorkCover here a week ago, allegedly coming to inform this Committee about issues in the workers compensation system, and we had from them not one whisper of the word "Goudappel" or mention of its impact. I have to say for myself, I do not know about the balance of the other members of the Committee, that I find it an egregious failure of the part of the regulator not to tell us that there is an important High Court decision with such system-wide implications that will be heard in a matter of weeks. I just find it absolutely remarkable that they came here and failed to tell us about that.

Ms WELSH: I did an Internet search yesterday to see where it was up to and I saw that it was listed for hearing on 1 April. Still, the High Court may be reserved for some months so there will be this continuing uncertainty.

CHAIR: I have a quick question on the Dust Diseases Board. We understand that liability is being accepted in most cases going there within about two months.

Ms WELSH: Yes.

CHAIR: It was suggested to us this morning by the Asbestos Diseases Foundation of Australia that there be a process whereby there can be a provisional acceptance within seven days on the basis that the facts are usually pretty straightforward in these situations. What would your attitude be to that?

Ms WELSH: I do not see how it could be a bad thing.

Mr STONE: It has to be possible in a lot of cases. It has been 17 years since I did my last dust diseases case. I was acting for the workers compensation board of Queensland back then. We got the statement of claim faxed to us in the morning and I had recommended to the insurer by the afternoon that they accept liability because we knew that the place the worker was 30 years ago was full of asbestos.

CHAIR: So it is something to be looked at very seriously?

Mr STONE: It certainly ought to be possible in the great majority of cases because the reality is that we know where the asbestos was now because it has killed enough people.

Ms WELSH: This is only anecdotal from speaking to other barristers about what is going on but the Dust Diseases Tribunal appears to be operating pretty efficiently. I cannot see that there would be any particular problem with what you have suggested.

The Hon. SARAH MITCHELL: I want to go back to the issue of work capacity assessments because you talk about that in a bit of detail in your submission. You raise the figure of only 31 being determined by the WorkCover Independent Review Office [WIRO]. Does that figure come from the WorkCover Independent Review Office?

Ms WELSH: I think that came from the annual report. I had a look this morning. I think we are up to 48—or something like that—published decisions that I have seen on the website.

The Hon. SARAH MITCHELL: I am genuinely confused whether—

Ms WELSH: They may only be published decisions and there may be other decisions. I am not sure.

The Hon. SARAH MITCHELL: I am not sure if you have looked at the transcript from when we heard from Mr Garling last week.

Ms WELSH: I did not look at that figure.

The Hon. SARAH MITCHELL: I think he says 106 and 88 have been completed.

Ms WELSH: He would certainly know.

The Hon. SARAH MITCHELL: I hope I am not being offensive, but that would probably be a more up-to-date figure. In your submission you say that only 31 decisions raises a number of questions. If you now take that figure to be 106 based on Mr Garling's evidence does that alleviate some of your concern?

Ms WELSH: It does. I have not read each and every one of the decisions that were published, and this may have been dealt with when Mr Garling appeared before the Committee, but my understanding was that a very large number of those decisions were overturning the decision that had been made at first instance by the insurer and it all came down to procedural shortcomings in what was happening with those determinations.

Mr STONE: The question you always have in those circumstances is: Is this all the ones there are or is it the tip of an iceberg? Is it the ones who are resourced or can be bothered or know of their rights to pursue it? If you went and did a random audit of the ones who do not would you find that they are being done beautifully and correctly and it is only the egregious ones that get brought up for review, or is it in fact that there are vast numbers of mistakes being made but only a small number pursue that route?

The Hon. SARAH MITCHELL: That goes back to the comments you made earlier about it being a very onerous process for people.

Ms WELSH: That is right. I would have thought there could have been by now at least thousands of people potentially who have been affected by these types of decisions. Whether it is a hundred and something or less than that, it is probably the tip of the iceberg.

Mr DAVID SHOEBRIDGE: Well in excess of 10,000 current work capacity assessments have been done removing people's entitlements and only 130 find their way to the top of the decision-making tree on a review. Is that the kind of imbalance that should have this Committee asking questions?

Mr STONE: From years of experience dealing with WorkCover and the Motor Accidents Authority, they tell you what a beautiful system we have and 99 per cent of cases are being done perfectly because these are the only ones that need that review. But you cannot make that assertion unless you have done an independent audit of some of the other decision-making by the people experienced in doing the reviews to say that we have taken this random sample of 100 and indeed that is right; 99 of them are perfect decisions where if we were advising we could not have found any grounds for review. They have not done that and that is not right.

Ms WELSH: My client yesterday got a letter last June or so telling him that he would not be getting any more weekly benefits of compensation. His injury was in June 2009 so at that stage he was up to the four year mark. He has 11 per cent whole person impairment. He is probably worse now because he has had a bad outcome from a medical procedure. He had to have his shoulder reconstructed and now he has got neck problems and added arm problems. He has just been living off his wife's income since last June. He left school when he was 16. There is no way a man of that type is ever going to take on this bureaucracy.

Mr DAVID SHOEBRIDGE: And face the uncertainty of Goudappel in the middle of all of that about whether he could make a further claim.

Ms WELSH: He would not even know what Goudappel was. He has just got the letter from the insurance company and thought, "Oh well, that's it for me." I am hearing stories like that from clients every week.

Mr STONE: I saw in their evidence WorkCover boasting or boosting—take your pick—about their telephone advisory services. They are very big on telephone advisory services and you can never pin them down on whether these services give legal advice and if they are giving legal advice is it lawyers doing it? They will always swear they are not giving you legal advice, but I can never quite work out how you can advise somebody about their legal rights and not call it legal advice. The qualifications, experience, competency of the people giving that advice always frightens me and, again, it is never independently audited.

The Hon. PETER PRIMROSE: In your introductory statements you mentioned the possible implications of Comcare on the financial viability of the New South Wales scheme. Could you elucidate on that?

Mr STONE: First of all, there was the creation some years back of the capacity for some State-based self-insurers to opt out into the Comcare scheme but they had to be in competition with a Commonwealth authority within the same field because it was said that the cheaper Comcare rates gave a competitive advantage. It has predominantly so far been white collar. There was then a freeze on that occurring and the freeze is apparently to be lifted and indeed to be broadened whereby now it is much easier to opt into Comcare and out of a State-based scheme. Whether that will see more organisations opting to self-insure so that they can then use that as the step to go to Comcare we just do not know.

But if it continues to be a trend that you bleed white collar out of the system and leave blue collar in the system you upset the balance of the system in terms of blue collar involves more serious injuries. None of us round here are in much graver danger of anything other than a paper cut, especially when you remove the journey claims. I cannot take it much further than that but WorkCover have actuaries. Again, they probably did not know about it last Monday but they certainly should have known about it as of last Wednesday. It is just a relevant question to raise with them when they come back. I cannot give you a much more sophisticated analysis than that.

The Hon. PETER PRIMROSE: You believe we should be approaching WorkCover's actuaries to seek advice?

Mr STONE: I think it is just a question of what is the leakage rate likely to be out of the New South Wales scheme of people taking up the option to shift to Comcare and what if any threat is there to the long-term stability of the New South Wales scheme if the leakage rate is greater than you expect.

The Hon. SHAOQUETT MOSELMANE: Many stakeholders have expressed concern about the lack of proper communication between WorkCover and stakeholders. What has your experience been?

Ms WELSH: We have taken a question on notice on that and we will report back to you in writing. I heard some of the comments that were made by Ms May from the Law Society and I was not surprised by anything that she said. But I have not been attending the meetings and Luke Morgan has, so we will report back to you on that.

The Hon. SHAOQUETT MOSELMANE: In their submission the Law Society made a final point in which they said that the investigation and enforcement of work health and safety obligations should be removed from WorkCover and vested in a separate independent body. What is your view on that?

Mr STONE: Absolutely.

Ms WELSH: The Department of Industrial Relations or somewhere else; perhaps the Attorney General.

Mr STONE: Stop them being the investigator, the insurer and the regulator all rolled up in one. Break the role back down and have it in some independent arms.

The Hon. SHAOQUETT MOSELMANE: Do you have any recommendation on what those independent arms should be?

Mr STONE: Let us give you a considered answer on notice.

The Hon. SARAH MITCHELL: My question goes back to the comments you made, Mr Stone, in your opening remarks when you said that the standard can vary considerably. I know that there probably is not an easy answer to this question but in terms of what needs to change to see a more unified standard, if it was to go to a separate body would that be a step in the right direction? Or can the Committee make other recommendations to WorkCover to try to get a better balance in the standards of the investigation?

Mr STONE: I think in part that where WorkCover is also the prosecutor they tend to investigate from a prosecuting point of view and where they determine early on that it might mostly be the worker's fault they tend to back off and lose interest fairly rapidly. In particular where the worker, for example, has been very badly injured and is not in much of a position to talk to them for some period of time and is fairly groggy because they have had a brain injury or they have been unconscious or they have gone through some major procedures, in some cases where they sniff they are on to a good prosecution they will certainly be persistent and keep coming back and keep investigating. Where the initial version they have heard from everybody at the company is that it was all the worker's fault they tend to back away in some instances where they should not and should wait and sniff around some more.

I think the answer to that is it certainly improves things if you remove them from the prosecution role and just have them as an investigation, but I think there has also got to be some external auditing that occasionally just pulls out some files and reviews them with somebody with an inquisitive mind saying, "Why didn't you ask this? Why didn't you ask that?", or, "Why did you use the company's mechanic to test it? Why didn't you get up on the machine and test it yourself or call in somebody independent?" I think part of that is a resourcing role. I think there will be some further challenges if Government continues down privatising paths in that they will end up using more and more, in effect, independent outside experts to help them with their investigation.

That can be a very good thing, if they have got good access to good people. It becomes a problem—particularly in regional and rural areas—if one is trying to investigate a malfunction in a piece of equipment and the only person in town who can look at it is the supplier who regularly supplies to the employer. That is not a relationship where you are likely to see a robust criticism of either the piece of equipment, its appropriateness or anything the employer has done with it, because everybody knows where the money goes. There are some real weaknesses in the investigation that we see from time to time.

Ms WELSH: It is incredibly variable as to what happens. As Andrew said, it was the case, and may still be, that prosecutions were the main aim of investigations. That has obviously been the focus for WorkCover in the past, I would say.

Mr STONE: To give you one example, I have a case of an Irish immigrant worker who was directed by his co-worker to go and switch on the 1974 tractor that, in turn, was hooked up to the grain auger. They were shifting some grain. He went and stood beside it, switched on the key, but because it had been left in gear by the last person to use it, it trampled over him and caved his chest in. He is a very ill man.

WorkCover came out, and said, "Oh well, it is all his fault for standing next to it and switching it on". They seemingly never asked anyone the question: Was that part of the regular system of work? They seemingly never asked whether the boss had done it before. They never even got up in the tractor and switched it on. If they had, they probably would have discovered that it has a very loose gearbox that might well have been left out of gear but slipped back into it, because it was a 1974 tractor. It really did reek of a once over lightly. Whereas others I have seen have been terrific investigations. I am not saying they cannot be good investigators but where they get a scent that causes them to say, "It is the worker's fault; I am not prosecuting anybody", they move on pretty rapidly.

Mr DAVID SHOEBRIDGE: I think it would be fair to say that the scheme is complicated.

Mr STONE: That undersells it by such a magnitude, it is not funny.

Mr DAVID SHOEBRIDGE: Could I ask you briefly to discuss one of the complications, which is that there are essentially three different thresholds for three different classes of entitlement. There is a 15 per cent whole person impairment, which has certain issues in relation to work injury damages; there is a 20 per

cent whole person impairment, which gives certain statutory rights; and there is a 30 per cent whole person impairment, which gives other statutory rights. Could you briefly explain to the Committee the effect of those three different thresholds?

Ms WELSH: Certainly. There are four actually; there is 10 per cent as well.

Mr DAVID SHOEBRIDGE: Of course.

Ms WELSH: The 10 per cent whole person impairment is the threshold that you have to meet before you are entitled to what is called lump sum compensation, which is for the loss of the use of some part of your body but it is assessed on a whole person impairment basis. That threshold poses big problems because you cannot make a claim for a lump sum if you are under it, but how do you work out if you are over it? You have to go to a lawyer who has to be prepared to take the punt that you might be over the threshold. Your lawyer has to make an application for legal aid-style funding from the WorkCover Authority which then will second guess whether or not you might get over that threshold before deciding whether to fund the cost of a medical report and then they might not fund the whole of the cost of that report. Then, if you get over the 10 per cent, you get your statutory compensation.

Mr STONE: And your legal costs.

Ms WELSH: And some legal costs. If you get over the 15 per cent, you have an entitlement to sue your employer for negligence or damages for your economic losses, past and future wage loss, and you could also, ever since 2002, theoretically cash in your workers compensation rights for a lump sum in something called a commutation. That has never happened with WorkCover; they have never been interested in doing it. People have just been on the system or off the system and that option was never available.

The 10 per cent is a new thing from 2012. The 20 per cent is also a new thing since 2012 and it cuts in in relation to weekly payments of compensation. After you have had 130 weeks of workers compensation, you are vulnerable to one of these work capacity assessments and if the assessment is that you can work more than 15 hours a week but you are not working, you do not get any more workers compensation. My client yesterday fell into that category. He has been looking for work; he cannot find it. No-one is going to give him a job with his bad arm so, bad luck to him, off he goes. If he had legal representation, he might have been able to take that on and persuade someone that he really does not have an earning capacity and he would have kept his payments for the rest of the five-year period.

If you are 20 per cent at that stage, you do not get cut off. You get to keep your rights, hypothetically, until you get to the five years, so that is a protection there. And if you are over 30 per cent, you cannot be subjected to one of these and you keep your benefits. If you get to five years at 20 per cent, you can continue to receive some weekly benefits of compensation. It is an increasing scale, I suppose. It is an exponential scale, because you get very few clients who are 30 per cent. You have already had the amputation who was under 30 per cent that was discussed here last week but there are not many people who get to 30 per cent and there are probably not that many who get to 20 per cent. So it is not much protection.

Mr DAVID SHOEBRIDGE: WorkCover's actuaries said that they are seeing a potential increase in work injury damages claims going forward and work injury damages claims have a 15 per cent threshold, plus you have to be able to prove negligence before you can go to work injury damages.

Mr STONE: And you must not have heavy ongoing treatment expenses, because you cannot afford to cash out that right. So it is only somebody who has finished all their treatment and will have no more.

Mr DAVID SHOEBRIDGE: But in many ways, given the new 20 per cent and 30 per cent thresholds that are in place and the prospect of many workers losing all of their ongoing benefits unless they get over 30 per cent, you would expect, would you not, that work injury damages claims will increase because it may be the only way that workers can crystallise some form of ongoing rights in the scheme?

Ms WELSH: It is inevitable and it is just going to be another one of those awful situations where, yes, there may be more work injury damages claims and then someone—perhaps the Government—is going to say, "Look at this. This is costing us too much. We will have to get rid of it."

Mr DAVID SHOEBRIDGE: And yet it might be the only safety net in the scheme, for a number of very seriously injured workers, to have some kind of ongoing income protection.

Ms WELSH: That is right and any increased costs in work injury damages claims we expect will be far outstretched by the savings in cutting all these people off.

CHAIR: Ms Walsh and Mr Stone, thank you for being with us and assisting us today. We look forward to getting your responses to the questions on notice. If you can get those to us within 21 days we would appreciate that.

Ms WELSH: Yes.

CHAIR: I am sure that your input will greatly assist us in our deliberations. Thank you very much.

(The witnesses withdrew)

(Luncheon adjournment)

BRUCE McMANAMEY, NSW Committee Member, Australian Lawyers Alliance, and

ANTHONY SCARCELLA, New South Wales Director, National Council of the Australian Lawyers Alliance, sworn and examined:

CHAIR: I welcome our next two witnesses, representing the Australian Lawyers Alliance. Thank you for being with us and taking the trouble to assist us in our deliberations. Would you like to make a short opening statement?

Mr McMANAMEY: Just a few words. I thank the Committee for the opportunity to bring evidence today. The inquiry which is occurring today is into the functions of WorkCover. The members of the Australian Lawyers Alliance [ALA], me included, have been practicing within the workers compensation jurisdiction for many years. When I first started practicing in the jurisdiction, the functions of WorkCover were carried out by four judges of the Workers Compensation Commission, and between the four of them they were able to regulate premiums, manage dispute resolution and otherwise manage all of the compensation aspects of the scheme.

In those days the other part of WorkCover's function, which is the inspectorate—the occupational health and safety part—was separated and was dealt with by the Department of Industrial Relations, whichever particular name it was operating under that that time; it was a separated system and it was a system that worked extremely well for over 50 years. In 1987 there was a significant change in the system; private insurance was abolished and WorkCover was created with its functions to oversee many aspects of the system.

Our role is essentially representing injured people—although some of our members represent insurers from time to time; we are at the dispute resolution area. We have found that there has been increasing bureaucracy, increasing—I am careful with the word—interference in terms of guidelines, directives, from WorkCover, which have made the management, in terms of dispute resolution, increasingly more difficult and we have seen amongst injured people an increasing distrust in the system. We have also seen, in terms of the way WorkCover has worked with its guidelines, from time to time it has produced guidelines that have actively interfered with the ordinary resolution of claims in that it has inhibited that, as well as increasing regulation and frustration. The ALA's position is set out in our paper and in that we also support the submissions that were made by the Law Society and we commend those submissions to you.

CHAIR: In your submission you say that WorkCover has too many functions to operate efficiently and is often conflicted in its functions. Can you give us some specific examples of where there is this conflict which impedes on the proper functioning of the system?

Mr McMANAMEY: I think the most obvious conflict that exists is one that was created by the 2012 amendments, which was the creation of work capacity decisions. What happened with those amendments was that whereas before we had an independent arbiter as to a person's continuing entitlement to workers compensation, it was handed over to a decision-making process whereby the insurer makes the decision; one can have a review and then one can seek a merits review with WorkCover. The difficulty with that, and it is simply the clearest form of conflict, is this in terms of the scheme agents, who are the majority of the workers compensation scheme once you put the self-insurers and specialist insurers to one side: WorkCover is the nominal insurer, they are the person paying the money.

One has a system where it is going to reduce down to the final arbiter of whether someone is entitled to ongoing compensation being determined by the person who does the paying. That seems to be the clearest form of conflict and it is certainly something that our members have seen in time, as this has come in, that injured workers have no faith in that resolution. The person who holds the bag of money is the final determiner of how much I am entitled to. Can I go somewhere independent to get that determination? That is probably the clearest conflict that exists at the current time.

Mr SCARCELLA: Can I just add to that, Bruce? Without being overly simplistic, if you look at it this way: WorkCover is the regulator, the investigator, the police officer, the prosecutor, the judge and the jury when you look at work capacity.

Mr DAVID SHOEBRIDGE: And the owner.

Mr SCARCELLA: And the owner, and that distrust comes from there.

CHAIR: So you say this is perverse?

Mr SCARCELLA: It is perverse.

CHAIR: Do specific examples come to mind where this has manifested itself in perverse outcomes?

Mr SCARCELLA: Mainly in the work capacity decisions that are made. I deal with clients every day that come to me and say, "Anthony, how can this be the case? How can this be so that"—they do not call them the nominal insurer but they say WorkCover—"WorkCover runs the thing; how can it make a merit decision?"

CHAIR: Being the devil's advocate, it may be for many reasons, but the question is you believe you can limit them to the fact that all of the functions are operated under the umbrella of WorkCover?

Mr SCARCELLA: That is right.

CHAIR: You can take this on notice but can you provide us with specific examples which show a perverse outcome that otherwise would not have arisen had there been the separation of different functions within WorkCover?

Mr SCARCELLA: I think the Transfield decision that was discussed this morning is one of those examples.

CHAIR: Apart from that, are you in a position to provide—

Mr SCARCELLA: We would probably be in a better position if we took that on notice and tried to get specific examples.

CHAIR: That is what I am proposing.

Mr SCARCELLA: We could go back to our members because we have a broad range of members and they experience this every day.

CHAIR: If you could take that on notice and come back to us with specific examples of perverse outcomes arising as a result of there being this amalgamation of functions and powers, a perverse outcome that would not have arisen had there been a separation, as you have been talking about.

Mr SCARCELLA: Certainly, yes.

Mr McMANAMEY: There is one slight difficulty with that. The point we are making is not that you are necessarily getting perverse outcomes, because in many cases we do not know because it does not go to an independent arbiter to say, "Hang on, that outcome was perverse". The real point we are making is that it has created a scheme where people have no faith in the outcome.

CHAIR: You are talking about the perception.

Mr McMANAMEY: It is the perception, as one can well understand. In most cases if someone owes you money, you would have no faith if that person who owes you the money was the final determiner of whether they give you the money or not. Most of us in most of our business dealings and the like, it is essential to our society that if you have a dispute about these things you can go somewhere else, to somewhere independent, in order to get a determination of my rights, be it courts, tribunals or whatever medium. Our whole society runs on that principle. We generally do not accept the principle that the person who pays the money decides the pay.

CHAIR: But perceptions are strengthened if there are specific examples of injustice out there.

Mr McMANAMEY: Certainly. Can we take that on notice?

CHAIR: Yes. I would be most appreciative of whatever you can get back to us.

The Hon. SHAOQUETT MOSELMANE: Just talking about examples, under the heading "Client Experience" on page two of your submission you say that many clients who experience the WorkCover scheme are traumatised and there is aggressive fighting against their claims by scheme agents. Can you provide the Committee with a specific example of that or an issue that resulted in one of your clients being traumatised?

Mr McMANAMEY: Without naming names, I can give you a generic example of how the problem arises.

CHAIR: If you respond we can remove names and specific references.

Mr McMANAMEY: I will respond in a generic sense as it arises many times. What happens under the current scheme is that once a person is injured, particularly if they have a long-term injury, they become subject to injury management. This involves people in a constant dialogue with the scheme agent. The scheme agent operates in accordance with guidelines given by WorkCover. What people are regularly finding is that they have no control of their own lives and their own decisions about getting back to work. In terms of getting medical treatment they are finding, for example, "My doctor says I should have this but a claims officer says that the WorkCover guidelines say you can only have six physiotherapy treatments per year so therefore despite the fact that you have significant problems and your doctor says you need some serious ongoing physiotherapy we are not going to approve it because it does not meet the guidelines." The person is left with the problem of wanting and needing treatment, they cannot afford it and WorkCover will not give it to them.

The constant changing of claims officers is a recurrent problem. They start talking to one person to try and have some rapport or understanding of how their injury is being managed, and the next time they call it is somebody else. One of the classic ones that does arise from WorkCover is that WorkCover has this very interesting habit of every now and then—what I describe as—shuffling the files. For example, someone is injured, a claim is made and the insurer is Gallagher Bassett. The claim is being made by Gallagher Bassett but for whatever reason—I think it is to do with market share—WorkCover then comes along with a collection of files, which are claims being managed by Gallagher Basset, and takes them over to Alliance. The next thing the worker says is, "Why is this Alliance person talking to me? It makes no sense. I have been dealt with by the person at Gallagher Basset and now I have to start all over again."

CHAIR: Except in terms of bureaucracy what you are talking about is not uncommon. This happens in government bodies, non-government bodies, small bodies; it can happen anywhere.

The Hon. SHAOQUETT MOSELMANE: But if they do it often what is the logic behind it?

Mr McMANAMEY: You would have to ask WorkCover. We only see it from the outside.

CHAIR: While we have to ask WorkCover, you would not be suggesting that there is this bureaucratic process specifically to—

Mr SCARCELLA: It adds to the burden.

CHAIR: I understand that.

Mr McMANAMEY: You asked for examples in which people were traumatised by the process and I was giving you an example.

The Hon. PETER PRIMROSE: It appears that the only person who is not consulted in that process is the injured worker.

Mr McMANAMEY: Yes. Injured workers very readily get this feeling that they are not being listened to.

CHAIR: This issue that you raise—if it does result in perverse outcomes that would not have arisen had there been a separation of these powers—have you raised it with WorkCover?

Mr SCARCELLA: At the stakeholders group, yes.

Mr SCARCELLA: I am a part of that stakeholders group and I can tell you—I was present this morning when some of the evidence was given—that our first meeting commenced on 21 June 2012. Between 21 June 2012 and 13 December 2012 we had 10 meetings—so it is fairly active. In between those periods there were subcommittees formed to go and look at specific item areas. Between 21 February 2013 and December last year there were only five meetings. This year we have had none. At one of those meetings in the middle of 2013 we were handed a draft legal stakeholders reference group charter. I have not seen the final version—I do not believe any on our committee has seen one. The opening paragraph says:

> The legal stakeholders reference group is a representative forum of the New South Wales Workers Compensation Scheme and its stakeholders established to facilitate stakeholder consultation feedback on significant issues relating to the scheme.

CHAIR: But can you request meetings?

Mr SCARCELLA: In almost all of those meetings map issues were raised about the scheme and the running of the conduct of the scheme. Some of us have kept minutes and more often than not the response was, "We will take it on board." We have not had those issues resolved and we have not had any further meetings. Now there may be good reasons for that but we don't know them.

CHAIR: Under this process with WorkCover are you entitled to request additional meetings if you think it necessary?

Mr SCARCELLA: Yes, we are and we have.

CHAIR: Are you saying those meetings dropped from 13 to 5 despite the fact that you were requesting additional meetings and they were refusing to have those meetings?

Mr SCARCELLA: I am not saying they refused. In fact, Ms May who gave evidence this morning, drummed-up the last meeting to make sure it took place in December of last year. One could conclude but for her intervention we would not have had that meeting.

CHAIR: Would you be able to take this issue on notice and give us some specific detail on this?

Mr SCARCELLA: Certainly.

CHAIR: For example, the number of meetings that you have had, showing the pattern of these stakeholder meetings dropping off in number and your efforts to try and have additional meetings, and the specific things you have endeavoured to raise to make the system operate more effectively as well as the specific response or lack of response from WorkCover.

Mr SCARCELLA: I can do that, and I can also add to that.

CHAIR: That would be very valuable to the Committee.

Mr SCARCELLA: Indeed, at the last meeting on 12 December 2013 I pleaded that the stakeholder group be consulted in relation to the drafting of guidelines in the future. I felt that I had to make that statement on the basis that that group has the experience. I have been in this jurisdiction for 38 years and I have seen the changes. Many of my colleagues there have the same sort of experience, if not more.

CHAIR: And there is the paper trail of you seeking—

Mr SCARCELLA: I don't know that minutes are recorded as such, what are recorded are agenda items. However, some of us do record notes.

CHAIR: You probably have the gist of what I am looking for.

Mr SCARCELLA: Yes.

The Hon. PETER PRIMROSE: I want to follow up on the last point you made about guidelines. The last dot point on your first page reads, "The role of WorkCover in the development of subordinate legislation must be reviewed." I have asked other witnesses—you were present when they answered—but can you

comment on what you think needs to happen? How can we improve the development of that subordinate legislation?

Mr SCARCELLA: Certainly, stakeholder consultation. I do not believe the insurers or the insurers' lawyers have got an issue with this: I think the stakeholders have an excellent opportunity to provide guidance and input into the creation of those guidelines and, more importantly, to simplify them, especially in a scenario where you have got work-capacity decisions where workers are on their own so to speak in the review process. It would be good to have something really simple. I mean lawyers have difficulty wading their way through some of those guidelines. So if they could be trimmed and brought back down to a reasonable number then maybe it would be easier to work with.

They should look at those who are at the coalface day in and day out. I am not saying just the plaintiff lawyers. The insurance lawyers and the insurers themselves have an important role to play and have the experience. In fact, in that stakeholder group, after the first few meetings which were fairly robust and emotional at the time the legislation was being put through, a certain camaraderie started to develop between those groups who people would see traditionally as opposing parties but for the good of, for the benefit of having a scheme that was expedient, affordable and fair.

The Hon. PETER PRIMROSE: It sounds like you need a bonfire of the guidelines.

Mr SCARCELLA: I used the phrase at the last meeting, "put a broom right through them and start again".

Mr McMANAMEY: I think there is a fairly strong case for a complete redrafting of the guidelines but one done with involvement of the stakeholders. A lot of the problems with WorkCover's guidelines is that they draft them in Gosford and then release them. A lot of that arose with the guidelines and the 2012 amendments. The stakeholders group was saying, "We want to help. We can give you input. We are looking at the legislation. We are dealing with people, the ALA with injured workers, the other lawyers with the insurers. We can see what the problems might be." We were rebuffed. We all saw somewhere about 20 June 2012 that there would be a problem over the pre-approval of treatment expenses because there were many circumstances where quite obviously you should not be denied treatment because you do not have pre-approval because pre-approval is not practical, it will not happen. They were all seen by the stakeholders very rapidly. WorkCover would not talk to us and we did not get a guideline that dealt with it until September 2013. That was an unnecessary 14 months of injured workers having trauma about what was found to be necessary treatment.

CHAIR: Can you give us details you have found of inconsistencies in the guidelines? Can you give us examples of the inconsistencies in existing guidelines and examples of matters that should be covered in the guidelines but are not and therefore create lack of understanding and confusion?

Mr McMANAMEY: Yes.

The Hon. SARAH MITCHELL: This flows on from what the Hon. Shaoquett Moselmane said and I want to tap into that a little more in terms of client experience. I know it is difficult to come up with concrete data but you say many clients—I think Mr McManamey used the phrase "regularly you find that it happens". Unless it is based on anecdotal evidence, do you think the negative experiences that your clients are having are 50 per cent of the time, 90 per cent of the time? How often are you finding that things are not going as they should?

Mr McMANAMEY: I think the short answer is the majority of the time. We get involved when there is a dispute, and that of course biases our experience. But once there has been a dispute, I can tell you that when it comes to trying to negotiate your way through things to try to get an outcome for people and there has been a dispute, 99 people out of 100 will say, "I just want out of the system. I have had enough." That is the ultimate. That is the work of experience. Overwhelmingly, sooner or later, "I just want out. I don't want to deal with these people any more. I don't want my life run in this particular way. I would like some dignity to do my own things." I accept that our experience is biased because it only occurs when there is a dispute.

There may be other people out there—I would speculate that the vast majority of claims are less than a week. Most people have a few days off, back at work, they do not have a problem. The problems arise when you have people with long-term injury. Of course, they are the people with the greater injuries that are more

incapacitating; those people are in more need of assistance, support and faith in the system and they are the ones who are constantly saying to me and to my colleagues, "I've had enough. Get me out of the system."

Mr SCARCELLA: Another perverse outcome and example which I encountered last week was a worker who had been representing himself and had been in communication with the insurer from mid 2013 to obtain approval for a procedure and the insurer was responding by saying, "We'll get back to you". Then he presented a list of the number of telephone calls he made. It carried over into January and February, and then in February they said, "We are no longer obliged to cover you because you are outside the period. You are barred." That is the sort of perverse outcome I have personally come across, and I have had to say to that chap, "Well, I'm sorry that has happened but that's the way it is." That sort of outcome comes from—and this is where the ALA has focused its submission; it was not the object here to talk about the legislation but some of it crosses over.

Here it comes back to any civil justice system; at its rock, its foundation, is information on the basis of education, prevention, knowing your rights. If people do not know their rights, how can they go about them? That was a clear example where there is no information out there for that person to have made an informed decision. It is easy for us to say as lawyers, "I'm sorry, you should have been aware of that when the amendments were made in June 2012 and you have the opportunity from then until 31 December 2013 to do something about the surgery and maybe go and get some legal advice." They do not know.

CHAIR: The detail will be invaluable to us.

Mr DAVID SHOEBRIDGE: Thank you for your submission and for coming here today. Can you explain to the Committee how it works in terms of medical benefits and treatment expenses when the 12 months, if you like, kicks in and how it ends and whether or not you have to have your treatment within that 12 months or approvals? There is some confusion about that?

Mr McMANAMEY: The way treatment expenses are dealt with, section 59 and 60 were the traditional sections that provided for coverage of treatment expenses so long as they were reasonably necessary to resolve the injury and that covered your treatment for life. The amendments put in place section 59A, which provides that the insurer is only liable to pay for treatment or services provided within 12 months of either the date of claim or, if there has been weekly compensation, in 12 months when you last received compensation. The first thing is that the treatment has to be provided. It is not a question of whether they have asked for it or received approval for it; you have to have had it. That was highlighted towards the end of last year when, for the vast majority of people, 31 December 2013 became the deadline, you had people who required surgery.

There was a dispute about whether or not that was reasonably necessary. One had to work one's way through the process of getting that resolved. I know of a number of cases where in early December they were coming back to the commission where arbitrators are going, "It is clearly reasonably necessary", and for some of them it always was. "I'll make the order." The answer was, "Well, that's going to be a bit pointless because doctors don't operate between Christmas and New Year." So you could get the order but you could not get the treatment. There was the regulation that turned up on 20 December which sought to deal with if you had approval before 31 December but unfortunately no-one knew the regulation was coming and everyone had gone off for Christmas by the time it appeared so it did not help.

Mr DAVID SHOEBRIDGE: Does that regulation only apply to that transitional class in December or does it apply to everybody as they are coming to the end of the 12 months?

Mr McMANAMEY: Only the transitional class in December that the regulations—if it has been approved prior to 31 December 2013 then I can have the treatment later. It is only that class.

Mr DAVID SHOEBRIDGE: I will give you an example. Let us say you are an older worker. You were injured when you were 63 or 64. You received a couple of years of benefits and they cease when you get to the Federal pension age. Is that right?

Mr McMANAMEY: Yes.

Mr DAVID SHOEBRIDGE: So your weekly benefits cease at age 67?

Mr McMANAMEY: Sixty-seven for most people.

Mr DAVID SHOEBRIDGE: That means you then have a further 12 months of entitlements to medical benefits under the scheme. But let us say that 12 months begins on 1 January. On 1 December it becomes apparent that the worker needs some serious back surgery and they then ask for the serious back surgery and the orthopaedic surgeon says, "Yes, you absolutely need it. It's related to your work. But I can't fit you in until February." What happens in that situation?

Mr McMANAMEY: Workers have to pay for it themselves. It is not covered because it is not delivered within the 12 months. There are many examples. I know this Committee has heard evidence earlier from Hearing Care and the ongoing requirement for hearing aids, that that disappears.

CHAIR: You are sure of that example, are you? That if the appointment is made within the time that it does not occur until after?

Mr McMANAMEY: Yes, section 59A is quite clear—the treatment or service must be provided within the 12-month period. There is no ambiguity about it. It is not just retirees; one group of people who are disadvantaged are people who have actually gone back to work. Say I go back to work and work away for 12 months, two years or three years and I have not got weekly compensation. Say I have had a knee injury that will inevitably lead to a knee replacement. I go back to work and in five years time I need a knee replacement, I have not had weekly compensation for five years so they do not pay for my knee replacement. There are a whole range of those where there is no doubt where significant medical treatment is a direct consequence of the injury but it takes time.

It is now truncated down to this 12-month window from when weekly compensation stops and under the scheme now weekly compensation stops for almost everybody at 2½ years. It looks like you can go further but the realities are that unless you are totally incapacitated it stops at 2½ years for almost everybody. That gets you 3½ years of treatment at best. For many, many major surgical procedures the doctors say, "You don't have it now. You have to wait until the appropriate time. You are too young to have a knee replacement. You are too young to have a hip replacement. You don't just launch into back surgery. We wait and see". What this is doing is that people are now having to make decisions as to whether they now have major surgery not on the basis of their medical advice but on the basis of whether it is going to get paid.

Mr DAVID SHOEBRIDGE: I have one further question. You said you had a meeting—and you were at that meeting, Mr Scarcella, were you not—on 13 December with WorkCover?

Mr SCARCELLA: Yes.

Mr DAVID SHOEBRIDGE: And it was a week later that they passed the regulation that extended for three months the period within which treatment could be provided?

Mr SCARCELLA: Yes.

Mr DAVID SHOEBRIDGE: Did they raise that with you at the meeting on 13 December?

Mr SCARCELLA: No.

Mr DAVID SHOEBRIDGE: Did you raise with them at that meeting in December the concerns you had been having about the way section 59A was operating?

Mr SCARCELLA: I cannot recall specifically whether we did at that meeting or not. I know it was raised earlier but at that meeting I am not quite sure.

Mr DAVID SHOEBRIDGE: So it had been a live issue between the group and WorkCover?

Mr SCARCELLA: It had been a live issue and we had been discussing it and the impending deadline coming and what was going to happen from the point of view of those workers who were not going to realise until the last minute that they were going to need surgery.

Mr DAVID SHOEBRIDGE: So then you meet with WorkCover with this consultative group on 13 December and they do not even give you a slight heads up a week later that they are going to pass a really important regulation that will have a widespread impact on your clients?

Mr SCARCELLA: I do not know whether they knew they were going to do it at that point or not or whether they later decided.

Mr DAVID SHOEBRIDGE: Perhaps I am being generous.

Mr McMANAMEY: I can say this: that the issue, whilst not directly raised with WorkCover, had certainly been raised with the WorkCover independent review officer as early as June and that arose from a course of action that was being taken by BlueScope to avoid having to pay for hearing aids. Basically they had figured out if you could put off buying replacement hearing aids beyond 31 December you would not have to pay for them and they went through a procedure of denying claims on all sorts of spurious grounds.

Mr DAVID SHOEBRIDGE: Just to keep the balls in the air until December?

Mr McMANAMEY: Clearly to keep the balls in the air and it only got resolved when one firm who acted for a lot of these people filed I think about 17 applications with the commission on the one day and the commission came to the party and allocated an arbitrator to say that the arbitrator will hear them next week. BlueScope paid every single one of them before that week was up. It was quite clear that there was behaviour out there that was not in the spirit of the Act, if I can put it that way, and they recognised a way of avoiding paying.

The Hon. PETER PRIMROSE: Whether this matter was raised or not, you may find someone who took some minutes at that meeting. Maybe you could take that on notice and advise the Committee?

Mr SCARCELLA: Yes, we will trawl through our notes.

CHAIR: Unfortunate we have come to the end of our time. Thank you very much for being with us. We look forward to receiving the information that you are to supply to us. You will receive appropriate questions on notice and I am sure it will help us in our deliberations. Once again thank you for taking the trouble to be with us today.

Mr SCARCELLA: Thank you for the opportunity.

(The witnesses withdrew)

IVAN SIMIC, Partner, Taylor and Scott Lawyers, and

MICHAEL PERKS, Injured worker, sworn and examined, and

RITA MALLIA, President, Construction, Forestry, Mining and Energy Union, Construction and General Division (NSW Branch),

SHERRI HAYWARD, Industrial Officer, Construction, Forestry, Mining and Energy Union, Construction and General Division (NSW Branch), and

ATILIO VILLEGAS, Private Citizen, affirmed and examined:

CHAIR: I welcome our next witnesses. Thank you for attending to assist us in our deliberations. We also have Atilio Villegas as an additional witness. I understand that your father was killed as a result of a work injury?

Mr VILLEGAS: Yes. I am the son of a worker who was killed in a workplace accident two years ago.

CHAIR: You would like to make a statement or you are happy to answers questions from members of the Committee?

Mr VILLEGAS: Yes.

CHAIR: We are quite happy with that. Would anyone like to make a short opening statement?

Ms MALLIA: Firstly, I thank the Committee for allowing us to come and address you and to expand on our submissions. I understand you have our submissions before you. We have some considerable concerns around the operation of the workers compensation scheme and the impact it has had on our members. You will see outlined in our submission that we traverse areas involving medical expenses, the issue around pre-approval, work capacity decisions, the review, the work capacity review service, breaches of WorkCover's own obligations, and the claims agents' guidelines. We believe that the system operates in such a way as to adversely impact on most injured workers but particularly the very seriously injured, or those who are older in time, older in years, and find it very difficult to find alternative employment.

In addition we understand that a number of issues have been raised around WorkCover and its role in occupational health and safety or work health and safety, and we want to raise just a number of concerns that we have around WorkCover's role in work, health and safety, including WorkCover's failing to issue improvement notices when called upon to investigate multiple contraventions—WorkCover inspectors that appear to be more concerned now with union right of entry rather than safety issues; the isolating of health and safety representatives and employee representatives from investigations, even when those people themselves have been the source of the safety complaints; WorkCover inspectors failing to notify health and safety representatives that an investigation is underway or what is happening with a safety investigation that they have reported, and the WorkCover hotline apparently being used to triage notifications around safety incidences where people are advising employers that people can return to work in an unsafe situation without investigation even being undertaken. That concerns us.

Our safety officer is away this week but he is compiling specific examples in respect of those issues. We would like to have the opportunity to table those further examples. There are some examples in our submission that go to the work health and safety regime, but had just to highlight a couple of examples: Clearly, WorkCover announced a blitz following the safety incidences on Barangaroo. We do not think that it was good enough. It was a bit of a knee-jerk reaction to, probably, some bad publicity. We think there needs to be a much more robust enforcement of the work health and safety regime in New South Wales. What we have seen over the last few years is WorkCover vacating that role and identifying or rebadging themselves as an advisory to the employers rather than really at the end of the day enforcing what we think are very strict obligations under the Work Health and Safety Act.

For example, in the Barangaroo incidences—the two fires—on both occasions very clear issues were raised around the evacuation procedures. It took nearly four hours to evacuate the site completely on the first occasion, which is four hours to determine whether or not every worker had been removed from that site. We

believe that was far too lengthy a delay. That highlighted an issue with the evacuation policy on that site, yet when WorkCover arrived—and they were not there before one and a half hours after the incident on both occasions—did not issue any notices in respect of even those really straightforward procedural things that could have been addressed by the builder at that time, even having to wait for the further investigations as to the cause of the fires themselves. On the second occasion, 20 workers were left on the site while the second fire was going on. There are some very clear and quite major safety breaches identified from our perspective.

I am even told by our safety officer who attended that fire personnel had to seek the assistance of our own safety officer and the chair of the occupational health and safety committee because they could not find or get in contact with a person from the builder, who is the person who is meant to be in charge of the incident control on the day. There were some issues. The health and safety representatives on that project in the safety committee requested WorkCover issues notices around how these things can be improved and looked out, and WorkCover has thus far refused to do so. That is a very clear departure from what we would have expected from WorkCover in previous times when there was a much clearer mandate to ensure that the provisions of the Act are complied with. We also have another major concern. It seems—I have not looked at the statistics—that the number of prosecutions has reduced.

We have two examples that I wish to raise. Mr Atilio Villegas is with us who, as you have heard, will speak. His father was killed two years ago yesterday on a Leighton's project in the central business district [CBD] of Sydney in Hay Street. There is a plaque there in memory of Atilio Villegas Senior. I am advised by Mr Villegas that WorkCover has indicated they will not be prosecuting either the officers of the employer or the builder in respect of that fatality. I find that extraordinary. It has not been properly explained why a prosecution is not going to take place. I understand the employer itself or the legal entity did wind up before, I suppose, WorkCover could prosecute. However, there is provision under the legislation in respect of officers. I know that that company has reinvented itself as another legal entity with virtually the same principles, as I understand it, so why WorkCover is not prosecuting the employer for what I think really is a clear breach of the Work Health and Safety Act on that project is really quite astounding.

The second one I would like to raise is that on 13 April we will have the one-year anniversary of the young Canadian backpacker who died on another construction site in Camperdown. These are sites that are very close to here. I met with the family last year. They visited Australia and met with representatives of WorkCover in about July last year. They were given really quite a firm guarantee that not only would a decision be made on a prosecution but that it would you very likely that a prosecution in that case would proceed by Christmas. To this day, and we are now looking towards the end of March, we have yet to get any idea from WorkCover when they intend to prosecute. Again, it was a fairly straightforward fatality. A young worker was on a project for a couple of days. A steel beam came down. The investigation has been finalised. We do not understand the delay. I am in constant contact with the family and they are very distressed that at this time there is not someone held to account for the death of their 23-year-old son.

They are the issues around WorkCover that we want to address. We hope that the inquiry exposes these many difficulties and injustices that both occur in the work health and safety and the workers compensation space. We also hope that we can, through this process, see the re-establishment of a more robust safety regime and a fairer and more just workers compensation system. I have with me a number of our colleagues to take questions from you and speak to the detail of the legislation.

CHAIR: Thank you very much for that, Ms Mallia. Shortly I will invite Mr Villegas to make a short statement to us. Thank you for being here, Mr Villegas, for something that must be very distressing to you. We understand the emotions you must be feeling recounting these things. We will come to that very shortly. In regard to those matters that you have mentioned in that statement and here, these are all matters that you have raised with WorkCover?

Ms MALLIA: Through the course of our involvement on-site on behalf of our members, yes.

CHAIR: You are either still waiting for a response or else you got a response that was not satisfactory.

Ms MALLIA: Yes.

CHAIR: Can you take on notice—I know you will not be prepared today—to give us the specific detail on these matters?

Ms MALLIA: Yes.

CHAIR: When they were raised, how they were raised, what response you received and when you received the response so that we have the detail of each of these issues.

Ms MALLIA: I understand that.

CHAIR: You understand what I mean by that process?

Ms MALLIA: Yes.

CHAIR: It is so that we can have the detail. It is no good going into individual cases now, but could you get the information to us so that we can go through it? Give us the detail so we can follow each one through to see what has been happening in these situations.

Ms MALLIA: Yes. We will do that.

CHAIR: Mr Villegas, I see you have a statement. I now invite you to make this statement.

Mr VILLEGAS: Good afternoon. Thank you. Yesterday marks exactly two years since my father was killed in a preventable workplace accident. You might think that after two years after such a traumatic life-changing event we could start moving forward with our lives, but you could not be further from the truth. All we knew on the day of my dad's accident is that he fell from scaffolding, and this is still all we know today. The process has been painfully slow and failed to deliver what my family has hoped for all of this time—answers and justice. During the first week of our two-year ongoing ordeal, the company owners of Perform, [Director One] and [Director Two] showed up with some of the Leightons executives to express their condolences. Along with their words of sympathy, [Director Two] and [Director One] made my family a promise, "We won't run away from this." This would not be the first promise to be broken in all of this. A couple of days after this I was called by WorkCover. An investigator called to tell me he was in charge of the investigation. He gave me his details and we established contact. I then met him at a union dinner where he reassured myself and my mother that he would find out what happened and do the best he could to find answers and possibly justice for my dad and my family.

During the next couple of months contact with [a WorkCover inspector] was good, although he could not answer questions about the accident. He kept saying that if he answered my questions, this could jeopardise pending prosecution or the coronial inquest. He promised that when the investigation was finished he would tell my family exactly what happened and answer all our questions. I sincerely thanked him for this. I called him every month to see where the investigation was at, but after about a year contact was a bit hard to establish: calls would go unanswered and we would wait days for replies to messages. From some of the information I gathered the investigation was nearing an end.

Many months later I started to get very anxious, especially when through word of mouth we found out that Perform was going into administration. We were told by Perform's workers that [Perform's directors] were going split and take their appropriate shares. At least one week later we got a call from WorkCover, not from [a WorkCover inspector] but from a lady, advising me about this but we already knew the situation. When I asked her how this affected the investigation, she said it would slow everything down. I asked the obvious question: Is this company trying to avoid prosecution? Her answer was: Companies go into administration for various reasons all the time, not necessarily that, but it will be investigated. During this time I constantly called the Coroner's office after every mention in regard to my father's case. The reply was always the same: We are waiting on the report from Work Cover.

On 21 February 2014 I had had enough of waiting and left a message for [the WorkCover inspector] to ask when they would know who to prosecute. After four days I received a message that he had asked WorkCover's legal office to give me a call. Promptly enough I was called by [a WorkCover representative] who is part of the safety and return to work division of WorkCover. She told me the investigation had found Leighton had no fault in the accident and even though the builder was Leighton it was Perform that had broken safety rules. She could not tell me exactly what happened because she had not been informed, but she could tell me no further action was going to be taken due to the company no longer existing.

I could not believe what I heard. Quite simply I said, "So they are going to get away with it?" She replied it was an unfortunate situation but nothing could be done about it. I am sorry but I must disagree. It is a disgusting and extremely shameful decision highlighting WorkCover's incapacity to act efficiently and appropriately when tying up prosecutions. One month ago [a WorkCover representative] offered to set up a meeting to discuss the decision and why WorkCover cannot do anything about it and we are still waiting for the meeting. It was originally arranged for 10 April, but one of her party cancelled so we had to reschedule.

I still cannot comprehend this decision and do not know what will arise from the meeting. [A WorkCover representative] led me to believe this decision is final. I asked her if I could bring a family friend to the meeting. The request was not well received. She pointed out that this kind of meeting was only for the family and that WorkCover does not automatically give families this opportunity. I got the impression it was a privilege. She showed great interest in who I wanted to bring to the meeting, and when I finally told her it might be a union official she said it would be an entirely different meeting and she would have to discuss this with WorkCover. I had assumed [a WorkCover inspector] would be at the meeting, because of his promise earlier in the investigation. [A WorkCover representative] said no to his presence also as it was not that kind of meeting.

CHAIR: I notice you have mentioned names. I put it to the Committee that we have a non-publication order for your evidence, which means those names cannot be repeated by anybody here. I suggest if you have more names in your statement you do mention them. We will ask you to tender the document when you have finished reading it.

Mr SCOT MacDONALD: Should we move in camera now?

Mr DAVID SHOEBRIDGE: No, I am happy to second the Chair's suggestion. It is important we get the detail and make a non-publication order.

CHAIR: It is appropriate to do that. We have made an order which means that no person's name can be referred to or repeated because of a non-publication order for the protection of everybody, but we will have the document. That is in respect also of anything that has been said so far.

Mr VILLEGAS: That is fine. Today there is some new information. I have been messaging an investigator of the case to remind him of the promise he made to my family. This morning he replied that he can no longer have that promised meeting. I asked why, as he had said he would, and he replied that management of WorkCover decides who will have the meeting. I tried to discuss this with him, saying I understand we are going to have a meeting about the legal issues involved and why there will be no prosecution, but the meeting I wanted with the investigator was to tell us what happened. It was planned originally, but the investigator has said he will not be able to have the meeting. He said there was a misunderstanding, but those are the words I remember.

CHAIR: Mr Villegas, would you prefer to table your document now, keeping in mind we need to get information on the record and we are restricted for time?

Mr VILLEGAS: No, I am almost finished. In conclusion, my father has been let down and my family has been let down. From what I gather, WorkCover has identified what happened and the guilty parties, and been aware of the company's actions to avoid prosecution, yet WorkCover has done nothing about it. It is essentially that WorkCover has watched it happen with folded arms. It is not good enough. The decision does not improve the safety of workers, nor does it create an awareness of safety. It just promotes the opportunity for companies to get away with these things, while workers and families are left to suffer. WorkCover heightened my expectations, broke promises and falsely reassured us while managing to make our pain and suffering even worse.

CHAIR: Thank you.

The Hon. SARAH MITCHELL: Mr Perks, would you like to tell your story?

Mr PERKS: I am happy to answer questions.

Mr SIMIC: Mr Perks' situation is totally different. His involves the treatment of WorkCover's insurer agent of medical treatment.

The Hon. PETER PRIMROSE: Your submission to the Dust Diseases Board review supports the recommendation of the Asbestos Diseases Foundation of Australia for the introduction of a new provisional liability process to assist people affected by dust diseases. Do you think that would be a good thing? How do you think it would improve the situation?

Ms MALLIA: I sit on the Workers Compensation Dust Diseases Board and see the suffering of workers affected by dust diseases. It takes a toll on their bodies, and any process to improve the capacity for benefits to be delivered, either by way of payments or medical expenses—and that is the biggest role of the board—should be encouraged. That is why we took the position to support that initiative.

The Hon. SHAOQUETT MOSELMANE: I note in your submission that you support recommendations made by the Asbestos Diseases Foundation of Australia. However, you do not refer to a specific recommendation of the foundation that there be an independent chair of the board because of the conflict between that and the role of the WorkCover Authority.

Ms MALLIA: I think an independent chair would be a good idea. WorkCover has many hats. It has to manage the investments, it has to ensure that the obligations of the legislation are met. That makes it very difficult then to be a chair of a board dealing with decisions around liability or exposure. There is some merit in what the Asbestos Diseases Foundation are suggesting as a way forward.

Mr SCOT MacDONALD: My question is about the issue with the company Phoenix. I am not sure who wants to answer it. I want to be clear in my mind that the employer in your father's case has gone into administration or receivership and in your father's claim he is not ranked as a creditor, or there is no—

Ms MALLIA: It is not about his civil rights. That is covered by insurance. My understanding is that what has occurred here is that the employer has wound up the company, which means that WorkCover can now not prosecute that employer for a breach of the Work Health and Safety Act because the legal entity no longer exists. As I said, there are provisions within the Act to prosecute the officers of a company so that in itself should not necessarily deal definitively with the issue.

Mr SCOT MacDONALD: The contractor in this situation is Leighton?

Ms MALLIA: That is right.

Mr SCOT MacDONALD: The company that your father worked for was a contractor?

Ms MALLIA: That is correct.

Mr SCOT MacDONALD: He was working on site?

Ms MALLIA: My understanding is that Leighton was the builder and they had their safety officers and site foreman on the project. To tell you the truth, I find it extraordinary that WorkCover would conclude that Leighton does not have some responsibility, but that is one issue. I find that hard to understand because they are the person conducting a business or undertaking—the company with the control of the site.

Mr SCOT MacDONALD: Do we not have chain of responsibility. For instance, in the transport industry if a truck rolls over Coles is part of the solution or the problem.

Ms MALLIA: That is why I find this decision really incomprehensible. I understand that if one legal entity disappears that might be a slight impediment, but the fact here is that the head contractor bears no responsibility. Normally with these sorts of prosecutions it is the principal contractor and the subcontractor, and it may be other subcontractors and officers and individuals who are proceeded against in respect of prosecution. I find that aspect of WorkCover's decision incomprehensible.

Mr SCOT MacDONALD: There are two separate things here. There is the Phoenix issue. It sounds like someone else has popped up in that space. I will finish with the chain of responsibility for the head contractor position. Do we need a recommendation to strengthen the chain of responsibility? We are here to make representations so that it is a fair system. The chain of responsibility is not there at the moment.

Ms MALLIA: I think the chain of responsibility is there and we do not have the details of why WorkCover has concluded what they have concluded, but if this case shows that there is a weakness in the legislation then we would be very supportive of a recommendation to tighten up that chain of command. We do not want to see principal contractors who control what happens on the site at the end of day to escape some liability and shift it to a subcontractor that has also breached the Act but may have mitigating circumstances because of the manner in which the whole site is managed. I think this issue has to be investigated and a recommendation like that might be very welcome.

Mr SCOT MacDONALD: We hear you. I return to the issue of the company Phoenix. You are saying in the case of a company winding up public officers presumably can still be chased. Someone has moved in and is performing that work and it sounds like a similar entity. Is that what I heard or misheard?

Ms MALLIA: The site is finished. This company has wound up. The principals or at least one of the principals of the company has opened a new legal entity with almost exactly the same name doing the same sort of work, which is formwork, and they have had work on other major projects—

Mr SCOT MacDONALD: They continue to work today?

Ms MALLIA: —and they continue to operate today. I guess as a separate legal entity but the officers bear some responsibility.

Mr SCOT MacDONALD: Does this Committee need to look at strengthening those provisions so that the public officer is reachable, if you like, especially if they are continuing to operate somewhere somehow?

Ms MALLIA: We would be supportive of that, absolutely.

Mr DAVID SHOEBRIDGE: Mr Villegas, I would have thought that one of the things you would want out of WorkCover in this situation would be for them to sit down with you and explain to you and your family, as best as they know it, what happened to your dad and why it was that he died? Has that ever happened?

Mr VILLEGAS: No. Like I said before, the investigator in charge offered that initially. He said he would sit down with our family and would tell us exactly what happened, his findings; all the questions that we had, he would answer. The only meeting we have been offered now is to answer why the decision to not prosecute has taken place. In this meeting its only family; they do not want us to bring anyone else apart from myself and my mum basically.

Mr DAVID SHOEBRIDGE: When were you advised about this agreement to have this very limited meeting for these limited purposes?

Mr VILLEGAS: I have the email. I have got the email when this happened. I think it was about 25 February.

CHAIR: Did you raise it with the union?

Ms MALLIA: Informally, yes.

Mr VILLEGAS: Informally, yes.

CHAIR: Did you raise the issue? Did you follow it through?

Ms MALLIA: Not with WorkCover because we have only just got this information in this last week and we knew we were coming here.

Mr DAVID SHOEBRIDGE: Could I ask any of you, what is the time limit within which these prosecutions need to be made?

Mr SIMIC: Two years.

Mr DAVID SHOEBRIDGE: So sitting here today we know that Mr Villegas' prosecution is now—

Mr SIMIC: This prosecution will not happen. If I may just add, in my experience as a solicitor I have often seen WorkCover wait until literally the last minute before putting on a prosecution, so the civil proceedings may be well in advance. I know one particular case where the prosecution was literally put on the last day when it involved a demolition worker who was crushed.

The Hon. SHAOQUETT MOSELMANE: Are you saying you can only prosecute when you get a report?

Mr SIMIC: I am saying that there is considerable delay before prosecution is commenced, even in the most serious cases where a fatality is involved.

Ms MALLIA: From our point of view there are times such as for a coronial inquiry—it can be conflicts that are facts, then a time frame might pass. I think in this case and the one that I mentioned about the young worker who died, there would be sufficient evidence from our perspective on the cause of the fatality and the breaches to have commenced a proceedings by now.

Mr VILLEGAS: Could I just add one more thing. I would constantly call up to find out where the investigation was. It looked like the investigation was done for months before—I am sitting here before you now, but it was done months before, and it was being reviewed by supervisors for a long time.

Mr DAVID SHOEBRIDGE: Mr Chair, just for the record, I have just realised I should indicate that for more than a decade I worked for Taylor and Scott Lawyers. They were happy days.

The Hon. SARAH MITCHELL: Unlike now.

Mr SCOT MacDONALD: They are probably pleased to see you in Parliament, David.

Mr DAVID SHOEBRIDGE: That is right. I think they are very grateful.

CHAIR: You were highly valued there.

Mr SIMIC: He certainly was.

Mr DAVID SHOEBRIDGE: I would not say that. More highly valued in retrospect, I am sure. Mr Simic, can I ask you about medical benefits and the impact that the change in the law concerning medical benefits is having on your clients and injured workers?

Mr SIMIC: It is having a massive effect on workers across the State. It is one reason why Mr Perks is here today, if I can use his case as one little example. Mr Perks lives on the South Coast. Last Friday we heard substantial evidence which would suggest that WorkCover is either out of control or out of touch, but to give you an example of Mr Perk's situation, he is a steel fixer, which is very heavy manual work. He is a young man and he has done a serious injury to his back. He is in the hands of a very experienced specialist, Dr Peter Moloney, in Wollongong. Dr Moloney requested of the insurer Alliance that he needs to do a discography on his back. In this case the injury happened in 2011. He has now been on weekly compensation for some time. He has had substantial medical treatment already. The specialist surgeon says, "I need to do a further discography." The agent's insurers replied, "We do not think that is reasonable treatment." Where does he go? He comes to my office and I see him on 7 March.

At the moment we have reams of paper telling us what should happen in the system. We have got statutory guidelines coming out of our ears, but I dare you to try to find them. They are hidden away on WorkCover's website. One of the principal statutory guidelines supposedly is when you are dealing with an injured worker the agent's insurer should always first go to the treating doctor to get their opinion. My instant reaction was that I would ring up Dr Maloney's rooms and find out what was happening. Maybe the doctor was busy and could not answer the report, but no such thing. I would like to tender as evidence this very short email from the practice manager from Dr Maloney's rooms, basically saying they have never received anything from the insurer. I will read out one paragraph:

> Our office has not received any correspondence from Allianz requesting further information re Mr Perks. I find it incredible to believe that the case manager would send correspondence to a doctor requesting further information re their claimant and say that

> the doctor has not answered the request so treatment is denied without calling the doctor's office to find out where the request was up to and when they could expect an answer …
>
> This would be [the] practice of anyone who was serious about helping their claimant.

For the record, I have never met [the practice manager]. My only ever communication with her was when I rang up and found out she was Dr Maloney's practice manager. I would like to tender that email. The point of it is, as I said, he is on weekly compensation. He wants to move forward. He has had to give up opportunities to try to get his life started again in some different area but his doctor cannot get approval for a discography to check out a potential major problem in his spine. What was the response and the reply of the agent insurer? Tomorrow Mr Perks has to travel to Bowral to see another medico-legal specialist. It will probably cost not less than $1,000—probably the cost of the scan required by Dr Maloney. This is the kind of absurd system we are talking about. You might say, "Why don't you do something Mr Simic?" Basically, I am doing this work pro bono. There is no commission anywhere I can go to file an application. I have to wait to see whether I get approval from WIRO before I can do anything. This is the system the Parliament has given us.

Mr DAVID SHOEBRIDGE: Mr Perks, what did you think when you got a response from the insurance clerk that your treating surgeon's proposal was not acceptable? How did it affect you?

Mr PERKS: I was just shocked at first and, as Ivan said, I contacted him straightaway. What it says is "the notice of decision to decline liability for workers compensation claim". When I read that I was just like, "What do you mean you are denying it?" I mean, this has been ongoing and since August this year it will be three years since I had the fall. I did not know what to do. I contacted Ivan and we got this underway. We were in Ivan's office and he rang my case manager, asked if he had requested more information from Dr Maloney. She swore blue that she had. Ivan requested the letter that she had sent and she said she could not release it to him because that is between them and the doctor. So Ivan said, "Can you send it to Michael since it is about Michael?" He was told, "Oh, no, I can't do that. If you want a copy of the letter you have to get in contact with the practitioner." That is what Ivan did and that is where [the practice manager] comes into it.

Mr SIMIC: That is how I spoke to [the practice manager] who quite kindly informed me they had never heard of anything from Allianz requesting further information.

Mr DAVID SHOEBRIDGE: This kind of bureaucracy where you cannot get an answer in this paper trail that ends up in coal stacks, is this a regular experience?

Mr SIMIC: It is commonplace. It is not unusual for me to have somebody who is 64 years old and who barely speaks English coming into my office and asking me to explain his brand new injury management plan. Can I just say one other thing? I think there has been at least some evidence that maybe WorkCover is a bit out of touch, if not out of control. It is not just at the base level; I think it is at the very top level. There is a farce that is about to be played out in Canberra on Tuesday 1 April, totally written by WorkCover. It is going to be before the High Court of Australia in a case called Goudappel and I am not sure whether the Committee is aware of it. It is a case about a building worker who has a bad knee. He was injured in 2010 when already the insurance premium had been paid for whatever risk was involved. The question is: Is he entitled to get a lousy $5,000 or $6,000?

New South Wales for almost two years has had almost 20,000 workers and their families swinging out on a rope not knowing what the law is. I think that is shambolic. It is incredible that it has been allowed to reach this stage. I think the Parliament needs to ask itself, "How did we get to this point?" I do not know whether any of you are familiar with the Goudappel case but basically WorkCover and its insurer agent have assembled one of the finest legal teams in Australia to argue on Tuesday that they have a Henry VIII clause. I am not sure how familiar the Committee is with that clause. If the Committee has any doubt about the Henry VIII clause, I will quote a statement made by the Lord Chief Justice of England and Wales in July 2010. This trend is also happening in the United Kingdom. It states:

> But my deepest concern at the moment is directed at the increased use of what are described as Henry VIII clauses.

WorkCover and its insurer agent, being led by some of the finest legal minds like David Jackson, QC—and this is no criticism of the lawyers who are just doing their jobs—are saying, "We have got a Henry VIII clause." This is what the Lord Chief Justice of England and Wales states:

> Henry VIII was a dangerous tyrant. The Reformation Parliament made him Supreme Head of the Church, the representative of the Almighty on earth—which is as we know hardly an encouragement to modesty and humility: that Parliament altered the

> succession at his will: it changed the religion backwards and forwards at his will depending on which religious book he had read most recently: they were a malleable manageable lot. And there is a public belief that the Statute of Proclamations of 1539 was the ultimate in Parliamentary supineness. The Act itself was repealed within less than 10 years, immediately on his death in 1547. But it had allowed the King's proclamations to have the same force as Acts of Parliament. That is a Henry VIII clause. It is perhaps worth emphasising that this famous Act, and this supine Reformation Parliament refused to, or was not persuaded to, agree that proclamations alone could prejudice any inheritance, office, liberty, goods, chattels or life.

That is what WorkCover is taking down to Canberra next Tuesday to argue. As much as I wish that the worker wins, the smart money around town is that WorkCover will be right with the legal advice it has received from David Jackson, QC. I think serious questions have to be asked because, as I said, for two years we have been swinging on a rope trying to advise workers. As a lawyer—maybe it is my failing as a lawyer—I have not been able to give them any answers. I do not know what the law is. The Premier said on 20 June 2012 on ABC radio and in the papers, "This law is not retrospective". On Tuesday we will hear WorkCover and its insurer agent, with some of the finest legal minds, tell you it is. That is the status of the law in New South Wales. It is absolutely shambolic.

The Hon. SARAH MITCHELL: Earlier Ms Mallia spoke about the role of WorkCover in work health and safety. I am not sure whether you heard the Law Society or read its submission that it would like to see the investigation and enforcement of work, health and safety obligations removed and go to a separate body. What is your view on such a recommendation from the Committee?

Ms MALLIA: I have not read the submission but we would probably be supportive of having a stand-alone or an inspectorate whose job is to enforce the work health and safety laws in every manner that is available. I think what has occurred with WorkCover kind of wearing different hats, wanting to be training and giving advice on other things, has meant that it has taken its eye off the ball in enforcement. You get the sorts of things that we are seeing here with Mr Villegas' family and others. There was a time when WorkCover did have very skilled and highly trained inspectors who put together the briefs and in appropriate cases prosecuted breaches of the Act. I think we need to go back to that. If that is some way of achieving that then we would be supportive.

The Hon. SARAH MITCHELL: In regard to members in regional areas, have any WorkCover issues been raised with you in recent times? I know that you are from the South Coast.

Ms MALLIA: I know in terms of the inspectorate, my understanding is that a large number of inspectors were lost out of the Wollongong area, for example. So we have some concerns around the resources that WorkCover has put into enforcing the law and ensuring that the safety legislation is complied with. I will get Ivan to deal with the issues around workers comp.

Mr SIMIC: I actually spend a lot of my time in the regions, in the Hunter, around Port Macquarie and down the South Coast. Given the state of the law, most local practitioners have not got a clue and they do not even want to go near a workers compensation case. It actually getting to the stage that doctors do not want to deal with you if you have a workers compensation matter because they do not want to have to deal with WorkCover, as per Mr Perks' example. What often happens is that they just fall between the cracks and you do not hear from them. That is what happens out in the regions: nobody knows.

The Hon. SARAH MITCHELL: Maybe they will get some social security.

Mr SIMIC: They literally fall between the cracks. If they can get social security, great. But you will find that most lawyers will not even go anywhere near it.

Ms HAYWARD: In addition to that, it is also the definition of suitable employment. Mostly when we are doing work capacity decisions, the fact that a person's location is not to be taken into account when determining whether suitable employment can be found, that really affects people in regional areas. We have a gentleman in Orange who was told that he could go for a job that was 2½ to three hours drive. He cannot drive that far. But that does not matter. It is his fault that he lives in Orange, therefore, he needs to move to where the jobs are.

The Hon. SARAH MITCHELL: We have had that raised by other witnesses.

The Hon. SHAOQUETT MOSELMANE: Mr Villegas have you now been left in limbo? What is the next step? Do you know what needs to be done?

Mr VILLEGAS: My family and I, we are just now waiting for the Coroner to see if there is going to be an inquest. That is one thing we are waiting for. The meeting that WorkCover wants to have with us to discuss why it is not going to prosecute anyone is another thing we are looking forward to.

The Hon. SHAOQUETT MOSELMANE: Earlier you said that a report was reviewed?

Mr VILLEGAS: Yes.

The Hon. SHAOQUETT MOSELMANE: You thought the report was reviewed?

Mr VILLEGAS: Yes, because I contacted her. Like I said, I contacted her many times to find out whereabouts they were and there times it was months ago that it was done but the investigator needed his supervisor to review it, which was always part of the process. I remember them telling me that. That was when it happened. Once he finished his investigation the supervisor would review, but that did not happen for a long time.

The Hon. SHAOQUETT MOSELMANE: Before that review was there any indication in what the report would contain?

Mr VILLEGAS: No, nothing. We were not shared anything.

CHAIR: We are out of time, but I will allow two quick questions and very brief responses.

Mr SCOT MacDONALD: I apologise for harping on the phoenix company chain of responsibility, but did Leightons demonstrate occupational health and safety responsibilities? In other words, yes you have a subcontractor doing formwork, whatever work subbies do, when they come on to the site they do an induction and all those sorts of things. Is Leyton involved in demonstrating the responsibilities of safe work?

Ms MALLIA: They have the control of the site. Those systems should have been in place. I cannot tell you if they were on that site or not, but it was a major site in the city: one would assume that there was some process in place. Certainly, there were safety personnel on the project.

Mr SCOT MacDONALD: Wearing a Leightons hat?

Ms MALLIA: Wearing a Leightons hat. That is why I find it extraordinary that someone can be killed on a site and the principal contractor with the ultimate control of the project is found not to have any responsibility. They may not have total responsibility, but the fact that WorkCover has concluded they have none just astounds me.

Mr SCOT MacDONALD: Would you say that again?

Ms MALLIA: As I understand from Mr Villegas' advice that he has received from WorkCover, the fact that Leightons bears no responsibility for the fatality I find incomprehensible. The way building sites operate and, as you have rightly identified, there is a chain of people who have responsibility, under the Act the buck stops ultimately with the principal contractor. They should have ensured that the subcontractor was doing the right thing and clearly they were not and have failed in that obligation. That is why I find it quite extraordinary that they are not being considered as a party worthy of prosecution.

Mr DAVID SHOEBRIDGE: You may take this question on notice. You said the evacuation of Barangaroo took four hours?

Ms MALLIA: Yes.

Mr DAVID SHOEBRIDGE: What would be the normal time to evacuate a building site? What risks would such a delayed evacuation mean for people working on the site?

Ms MALLIA: I will take that question on notice because that is quite a particular site and I will take the advice of our safety officer and personnel who are on the site. We will be able to provide an answer in respect of that.

Mr DAVID SHOEBRIDGE: Also if there is any history on the site. The question will be provided in writing. Is there any history on the site about evacuation?

Ms MALLIA: Indeed.

Mr DAVID SHOEBRIDGE: I understood that at some point the evacuation point on the Barangaroo site actually was on the site, is that right?

Ms MALLIA: I can speak directly to that, but we will give you more details. At the beginning of the project that issue did come up and there was a lot of activity around developing an evacuation process.

CHAIR: Did you have some documents or papers you wanted to tender?

Ms HAYWARD: Yes. We have some information from our Forestry and Furnishing Division. But I have also put together a more up-to-date spreadsheet of the Merit Review Service that I attached to our submissions to show that the blowout is now up to six months for a decision to be made.

CHAIR: We are over time. Thank you all for attending today. Your input certainly is very important to us and will help us in our deliberations. The Committee would appreciate responses to questions taken on notice within 21 days from the time you receive its letter.

Ms MALLIA: You will get those questions to us in writing?

CHAIR: Yes, we will frame them and forward them to you.

Ms MALLIA: Thank you for having us.

(The witnesses withdrew)

(Short adjournment)

DAVID HENRY, New South Wales Branch Work Health and Safety Officer, Australian Manufacturing Workers Union, affirmed and examined:

CHAIR: I welcome the next witness, Mr David Henry, from the Australian Manufacturing Workers Union. Mr Henry, I thank you for taking the trouble to be here to give evidence today.

Mr HENRY: I am here today to represent the Australian Manufacturing Workers Union. I am employed as the New South Wales Work Health and Safety Officer.

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

Mr HENRY: I would, thank you. First of all, I would like to thank the Committee for the opportunity to be here today for this important review into the functions of WorkCover and the Dust Diseases Board. This review has provided an important opportunity for all of us to reflect on the functions and performance of these organisations. For the period I have been doing this job, I think this is the first opportunity I have ever had to participate in a forum looking at this particular issue. We all know that legislation is only as potent as it is adhered to and policed. We believe that the opportunity to reflect on these functions as set out in the respective Acts provides an opportunity to improve on our health and safety performance and the way we manage and care for injured workers and all workers in the state of New South Wales.

I note in the record of the first day's hearing the important undertaking given by WorkCover to recommence publication of the WorkCover New South Wales statistical bulletin. The good work of this review has already begun. I am encouraged to read that the intention is to duplicate the information previously provided. I hope that we can be a little more adventurous and maybe consider some new areas as well, such as durable return to work set by industry. We have tried in our submission to critique what we observe to be occurring in manufacturing workplaces across the State as far as our interaction with WorkCover and the Dust Diseases Board goes—both the good and the bad.

We are hopeful that this Committee sees fit to adopt our recommendations, which we have limited to practical changes we believe, if implemented, would lead to greater compliance; so that the union can get on with its important work of representing working people's health and safety and workers compensation issues whilst at the same time setting WorkCover a clear path and putting it in a strong position to respond to these issues in a meaningful way. The Australian Manufacturing Workers Union upholds the good people at WorkCover and hopes that the deliberations of the Committee will act as an enabler for WorkCover to carry out its functions in a manner that is both transparent and supported by its social partners and society in general.

The Hon. PETER PRIMROSE: Mr Henry, concerns have been expressed in your submission regarding the advice and information provided to duty holders in the community. How do you think WorkCover could start to address the imbalance in the advice and information they are providing?

Mr HENRY: What we have noted is that all of the advice generated by WorkCover is targeting persons conducting a business or undertaking [PCBUs]. I am not here today to say that that good work should not be happening but there are other people in the workplace who also need key information. One of the important groups that I think need this information are our health and safety representatives, the elected representatives in workplaces. The Committee would be aware that the introduction of health and safety representatives was new when we adopted the Work Health and Safety Act and commenced on 1 January 2012. Yet if you go to the WorkCover website, you see that there is scarce information for health and safety representatives to be able to do the important work that they are doing.

Over the course of the last couple of years I have had meetings with WorkCover to talk about this issue and have put forward a request that we have a specific webpage for health and safety representative to go to. We should have a specific hotline number that they can go to. If any of you have had the misfortune of having to ring the 131050 number then you would realise that you have to be quite patient and wait for 10 or 15 minutes before you finally get to speak to a live human being, who may or may not be able to answer your questions. I believe that if we were to have a dedicated hotline number with people focused on health and safety representatives and their issues then health and safety representatives would of course be more effective in workplaces in the important work they are doing.

Mr SCOT MacDONALD: I would like to follow on from the line of questioning that Mr Shoebridge started about concerns about a movement of sectors over to the Commonwealth, leaving, if I understand your submission correctly, your sector with a cohort of more serious injuries. Have you had any thoughts about the consequences of that and what we could do? I guess we cannot stop that transition, if you like, of some of the sector over to the Commonwealth sphere, but what might the future be for you under that? I would imagine that would mean significantly higher premiums and have all sorts of consequences.

Mr HENRY: Are you referring to the potential move into the Comcare system?

Mr SCOT MacDONALD: Yes, which the employees that you represent generally would not be able to be part of. Correct me if I am wrong.

Mr HENRY: My understanding is that the Federal Government has announced that businesses will not have to be in competition with a current or former Federal agency anymore so the sky is the limit; anyone can move across into Comcare now. The only limitation, as I understand it, from the Commonwealth announcement is that you have to operate in more than one State. It is fair to say there is a fair portion of manufacturing that is going to meet the criteria.

Mr SCOT MacDONALD: A lot of your sector could end up under the Commonwealth system.

Mr HENRY: There certainly is the potential. We already have a portion of our members who are represented by Comcare. Thales is one of our big employers; they are already self-insured under the Commonwealth system. John Holland is one of our big employers, Pacific National and so on and so forth. We are already used to the Comcare regime.

Mr SCOT MacDONALD: That is not necessarily bad. Is that what you are saying?

Mr HENRY: Certainly in 2006-07 unions were quite vocal about our opposition of companies moving into Comcare. Part of that opposition was Comcare did not have inspectors. What they had at that point in time was investigators, which meant that they only investigated a matter once it had occurred. There was no proactive inspectorate. It led to quite poor health and safety outcomes and a reliance on the organisations within Comcare to be doing the right thing, which of course was not always happening.

As a result of the harmonised legislation the Commonwealth has been forced and dragged into a regime of having an inspectorate that is now proactive. In fairness to Comcare, do they do a better or worse job than WorkCover? I am not in a position to answer that. Has their performance improved since the harmonised legislation? I think it is fair to say it has.

Mr SCOT MacDONALD: What does that mean for those employees left in New South Wales who might be at the higher end of risk and injury?

Mr HENRY: The clear potential—and I think we are all aware of this in 2006 as well—is that premiums could rise. As larger organisations—

Mr SCOT MacDONALD: Who might have some capacity?

Mr HENRY: Who have got some capacity to manage their health and safety or should have better capacity to manage their health and safety move into the Commonwealth that leaves smaller companies left simply in New South Wales with less capacity, a smaller insurance pool and the potential for—

Mr SCOT MacDONALD: That also has possible consequences for WorkCover and the agents left here.

Mr HENRY: Our greatest fear from a union perspective is what it does to the workers left behind. Last time the scheme got in trouble it was workers who got the kick in the backside.

Mr SCOT MacDONALD: By what means?

Mr HENRY: As far as having their benefits stripped from them and as far as going through these capacity decisions and being taken off benefits altogether. The impacts of the 2012 changes in my industry have

been devastating. I just cannot put it any simpler than that. They have been devastating. As you correctly pointed out, in our paper we gave the statistics about seriously injured workers. Manufacturing represents about 16 per cent of all seriously injured workers. We represent 20 per cent of every cent WorkCover is paying out for injured workers because of the severity of those injuries. But it is a very tiny amount of those people that are going over this 30 per cent artificial threshold. That means those workers suffering permanent impairment injuries eventually get lopped off the system, but they have injuries that never go away. They have a permanent impairment. They have permanently been injured. The effects have just been absolutely catastrophic.

At the same time, the promises about return to work and support have never eventuated, never materialised. I had the opportunity to be listening to the last group of witnesses from the CFMEU as they explained the difficulties in dealing with the case managers for the scheme agents and the barriers and obstacles being put in the way. I remember many years ago a colleague saying that if you are a football player and you get injured out on the paddock you are in with the best treatment straightaway. Why are we not doing the same with injured workers? Why are we putting barriers in the way to getting them treated with the best possible care we can get them and then straight into rehabilitation? The average period between a worker being injured and a rehabilitation provider being engaged in New South Wales is three months. They are doing nothing for three months.

Mr SCOT MacDONALD: What would be reasonable: two months or something like that?

Mr HENRY: I do not believe that we should be proposing a time frame. It should be straightaway. It should be almost automated. The system should be fine-tuned to automate it. You get injured, you get the best care as fast as we can give it to you and straight after the treatment we are then thinking about how we are going to rehabilitate you back into the workplace.

The Hon. SHAOQUETT MOSELMANE: I have a couple of questions. You have just said that 16 per cent of all seriously injured workers are from your union?

Mr HENRY: From my industry—manufacturing.

The Hon. SHAOQUETT MOSELMANE: Your industry?

Mr HENRY: Yes.

The Hon. SHAOQUETT MOSELMANE: And yet, on page 6 of your submission, you say that in the past 12 months WorkCover has not shared any information with you. Can you tell us, how do you communicate and why is there lack of communication with WorkCover?

Mr HENRY: There are probably a couple of different things. It is important to go back to what was in place when we were communicating. There were two things in place previously: Firstly, WorkCover at the highest level—with its chief executive officer—had a regular meeting with the unions so that we could raise issues and hopefully work with WorkCover towards finding solutions to problems. The second thing that was in place—something for which we have advocated in our submission—was that the advisory council was involved. There was a tripartite body in New South Wales where high level but also some lower level information was being provided and, based on that information, the advisory council was able to give some direction to what the regulator was doing and what activities it was carrying out.

We believe that the regulator benefited from that. The minute you are engaging with industry, the minute you are talking with industry about what the issues are and how they can be fixed, you better enable yourself to be able to address those issues. Those things are gone. There are no formal meetings with WorkCover. As you are probably aware, the advisory council was swept away with the reforms in June 2012. So there are now no mechanisms to deal with these issues. That creates other problems. It means one does not have that point of contact and that is really important. I had the benefit of sitting on the advisory council and there would be issues that arose outside of those meetings but there was a point of contact and I could pick up the phone, have a talk to them and say, "We have an issue here, what do you reckon we can do?" One had a point of contact and could move on but that has disappeared as well.

The Hon. SHAOQUETT MOSELMANE: That brings me to my second question regarding a recommendation by the Law Society of New South Wales which basically says that the investigation

enforcement of work health and safety obligations should be removed from WorkCover and vested in a separate, independent body. What is your view on that?

Mr HENRY: In principle, I think we would be supportive of that, that there needs to be a separation of roles. Whether it is called WorkCover or not, I do not think anyone is worried about what we name it. There should be a fearless independence to do an activity and that, I think, is the concern that many of us have, that that fearless independence is missing and that there is compromise and priorities are set. We all know about priorities—what is a priority this month is not necessarily a priority next month—they have a habit of changing. In principle, I think we would support the argument.

The Hon. SHAOQUETT MOSELMANE: Thank you.

Mr DAVID SHOEBRIDGE: Mr Henry, you have said that the changes have been devastating for some workers that you have seen going through this new system. Can you give a couple of examples that will explain to the Committee the kind of human stories behind those statements?

Mr HENRY: There is one happening right now that I became aware of this week. We had a gentleman who was aged 64 years, a member of our union. He suffered a workplace injury four days before he turned 65. Our member was paid workers compensation. The insurer has just realised that it should not have paid Workers' Compensation beyond the age of 65 and is now seeking reimbursement. So, despite the worker still being injured, under this scheme the worker was only entitled to four days workers compensation, because he turned 65. Ironically, if he was already 65 he would have been entitled to 12 months payment. So he would have had a year's wages if he was past 65 but because he rolled on to 65, four days after the date of injury, he only gets four days payment.

Mr DAVID SHOEBRIDGE: The way the law operates is, if one is older than 65 and one is injured one gets one year's pay?

Mr HENRY: One year's pay.

Mr DAVID SHOEBRIDGE: But if one is under 65, it cuts out?

Mr HENRY: It cuts out at 65.

Mr DAVID SHOEBRIDGE: So he was in this unfortunate sort of half-life?

Mr HENRY: Yes, he was four days before and it just makes matters, as you can imagine, so much worse when the insurer then says, "By the way, we want our money back". It is adding insult to injury.

Mr DAVID SHOEBRIDGE: Surely one thing you might suggest to the Committee from that is that we recommend that there be provisions that mean that those people caught between those two regimes get the 12 months. If one is injured with four days to go before one turns 65, one gets the four days plus another 361 days, otherwise there is an arbitrary unfairness that imposes itself with workers who are in their sixty-fourth year.

Mr HENRY: I am not going to disagree; I agree 100 per cent with you.

Mr DAVID SHOEBRIDGE: Did anyone from the union raise this issue with WorkCover?

Mr HENRY: As I said, this issue has just come to light in the past week. So at the present time I am fortunate enough to have a workers compensation officer who works with me and he is managing this case and helping this worker through the process.

The Hon. SHAOQUETT MOSELMANE: Has this happened before? Do you know of another example?

Mr HENRY: Of this particular type of issue? Personally I am not aware of it happening before but if you have a look at 40,000 workers injured in New South Wales a year, your averages are going to tell you it is likely.

Mr DAVID SHOEBRIDGE: In other words, be careful working when you are aged 64.

Mr HENRY: That is right. The other problem is, in an era where we are trying to encourage people to work beyond the nominal retirement age, it is a massive disincentive. There is this big disincentive saying: You know what? We are going to treat you differently if you suffer a workplace injury because you work beyond the retirement age. At the other end of the spectrum we are saying, "We would like you to work beyond the retirement age."

Mr DAVID SHOEBRIDGE: Are there any other examples that might highlight some of the difficulties about the cessation of benefits, maybe for some younger workers and what impact it has on their lives?

Mr HENRY: Irrespective of age, the cessation of benefits is just devastating. I am sure everyone on the Committee can imagine life with no income. These workers do not go out to deliberately injure themselves. You would need to have a serious psychiatric problem to go out and injury yourself, one would suggest. They are victims of their circumstances. Overall, they feel quite helpless in the system. A lot of this is done by letters. Quite often these scheme agents will make a phone call before the letter arrives and I have to say it is counterproductive. I know that the claims managers do not do it thinking they are going to frighten the worker, but that is the effect it has. They think they are doing a good thing because they think they will give the person a heads-up so they do not get a shock when they open the letter saying, "By the way, we are cutting your benefits". But that is not how the injured worker takes it. The injured worker gets this hit on the phone.

Mr DAVID SHOEBRIDGE: And then does not have any real information to deal with it.

Mr HENRY: Has got no information and then they get a letter saying, "We are cutting you off and by the way, there is no appeal mechanism. This is just it. This is the way it sits".

Mr DAVID SHOEBRIDGE: In regard to the union's experience, now that legal representation has been removed for all the work capacity assessments, what are you seeing in relation to the number of complaints coming to the union or the circumstances in which complaints are coming to the union and how they are being dealt with?

Mr HENRY: The first thing we cannot do is provide referrals for legal support. We are trying to manage it the best we can in-house, but remembering as a union we are an organisation that has been established to principally provide representation for working people. We are not lawyers, we are not specifically trained in all the aspects, so what we try to do to help our members is certainly step them through any review processes that might be available to them; we will certainly help them fill in paperwork, template letters, all that sort of information. But there is really a limitation on what amount of help we can do, and it is devastating. A lot of workers just walk away—they will step through the processes that we can do but the legislation is the legislation.

The Hon. SARAH MITCHELL: I want to ask you about recommendation 5 that you made in your submission, which talks about appointing an independent Inspector General of WorkCover. I thought that was quite an interesting idea. Can you elaborate on that a little more for the Committee and perhaps tell us why you have made that recommendation?

Mr HENRY: Certainly. I think in my opening statement I mentioned that this is a first for me. I have been in this particular role solely focusing on health and safety since 2003 and it was a first for me when we turn around and put the spotlight on and say, "Hey, we have got all these functions; are they actually being done and being done right?" This is a process that should probably, to some extent, be ongoing. I respect that the Committee under legislation has got a responsibility to review the functions, and that is done periodically. The reason that we have recommended this sort of Inspector General is that we think that there would be some benefit from a somewhat ongoing review so that these issues are picked up straightaway. A lot of the things that we have been talking about today stem from legislation that was implemented in 2012. We are two years down the road, and there are issues, of course, that would have predated that.

I think the other benefit is that as well as having that kind of role, when this Committee does meet to do its reviews I think it is an important voice that this Committee could be hearing from. It is one thing to have WorkCover come in and tell you what a fantastic job they are doing, but—it may be because I have been doing this too long—I do not see everything as rosy as maybe the picture they want to paint. Let us be honest: We

cannot seriously address issues and make things better unless we actually have an honest appraisal of how things are going. There is no point just giving the rose-coloured glasses view of the world because that is not going to lead to positive change. That is why we have suggested that permanent sort of role would be beneficial for working people, for injured workers or health and safety reps or people who have got issues. It also offers an avenue of independence when they are maybe not happy with the response that they got from WorkCover.

The Hon. SARAH MITCHELL: We have heard other witnesses today talk about people losing faith in the system, and if there was some sort of independent oversight role in excess of this Committee as well, being an offer such as the one you have suggested, perhaps that might go some way to addressing those sorts of concerns.

Mr HENRY: Exactly right. I have had an opportunity to speak with Kim Garling from WIRO. I note sometimes in talking with him some of his frustrations that he has sort of got this capacity to give recommendations but cannot take it any further; so that creates a tension in his role. I do not think I just talk from a perspective of a trade union; I think there is broader support to say we do need some capacity. I am aware that down in Victoria they have the WorkSafe Ombudsman who is permanently sitting there looking over the activities of WorkSafe in Victoria. It is not a new concept but I think it is certainly one that it would be worth giving it a try.

Mr DAVID SHOEBRIDGE: Can I just ask a question arising from that? What about beefing up the WIRO then? Rather than creating a new entity you give some increasing powers to WIRO, some statutory independence to WIRO and some increasing resources to WIRO?

Mr HENRY: That may work as far as the workers compensation, but you are also talking about someone with oversight of the work health and safety and that is sort of part of the activity as well. So you would effectively be recreating the boundaries within which WIRO would be operating.

Mr DAVID SHOEBRIDGE: But I think earlier you said one other thing that might be useful would be separating the prosecutorial and putting those Chinese walls at least in the organisation, which might go some way to putting some more independence in the organisation as well.

Mr HENRY: If WIRO was beefed up to have that role that would be fine. All I am suggesting is that it would probably be limited within the scope—

Mr DAVID SHOEBRIDGE: Of the compensation scheme.

Mr HENRY: Yes, that is right. Then you would need to address how we are going to sit there and manage the other side.

The Hon. SARAH MITCHELL: You used the Victorian example where it is within their Ombudsman's office, I imagine. Coincidentally I am also on the committee that oversights the Ombudsman and obviously in New South Wales we do have various deputy ombudsmen with specific roles. Do you think maybe there is scope to look at what they are doing in Victoria and replicate that here as well as another option?

Mr HENRY: Yes. I am a true believer in having a look at all options. We have put it out there as a suggestion; we know it is left-field in this State, but we are not about limiting it. It is really about achieving the goal rather than worrying about how we get there. So we would be open to looking at anything.

The Hon. PETER PRIMROSE: One question you can take on notice: In your opening statement you said how good it was that the statistical bulletin was coming back—you mentioned the annual report. WorkCover indicated to us that they would be happy to receive suggestions as to what additional information should be in those reports. Can I get you to take on notice and then come back to us with the sort of information you believe should be in those reports, unless you have something you want to say?

Mr HENRY: I suppose there are a few areas that I would love to see in there, but I would be happy to come back on notice and properly consult with others.

The Hon. PETER PRIMROSE: Thank you. You will get advice from the secretariat on that. My other questions both relate to the issue of the Asbestos Diseases Foundation of Australia [ADFA]. I note that in

your submission you support ADFA and its submission. What do you understand about the function and effect of the current cap for medical expenses and hospital treatment?

Mr HENRY: Currently the sections that provide a cap, and it comes out of the principal Act, the Workers Compensation Act 1987, in my experience—and for the purpose of the Committee, just to make you aware, I am a board member on the Dust Diseases Board—it is an administrative process and creates an administrative delay. It is fair to say that the Dust Diseases Board has never refused to extend a cap as all medical requests are supported by an Australian registered physician's report justifying the requirement for hospital treatment or whatever the treatment may be. Further, it serves no purpose as all costs for treatment have already passed through a statutory test, and that test is being reasonably practicable for the treatment required having regard to the reasonable necessity of the treatment. It has already gone through a gate to protect the scheme. As I said, I started in 2003 and this legislation was in 1987 so I do not understand the historical links but its purpose is lost on us now.

Mr DAVID SHOEBRIDGE: Are you saying that there is discretion to extend the payment beyond the cap and that is routinely exercised when it is found that their treatment is reasonable and necessary?

Mr HENRY: That is correct. So for reasonable and necessary medical treatment there is $50,000 cap. I have got some statistics here. To give you some idea—

The Hon. PETER PRIMROSE: Does that mean that there is no purpose in having a cap?

Mr HENRY: Exactly right. It comes to the board and we approve it. My point is, we have never knocked one back, and I do not foresee that ever changing. We have approved exceeding the cap on 208 occasions—so not a couple.

Mr DAVID SHOEBRIDGE: How often have you refused?

Mr HENRY: Never, and we never would. As human beings can you imagine turning around to someone with mesothelioma and saying, "You will not be getting chemotherapy"? That is what I was saying: there is a gate, and the gate is that the medical treatment must be recommended by an Australian registered medical physician. So they are passing that gate. We are getting the advice from their physician that they need this treatment but they are hitting the $50,000 cap. There are a couple of reasons behind it—namely, as you can imagine, medical expenses in 1987 to 2014 are slightly different; and the life expectancy of mesothelioma suffers in New South Wales certainly in the time that I have been sitting on the board—which has been about a decade—has increased by 50 per cent. When I joined the board it was eight months; it is now 12 months. Four months may not seem like a lot but that is a 50 per cent increase in life expectancy, and that is a lot to those people. Anything that we can do to assist them and give them quality of life we need to be doing.

The Hon. PETER PRIMROSE: Could you comment on the proposal for provisional liability in malignant claims?

Mr HENRY: Based on the experience of the board, if we were to adopt a provisional liability regime for principally mesothelioma cases I think it is fair to say it would have near no affect at all on the scheme; the only thing it would do would be to deliver security to the families of these workers—security that the treatment and expenses are going to be funded, security that there is going to be a source of income. Just in 2012-13, the last financial year, the medical authority issued 150 certificates for applicants who were deemed disabled with mesothelioma. Of those 150 the board made an award to 142 applicants, seven matters were carried across to the next financial year and in only one matter was an award not made, because the board deemed that the claimant was not a worker. If that scenario was to be repeated, we would be talking about one person a year getting some benefits and payments for a period of up to about two months—because the average period for us to process and make awards for these people is two months.

Mr DAVID SHOEBRIDGE: And that would be someone who has mesothelioma?

Mr HENRY: Yes. My understanding from the ADFA was the proposal was for malignant disease, yes. So for almost no cost you create significant change and benefit for these workers and their families.

Mr DAVID SHOEBRIDGE: Indeed, the cost is that someone who has a malignant, life-ending disease may get two months of benefits that they were not entitled to under the scheme, which is erring on the side of decency?

Mr HENRY: Yes, remembering when we do make an award we back pay everything as well. Everyone who is getting the provisional liability are not getting something they would not have got.

The Hon. SHAOQUETT MOSELMANE: In your submission you make five recommendations. Could you please cite an example in relation to recommendation three which states:

> WorkCover should establish a system to fine and prosecute scheme agents or licenced insurers where they are found to have, without reasonable excuse, withheld weekly benefits or authority for medical treatments …

Mr HENRY: The issue we have is that the legislation provides for a penalty. In New South Wales under the Workers Compensation Act we have provisional liability. What is regularly not happening is that the weekly benefits and approval for treatment is not being done within the statutory time of seven days—the Act specifies seven days. So we have a regular, almost systematic, non-compliance with legislation. We have an Act that provides for penalty, which has never been applied. It is not about sitting there having a bash on the insurers but quite clearly if we want to kerb this behaviour—this State Parliament has decided that workers are entitled to provisional liability because we recognise that there are tangible benefits to it but if the people we have engaged to do that process are not doing it then we need to change that behaviour. Whatever other mechanisms WorkCover may have put in place or whatever levers they may have with these scheme agents they are not working, but the one thing that is there is a penalty regime that has never been used. Like anything else, a couple of good examples and maybe we will kerb that poor behaviour and get the scheme that we are supposed to have.

The Hon. SHAOQUETT MOSELMANE: Reference was made to issues with WorkCover inspectors in some of the submissions. Can you give us your views on the operations of WorkCover inspectors and what your experience has been with them?

Mr HENRY: Overall I think it is fair to say that the majority of my experiences with WorkCover inspectors have been positive. I have a lot of time for WorkCover inspectors. Being a WorkCover inspector is not just about choosing a career; it is a vocation. These are people who have decided that they want to create positive change in the workplace and the way they are going to do it is by joining WorkCover. So I have got a lot of time for WorkCover inspectors. There is no question that they have got a tough job. They do not always get everything right, but none of us are infallible—that is true. One of the difficulties I do see with the inspectors is that there does need to be some independence. If you are an inspector you need to be able to exercise your training and knowledge to the best of your ability. That should not be curtailed or influenced by outside sources. I think that is important because quite often when I am speaking with inspectors and saying, "Why are you not doing this?" They say, "Because we have been told not to."

CHAIR: They are being told not to by whom?

Mr HENRY: Generally from the management within WorkCover, so there is a directional decision within the organisation and an instruction to inspectors.

CHAIR: Can you give the Committee an example without mentioning names or a specific incident?

Mr HENRY: A generalised example is around the issuing of notices. There has been what we would consider over a period of time a reduction in notices. I have spoken to inspectors and said, "Once upon a time you would have issued an improvement notice." I am not talking about penalty notices, just an improvement notice. The inspectors will say, "No. Now we are being told that we have to fill in an activity notice"—which has no standing—"and that's the way we've got to do it." The problem for me as a worker representative is if they issued the improvement notice and the person receiving the improvement notice decided not to follow it, then they are subject to a penalty. Whereas if they are provided with an advisory notice, there is no penalty for not following the advice. It is about creating, for me as a worker representative, some sense of accountability with the person who has issued the notice.

CHAIR: Are you saying that there are two different types of notices that can be served?

Mr HENRY: Yes.

CHAIR: There is an activity notice—

Mr HENRY: Advisory notice.

CHAIR: An advisory notice. And they have been discouraged from using advisory notices?

Mr HENRY: No.

CHAIR: Or is it the other way round?

Mr HENRY: The other way round. An advisory notice does not have any enforcement or penalty if you do not adhere to it. An improvement notice does.

CHAIR: With this change that you have heard about, has there appeared to be a lessening of standards? Has it still got the same results or has there been a deterioration with the greater use of the notices?

Mr HENRY: I would probably suggest in my experience that advisory notices do not hold the same regard as an improvement notice. The other issue which inspectors have—and I have had a number of discussions with different inspectors at different times—is the training they receive. We have high expectations. I know it can be easy for people to criticise WorkCover but their job becomes so much more difficult when they have not received the training they should have received. From time to time I will be speaking to a WorkCover inspector away from the issue that they might be on site because I want to ask them for an opinion. Often the response is, "I just don't know, Dave." WorkCover either does not have a formal position or we have not been trained, so there are issues around that.

CHAIR: But overall you have a good opinion of the WorkCover inspectors.

Mr HENRY: I think the inspectors are terrific people.

CHAIR: We are out of time but if you have a quick question.

Mr DAVID SHOEBRIDGE: I just wanted to quickly show Mr Henry the document we were given by the business chamber and ask what he understands of penalty notices and prohibition notices. When I got it, it did not have the pen markings on it. You will see there is a significant reduction in penalty notices and in what are called prohibition notices.

Mr HENRY: Yes.

Mr DAVID SHOEBRIDGE: Is a prohibition notice the same as an improvement order?

Mr HENRY: No.

Mr DAVID SHOEBRIDGE: Can you explain what it is?

Mr HENRY: My understanding of a prohibition notice is if an inspector went into a workplace and saw a dangerous activity or a dangerous piece of plant they would issue a prohibition notice—

Mr DAVID SHOEBRIDGE: Stop until it is fixed.

Mr HENRY: Exactly right. A penalty notice is, an on-the-spot fine is probably the easiest to sum it up.

Mr DAVID SHOEBRIDGE: If we wanted to ask WorkCover for some sensible information to show this historically, we would want to have prosecutions, penalty notices, prohibition notices, improvement notices and this last one, advisory notices. Is there anything else we should ask for?

Mr HENRY: I err on the side of caution.

Mr DAVID SHOEBRIDGE: If the answer for the moment is no but you would like to reserve, could you let us know that particular thing very quickly because if we want to ask WorkCover about this I think we would have to ask them fairly soon?

Mr HENRY: Yes.

Mr DAVID SHOEBRIDGE: But for the moment it is those five categories. If we had a historical review of that, that might be useful for us.

Mr HENRY: It would be, yes. Maybe something for the statistical bulletin as well.

CHAIR: Thank you for being with us this afternoon. We appreciate your input into our inquiry. There may be some questions on notice, and if there are any we would appreciate it if you could get us a response within 21 days of receiving such a question.

Mr HENRY: Absolutely.

CHAIR: That will also help us. Once again, thank you.

(The witness withdrew)

ANITA LESLEY ANDERSON, General Manager, Workers Compensation (Dust Diseases) Board, and

PETER DUNPHY, Acting General Manager, Workers Compensation (Dust Diseases) Board and Chair of Heads of Asbestos Coordination Authorities Working Group**,** sworn and examined:

Mr DAVID SHOEBRIDGE: I must have misheard. I thought Ms Anderson said she was the general manager and then Mr Dunphy said he was the acting general manager.

Mr DUNPHY: That is correct, yes.

Ms ANDERSON: If I may explain, my substantive position is the general manager. I have been the general manager for the past six years. In the past six months I have taken up a secondment opportunity elsewhere in the department and during that time Mr Dunphy has been acting in the position. So we are both here today.

Mr DUNPHY: We are sort of a tag team. I finish up today and Ms Anderson takes my place.

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

Ms ANDERSON: A very short opening statement, in the interests of timeliness. The Dust Diseases Board has been caring for workers who have an occupational dust disease and their families for more than 85 years now. Dust diseases have a long latency period. It can be 20, 30, 40 or more years before the period of time when the person was exposed to dust and when they develop the disease. As a result of that, most of the applicants we see have already passed retirement age. The other thing about dust diseases are that they are lifelong diseases; once you get a dust disease you have got it for the remainder of your life. Sadly, about half of the dust disease workers we see have mesothelioma and they will die, as Mr Henry said, in 12 and sometimes 18 months.

CHAIR: They are also known as asbestos diseases.

Ms ANDERSON: Asbestos-related diseases is the broader group, of which mesothelioma is a cancer of the lining of the lung. There are two cancers we compensate for: mesothelioma and asbestos-induced carcinoma of the lung, which is within the lung. Those two things have given the scheme some unique characteristics for a workers compensation scheme. There is no age limit on applying for compensation to the Workers Compensation (Dust Diseases) Board, and there is no age limit on receiving compensation. Compensation benefits are paid for the life of a worker, as are medical expenses. When the worker does pass away that compensation entitlement moves from the worker to the dependents of the worker and it also applies for the lifetime of those workers, subject to certain conditions. In the Dust Diseases Board there is no bar on also pursuing common law damages. The two systems in New South Wales—the workers compensation scheme for the DDB and the common law scheme by the DDT, the tribunal—act in concert.

In addition to compensation, we provide a number of services to our community. One of the major things we do is the health care services that we provide once someone has an award. Many of our workers, as you can imagine, are elderly. They are very ill. While there is no requirement that they use our services, they can go out and purchase their own services, they do not have to get pre-approval in the dust diseases board for medical expenses. For many of them, we take that responsibility on for them and we will organise health care services for them. We have contracts in place for nursing care, domestic assistance, lawn mowing services, oxygen services, and we will organise those services for them and the invoices are sent directly to us so the person does not have to worry about it.

Similarly, once we have established a relationship with a worker we organise for their treating doctors and service providers to send their invoices directly to us so that the worker does not have to pay it. It just comes to us and we take care of it for them to take that burden away from them. We offer free medical examinations to both past and present workers who have been exposed to hazardous dust in the workplace and want to know whether or not they have a dust disease. That is a free service. We offer it throughout New South Wales. They can come to our Sydney office where we have a medical centre. We have a respiratory mobile screening service that we like to refer to as the lung bus. It goes around New South Wales to country towns and people can go to the lung bus and be examined.

If neither of those two things is suitable, we will arrange for tests to be done by local doctors and service providers and have those tests sent into the Dust Disease Board where we can then analyse the results and let the person know. I spoke about the lung bus. The lung bus' primary concern is to visit workplaces across New South Wales and provide respiratory screening services for workers who are working in hazardous occupations across New South Wales. It spends a lot of time out in the country providing services to country employees and country workers. The Dust Diseases Board has a couple of other functions that are of value. First, it has the ability to fund research and it funds research into the diagnosis, treatment and prevention of dust diseases. Second, it provides funding to support groups, those people who provide support to people with dust diseases.

We have just under 4,000 people receiving benefits from the board at the moment. About 1,100 of those are workers and the rest are the dependents of either live workers or workers who have passed away. Our staff are very committed to providing the best services that we can for these people. There is a great deal of empathy for people who come to the Dust Disease Board and in our most recent client satisfaction survey—we conduct one every two years and one was done late 2013—we were very pleased to see that we got an overall satisfaction rating of 93 per cent amongst our clients. I might stop there and let you ask questions.

CHAIR: Thank you very much. You get mesothelioma from asbestos dust, is that correct?

Ms ANDERSON: Yes.

CHAIR: Once you have it, it is a death sentence, is that right?

Ms ANDERSON: Yes.

CHAIR: The number of cases will not peak until round about 2020 or thereabouts, is that right?

Ms ANDERSON: Yes. I have some notes that I will refer to, if you do not mind. Dust disease rates are the commonly cited rates for the general community and the Australian community so that includes both occupational and non-occupational exposures, and you hear talk about the third wave and home renovators. At the Dust Diseases Board over the last 10 years the total number of dusts diseases awards that we have made has actually fallen. They have fallen by 22 per cent but the group that has not fallen are the cancers, the mesotheliomas and the lung cancers; they are very static. We have not seen an increase. The numbers have been very static over the last 10 years.

Other types of asbestos-related diseases have fallen by about 38 per cent and that is because they tend to be dose-related diseases. The heavier the dose of the asbestos the more likely you are going to get one of those diseases. With mesothelioma there is no known threshold below which an exposure is not considered to be causative of mesothelioma so the smallest, slightest exposure can cause mesothelioma.

CHAIR: So mesothelioma is the cancer?

Ms ANDERSON: That is the cancer. There are other forms of respiratory cancers as well.

CHAIR: But this comes from asbestos dust?

Ms ANDERSON: Yes.

CHAIR: What proportion of buildings and homes are estimated to have, as best you can ascertain, asbestos?

Ms ANDERSON: I might ask Mr Dunphy to answer this one because he has been doing some work through the Heads of Asbestos Coordination Authorities in this area.

CHAIR: So there could well be tens of thousands of people out there who could be exposed without knowing it. Is there any awareness campaign?

Ms ANDERSON: Yes.

CHAIR: And are you in fact doing any of this to warn people what to watch out for?

Ms ANDERSON: I will ask Mr Dunphy to answer that one because the Dust Diseases Board of course is a compensation authority but the Government as a whole has a broader role in asbestos awareness.

CHAIR: Does your board have a role in this?

Ms ANDERSON: The Dust Diseases Board is a signee of the statewide asbestos plan and we are members of the Heads of Asbestos Coordination Authorities, which is a collection of agencies which coordinate responses to these things and raise awareness. I will ask Mr Dunphy to give you a bit more detail.

Mr DAVID SHOEBRIDGE: You fund some education too, do you not?

Ms ANDERSON: Yes.

Mr DAVID SHOEBRIDGE: That is your specific role, to fund some education?

Ms ANDERSON: We do some funding and education work and we do some education work ourselves. One of the major things we fund is National Asbestos Awareness Week and we are the major funder of the Asbestos Diseases Foundation of Australia in the activities they do. We work with them during that week and we also do a number of other awareness activities during that week. It is the major focus of activity.

CHAIR: Could you give us a snapshot of where we are at as far as asbestos in the community?

Mr DUNPHY: In the community in terms of housing, we know that prior to 1987 many houses had asbestos, whether it is in the wet areas, typically fibro-cement in the bathroom behind tiles and in the kitchen areas. Up until the 1960s about one in three houses were clad with asbestos cement material so it was quite a significant number up until that period. We still think that most houses built before 1987, even if they are brick houses or timber houses, will have asbestos materials most likely in their bathrooms, in their wet areas, under eaves and in different parts of the house.

What we have been doing as part of the Heads of Asbestos Coordination Authorities is working on a community campaign to raise awareness, particularly amongst home renovators. Some of the things we have been doing as part of that campaign, in conjunction with the asbestos education committee, has been to try and raise awareness particularly among homeowners of asbestos in their houses. There are a couple of things. We have had the Renovation Roulette campaign, which is about trying to raise awareness about the risks of asbestos in homes. We have had Betty the Asbestos House, which is a purpose-built mobile home that goes around the community. We have been to 18 different councils that have sponsored visits to different areas. We have been to about 17 different Bunnings stores with Betty and we have been working with Bunnings to ensure that they have the right equipment and information to provide to home renovators when they go in their stores.

That has been quite a successful campaign in terms of raising awareness in the local community. We have also funded the establishment of the asbestosawareness.com.au website, which is really targeted at home renovators to ensure that they have up-to-date information about what they need to do about managing asbestos on their properties. Again that has had over 85,000 hits on it since we launched Betty. Every time Betty is out in the field—

CHAIR: Over what period have you received the 85,000—

Mr DUNPHY: That is over the last two years. There has been quite a significant increase in terms of traffic to the site. If you actually go on to Google and type in "asbestos" you will find that site is the second highest non-commercial site on the internet. After Wikipedia it is the first site people go to.

CHAIR: Really?

Mr DUNPHY: Yes, it has been quite well visited and quite well appreciated within the community.

CHAIR: You are saying up to one-third of homes built during a particular period contain asbestos?

Mr DUNPHY: Up until the 1960s the Australia Bureau of Statistics [ABS] used to count what a house was constructed of and up until the 1960s in the ABS statistics in New South Wales about 30 per cent of houses were actually constructed, on the outside, of asbestos so they were fibro houses.

CHAIR: So any person who is undertaking renovations could be exposed to asbestos?

Mr DUNPHY: Yes, any house that was built before 1987 could be, yes.

CHAIR: A third of them.

Mr DUNPHY: Sorry, the one-third relates to just the ones that were clad. What I am saying is that any house built before 1987 is most likely to have asbestos in it in some form.

Mr DAVID SHOEBRIDGE: If not in the cladding then in the waterproofing in the bathroom or under the eaves?

Mr DUNPHY: That is right, yes. So the majority would have, yes.

CHAIR: So what is being done about warning people that they could be living in a home that probably has asbestos and how they can best defend themselves against breathing in asbestos dust?

Mr DUNPHY: The key messages that we have been doing through the website, through Betty and through the renovation roulette campaign, has been to provide information about the types of materials you will find in your homes. There are demonstrations of what a house looks like and what is in the house that you can potentially find. It provides information about what to do. Certainly we recommend that people do not do their own disturbance of the asbestos material but get a licensed removalist in, if they are doing renovations or major work on their homes. It is also about trying to identify and make sure people are aware, if there are minor repairs that they are doing, what are the safe ways. There are safe ways of managing that.

CHAIR: You have the website and so forth. These are for people who contact you. How do you get to people who do not go out of their way to contact you—just out there, ordinary people who are not aware of the problem? I am not saying you personally but your board. What sort of campaigns are there to get out there and make people aware?

Mr DUNPHY: As part of the campaign, we developed a television commercial. We have Asbestos Awareness Month or week every year that we can. Last year's was Asbestos Awareness Month. We developed the home renovator and the renovation roulette television commercial, which is a child spinning an electric drill on the table in front of the family to raise awareness of asbestos. We have used that through community television so it has actually been shown during Asbestos Awareness Week at the show and on Channel 9 and Channel 7. We funded a program on *Better Homes and Gardens.* During Asbestos Awareness Week this year, *Better Homes and Gardens* had a special segment on how to safely manage asbestos and remove and work with asbestos in your homes. We have been working with Bunnings try to make sure that when people go into those stores, they have the right information in the do-it-yourself areas and that Bunnings actually store and stock the right type of safety equipment in their stores. Betty the asbestos house has been going around. We have been getting local councils to sponsor her visits to local council areas. We have been setting up in shopping centres and in public areas to raise awareness.

CHAIR: I will ask one more question and then I will hand questioning over to other people. Earlier we heard evidence from the Asbestos Diseases Foundation of Australia, keeping in mind that time is critical because once this is diagnosed people die between nine to 12 months later or thereabouts. I understand these claims are processed within a period of about two months. It has been suggested that there be provisional approval within seven days, keeping in mind that the facts that you need to establish in these cases are pretty clear cut. What is the view of the board in considering tentative approval in a period of seven days? That makes a big difference, does it not—seven days compared to two months.

Mr DAVID SHOEBRIDGE: We got that figure from the metal workers—that out of 150 claims, only one of this class had been refused.

CHAIR: That is right.

Ms ANDERSON: If you like, I will provide some comment on that, but I will firstly put a rider to it to say that I do not speak on behalf of the board. I am the administrator and it would in fact be a decision for government. I will speak to give you some background and context to help you understand the issue.

CHAIR: Are there any logistic problems, without going into the issue of policy?

Ms ANDERSON: There would be a number of logistic problems that would have to be carefully considered.

CHAIR: Yes.

Ms ANDERSON: But I first want to say that there is no need for someone to get an award from the board before they seek medical treatment. There is not a pre-approval process. You can go and get your medical treatment. We regularly are reimbursing Medicare and private health organisations for the cost of treatment that was incurred before the making of the award. It is unlike other jurisdictions where you have got to get the approval of the insurer. That does not happen in this jurisdiction. There is no financial disadvantage to the person. The proposal needs to be looked at in terms of impacts on the scheme and whether or not in fact it would achieve the outcome. I had thought of some of the things.

Mr Henry said that there would be no financial impact, but you would have to have a look at that because it would require fundamental changes to the operating model of the Dust Diseases Board and the way in which compensation application decisions are made. Both the medical authority and the board have a decision-making role. That would have to be looked at if that was to be condensed into a seven-day period about how you would go about doing that. I understand from the Asbestos Diseases Foundation of Australia [ADFA] submission they are suggesting it be done on the basis of external documents. There are also implications for the Dust Diseases Tribunal because they work in concert with each other. They hang off making their award until the Dust Diseases Board has determined its liability. Questions about whether they would make an award on provisional liability or not would have to be considered.

Mr DAVID SHOEBRIDGE: I think you would assume that the answer to that would be no.

Ms ANDERSON: I am just saying that it is something to be considered. The other thing is that the Dust Diseases Board has the ability to recover its costs from negligent third parties. Whether or not the provisional liability would have an impact on that, I do not know. It will have to be considered. Lastly, there is a consideration of the person themselves if provisional liability did not end in a final award and we had to say, "Look, I'm sorry, you're not going to get any more compensation", and just the personal devastation of that. They are all things that need to be considered.

CHAIR: Good.

The Hon. PETER PRIMROSE: Can I ask you this: Is it possible to get a comment from the board about this proposal?

Ms ANDERSON: I am sure the board would.

The Hon. PETER PRIMROSE: There are a number of proposals.

Ms ANDERSON: Yes.

The Hon. PETER PRIMROSE: This is the key one and the other one is removing the $50,000 cap.

Ms ANDERSON: Yes. I think the primary consideration in relation to provisional liability is the medical diagnosis. We see a significant number of applications coming to the board where there is not a definitive diagnosis of mesothelioma. It is a very complex area of diagnostic skill and it is an area of expertise. Last year the Asbestos Diseases Research Institute issued guidelines for the diagnosis and treatment of mesothelioma, and if I may quote the reasons they gave for having to issue those guidelines, they were, "The diagnosis of mesothelioma can be difficult with symptoms and clinical findings that mimic and can be mimicked by other diseases." They went on to say, "There are indications in Australia that diagnostic and treatment practices for malignant mesothelioma are not equally distributed."

CHAIR: Why do we not give you some questions on notice?

Ms ANDERSON: We will be happy to take those on notice and give you some background information.

CHAIR: We will give you some questions on notice to give you the opportunity to respond to all of these technical issues.

Ms ANDERSON: Of course.

CHAIR: Without going into issues of policy.

Ms ANDERSON: We would be happy to do that.

The Hon. SARAH MITCHELL: I also just want to raise a couple of things that came up when we heard from the Asbestos Diseases Foundation of Australia earlier this morning. One of the issues that they said—and this probably goes with what you have just been talking about—is that they seem to have a bit of a concern that people were going to their doctor and were not actually being told that they could go to the Dust Diseases Board, and maybe there is a bit of a lack of communication between the local doctor and the patient and what happens next. Do you have interactions with organisations like the Australian Medical Association [AMA]? How does that work in terms of making sure that the doctors who do see these people know where to send them?

Ms ANDERSON: Firstly I would say that our client survey tells us that 60 per cent of the people who come to us find out about us through their doctor.

The Hon. SARAH MITCHELL: Okay.

Ms ANDERSON: I think we provided you with some information earlier in the week on what we do to promote our services among the medical profession.

The Hon. SARAH MITCHELL: Yes.

Ms ANDERSON: We do quite a lot of work with the Australian and New Zealand Society of Occupational Medicine [ANZSOM] and the Thoracic Society to promote the Dust Diseases Board and the work that we do. We send information packages out. These diagnoses are generally made by respiratory physicians so it is not the general practitioners but the respiratory physicians you need to work with. Those two groups are the representative groups for respiratory physicians. We also have nine respiratory physicians who work for the board and they also work in their profession to raise awareness as well.

The Hon. SARAH MITCHELL: Just following on in a sense from that and from something that was raised this morning, in the information that you gave to the Committee last week that we had asked for, you talk about workers being entitled to have reasonable medical, hospital and ambulance and other related costs. For people who live in regional areas—I am from Gunnedah—if someone from Gunnedah has mesothelioma and has to come to city of treatment, what percentage of travel costs or accommodation costs are covered? Is any of that covered, or is that separate?

Ms ANDERSON: It is all covered.

The Hon. SARAH MITCHELL: So everything to do with the treatment from home to service and back again is all completely covered through the Dust Diseases Board?

Ms ANDERSON: It is covered. In addition, we have contracts in place on a regional basis for things like nursing care, personal care, lawn mowing services, and equipment. We have deliberately done that on a regional basis to ensure that we have got those services in the region and we can provide services for them.

The Hon. SARAH MITCHELL: So there is no disadvantage to patients who are in regional areas as opposed to metropolitan patients?

Ms ANDERSON: Other than the travel requirements, yes.

The Hon. SARAH MITCHELL: But in a financial sense, they are not put out of pocket?

Ms ANDERSON: Financially, no.

The Hon. SHAOQUETT MOSELMANE: Just following up on the questions that the Chair was asking earlier about the awareness campaign, you have named a number of areas that you do some work through. I am just curious in terms of migrant communities. There are a lot of recent migrant communities that have arrived since 1970.

Mr DUNPHY: Yes.

The Hon. SHAOQUETT MOSELMANE: Do you have campaign awareness through the ethnic media, for example, or even the Community Relations Commission [CRC]? There are a lot of new Australians who have bought homes and who have done extensions to their homes and so forth, and they may not be aware that what they had doing in the kitchen or the bathroom, whatever the material is, they are actually inhaling this material.

Mr DUNPHY: Part of the campaign, and one thing we are trying to do, is to reach not only rural outlets but also the ethnic or different language press. We have been trying to ensure we get those messages out. There are translation services for the messages we get out, so people can get different forms of information which have been translated. We have been working with particular communities. We have identified that there is a big concern in the Aboriginal community, particularly in housing areas where work is being done. We have targeted Koori Radio and press around that. We have also been working with local councils, particularly those with connections to local communities. As part of sponsoring local councils we have gone along to activities with broad representation.

The Hon. SHAOQUETT MOSELMANE: The Asbestos Disease Foundation of Australia suggests that the board should not have a role with the WorkCover Authority and the chair should be independent. How do you respond?

Ms ANDERSON: It is a matter for the Minister. Appointments are made by the Minister.

Mr DUNPHY: To give it context, the Dust Diseases Board, in its previous incarnation, was the Silicosis Committee, the original committee in the 1920s and 1930s. The legislation set down that there was to be an independent chair who was a fulltime executive member of the organisation. That continued until 1989. From 1930 until 1989 the independent chair was always a fulltime executive officer of the Dust Diseases Board. In 1989 there was a change to the legislation and WorkCover was created. That removed the reference to the chair being a fulltime member of the Dust Diseases Board. From then, the chair has been the general manager of WorkCover or chief executive officer of the safety, return to work and support division.

There are practical reasons for having the chair as a fulltime member of the Dust Diseases Board or the actual organisation in that decisions made by the board are really decisions on whether somebody should or should not get compensation. The reality is this has to be operationalised, so somebody needs to give effect to those decisions. One purpose of the chair is to make sure resources, staffing and governance arrangements are in place to give effect to the board's decisions. Going back to the origins of the board, it was referred to as having an independent chair but it was a requirement that the chair be a fulltime member of the dust diseases group. That was only changed when WorkCover took charge of the reserve fund, which was in 1989. In some ways it is an independent board in that there are three employee representatives and three employer representatives. The board has an autonomous role, but independent chair would need to have some connection to the organisation to give effect to the board's decision.

Mr SCOT MacDONALD: I would like you to take my question on notice. I had experience with a small council in the west which came upon an asbestos incident. The council did not handle the incident well to start with, probably because this was the first incident it had had to handle—and I do not think the council would object to my saying that. Staff suddenly found asbestos in old drain sites, from memory. I heard you say you are working with local councils, but I would like to be comforted that you are assisting smaller councils without the capacity to deal with these issues. The environmental director of this council is also the planning director and has various other roles. I would like information about what you are doing for small councils, covering fewer than 5,000.

Mr DUNPHY: I am happy to respond to that. One thing we made sure of when we set up Heads of Asbestos Coordination Authorities was that there was a strong local council involvement. We have a representative from the Division of Local Government, the State agency, as well as a representative from Local Government NSW who represents all the local councils. We have funded a position in Local Government NSW to assist the Heads of Asbestos Coordination Authorities to get all councils to develop asbestos policies. For the last two years we have funded a fulltime position with Local Government NSW with the role to work with all 150 or so councils to develop a model asbestos policy. This policy was developed and launched towards the end of November 2012. The Division of Local Government gazetted that as a guideline under the Local Government Act in about April last year. That is a requirement for all local councils developing model asbestos policies. Now the policy has been developed that person is working with local councils, running workshops for people like environmental directors and building inspectors.

Mr SCOT MacDONALD: I understand it is going well in councils with a bit of capacity, but what about the shires or councils covering 3,000 or 4,000 people?

Mr DUNPHY: It is uneven. We have not been able to get all 150 councils signed up, but one of our roles in Heads of Asbestos Coordination Authorities is to make sure we assist them and that information is being put on their websites. The role with Local Government NSW is providing resources, particularly to smaller councils without capacity.

Mr SCOT MacDONALD: Do you have a list of dust diseases covered by the scheme?

Ms ANDERSON: Yes, there is a schedule to the Act that lists them all. Having said that, the vast majority are asbestos-related diseases. We do not see a lot of other diseases, which are often older diseases phased out over the years.

Mr SCOT MacDONALD: Coal?

Ms ANDERSON: I would hazard a guess that 95 per cent or more are asbestos-related diseases.

Mr SCOT MacDONALD: I had an experience with a guy from Glen Innes who almost fitted the mould you described. He was quite elderly and had worked for a company in Glen Innes that, after multiple changes of ownership, was still a car dealership with one of the first smash repair businesses. This was post-war, so before respirators. He claimed he had difficulty with the Dust Diseases Board because it was hard to do company title searches following multiple changes of ownership. Would the car-spraying industry be covered by the Dust Diseases Board? What are we doing for people having difficulty proving something that happened 60 years ago?

Ms ANDERSON: That is a very common experience in the Dust Diseases Board because of the long latency. The first point to make is that dust diseases is a no-fault jurisdiction. To be eligible for compensation, the person has to satisfy the board that they have a dust disease and that they are disabled as a result of it and the dust disease is reasonably attributable to exposure in a workplace in New South Wales. The name of the employer does not matter. The eligibility threshold in the Dust Diseases Board is very low. It is what we call reasonable attribution. It is not the common law balance of possibilities test. The court has said reasonable attribution means more than trivial. So when we get an application in that circumstance, the first thing we do is document the person's work history. We ask them where they work and what jobs they did and things like that. We do not put the onus on the applicant to provide information about proof of the work. We take their statement and we go away and do the work to try to find the evidence that supports their statements. It is rare that we cannot find some evidence.

There are a number of documents and processes we can use to corroborate information, not just work records. We look at photographs of the workplace, if they have some photographs of where they worked. We will talk to colleagues, the people they knew and worked with. A lot of them do not exist anymore. We would look at things like council plans. A lot of work places do not exist anymore. They may have worked at a particular workplace and that workplace has gone, but the council plans are still there, and we have access to that. We do internet searches and find out about things. We do all of this work in-house for the applicants. All they have to do is tell us, "I worked there." A lot of them do not know who they worked for. They may say, "I worked for a builder. I do not remember his name. It was 40 years ago, but I remember we worked around Marrickville", or whatever, and that is as much information as they can provide us. That is perfectly reasonable,

given that we are talking about exposures many years ago. Did you want some more on that? The answer to your question is all workplaces are covered. It is not particular workplaces. You have many workplaces where the business was not what we call a busting trade, but there may have been renovations that happened in that workplace and people were exposed in that way.

Mr SCOT MacDONALD: You cannot tell me, from memory, in that schedule if the spray-painting industry is covered?

Ms ANDERSON: The schedule is for the diseases.

Mr SCOT MacDONALD: Not an occupation.

Ms ANDERSON: All industries. All occupations are exposed. The only test is they were exposed as a worker in New South Wales. The occupation does not matter.

The Hon. PETER PRIMROSE: If I can jump in with a relevant question. Submission number 3 is from DLA Piper Australia. You would have seen they asked the same question. You have responded to that.

Ms ANDERSON: Yes.

The Hon. PETER PRIMROSE: Could you talk about how the investigation process could be improved? Are there any things that you would like to be able to do but for some reason cannot? At the legislative level is there some particular restriction we could look at?

Ms ANDERSON: One of the advantages we have at the Dust Diseases Board is the length of time we have been operating. Over that time we have developed a huge database of workplace exposures and when we cannot find a particular employer or work of employment we will look at what was the task the person did. Is it reasonable that they would have been exposed and we use our own databases to do that. It is a well sought after database. We often get requests from researchers for information because it is an indexed source of information. We have the ability under the Act to ask employers to provide us with information about workplaces. Most of those workplaces do not exist anymore, to be perfectly honest, but we have lots of other sources that are available to us. Because it is a no-fault jurisdiction we do not have to prove that the employer existed. We only have to prove that the workplace existed and the worker was exposed in that workplace.

Mr SCOT MacDONALD: On that same point this fellow was reluctant to pursue it because he thought—and I did not know any better at that stage; I have since learnt more—that he thought he was going to be up for thousands. I remember his words now were, "I cannot afford tens of thousands of dollars of legal fees." He basically put it in the "it is all too hard, and I am going to give up" basket.

Ms ANDERSON: There are no application fees and without knowing the case it suggests to me he may have been talking about the Dust Diseases Tribunal, which is the common law jurisdiction and he would claim for personal damages.

Mr SCOT MacDONALD: Against his original employer?

Ms ANDERSON: Yes, against his original employer.

Mr SCOT MacDONALD: As I said before, there were multiple changes of ownership. I do not think there was any hope that he was going to go back—

Ms ANDERSON: A lot of the work that we do at the Dust Diseases Board is talking to our clients and explaining the process to them. We actually help them through the process. A lot of the work we do is getting the information they need to get a successful outcome rather than sending them off and saying, "You will have to get this, that and the other and a medical test." We do that for them.

Mr SCOT MacDONALD: How well do you serve the casual transient workers? I was not thinking of your Marrickville builder. In some of the western areas such as people who work in the grains industry, in the old days of silo operators, they could work for a different header driver every two or three weeks, so there would be no hope in Hades of any record of his employer. He was probably paid cash and all those sorts of things.

Ms ANDERSON: As long as they meet the definition of "worker" that is set out under the principal Act they are eligible for compensation.

Mr DUNPHY: The thing that has impressed me while I have been at the Dust Diseases Board is with the compensation scheme normally people have to provide all the information before they submit their application. The thing that I have been really impressed with by the industrial history officers is that they spend so much time researching to establish the workplace relationship. If someone said they worked in Marrickville in 1950, they will go to the State Library and look for the telephone directory to see if they can find that particular employer. They do a lot of work and it is really a great service that they provide to the person, who is often quite ill, in respect of gathering that evidence so they have all the right information to make the claim. Likewise with the medical staff, who spend a lot of time chasing the hospitals to get all the information they need in respect of the diagnosis, the X-rays, the CT scans, which the applicant does not have. We often get applications that people have forgotten to sign or they have forgotten to provide all sorts of information but we still go through the process of following that up. We do not reject it and send it back.

Ms ANDERSON: To finish off answering your question about the powers, it is not so much the powers because we can get the information. By nature it is a time-consuming and complex process, which is why we give the support to them.

Mr DAVID SHOEBRIDGE: I was interested to get an understanding of the structure. Are the investigators and the industrial history officers employed directly by the board?

Ms ANDERSON: They are employed by the Dust Diseases Board, yes.

Mr DAVID SHOEBRIDGE: That is a distinct separate legal entity to WorkCover?

Ms ANDERSON: Yes.

Mr DAVID SHOEBRIDGE: In respect of the medical officers, they would be contracted by the board?

Ms ANDERSON: We have two decision-making functions within the scheme: the medical authority and the board.

Mr DAVID SHOEBRIDGE: So making a decision about whether it is a dust injury is a medical—

Ms ANDERSON: Decision and there is a panel of respiratory physicians appointed by the Minister. We have nine in total; three medical authorities sit. We submit all the information to them and they make the decision. They are private practitioners who come in and we pay them a fee to sit and do that.

Mr DAVID SHOEBRIDGE: Having made the medical decision, the job for the board is to work out whether or not the connection with work exists?

Ms ANDERSON: They were a worker, yes.

Mr DAVID SHOEBRIDGE: The submissions have been praiseworthy of the work of the board. After hearing a couple of days of deep criticism of the way the statutory scheme under WorkCover operates, I think we have had hardly a criticism of the board's conduct. Indeed, there has been very positive praise the way the board operates. Does WorkCover ever come in and ask you how you run your claims to get some understanding of the customer satisfaction level that they do not have?

Mr DUNPHY: I certainly will be going back to WorkCover as an advocate of the Dust Diseases Board because they do a good job.

Ms ANDERSON: WorkCover and the Dust Diseases Board are both agencies within the safety return to work support division, along with the Motor Accidents Authority and the Lifetime Care and Support Authority. The Dust Diseases Board has elements of the workers compensation scheme to it in the way in which benefits are paid and calculated but it has elements of the lifetime care scheme in it as well in the way in which it provides services, so it is a bit of a hybrid scheme. It does not sit neatly into one or the other.

Mr DAVID SHOEBRIDGE: Mr Dunphy, I do not mean this to be in any way a personal criticism of you but I look at your job title of Director, Operations, Work Health and Safety, WorkCover and Chair, NSW Heads of Asbestos Consultation Authority's Working Group and then I look at the job titles we had from other representatives from WorkCover which are General Manager, Work Health and Safety, WorkCover Authority; General Manager, Strategy and Performance, Safety, Return to Work and Support; and General Manager, Workers Compensation Insurance Division, WorkCover Authority. I have no idea of the shape and nature of or interrelationships of this enormous group of authorities and agencies and boards. Will you explain to me how the Dust Disease Board sits within this overall group? Are you in possession of a chart?

Ms ANDERSON: I think we provided an organisational chart with a bit of information on it.

Mr DAVID SHOEBRIDGE: Where do you sit within the overall scheme?

Ms ANDERSON: Each is an entity in itself. The Dust Diseases Board has a slightly different relationship to the Safety, Return to Work and Support Division than others. We have our own board whereas the others are under one board.

Mr DAVID SHOEBRIDGE: The fact that you have your own board seems to give you autonomy and an ability to craft your services in a way that is getting really positive responses. Do you value that autonomy?

Ms ANDERSON: In a legislative sense we are autonomous. In a day-to-day operational sense we certainly have a close relationship with the other schemes in the agency. Things like corporate shared services and training and development of staff are all provided as a cluster, if you like. The thing about the Dust Diseases Board and what is unique about the board—and I am talking about the members who makes up the board—is the statutory function of making all decisions in relation to the claims. That sits encapsulated within that board and WorkCover does not have a role in that. And we have our own Act.

The relationship between the two pieces of legislation is the principal legislation applies in what is the prescribed benefit. But the way in which the Dust Diseases Board operates is within its own piece of legislation. It is the nature of the work, working with people who are going to die within a very short time who are ill and sick and scared, any person would want to help someone in that situation. It is a very direct relationship.

Mr DAVID SHOEBRIDGE: And you have the statutory autonomy to do that?

Ms ANDERSON: Yes.

Mr DAVID SHOEBRIDGE: You can set up structures that work well in those circumstances?

Ms ANDERSON: Yes.

Mr DAVID SHOEBRIDGE: Mr Dunphy, you have worked for both agencies?

Mr DUNPHY: Yes.

Mr DAVID SHOEBRIDGE: Would you speak to the differences you see in the two work cultures? Would you tell the Committee what lessons you will be taking back on Monday?

Mr DUNPHY: Certainly. In the experience I have had with the Dust Diseases Board—I have been there for six months in the role—it has a long history. It has been going for 80 years. There is a very strong culture of support in its client base. I have detected that because we have a lot of interaction because it is, as Anita said, really a lifetime care model. So our staff members are continuously engaging, I think every year, with the workers. We have about 25,000 engagements or interactions with them over the year so there is quite a lot of toing and froing in our day-to-day contact with them. I think that makes it a very personalised service and it creates a culture where we are closely aligned to the values of ensuring that we are providing good service to those people who we are dealing with on a day-to-day basis.

Ms ANDERSON: It is a much smaller scheme as well.

Mr DAVID SHOEBRIDGE: Of course it is a much smaller scheme. But there has been stability and the ability to build up this in-house knowledge, this amazing database and this great institutional knowledge. I compare that to WorkCover. Let us look at the names of the coordinating authority's working group—the work health and safety division, the strategy and performance division, the insurance division, the safety return to work and support division. If we went back over 10 years we would have found organisational change and those things churning in an extraordinarily different way to what we find in the Dust Diseases Board. Is that a fair historical review?

Mr DUNPHY: I am an old timer. I have been with WorkCover for 20 years so I have seen quite a lot of changes over the years. Certainly there have been lots of changes because we have moved within government. Even more recently we are now part of the Department of Finance and Services. Over the years there have been significant changes since WorkCover was originally founded between 1989-1990. There have been changes but to me I have always seen that as positive in trying to improve the way we have been operating. I have certainly always seen that in a positive light, I guess, in trying to provide better services in how we deal with the community. I think there is always room for improvement, and we know that. Maybe that is why we are always looking for some changes.

Mr DAVID SHOEBRIDGE: You say you see it in a positive light but the Committee has heard of enormous distress with the way the WorkCover scheme operates, enormous dissatisfaction and this constant churn and change. Then you have something else that has been sitting there with stability and certainty and institutional strength and there is enormous satisfaction. Do you think there is something to reflect on there?

Mr DUNPHY: I think there is always room to reflect. I am someone who advocates that we do need to reflect and to look at how we can improve. My experience has been in one part of the organisation so I cannot talk about the whole.

The Hon. SARAH MITCHELL: I refer to the Committee's discussions with the ladies from the Asbestos Diseases Foundation of Australia Inc. this morning and the issue of the $50,000 cap. I know that the Hon. Peter Primrose raised the issue. There was discussion this morning about whether a nominal figure was put on it and obviously that was set in 1987. Would you make that figure higher? Would you index it? Upon hearing from Mr Henry prior to you, he said that the board had approved breaching the cap on 208 occasions and he had those figures. If the Committee were to recommend for the removal of the cap would there be a financial issue with that, given that apparently it has been breached frequently? Would you talk us through that process?

Ms ANDERSON: The short answer is no, there would be no financial impact. The limits on the medical expenses are in the principal Act. The Dust Diseases Board has previously determined that it has the statutory authority to approve expenses above what is in the principal Act and it does do so. Mr Henry said no-one has ever been disadvantaged as a result of that. There is no delay in the approval process. Every application has been approved. In order to ensure compliance with the legislation, the administration formally asks the board to approve expenses once we are getting near the $50,000. When the board is asked whether it would approve continuation it says yes and we continue.

Mr DAVID SHOEBRIDGE: Can that just be one approval?

Ms ANDERSON: One approval.

Mr DAVID SHOEBRIDGE: One approval for any expense above it? You do not need to do it for every one?

Ms ANDERSON: Yes, one approval. It is only a very small group. I note that Dave spoke about 200, but I think that is over a 15-year period. Currently I think we have 1,078 workers, just off the top of my head, who are receiving payment for medical expenses. I know that 5.8 per cent of them have gone over the $50,000. It is a small group; it is mainly the cancer treatments.

The Hon. SARAH MITCHELL: It is sort of a number on paper for which there is a mechanism to go around it?

Ms ANDERSON: It has no operational impact.

The Hon. SARAH MITCHELL: If the Committee were to recommend that it be removed—

Ms ANDERSON: It is in the principal Act. I do not know what consequential impacts from the principal Act would flow from that.

Mr DUNPHY: The Dust Diseases Board has raised that. We have looked at the issue because the principal Act says it is $50,000 or it can be a greater amount if it is gazetted by WorkCover, so we have asked it to have a look at that. There is room to gazette a higher amount.

Ms ANDERSON: So the remedy does not have to be a legislative one?

Mr DUNPHY: It does not have to be; it could be a gazettal.

Mr SCOT MacDONALD: I refer to your fund. There is no agent, no Suncorp—

Ms ANDERSON: No.

Mr SCOT MacDONALD: That is a big difference, is it not? The Committee has heard a lot of adversarial matters today about agents and whether they are fair. Is your income a levy?

Ms ANDERSON: Yes.

Mr SCOT MacDONALD: Obviously, you have an actuary and all your work is long tail, is it not? Are you the classic long-tail industry?

Ms ANDERSON: Yes.

Mr SCOT MacDONALD: Who does your actuarial work?

Ms ANDERSON: We employ actuaries on contract and go out to tender on a five yearly basis. I think the important feature about dust diseases is that it is a pay-as-you-go scheme, if I can put it in that way. Each year the board estimates what it will pay out in the next year for the claims we know about and are already in the system, and the ones we know from actuarial experience will come into the system in that year. That is the amount of money we collect through the levy. It is an annualised pay-as-you-go scheme. The levy is collected from the New South Wales insurers and they in turn impose that on the workers comp premiums that you see.

Mr SCOT MacDONALD: What you want to raise you put on the workers comp premium and that is what you get back?

Ms ANDERSON: That is what we get back. We go and collect that and we hold that in the Workers' Compensation Dust Diseases fund and all the expenses from the scheme are paid out of that fund.

Mr DAVID SHOEBRIDGE: There is no guessing about investment returns or any of that sort of thing that is such a difficulty with WorkCover and motor accidents; you are just predicting for the next 12 months and you expend it in 12 months?

Ms ANDERSON: Yes, exactly. The unknown claims, the claims that will be made on us in future years that we do not know about now, we have the ability to raise the levy in that year to cover the costs of that claim as it comes in. We do not have to worry so much about the tail because we can levy each on a yearly basis.

Mr SCOT MacDONALD: Returning to Mr Shoebridge's point, you must also have a reserve?

Ms ANDERSON: We do have a reserve because we estimate how much money we are going to spend and we collect that money. It goes into the fund and if there is a surplus or an extra, you have a reserve on which you can reply. I think there is around $780 million in the reserve now. We invest that money. All the investment goes back into the fund.

Mr SCOT MacDONALD: Discount breaks for you in yields and GFCs were not as critical as the WorkCover scheme where it was gutted for a couple of years, or as it was put to us?

Ms ANDERSON: I cannot comment on the WorkCover scheme. I only know about our own scheme. We offset the funding ratio of our known liabilities against what we have in the fund. The board has set a ratio that it likes to keep.

Mr SCOT MacDONALD: What is that ratio?

Ms ANDERSON: The board would like to see the ratio it has set kept within the 90 to 110 per cent mark. Most recently, I think at the end of December, it was at 109 per cent of assets to liabilities.

The Hon. PETER PRIMROSE: The author of submission 1 to this review was concerned that his compensation payments from the board preclude him from receiving the age pension from Centrelink. Can you tell us how compensation payments from the board impact on pensions from other sources, such as Centrelink?

Ms ANDERSON: Centrelink has defined compensation payments, not just from the Dust Diseases Board but all workers compensation payments, as ordinary income. They apply one or two tests: either the dollar-for-dollar test or the ordinary-income test, according to whether they got the award before or after they got the pension. It is a Commonwealth Government issue. We actually wrote to the Commonwealth in 2010 and asked it to have a look at this issue for us. It wrote back and said thank you but no. It really is something outside of our control. There is a provision in the Act that allowed the board years ago to reduce the amount of pension so someone could get their age pension, but the 1991 amendments to the Social Security Act did away with that and overrode that.

Mr DAVID SHOEBRIDGE: In other words, in a whole bunch of cases the board, effectively, is making a payment that is subsidising the age pension or other Commonwealth payments?

Ms ANDERSON: Yes.

Mr DAVID SHOEBRIDGE: That is the end effect of it?

Ms ANDERSON: Generally, most of our beneficiaries get some part of the age pension, which allows them to retain the benefits. It is when they have other income streams as well when added to the Dust Diseases Board scheme that throws them outside of the Centrelink thresholds.

The Hon. PETER PRIMROSE: Is it appropriate for you to consider a recommendation this Committee would make on that matter?

Ms ANDERSON: It really is a Commonwealth decision. It is how Centrelink and the ATO also have defined it as ordinary income. It is a Commonwealth decision about how they treat it. We cannot influence how the Commonwealth and Centrelink treat the pension.

CHAIR: Thank you very much for being with us this afternoon. A number of questions were taken on notice. The Committee would appreciate it if you would respond to those within 21 days of receiving them. Your evidence will help us considerably in our deliberations.

Mr DAVID SHOEBRIDGE: Particularly if you can put some of those issues to your board about the provisional liability and get its response. That would be useful. What sort of time frame would you need for that? Normally the response time for questions taken on notice is 21 days.

Ms ANDERSON: The board meets only monthly. The legislative framework is such that WorkCover has responsibility for the legislation. Obviously, the Minister consults with the board on those things and asks the board does it have a view. That is the framework in which we operate. So it may take a little bit longer.

CHAIR: In any event, you are dealing with logistics. It is not so much going to be a policy matter. So that should not delay the answers being returned.

Ms ANDERSON: Certainly, we can give you some factual information about things that need to be considered.

Mr DAVID SHOEBRIDGE: All I am thinking is that if they need extra time because something needs to be taken to the board, they can feel quite certain that we would grant them additional time to take anything to the board.

CHAIR: That is fine, yes. That is right. We have a little flexibility.

Ms ANDERSON: Okay. Thank you.

(The witnesses withdrew)

(The Committee adjourned at 5.26 p.m.)