REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE No. 1

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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At Sydney on Monday 2 May 2005

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The Committee met at 9.00 a.m.

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PRESENT

Reverend the Hon. G. K. M. Moyes (Chair)

The Hon. R. H. Colless
The Hon. K. F. Griffin
The Hon. R. M. Parker
Ms L. Rhiannon
The Hon. E. M. Roozendaal
The Hon. I. W. West

CHAIR: Welcome to this the first public meeting of General Purpose Standing Committee No. 1 inquiry into personal injury compensation legislation in New South Wales. The first witnesses to provide evidence today are Mr Michael Slattery and Mr Philip Selth, representing the New South Wales Bar Association. They will be followed by witnesses from the Construction, Forestry, Mining and Engineering Union, the Community Care and Underwriting Agency, the United Medical Protection Group of Companies, the Society of St Vincent de Paul and the New South Wales Council of Social Services. I wish to thank all witnesses in advance for their attendance at today's hearing.

The Committee previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the broadcasting guidelines are available from the table by the door. In reporting Committee proceedings the media must take responsibility for what they publish, including any interpretation placed on evidence before the Committee. In accordance with these guidelines, while members of the Committee and witnesses may be filmed or recorded, people in the public gallery should not be the primary focus of the footage or of photographs.

Under the Standing Orders of the Legislative Council evidence and documents presented to the Committee that have not been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by a Committee member or by any other person. Witnesses, members and their staff are advised that any messages should be delivered through the attendant on duty or through the Committee clerks. Would you all please turn off your mobile phones.

MICHAEL JOHN SLATTERY, QC, Senior Vice President of the New South Wales Bar Association, Selborne Chambers, Phillip Street, Sydney, and

PHILIP ALAN SELTH, Executive Director, New South Wales Bar Association, Selborne Chambers, Phillip Street, Sydney, sworn and examined:

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

Mr SLATTERY: I am the Senior Vice President of the New South Wales Bar Association and I appear in that capacity before the Committee.

CHAIR: Are you conversant with all the terms of reference for this inquiry?

Mr SLATTERY: I am.

CHAIR: Mr Selth, what is your occupation, and in what capacity are you appearing?

Mr SELTH: Executive Director of the New South Wales Bar Association, and I am appearing as Mr Slattery's junior.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mr SELTH: I am.

CHAIR: If either of you should consider at any time that certain evidence you wish to give or documents you wish to tender should be heard or seen only by the Committee, in other words, a privacy issue, would you please indicate that fact and the Committee will consider your request. Would you like to start by making a short opening statement?

Mr SLATTERY: Yes, Mr Chairman. I seek your guidance as to how long you would wish me to speak.

CHAIR: Take as much time as you like.

Mr SLATTERY: I hope this self-imposed time limit is realistic.

CHAIR: It is envisaged it will be a short statement.

Mr SLATTERY: It would be about 20 minutes, if that is thought to be appropriate. I would propose to summarise the main themes of the submission and some issues that are no doubt going to be raised against the association, and to put the association's position on those as clearly as I can. May I say at the outset that the President of the Bar Association, Ian Harrison, apologises. He is not able to be here because he is actually in court this morning. On the other hand, he has delegated to me primary carriage of this issue within the association, and I have the significant responsibility for the drafting of the Bar Association's report and submission to this Committee, along with the assistance of the Personal Injuries Committee of the Bar Association, for which I am very grateful.

Can I firstly say it is a privilege to be able to give evidence before this Committee of the Legislative Council. This Committee's proceedings are very much needed at this time. As we look back about three years, after the Civil Liability Act was passed, the time has well and truly come to review the operation of the Civil Liability Act. I and the Bar Association both applaud and praise the foresight and courage obviously evident in the setting up of this Committee.

Could I next identify what we can talk to you about in relation to the terms of reference. The Bar Association cannot give complete information to the Committee on every one of the terms of reference. The terms of reference commence with a general statement that the Committee is to inquire into and report on the operations and outcomes of all personal injury compensation legislation. That part of the terms of reference is specifically what we can help you most with, because the daily work of barristers is appearing in court, advising persons with personal injury claims as to their outcome,

and observing what happens under the common law and under the new legislation. To some extent, we can talk also about specific term of reference 4, but you will see from the submission that we have put in that essentially we are talking about the fairness or unfairness of the operation of this legislation.

Could I then highlight a couple of themes that come from our submission which are very important, we say, to be recognised in the public debate about these issues. They tend to get obscured when people talk about premiums, premium reductions, and issues of the cost to business. Yes, these things are very important, but one has to understand what a system of compensation is all about fundamentally. It is this. Any system of tort—that is, compensation for wrongs—is actually a measure of the value of our right to personal security, that is, personal security from either intentionally or negligently inflicted violence. That is essentially what the law of tort was, and how it has developed over hundreds of years to provide compensation by way of a measure of that right to personal security. Just as the criminal law, for instance, punishes offenders by putting them in gaol or by imposing some other penalty, the civil law looks at the position of the victim of that kind of violence, be it intentional or be it as a result of negligence. Over many generations the law has developed a measure, by compensation, of that right. So we are dealing with a matter of fundamental concern to all citizens.

The reason that the law of tort exists is ultimately to provide stability to society, because both the criminal law and the law of tort serve the same social end. That social end is to stop the cycle of revenge and further crime in society. The criminal law does that by punishing. The civil law does that by attempting to alleviate the resentment of those people who have been injured by reason of the wrong of others. The process of providing compensation gives some satisfaction to reduce that resentment. Unfortunately, the fact is that the sense of grievance and resentment is suffered alone and in private by people who have been injured. Here we are dealing ultimately with public issues, but it is something that needs to be recognised.

The next thing I want to emphasise is that the lead-in to this inquiry was by way of statements by two Chief Justices, one by Chief Justice Spigelman in New South Wales, and one by Chief Justice de Jersey of the Supreme Court of Queensland. Both said, astonishingly or perhaps not astonishingly, similar things about the operation of the civil liability legislation and workers compensation legislation. Both said that, from their perspectives, what is going on right now is that people who they believe as judges should be compensated under any fair system of compensation are simply missing out. It is going to be said against the Bar Association and barristers, as it may be said against doctors, that there is a degree of self-interest in any submission put on their behalf. I will deal with that in a moment.

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What I want to say about the chief justice of New South Wales and the chief justice of Queensland is that you could never say of those individuals that they had any self interest in this. In fact, to be blunt about it, their self interest is the reverse. They no doubt want efficient, well-streamed court procedures with cases being disposed of as quickly as possible, with probably fewer claims. But in fact what they are saying is that they are perceiving the operation of this legislation is unfair to seriously injured people. When I say "this legislation" the comments that they have made are sufficient to cover the Civil Liability Act legislation, the Motor Accidents Compensation Act and the Workers Compensation Act. They are particularly concerned about the thresholds which apply in the latter two pieces of legislation.

The next point I want to make is this. I want to focus on the Civil Liability Act 2002. I want to take you back to the atmosphere of March-April 2002, remembering that we were only then six months out from September 11 and we were only about 18 months or less than that—15 months—out from the collapse of HIH. There was an atmosphere of crisis in the first half of 2002 in which the Civil Liability Act legislation was passed. It is the contention of the Bar Association that, although it was appropriate for government to deal with that crisis and to do so in a way that involved some proper response to provide insurance or to ensure that insurance was provided to all community groups involved in community and recreational activities, what was actually done was a classic managerial error, which was to provide a long-term solution to solve a short-term problem.

That is what happened, because legislation is a long-term solution. It is permanent. Unless it is amended, it sits there, and that is the solution which was imposed. There was a short-term problem. We say it was a cyclical problem and we said so at the time. That view do not prevail but, as I say, we

do not criticise the Government for responding. The question is what was the content of the response. Now that we are more distant from those crises ridden times we have the opportunity, through this Committee, to get the settings right, rather than to do what was done so hurriedly then. Can I just digress for a moment and say this? At that time the chief justice of New South Wales posed a set of principled reforms in an article in the *Australian Law Journal* and a speech which he made at that time, which said that what was really required was to make a change to the law which would not be the kind of sharp instrument that is the Civil Liability Act but to change the nature of the duty of care back to a position where it had been prior to about 1964, and that that was a principled legal change that all judges and juries would have to observe and if they did observe it in due course that would lead to a rational and principled contraction of claims.

That was not done. What was done is that a series of very concrete prescriptive steps were taken which we say will create their own problems in due course. If a more considered position had been taken at the time we say that that kind of principled reform, if it had been given time to work, would have produced a much better and more lasting result. Can I speak now a little about the role of the association? Barristers on a daily basis advise those with claims for personal injury. I myself, particularly in the first 10 to 12 years of practice, had an extensive personal injuries practice. I tend to do other things now. Frankly, it is some of the most important work that the Bar does in making sure that injured members of the community have their rights properly addressed in an open forum in a court and they receive compensation that is fairly and justly matched to their circumstances.

In the course of giving that advice and doing that work the Bar requires special expertise and it is on that basis that we speak to you now. Of course, the Bar earns income in the course of that but that is a natural product of acquiring the expertise about which we can speak to you. The reality is that there is no natural advocate or proponent for the class of the prospectively injured. Just think about it for a minute. The only proponent traditionally for the class of a prospectively injured is in one area—that is in workplace incidents—and it is the union movement. Quite properly and energetically over a century, the union movement, both in this country and the United Kingdom and many others, has properly pursued the rights of the prospectively injured in workplaces. But if you look at motor accidents and the Civil Liability Act the prospectively injured are an open-ended class of unidentified people, but every one of us has these inherent rights. That is the right to freedom from intentionally or negligently inflicted violence. That is what it comes down to and that is what we are talking about here.

The Bar Association and barristers are people who seek those who have been turned from the prospectively injured to the actually injured and who are looking for compensation, and that is why we can speak to you. Can I talk to you about the insurance industry for a moment? I want to say one simple thing: We are not here to attack the insurance industry. We are here to ask the Parliament and to point out to the insurance industry that the reforms of 2002 went too far and that what we seek to do now is to invite, as we do in our submission, the insurance industry to join with us, with the union movement and with persons of goodwill to seek to adjust these reforms in a rational and sensible direction. That is the question which should be directed to the insurance industry. It should recognise that the reforms have gone too far and should be prepared to engage on the question of what are appropriate adjustments. That is effectively what we invite them to do, as we have in our written submission.

The Bar Association, frankly, like all Australians, would believe that a sustainable liability insurance industry is important for society. There is no doubt about that but the question here—and we do not want to attack a sustainable insurance industry; we want to promote it—is how do you measure that sustainability. We have set out some practical proposals—I can go into in a short while if you wish to ask me about them—as to how some of the insurance industry's position on these reforms can be properly measured. The last few things I want to say our these. Another important theme of our submission is the simple idea of consistency and cohesion in the law. The community expects that there will be equality before the law. That means not just equality of rich and poor, equality of the influential and the uninfluential; it also means equality and the way that people are treated by the law when they are injured in similar circumstances.

What I mean by that is this: If someone is injured and suffers a very substantial spinal or leg injury, the reality of the current mix of legislation that we face is that under the Civil Liability Act they might be compensated but under the Motor Accidents Compensation Act they have less chance

of compensation and under the Workers Compensation Act they have probably no chance of compensation for non-economic loss.

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You can have exactly the same injury but, depending upon whether you are injured in a motor car, or by falling over at home, at someone else's home or at work, you will be treated differently. That simply offends people who are told about it. I have seen it in my own chambers and I have heard anecdotally that when people are told, "Sorry, this injury occurred in a work place. Had it occurred in a motor car or had it occurred at someone else's house you would have been compensated for your pain and suffering. But now you can't be." They look at you in absolute bewilderment, and they do that because it offends a fundamental human idea that we all hold as members of society that the law should be rational and coherent, and that it should treat people equally in equal circumstances. The next point, and I am getting towards the end, is this, that there are two contradictory ideas in all of this legislation, particularly under the Motor Accidents Act and under the workers compensation legislation.

There is a consistent trend to either eliminate lawyers from the process or to reduce the legal fees payable so that they are practically eliminated from the process. That is fine. If they do not want lawyers involved so be it. That is their principle. But the trouble with that in this context is this, that is being done at the same time as the legislation has become eye-glazingly complex. The workers compensation legislation, in particular, is an absolute minefield. The most experienced appellate lawyers can negotiate and debate with a court of appeal what it means. How on earth would you expect an ordinary member of the committee to get to grips with this, particularly where they have been denied a lawyer? I am not here to say that the removal of lawyers from some kinds of bureaucratic or decision-making processes is not a good idea, but what I am saying is that you cannot adhere to that principle and, at the same time, say, "Let's exponentially increase the complexity of this legislation."

It is distressing to many individuals when lawyers, and I have seen this happen, attempt to explain the workers compensation legislation and the numbers of amendments that apply to their particular case. Again, they look at you in absolute amazement, as a lawyer, that this is the law of New South Wales. Can I now finish by saying that the Bar Association is fundamentally committed to the idea of decision making by contestable tribunals in an open forum, and that one of the great advantages of the Motor Accidents Compensation Act and the Workers Compensation Act is that that fundamental right is denied. Again, if you are talking about satisfaction with the outcome and the reduction of resentment at the outcome, open courts, open processes, open decision making is the way to achieve satisfaction, even from people who lose. Those are my submissions in my opening statement.

CHAIR: You argued that very cogently. Before we go on to questions, you have given us a document "Personal Injuries Compensation Legislation Case Examples". Do you wish that to be tabled?

Mr SLATTERY: I do, and I wonder if I could do so in circumstances where the Committee has the names of individuals but they are called, for public purposes, A, B and C, or something like that? I also have a photograph that I am very happy to give to the Committee, and in respect of that person and for her sake I would not like—

CHAIR: You ask for their names not to be placed on the public record or used in *Hansard*.

Mr SLATTERY: Exactly.

CHAIR: We have the cases, but we do not use the names of the photographs. We will produce a public version of this document for members of the public gallery with the names removed. I will now open the inquiry to questions.

Mr SLATTERY: I am sorry, I should have pointed out that I have some photographs. Perhaps the easiest way is to use the initials in the document that has just been tendered. The initials YB are the case study to whom the photographs relate. Again, if Mr Selth might pass it to the Committee and I can speak about these in due course. But, again, the photographs, for the sake of the individual concerned, I would not wish to be made public.

CHAIR: We have made that point.

Mr SLATTERY: Although I do say this, every one of these, very plainly, has been asked and given their consent to their case study being used by this Committee in its important work.

The Hon. IAN WEST: Thank you to the Bar Association for its very competent submission, which contained some thresholds and caps in a submission for accessing non-economic loss damage. For clarification, in a table you referred to the common law caps in regards to motor accident, workers compensation and civil liability. You indicated that there were no caps at common law for workers compensation. Could you clarify what that means? My understanding is that there is no ability to access non-economic loss.

Mr SLATTERY: I may have said that badly, but the full story is this, that in respect of workers compensation one's access to non-economic loss, that is damages for pain and suffering, is available only if you can establish, through the medical assessment process, that your percentage of a whole person impairment is 15 per cent. You need to go through a medical assessment process and prove that your injury means that under the relevant guidelines you would be assessed as being impaired as to 15 per cent of your whole person. That is an extraordinarily difficult test to pass, and tends to be passed only by paraplegics, quadriplegics and people who are very, very seriously injured.

The Hon. IAN WEST: And then you are entitled only to economic loss, not non-economic loss?

Mr SLATTERY: That is correct.

The Hon. IAN WEST: The table in the submission talks about caps for non-economic loss. So long as we have clarification that there is no access.

Mr SLATTERY: The table you are referring to is?

The Hon. IAN WEST: I am sorry, it is the Law Society's submission.

Mr SLATTERY: There is a limited right. I have answered that question.

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The Hon. IAN WEST: Looking at the issue of representation, as the union that represents people who represent injured workers and represent insurance companies, are you putting forward the view for your members at large, that is barristers who represent injured workers and barristers who represent insurance companies—your view on behalf of those people as the union who represents those people—that the changes have gone too far?

Mr SLATTERY: We do not really see ourselves as taking a union position on this. I acknowledge right up front that one of the consequences of adjusting tort reform back is that it will increase litigation by injured persons in our community and that will result effectively in more work going through the courts, but the thrust of what we are saying is back to that idea of the class of the prospectively injured. We are saying there is no advocate for them but the people who know and understand what happens in the court process, except in the union movement, and we are saying that for all those individuals when they suffer injury we can now point out that they will not be fairly dealt with under this legislation. That is the thrust of what we are saying rather than in any way looking to our own interests. While I am on that, may I say there is a degree of hypocrisy, if I can put it that way, in anyone in this debate saying this is motivated by the self-interest of barristers when, if one looks at the other side of the debate, the insurance industry's arguments are obviously far more directly self-interested than anything that might be the basis of our submission.

Mr SELTH: I might add that this submission was prepared by a personal injury litigation committee, which has barristers who do both insurance work, if you like for the injured, and was signed off by the Bar Council as well. That is about 30 people. So, there is no or one side or the other. It is a joint approach.

The Hon. IAN WEST: That is my question. It is the Bar Association's submission on behalf of barristers?

Mr SLATTERY: Yes.

The Hon. IAN WEST: Who represent?

Mr SLATTERY: All sides.

The Hon. IAN WEST: Except the unions?

CHAIR: They can represent unions, but unions have their own support network.

The Hon. IAN WEST: I appreciate that. But the Bar Association represents barristers who represent all people, people injured and the insurance industry?

Mr SLATTERY: Under our cab rank rule we are required to take briefs from either side. One day it might be for the injured, then the next day for the insurance industry.

The Hon. IAN WEST: The question I am asking is that in your deliberations as the association, federation or union that represents barristers, those barristers are representative of people who represent injured workers, people who represent the insurance industry, people who represent everyone before the appropriate tribunal, be it the motor accidents tribunal, the workers compensation tribunal, the District Court or the civil courts?

Mr SLATTERY: Absolutely, Mr West, and I am sorry, I had not understood your question properly. That is exactly right.

The Hon. IAN WEST: It is the view of all those?

Mr SLATTERY: It is the view of all, and it is even more diverse than that when one thinks about it, because probably 25 per cent or 30 per cent of the bar deal with personal injuries work. There is also that other large part of the bar that deals with industry and administration generally, and this is a submission on behalf of them as well. That is, personal injuries work and the cost of liability insurance to business is part of, indirectly, all sorts of litigation and all business litigation, and it is all those barristers also on whose behalf this submission is made.

The Hon. IAN WEST: It is important that we clarify who you represent.

The Hon. ERIC ROOZENDAAL: I note that you said between 25 per cent at 30 per cent of your association deal with personal injuries?

Mr SLATTERY: Yes.

The Hon. ERIC ROOZENDAAL: Can you give us an idea what the reforms you have spoken about in personal injury matters have cost your members in lost income and business?

Mr SLATTERY: I do not have those figures to hand and it would be extremely difficult for us as the association to get a handle on those figures other that on a fairly speculative basis. One can talk, at least in statistical terms, the way, for instance, the District Court of New South Wales does. From its filings you can see in the past three years a reduction in filings in the District Court. We can provide those figures to you quite readily. One can infer from those numbers a reduction in both barristers' and solicitors' work associated with the cases that do not proceed. We can provide that data to you but there is no comprehensive analysis within the association of the effect in dollar terms it has had upon the Bar Association's members. That is the short answer to the question.

The Hon. ERIC ROOZENDAAL: It seems a fairly long answer to me. Would it be fair to say that your members involved in these particular areas have had a substantial reduction in their income in what was quite a lucrative area prior to the reform?

Mr SLATTERY: Undoubtedly some members of the Bar Association will be doing fewer personal injury cases than they did before, and those members of the association had access to schemes and education programs within the bar to expand their areas of operation and going to other kinds of work, and that is exactly what they are doing now.

The Hon. ERIC ROOZENDAAL: What I am alluding to, a number of your members would have had a substantial reduction in their income because of the reforms and there is a certain level of interest in sustaining their incomes at previous levels. I remember at the time of the reforms a lot of money was spent by a lot of people campaigning against the reforms, and I cannot believe that all those motives were simply altruistic.

Mr SLATTERY: There is little doubt that some members of the association have lower incomes as a result of these legislative changes, but that is not why I am here. As I said in answer to Mr West's question, a large class of the prospective injured have frankly no other advocate than people such as the bar, who are put in the dreadful position of telling them across the table on a daily basis that they have no rights.

The Hon. ERIC ROOZENDAAL: In your submission there is an implication that there was no crisis in the public liability insurance industry in 2001 and 2002.

Mr SLATTERY: Could you take me to the paragraph?

The Hon. ERIC ROOZENDAAL: Pages 15 to 17 I am referring to. I am interested in how you explain the withdrawal of insurers from the insurance market at the time and particularly your assertion that it was just a tightness of the insurance market.

Mr SLATTERY: We point to four factors. We to say there was a tightness in the market. We set out on pages 15, 16 and 17 that the market was cyclical, the tightness was caused by the withdrawal of HIH's capacity when HIH collapsed, and the change to the reinsurance market as a result of the September 11 attacks. All that did produce market tightness and therefore the market response by insurers in relation to premiums at the less attractive end of the market, which led to the way insurance was being written at the time. So, there was tightness but it was cyclical and what we say is a long-term solution to that short-term problem was entertained and enacted, and it should not have been.

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CHAIR: We will move on to some Opposition questions. I mention that the Hon. Rick Colless is in an aircraft. I returned to Sydney via interstate and there is a lot of fog around this morning. I understand that the Hon. Rick Colless is caught up in an aircraft.

The Hon. ROBYN PARKER: I am interested in your comments today and in your submission in terms of the thresholds. You have basically said we have not quite got it right and we need to adjust those. I am interested in what you think those thresholds should be. In your submission you say the thresholds for assessing general damages for pain and suffering should be lowered. What I am interested in finding out that is where the Bar Association sees those thresholds should be adjusted.

Mr SLATTERY: Thank you, Ms Parker. There is a theme through the submission which is mentioned in a divided way, but the question gives me an opportunity to explain it in perhaps a more unified way. It really comes down to this: the Bar Association says that the Civil Liability Act 2002 was not all bad; that the Civil Liability Act to the extent that it set a benchmark at the time in respect of claims for non-economic loss and entitlement to non-economic loss on the basis of a percentage of a most extreme case got close to getting it right. It needs to be more closely looked at and possibly adjusted in a direction to provide access to more claimants. On the other hand that is the benchmark which we say should be applied to workers compensation and to motor accidents cases. A very, very different measure is used in those cases which is much more restrictive.

The way it works is this: under section 16 of the Civil Liability Act, which really adopted a measure of the award of non-economic loss that originally existed in the 1988 Motor Accidents Act, which provided that you could get an entitlement to non-economic loss if there you are able to establish yourself above 15 per cent on a measure of your case against a most extreme case. If you got

above 15 per cent, you got something for non-economic loss; if you have got 33 per cent of a most extreme case, you got all the traditional common law non-economic loss for pain and suffering. That was introduced in 1988 in section 79 and section 79Aof the Motor Accidents Act. It is reproduced in section 16 of the Civil Liability Act. That was not too bad. It needs further study, as I say, to be opened up and relaxed in due course.

But I take you to the Motor Accidents Compensation Act and the Workers Compensation Act as they now stand. What they do is deny access to any damages for non-economic loss unless you prove, in the case of the Motor Accidents Act, that you suffered a 10 per cent impairment, that the measure of their impairment is 10 per cent of the whole person—that is, impairment of 10 per cent of the whole person according to the medical guidelines which they use—and in respect of the Workers Compensation Act, the threshold is 15 per cent. It is very, very difficult when you have got an injury to a leg or an arm or part of the head which does not ultimately disable the whole person to a significant percentage to reach these thresholds. What we say is that they are the thresholds that need to be adjusted back and that you would get consistency and coherence in the law if the workers compensation and motor accidents thresholds were made in the short term simply to reflect what is in the Civil Liability Act in section 16 and that a proper measure of justice to individuals at least would be so that they can be told that in a workplace injury or a motor car injury they will be compensated in the same way as they would be anywhere else.

Perhaps this is an appropriate spot to take you to a case that shows what would happen if more consistency was applied. I take you to the case of YB, which I think should be the last on your case list. We handed out photographs and in conjunction with this you might wish to have a look at those. I will take you through the facts because it is a useful illustration of these comparisons. One starts with an obvious recognition through the photographs and only the slightest degree of imagination as to what this woman has gone through in relation to these injuries. Plainly this young woman suffered a very traumatic and dreadful accident with very significant injuries around the head and the face. The summary in our list from 1 to (vi) points out each of those injuries. Her right ear was torn off. There were significant injuries to the scalp, a fracture to the shoulder and a Colles's fracture to the wrist after being involved in a car accident. With all those injuries, a motor accidents assessment as to scarring assessed her at 5 per cent of whole person impairment [WPI], so that is 5 per cent whole person impairment in relation to the face, 3 per cent in relation to the scalp and 1 per cent in relation to be grafted donor site. Scarring and disfigurement came only to 9 per cent. She had a total of 9 per cent.

There is actually a mistake where it says the Motor Accidents Compensation Act 1999. It should say under the Motor Accidents Act 1988. Under section 16 of the Civil Liability Act she could have expected to receive in excess of $100,000 for general damages as compensation for pain and permanent impairment. But she gets no compensation for pain and suffering and disfigurement and loss of amenity of life by reason of the 10 per cent threshold, and that is how it works. It cuts out people such as this lady. What we are saying is that if we changed the Motor Accidents Act thresholds to be just like the Civil Liability Act thresholds, then you will bring someone like that back into play as someone who has a chance of getting compensation. But we are saying that a responsible submission says let us not restore the common law as a whole. Let us look at the kind of threshold which is in the Civil Liability Act and see how that works in the long term to give someone like this person at least a chance of compensation.

Earlier I spoke about what the purpose of compensation is and the sense of injustice and resentment that arises in the community when it is not provided. I simply ask—and it does not take much to use one's imagination—that some thought be given to what this woman would have felt when she was told that she had no entitlement whatsoever to compensation for these injuries.

The Hon. ROBYN PARKER: I understand all of that. I understand what you are saying by taking it back to the Civil Liability Act and to those thresholds. But did you not also say, though, that you thought that the Civil Liability Act compensation thresholds needed to be changed? I think "opened up and relaxed" might have been your words.

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Mr SLATTERY: Yes, we do say that, but I suppose the principal submission is the one that I opened with, to say that coherence and consistency in the law within the community are objectively desirable. That means that before one starts pushing the Civil Liability Act in a downward direction, if one is going to give some weight to that principle, probably the best course is to change the whole person impairment test in the workers compensation and in the motor accidents test to bring them down to the Civil Liability Act level and then, after a suitable study and consideration, consider coherently and consistently bringing it down further, if that is warranted.

The Hon. ROBYN PARKER: But you have already said that you think it should be relaxed and reduced, so you must have some view already about that. What do you think is a fair threshold if we were going for an ambit claim?

Mr SLATTERY: It is partly a question of affordability and partly a question of what is just to individuals. Frankly, the ideal situation is the common law. The common law says that there are no barriers; there are no obstacles—be they as a percentage of the most extreme case or in any other way—to a woman such as this receiving full compensation. The reason these thresholds were introduced is that that has had an impact on liability premiums.

What we say should happen is this. In the forefront of our submission we point out that in the Australian Capital Territory when the Civil Liability Act was introduced, a kind of trade-off was done—a very interesting one. What the Chief Minister in the Australian Capital Territory did at the time of the introduction of that legislation was to say—rather like what happens under the Motor Accidents Act here in New South Wales now—that insurers who were writing business in the Australian Capital Territory in the public liability area should be required to report to the Parliament on an annual basis about what business they are writing, what the premiums are, what claims are being made, what claims are being paid and the general profitability of the business in each class and category. From there the Parliament would then be in a position to make a judgment as to how and when those thresholds should be reduced.

It is, I must confess, a little difficult to put a precise percentage reduction in the absence of full and proper data, but one of the things we say should be done is that what has already been done here under the Motor Accidents Act and what is being done in the Australian Capital Territory generally in public liability should be introduced in New South Wales in respect of public liability so that the Parliament has the data to make the judgment which you are, frankly very properly, asking about because it is difficult to make that judgment in the absence of the data.

The Hon. ROBYN PARKER: You mentioned the Australian Capital Territory. In your view does that Territory have it right? I am not aware of what happens in other States but do they have a different system or is there a model that you think is working well?

Mr SLATTERY: The Australian Capital Territory legislation has effectively the same tests in terms of thresholds but it has institutionalised accountability in relation to how the insurance industry is performing in the class of public liability insurance with these thresholds. It creates data accessible to the Parliament on an industry-wide basis, which permits the Parliament to judge whether or not those thresholds should be reduced further and how soon. That is the main difference.

Most aspects of the Civil Liability Act in New South Wales have been enacted in substantially the same terms, certainly in the eastern States of Australia, but the Australian Capital Territory is one of the only Territories or States, in my recollection—and I can give you more detailed data if you wish—which has enacted this institutionalised accountability, if I can put it that way, and it is an interesting model and one well worth looking at closely.

Ms LEE RHIANNON: You spoke earlier about the insurance industry. I think you said that you are not here to attack the insurance industry, and then you called on them to engage with the process. I think you said there was a need for them to recognise that the reforms had gone too far. Could you comment on whether they are engaging and, if so, are you engaging with them directly, or how do you think that could be taken forward?

Mr SLATTERY: I am a little depressed, I suppose, by looking at the content of the submissions from the insurance industry, which are, to a company, taking the position that no change

is necessary and it is not even worth looking at. But I am confident, by approaches that may indeed be generated by the processes of this Committee, that the industry may well be able to recognise that some change is necessary.

It is not necessarily right to look at the industry as a unified monolith on this. For instance, one of the few companies to come out and make a public statement about the reduction of premiums is IAG, which it did, I think in September or October last year—that is, public liability premiums were announced to be reduced by 10 per cent. That was obviously a welcome development and I think reflected itself in the marketplace. But the trouble with the insurance industry submissions is that they are ultimately the product of assertion which is not able to be tested other than by the process that I am talking about, that is, whether the reductions of premiums have been delivered or whether or not it is not possible to adjust this legislation to lower thresholds and provide more rights to injured people.

Until you have objectively verifiable data available to the Parliament, as it is under the Motor Accidents Act, that is always going to be difficult to do and one of the things at least the industry, in a process of engagement, should do is perhaps to put its hand up and volunteer and say, Yes, we will agree with the introduction of some ACT legislation to give accountability to the Parliament about what we are doing in respect of public liability legislation, for instance. That would be a very healthy start.

Ms LEE RHIANNON: Just on the other side of how your people are presented, we know that often in this debate—and I think it was where Mr Roozendaal was going with his questions—the idea is that barristers and lawyers are in it for self-interest, trying to make sure there is plenty of work for themselves—

CHAIR: Ambulance chasers, I think is the term.

Ms LEE RHIANNON: I am interested in you exploring that perception and picking up on the comments made by Mr Roozendaal about loss of income. Has there been an overall loss of income or is it that barristers and solicitors are picking up work in other areas? Is there an overall change in the industry? I am asking some specifics in that area and also for your comments because I find that often the comment is made that it is just for self-interest?

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Mr SLATTERY: There are several answers to that. First, when these reforms were introduced the Bar Association thought that some 20 or 25 per cent of the bar might leave the bar; public statements were made by the president, Ian Harrison, about the reduction in practising barristers. Frankly, that fear was entertained and the effect upon incomes of the bar may be substantial. In fact, what has happened has given real pause for thought. Upon the renewal of practising certificates in 2003 and 2004, there has been hardly any change at all. No people have retired from the Bar because they cannot survive in this environment.

What has been happening is that the fairly creative self-starting group of people, who barristers mostly are, have gone out and tried to do other things and expend their practices in other areas. A number of magistrates have said to me that former personal injuries barristers are appearing before them doing general work, either debt recovery or the variety of work that is available in the magistrates courts and other things in the District Court. That is what is happening. It has not had a dramatic insuperable effect as yet. It is no doubt that the effect of this legislation will be to reduce the income of some lawyers, barristers and solicitors. But that is not the point.

I acknowledge that, but I am not a spokesman for barristers' incomes; I am a spokesperson for people who will not otherwise be able to access common law rights or get proper compensation for their injuries. Sure, doctors can talk about infrastructure shortages in hospitals, but they make money out of practising as doctors in those hospitals. Let us give some credit to people who, although they make money out of their expertise, because of their experience can see what is going on around them. They have a genuine concern for people who are suffering without remedy or, in the case of doctors, who are not being properly treated because of problems in the hospital system.

The Bar Association's position is simply one of a closer perspective; sure that leads to income, there is absolutely no denying that. But it also leads to a better perspective. I have seen people look across my table in astonishment when I say, "Sorry, under this legislation you have no rights."

That is something which, frankly, appals me every time I have to say it. It is one of the reasons I am saying it to the Committee today. I earn money from a lot of things in my practice, from commercial work, from service in the naval reserve, from service in administrative law and other things. In any opinion I have offered publicly about this issue I am not, and never have been, motivated by self-interest. I am speaking on behalf of 2000 barristers in New South Wales and they share similar concerns to mine it.

Ms LEE RHIANNON: You would have heard comments from the Premier down about greedy lawyers on this issue. Would you comment on why you think lawyers get the bad rap from public figures, such as the Premier, and maybe the insurance companies do not?

Mr SLATTERY: It is odd that when there is a general community view that lawyers are an open target for all sorts of reasons that is fine, but when public figures and people who attack lawyers find themselves sued in a courtroom, they are a very happy to come to lawyers because they acknowledge that we are necessary. To those who attack lawyers, all I can say is, "Come and talk to me and I will tell you the good things that we do."

Ms LEE RHIANNON: Do you want to comment on why the insurance industry does not cop it?

Mr SLATTERY: No.

The Hon. IAN WEST: On the question of justice, equity and consistency versus costs, can you expand on what you said in your submission at 3.3.5, on the cyclical nature of personal injury insurance?

Mr SLATTERY: What specifically do you wish me to expand on, Mr West?

The Hon. IAN WEST: In your submission you indicated that the insurance industry operates on a very long tail and that crises that occurred in the 2000-01, although serious, were but a hiccup in the long history of insurance and that the reaction to where was quite hasty. Can you comment on that?

Mr SLATTERY: Yes, along with most marketplaces, in a specialised way the insurance industry works upon the basis of changes in confidence in what it is doing. Insurers take, depending on market conditions, a different view at different times of the insurance cycle about claim levels and about cost of claims. The actuarial estimates they do and the provision they make as a result of those will vary, depending on where they are in the insurance cycle. With liability insurance it takes some three or four years before the claims are ultimately resolved. During that time the cycle may well have moved on.

The part of the cycle at which premiums will start to rise is usually when insurers believe that claims are going up and insurance capacity is falling. That is what happened in early 2002: the removal of HIH, which was undercutting just about everyone else, from the scene. There was a perception that verdicts were rising and that is why two things happened: premiums rose and insurance was, in effect, made unavailable to some classes of small claim is for insurance. We have sought to focus upon the fact that that is a cyclical thing and that in due course it would resolve in two ways: first, capacity would return—and that has happened—and, second, in 2002 there was indeed a false perception about what was happening in verdicts in the courts. That is very interesting, but if you look at the decisions of the Court of Appeal in New South Wales starting in late 2000, in 2001 and in early 2002, there were increasing speculative plaintiffs' cases which were being rejected by the Court of Appeal and verdicts were being reduced.

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In some senses, the insurance industry was reacting to what had happened at first instance. With regard to the reforms introduced in 2002, had there been a pause and had there not been such a frisson of activity at the time, if the industry had gone back and looked closely at what the Court of Appeal was doing it might have seen that its fears about rising claims were unjustified.

We say that what should have happened is that if the reformers at the time had looked to a short-term solution for a short-term problem, within a year or so they would have realised that the

courts were doing the work that the legislature thought it had to do, and that the courts were curing it pretty well. I hope that answers the question.

The Hon. IAN WEST: I refer to the issue of impairment versus incapacity and the great dilemma that the medical profession, for example, is having in trying to come to grips with the Australian Medical Association guidelines that have been introduced, which I understand specifically said that the guidelines were purely for medical assessment and not occupational assessment for incapacity. Can you give us an indication as to some of the difficulties that are occurring with those methods of assessment?

Mr SLATTERY: Yes. This is something that ultimately it is best if I provide in a document, and I am very happy to do so. But I can tell you the nature of the problems being encountered by the medical profession. I am extremely glad this question is being asked, because it is specifically out of a lawyer's field, it is more the kind of angst that some of the medical profession are feeling about the implementation of these guidelines.

I would make three points about it. Firstly, the point you have made in your question is perhaps at the forefront of all of this. That is, when the American Medical Association promulgated these guidelines in the first place a warning, in red letters, came with the guidelines, which said they are not to be used for the assessment of compensation for disability; they do not have that purpose and they are inappropriate for that purpose. In any event, effectively that warning has been crossed off and they are being used under the legislation for this purpose.

The second point is this. The American Medical Association guidelines have not been adopted holus-bolus; that is, they have not been adopted in the way they were written originally. It is very important to understand the nature of the differences between how these guidelines were written and how they are incorporated into the legislation. The core difference is simply this—and I can give you lots of examples in a written document. What happens is that the doctor's discretion, the medical judgment that goes behind the operation of the guidelines, is very substantially removed.

Can I give you an example. If someone has a spinal injury and, say, a knee injury, and the guidelines say that they are to be assessed separately at, say, 4 per cent for the knee and 5 per cent for the spine, that comes in at 9 per cent. Under the American guidelines, in certain circumstances when doctors look at different parts of the body and they look at the combined effect of two injuries upon the whole person, they can in their medical judgment say that the combined effect of these injuries, although individually they come to only 9 per cent, is more than 10 per cent, and they have that discretion.

What has happened with the guidelines as enacted pursuant to the workers compensation and motor accidents legislation is that that discretion is substantially removed. That means that even when persons go to the doctor to be medically assessed, the assessor does not have the full range of judgments open to the doctor, as a doctor, to do what the doctor could do under the American guidelines—that is, to look at the person as a whole person. It is a mechanical, prescriptive, atomic view of the individual, whereby everyone is divided up into a bit, you add the bits together, and that is that. That is the second point.

CHAIR: What opportunity is there for appeal, under those guidelines, against any of the percentage delineations?

Mr SLATTERY: There is a system of assessment review available, certainly under the Motor Accidents Act and also under the Workers Compensation Act, but it is an internal review which still applies the same guidelines. If an individual is unhappy with the assessment by the medical assessor—taking the example I gave, it comes to 9 per cent—they can certainly appeal to the Internal Review Panel, but the Internal Review Panel still has to apply the written guidelines. For example, although it might be able to bump the 4 per cent up to 5 per cent in relation to the knee, if the guidelines do not permit the initial doctor to exercise discretion to look at the whole person, on top of that the review panel cannot either.

The Hon. IAN WEST: But it is not a judicial assessment; it is an internal peer assessment?

Mr SLATTERY: It is.

The Hon. IAN WEST: In terms of medical assessments and incapacity versus impairment, and the methodology for assessing that supposed medical incapacity, as opposed to incapacity to work, you are saying that for the sake of consistency the Civil Liability Act is the appropriate starting point?

Mr SLATTERY: Yes, for this reason. I did not really answer your earlier question properly, Mr West, and I apologise. I should also have pointed out this. There is a difference between impairment and disability. The conceptual differences are simply these. One is really the result of the other, in that conceptually a disability is the result of an impairment. Impairment is strictly the fact that the knee and the back do not have the range of movement that they had in a normally healthy person. But the disability which follows from that is the effect upon the person, on their way of life, and the pain that goes with movement and everything that affects one as a human being, as a result of the measured impairment.

The real difference between the medical assessment under the Workers Compensation Act and the Motor Accidents Compensation Act, whole person impairment, and the Civil Liability Act assessment is that the whole-person impairment is simply a measure of the mechanical impairment of the joint, or whatever it may be, in relation to the whole person. What the Civil Liability Act at least retains is that it measures the individual as an individual in relation to their particular disabilities, whatever they may be, as a person against a range of other individuals up to a most extreme case. It is at least an attempt to reflect that core ingredient of the old common law which simply says that in an action for personal injuries people should be judged by their individual circumstances, not according to formulae or tables, and that if a judge or jury believes that person is suffering more in their life as a result of a particular impairment than someone else, they may be entitled to more compensation. Although the impairment may be objectively the same, their way of life is different and it affects them differently.

The Hon. IAN WEST: I understand you to say that in terms of trying to obtain some consistency, justice, equity and transparency in the whole exercise, there should be one operation, and you say that the Civil Liability Act is an appropriate starting point for a common approach to these issues?

Mr SLATTERY: That is exactly what we are saying. Your words—an appropriate starting point—very adequately describe what we were saying in answer to a question asked earlier by the Hon. Robyn Parker. We are not saying that the Civil Liability Act is perfect in the long term; we are saying, "Let us get it into consistency. Get more data from insurers about all this and then consider whether even that can be relaxed further." But that is the appropriate starting point.

The Hon. ROBYN PARKER: I refer to that data from the insurance industry and wish to ask you a couple of questions. In your submission you state that in recent years insurers have made profits. By implication I think you are basically saying that they are profiteering because of the new tort reform.

Mr SLATTERY: We are saying that there is strong reason to believe that one of two things is the case. The market has turned in such a way that anything like the kinds of market restrictions that led to the crisis of 2002 are well and truly gone. The evidence of that is in the insurers' profitability in the last three years. That is evident from what we said on page 18. There have been astonishing increases in profit, year upon year, since 2002. We say that whatever the situation was then, profits like that indicate a real capacity to reduce premiums or to increase payouts. It is simply self-evident from what is being reported. The industry says, "That is due to all the sorts of things, not necessarily the effect of the reform."

That is not a complete answer to the point. The points are these: First, there is the capacity to address reform because of the profitability of the industry. Second, the insurance industry is not providing the exact figures in relation to the effect of public liability or Civil Liability Act reforms. We are saying that if you enact a kind of Australian Capital Territory-style institutionalised accountability we will have the precise figures to prove whether or not the insurance industry has done well out of those reforms.

The Hon. ROBYN PARKER: At the time of these changes I think public perception was that premiums would eventually be lowered because there would be fewer claims and that high premiums were a huge problem. Do you think that insurance premiums have been lowered?

Mr SLATTERY: There have been some announcements of the lowering of premiums, like the one I mentioned by IAG.

CHAIR: I think the figure of 15 per cent has been mentioned across the industry.

Mr SLATTERY: Yes. I think one needs to put that into perspective over time. We have done an analysis of what has been published by the insurers and the monitoring report of the Australian Competition and Consumer Commission [ACCC], on which some of the insurers rely. We can provide a more detailed analysis in writing. I will say this about what that really shows about premiums. It really amounts to this. It seems that average premiums in real terms were stable between 1997 and 1999 at around $620. This is in relation to public liability insurance. They increased substantially between 1999 and 2002. If one looks at the ACCC report at pages 15 and 16 one can see these graphically indicated. In fact, premiums doubled between 1999 and 2002.

The greatest increase was in 2002 when the Civil Liability Act was introduced and there were further increases in 2003. All that has happened is that any reductions in 2004 did, at best, only reduce premiums to about 2002-03 levels. There has not been any premium increase that would really entrench upon any premium reduction, which would neutralise whatever happened before 2002 because there have been increases in 2002-03, and these have just been reversed, in effect, to where we started. That is what we say that table shows. I can provide a more detailed document to analyse that for you, if you would like.

The Hon. IAN WEST: One important part of this equation is the effect on injured people. There has been an emphasis on whether or not the insurance industry is profitable. The Insurance Council of Australia [ICA] in its submission is saying that the current industry in Australia has $80 billion worth of assets; it collects $25 billion worth of premiums each year; and it pays out $2.5 billion in payments. I would be interested to find out what those payments are and what that covers. It seems like a very profitable industry. Those are the figures from the ICA's submission. I would be interested to have them explained.

My question relates to injured people. I would have thought that they were a fairly important part of the equation. They are referred to as customers but I find that terminology oppressive. If you trying to recompense people and put them back in the position they were in prior to their injury, what weight is given or should be given to that part of the equation as opposed to profitability? Could I get some comment on that?

Mr SLATTERY: The system of tort was originally and ultimately developed by the courts to attend to the fundamental social problem of people who suffered intentional or negligent injury or violence and who needed to get compensation for social stability. That was the core reason that this liability developed. Because it was recognised by the courts that full and proper compensation needed to be given to people who were seriously injured the insurance industry developed a deal with the liabilities that were created.

The core origin of what we are talking about is the creation of a liability that has been socially recognised for the benefit of those individuals. It has a core association with social stability. This is not just a bunch of freeloaders getting windfalls out of the court system. I can tell you from long experience that if people who are injured sit across a table from me I would say to them, "Would you prefer to have the money or not to have your injuries?" It is a no brainer. They always say, "I would prefer to be like I was before." But the money is some compensation for what they have been through.

The core question is a social one, but there has to be a balance with a sustainability of insurance industry and one needs to look very, very closely at any complaint by the insurance industry that any change will adversely affect the sustainability of public liability insurance or any of the other classes of insurance we are talking about here. There is an easy way of becoming a sceptic in all of this. One

only has to look at page 22 of our submission, for example, about how the motor accidents scheme operates, and the figures that we are citing here are directly from the returns to the Parliament and have been analysed. As we point out on page 21, what was intended by the Motor Accidents Compensation Act was to get to a situation where insurer profit was about 6 to 8 per cent of premium written. That was the objective of the Motor Accidents Compensation Act.

Well, guess what? If you look at page 22 what happened was that in 2000 profit as a percentage of premium written was 23.77 per cent, 2001 it was 21.34 per cent, 2002 it was 20.64 per cent. In that underwriter regime it is triple what was anticipated at the time the legislation was passed. And if that is what is happening in motor accidents heaven knows what is happening in civil liability. That is why we say let us get the ACT legislation enacted here in New South Wales and that might reveal the kind of data which we can show you now from what has been returned to the Parliament in the motor accidents area, and that is not a good look about anyone from the insurance industry who is saying that they cannot afford any changes to provide more compensation to, in this case, injured motorists.

The Hon. ROBYN PARKER: So you are saying then if we change the threshold for general compensation, if you adopt that method, that that will prevent the possible knee-jerk reaction from the insurance industry to increase premiums. Is that what you are saying?

Mr SLATTERY: I suppose we are saying that and something else, which is also a response to Mr West's question, which is this: we are proposing coherence and consistency in the law and we say let us start with section 16 of the Civil Liability Act and that anyone who propounds the idea that that is unaffordable should prove it and should prove it to you. That is where the onus lies and they have been required to prove it under the Motor Accidents Act and we say they have essentially failed. If they are going to do it under the Civil Liability Act what we say is that they should come up with similar data and prove by proper data, and not just by generalised ACCC reports, but data that specifically focused upon the civil liability issue, that they cannot afford it. That is what they should do.

The Hon. ROBYN PARKER: You said before that you thought there would be an increase in claims. Have you projected what percentage of increase in claims there might be if you change these thresholds?

Mr SLATTERY: It is very difficult to predict. In fact, no-one in this debate has really quantified that issue, and probably that is why the question is being asked, because there are two levels of issue here: one is a perception issue and one is an actual experience of what happens in the courts. The fact that there are changes to the law in train means that people behave differently in their claim-making behaviour. I can give you a very interesting example of that. I was involved last year in the James Hardie asbestos inquiry, appearing for the foundation against James Hardie, and one of the very interesting things that emerged in the foundation's own public data about claims as a result of the inquiry was that the level of claims against the foundation—that is the old Hardie's companies—escalated dramatically in the course of the inquiry.

Similar numbers of people were being affected by and dying from asbestos-related diseases; that did not change. What was changing was that people, because of the James Hardie issues, because of the public nature of that inquiry, were starting to make claims which they never did before and there is a double effect: it takes a while for any legislative change adjustment to work its way through the courts in terms of what the results will actually be, but before that happens there is either an encouraging or a deterrent effect from that particular legislative change. What has actually happened now under the Civil Liability Act is that it has been a very great deterrent to claims, not just speculative claims—and, frankly, the Bar Association, like every sensible member of the community, is clearly of the view that fraudulent and highly speculative claims that have no basis are not claims that should occupy the court system and should be deterred as much as possible—but claims of a valid nature where there has been negligence in respect of seriously injured people should not also be deterred. And the trouble is that is what is going on.

That is a long and convoluted way of perhaps not answering your question. The reality is it is very hard to measure, but the answer is this: one does it carefully on the best data available and I get back to the point I am making that you need to get the best data available through some sort of

amendment like the ACT institutionalised accountability in respect of public liability claims and then there needs to be considered a reform of a developmental kind.

The Hon. IAN WEST: Can I ask a follow-up question to that? Would I be somewhere near the mark if I was to say that if they are legitimate claims the number of claims is not the issue? If it is a legitimate claim and there is an increase in the number of claims is that not appropriate anyway?

Mr SLATTERY: Yes. I completely agree, if the claims are legitimate and there is simply no social reason why they should not be pursued.

The Hon. IAN WEST: So most definitely any assessment of affordability it would be flawed to say that the number of claims would be a fundamental threshold issue in assessing the criteria of affordability?

Mr SLATTERY: Yes. That really is probably the best answer to the question asked rather than the one that I gave.

CHAIR: The number of claims is in direct proportion to the publicity given to the likely success of the outcome of the claim.

The Hon. IAN WEST: That is incorrect, very fundamentally incorrect. That is a perception that people have, but it does not follow.

CHAIR: Well, can I ask, going back to your James Hardie case, did all publicity on that have any impact on the number of claims that were made?

Mr SLATTERY: Yes. The point I was making was that there was no epidemiological evidence which suggested that there was any good reason why between 2003 and 2005 the numbers of people who were suffering from that dreadful disease mesothelioma would suddenly spiral. The disease process was unchanged.

CHAIR: I agree with you.

Mr SLATTERY: But what happened during the Hardie's inquiry was that the numbers of people who realised, because of what was happening on a daily basis in the media, that they had a claim, went up and the foundation got a very substantial increase in genuine claims. Frankly, where you proved mesothelioma they were all genuine claims and they were able to, provided they could sheet it home to Hardie in some way.

The Hon. IAN WEST: Therefore, you would not put forward an argument to say: There has been an increase in claims so we must address reducing access to the Dust Diseases Tribunal?

Mr SLATTERY: That is exactly right, Mr West, and really the Hardie case is a very interesting illustration of the fact that a lot of people justly need to be compensated but a lot of people simply do not exercise their rights, and therefore increases in claims can be a quite misleading way of dealing with this problem.

The Hon. IAN WEST: Is it then true to say that there have not been any changes to the Dust Diseases Tribunal in terms of access during the period of the so-called crisis?

Mr SLATTERY: The Dust Diseases Tribunal has been largely immune from all of these legislative changes. It is a specialised area and it has not been affected by the Civil Liability Act; the old common law applies. What is interesting in that context is this: Partly as a result of the James Hardie experience last year, one of the things that James Hardie did to defend itself was to say that very substantial parts of the money that was being paid out was going to doctors and lawyers and, therefore, it was appropriate for reforms to be undertaken. It is the same argument that is being used by insurers, and James Hardie was using it too.

What happened as a result of that inquiry, in part, was that, as we all know, there was an inquiry and a joint statement was made by the foundation and the union movement about how claims

could be managed through alternative dispute resolution processes at the end of that inquiry. The anecdotal evidence is that that has very substantially reduced, by better management, the cost of pursuing those claims. One of the interesting things about the Dust Diseases Tribunal now and what is happening in the management of those very serious cases is that by better alternative dispute resolution procedures the transaction costs of the claims are being reduced to well below what James Hardie was talking about publicly. That can happen across the board, not just in that area.

The Hon. IAN WEST: My final question—

CHAIR: Ian, I ask you to leave that question until after the Opposition time is finished. You will have time to ask it after the time for Opposition questions has expired.

The Hon. ROBYN PARKER: Returning to where we were before, I am conscious of the need for balance in terms of victims and genuine victims. I wonder whether you have any evidence of changes in this legislation reducing the number of speculative and fraudulent claims. Does changing those thresholds increase that? There is a perception out there that it is a pay-dirt situation if the thresholds are adjusted.

Mr SLATTERY: There are probably two answers to that question. At about the same time as that legislation was passed there was also a change to the Legal Profession Act: section 198J was introduced. It required expressly in the statement of claim the solicitor concerned to certify that there were reasonable prospects or grounds for success of litigation. So that unless, on proper consideration of available facts and the available law, a lawyer could not come to that view reasonably, the certificate could not be signed and the document could not be filed. That was not an amendment to the Civil Liability Act but an amendment to the Legal Profession Act. It has been, I can tell you from direct experience of the way that provision operates, a very sobering influence upon decision making about the commencement of litigation. It, more than anything that has happened in the Civil Liability Act, has been a basis for this kind of dispute, let me tell you.

Defendants' lawyers now attack plaintiffs' lawyers and say, "You are going to pay the cost of these proceedings personally because your 198J certificate is wrong. These proceedings should never have been commenced and, if they fail, we're going to sue you." That is what is going on out there as a result of the introduction of that section. It is a very sobering provision and in every process by which I am asked to advise upon now it is just routine, after the statement of claim has been settled or an advice is given before the statement of claim is to be settled, that the solicitor will sit down with you and we go through the question of whether that certificate can be signed by the solicitor. It has been very, very powerful. We are not suggesting that change when the Civil Liability Act is reformed, or the other Acts are reformed in the way we say. There is no proposal by the Bar Association to remove 198J. Indeed, I should point out that 198J really reflects what barristers always thought their obligation was any way, it is just that it has now been formalised in a way that everyone really does focus on.

The Hon. IAN WEST: Finally, in terms of the actuarial advice that was received initially by James Hardie as to the viability of that particular scheme, over the period of those investigations that actuarial advice was revealed to be somewhat suspect as to its future estimates. As to the actuarial advice that was relied upon to assess the so-called crisis in 2000 and 2001, could it be that that actuarial advice was in some way weighted towards a crisis that may not have been there in terms of the estimates being a little premature?

Mr SLATTERY: That is a really interesting question because the Hardie's experience provides interesting illumination of actuarial perception. I am not really competent to answer the question about 2002 but I can give you this example from Hardie, which will cause you to have some reason to inquire into what happened in 2002. In brief, the Hardie's experience was that a series of actuarial reports were provided about the future liabilities of the old Hardie subsidiaries, commencing in 1999. There was another one in 2000, another one in 2001 when the foundation were separated and then during the inquiry in 2004 but as at 2003.

When you look at all the curves that were produced by the actuaries over those five years—they were all done by Trowbridge; they were all done by the same people and generally were the same assumptions—what happens is this: In each case the peak for mesothelioma in those actuarial curves

sets out about two or three years from where the observer is looking. Each time the actuarial report is produced the peak just moves out a little bit further and then a little bit further and then a little bit further. What has happened is that by 2005 it is obvious that a 1999 prediction about where the peak would be is just wrong. My point is simply this: In assessing actuarial evidence of any kind you need to be extremely conscious of the time and the perspective with which it is done. That, I expect, without anyone attributing bad faith to anybody, is a real flaw—perhaps not a flaw but a weakness—in actuarial reasoning that one needs to be very conscious of.

The Hon. IAN WEST: I will leave it up to you as to whether you can answer this question but in relation to these peaks continually going three and four years into the future, and looking at the increase of assets of the insurance industry, their yearly income and expenditure returns do not seem to be going into the red. Perhaps the actuarial advice is a little bit out?

Mr SLATTERY: The only thing I will say is that one needs to be very cautious about the kinds of assumptions made about the future in any actuarial advice.

CHAIR: It is the old economist problem.

Mr SLATTERY: That is right, make sure you get it right.

The Hon. KAYEE GRIFFIN: Could the actuarial advice also relate quite substantially to reinsurance and the tail on workers compensation?

Mr SLATTERY: Yes, and today's conditions might not be next year's or the year after. The industry is clearly cyclical but on the other hand the present capacity, the increase in profits that has occurred does not to be weighed very heavily in the equation about what should happen with either returning funds to genuinely injured persons by changes of legislation or reduction of premiums or both.

(The witnesses withdrew)

ANDREW JAMES FERGUSON, Secretary, Construction, Forestry, Mining and Energy Union, 10 Railway Street, Lidcombe,

RITA MALLIA, Senior Legal Officer, Construction, Forestry, Mining and Energy Union, Locked Bag No. 1, Lidcombe,

IVAN ANTHONY SIMIC, Solicitor, Taylor and Scott, 10 Railway Street, Lidcombe,

DANIEL JAMES REEVES, injured worker, 14 Inkerman Avenue, Woy Woy,

TOMO SUSAC, formwork carpenter, 6 Boorara Avenue, Oatley, and

PETER SORE, joiner/carpenter, 6 Sillwood Place, West Hoxton, affirmed and examined:

GRANT IVAN WAKEFIELD, estimator, structural field, 119 Burragorang Road, Mount Hunter, and

BRUCE ALFRED ETON, scaffolder, 15/107 High Street, Mascot, sworn and examined:

CHAIR: In what capacity do you appear?

Mr WAKEFIELD: Representing the union and the interests of injured workers.

Ms MALLIA: As a trade union representative.

Mr SIMIC: As legal representative of the Construction, Forestry, Mining and Energy Union.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mr WAKEFIELD: Yes, I am.

Ms MALLIA: Yes.

CHAIR: Mr Ferguson, do you wish to make a brief opening statement?

Mr FERGUSON: Yes, I would like that opportunity.

CHAIR: Please go ahead.

Mr FERGUSON: At the outset, I would like to say that the union is very critical of the workers compensation reforms introduced in more recent years in terms of the consequences for working people and, specifically, injured workers. I am certainly aware of the terms of the reference of this inquiry and our comments probably relate, in particular, to item No. (5), "Any other issue that the Committee considers to be of relevance to the inquiry". The union recognises the importance for premiums, but we also recognise the fundamental importance and the obligation of our elected representatives to be aware of the consequences of legislation for working people. We do not believe that anything can be more important than the consequences for workers who have been injured at work, in particular, on occasions due to the negligence and reckless disregard of an employer.

In terms of the past reforms, we acknowledge that there have been certain improvements in the legislation that have been to the benefit of the scheme and also some that have been to the benefit of workers; in particular, the introduction of provisional liability provisions in the Act, which has been of value in terms of expediting the initial payments to injured workers. We also recognise the value in terms of provisions in respect of the meaningful rehabilitation of injured workers, but we do not believe that the end result has been meaningful rehabilitation, at the end of the day, in getting injured workers back to work.

We have got five witnesses here today. They are not union activists; they are workers who have been injured on the job. Two of them are workers from a non-English-speaking background, who have limitations in terms of their English skills, but we have got thousands of workers in the building trade who have got no language skills at all and who are often mistreated by a system in terms of their rights when they are injured at work. In particular, we are concerned about long-term unemployed workers who are injured and the terrible consequences for those workers. Many of them have no realistic option to return to work but are required, often despite their language difficulties and their educational difficulties, to comply with a paperwork system that has got no meaning to them and is of no value to the human suffering that they are confronted with.

The current system does not allow seriously injured workers, who are incapacitated for work long term, to have a meaningful life. The consequences of the current system are a loss of self-esteem and human dignity. We have single workers who have been off work for more than six months, who only receive a statutory wage of $334.10 gross per week, and it is impossible for any single workers to survive on that miserable form of compensation.

We have got many members who have suffered severe financial hardship when they get injured and the consequences of that are not just the loss of self-esteem for themselves but marital failure and a lack of dignity for themselves in front of their family members, within their broader family and within their community.

We have got insurance companies that deal with injured workers in a dismissive way. We have got insurance companies that refuse to reimburse workers promptly for expenses they incur. They are sometimes travel expenses, sometimes they are medical expenses, and those workers feel no power in trying to deal with this lack of reimbursement. We have insurance companies that refuse to deposit compensation to workers by EFT. We have got workers who are required to fill out job-seeking logs, which is nothing but a bureaucratic exercise, with many of these workers having no prospect whatsoever of finding meaningful work and who simply get family members who have a better command of English to fill out this bureaucratic paperwork so that they are not entirely chucked off the system and chucked onto the scrap-heap.

The workers we present today will be in a position to outline some of the indignity that they suffer. None of these workers have ever been to Parliament House before. None of them have had the opportunity to talk to an elected member of Parliament, so we are hopeful that they will get a fair hearing but, more importantly than a dutiful response from parliamentary members of this inquiry, we would be hopeful that the human stories can be listened to and that they can get some support to change a system that does not work for many workers.

In terms of the WorkCover guidelines, far from compensating workers fairly, the WorkCover guidelines by which an injured worker's disability is measured result often in lower compensation than they would have received in the past. We have details today of some case studies that provide evidence of seriously injured workers receiving less compensation than they did under the old system. These workers have got no right to proper representation. They have no capacity often to represent themselves. They have got no power and they need effective expert representation to pursue their interests.

We do not regard it as a fair system when workers do not have effective representation against politicians and laws that do not understand the consequences of what happens to injured workers. In New South Wales in particular, workers have to overcome very high thresholds to be in a position to sue for damages in the event that they are injured by employer negligence. We regard that as an unfair system. Workers who are injured due to negligence of the employers should have the capacity to sue so that we have more effective sanctions against employers that cut corners and have a complete disregard for the health and safety of working people. There may be some legal consequences in terms of giving workers the right to sue, but we regard that as important in terms of educating employers about their obligations in terms of providing safer systems of work.

So we welcome the opportunity to speak here. I have often heard politicians being dismissive of injured workers and remarks about workers who bludge on the system and malinger. None of these five workers are bludgers. They are not malingerers. They want to be returned to work, but they also want proper compensation for their human suffering, physical, emotional and psychological. For

every worker who has done the wrong thing by putting in a fraudulent claim—and there are some workers who do that—there are probably 1,000 employers who rip off the system one thousand times more.

On a daily basis I examine the workers compensation policies of employers. I see employers that declare to insurance companies that they are paying a wage bill of $100 for all their workers for a 12-month period when their wage bill is millions of dollars. I find employers that have told insurance companies that they are involved in selling ceramic tiles, and paying low premiums, when they have workers fixing ceramic tiles. I find employers who have workers operating heavy plant in very dangerous occupations that have told insurance companies that all they do is hire plant, and pay much lower premiums than they should be paying. I would like to see the Parliament do more to tackle the employers that rip off the system many times more than a small minority of workers that malinger or bludge on the system. So thank you very much for the opportunity to give a brief presentation.

CHAIR: Members, I propose to ask the other two key presenters here whether they wish to make a short statement first, and then call for questions. Ms Mallia?

Ms MALLIA: Today we want to show five examples of workers whose lives have been devastated because of injuries they have suffered. We three individuals could tell the Committee their stories, but there would be nothing more powerful than hearing these five gentleman telling their stories to you, because you will see the human face of the tragedy that occurs when someone is injured at work and the way that the system in New South Wales is failing them.

CHAIR: Mr Simic, do you wish to make a statement?

Mr SIMIC: I have nothing at this stage.

CHAIR: The Committee will proceed to questions, first by Government members.

The Hon. IAN WEST: I thought we were going to hear the five cases first.

CHAIR: We will go to the five cases later. Do you want to ask the presenters any questions about their opening statements?

The Hon. IAN WEST: No.

CHAIR: Do Opposition members wish to ask questions on the opening statements?

The Hon. RICK COLLESS: Just a couple of questions for clarification, Mr Chairman. Mr Ferguson, when you talk about the malingerers in the system—and I agree with your comment that there are a lot of comments made publicly about those who are supposedly malingerers in the system—what sort of percentage of injured workers would you consider to be malingerers?

Mr FERGUSON: I find it very difficult to evaluate that. I personally have never met a worker who bludges on the system. But human nature tells me that, just as there are lazy politicians and judges who fall asleep during court cases, inevitably there are some workers who will do the wrong thing by the system. I think Ivan Simic wants to say a few words about this as well.

Mr SIMIC: I have been acting on behalf of the CFMEU construction workers for the past 10 years. Almost exclusively, that is what I have been doing. I am very proud of my association with them. My experience is that you might find one out of a hundred that I would call a dodgy case. My experience is that not one of the persons who walk into my room wants to be there. None of the construction workers, who normally pull in somewhere between $800 to $1,000 a week, want to come into my office and talk about compensation at the rate of $300 a week. It may be even less than one in a hundred, and that is in my 10 years of experience acting on behalf of injured workers. It is a very, very small minority. There is just no financial incentive for any one of say these five gentleman behind me to go onto workers compensation.

The Hon. RICK COLLESS: Please do not get me wrong. I am not insinuating that anyone in this room is in that category. I thought it was an interesting comment that you made, Mr Ferguson.

What sorts of checks and balances are in place to make sure that some of these malingerers do not get through the net?

Mr FERGUSON: I am not too sure whether you are referring to workers or employers that bludge on the system.

The Hon. RICK COLLESS: I am using your term. You used the term malinger. I am wondering what checks and balances are in place to weed out those malingerers. Unfair compensation is what I am getting at.

Mr FERGUSON: I would say, unfortunately, there is more focus by politicians and insurance companies on malingering workers than on employers that rip off the system. In terms of employees, I have heard on many occasions of insurance companies that set up surveillance of workers mowing their lawns or carrying a bag of groceries. I have never—and I have worked for the union for 25 years—heard of an insurance company putting surveillance on an employer that rips off the system.

I want to say just a few things to you about employers. Basically, we have an honour system for employers to declare to an insurance company how many workers they have got and what their estimated wages will be for a 12-month period. It is an honour system. I can say to you with a lot of authority, backed by a lot of evidence, that employers frequently tell insurance companies that they have 10 workers when in fact they have 100 workers, or that their wage bill for a year is $10,000 when it should be $100,000 or even $1 million. I have actually found insurance policies that tell the insurance company by way of declaration that the estimated wages for a 12-month period for a company is $1. I have found some policies with an estimate of zero wages, when the employees are physically working on building sites.

So I say to you that there is a lot of bias in the system. I would like to see more activity against employers, rather than this focused on that minority of workers who want to malinger. As Ivan says, in terms of the building trade, we have very effectively bargained for workers to get very good wages and working conditions—$1,000 a week, doing physically arduous work, long hours of work, 10 hours a day, six days a week—and I do not know any worker who would give up that decent wage packet to live the misery of $330 a week.

The Hon. RICK COLLESS: What checks and balances are there to make sure those malingerers do not get through the net?

Mr FERGUSON: As I said to you—and I have 25 years experience—I have heard frequently of insurance companies monitoring and having workers under surveillance to check whether they are sitting at home or doing another job. But, as I also said to you, I do not see the same surveillance of employers.

The Hon. RICK COLLESS: The union does not have any checks and balances at all?

Mr FERGUSON: We have checks and balances.

The Hon. RICK COLLESS: To make sure those malingerers do not get through the net?

Mr FERGUSON: You talking about employers or workers again?

The Hon. RICK COLLESS: The term that you used was malingerer.

Mr FERGUSON: You are not clarifying whether you mean employers or workers. But I have got no doubt you are referring to workers. In terms of the employers, we audit building sites on a regular basis. Fortunately, we have still got right of entry, and we do a lot to ensure compliance by employers, but we do not have the resources to clean up a system that is not working. In terms of workers, we have integrity, and if we find any worker working and running a workers compensation claim at the same time, we would abandon that worker and not support them. So we have checks and balances.

The Hon. RICK COLLESS: Thank you.

Mr FERGUSON: But I have never found that in 25 years.

Ms LEE RHIANNON: Mr Ferguson, you spoke about insurance companies often dealing with workers in a dismissive way. Do you mean by this that there is little co-operation, or are they actually breaking the law in some way?

Mr FERGUSON: It is probably a combination of both. They have a licence that does not regulate the detail of their performance and their behaviour. So I suppose the sanction is that you can lose your licence if you do not do your job. It has never happened to an insurance company. They have enormous muscle in the system, a lot more muscle than working people. I think they are often dismissive. These claims are very important for a worker. If you are sitting at home and you have incurred a travel expense or medical expense, and you do not have enough money to survive, to pay your rent or to buy food, it is the number one item in your life; you have got to get reimbursement.

I know of cases where it has taken months on end for a worker to be reimbursed for a travel expense or a medical expense or for a pharmacy bill. They do not have power in the system. They often complain that they ring up the insurance company, and a message is left—not once, twice or three times, but more frequently than that—and they do not get return phone calls. It is not a big priority for an insurance company in their big picture, but it is absolutely important to a working person who is living in destitution and desperate for reimbursement. Sometimes it is a psychological issue about having some power, when you have no self-esteem, you do not feel you have any power and you are treated in a dismissive way. Some insurance companies refuse to electronically transfer wages to workers, and they are posted cheques that do not arrive and they have to chase up their cheques, or they have been sent to the wrong address. We think it is nothing but an absurdity not to have electronic transfer of money at this point of time.

We have heard of case managers handling a claim going on annual leave and no-one being responsible to look after that worker's claim for the four-week period, and simply when they come back it is dealt with. I think a lot more should be done to regulate the detail of the behaviour and performance of insurance companies.

Ms LEE RHIANNON: I was about to ask what you think should be done. You were saying put in regulations. What are you suggesting?

Mr FERGUSON: I do not know the detail of what is required but I know that these claims should be dealt with in a more appropriate fashion. These people have no power in the system. They do not have lawyers to spend time representing their interests about what is regarded as minor detail by the system. Lawyers who operate in terms of running business and profit and so on, there are limits to their capacity. There are limits to union resources. We have a lot of conservative politicians in the country right now trying to destroy the union movement. So these workers have no power whatsoever in the system. I think there should be detailed regulations in respect of non-performance. When people do not perform in insurance companies, this sanction of losing their license is not good enough. There should be penalties in terms of costing them money, just the way they cost workers money when they do not reimburse their claims.

The Hon. ROBYN PARKER: In your submission you talk about injured workers not receiving proper and adequate compensation and workers being denied access to proper lump sum compensation. Can you define what is "proper lump sum compensation" or "adequate compensation"? What does that mean?

Mr FERGUSON: Substantially more money, in very blunt terms, than workers receive now. You will see some case studies today of workers who are being drip fed by a system who do not have a prospect of returning to work. I have met many of those workers. Some left school at 15 years of age. Some have no command of English. Some have no capacity to be retrained. One of the workers here today comes from a non-English speaking background and had difficulty with the affirmation today. He is doing a computer course at the moment. He has to get family assistance to fill out the paperwork required so he is not chucked off the system for non-compliance. We think there are situations where workers would be better off for themselves and for the system to receive a lump sum

of money to give them some decent compensation and allow them psychologically to get on with their lives, rather than feel that they are in this system and the treadmill that is not working for them.

Certainly, the issue of compensation, before there was a system where workers could sue a reckless employer. And there are reckless employers. I have met many of them—not the majority of employers but there are a lot of reckless employers. Workers who are badly injured should have a greater capacity to sue those employers to get decent compensation but also to educate employers about the importance of workplace safety. It is not just an issue of justice for workers; it is also about making a substantial contribution to getting better safety performance by companies.

The Hon. ROBYN PARKER: So just to clarify that, you do not have a definition of "proper" or "adequate". You would have no cap then; it would be whatever you can get, or—

Mr FERGUSON: I do have a definition. The definition is "substantially more money than they currently receive". I do not think it is necessary to say $1 million—

The Hon. ROBYN PARKER: What—1 million, $2 million, $3 million?

Mr FERGUSON: I do not think it is necessary to say that.

The Hon. ROBYN PARKER: You have not got any sort of cap.

Mr FERGUSON: I did not say that, and I certainly do believe in some caps. I do not think it is of any value to anyone here to say that every worker should get $1 million. I think it depends on the circumstances. The age of the worker would be an important consideration. Some of the workers here are quite young workers. I have seen workers of 17 years of age be in a position to never work again because of the negligence of an employer. That worker should get more compensation than a worker probably 64 years of age who does not have a life in front of him in terms of the cost of living. So it depends on circumstance. Definition is certainly "substantially more money" than politicians currently provide for badly injured workers. I think it is absurd to quantify an amount of money for every single worker because it depends on circumstances.

The Hon. ROBYN PARKER: So you would have a sliding scale according to circumstances?

Mr FERGUSON: That is one option. At the end of the day I do not believe it should be a union official or yourself, frankly, but a court of law that should evaluate these issues and make a decision based on the guidelines drawn up by the elected representatives of people.

The Hon. ROBYN PARKER: So you would want a common law resolution then?

Mr FERGUSON: With a much lower threshold, so that more workers who are very badly injured would have more opportunity to sue and get justice.

CHAIR: Nine per cent or 8 per cent or something like that.

Mr FERGUSON: Much lower than the current threshold which makes it very difficult for badly injured workers.

The Hon. ROBYN PARKER: Your submission states that as a result of the 2001 workers compensation amendments these workers are badly done by. So things were okay before that, were they?

Mr FERGUSON: The submission does not say that. I would say that in the past and currently no effort is made for employers who are ripping off the system. So it is an ongoing criticism. In terms of the old system, as I said when I made my presentation, we welcome provisional liability. That is of assistance in expediting payments to injured workers. So we see a significant improvement in that area. What I said in the submission and orally was in particular, badly injured workers—not workers who have a scratch—who have less capacity because of the low threshold to sue for justice in terms of compensation.

The Hon. ROBYN PARKER: Just reading your submission, I must have misinterpreted it because it says, "in the construction industry the CFMEU has had to deal with the overwhelming numbers of its members who as a result of the 2001 workers compensation amendments have been denied access to proper lump sum compensation", et cetera.

Mr FERGUSON: As I said earlier—and I think everyone on this inquiry would understand this—the building industry is physically arduous and dangerous. They are not shuffling paper. They are doing heavy physical labour on high-rise building projects often with heavy machinery. When injuries occur they are often horrific and you will hear some of the stories today. Many of our members in particular, because of the nature of their work, have been disadvantaged by the system as opposed to possibly other sections of the work force that do not encounter the same safety hazards or the same horrific injuries.

The Hon. ROBYN PARKER: So is it your view that there did not need to be changes because things were okay prior to 2001?

Mr FERGUSON: The previous system was not perfect—I have never said that. As I said, provisional liability was a significant improvement. There have been some reforms in the area of rehabilitation that have been beneficial. Nothing has been done in relation to employers who are ripping off the system in terms of premiums and badly injured workers in particular under the current system are worse off.

CHAIR: Mr Ferguson, would you care to introduce each of the individuals by turn?

Mr FERGUSON: I think members of this inquiry realise that these people have never been in this type of forum before and if they find it difficult—

CHAIR: We will do everything we can to make it easy for witnesses.

Mr FERGUSON: And hopefully hear their story if it is not drawn out by themselves.

Ms MALLIA: Our first witness is Mr Bruce Eaton. He is a 51-year-old scaffolder. He was 48 years old at the time of his injury. At the time of his injury he was earning about $1,000 per week. On 31 August he suffered serious multiple injuries when a large stack of scaffolding fell on him. The employers had allowed the scaffolding to be stacked way beyond safe limits, and WorkCover successfully prosecuted that employer for breach of its duties under the occupational health and safety laws, and Mr Eaton actually gave evidence at that inquiry.

The workers compensation insurer accepted liability for his injuries and he was ultimately paid an amount of $22,500. He is incapacitated for work. He is now living on a gross amount of $200 per week which he is paid under the Workers Compensation Act. He has made an application to the Workers Compensation Commission to be assessed to see whether he gets over the 15 per cent threshold, but all the medical advice is that he will not reach that threshold.

Mr Eaton has made about 100 job applications in his time since his injury, but he has not been successful in gaining new employment. He is here today to briefly tell you what his personal experience has been since his accident occurred.

CHAIR: Thank you, Mr Eaton, would you like to tell us?

Mr EATON: Yes. The accident, which occurred in August 2001, has impacted quite a lot on my life financially, mainly. Before I was making over $1,000 a week average. Now I have been reduced to about $200 gross, which is about $185 net. It has had an effect on my relationship with my wife. From working part time she has had to take on a full-time job and work extra hours financially to pay bills and things like that. Physically it has affected my whole life because of the severe injuries that occurred to my upper and lower back, both knees and my neck. I take very strong painkillers, which are morphine based, on a regular basis. I take anti-inflammatories. I have been on them constantly for approximately four years. Just doing simple things like walking for a long time as doing

things like I usually did, like sports, these things I cannot do any more. I just wish that I had my health back. Your health is your main asset. But accidents happen. I cannot go back and change that.

It has been very hard for me. I have applied for all these jobs, this that and the other, but when you say you are on workers compensation nobody wants to know about you pretty much. I feel like I am in a hopeless situation. I am suffering from depression because of this, and I just feel like no-one is going to take me on. It is just an endless thing. As far as the GIO insurance company, which I deal with, they are refusing to pay. I was awarded under section 60 that they would pay medical expenses, et cetera, as far as acupuncture because of the chronic lower back pain and knee pain, which I have. I am having hassles getting payments for this that and the other, even though they approved it. Recently I had not been paid workers compensation for a period of three months. I do not know what happened, they did not give me a reason for that. Even though I am supposed to be getting it on a regular basis as far as getting directly put in my back account, I have hassles like this all the time continually with the insurance company.

CHAIR: Just to clarify, was this for any medical fees or was this part of your $200 gross per week they were not paying?

Mr EATON: I never received any payment for the last three months.

CHAIR: For three months?

Mr EATON: Yes.

CHAIR: Weekly?

Mr EATON: And that is just recently.

Mr FERGUSON: That is your wages, is it?

Mr EATON: That is my wages, yes.

The Hon. IAN WEST: How are you surviving, on your wife's money?

Mr EATON: Yes, on my wife's money. That is pretty much it.

The Hon. RICK COLLESS: I think it was actually Ms Mallia who said that the employer was prosecuted in this case. Is that correct?

Ms MALLIA: Yes.

The Hon. RICK COLLESS: What was the outcome of the prosecution?

Ms MALLIA: We tried to find that. It was a case before the Chief Industrial Magistrate's court as far as I am aware. We were trying to find the result of that, but I could not. I understand anecdotally that it was about a $15,000 fine.

The Hon. RICK COLLESS: The company was fined $15,000?

Ms MALLIA: But I do not have that for certain because I could not find the decision.

Mr SIMIC: I am Mr Eaton's lawyer. I have been informed by WorkCover that the prosecution was successful. I do not have it here before me, but I believe they received a penalty of $15,000 odd.

The Hon. RICK COLLESS: What happens to that money? Where does that money go?

Mr SIMIC: That goes to WorkCover as a moity. The bizarre situation we have here is that Mr Eaton got $22,000 for his pain and suffering and WorkCover got $15,000. I would need to check that. I say that qualified. But I believe anecdotally that it was about $15,000 odd. Just to answer the

honourable members about what would be adequate compensation, Mr Eaton's case is a great example. This gentleman is looking for nothing more than the real financial loss he suffered. In our society I certainly grow up thinking that if you have been wronged—if somebody defames you or takes a photograph you do not like you can get a lot a lot of money, but if you have been swinging a hammer or chasing a crane for the past 10, 20 or 30 years and you are unlucky enough to come unstuck and have an accident the law now says, "Sorrow, you are not going to get any of your real financial loss except for the statutory compensation for the rest of your life." People just feel like they lose control. I have had grown men crying in my room, tough blokes. It is not the physical pain of the injury. It is not the pain of the injury. It is just seeing that you lose control of your life and there is no end to it. Before the law changed there was some satisfaction to my job in that I could bring it to an end and there was some focus. I could say, "The money won't bring back your health, but at least you'll get a lump sum that will cover you and let you look after yourself and your family." You cannot do that on $200 a week.

The Hon. RICK COLLESS: Perhaps you might be able to inform us what was the maximum possible fine in Mr Eaton's case that could have been applied to the company?

Mr SIMIC: The maximum fine?

The Hon. RICK COLLESS: Yes.

Mr SIMIC: Under the old prosecution laws—

Ms MALLIA: If the case was brought in the Chief Industrial Magistrate's court, the maximum there is $50,000.

The Hon. RICK COLLESS: $50,000 was the maximum possible fine the company could have got and $15,000 was imposed. I am interested in where that money goes. Does the whole lot of it go back to WorkCover?

Ms MALLIA: My understanding is that just goes back to consolidated revenue or to the WorkCover pool.

Mr SIMIC: Mr Eaton has gone through two court proceedings, one to get that small lump sum of about $22,000 odd and the second one as a witness for WorkCover to prosecute the employer. The money that is recovered by WorkCover in those prosecutions goes to WorkCover or the State coffers, if I may be so blunt.

CHAIR: Can I just address the gallery for a moment, earlier I asked that all mobile phones be turned off. Someone switched to silent, which is the reason the system is beeping away and why our Hansard reporters are having difficulty. Would you please switch your phones not to silent but to off?

Ms LEE RHIANNON: What would make your life better? You acknowledge the accident has happened and you have had to move on. The money side of it is huge and the money is not there under the present system. Considering what we have under the present system, what could be done to make your life better?

Mr EATON: If they change the system, pretty much. The way it is it is not good.

Mr SIMIC: Mr Eaton has come to see me many, many times over to settle disputes over travel money, medical expenses. I can never close his file. There is no end to it. The law says his injuries are not serious enough to get some sort of pay out for this financial loss.

Ms LEE RHIANNON: In terms of little things like travel money and regular payments, that would bring at least a bit of dignity?

Mr SIMIC: Yes. I think it allows a worker to take control of their life because if they say, "Here's $X", at least they can say, "This is how I am going to spend it: on medication, on travel, or I

am going to relocate from Sydney or I am going to do something to change my life." At the moment you just cannot do that because the law says the injury is not serious enough.

Mr FERGUSON: I want to say one thing about the fine of $15,000. I do not know the detail in this particular case, but it is not uncommon, in particular in the building trade, for a company simply to close up shop and the next day to set up a new business to avoid payment of the fine.

CHAIR: Yes. We understand.

Mr FERGUSON: It happens frequently in the trade.

CHAIR: We have looked at some particular cases like that on other issues of legislation.

CHAIR: Mr Ferguson, is there nothing that your union can do to encourage the insurance company, on these small payments, to pay on time and pay properly?

Mr FERGUSON: The last case I had was for a member, Max Massias. I made representations and did not get an appropriate response. I made it very clear that the next day we were sending down 100 of our delegates to protest outside of GIO, and the next day Mr Massias received a cheque for $15,000. But I think members of Parliament should take more responsibility for this. I intend to take up the case for Mr Eaton to make sure he gets his money, and I am very confident that we will get the money for that worker, but I think we should have a system that works. I think elected members of Parliament should be aware of the problem and do more about it, in looking after the interests of working people who do not have power.

Mr SIMIC: When a person has a serious injury, he is assigned a case manager from the insurance company. That case manager is given enormous power over the worker in terms of when they get paid and how they get paid. Yes, the worker has legal rights and if you can find a lawyer who is willing to do it, they can take it up and you can get a result. But in that five or six weeks when you have not seen your cheque—you may have been evicted, the bank may have foreclosed—all sorts of problems arise. You just lose control of your life. I had a case just recently where a fellow had not received payment for five-weeks. I believe the only reason we got it sorted out so quickly was that Ms Mallia from the union stepped in and made her presence felt.

CHAIR: Typically the case manager would be someone like an occupational therapist or someone to make the evaluation?

Ms MALLIA: Junior people in insurance companies.

Mr SIMIC: No, this is the problem. People who are managing seriously injured workers have no medical training. They have no legal training. Often they do not even know the provisions of the Workers Compensation Act. They sit in an office and you can only access them by an 1800 number. If you ever try to ring these numbers you will go crazy, just sitting there waiting on your mobile phone. You just cannot get through. You never actually meet your case manager.

Ms MALLIA: Mr Wakefield is a 38-year-old construction worker, a boilermaker by trade. At the time of his accident he was earning $900 net per week. On 18 May 2002 he fell from a height of four metres through a glass awning at work. He fractured his wrist and vertebrae in his spine. He has had substantial medical treatment. He has had two operations on his wrist and there is clear independent expert opinion that his employer was negligently responsible for his accident. His present situation has improved slightly in that he has been able to obtain alternative employment recently as an estimator. From that point of view Mr Wakefield is one of the lucky ones because he has been able to find some alternative employment himself.

His legal outcome, though, is not great. He is unlikely to get over the 15 per cent whole person impairment, despite the serious nature of his injuries, which will mean he will not be allowed to sue his employer for damages despite the employer's gross negligence. Just to make a point about that issue of suing employers, even if you get to 15 per cent you are only entitled, if you are a worker,

unlike people under the Civil Liability Act for example, to receive economic loss. There are no general damages, even when you make that threshold.

CHAIR: Yes, we do understand that.

Ms MALLIA: Your damages are limited, and you come to an end. You have to fend for yourself for medicals and those kinds of things. As I said, he is not entitled to any lump sum in respect of his loss of earnings. He will receive at some point a small lump sum under sections 66 and 67 of the Workers Compensation Act. But on the effect this injury has made on his life, I will turn to Mr Wakefield to describe.

Mr WAKEFIELD: I am not sure where to start. I used to build fabulous buildings, unlike this one here, until three years ago. I would quite happily give a million dollars to have my old life back. I am not quite sure what to say.

CHAIR: Do you want to talk to us about the financial difficulties that you have had?

Mr WAKEFIELD: I was in a position to buy a house or very close to it just before the accident. Six months later I got myself a job, took a great pay drop. I now take home $460 a week. I paid all my bills off because I did not know what was going to happen with my money, whether I was going to live on $460. I paid all my bills off thinking I was possibly going to get a lump sum to get this house, and the deposit just has not come back.

CHAIR: Has that had an impact on your family life?

Mr WAKEFIELD: As you can imagine, that has had an impact on everything—my daughter, my partner, everything.

The Hon. RICK COLLESS: I might perhaps pursue a similar line as I did with Mr Eaton, with the fine the company received. Was the company prosecuted?

Ms MALLIA: I do not know in this case.

The Hon. RICK COLLESS: You are not aware of any action that is pending?

Ms MALLIA: I do not have that information, I am sorry. I am not aware that WorkCover has taken it up. It may, but I did not make those inquiries in relation to this.

Mr SIMIC: WorkCover has up to two years to decide whether it is going to carry out a prosecution or not. I do not have that information at my fingertips.

The Hon. RICK COLLESS: This accident happened in 2002, which is now three years ago, did it not?

Mr SIMIC: Yes. I would assume, since nobody from WorkCover has contacted him, WorkCover is not prosecuting this matter.

The Hon. RICK COLLESS: Is that not something the union would be dealing with? Are you interested in whether or not these cases are prosecuted?

Mr FERGUSON: I can guarantee you we are interested. We have prosecuted employers for killing workers. One was at Melmac. We have some political parties in this country that do not like the union movement prosecuting employers. We work very closely with WorkCover to collate evidence in relation to safety breaches. I personally, as union secretary, ring WorkCover on a daily basis about unsafe sites. There is a lack of resources here. I do not think this is about the issue of whether or not WorkCover got a fine in this case. I think we are talking about the human suffering here from a scheme that is not working for working people. People here no longer have the capacity to have any financial security in their lives and it has a devastating impact on their family life and their ability to participate in the community. Politicians, not WorkCover, are responsible for rules you have acted to create this predicament. I think it is an excuse to start looking at WorkCover. I am not trying

to be blunt here about the issue, or rude, but that is the reality of what you have done. You have passed laws that mean misery for working people in New South Wales.

The Hon. ROBYN PARKER: I congratulate you, Mr Wakefield, on going out and getting a job yourself. That must have taken a lot of energy when you were coping with a whole range of other things. I guess that this injury limited the sorts of employment you could get and therefore the sort of income you could get, is that right?

Mr WAKEFIELD: Yes.

The Hon. ROBYN PARKER: So you are limited to doing anything that was not manual labour, or are you able to do some?

Mr WAKEFIELD: Pretty much. I went to rehabilitation for three months probably. He said, "What do you want to do? Anything you want you can do." Everything I suggested he said, "How are you going to do that?" Then my old employer was advertising for an estimator. So I rang up and said can I apply?

The Hon. ROBYN PARKER: So this is the company that was negligent in the first place, that is who you are working for now?

Mr WAKEFIELD: It has actually changed hands, it is a different company. It changed hands, I think, two weeks after my accident. Six months later they were advertising for an estimator.

The Hon. ROBYN PARKER: With the change of ownership of the company, are they undertaking in your view safer occupational health and safety conditions than the previous employer?

Mr WAKEFIELD: I am sorry, I did not understand?

Mr FERGUSON: Is the company safer now that it was before?

Mr WAKEFIELD: I would say probably yes. As a rule, most building sites are safer than they were three years ago, due to ongoing safety committees, OH&S and stricter guidelines.

The Hon. ROBYN PARKER: With the rehabilitation, you said you got yourself a job. Was there any assistance offered to you in terms of seeking employment at all?

Mr WAKEFIELD: No. The only assistance I got was rehab, which I actually thought was a waste of time.

The Hon. ROBYN PARKER: Was there a difficulty when you were applying throughout the jobs in terms of saying that you are on workers compensation? Did you find the same issue as Mr Eton had?

Mr WAKEFIELD: To be honest, I had been off work the six months. I had not applied for another job. I had no idea of what I was going to do or what I could do. When I saw the ad in the paper for the estimator, at least I had the background, so I thought it was worth a go, and I got the job on my background of a construction boilermaker for 15 or 18-odd years.

Ms LEE RHIANNON: You said that the company changed hands. Do you see that that was related to your accident?

Mr WAKEFIELD: No. My old employer had cancer and has actually passed away now. He sold the business so that he could enjoy the last few years of his life.

The Hon. IAN WEST: The medical assessments that took place in terms of percentage loss of use, can you give us some information as to the assessment by your doctors and whether or not there was any contrary assessment by other doctors, and how many doctors you have had to go and see?

Mr WAKEFIELD: I have seen quite a few doctors. One doctor has actually given me zero per cent for my wrist. I would like to hit him with it. I cannot hold up a coffee in this form like this. I cannot drive with it.

CHAIR: You do not have flexibility.

Mr WAKEFIELD: Yes. To say that I can do 100 per cent of stuff with my wrist that I used to do, no. To say that I could do 85 per cent or more with my whole self that I used to do, I do not think so.

Mr SIMIC: To assist the Committee, in Mr Wakefield's case there are probably about four different assessments under the so-called standard American Medical Association guidelines ranging from 0 per cent. All of them are under 15 per cent except for one doctor who was instructed by our firm and who believes that he is just on it. But, realistically, he is not going to get to the threshold. He will not be able to sue his employer at common law or recover his true financial loss from his employer.

The Hon. IAN WEST: But the medical assessments that were made were extremely variable from 0 per cent to 16 per cent.

Mr SIMIC: From 0 to 16 per cent, and only one of them was over 15. I must say that that was our doctor, but that is the state of play.

The Hon. IAN WEST: And that assessment was on the basis not of incapacity for work but a medical assessment as to incapacity.

Mr SIMIC: Yes, that is correct. That is on the basis of what they see as the disability—that is, fractured vertebrae and severe fractures to his wrist. Is it the dominant wrist?

Mr WAKEFIELD: No. It is the left hand.

The Hon. ROBYN PARKER: This is probably a question more for Mr Ferguson. In relation to your comments about pursuing employers and your views on politicians, I just wonder what action you have taken to lobby the Carr Government that brought in these changes to the compensation legislation?

Mr FERGUSON: The union is very active around the issue of workplace safety and workers compensation. I am more than willing to give you submissions that we have done to the Government in respect of workers compensation and we are hopeful that we can get some assistance in reforming the system, in particular for those workers who have been badly injured and cannot meet the threshold, and get some decent compensation for their injury. So we will do that.

The Hon. ROBYN PARKER: This change of legislation occurred in 2001. Have you been lobbying the Government consistently since then?

Mr FERGUSON: As I said, I will give you a copy of submissions that we have provided, not just in 2000 or 2001 but also since then. We have done that. We have raised that in party conferences. We are affiliated to the Labor Party. We have raised the issue with the media. We have raised the issue with Unions NSW. We are again raising the issue today. We are hopeful people are listening. They have created some misery and unnecessary injustice for workers who have been badly injured.

The Hon. ROBYN PARKER: Why do you think that that has been falling on apparently deaf ears of the Government to date?

Mr FERGUSON: Because often politicians are focused on the economic impact of issues rather than on the consequences for working people. I see that the terms of this inquiry are about premiums and so on. I just think that there should have been a greater opportunity to raise this much broader issue about the human suffering caused to injured workers. We would like to see an inquiry

just dealing with this issue, if you would be supportive of that, because of the need for some radical reform to get justice for working people.

The Hon. RICK COLLESS: I will follow on from that. Mr Ferguson, you made a statement earlier which was something along the lines—and correct me if I am misquoting you—of conservative politicians around the country trying to destroy workers compensation conditions. Am I correct in my assessment of what you said?

Mr FERGUSON: No, you are wrong.

The Hon. RICK COLLESS: Perhaps you could repeat it for us.

Mr FERGUSON: Yes. Conservative political parties and politicians, in particular the Liberal Party, are spending all their resources trying to break union organisation in the building industry. I can give you one very good example. The Building and Construction Industry Improvement Bill was tabled on 9 March in the Federal Parliament. It has just banned our right in the building industry to convene a meeting of workers to discuss bad safety on a building site. We are only allowed to have a meeting of workers if there is an imminent threat to human life, such as when the scaffolding is collapsing and you can rush for cover and stop work. That is one way we are allowed to have a meeting. Secondly is where there is protected action to get an enterprise bargaining agreement, or when we have the written permission of the builder and every employer on a particular site.

So we are having very significant attacks upon union organisation in the building industry. We have efforts by the Liberal Party in particular to restrict the right of entry of union officials to building sites. The end result will be a lowering of safety standards, more accidents and, quite frankly, more fatalities. We already have one fatality every week on a building site in this country. Conservatives are spending a lot of time trying to break the union movement rather than having a co-operative agenda of working with the union movement and working people to get a better system.

The Hon. RICK COLLESS: I take on board what you are saying, but is that in fact any worse than what the ALP has done in New South Wales, which, by your own words, shows that seriously injured workers in this State are not receiving proper and adequate compensation, and have been substantially disadvantaged by the retrospective amendments made to the Workers Compensation Act in 2001 that was introduced by the Labor Party?

Mr FERGUSON: I think there are some significant differences. One thing is that the Labor Party, to its credit federally, voted against this repressive legislation that your party is supporting in the Federal Parliament and is not seeking to restrict the right of entry of union officials to organised workers to give them power to get better workplace safety. I am not on the payroll of the Labor Party. My wages are paid by workers. When it is appropriate, I will criticise the Labor Party, and I rightfully criticised the Labor Party about the issue of those reforms that have been to the disadvantage of badly injured workers. But quite frankly I suspect and I am very confident that your party, if you had more opportunity, would attack workers benefits a lot more than the Labor Party did.

CHAIR: I am anxious that we hear each of the other witnesses who have attended today.

Mr WAKEFIELD: Could I just say one more thing?

CHAIR: Certainly.

Mr WAKEFIELD: In the construction industry—in all trades, as a matter of fact—there is a high demand for workers at the moment who are just not there. If something is not done about it, it is going to get worse and there just will not be one. Who is going to go out there and do a job when there is the chance of an accident and that you will not get paid and you will not get any compensation?

CHAIR: We have taken up that point within the Parliament on other occasions. Thank you, Mr Wakefield, and all the best to you.

(The witness withdrew)

Ms MALLIA: Our next witness is Mr Daniel Reeves. Daniel is a young construction labourer who is 28 years old. He has three dependent children. At the time of a horrific accident which he witnessed and was also injured in, he was earning approximately $1,000 to $1,500 net per week. He was involved in an accident in February 2005 on a building site which involved the collapse of some concrete planks that he and a fellow worker were standing on. The concrete planks were over an 8 metres span and they collapsed. Beneath them was the supervisor who died instantly when a concrete plank decapitated him.

Daniel was a witness to this horrific accident. He landed flat on his back and has suffered considerable injuries to his back. He has fractured vertebrae in his spine and has lower disc damage, and, understandably, he is also receiving counselling for post-traumatic stress disorder and preprinted memory syndrome. Despite the horrific events and circumstances in which he has found himself, he is in the early stages and is unlikely to meet a 15 per cent whole-of-person impairment threshold for the nature of his injuries. One of the absurdities of this legislation is that the premedical specialists when they come to do the assessments cannot combine the effect of both his psychological injury, which will be long-term as you could understand, and his physical injury to get him over the 15 per cent threshold.

It is assumed that Mr Reeves' most likely outcome is that the workers compensation insurer will be liable to pay him a small lump sum, of the order of $20,000, for his physical disability arising from his fractured vertebrae. He will probably get nothing for his psychological damage unless he can show that he is completely incapable of taking care of himself. In the meantime his employer also terminated his employment within seven days of the accident occurring. Daniel is new to the system and we thought it was very important for the Committee to hear from him firsthand what his experience has been in the current situation.

CHAIR: Thank you, Mr Reeves. Would you like to tell the Committee about your experience?

Mr REEVES: Yes. Currently, since my accident, I am receiving $425 per week compensation. I have to pay rent out of that and support three children. It is pretty hard to do. My wife has been caring for or baby while I have worked full-time. Since the accident she has had to put that on hold to find casual further employment. I have a little two-year-old daughter who is suffering in the process. I mean, I have to look after her, which I cannot do, and things like that. I have to live with this accident every second of my life. When I go to sleep at night I forget about the accident; when I wake up I think about the accident. To think I am not going to get some sort of compensation payout while I suffer for the rest of my life, it is pretty important.

I was told last Wednesday that I will never do physical labour again, so where does that leave me? I am a pretty big bloke and I have been labouring for the last 15 years. To be told that is a bit of a shock to the system. How you deal with what I have to deal with, I do not know. Something has definitely got to be done.

CHAIR: Do you have a case manager who is looking after your case?

Mr REEVES: I do have a case manager. She has put me through the run-of-the-mill. She rang me up to put me onto some psychological people. I didn't really know who they were. She told me I had to be at a certain place at a certain time. The next day at about six o'clock there was a phone call, and I rang Mr Simic after to tell him about this.

Mr SIMIC: His first contact with the insurer was a letter, which did not tell him who he was going to see and he only had notice of a day or two. I rang the case manager and they had no idea about what he had been through, about the decapitation he saw, or about the fractured vertebrae. They just had no clue.

The Hon. RICK COLLESS: They did not know?

Mr SIMIC: They did not know. They did not know their file.

Mr REEVES: They didn't have a clue, until I actually—

CHAIR: Was it some very junior person?

Mr SIMIC: Very junior. I am not blaming the junior person, but I am saying that the system just processes people; it does not help them.

The Hon. ROBYN PARKER: Do you think that, under the current system, they come to you with a negative view about your situation to start with, from the insurance company point of view?

Mr REEVES: It was pretty negative I suppose. I mean, the fact that they did not look at my file and did not know who they were talking to, and were trying to put me somewhere where I really did not have to be. It just struck me that it was going to go against my claim if I did not turn up. I live on the Central Coast and most of these companies are in Sydney. To jump ship and get down here in one day is almost impossible. There is a fact that I am taking medication for different reasons. I have to ring up and try to chase expenses I have had, because they pay for my medication. I sent a letter away two weeks ago and I am still waiting for some sort of payment for medication—which I can't afford on $425 per week. Some of my tablets are $45 box.

The Hon. ROBYN PARKER: If it were possible for you to get a lump sum payment of compensation, what would you use it for?

Mr REEVES: Well, my earning capacity has gone right down to practically zero. I would have to be retrained. I mean, I was on the verge of buying a house. For a start, I would buy a house to secure my family and put a roof over my kids' heads. That is the most important thing in my life, sort of thing. That would be where I would put my marks on to. Plus, I have got medical expenses that I will have for the rest of my life. They are the sorts of peak things on the list.

The Hon. IAN WEST: The accident happened in February 2005, is that correct?

Mr REEVES: Correct.

The Hon. IAN WEST: You are getting $424 per week.

Mr REEVES: Yes, $425 per week.

The Hon. IAN WEST: Will that change at the end of the six-month or 12-month period?

Mr SIMIC: The way it works is that for the first six months they just get their base rate. They do not get any of the allowances that building workers get or overtime. After six months they go down to what is called the statutory rate, which for a single worker there is about $330-odd. If you have a dependent wife they will throw in an extra $80 and a bit for each child, and that is it from here to 66.

CHAIR: I am conscious of the time and the fact that you have another two people you would like the Committee to hear from. The Committee would also like to hear from them, too.

Mr SIMIC: Could I just add one thing about Mr Reeves. I know the Committee has heard a lot about the Civil Liability Act from the New South Wales Bar Association this morning. Just to show you the perverse state of play in New South Wales and what injustice means, Mr Reeves has fewer rights than a prisoner in New South Wales, so far as his employer is concerned. You might remember that last year there was a newspaper article about a prisoner receiving common law damages for his loss of future earnings. Parliament then amended the law and they were looking for the lowest common denominator. They decided on the Workers Compensation Act benchmark, that is the 15 per centre threshold. That is the lowest common denominator for workers.

But even under the Civil Liability Act a prisoner in New South Wales would, one, if he gets under the 15 per cent threshold be able to combine his psychological injury and his physical injury in order to get over the threshold to get his damages for pain and suffering; and, two, even if he does not

get over the threshold he still has an entitlement to damages for his future economic loss. Mr Reeves cannot sue his employer for his—

CHAIR: Psychological damages?

Mr SIMIC: Not only that but for his future wage loss. They say his injuries are not serious enough to get over the threshold. Sorry, you cannot sue your employer.

The Hon. RICK COLLESS: Under what legislation? Is it WorkCover or the occupational health and safety legislation.

Mr SIMIC: It is the Workers Compensation Act. The occupational health and safety legislation has nothing to do with his legal rights to recover damages.

The Hon. RICK COLLESS: What about in a civil court, can he take action?

Mr SIMIC: That is what I am talking about. He cannot, he just cannot. He has fewer rights than a prisoner in the New South Wales State penal system.

CHAIR: Thank you very much and thank you, Mr Reeves, for appearing before the Committee today.

Ms LEE RHIANNON: Thank you, Mr Reeves.

Ms MALLIA: Our next witness is Mr Peter Sore. I will go through his case in a little more detail because his English is limited and it will probably be a lot easier for the Committee to hear the background from me. He came to Australia in 1971 as a 20-year-old. In some ways he is an example of where Daniel might be in 20 years' time. He worked as a carpenter in the building industry until the time of his accident on 28 May 2001. He was employed with the same employer for 13 years. Six months after his accident he was terminated. He used to clear $800 a week and have superannuation and annual leave entitlements and, because of his secure employment long service leave and other benefits of employment.

Peter suffered a serious injury to his right shoulder in an accident while carrying a large aluminium window upstairs. He suffered his injury to his dominant arm, the one that he most depended on as a carpenter. He underwent surgery in November 2001 and, as a result, has now very restricted movement in his right arm and cannot do any heavy lifting, which has since made him an employable. He saw his solicitors in 2002 who advised him that the changes to the Act just before at the time of his injury had changed so dramatically that the value of his legal rights were much less and he ended up with a lump sum payment of about $40,000.

It has had to live off weekly benefits since then of about $350 per week. At the time of his injury had for dependent children. They have since grown up but some are still at university and he has found it a struggle to pay off his mortgage on the sort of money and feels very jaded by his whole experience because you never thought that he would be living basically off the Social Security system.

It has been a very stressful and devastating time for him. He takes a lot of medication including Tramal, Panadeine Forte and for a long time was using also Vioxx. He was sent initially to the CRS rehabilitation service at Liverpool for almost 1½ years after he was hurt. During that 1½ years an attempt was made to finding work, but nothing was found. His employer terminated his service within six months of his accident. He has made his own inquiries as best he can for light duties, but he advised us that no-one wants anything to do with him when he tells them that he is on workers compensation and has been injured. He described to us his feelings as being trapped, having little control over his future. Obviously has been told by his legal representatives that as there is no lump sum payout for him he should exit the system and try to deal with the situation as best he can.

Last month, four years after his accident, the insurance company started sending him letters again. Suddenly they want him to see another doctor of theirs and undergo a new rehabilitation program. I understand he has been told it will cost about $10,000 to undertake that program. He is not very optimistic that that rehabilitation program will lead to anything fruitful, given his circumstances,

his limited English capacity, and the fact that he has worked basically only in the building industry. He would rather get simple payments to let him readjust to the circumstances and get on with life rather than having to live on a drip-feed system that does not cater for his personal circumstances. Peter may want to add something, and Ivan Simic may assist him with translation.

Mr SORE: Briefly, I am 51 years old and worked very hard for one company for 14 years. Did not take one cent from the Government, and there are six in my family. Older daughter 18, and the rest 14 to 18. I got good money, I work five, six, seven days, all depends. I have this accident and after six months the boss pulled me off. Money dropped down, not enough for living. My older daughter had to finish high school, very good student. She go to university, but what she do now? She stop that, or keep going? I borrowed money from everywhere for children. Another year, everything goes up. Another three left and she goes to university again, but cannot go because no money. Now six in the family living on $400 and something. Now my life is affected. My wife too, and the children. Now only half finished high school or university, another three.

Now, after four years, they docked me to $350. I cannot live on $350. Now my wife cannot go and bought something for all our family. One daughter finished high school, no university, looking for job, working part time here and there, just for shoes. For $350 all my children are dependent on me. It is very hard for me.

CHAIR: Yes, I can understand.

Mr SORE: Now, my right shoulder is finished, it is gone. What do I do in the future? I am 54 years old.

CHAIR: Mr Sore, you have expressed yourself very well and the Committee thanks you.

Mr SORE: I did the best I could anyway.

CHAIR: We understand.

Mr SORE: I feel like no normal man. Because I am working hard all my life, for me and my family and for the Government too. Now, not got any money. Looking here and there for a job. They ask me, "What you do before?" I say, "Carpenter." They say, "What you doing now?" and I answer, "On insurance, government insurance." They say, "Sorry, no job for you." Nobody want me now. Plus they send me here and there and I am 54 years old. I have never used a computer and my English is now very good. When I come to Australia I looked for a job for my future; now my future is gone. Surely someone should help, or try to do something anyway for the rest of my life.

CHAIR: Thank you, Mr Sore. We wish you well.

Ms MALLIA: Our final witness is Mr Susac, a 61-year-old former carpenter who immigrated to Australia in 1969. Since that time he has worked in the building industry. In 2001, at age 57, while at work, he suffered a serious injury to his right shoulder whilst attempting to hold a 4.5 metre timber beam being passed down to him. He has had major surgery to his right shoulder, including a subacromional decompression and extensive hydrocortisone treatment. His pathology includes a significant rotator cuff tear in his right shoulder, and he is right arm dominant. All the doctors and treating specialists who have seen him agree that he is totally unfit for any heavy manual work involving his right arm. His educational background is limited, having left school at about 16. He speaks English, however he has very limited command of reading and/or writing English.

He received a $30,000 lump sum payment as the workers compensation accredited medical specialist doctor determined that he had only 11 per cent whole-of-person impairment. As the Committee would understand that decision is binding. He is effectively unemployable given his background, age and disability to his right arm. He and his wife are forced to live off a statutory payment of $415 gross a week. Prior to this accident he was a mean about $1,080 a week gross. The finding of an 11 per cent whole-of-person impairment prevents him from bringing a common law action. He is continually required by the insurer to fill out statutory declarations and job log forms to ensure that his weekly payments arrive on time.

It is now more than four years since the original injury. Despite him having undergone substantial medical treatment, surgery and rehabilitation—that did not go anywhere—the insurer has now requested him to attend another rehabilitation course. He is required to travel from his home in Hurstville to Parramatta, a distance of 50 kilometres a day, to do computer courses. He has been told that he has to do the computer courses until such time as he finds alternative or light duties. With the help of his daughter he applies for five jobs a day to ensure that he is able to fill out the paperwork to ensure that his payments arrive on time. He has been told that if he does not attend the courses and participate in the rehabilitation program that his weekly compensation will stop.

Obviously, because he has an entitlement under this system he is not entitled to receive a disability support pension under the Commonwealth system or any Newstart Allowances or entitlements that an unemployed person would be entitled to under the social security system. Surely this man is probably worse off than he would be under the Commonwealth social security system—I guess that says something! The worker's treating general practitioner has serious reservations and doubt about the value and cost of this most recent rehabilitation course that he has been forced to undertake, given that it is more than four years since his accident, his age, his educational and occupational background and the substantial extent of his injuries. Mr Susac and his doctors do not believe that there is any further treatment that would improve his condition. Obviously he is pessimistic about anyone picking him up for employment.

This example raises questions about the costs of rehabilitation. The futility of this gentleman undertaking a computer course—which will probably not lead to future employment—is another example of the capacity to receive some sort of lump sum payment which would bring this chapter of his life to an end, so he could go on and adjust to his new circumstances. This is another example of someone being forced to live on a treadmill on a paltry amount of money and forced to travel 50 kilometres a day.

He was asked whether he could do a course closer to his home. The only response from the insurer was, "There's something in Blacktown." There is a large distance between Blacktown and Hurstville. So it is really putting him in a difficult position. I do not know whether Mr Susac wants to add something.

Mr SUSAC: All my life I have been in the building industry, from 1969 until 2001. When I had the accident I stopped work, then I could not find a job. Each day I applied for five jobs. Over four days, that means I applied for 20 jobs. I applied for a job as a process worker; I have never worked in a factory. I applied for a job as a handyman; I have never worked as a handyman. I applied for maintenance work. I applied for a job reading meters. I applied for a job as a cleaner—anything. I must apply, and must send it to the insurance company every fortnight. The insurance company asked, "Where have you been? Did you talk with them on the telephone, or did you fax them?"

The Hon. RICK COLLESS: Ms Mallia, given Mr Susac's situation, whereby he was forced to do a 50-kilometre round trip to undertake a course that was inappropriate for him anyway, do you believe that insurance companies deliberately send injured workers to do courses that are not appropriate to their situation and not appropriate geographically, to force them out so they will drop the course and then their payments will stop as a result?

Ms MALLIA: I think there is some aspect of deliberateness in this. Section 52A gives insurers the power to cut people off. Once they have made that decision to cut you off, you cannot appeal that decision. One of the grounds for that power to the exercise is someone's non-compliance with their rehabilitation program. Given that workers compensation costs money, and having someone on workers compensation indefinitely is an expensive process, my view is that there will be insurance companies out there looking at how to utilise those capacities in the Act to cut people off, and that is one of them. I think there would be some insurers out there looking at ways in which to bring some of these long-term claims to an end. At the end of the day, it is not by giving these people just the payout; it is by cutting them off the system, and they have to go through this rigmarole to do it.

Mr SIMIC: Insurers have huge resources at their disposal, because it is not the insurers' money but WorkCover's money they are spending. So they do not mind forking out perhaps another $10,000 for a useless rehabilitation if somebody wishes to do that. This is the ultimate case example. This 61-year-old gentleman should be paid out and let be, I believe.

Ms MALLIA: I think it comes back to the skill of these people. Ivan mentioned a case that we were involved with last week. Someone had received his payment for three months in circumstances where his marriage had broken down, he had suffered psychological breakdown and had gone to hospital, and the insurer was aware of this. When we asked, "Why have you cut off this man's benefits?" the response of the claims officer was, "Well, he has not been sending in the job search logs, and until he does so we will not pay him." We said, "Where under the Act do you have the power to do that?"

The next day, they processed the cheque, because there was no power under the Act for them to do it. There are processes you are supposed to undertake before you cut someone off, and this person had not done it. When we put this to the claims officer, her response was, "Well, tell your client to co-operate with the process and everything will be okay." It is not a very sympathetic, useful or productive way of dealing with this man's particular set of circumstances. It was not until he came to us finally and we managed to get it sorted out that some money would come to him, but it was not an adequate or satisfactory response.

Mr SIMIC: With regard to Mr Susac's matter, his family general practitioner rang me and said, "This is ridiculous. In case someone asks this question, why don't we put this bloke on a disability support pension. He is obviously a candidate, at 61 years of age." Unfortunately, if he does not co-operate through this rehabilitation program, although as a normal person he would be entitled to go to Centrelink and claim whatever benefits he is entitled to, Centrelink will tell him, "No, sorry, we are not going to make a Centrelink payment to you because you still have workers compensation entitlements. See your lawyer, and let him fight it out with the insurer until they give your workers compensation back."

I do not know whether you are familiar with the work of playwright Samuel Beckett, but this is *Waiting for Godot* to the nth degree; this is just ridiculous. I cannot close this file.

CHAIR: I am conscious that we still need to hear from other union representatives. Is it your wish that we thank Mr Ferguson and his team at this stage?

Mr FERGUSON: I want to say one thing. I know we have some political differences here, but I appeal to you to place some priority on this issue of badly injured workers and the threshold issue. I am hopeful that you have listened to these cases, and that you will make a genuine effort to deal with this problem. The changes have created a lot of unnecessary mystery for workers.

CHAIR: May I assure you, we have listened to the witnesses. Secondly, it was this group of people who decided to establish this inquiry. We wish you all the best in your future endeavours.

Mr FERGUSON: Thank you for your support.

(The witnesses withdrew)

BRETT WILLIAM ELLLWOOD, Return to Work Facilitator, Forestry, Furnishing, Building Products and Manufacturing Division, Construction, Forestry, Mining and Energy Union, New South Wales Divisional Branch, P.O. Box Q694, Sydney, and

CRAIG ANTHONY SMITH, Divisional Branch Secretary, Forestry, Furnishing, Building Products and Manufacturing Division, Construction, Forestry, Mining and Energy Union, New South Wales Divisional Branch, P.O. Box Q694, Sydney, affirmed and examined:

Witnesses' submission tabled.

Mr SMITH: I will make a brief comment in opening and state that Mr Ferguson, in his opening statement, articulated the general view and position of the Construction, Forestry, Mining and Energy Union [CFMEU] in respect to personal injury compensation legislation. The CFMEU obviously has a consistently united position in regard to that matter and there is no point in rehashing what Mr Ferguson said in his opening statement. My colleague Mr Ellwood and I are here to speak specifically in respect to the issues affecting workers in the forestry, furnishing, building products and manufacturing industry sector. On that note I hand over to Mr Ellwood to give a productive statement in respect to the written submission made by our division to this inquiry.

Mr ELLWOOD: As noted in our submission, we fully endorse the views of Unions NSW on the need to restore some fairness and balance with regard to workers compensation claimants access to decent lump sum compensation for permanent impairment, pain and suffering. We also fully support the comments and submissions of our comrades in the construction and general division of our union. We appreciate that leading up to 2001 it was necessary for action to be taken to ensure the long-term viability of the scheme. However, we contend that removing and reducing injured workers entitlements was not the right approach.

We ask the standing committee to consider the context in which legislation affecting injured workers access to entitlements has been introduced. In particular, we are concerned about the amount of money that appears to be being wasted by insurers or, as they should be known, fund managers, on legal services and medical assessments not related to injury management. We contend that fund managers have been spending far too much of employers' premiums on unnecessary and independent medical assessments and far too little on the provision of services aimed directly at helping injured workers return to suitable, durable employment.

We have provided you with a report prepared for WorkCover in June 2004, which touches on many issues that require attention. Underlying our concerns are the following: Fund managers generally are not fulfilling their duty to interpret and apply the relevant workers compensation and injury management legislation fairly and they are not devoting adequate resources to proactive injury management and correct and timely payment of weekly benefits. We believe that better return to work outcomes would result from greater investment in quality injury management and through treating injured workers as people with legal rights and entitlements.

In our submission we particularly highlighted the huge problem of injured workers not being paid their full section 40 make up pay entitlements during periods of partial incapacity for work. We have provided for you today a case study that demonstrates the lengths to which one insurer has gone to deny one of our members his statutory entitlements. That 10-page document at the back is pretty dry reading, especially with the names changed. Even if you do not read the whole thing it is 10 pages long and there were phone calls backwards and forwards over a period of 10 months to get a fellow his statutory entitlements of about $200 a week. Regrettably, he still has not been fully paid.

You will also note if you have a look at that document that we called in WorkCover to assist with this one. WorkCover tried hard to get them to pay and it was also unsuccessful. We ask you to consider whether it is appropriate for an insurer—a fund manager—to behave in this fashion. We ask you also to consider the effect that denying an injured worker income on which he would depend to support his family and pay the rental mortgage has on his recovery from an injury and his prospects for returning to durable employment, and whether insurers trying to avoid paying weekly benefits really does result in savings to the scheme in the long run.

Currently, if you are injured at work and you return to work on suitable duties, you need to get a solicitor if you want the insurer to pay your full weekly benefit entitlements and then you might have to wait months or even years before that occurs. Why must that be so? Why is it not possible for insurers to play claimants their correct weekly entitlements? Are they not contracted, among other things, to do exactly that? I am happy now to answer questions.

CHAIR: I wish to ask a general question. I am thinking about your forestry industry area and so on. You have workers scattered throughout the State. Do you find that there are greater disadvantages for those in rural areas because they are not able to be visited, they might not have return to work people nearby and they might not have easy access to medical assessments?

Mr ELLWOOD: Inherently there are, for exactly those reasons.

CHAIR: Is it a major issue?

Mr ELLWOOD: No. I have not observed any major differences in the way in which these people are treated by insurers and others. But it is true that it is harder for everyone involved, including insurers trying to manage claims, to assist people in rural areas with things like retraining and finding suitable alternative employment, simply because of the distances involved and the comparative lack of resources, in particular, medical resources. That is something about which employers complain a lot in rural areas. There are few doctors left in rural areas who are willing to get involved in workers compensation. My perception of that is that a lot of doctors consider it a messy, dirty and complicated business.

CHAIR: I want to know whether or not I am interpreting you correctly. You said that companies or fund managers ought to be using more of their funds directly in helping individual injured workers rather than getting more and more medical tests and assessments. Are you saying that there is collusion between medical assessors and companies?

Mr ELLWOOD: Oh no, not at all. I am just saying that what I have observed in my less than two years with our union and many years prior to that working for rehabilitation provider services, is that the focus of insurers seems to be far more heavily on determinations of liability and finding ways to reduce the cost of benefits to workers rather than on assisting these injured workers to get back to suitable and durable employment, which is what I have always understood should be the main aim where it is possible to do that.

I am not backing rehabilitation providers. It is a bit complicated to explain. Having worked for rehabilitation providers and as a rehabilitation counsellor I have tried to assist gentlemen like those we met here earlier from non-English speaking backgrounds. I have had the experience over the years of being continually frustrated with not being able to get funding to pay for things like retraining, assessments that are needed and adequate assistance to find suitable employment. When I last worked for a rehabilitation provider it was specialising in the construction industry. I had a lot of clients like the gentleman who was here today. I think he was approximately 50 years of age, he had been a carpenter all his life and he came from a non-English speaking background.

Without being able at this point to give you a specific example I can tell you that it is very common to find that an insurance company would not be prepared to find, say, $150 for an administration fee for TAFE for a gentleman like that to improve his English skills. As you heard in that case, if I remember rightly, he is supposed to be doing a computer course. My questions there would be, "Have things been done thoroughly? Have appropriately qualified professionals been used and resourced adequately to determine a suitable vocational goal for a gentleman in that position? Is enough being done to help him back into work?"

We agree totally with other comments made today about lump sum compensation for people in that position. We recognise again that perhaps for the 61-year-old gentleman there is a good argument that his main need is adequate lump sum compensation. It has been my experience over the years—and it has been very disappointing—that not enough quality resources are being put in to thoroughly assist people who need to get back into the work force.

The Hon. RICK COLLESS: I refer to a question asked earlier of Ms Mallia about the insurance company. Some insurance companies, perhaps deliberately, allocate inappropriate courses in inappropriate areas to injured workers with a view to getting them off the ledger. Do you think that is a reality? Does that go on?

Mr ELLWOOD: I, like Ms Mallia, have heard that anecdotally. Sometimes it appears to be the case. However, I am not in a position to say that it is deliberate. Perhaps it is too strong a sounding term, but it is more in the realm of incompetence than deliberate.

The Hon. RICK COLLESS: Would it be fair to say that there is a need to make sure that rehabilitation courses that are allocated to injured workers are more appropriately allocated than they are at present and more appropriately geographically as well? Would that be a fair comment?

Mr ELLWOOD: Speaking from my own experience as a rehab counsellor with a rehab provider and a rehab counsellor's main role, while I do a lot within a workplace mode my main role as a rehab counsellor is to help people in a situation like the gentleman we met earlier, who do not have a job to go back to. By the way, I should add too that rehab counselling is a recognised profession; there is a degree, and it is a particular field of expertise which—I do not want to sound arrogant—a lot of others working out in the community helping people find jobs do not necessarily have.

What I found was that there was always a push to find a quick solution. There are no quick solutions for some of the gentlemen we met here earlier and there is no quick solution for someone from a non-English-speaking background who is unable to do physical work; they need to learn English; they need to develop English literacy, even if that takes years. These people are being given up on. To conduct a vocational assessment, for example, which is aimed at coming up with a suitable vocational employment goal for someone with a serious injury who needs to find work can be a very time-consuming and detailed undertaking. My experience in attempting to help people in that situation was that insurers were not prepared to pay for the thorough good-quality job that is required to get results and I have come to the conclusion that in many cases money spent on rehab—we heard someone earlier talk about the cost of rehab—it can be costly but in the greater scheme of things I believe it is a very small percentage of total workers compensation costs.

I believe that a lot of money is, however, getting wasted on rehab services because insurers are not prepared to pay for what it takes to do a quality job. In my experience, and I have not worked in rehab for a couple of years and you might like to actually talk to people currently working for rehab providers to get a bit of an update on the state of play now, but the way it was, and I believe it still is, is that if you propose a training course for someone that takes longer than six months they simply will not approve it; if you suggest that a lady or gentleman might need to do, say, 12 months at TAFE to develop literacy, or to point out the simple reality that doing a certificate level computer course at TAFE will not get you a job, you need to do an associate diploma level course which might take a year or two. The training that is needed for people, in my experience, was not being approved: training bordering on pointless because of the inadequacy of the training to get a job in labour markets right across the State. I think you understand what I am saying. If I may dare to use the vernacular: half-arsed rehab is a waste of money.

CHAIR: Just before we finish up I might just make a personal explanation. I have been responsible, in wearing another hat on behalf of Wesley Mission, for running 60 rehab and return-to-work services over recent years. The people who run the services can make a profit in that work and they win contracts depending on their results, as you would well know. I have worked on the basis that you put potential profits back into ensuring that the person is fully equipped and able to return to work. Consequently, my staff have been responsible for paying for people to get a truck driver's licence, a forklift driver's licence; we have provided them with clothes, TAFE courses and so on, but the one that stands out in my memory is a person—who was an upfront person—we helped get a new set of false teeth, which made them much more presentable, and ultimately that person got a job. What we have really got to do is to help providers use their profit in order to help workers to get back into jobs.

Mr ELLWOOD: Certainly I would have no argument with that but I would just reiterate that we are supposed to have a system whereby WorkCover funds employers' premiums, that all of our money is being used sensibly and proactively.

CHAIR: And the evidence is too much is being wasted?

Mr ELLWOOD: Wasted and by being not proactive enough in approving necessary things. Time is getting wasted, and time is money.

CHAIR: Thank you very much, Mr Smith and Mr Ellwood. Keep up the good work.

(The witnesses withdrew)

(Luncheon adjournment)

PHILIP JOHN TURNER, Manager, Community Care Underwriting Agency, GPO Box 2888, Sydney 2100, sworn and examined:

CHAIR: Welcome to the continuation of the first public hearing of the inquiry by General Purpose Standing Committee No. 1 into personal injury compensation legislation in New South Wales. We welcome Mr Turner, who is the Manager of the Community Care Underwriting Agency. Mr Turner, are you representing that body at this inquiry?

Mr TURNER: Yes, I am.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr TURNER: Yes, I am.

CHAIR: Thank you. We have received your submission, which is No. 7 on our list, but would you like to make an opening statement?

Mr TURNER: I suppose the only thing I would like to say is that, as we say in our background, the Community Care Underwriting Agency [CCUA] is a joint venture between three of Australia's largest insurers: QBE Insurance Australia, Allianz Australia and the Insurance Australia Group. The CCUA was formed in 2002 to respond to the need for public liability insurance for the not-for-profit sector. That is about all for my opening statement.

CHAIR: Would you care to elaborate a bit on your company's performance?

Mr TURNER: As we say in our submission, as at the end of January we have had more than 6,000 community groups throughout Australia contact us either via the telephone or via our email and registration set up. We have provided more than 4,000 quotes to those groups and, at this point in time, issued more than 2,000 public liability policies for those groups. As we also say in our submission, a number of those have been for what we call one-day or one-off events, but we currently have about 1,500 annually renewable policies on our books. They are policies that have been issued for 12 months and have been renewed into a second or third year with us. So we have a renewable retention rate of about 75 per cent—75 per cent of the renewal notices that we send out each month renew with CCUA. We see that as a pretty good figure at this point in time.

CHAIR: Before my colleagues begin to ask questions, may I ask: Do you feel that you are covering that large number of people who want one-off policies for the local shire show, the gymkhana, a special march and so on?

Mr TURNER: We thought we would be inundated with one-off requests but we have found that after a little bit of talking with the client we have been able to convince them that they need an annual policy. Instead of taking out a one-day policy and then in 12 months time having to come back and try to get that cover again, we try to convince them—I suppose that is the right term—that they have an exposure throughout the year because they have regular meetings.

CHAIR: They might have monthly meetings and people at those meetings.

Mr TURNER: Yes. They could have fund-raising events during the year to try to raise some money for the promotion of their event and so on. So we have been able to convince a large number of the groups to take out annual cover. There are still a number that say, "No, we only want it for the event." So, rather than saying "We can't insure you" we prefer to give them the cover for the event.

CHAIR: Thank you. Do Government members have any questions?

The Hon. IAN WEST: Mr Turner, you say that you have 1,500 renewable policies.

Mr TURNER: Yes.

The Hon. IAN WEST: Has there been a number of claims from those policies?

Mr TURNER: At this point in time we have received notifications of 12 claims since we started in December 2002.

The Hon. IAN WEST: And you have how many policies?

Mr TURNER: We have 1,500.

The Hon. IAN WEST: I assume you would be quite satisfied with that from an actuary point of view.

CHAIR: Not necessarily—one of them might have been a carnival ride in which 12 people were killed.

Mr TURNER: So far we have had no catastrophic events. We have had one major personal injury claim made against us from an event held in the Australian Capital Territory but the other claims that we have had notified at this point in time have been small. Based on the results so far it has been decided that there will be no premium increases attached to our policies going forward. As we say in the submission, if a client comes to us and they have changed their activities we will then look at increasing their premium if it is deemed necessary. But the majority of our renewed policies now go through without any premium increases. That is based on the fact that we have had a good loss ratio at this point in time and, the way that our actuaries review it, they are comfortable that our policies should continue without any premium increases.

The Hon. IAN WEST: Thank you, Mr Turner. I was quite confident that you would be able to answer my rhetorical question. Has the consortium of QBE, Allianz and IAG—

Mr TURNER: Or the old NRMA, as we know them better in New South Wales.

The Hon. IAN WEST: Yes. Has that been a successful alliance?

Mr TURNER: It has been very successful. All three organisations are comfortable with it proceeding into the future.

The Hon. IAN WEST: Could you enlighten us with some anecdotal advice as to why you think it is successful now and would not have been successful previously?

Mr TURNER: Going back to 2002 when the whole issue of the not-for-profit sector was raised, many insurers—including the three companies that formed Community Care—looked at the not-for-profit sector and did not have much of an idea of exactly what they did. It was a misunderstood sector in some of the activities that were undertaken. But the three companies got together thinking that they could accept a risk by sharing it between the three companies and trying to have affordable premiums by sharing the risk between three companies. Therefore, they were more prepared to underwrite a risk that might have been considered unusual whereas, if they had been individual insurers, they may not write it. The sharing of the risk has been the best part of it.

The Hon. IAN WEST: There was a little bit of innovation in the market as to how to approach it?

Mr TURNER: As to how to approach it, that is correct. We believe in the nearly three years that we have been going that we have learnt a lot about the not-for-profit sector but then when we say that the next day something new out of left field happens. So the not-for-profit sector is very innovative in the way it goes about raising funds and undertaking its activities.

CHAIR: Reasonable risk management?

Mr TURNER: We are finding risk management is being better accepted now. More and more groups are taking up the idea of risk management but there are still a lot of groups out there that say "We are all volunteers. We don't have enough time to do the things that we want to do, let alone

having to take risk management into account." We are trying to foster the idea of risk management and build it into a normal part of the everyday practise of a not for profit.

Ms LEE RHIANNON: You said you would rather be able to work out the figures rather than say "No" to groups. But from your figures I assume you must be saying "No" because you said you were approached by 6,000?

Mr TURNER: Yes. We have been approached by 6,000, quoted 4,000 and written 2,000 policies and that is not because we have said "No", it is basically because now more insurers are back in the marketplace. Even when we kicked off in 2002 we had in Queensland Suncorp Metway that had an arrangement with the Queensland Government so a lot of the quotes that were coming in from Queensland were checking our price against the Suncorp Metway price. The Victorian Government set up a scheme through the Municipal Association of Victoria, which is all their councils, and that scheme was picking up a large number of not for profits in Victoria but they were still coming to us for quotes. In a lot of cases we would say to them "You're insured with MAV now. You've got a good policy. You've got a good premium, stay there."

In Western Australia, for example, you had the Insurance Commission of Western Australia that was given authority to write commercial insurance business again so we would get quotes from groups in Western Australia. Part of the process was they would have to get a quote from a commercial insurer then take that price back to ICWA and then ICWA would either match that price or better it. So in a lot of cases we were quoting clients who were already insured and they didn't take our price.

Ms LEE RHIANNON: Are community groups now covered? Are any falling through the cracks?

Mr TURNER: I do not believe so. A lot of organisations are still concerned about the cost of their insurance and the fact that if their insurance premium increases they have to cut back services to their client base. In this morning's *Daily Telegraph* a story is about St Vincent de Paul and they are the sorts of things that we hear quite a lot about. I believe most community groups can now obtain insurance but as to whether they are prepared to pay the premium that is required becomes the big question. Even when we quote people $600 or $700 premiums for their insurance they get very concerned about the cost of that insurance.

Ms LEE RHIANNON: Do you hear about groups that choose not to take insurance and go ahead with their work, as they believe they cannot afford it?

Mr TURNER: Not as much now as we did in the early days. I think more groups now realise that they have to have insurance and are trying to find ways to pay the premiums. We do not hear of many people now saying "We are not going to take insurance" but in the early days we certainly did.

CHAIR: If you are uninsured you then tend to run into other problems from unions representing those workers.

Mr TURNER: The councils are probably one of the best supporters of insurance because they want any group that uses their facilities to have insurance so they certainly force, if I can put it that way, community groups to find insurance or else they cannot hire their venues.

CHAIR: I have experience of having three buildings on one side and four buildings on the other side of a road. The unions regarded it as an occupational health and safety issue that workers would actually cross the road. Eventually because we could not get specific insurance we had to abandon that program and develop two different programs.

The Hon. RICK COLLESS: I note you cover the Marulan Youth and Sports Club Inc. How do you calculate the risk and the premium for organisations like that. For instance, how do you calculate the risk and the premium of the Tibooburra Gymkhana that holds buckjumping and bullock riding and so on?

Mr TURNER: We have broken down the not-for-profit sector into a certain number of different classifications. We use the Australian and New Zealand Standard Industries Classification [ANZSIC] codes and have broken them down into things like education, health, sport and recreation and special interest groups. We have approximately one dozen different codes into which we break the groups. For example, a pensioner group would fall into special interest groups and within that we have a rating base that says "If an organisation has 100 members, only has monthly meetings and then it might have one special event per year" we look at the size of that event. We have a base premium which is $648 and then we will load that premium based on how we see the exposures.

For example, a small pensioner group that does nothing but have their monthly meetings would pay $648, but a pensioner group that might have lots of fund-raising activities, cake stalls and so forth in shopping centres, we may see that as a higher risk so we might add a loading of 10, 20 or 30 per cent on top of that, but for each classification we have a base rate. Then we look at the types of activities that they undertake during the year and apply a multiplier to that base premium. The highest base premium we have is $1,404, for what we call a class-5 risk, which would be something like a sporting group. Then we would add multipliers based on the size of the organisation and the activities that they undertake.

The Hon. RICK COLLESS: Obviously, something like horse sports, bullet riding and so on would be very high risk?

Mr TURNER: Yes.

The Hon. RICK COLLESS: The local show, gymkhana or rodeo is the main social event of the year for many small communities?

Mr TURNER: Yes.

The Hon. RICK COLLESS: What sort of premium could they be up for?

Mr TURNER: It is very subjective and I will give three examples. We have Playgroups New South Wales insured with us at the moment. They have something like 1,200 playgroup activities every week. They have something like 25,000 or 30,000 family members, involving something like 60,000 children. That organisation pays us nearly $40,000 a year in premium for a $20-million cover. We then have the Lismore Arts Council, which organises a whole heap of activities during the year such as art classes or drama classes. But during June, I think it is, they hold their Lantern Festival, which involves a large street parade and then a concert at the end of the night. We charge them round about $4,500 for that activity.

The Tibooburra gymkhana's premium could be somewhere between $1,000 and $5,000 to $10,000, depending on the size and type of activity that they are going to do. The reason I gave the other two examples is that Playgroups New South Wales and the Lismore Arts Council put a lot of time and effort into developing their risk management strategies. With playgroups, when you are looking at thousands of children doing lots of activities, the premium for that can be quite high, but the premium for something like the Lismore Arts Council, which has fewer activities involving adults and children, is around about $4,000 or $5,000. It just depends on the types of activities and risk management techniques and risk management plans that they implement.

All the pricing varies but we try to stay consistent. For example, we do over 70 arts councils throughout New South Wales and we have broken their rate down into three different categories, based on the number of people they expect to attend all the different events during the year. So the most an arts council pays at the moment is probably about $2,500, but they could have anywhere up to 5,000 or 6,000 people attending all different sorts of functions during the year. The Tibooburra gymkhana premium would probably be a minimum of $1,000, but it could go higher than that.

The Hon. RICK COLLESS: The Tibooburra example is a good one because of its isolation and the fact that it does not have very many functions because it is a small village. The gymkhana would be lucky to attract 1,000 people, I suspect—maybe a few more—but if the premium was $5,000, that would virtually—

Mr TURNER: Wipe it out.

The Hon. RICK COLLESS: Spell the end of that gymkhana?

Mr TURNER: Yes.

The Hon. RICK COLLESS: Must each policy be self-funding or is there cross-subsidisation?

Mr TURNER: It is cross-subsidisation. The basic tenet of insurance is to spread the losses of a few amongst the many.

The Hon. RICK COLLESS: That does not always apply.

Mr TURNER: That does not always apply.

The Hon. RICK COLLESS: No, sometimes they spread over the same organisation over a number of years if you have a claim.

Mr TURNER: Yes, if you have a claim there is what they call a payback period, so we have to have a look at the types of claims that have come in and we may increase a person's or an organisation's premium because of the exposure but, generally, we try to make sure that if it is a gymkhana, we would not put a premium on them that would make it unprofitable for them or make them close down. We try very hard to meet the needs of all our clients. We do not succeed all the time because there are other insurers out there and in some cases people will not take the insurance, but I think we have actually dealt with Tibooburra in the last 12 months; we have spoken to them. I cannot recall whether we have actually got them on our books.

The Hon. RICK COLLESS: So that same process would be used for all the country shows that you would have the opportunity of broking?

Mr TURNER: Country shows are an interesting one because the country shows have either a State or a national policy that covers a lot of the agricultural societies. In New South Wales there is a statewide policy that all the agricultural societies can take advantage of; the same in Queensland and, indeed, all the States.

The Hon. RICK COLLESS: That covers the ring events and that sort of thing as well?

Mr TURNER: That covers them as organisers of their local show for the activities that go on. Again, one of our tenets was to try and not upset some of those schemes that were already in place. If organisations had an insurance program in place we would say to them, "Well, you have an insurance program in place that gives you cover that you have been satisfied with for a long period of time. You need to negotiate with your insurer or your broker to try and get a better deal". But we would not purposely go out there to attack other schemes that were in place because we think that would be upsetting the applecart a little bit. Other people might say we should be quoting everything, but sometimes it is better to leave things as they are.

The Hon. KAYEE GRIFFIN: I was interested to see that two of the groups you listed were the Greek Orthodox Community of New South Wales and the Pole Depot. The Greek Orthodox Community has diverse activities.

Mr TURNER: It certainly does.

The Hon. KAYEE GRIFFIN: Such as Sydney festivals, a licensed club, a nursing home complex and so on.

Mr TURNER: Yes.

The Hon. KAYEE GRIFFIN: The Pole Depot is a very different type of place. Could you just expand a bit on that?

Mr TURNER: The Greek Orthodox Community of New South Wales, you are quite right, we cover the Greek film festival—the Greek festival in March, which has just taken place. We cover their language classes that are held in State schools after hours. We look after two of the nursing homes. They own quite a few buildings around Sydney so we are covering their property owners' operations, as well as their educational side and a lot of their social activities.

They are an organisation that we only picked up in December last year. The Greek festival attracts something like 100,000 people to Darling Harbour and the rest of Sydney during the month that it is run, so it is a month-long festival. But, again, they have taken the time to develop risk management techniques. They work closely with the Sydney Darling Harbour Foreshore Authority to put everything together. They have good security in place and they are a diverse organisation.

The Pole Depot is totally different in some respects but deals a lot with youth in the St George and Hurstville area and they do lots of activities, whether it be welfare, counselling, after-school care and so on, so they are also a diverse organisation.

The Hon. KAYEE GRIFFIN: Does the Pole Depot have some affinity with local councils as well? Do local councils assist with some of the activities?

Mr TURNER: They probably work in conjunction with local councils in relation to the activities that they undertake. I should know because we sponsored their 25-year history, which they produced last year, but they do work with local councils, yes.

The Hon. IAN WEST: When the joint venture commenced after December 2002, did you find that you had an increased number of insurance companies interested in getting involved in the type of insurance that you were looking at?

Mr TURNER: The interesting thing, go back to December 2002, was that a lot of the insurers sat around—can I go back one step? In March 2002 the Federal Government called together the State Ministers as well as Federal Ministers, the ICA and the Australian Local Government Association for a large meeting in Melbourne, where they raised the issue of how can not only the insurance crisis for public liability be solved but also medical malpractice insurance? Out of that, the ICA pulled together a working party where most insurers in Australia were invited to attend a series of meetings to look at a solution. Over a period of months leading up to November 2002 it got down to three insurers involved, which were Insurance Australia, QBE and Alliance, and we formed CCUA.

But always in the background there were other insurers in the marketplace who were probably not out there yelling from the rooftops that they were prepared to write this insurance but they were writing insurance. I mentioned Suncorp Metway before and QBE-Mercantile Mutual, which is a joint venture between QBE and Mercantile Mutual, were writing the business. CGU were writing the business and EIG-Ansvar, so there were a number of insurers out there writing the business.

The Hon. IAN WEST: But when you started writing the business there was an increased interest?

Mr TURNER: Yes.

CHAIR: Have the tort reforms helped you?

Mr TURNER: The tort reforms have helped, yes, throughout Australia. We now look at risks differently because of the tort reform and the personal responsibility. We encourage our clients to introduce waivers where they are needed when they are providing recreational services and that seems to help the clients understand what they have to do with their participants when they participate, so the tort reform has helped, and we can see that in the number of claims that have been notified, not just to Community Care, but to insurers in general, over the last couple of years.

The Hon. RICK COLLESS: The Community Care Underwriting Agency has been developed for not-for-profit organisations. That is what you have been saying, is it not?

Mr TURNER: Yes.

The Hon. RICK COLLESS: Does it have the same philosophy? Is the CCUA a not-for-profit organisation?

Mr TURNER: The concept of community care is that we provide insurance to the not-for-profit sector, and the three organisations look at making sure the costs of running the operation are covered. None of the three insurers believe that they should be out there making large profits, but they need to cover the costs. If I could give just a bit of background. All the staff of the Community Care Underwriting Agency are seconded from one of the three insurers. So all of the staff are employed by one of those three companies, and the majority of staff spend 12 months working with Community Care, then go back to their former roles within the other organisations. So all the costs are shared, on an almost even basis, by the three companies.

The Hon. KAYEE GRIFFIN: You spoke about local government probably being very strict about insurance issues. From your experience, is that the position across the board in local government?

Mr TURNER: Yes. Local government is very strict about making sure that commercial operations or incorporated associations have their own insurance when using council facilities. That has been one of the big issues that we have been working on over the past couple of years. Councils, when they enter into hiring agreements, whether it be with a not-for-profit group or even a private individual, have been requiring the not-for-profit group to accept total responsibility for anything that goes on at that council hall whilst the group is hiring the hall. So, for example, if the roof of the building was to fall in, and I as a not-for-profit organisation had signed a hire agreement, I could find myself responsible for that claim, even though I had no control over the repairs or maintenance to the building. So we have been trying to work with local government, and having some success, to get local government to realise it has to accept its responsibilities, so that if the roof does fall in the council picks up the liability, not the not-for-profit organisation.

The Hon. KAYEE GRIFFIN: Is that being done with the individual councils or through the peak bodies?

Mr TURNER: I am now working with Statewide Mutual, which is the major insurer of councils in New South Wales. We have started working with West Pool and Metropolitan Pool in New South Wales as well, and we are also working with the Australian Local Government Association to try to get councils to ensure they have in place insurance to cover their liability, so that there should be no need for them to foist that liability on a small not-for-profit group. Some insurers might say: Because of indemnity insurance, we cannot give you insurance. We have stood fairly firm on this issue, and at long last we are starting to get some positive reaction from councils. We have actually started to see councils writing to users of their facilities and saying, "We are thinking about introducing new indemnity clauses which say that the incorporated association takes its responsibility and the council takes its responsibility." So it is starting to come through at long last.

If I could use the example of play groups yet again. With all the groups they have throughout New South Wales, we get inundated by lease agreements, because we want to have a look at the indemnity clauses to make sure that play groups do not pick up liability that they should not pick up. So, if we can get this agreement with State governments, it will mean that play groups do not have to worry about contractual arrangements within their hire agreements. We can just give them cover for hiring that hall. So it cuts down on a lot of paperwork for everybody concerned. We are trying to streamline the process.

CHAIR: Apart from personal liability, do you do any general insurance or anything like that?

Mr TURNER: At this stage, no.

CHAIR: Such as retirement villages and so on?

Mr TURNER: We have been restricted by the joint venture agreement, and the fact that we had to get approval from the Australian Competition and Consumer Commission to be able to operate, because of its concerns with three big insurers getting together. We have been restricted to doing only public liability insurance for not-for-profit groups with turnovers of not more than $5 million. So we are restricted in what we can offer.

CHAIR: Thank you. I think that concludes the questions.

Mr TURNER: Thank you for the opportunity to address the Committee.

(The witness withdrew)

DAVID IAN BROWN, Solicitor, United Medical Protection, sworn and examined:

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

Mr BROWN: I am the legal manager of United Medical Protection, medical indemnity insurer.

CHAIR: We have your submission, but would you like to make an opening statement?

Mr BROWN: Certainly. There is nothing in particular in the written submission on which I would need to expand. In summary, our position is that tort reform in relation to its impact on medical indemnity was necessary. But there are a number of factors that have made it difficult to assess the effects of the tort reform that has been brought into place over a number of years. It is now becoming reasonably clear that there are some significant reform benefits. In response to that, United, through its insurance subsidiary, Australasian Medical Insurance Limited, AMIL, took the decision for renewal of insurance this year to make reasonably significant premium reductions available to its insured doctors. So that is the summary of our position in relation to the impact of tort reform.

CHAIR: I now invite questions from Opposition members.

The Hon. ROBYN PARKER: You mentioned benefits. Benefits for whom?

Mr BROWN: I suppose the benefit I have in mind is in terms of making medical indemnity insurance more affordable, making it possible to turn back the spiral in increased medical indemnity insurance. So it is a benefit in the first instance to medical practitioners, and then one would hope something would be passed on to the community at large resulting from that.

The Hon. ROBYN PARKER: How do you see that benefit being passed on to the community at large?

Mr BROWN: I suppose there are a couple of factors. One would be that the costs of medical indemnity would have to be included in the cost of medical practice, and one assumes that they are passed on to patients or in other ways in the ordinary course of events, so that any downward pressure on those premiums should be downward pressure on costs generally. Secondly, in relation to the availability of services, I think by around 2000-01 we were getting to the stage where things like obstetric services in country towns and so on were becoming quite precarious. The downward pressure on premiums, in combination with various other reforms, I think has had a reasonably positive impact in some of those areas.

The Hon. ROBYN PARKER: Are your premiums for practitioners going down? I mean, they have been propping up UMP for some time, have they not?

Mr BROWN: Yes. They came down by an average of, I think, 20 or 20.5 per cent for the 2005 year.

The Hon. ROBYN PARKER: Do you see those going down further?

Mr BROWN: That will obviously depend on annual review year by year of how claims and liabilities are tracking. To reach the position of offering premium reductions in the 2005 year, we would have to have a look at what our actuaries were saying was most likely to happen over the next four or five years through to 2008-09 because one thing we would not want to do is have a significant reduction in premiums only for them to hike up in the next year. So we are reasonably confident that we will not have a volatile up and down but by the same token if there was to be a huge upward pressure on claims again obviously we would have to review that situation.

CHAIR: What was the main reason for your reduction in large claims?

Mr BROWN: In the value of large claims?

CHAIR: Yes. Is that because some practitioners moved out of areas?

Mr BROWN: If I can do it in two parts, the single factor in terms of tort reform that has reduced the value of the large claims has probably been the introduction of the 5 per cent discount rate so that future losses are discounted by a bigger factor and on those very large claims that has a very significant effect on the valuation of each very large claim.

CHAIR: Would that not lead to even larger claims being made to cover the 5 per cent discount?

Mr BROWN: Certainly in catastrophic injury claims the progression has been that more and more heads have been brought into existence by creative thinkers So whether that process will continue, I guess it is quite likely. At the moment in terms of our valuation of claims it has had the downward effect. That would be a good example in fact of the kind of thing where only time will tell whether it is sustained.

The Hon. RICK COLLESS: What are the actuaries telling you in that regard? What are their predictions for what will happen?

Mr BROWN: The actuaries, certainly by the time they did the most recent valuations, had reached the view that there were significant benefits, a reduction in claims costs and numbers in evidence at present. They think that those claims costs and numbers will gradually creep back up again. So it is a question of estimating just how steep the creep up is, I guess, but they certainly see claims and costs gradually increasing in the next five years for example.

The Hon. RICK COLLESS: It is a real issue for country towns particularly in relation to birthing facilities and so on. There are not many country towns where ladies can go to have their babies.

CHAIR: You are not allowed to have babies over the other side of the Blue Mountains.

The Hon. RICK COLLESS: No, and we have all heard reports in the media about people having to travel hundreds of kilometres and then getting there and not being able to get in there when they need to and so on. How do we get around that problem? As a result of this decrease in premiums there are no more doctors in country towns. There are no more facilities for women to have babies in country towns than what there was two or three years ago. In fact, it has gone the other way; it has got worse. So it is not solving the problem that country communities are facing. How do we get around that?

Mr BROWN: It is difficult to know how insurance itself can get around that. There may be factors that can be developed in the insurance that could help, but it will be interesting to see if we can manage to continue a trend downward on premiums, whether that can have any effect—it is just too early to say in that regard. Certainly, some of the Commonwealth reforms in relation to support of premium costs may have an impact over time where practitioners can recover a percentage of the cost of their medical indemnity premium where the cost of that premium is above a certain percentage of their gross billings and so on. So there are measures like that but whether they are specific enough to deal with particular country problems is another matter.

The Hon. RICK COLLESS: When you are calculating premiums do you take into account the pressure that country doctors are under? I mean, most country doctors that I know—and this also applies to dentists—work extraordinary hours because in a lot of cases they are the only doctor who is available. So they are virtually on call 24 hours a day, seven days a week.

Mr BROWN: The answer from an insurance perspective is probably simply no, much as they feel sympathy and empathy for that problem. The specific issue for medical indemnity insurers in recent years has been that you must have proper prudential management, which means simply having adequate capital on board to deal with the total risk. So we have to take an insurance approach to it, which involves collecting that premium to deal with the risk. We have many different categories of members, both divided in terms of craft groups or specialty groups, whatever you want to call them,

and also in terms of billing bands. Obviously if someone is working in a certain specialty that earns very much more than someone else, they may be paying a higher premium. There are all manner of categories so there is a differentiation like that. There is a differentiation on a State-by-State basis, which again reflects valuation of the risk with those particular specialty groups in different States. So there are some attempts to make differentiations, certainly.

The Hon. RICK COLLESS: Is there any assessment of a doctor who is under constant pressure by being the only doctor? We are not talking about tiny little towns because tiny little towns do not have doctors; it is the medium sized towns with 3,000 to 5,000 people, something of that order and often there are only one or two doctors there. Is there any assessment of an increased risk because of the fact that these doctors are on call 24 hours a day, seven days a week?

Mr BROWN: We do not load people's premiums because they are in a country town and therefore create a risk. There is no loading of that kind and certainly in specific cases those issues can be very important. So if we are acting, whether it is in disciplinary matters or in civil claims, we certainly work hard on those issues about the problems faced by those practitioners. For that matter, they are not just in country towns but also in outer suburban Sydney, hospital environments for example where there may be huge resources issues and so on. There may be tremendous human pressure and so on which are relevant factors in the conduct of those cases. They are not things which allow you to give a discount in insurance premiums; nor do we load for them.

The Hon. ROBYN PARKER: If there is a claim in favour of a plaintive, does the doctor's insurance premium increase because of that?

Mr BROWN: There is not a direct correlation in the way you have put it. Certainly if a doctor has many claims for example, we have a filter process which identifies doctors who have many claims and they could be subject to premium loading or to specific conditions in their insurance cover. For example, if a doctor has a number of claims relating only to one particular kind of surgical procedure, it may be more appropriate that there is a condition about that procedure or something. But the fact that one has a single claim, no; someone who has multiple claims, we start to go through a risk management process and reassessment and potentially loadings on premiums.

The Hon. ROBYN PARKER: And there is no consideration of the type of procedures that they do in general? I was thinking maybe of plastic surgery or something like that as opposed to—

CHAIR: As being more high risk.

The Hon. ROBYN PARKER: Yes, high risk.

Mr BROWN: I think the assessment of the risk of those procedures tends to be built into the different insurance categories of premium categories in the first instance. For example, a general practitioner who performs minor surgical procedures would pay a higher premium than a general practitioner who does not perform surgical procedures and so on. That tends to be built into the system.

The Hon. RICK COLLESS: Is it the same with gynaecological services?

Mr BROWN: Let me think. There are certainly different bands for obstetrics and gynaecology. I just cannot think. I would have you take on notice whether we have several different bands within gynaecology.

The Hon. ROBYN PARKER: In what percentage of cases do you make a decision to settle?

Mr BROWN: Fewer than 10 per cent of our cases reach a court hearing, a final hearing in court. Something in excess of 90 per cent are resolved out of court. I would think about two-thirds of those involve a payment and the others would be matters that discontinue or settle without payment. The vast majority do not reach court.

The Hon. ROBYN PARKER: You make a calculated decision not to settle because it is a cheaper process for you or the insurer to go through?

Mr BROWN: Obviously, a commercial decision is part of the process but in the medical indemnity environment we also have a fairly extensive medical review of cases. Experts in the relevant field form a view about whether they regard the care provided by the doctor who is being sued as being appropriate. Generally speaking if the expert view is that they regard care as being entirely appropriate then we would not make a commercial settlement. We would proceed to defend the matter.

The Hon. ROBYN PARKER: In every case?

Mr BROWN: It is not every case. Occasionally some sort of extra medical factor can come in, in terms of the logistics of running the case. You may have people who just are not available to give evidence, which will create problems, or something of that kind. But in the vast majority of cases we are strongly guided by that expert medical view of whether the care met the standards accepted by peers in Australia.

CHAIR: Therefore do you take up on behalf of the insured cases in which there have been complaints to, say, the Health Care Complaints Commission or other professional bodies?

Mr BROWN: Yes. Certainly we do.

CHAIR: You would take them up in the regular course of events?

Mr BROWN: We do, yes.

CHAIR: I do not know what you would call it in a medical sphere, but do you have a knock-for-knock agreement with other companies on issues like that?

Mr BROWN: We do not have a knock-for-knock agreement of the kind that you find in other areas of insurance. We have a reasonably close relationship with the Treasury Managed Fund that deals with New South Wales public hospitals of necessity because quite often we are both involved in the same case and, obviously, it would be extremely inefficient and costly and so on if we could not take a commonsense approach to where we are both involved. But it is not a formal knock for knock.

The Hon. ROBYN PARKER: You referred to a reduction in insurance policies, litigation and claims, and you attribute that to the tort law reform. Do you think that medical practitioners who are your clients feel that the environment is less litigious than previously, or do they still feel as though that environment is out there?

Mr BROWN: They are still at the stage of being quite cautious because they have seen a trend going the other way for some years before. I think they would reserve judgment still. But obviously we are getting reasonably positive feedback from our members in relation to at least getting a reduction for the first time in many years. I guess it is sort of cautiously hopeful.

The Hon. IAN WEST: However, I notice in the third last paragraph before your conclusion you indicate that your actuaries have put a downward valuation on outstanding insurance claims liabilities from $432,000,000 to $345,000,000. In regard to your incurred but not reported [IBNR] claims there has been a revaluation down from $455,000,000 to $367,000,000.

Mr BROWN: Yes.

The Hon. IAN WEST: That to me sounds like a confident actuary. Are the estimates of IBNR claims tracked by a real outcome? In other words, between now and, say, 2010 or 2015 are the $367,000,000 worth of estimated claims, described as IBNRs, actuarially tracked? Are they an estimate as opposed to a real outcome?

Mr BROWN: The answer has to be yes. The IBNR valuation is repeated each year and subject to review by the Commonwealth Government Actuary as well. Any event affecting the valuation of claims generally has to be taken into account. For example, if court awards in comparable

cases are coming in lower than that has to be reflected in the valuation of IBNR claims. If other trends are becoming apparent, for example a typical one would be assessing the conversion rate of notifications to claims, if the current statistical data on those issues indicated a change then that would have to be passed on and reflected in the annual valuation of IBNR claims.

The Hon. IAN WEST: You are saying that you would be able to have statistical information going back from now to 1995, statistical comparisons between the actuarial estimates and the real outcomes?

Mr BROWN: I think the answer is yes. If I understand your question properly, the answer is yes.

The Hon. IAN WEST: Therefore, theoretically, we should be able to assess whether or not the actuarial estimates track truly?

Mr BROWN: There are certain factors you can certainly check, for example, concession rates over a period of time. If they make a certain assumption—

The Hon. IAN WEST: I am talking about an actual acclaim. If your actuary assesses my injury that I have not yet reported as coming in on all the others at $367,000,000 down from $455,000,000 am I able to track that difference in actual outcomes—this is projected estimates?

Mr BROWN: If I am understanding the question properly, the IBNR figure always remains inexact; always remains inexact. It is problematic, and it is particularly problematic in terms of a long-tail business like medical indemnity. For example, one of the things that would have to be taken into account is not just that claims coming into existence next year from old incidents might be something like the one that came into existence this year, but that a claim that comes into existence in 20 years bears some relationship to what we know today. Historically that has been tremendously difficult.

The Hon. IAN WEST: My question, then, is if Ian West, injured person, makes a claim today and your actuaries put an estimate on that claim and that claim is finalised in the year 2008, there is no way of measuring the actuaries' estimate as opposed to what I cost you?

Mr BROWN: You can take the result of his claim once it is finally resolved and you can track how the estimates have varied over the years so is possible to trace the development, whether your estimate is accurate or inaccurate or gone up or gone down. It is literally possible to do that, and we certainly do that.

The Hon. IAN WEST: So you would be able to provide some information as to the tracking?

Mr BROWN: Certainly, yes, sure. Sorry if I did not understand.

(The witness withdrew)

(Short adjournment)

OWEN ROGERS, Chief Executive Officer, Society of St Vincent de Paul, New South Wales State Council, and

CARY NEIL TOBIN, Insurance Adviser and Occupational Health and Safety Auditor, Society of St Vincent de Paul, sworn and examined:

CHAIR: We have your written submission before us, but do you want to make a statement?

Mr ROGERS: Thank you very much. If I make just a brief introduction on the society, its background and it works. The society is an international organisation. It was founded in 1833 in Paris and was established in New South Wales in 1881. Its mission is to deepen the Catholic faith of its members, to go out into the nation to heighten the awareness of Jesus Christ. This is done by sharing ourselves—who we are and what we have—with the poor on a person-to-person basis. The society's aim is to help demarginalise the poor and the destitute irrespective of colour, creed or religion.

In support of its work, the society has some 20,000 volunteers and some 1,782 employees. The society has a large number of special works—113 to be exact. They consist of homeless men's hostels, homeless women's refuges, homeless youth services, homeless family services, aged hostels, aged care self units, aged nursing homes and 271 centres of charity as well as having 573 conferences. The hierarchical structure consists of, very briefly and broadly, the State Council, who are known as the trustees. We have 11 diocesan councils, 66 regional councils and 573 conferences. The society is a volunteer organisation. Volunteers are in control. Employees in the society are engaged to fill the roles of management on a day-to-day basis that cannot be carried out by the volunteers due to their other work commitments and where professional expertise is needed to support the operational functions of the society.

I would just like to address the issue of insurance. The society is incorporated under the Roman Catholic Church Communities' Land Act 1942 and the trustees of the society have a legal obligation to protect the assets of the society, which they hold in trust on behalf of the benefactors, members and of the poor. The protection of the assets is carried out by adequate fire insurance. The trustees also have an obligation to see that the society does not face financial ruin in the very litigious world by having inadequate liability insurance. Therefore, the arrangements for public liability are vital for the society to survive in a world where people are prone to suing if they are hurt. Thirty or 40 years ago it would be unheard of, people suing a charity. With high morality we had a sense of community, but where morality is low litigation is high. Today the society is sued by the people we are serving if they have been injured and consider the society negligent. We also find that the society is sued at times by our members if they have been injured through negligence.

Let me give an example of the Matthew Talbot Hostel. Three years ago the Matthew Talbot Hostel on a Christmas Day had provided Christmas lunch for more than 1,000 homeless men. The hospital kitchen staff found they were running short of food, of turkey. So that the waiting guests would not be disappointed some undercooked—the staff thought they were sufficiently cooked—turkeys were served to the last group of men. Because the turkeys were not properly cooked, food poisoning occurred and, as a consequence of that, some 12 homeless men on legal advice are preparing a class action against the Matthew Talbot, the society, for negligence. Fortunately, the society was able to settle this claim out of court. That event shows how prone charities are to litigation and how important it is for adequate liability insurance to be required. People are at liberty to sue the society from a social justice perspective.

Prior to the collapse of HIH it was not difficult to arrange liability insurance at a reasonable premium. With the demise of HIH liability insurance became expensive and it certainly became very difficult for many charities and not-for-profit organisations to arrange liability insurance. About two years ago a very important event occurred in the Australian insurance market, with local reinsurance companies closing their doors and forcing the Australian insurance industry to seek reinsurance protection with overseas reinsurance companies. CCI, Catholic Church Insurance, could finance about $250,000 of any one claim, and the remainder would be offset to other reinsurers. All Australian insurance has to place their reinsurance with overseas insurance, and they dictate the premiums and the conditions.

With a premium, the reinsurance company endeavours to make a profit for their shareholders, and their acceptance of risk is certainly motivated by that profit. If the risk is high and could cause them a loss, they are not interested in accepting that risk. The society's insurers, Catholic Church Insurance, have counselled the society to do everything possible to control its risks. If there is a high risk, for example children, the society would do everything possible to reduce or eliminate that risk. For example, mentioning children, children come in to work at our special works as volunteers. For example at Matthew Talbot Hostel we had to impose age limits. Arranging holiday camps for needy children: exposure to long tail exposure is the key here. If they are injured through negligence, the parents may not sue the society but the young person, when turning 18 years of age, is given the opportunity by law to sue the society for a further three years, and this period could be extended if warranted.

With inflation the court awards are getting higher and higher. The society's insurers have advised the trustees of the society that if the society is not diligent in controlling its liability risks and claims occur, reinsurance companies could decline to offer availability of insurance to the society.

If this were to occur, all the society's special works would cease immediately. Yet the society is diligent; with some 20,000 volunteers involved in the work of the society it places a very onerous task on the trustees to ensure that all the risks are controlled, all the risks are reduced and, if possible, eliminated. However, the society is pro-active in the training of its volunteers and employees. No volunteers can work for the society until they have been inducted into safe work practices associated with their workplace, with special emphasis on manual handling and how to deal with aggression and violence in the workplace.

It is becoming difficult to attract volunteers to the society, particularly men who have retired and wish to perform voluntary work with the society or charities, because they come to the society, but then they have to face an induction course. While working in the society's workplace they are continually made aware and are frequently reminded of the occupational health and safety [OH and S] requirements. Also, they are continually told that if the workplace is not safe and someone is seriously injured, the society's insurers could cancel the public liability insurance for their workplace because of the escalation of claims that occur. This will have an effect on the society. The society strives to point out to its volunteers that the main purpose of the Occupational Health and Safety Act is to keep them safe and when it comes to the safety of all concerned—that is, volunteers, members, employees and the people we assist—the society will not compromise on safety.

I would now like to address premiums. Since the collapse of HIH and the requirement of our insurers for adequate premium for the risks that they are insuring, the society's liability premiums have increased from $200,000 to $600,000 over two years, which represents an increase of some $400,000. Of course, that maybe came about because HIH were underwriting insurance companies in accepting liability risks, and from evidence and facts that have emerged, were not providing adequate reserves to meet liability claims. The local market closed and the overseas market increased, and of course when that happened, they dictated the premiums that they required for the risks.

These huge increases in premiums mean that the society has fewer funds available to assist people in need. Charities and not-for-profit organisations are not able to pass on the increased costs of liability insurance because, in the commercial world, if your costs increase, you increase the price of goods that you are manufacturing or selling to cover those insurance premium costs. The society cannot turn to government for additional funds because government is continually stating that there are limited funds available and no surplus funds can be made available. As insurance costs increase, charities will have fewer funds to assist people in need and may in the future have to close some of its special works.

In conclusion, members of this Committee may consider that $600,000 is a high premium for a charity such as the St Vincent De Paul Society. However, it is important to note that the Council of Social Services of New South Wales [NCOSS], with the assistance of the State Government, has been able to arrange the facility for public liability insurance through the insurance broker, AON, and be underwritten by a consortium of the insurance companies, with NRMA being the lead company. The society approached NCOSS, hoping to reduce its $600,000 liability premium, only to find that NRMA could offer an indemnity of only $10 million. Because of the works in which the society is involved and the number of people at risk—for example, the Matthew Talbot hostel where 600 people are in

attendance daily—that has forced the society to take out liability insurance indemnity far in excess of the $10 million offered by the NRMA.

On sound legal advice, the society has been advised to insure for an amount of $250 million. The society's legal advisers pointed out that if an event involving negligence occurred, for example, at the Matthew Talbot hostel, in which a group of men was seriously injured due to the negligence of the society and a class action was taken out, and we asked the question, "Would $250 million be enough or adequate to serve that claim?" Let me just give an example to re-emphasise the point. Let us say that a staff member at the Matthew Talbot hostel, in his enthusiasm to secure the premises at night, locked a fire door and fire broke out. Let us say that 30 men were severely burned or maimed and a cross-action was instituted resulting in each of the injured residents receiving $10 million on a claim. The costs of that event could be $300 million.

The society's legal advisers in recent times have pointed out to the trustees of the society that the largest personal award for negligence was $15 million. With social inflation, liability awards increase yearly. Finally, the society is facing a further worry with changes to the Workers Compensation Act. Perhaps the Committee may well be aware of that. The Government will impose higher premiums on charities which could result in the closure of the society's work. Government policy is preparing for the grouping of insurance whereby the society would have to pay the first $150,000 on each and every claim. That concludes my instructions related to this presentation.

CHAIR: Thank you, Mr Rogers. Your illustration of what would happen if you had a fire at Matthew Talbot did of course happen in Melbourne at the Gill Memorial where 35 homeless men were burnt to death. That stays in my memory as something that could happen in reality.

Mr ROGERS: Yes.

CHAIR: Not because fire doors were locked but because some men slept on the floor and others tripped over them. Before we get into this, what about needle-stick injuries among your staff who have been fluffing pillows after someone has slept during the night?

Mr ROGERS: We are always conscious of the need to be on the lookout for needle-stick injury. We have not had a great return of claims regarding needle stick. Carey, did you want to make any comment?

Mr TOBIN: No. Minimal.

CHAIR: I could understand that you should be sued for undercooked turkey because that was your own staff or volunteers making a conscious choice, but what about on Christmas Day when much of the food that you might receive has been given to you by restaurants and comes from other places which may in fact carry salmonella or some other virus? Has the litigious nature of our society meant that you are changing your practice on the reception of, say for example, free food from restaurants?

Mr ROGERS: We are always conscious of that fact, Mr Chairman, in terms of accepting food. The policy is that any exposed food we would certainly not accept and we are conscious of the fact that tinned food, for example, is not out of date. Carey, did you want to add anything?

Mr TOBIN: Yes. The days of the Randwick races and the leftover pies have gone. We just thank them, but it goes into the bin.

CHAIR: I did speak about this in the House recently as a matter of real concern—that a major charity might get caught up because of food handling processes. Hopefully, none shall.

The Hon. IAN WEST: Thank you very much the coming in.

Mr ROGERS: Pleasure.

The Hon. IAN WEST: In your submission, you indicate that you insurance has increased from $200,000 to $600,000.

Mr ROGERS: Yes.

The Hon. IAN WEST: I have not been able to assess the actual period you are talking about, but in the period when the premiums increased from $200,000 to $600,000, can you give us some indication or some summary of the claims that have been made in that period? For example, has there been a threefold increase in claims?

Mr TOBIN: No. In fact, our claims were minimal and our insurers, Catholic Insurances, congratulated us on the fact that we were implementing good OH and S practices. But what happened was that the overseas reinsurers dictated to our insurers these further premiums that they wanted to get for our risk. When a reinsurer overseas looks at a charity like us and sees that we are completely controlled by volunteers—you might have a school teacher in charge of the Matthew Talbot hostel—they worry, particularly when they are on a risk for $250 million. Those increased premiums came from the new rates set by the reinsurers, not on our claims.

The Hon. IAN WEST: I am just trying to understand, in terms of perceptions of litigious society or Santa Claus judges or whatever, in your particular case that really was not in the equation. What was in the equation was that there was a risk assessment by reinsurers to increase the premiums from $200,000 to $600,000?

Mr TOBIN: Yes.

The Hon. IAN WEST: There was not an increase in your claims and all?

Mr TOBIN: No.

The Hon. IAN WEST: I just needed to understand the base we are coming from so that we are not really getting a mythology as to litigious society and Santa Claus judges in your particular case, which it clearly is not.

Mr TOBIN: I think, too, the reinsurers were determined to get back some of the premiums that they had not been getting from HIH, because HIH was undercutting everybody. With the collapse of HIH, of course, now the reinsurers coming in and dictate the terms so that they are going to get their pound of flesh.

The Hon. IAN WEST: In terms of your 20,000 volunteers annual 1,700 paid workers, can you give the Committee an indication as to any differences in the insurance regime in those two categories?

Mr TOBIN: Claims?

The Hon. IAN WEST: Claims and the actual insurance regime, how the insurance assessors assess volunteers as opposed to paid employees?

Mr TOBIN: They usually assess it on the risk itself. For Matthew Talbot you have 600 or 700 men at risk, so they would look at the risk itself, look at the staffing levels and with 100-odd employees at Matthew Talbot 24 hours a day, they would assess it accordingly. If it was staffed totally by volunteers, of course, the premium could be higher.

The Hon. KAYEE GRIFFIN: In respect of the conferences you have, basically a lot of the work that the volunteers do is visiting individuals, is that so?

Mr ROGERS: Correct.

The Hon. KAYEE GRIFFIN: What sorts of liability premiums are involved? Are they very different to, say, the cost of Matthew Talbot? Is there a differentiation between the cost of liability for local conferences, as opposed to the larger, say, Matthew Talbot and some of the other refuges that you run?

Mr TOBIN: Yes. The hundreds occasion is minimal because it is low risk, whereas Matthew Talbot is extremely high.

The Hon. KAYEE GRIFFIN: Do you have to have a separate policy for each conference or is there an overall policy to cover conferences, as opposed to some of the other things?

Mr TOBIN: No, we have a master policy that covers the whole society in New South Wales and the Australian Capital Territory. Everybody is covered and then we listed our number of conferences and they charge a premium for that. Then we list all of our special works, they assess the risk and charge a premium accordingly. Each special work is rated on the risk.

The Hon. KAYEE GRIFFIN: It is one policy divided into sections?

Mr TOBIN: One policy, that is right.

The Hon. RICK COLLESS: You mentioned local reinsurers people had closed their doors. This actually as a result of the collapse of HIH?

Mr TOBIN: Yes.

The Hon. RICK COLLESS: How many steps are there on the reinsurance ladder? Who reinsurers the reinsurers? Are there other insurance companies behind them?

CHAIR: Munich Re, would be one.

Mr TOBIN: Yes. With our account, we are with Munich Re, Aust Re and American Re. In insurance world the most important thing is to make certain you have good reinsurers. As you know, there are a lot of builders today getting cheap liability insurance in Third World countries. They may never be paid. Because the Catholic insurance is for all the Catholic schools and children, it is vital that we ensure with the top reinsurers. That is why we are delighted that those are the three reinsurers on our account. Munich Re, for example, no doubt would offload part of their risk in insurance world.

The Hon. RICK COLLESS: So that there could be a number of steps in that reinsurance field. Is that right?

Mr TOBIN: Yes.

CHAIR: Say that if there are major storms in the northern hemisphere they would be offsetting that with some in the southern hemisphere.

Mr TOBIN: Yes.

The Hon. RICK COLLESS: Just moving on to the tort law reforms and your comments regarding the fact that the Government's tort law reforms have had no effect on premiums at this point, what have been the causal factors for that? Why have they not been working?

Mr TOBIN: With liability the Government has not restricted your ability to sue at common law. They have brought in reforms in workers compensation, but in the liability area if you are injured you can go to court and sue for whatever amount your legal advisers tell you to sue for.

CHAIR: The evidence you have presented has been very clear the Committee appreciates getting your experience on what is a very difficult issue. Thank you, and I wish you well in your work.

(**The witnesses withdrew**)

SANDRA MAY HANDLEY, Project Officer, Council of Social Service of New South Wales, 66 Albion Street, Surry Hills, and

GARY MOORE, Director, Council of Social Service of New South Wales, 66 Albion Street, Surry Hills, affirmed and examined:

CHAIR: The Committee has received your submission. Would either of you like to make an introductory statement?

Mr MOORE: I would like to make a couple of comments. Sandra will also make some introductory comments, and then we will proceed to take questions.

At the moment there are over 30,000 incorporated, not-for-profit organisations in New South Wales and probably just as many unincorporated bodies. At least 80 per cent of them are what we would call small in size; if they employ any staff, they employ fewer than 20, and many of the unincorporated organisations are totally run on a voluntary basis.

The increases in insurance premiums over recent years, particularly in the public liability and professional indemnity areas but also in workers compensation premium costs, have been felt enormously harshly by many of the not-for-profit organisations. Our submission details more recent evidence of survey work we have done.

We think it is fair to say that many in the sector are under extreme pressure financially—not solely because of insurance premium increases, but certainly that is a significant part. Of course, each year since 2000 we have seen some services close their doors and others certainly reduce services, primarily because of the major back-office cost increases of which insurance is a part.

Ms HANDLEY: I would like to summarise the three key points from our submission. While tort reform has reduced the rate of litigation across New South Wales, premium prices have not been reduced to reflect this. Not-for-profit organisations are still experiencing increases in public liability insurance premiums of more than twice the national average. At the moment not-for-profit organisations are looking at increases of about 10 per cent for 2004-05 insurance prices, whereas the national average was quoted by insurers as being 4 per cent for that year.

Continuing lack of affordability of public liability insurance, as well as exclusions by some insurers, means that both vital human services and the activities that create a community have been cut. For example, local festivals that have been run for years have had to stop because they can no longer afford public liability insurance. Fundraising organisations are now folding because they are now raising funds just to pay for their insurance; they are not able to raise funds for anything else.

Finally, the fear of litigation has increased amongst community organisations, with many organisations now cutting specific services and management committee members leaving organisations because of the fear of personal litigation.

The Hon. IAN WEST: What would you like to see come out of this inquiry?

Ms HANDLEY: The Council of Social Service of New South Wales [NCOSS] would like to see accounting by insurers. It seems that when the tort reform was first mooted it was seen that the exchange for tort reform was that insurance prices would come down. We would certainly like to see what is happening with that, in particular for not-for-profit organisations.

If I had a wish list, I would also like to see government look at ways in which we might be able to help the not-for-profit sector with their insurances, because it seems that prices are going to need to be at least half before community organisations will start affording them. Many organisations have experienced increases of up to 1,000 per cent in the last three years, with no corresponding increase in funding.

It would be great to have a look at how government can work with the sector to assist with insurance premiums, or looking at other ways of reducing the possibility of litigation so they do not

need public liability insurance, particularly the very small, unfunded, not-for-profit organisations such as seniors groups and small fundraising groups. They are the ones, in particular, that I believe really have problems, because they are the ones that will simply fold tomorrow and we will no longer have the benefits of the community-building activity they create.

Mr MOORE: NCOSS has been involved, with assistance from the State Government which we duly recognise, in trying to put together a pooled bulk purchase insurance scheme to collect many of the small and medium-size organisations to build scale, et cetera. Our best efforts at the moment—and we have been operating for about nine or 10 months now—is that we could probably put a bit of a ceiling underneath the increase in insurance prices. At the moment 2007-08 seems to be the earliest, even if we bulked up our numbers across the country in a big enough way, before we see prices begin to plateau, let alone fall. Despite the impression that perhaps has been given, we are certainly not through this by any means, we do not think, for at least another three or four years.

Sandra has alluded to the cost in our sector and to the organisations that we lose. The organisations simply cannot start up. As you heard in evidence from others today, some of our major organisations within the sector have to make some pretty hard decisions about premium increases of several hundred of thousands of dollars. Once again, public liability insurance is not the only big cost driver in our sector. There are many other things too but, because of the scale, it just makes it incredibly hard. In our submission we have made some reference to coming back—and I know that this is a long-winded answer to your question—to the New Zealand scheme. Sandra might want to say something about that.

Ms HANDLEY: This is more around looking at a catastrophic injury scheme, which is what has been mooted. We had some concerns around that, partly because there has been no community consultation. It has just been an idea that has been put forward and there has been some suggestion about workers compensation premiums being increased to cover it, which is real worry because of the incredible increases most organisations have had around workers compensation. But also it is an idea. I know that what operates in New Zealand is that it has a no fault claim system. That operates for anybody regardless of how the accident occurred.

As we mentioned in our submission, it seems unfair that if you get injured while you are at work, or if you get injured and you can blame somebody you will get cover for your injury, but if you cannot blame somebody or you do not win the court case, then you get nothing. So it seems like an accident compensation scheme where everybody pays into a pool and the injuries are paid out of that pool. It would make a lot more sense than the situation in which we have ended up at the moment.

CHAIR: I note that you were concerned that the costs might be covered along with car insurance?

Ms HANDLEY: Yes.

CHAIR: That seems to me to be a very good leveller. If it has to be paid from somewhere car insurance is just about as good as anything. I am just thinking of what I heard recently from the Roads and Traffic Authority on the number of cars in the community and all the rest. What is your objection to that?

Ms HANDLEY: I have been thinking more around workers compensation increases than perhaps car insurance. From my understanding of motor vehicle insurance we are looking particularly I imagine at compulsory third party [CTP] as it has reduced quite significantly over the past few years. So perhaps increases around that might not be quite such an issue. When we were doing the submission we were much more concerned about workers compensation. As far as the sector goes and increases in the CTP I do not think it would affect the sector too much because generally there are not a lot of vehicles in the sector. Mainly that would then come from workers using their private vehicles for work purposes, which could be another issue.

CHAIR: Have you found that there is a greater reluctance among your members because of growing litigation, with volunteers not willing to become directors of organisations, sporting groups and so on?

Ms HANDLEY: Yes. I have had people contacting me saying that their committee members have left the organisation and that those who are on the organisation are still really concerned about litigation.

CHAIR: Why lose your house when you are giving four hours of volunteer work a week?

Ms HANDLEY: Exactly. While a directors and officers insurance is available that can help to cover some of that, it is very expensive as well. So we come back to that catch-22 situation.

CHAIR: Have you any suggestions in that area?

Ms HANDLEY: I think it would be useful to see some type of legislation to assist us. It is a very difficult one. I can see on both sides that we need to ensure that committee members are acting with responsibility and due diligence. That is not always easy in a sector where a lot of the management committee members are clients. Sometimes they might have an intellectual disability and quite often they are retired. When I was working in a community transport organisation the management committee members were all over the age of 75. So they did not really have experience in the issues that you need to have when you are doing governance.

CHAIR: A good risk for bungee jumping and things like that.

Ms HANDLEY: They were not bungee jumping. I have seen too much of that going on. But they were not necessarily aware of the issues of due diligence. So it is always difficult to ask for legislation against people's due diligence. At the same time the tradition of the sector has been that we are run by members. We are operating as local services to help local people. So it has been part of the way our society has been. Communities get together and they form groups to help, whether it is resident action or whether it is a service.

CHAIR: Is that something NCOSS could do in providing pooled cover for officers and directors insurance?

Mr MOORE: It is certainly an area where we have mainly gone out in the public liability arena to date in our bulk purchasing approach. I guess it is an area at which we could try to look a bit further.

CHAIR: You might be more successful there with general public liabilities, which is a huge issue.

Mr MOORE: Possibly.

Ms HANDLEY: I am going to interrupt on that one because we have actually got association liability, which is a combination of professional indemnity and directors and officers inside the scheme. The difficulty with pooling arrangements is that while it seems like a great idea when it is talked about, insurers actually want minimum premium pools of $50 million. So to get a $50 million premium pool is not an easy thing to put together. As well, they actually run on minimum premiums, so they all have a minimum premium for a particular organisation of, say, $3,500, which is too much.

So pooling is, again, a long-term solution and it does mean that the organisations have to have the premium money to actually buy the insurance in the first place. What we are seeing is they actually do not have the money and that is why they are ending up cutting their services so they can pay for their insurance premiums.

The Hon. ROBYN PARKER: I was just wondering from the New South Wales perspective, tort reforms occur in every State but are there any examples where you think it has been done better in terms of your organisation in other States?

Ms HANDLEY: There is one. In Victoria the Department of Human Services, which is their State department, pays for all the insurances for not-for-profit organisations. So that is around insurance as far as placing goes; they actually cover the whole lot if you are funded with them. As far as litigation, I have not come across any other State that suddenly has not had issues anymore; the

premium prices have dropped hugely and everybody is happy. I have talked with most of the other States and that does not seem to have happened.

The Hon. ROBYN PARKER: So in Victoria it is similar to our doctors in public hospitals being covered. They have gone that step further in terms of community organisations—only those funded by the State Government though. What about those that are partially funded? Is there a cap or is it just if you receive any funding from them?

Ms HANDLEY: I do not have enough information. I can find the answer for you but I have not got that information.

Mr MOORE: One of the things about that, of course, in Victoria is that that particular department is a mega department that runs a range of programs and that comparison in New South Wales will be having to put together perhaps five individual State government agencies to match the Victorian situation.

Ms LEE RHIANNON: This might have been covered. We heard today from Mr Phil Turner, the manager of Community Care Underwriting Agency, and he said in response to a question that he believed all community groups are now able to gain coverage, that he thought that the situation had all been solved. Is that your feeling? Because you still hear some reports that some community groups just give up. I was interested in what your findings were.

Ms HANDLEY: So far in the last year I have not come across any organisations that cannot actually obtain cover. The main reason they give up is because they cannot afford the cover and what I have seen is that there are still some exclusions, there can be exclusions on key areas. One of the big issues, and it is not so much with personal injury but it is child molestation, it is impossible to get cover for a child molestation, which means that even if an organisation just has an accusation, there is no cover for that, which, of course, is a particular worry for children's services. Camps can sometimes be an exclusion; playground equipment can be an exclusion. So there are little bits like that, but, on the whole, I have not heard of anyone that cannot get cover now.

CHAIR: Try looking at those that run adventure campsites where there are high ropes, high swings, horseriding, canoeing—

Ms HANDLEY: Forget it!

CHAIR: Climbing walls, and then 80,000 children a year into that campsite. Try getting insurance cover for that.

Ms HANDLEY: That would be virtually impossible.

Mr MOORE: Just reflecting back to your question more about the core human services, could I just add to that that part of the problem that we also have is with the change in the client base in many human services, more complex multiple issues, high levels of intervention, the actual premium prices have also massively increased, more in some of those areas; mental health, drug and alcohol, disabilities, et cetera; clients with highly challenging behaviours, and a structural change has taken place in the human services. This insurance crisis, unfortunately, has exacerbated the situation as well.

It is true, two years ago a lot of what Reverend Moyes is referring to is exactly true, they still cannot, but a lot of the other services that could not get cover can now get it, but it costs a bomb.

Ms LEE RHIANNON: Are you seeing many organisations just give up because it is too expensive?

Ms HANDLEY: Generally the bigger organisations cut services so they can pay for their premiums. It is the smaller organisations that give up. So your local history group; the fundraising groups; the local housing estate might have put together a social group and they go out on excursions; they do not do that anymore. People try to meet at each other's homes rather than being able to meet at

a hall because they cannot afford the insurance so they cannot therefore rent halls. So those types of groups, the really small groups.

Ms LEE RHIANNON: Is that quantified in any way or just what you have picked up through your experience?

Ms HANDLEY: There is some quantifiable evidence. We have done a survey which was completed about two months ago and we had 70 responses to that, which actually talked about specific situations. A lot of it is my experience. I have talked to over 2,000 organisations in the past two and a half years which have problems, so I have picked up a lot on the way from that.

The Hon. IAN WEST: With that survey and taking into account this changed client base that you have got—a more complex client base—and structural changes, and the increase in the premium costs, have you noticed any tangible change in the number of claims that have been made over the past three years?

Ms HANDLEY: No. We did a survey in 2003 and another one in 2005. As well we had 950 organisations registered to say they were interested in being part of the bulk-buying scheme. With all the three surveys we saw claims of around about 3 per cent.

The Hon. IAN WEST: And it has not changed?

Ms HANDLEY: It has not changed. Certainly one of the things that the insurers have said is that it would take around five years because the claims can often take a long time before they actually get registered. We have not seen any change.

CHAIR: For decades members of local churches, for example, may have a couple celebrating their golden wedding anniversary and they just have it down in the church hall. Today the church would have to put a special charge just to cover the insurance cost of Grandma's golden wedding anniversary.

The Hon. IAN WEST: And have you ever had a claim from Grandma?

CHAIR: No.

Ms HANDLEY: I have noticed quite a few hall committees—it is not something that happens so much in Sydney but outside Sydney you get groups that run the local community hall, like a progress association; they are really struggling because there is no money coming from that. They might hire the hall out for $20 and they cannot afford insurance. They also cannot afford to renovate the hall, so they have got a double bind because the insurance is really high because the hall is a bit run down.

The Hon. RICK COLLESS: A lot of those hall groups and so on are very often under the control of local government, in which case they fall under the council's general insurance.

Ms HANDLEY: Some do and some do not.

The Hon. RICK COLLESS: In fact, a lot of them are now deliberately setting themselves up as section 327 committees to allow that to happen—to get over that very problem.

Ms HANDLEY: Yes.

Mr MOORE: In response to things to do about this, one of the things that we had talked to Treasury about was the notion of trying to work with local government in terms of growing that experience much more and whether or not there were in fact some trade-offs here in terms of rate pegging and community service obligations—one of which might well be to assist councils taking groups under their wings through their own insurance arrangements. That is just a suggestion that we have not been able to take any further. But it seemed to make sense—particularly for those unfunded self-help groups around the place.

The Hon. IAN WEST: What response have you had from the Treasury Managed Fund?

Mr MOORE: We have not.

Ms LEE RHIANNON: How long ago did you put it in?

Ms HANDLEY: The beginning of last year.

Ms LEE RHIANNON: The beginning of last year—a year ago?

Ms HANDLEY: Yes.

Ms LEE RHIANNON: And you have heard nothing?

Ms HANDLEY: It was more, I guess, an informal discussion around what could be done because we were looking at a number of different ways. One of the ways we were looking at was whether not-for-profit organisations could actually be put into part of the Treasury Managed Fund—whether it was possible for them to pay, for example, a percentage of their turnover and be covered by government insurance. The issue around council was part of that discussion. There was this issue and there was maybe the Treasury Managed Fund—we did look at a few options around that. So it was more an informal than a formal application.

Ms LEE RHIANNON: Thank you.

The Hon. IAN WEST: Would you be speaking with the management of the fund? Would you speak to Suncorp-Metway, for example?

Ms HANDLEY: We were actually talking to Treasury at the time about the possibility of this happening. So we were just having an informal discussion to see whether it would be possible and, if they thought it was possible, we would take the next step. But they said very clearly it was not possible so we did not take it any further.

CHAIR: Ms Handley, thank you for being with us. Mr Moore, I note that you are having a very large dinner to celebrate 70 years of NCOSS service. I hope the function will be duly covered against food poisoning! Congratulations on 70 years service. Thank you both for appearing before the Committee this afternoon.

(The witnesses withdrew)

(The Committee adjourned at 4.12 p.m.)