REPORT ON PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

CORRECTED PROOF

At Macquarie Room, Parliament House, Sydney on Friday, 4 November 2016

The Committee met at 9:10 am

PRESENT

The Hon. S. Mallard (Chair)

The Hon. L. Voltz
The Hon. T. Khan
The Hon. D. Clarke
The Hon. D. Mookhey
Mr D. Shoebridge

The CHAIR: Good morning, and welcome to the review of the workers compensation scheme. The Committee previously examined the workers compensation scheme as part of a review of the exercise of the functions of the WorkCover Authority in 2014. However, this is the Committee's first review of the scheme since the Government introduced a suite of legislative reforms to the State's insurance and compensation schemes in 2015. The review is examining the affordability, efficiency and sustainability of the scheme since the 2014 review, and the impact of the recent structural changes. Before I commence, I acknowledge the Gadigal people, who are the traditional custodians of the land, and I pay respect to the elders, past and present, of the Eora Nation and extend our respects to other Aboriginal people presents.

Today is the first of two hearings the Committee plans to hold for the review. We will hear today from legal organisations, unions and injured workers, business groups and representatives from the self-insurance industry. Before we commence, I will make some brief comments about the procedure for today's hearing. Today's hearing is open to the public and is being broadcast live on the parliamentary website. A transcript of today's hearing will be placed, when it becomes available, on the Committee's website. In accordance with the broadcasting guidelines, while members of the media may film or record Committee members and witnesses, people in the public gallery should not be the primary focus of any filming or photography. I remind media representatives that they must take responsibility for what they publish about the Committee's proceedings.

It is important to remember that parliamentary privilege does not apply to what witnesses say outside of their evidence at this hearing, so I urge witnesses to be careful about any comments they may make to the media or to others after completing evidence as such comments would not be protected by parliamentary privilege if another person decided to take an action for defamation. The guidelines for the broadcasting of proceedings are available from the secretariat. This is a public hearing and it is not an open forum for comment from the floor. Audience interruptions are not recorded in the transcript and it makes it difficult for witnesses to communicate with the Committee. If members of the audience to interrupt proceedings, I may need to stop the hearing and have them removed from the premises.

There may be some questions that a witness can answer only if they have more time or with certain documents to hand. In those circumstances, witnesses are advised that they can take the question on notice and provide an answer within 21 days. I remind everyone here today that Committee hearings are not intended to provide a forum for people to make adverse reflections about others under the protection of parliamentary privilege. I therefore request that witnesses focus on the issues raised by the inquiry's terms of reference and avoid naming individuals unnecessarily. Witnesses are advised that any messages should be delivered to the Committee members through the Committee staff. Finally, I ask everyone to turn mobile phones to silent for the hearing. welcome our first witnesses from the Law Society, the New South Wales Bar Association and the Australian Lawyers Alliance.

TIM CONCANNON, Member of the Injury Compensation Committee, Law Society of New South Wales, sworn and examined

PAUL MACKEN, Member of the Injury Compensation Committee, Law Society of New South Wales, sworn and examined

ROSS STANTON, Barrister and Member of the Common Law Committee, New South Wales Bar Association, affirmed and examined

ROSHANA MAY, New South Wales Branch President, Australian Lawyers Alliance, sworn and examined

The CHAIR: Would a representative from each organisation like to make a brief opening statement?

Mr CONCANNON: I do not think it is appropriate, given today's format, for us to make an opening statement. I think we have already done so in previous Committee hearings. I am happy just to take questions.

Mr STANTON: The association welcomes the opportunity to hopefully assist the Committee in its important work. You might have noticed from our written submissions that the association and its members have a very long history of involvement in workers compensation jurisdictions. I have personally been practising in the area and other related areas since 1983 and a lot of my colleagues have been involved in it for much longer than that. What we have tried to do with our written submissions is give you historical perspective. It seems to us that lawmakers such as yourselves can potentially gain some assistance in relation to what your predecessors have done, or tried, or abandoned, or changed.

As you probably noticed, the main thrust of our paper is to do with medical expenses. Obviously, we are not actuaries but I note in particular from the Law Society's paper that the scheme has moved from a large projected deficit—somewhere in the order of $3 billion in 2012—to a large projected surplus now in a relatively short period of time of, I think, approximately $3 billion. That suggests to the association that the difficult balancing act, which is always done with these schemes—that is, balancing between the cost of the scheme and the benefits and the related matters—probably is not correct at the moment. Bearing in mind the scheme's objectives, it seems to us that potentially one of the most useful things you can do to help the scheme attain its objectives is to return to the situation which existed between 1929 and 2012—simply paying medical expenses which are reasonably required to treat an injured worker's state.

The CHAIR: We will come back to that conversation. That is pretty much your submission, I note. Ms May, would you like to make a brief opening statement? We will then open up to questions.

Ms MAY: The Australian Lawyers Alliance [ALA] also welcomes the opportunity to be here today and to present oral evidence to the Committee. I have to declare that I was a director of the Parkes project, which may or may not be known to you, through submissions from the Workers Compensation Independent Review [WIRO], various unions, and including the ALA. I just want to make that known. Also, several members of the subcommittee on workers compensation within the ALA are members of the Injury Compensation Committee of the New South Wales Law Society, including me. We hold and have many hats. The ALA's submission is along similar themes that you will find from the other legal professional organisations, both the Law Society and the Bar Association.

While the ALA has attached upon affordability, it has a focus on accessibility to benefits as a means of demonstrating to the Committee that, regardless of whether or not there is sufficient money in the scheme to fund further benefits or whether or not that requires further premium reductions, the benefits that are currently available under the Act are not able to be sufficiently accessed by injured workers. We see that the scheme is in crisis because of that.

The CHAIR: Thank you for your opening statements, which help us to focus. We have broken up the time for questions between different groups on the panel. I will open questions to the Opposition.

The Hon. LYNDA VOLTZ: The Bar Association may or may not have raised this, but first of all I want to go to section 32A in regards to suitability for work. In particular, how is that working now, the suitability for return to work, and what are the constraints on that?

Mr CONCANNON: I think that is right at the crux of the problem with regard to the current system that is based on work capacity decisions and work capacity assessments. Really, I think we have made reference to a decision of the Workers Compensation Commission that wrestled with that definition of "suitable employment" and made it very clear that the fact that the job that is considered suitable may not be available in the marketplace, accessible to the worker—let us say, a person the country or the worker may not necessarily have any background in the particular area that is considered suitable—is something that, by reason of the

definition of subsection (2) of the definition of "suitable employment", is able to be disregarded by the insurer when making a decision on whether the worker has work capacity or otherwise.

The Hon. LYNDA VOLTZ: When they are making that decision, is it based around whether there are jobs available of that type within that region relative to the skills level? Can you elucidate?

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Mr CONCANNON: No. Subsection (2) of the definition of suitable employment actually entitles them to disregard the jobs available in that geographical area, which is quite different to what the state of the law was pre-2012. There had to be a job reasonably accessible to the worker in their local area.

The Hon. LYNDA VOLTZ: So, for example, if you were a farm labourer who was injured and they assessed you as suitable for security work, even though there is no security work, they would deem you to be suitable for that type of work?

Mr CONCANNON: Exactly. For instance, I see a lot of people down the South Coast of New South Wales and a person takes tickets at the local movie theatre but that is one job in an area of 400 square kilometres; that may well still be considered as suitable. It is farcical.

The Hon. LYNDA VOLTZ: Okay. So they are assessed as suitable for return to work, there is obviously no suitable work. What is the next move?

Mr CONCANNON: The insurer makes a theoretical assessment of what the person is capable of working and then makes a work capacity decision on that basis.

The Hon. LYNDA VOLTZ: And then their benefits are—

Mr CONCANNON: Either reduced, cut off or kept as they are, if they determined that there is not, in fact, suitable work.

The Hon. LYNDA VOLTZ: Once they are deemed as suitable for employment under section 32A and the decision is made, how would that appear in the statistics on the return to work criteria for anyone who holds the statistics?

Ms MAY: It does not figure at all.

Mr MACKEN: It depends on how you define return to work. It would appear that some of the definitions of return to work have been based on a person ceasing to be entitled to weekly compensation and the assumption is therefore made that they have returned to work when in fact that has not been the case.

The Hon. LYNDA VOLTZ: So if we are measuring the success of this scheme and the prime measurement is a return to work criteria, we do not really know whether someone is actually returned to work or whether they have just been removed from benefits?

Ms MAY: No.

Mr CONCANNON: The other issue is that the return to work depends on whether you are talking about the first return to work or—and I think there is a Macquarie University report that has been provided to the unions this year that makes the valid point that a one day return to work, let us say three weeks after the injury, perhaps a return that has been made prematurely, is not really a return to work at all. It has to be a sustainable return to work.

The Hon. LYNDA VOLTZ: What I want to get to the nub of is that the Government introduced these legislative changes to improve this. One of their key performance indicators, you would say, would be the return to work criteria, which they wanted to drive. How can we assess what the return to work criteria is if the mechanism for that is merely that the benefit has stopped because you have been assessed as suitable for work even though there is obviously no employment in that job type for you?

Ms MAY: I will try to address this a different way. Yes, when the 2012 changes were made return to work was one of the driving features of the changes. Minister Dominello only recently in budget estimates said there are better return to work outcomes now than ever so we have achieved what we set out to achieve. The problem is that the measure of return to work is rather arbitrary and the best place to go to have a look at that, apart from the Macquarie University report, which was convened by Unions NSW, is to look at the Safe Work statistics and the comparative reporting from Safe Work, the national body, that collates statistics around the nation.

For many years they have been running a national return to work survey where they surveyed a number of people within the State who have been involved in the workers compensation system. Many years ago they

used to ask three or four questions about return to work, including the primary question, which is the only remaining question they ask now: Have you returned to work at any time since you have claimed compensation? That is the only question that is now asked in respect of that national survey. That is the survey that the State regulator relies on to report on return to work outcomes.

So if you have a worker who has received compensation benefits and returned to work for one day, found that it was impossible to sustain work and went off or had surgery or for whatever reason was unable to sustain the work, if that person is contacted and asked that question their answer to the question would have to be yes. That becomes a positive answer to the return to work survey.

Return to work is not about getting back to work for one day because our experience is—and we have all had close on 30 years experience in the scheme—most workers return to work for at least one day after having had an injury. What they do not return to work and do is sustain their employment. A lot of them do not sustain their employment for three months, which is the standard probationary period, or work trials, which are 14 days or 28 days, or six months or two years. So there is not a further question that used to be asked: Are you still in the same employment? Are you still with your same employer? There are no additional or subsequent questions that are asked in that survey and it is a survey of 500 to 1,500 people around the nation. It is not 50,000 workers in New South Wales.

The Hon. LYNDA VOLTZ: It is a random sample?

Ms MAY: Firstly it is a random sample but, secondly, the questioning does not go deeply enough.

Mr DAVID SHOEBRIDGE: So does one hour satisfy it?

Ms MAY: Yes, of course it would. One hour would satisfy it. The question is simply: Have you at any time since receiving compensation returned to work—at any time?

Mr MACKEN: Can I just qualify it further too? Measuring the scheme's success by reference to return to work can sometimes lead to inaccurate measurements because if you are getting people to return to work by stopping paying them, that may not necessarily be achieving the scheme's objectives. If they are going back to work notwithstanding having a reduced capacity, being injured or hurt, because they are not getting paid that is not necessarily consistent with the objectives of the scheme. If you stop paying everyone you will get more people going back to work. That is not what it is about.

The Hon. LYNDA VOLTZ: So what I want to get to the nub of is: Are there any statistics available that show how many people had payments stopped because they had actually returned to work or how many people actually had payments stopped because they were deemed suitable for employment but did not actually returned to work?

Mr CONCANNON: I think the simple answer to that is no. If you look at the latest performance report issued on the first occasion by the State Insurance Regulation Authority [SIRA] a couple of days ago, figure 6 actually says "return to work rates" and then it has "off weekly benefits", so they have equated return to rates with off benefits. It is just absurd.

The Hon. LYNDA VOLTZ: So we assume that is the assessment that they are making their decisions on—it is merely off benefits?

Mr CONCANNON: Exactly.

The Hon. DANIEL MOOKHEY: I turn to the comments by the Bar Association about the dispute resolution system and other like comments by the Law Society. In your view is the current system for resolving disputes sufficient, effective, predictable and capable of providing resolutions that the parties seek—

Mr DAVID SHOEBRIDGE: Or any one of those?

The Hon. DANIEL MOOKHEY: Or any of those?

Mr MACKEN: I think you would have seen fairly clearly from the Law Society's submission that we do not regard the dispute resolution system as in any way efficient and I think anybody objectively looking at it would come to that conclusion. It has multiple different paths by which different elements of one statutory compensation scheme are resolved and they have varying degrees of complexity, all of which make it extremely difficult for even extremely competent professionals to manage much less those who are injured who may not have the qualifications to manage it and it is leading to some great high level of injustice because the theory behind, for example, producing a notification as to a person being stopped from getting what they otherwise thought they might be entitled to that runs to five pages, sets out reams of the legislation, seems to be that a

worker would get that, having been injured, and say, "There you go, there's five pages of reasons why I am not entitled to compensation. Fair enough, mate. Off we go."

That is not how it works. It needs to be simplified. It needs to be made very straightforward so that somebody can see why they are not getting paid, access advice to see whether or not that is a legitimate decision and if they do not think it is a legitimate decision, go to one place and have that decision determined. That is not what is happening and it has created a dispute management system that is frankly dysfunctional.

Mr CONCANNON: I commend to you something that I think we included in terms of the Law Society with the third party review—the International Framework for Tribunal Excellence prepared by the Council of Australian Tribunals in November 2012. I think you will find that the dispute resolution system here would probably not adhere to a single one of those principles.

Ms MAY: Whether you call it bifurcated or trifurcated, whether there are three paths or two paths, there is some transparency in one of the dispute resolution processes, principally the workers compensation commission path, but there is no transparency in relation to the challenge of work capacity decisions and that is of great concern. That is of great concern. I do not want to traverse whether legal costs should be provided for legal advice to workers or insurers, but there is simply no transparency.

The Hon. DANIEL MOOKHEY: That goes to my next point. As I understand it, one of every nine work capacity decisions are subject to some aspect of review. The State Insurance Regulatory Authority [SIRA] tells us it is 10,000.

Ms MAY: That is what SIRA tells you. The Committee is taking evidence from Kim Garling of the Workers Compensation Independent Review Office [WIRO] on Monday. In his submission he more accurately points out that there must be hundreds of thousands of work capacity decisions. When you look at the definition of "work capacity decision" it covers a range of things. The statistic of 10,000 is said to be those that are adverse decisions. That cannot be right. We have anecdotal evidence—and I think it has been presented to this Committee in a number of submissions by private individuals—that work capacity decisions are not pursued because it is just too complicated. That figure is reliable only if you assume that the regulator is able to compile the details of every work capacity decision ever made. Given that we have scheme agents reporting to icare and we do not know to what extent they report, I would not rely on that figure.

Mr CONCANNON: The danger with that figure is that one out of nine, on the face of it, seems relatively low.

The Hon. DANIEL MOOKHEY: I was going to suggest that it is quite high.

Mr CONCANNON: I think that ignores the number of workers who just throw up their hands when they hear about what the process involves and how intimidating it is to navigate it without lawyers. They are not provided with legal advice by SIRA on how to construct an internal review, let alone a merit review.

The Hon. DANIEL MOOKHEY: Does that award an unfair advantage to a scheme agent or does it provide the scheme agent with unilateral power over a worker's return to health?

Ms MAY: It is more the latter than the former—or both.

Mr MACKEN: Where an insurance company is making a decision about how much money an insurance company pays out, that is, in my view, always going to create a bit of a problem.

The Hon. DANIEL MOOKHEY: You go on to say that the merit review system should be abandoned. The Bar Association, at least, volunteers that as an idea. Would that have genuine support? Are you able to explain why you think the merit system is an ineffective mechanism to provide balance?

Mr STANTON: In our view, it is fundamentally inefficient and productive of delay, complexity and added costs to have different jurisdictions looking at the same individual. Currently a worker, in relation to the same injury, can have a matter before the Workers Compensation Commission and, concurrently, a matter before the Merit Review Service. There is nothing to stop the two tribunals coming to completely different decisions about the same worker's circumstances, which is a problem for consistency and fair application of the laws of New South Wales. It is fundamentally undesirable.

Interestingly, there is a historical precedent for it being a problem. In the late 1980s there were two jurisdictions for workers compensation matters in New South Wales. It was decided after a few years that there was no point in having two, and the second one was effectively abolished by bringing it into the then Compensation Court of New South Wales. As the Committee knows from its previous recommendations, with the Merit Review Service there are particular problems with workers not being able to be legally represented. What chance do ill-educated immigrants who are uncomfortable with English have of navigating this system?

They have none. Under the Workers Compensation Commission or previous equivalent bodies like the workers compensation court they had legal assistance, interpreters were provided and it was much fairer. There was better quality of adjudication and consistency of decision-making.

Ms MAY: There was certainty of outcome.

Mr MACKEN: I do not think it would be suggested that the Merit Review Service is approaching its job unfairly or with a lack of objectivity. Part of the problem is that what informs the process to get you to the Merit Review service is a decision made by an insurer, informed by information and documentation generated by the insurer and put together by the insurer, and the insurer comes to a decision about how much money it will or will not pay. That is what goes to the Merit Review Service, without the benefit of legal advice, without the worker being able to say, "I do not agree with that doctor or that rehabilitation service provider. I would like to get my own evidence about that." That is not what is happening."

The CHAIR: That is an interesting point, but Mr Shoebridge's time to ask questions is being eroded.

The Hon. TREVOR KHAN: He gets antsy if people cut into his time.

The CHAIR: That is very unusual.

The Hon. TREVOR KHAN: He just gets antsy, let us face it.

Mr DAVID SHOEBRIDGE: If only I had your patience.

The CHAIR: We started off so well. Let us maintain that.

Mr DAVID SHOEBRIDGE: Imagine that a woman who is working in a bank has a slip and fall injury. She goes off work for a period of time and is paid workers compensation. There is no issue about injury. The insurer sends the woman off to three doctors. They say, "The injury has resolved and is no longer what is causing any incapacity for this worker." The insurer then writes a letter to the injured worker saying, "We have read this medical evidence. We believe you are no longer suffering the effects of any incapacity because your injury has resolved. We are cutting you off weekly benefits." Is that a work capacity decision or is it a liability decision?

Ms MAY: No, it is not.

Mr MACKEN: It is arguably both.

Ms MAY: As best we can tell, following the *Sabanayagam v St George Bank Limited* decision, which I think is referred to in all of our submissions, we would hope and trust that that would be what is called a section 74 notice, or dispute notice in relation to liability, but we are not clear on that.

Mr DAVID SHOEBRIDGE: What if the same decision has a line in it that says, "This is a work capacity decision and we believe that you are capable of returning to work"?

Ms MAY: It would say that the person had work capacity and the capacity to earn X.

Mr MACKEN: It does depend in part on how the decision is categorised. Probably the more difficult situation is if the insurer, whether a specialised insurer or self-insurer, writes two letters. One might say, "We have made a work capacity decision, based on these medical reports, that you have no incapacity, so we are not paying you." A separate letter might say, "This doctor says your condition is not work related, so we are denying liability for your claim altogether."

Mr DAVID SHOEBRIDGE: That is a far from unheard of scenario.

Mr MACKEN: It is not unheard of at all.

Mr DAVID SHOEBRIDGE: So there is one letter that says, "We have read the reports from these three doctors and we believe your injury is resolved. You are no longer suffering from a work related incapacity and we are cutting you off from benefit." That is arguably a liability decision.

Ms MAY: Yes.

Mr CONCANNON: Yes.

Mr DAVID SHOEBRIDGE: But there is argument there.

Mr CONCANNON: It is a very fine line.

Ms MAY: You are using the word "incapacity" rather than "work capacity", and I think you are choosing that word deliberately. We all know, Mr Shoebridge, that you worked for many years in the workers

compensation system. We do not want to be trite. We also do not want this to become too complex. The complexity is demonstrated by the words that you are using.

Mr DAVID SHOEBRIDGE: The Sabanayagam decision effectively analysed a not dissimilar case—countless paragraphs of it. With some division amongst the three members of the Court of Appeal, it kind of came to the conclusion that in those circumstances it is a liability decision and it can go to the Workers Compensation Commission.

Mr MACKEN: Sort of.

Ms MAY: The absurdity of that is —

Mr MACKEN: They said there was no evidence to support the finding that it was a work capacity decision, which is slightly different thing. For example, if the letter had said, "We made a work capacity decision about you last week that you have no entitlement and now we are saying we have no liability," then the Court of Appeal decision might have been different.

Ms MAY: Except for this: the work capacity decision review process goes through internal review, merit review and then procedural review. If you go down the path of the commission and the commission cannot make a decision consistent with the work capacity decision, and if a work capacity decision is found, if it is not in the proper form eventually on procedural review it will be overturned. Where does the worker end up? They are in a catch-22 situation.

Mr DAVID SHOEBRIDGE: Can we work out what that means to that worker? The worker is sitting at home, having suffered a work injury. They do not feel they can go to work. They get a letter from the insurer saying that they have been cut off. If they read it and form the view, after reading three or four pages plus the attached medical reports, that it is a work capacity decision—how they would come to that conclusion I do not know—they may think that they cannot see a lawyer because the law says that a lawyer cannot be paid for that work.

Mr MACKEN: They can see a lawyer, that is right.

Mr CONCANNON: The lawyer will not get paid for it.

Mr DAVID SHOEBRIDGE: If they form the view—I do not know how—that it is worthwhile seeing a lawyer because there might be a liability issue, they can potentially challenge it in the Workers' Compensation Commission. Is anybody helping them at that point?

Mr MACKEN: If it is a liability decision, then they can get help from a lawyer. The real difficulty that arises is where it can be characterised as both. They want to review the insurance decision and then go to the merit review service. If the merit review service forms the view that it is a liability decision, they will say, "We are not going to deal with it, it is a liability decision." They then go to the Workers' Compensation Commission, and the Workers' Compensation Commission can say, "We think you have a liability to pay compensation, but it is a work capacity decision so we cannot order the compensation. Go somewhere else."

Ms MAY: I think it is even worse than that, having worked for a large law firm. At some point in time you have to triage the number of people you see. Having worked for a large law firm that had a triaging process in a national call centre, you have to set parameters around who you see and who you do not see. A lawyer can be seeing 20 people a week and maybe only getting one client out of it, in which case it is a very ineffective use of your time and for those of you who are lawyers on the Committee, and there are several of you who have run law firms or worked in law firms, you can go bust trying to help workers and working out whether they have workplace decisions or section 74 notices. It is completely inefficient.

Mr DAVID SHOEBRIDGE: If you make the wrong call—

Ms MAY: You make the wrong call, the worker is off the system. You are avoiding the third option. That is that these work capacity decisions are not one or two pages long. There is no prescribed form. There is a whole lot of prescribed content. You have to tell them this, you have tell them that, you have to give them notice, you have to give them a call. When you see these things, as you no doubt have seen or maybe have been shown, they come to pages long of gobbledegook reciting opinions of doctors all over the place, which are written by people who are inexpert at writing and inexpert at communicating, and so people give up.

Mr DAVID SHOEBRIDGE: Then it is for the worker or if they have seen a lawyer, to somehow tease their way through pages and work out whether or not they are going to go down path A or path B?

Ms MAY: Or not go down any path at all.

Mr CONCANNON: If you choose the wrong way, for instance, if you decide to make it a liability decision rather than a work capacity decision and you fail to challenge the work capacity decision within 30 days, you do not get the stay of the work capacity decision that you would otherwise get as a result of the 2015 amendments.

Mr DAVID SHOEBRIDGE: Meaning that after 30 days they are cut off benefits?

Mr CONCANNON: Yes.

Ms MAY: It takes a fair kick—

Mr DAVID SHOEBRIDGE: If you have made the wrong call and gone through the liability dispute and then it is found not to be a liability dispute but a work capacity decision, or it is a disability dispute but quantum has to be determined through a work capacity decision, how long can it be before someone gets their benefits reinstated?

Ms MAY: Originally it was about 18 months. It is sometimes 18 months. At best guess, somewhere between three and six or nine months.

Mr MACKEN: It can be a long time.

Ms MAY: Depending how long and how far you go.

Mr MACKEN: It is not particularly consistent with return to work.

Mr DAVID SHOEBRIDGE: Can you take us through the steps to challenge a work capacity decision, and who does it?

The Hon. TREVOR KHAN: David I will give you a bit of our time, but can you tease out why it is three, six or nine months?

Mr MACKEN: If, for example, you are characterising the decision as a liability decision then, generally speaking, you write to the insurer and ask them to review their decision, "It is wrong. Can you please fix your decision?" They will say no. Then you will file an application to resolve a dispute in the commission. You are probably already at least six weeks down the track. The application then has around about five weeks before it gets listed for a telephone conference at the earliest. At the telephone conference, subject to directional matters, it will take a further six to eight weeks before it is listed for arbitration. Following the arbitration, it will take at least three weeks for an arbitrator to make a decision and give it to the parties. Assuming there is no appeal, which will obviously extend the problem more, then you are down four or five months and you might find out that, actually, we now have to go back to review the insurer's decision. The insurer's decision gets reviewed internally by the insurer and they have a period of time in which to do that. Then you have the application to go to the merit review service. That will take several months. Beyond that, if you are unsatisfied, for example, with the manner in which the decision was carried out, rather than the substance of the decision, you can make a request to the WorkCover independent review officer and they will conduct a procedural review.

Mr DAVID SHOEBRIDGE: The whole second leg of the process does not have a lawyer in it?

Mr MACKEN: No, you cannot fund a lawyer.

Mr DAVID SHOEBRIDGE: The worker is doing it?

Ms MAY: There are time restrictions on the internal review on the second limb, but there are no time restrictions on the merit review. There is often a—

Mr STANTON: It is the other way around, I think.

Mr CONCANNON: The other way around, yes.

Ms MAY: Sorry, there is no time restriction on the internal review but there is a time restriction on the merit review.

Mr CONCANNON: It is 30 days.

Ms MAY: But often merit review—

Mr CONCANNON: On the second and the third stage.

Ms MAY: —will ask—of course, you have forgotten about—

Mr DAVID SHOEBRIDGE: Of course, the worker without any legal training would understand which has time limits and which do not—

Ms MAY: The worker without legal representation—

Mr DAVID SHOEBRIDGE: Is that right?

Mr CONCANNON: Yes.

Mr DAVID SHOEBRIDGE: Or you have no idea?

Mr CONCANNON: You have to understand—

Mr DAVID SHOEBRIDGE: We will wind back. A worker would have almost no real capacity to work out which has a time limit and which does not have a time limit.

Ms MAY: No, because that is normally dealt with in four dot points at the end of the work capacity—if it is a work capacity decision.

Mr DAVID SHOEBRIDGE: On the seventh page of the—

Ms MAY: Or twentieth page or 100th page, if you get through it. More to the point, Mr Macken pointed out that the worker is faced with a work capacity decision or a document that has been informed by a whole lot of information that the insurer has gathered, so the worker needs time to do their own information gathering. They have not been provided with documents along the way—this is the rehab report, this is the assessment we have done on you. You may want to gather further information. There is no access to that information until the decision is made and then they are required to give all of the supporting information, so the worker ends up with maybe a folder as big as this, maybe twice as big, maybe 20 pages, maybe 50 pages, and then they have to work out for themselves—which of course they can do—what doctor—

Mr DAVID SHOEBRIDGE: You say that with irony.

Ms MAY: Of course. Sorry, did I not—

Mr DAVID SHOEBRIDGE: It does not show up well on *Hansard*.

Ms MAY: It does not show up my face, I am sorry.

The CHAIR: It did not sound like irony to me.

Ms MAY: But the worker has to then decide, without legal assistance or sometimes with some assistance, who is the appropriate service provider to give them the information that will support their dispute against the decision that has been made.

Mr DAVID SHOEBRIDGE: How long do they have?

The Hon. TREVOR KHAN: We talk about these decisions having been made, we will say, by the scheme agents. Is there a difference in approach taken by the different scheme agents to what material they provide in these notices?

Mr MACKEN: Not if they comply with the guidelines given to them by the WorkCover authority. The guidelines give them a process they have to follow. If they follow that process, no. Experience would suggest there are some differences. You would not really find that too surprising, I do not think.

The Hon. TREVOR KHAN: No, I do not, that is why I am asking the question.

Mr MACKEN: There is some inconsistency in the manner in which they approach it.

Ms MAY: There certainly is in terms of the pre-injury average weekly earnings [PIAWE] work capacity decision disputes. I think you will get some very good information out of—I think Sherri Hayward is appearing on Monday from the Construction, Forestry, Mining and Energy Union, who predominantly does work capacity decision reviews for members of the CFMEU, and her experience in this area is probably the best that I know.

Mr CONCANNON: The real crux of the 30-day issue is frequently the basis of the decision that the person does have a capacity for suitable employment is based on a vocational capacity assessment report, which is based on a theoretical assessment of what the worker may be capable of doing in the labour market. The reality is that even if the worker was legally represented, the chances of obtaining a vocational capacity assessment report to challenge the determination made by the insurer based on their own vocational capacity assessment would be impossible within a 30-day limit that is provided by the legislation.

The Hon. TREVOR KHAN: You know better than me, but do you need that assessment to challenge?

Mr CONCANNON: No, you do not, but if we are dealing with a theoretical capacity for a particular job in the labour market, without providing your own report to challenge the expert determination in the vocational assessment report, your chances of doing that in most cases will be very slim.

The Hon. TREVOR KHAN: I am missing the point. Putting aside the issues of theory, as a matter of practice, if served with a decision, do you actually need your own assessment report to respond?

Ms MAY: Of course you do, because embedded in the legislation is the fact that the insurer is the determinant—the body that determines capacity. Within the provisions of the Act in respect of weekly payments after a period of time, the insurer makes the decision as to capacity. They have to decide whether or not the person is indefinitely capable or incapable of working. It is an insurer decision, so if you want to effectively challenge it, or challenge the basis for it, you have got to find something that undermines the insurer's position, not merely another medical report.

The Hon. TREVOR KHAN: I have not practised in the Traffic Court but I do understand those basic concepts. What I am asking for is in that 30-day period do you actually need the assessment report?

Ms MAY: Do you need the assessment report? Yes, in order to be able to do the internal review, because you are asking the insurer—

The Hon. TREVOR KHAN: Within the 30 days?

Ms MAY: Yes, because you are asking the insurer in the 30 days to review their own decision. So you have got to tease out of their decision what it is that you think is manifestly wrong or capable of being challenged.

Mr CONCANNON: It is not a direct prerequisite of lodging the application for review, but the prospects of successfully challenging the review without it in very many cases will be slim.

Mr DAVID SHOEBRIDGE: Can you just take us through the steps? Let us assume it is a work capacity decision. The insurer has written a letter, you have got a lever arch folder of materials that have turned up, there is a 10-page covering letter that sets out why it is that the worker is not going to get any more compensation and classifies it as a work capacity decision. What steps does the worker take by themselves to challenge that?

Mr MACKEN: It depends, but a lot of them just walk away at the moment and say, "Oh well, that's bad luck". But assuming they do—

Mr DAVID SHOEBRIDGE: Or they just bounce off the sheer size of the brief they had.

Mr MACKEN: Assuming they do want to challenge it, presumably they will contact their union or a lawyer and say, "They've told me I can't have compo. What can I do?" and most lawyers will say, "Can you tell me what's written at the top of the letter?" and it will say, "Work capacity decision", and the lawyer will say, "I'm sorry, I can't get paid for it. I can't help you, but good luck", although most lawyers will do something a bit more generous than that, but they are perfectly entitled to take that approach.

Ms MAY: There is an itemisation of that process in terms of the work and the time and the steps.

Mr DAVID SHOEBRIDGE: I know, but this is just for the benefit of the Committee. They then cannot get legal assistance and they have 30 days in which to file an internal review?

Mr MACKEN: Apply for an internal review.

Mr CONCANNON: No, not an internal review. There is no absolute time limit on internal reviews. It is the second and the third stage where the 30-days comes in.

Mr DAVID SHOEBRIDGE: Take us through it.

Mr MACKEN: They would, presumably, go to the insurance company and say, "I don't like the fact you're not paying me. Can you review it please?"

Mr DAVID SHOEBRIDGE: And sometimes it is as simple as that—an email?

Mr MACKEN: Absolutely.

Mr DAVID SHOEBRIDGE: It just does not seem fair.

Mr MACKEN: Absolutely.

Mr DAVID SHOEBRIDGE: Sometimes they have worked up their own arguments.

Mr MACKEN: The insurer will pass the volume of material onto somebody else within the insurer and they will review it without recourse to the original decision and they will come up with their own independent decision.

The Hon. TREVOR KHAN: That is irony, I take it.

Mr MACKEN: Yes. I should have recorded the irony. I apologise.

Mr DAVID SHOEBRIDGE: Are there any statistics on the proportion of cases where the determination is changed?

Mr CONCANNON: I think there is in the State Insurance Regulatory Authority [SIRA]. In the latest SIRA report I thought there were some statistics.

Mr MACKEN: The statistics would exist, put it that way.

Mr DAVID SHOEBRIDGE: Let us assume then that the worker is dissatisfied with the internal review, which restates the original position. What does the worker do?

Mr MACKEN: In the review decision there will be notification of the process they can follow if they want a further review; it will say, "You go to the Merit Review Service". So if the worker elects to do that and they do it within 30 days they get a stay of the decision and they go to the merit review service and say, "I really don't think I should be cut off compensation. Can you help me please?"

Mr DAVID SHOEBRIDGE: And what criteria does the Merit Review Service look at when working out whether or not to intervene?

Mr MACKEN: Essentially, the same criteria that was looked at by the insurer both at the first instance and on review, unless the worker has put together some material that is different or inconsistent with that—obviously, under their own initiative and without the benefit of legal advice—and then the Merit Review Service will consider the merit of the original decision.

Mr DAVID SHOEBRIDGE: And who runs the merit review?

Mr CONCANNON: SIRA.

Mr DAVID SHOEBRIDGE: And it is SIRA's own money?

Mr CONCANNON: Embedded within SIRA. The point I was going to make earlier was the lack of independence of SIRA, and again, the COAT document that I made reference to before is something that I would draw to your attention.

Mr DAVID SHOEBRIDGE: SIRA controls the fund, in large part, or is—

Mr MACKEN: Well, Insurance and Care NSW [icare].

Mr DAVID SHOEBRIDGE: SIRA is a government agency, it is a government fund—

The Hon. TREVOR KHAN: But legally SIRA is the regulator; icare is the insurer.

Mr MACKEN: Correct.

Mr DAVID SHOEBRIDGE: And if there is a blow-out or a problem in liabilities in the fund, SIRA is the one that has to intervene in order to fix it?

Mr CONCANNON: Yes.

Ms MAY: They will still all be in the same department.

The Hon. TREVOR KHAN: I do not think that is actually—

Mr MACKEN: No, I do not think that is correct.

Ms MAY: Well, they are under the Department of Finance.

Mr DAVID SHOEBRIDGE: The cluster, group.

Ms MAY: They are in the same cluster, yes.

Mr DAVID SHOEBRIDGE: But either way, SIRA is separate to icare?

Ms MAY: Yes.

The Hon. TREVOR KHAN: As you rightly pointed out, some of us are lawyers. It is useful being accurate.

Mr DAVID SHOEBRIDGE: So if the worker is dissatisfied with the merit review determination by SIRA what does the worker do?

Mr MACKEN: There are two paths available: one is to go to the WorkCover Independent Review Office [WIRO] for a procedural review, which essentially says "There was something faulty about the procedure. Can you correct it for me?" and go back to square one; or, alternatively, they go to the Supreme Court for administrative review.

Mr DAVID SHOEBRIDGE: But most would go down, I assume, the Supreme Court avenue.

Mr MACKEN: Yes.

Mr DAVID SHOEBRIDGE: So they go to WIRO, who then assesses whether or not there is merit to the procedural review. Is that right?

Mr CONCANNON: No. They can only determine procedural issues arising from either the first or the second decisions.

Mr DAVID SHOEBRIDGE: And if there is a procedural defect identify it?

Mr CONCANNON: There is a recommendation made by WIRO that they remake the decision.

Mr DAVID SHOEBRIDGE: So it will go back to first base?

Mr CONCANNON: It does, yes.

Mr DAVID SHOEBRIDGE: Assume that there is a liability issue. What is the process? The worker gets a letter that says, "We don't believe you were injured at work" or that there is a clear liability?

Mr CONCANNON: They can take that to the Workers Compensation Commission. But if you are beyond the first two periods of incapacity, the determination of how much the weekly benefits are will have to be determined elsewhere. The commission itself cannot make that determination as to what level of weekly benefits are payable.

The Hon. TREVOR KHAN: Sorry. Can you just say that again?

Mr CONCANNON: Liability—assuming it is a liability decision—will be determined by the Workers Compensation Commission. However, beyond 130 weeks the determination of what weekly payments the worker will be entitled to will depend on the insurer's decision. The commission cannot interfere with that, so, in effect, the determination of weekly benefits could not be made by the commission in that case and would have to be returned to be assessed by a work capacity decision by the insurer.

Mr DAVID SHOEBRIDGE: So they would win their case in the Workers Compensation Commission but then it is referred back to the workers compensation insurer to make a work capacity decision—

Mr CONCANNON: It would be up to the worker to do that, yes.

Mr DAVID SHOEBRIDGE: And then the work capacity decision might be "You may well have been injured at work but we believe that you have recovered from your incapacity from the injury", and the whole thing starts again?

Mr CONCANNON: Yes.

The Hon. TREVOR KHAN: Whereas it would be more efficacious if the whole decision was made at the one time. Is that what you are saying?

Mr CONCANNON: Exactly, yes.

Mr DAVID SHOEBRIDGE: In one jurisdiction—one shop with broad jurisdiction can resolve everything at once.

Ms MAY: With one notification.

The Hon. David CLARKE: A question to Mr Concannon or Mr Macken. Would you like to elaborate on the Law Society's concerns about the surplus in the Workers Compensation Scheme?

Mr MACKEN: I do not know that "concerns" is the right word. If this Committee is focused on whether the system is sustainable and affordable then the answer at the moment is yes, it is doing very well,

thank you very much. The efficiency thing we have addressed in terms of the dispute resolution. The efficiency is, in some respects, appalling in certain areas of the scheme, and from a fairness point of view what arises by reason of the scheme being in substantial surplus and being either 120 per cent or 130 per cent fully funded is that the balance appears to have shifted from an overall fairness point of view.

The Hon. David CLARKE: That is a concern, is it not?

Mr MACKEN: It is a concern. Well, it depends: if you are an employer it is not as much of a concern as if you are an injured worker. If you are an injured worker and you cannot access medical treatment other than through Medicare and through the public hospital system, if you are a worker who has been trying to pay off a house at 130 weeks after seriously injuring itself in the service of your employer and nobody is paying you anything it is a concern.

The Hon. David CLARKE: And that goes to the very basis of the scheme in the first place, does it not?

Mr MACKEN: It does appear to the Law Society that the balance might have gone too far one way in a number of respects.

The CHAIR: In regards to the surpluses you refer to "additional funds could be used by measured restoration of benefits to injured workers". Could you outline what you consider is measured restoration of benefits or benefits that are no longer there that we could look at?

The Hon. TREVOR KHAN: We cannot look at anything. We can give a report, that is all.

Mr CONCANNON: I would have thought the number one priority there would be restoration of medical treatment expenses and the issues with regards to those being cut off after two, five years, or whatever the case may be, and this system of linking entitlement to medical expenses to permanent impairment should be removed because it just does not work. If the Law Society was prioritising where that means of restoration should arrive I think medical treatment expenses would be the primary one.

Mr MACKEN: Yes, I think that is probably right.

The CHAIR: Will you outline the current situation?

Mr MACKEN: Like everything in workers compensation it is extremely complex. The short version is this. If you are a person who falls into what are the large majority of injuries where your level of whole person impairment is 10 per cent or less, essentially your entitlements to compensation can be cut off two years after either you notify the injury, if you have not sought weekly compensation, or two years after you cease to be entitled to weekly compensation. So you get weekly compensation for a period which may be quite limited because, of course, the qualifying for weekly compensation is now more difficult than it was, and then that sets the clock ticking and your entitlement to go and get treatment for your injury is going to be chopped off after two years. If you are 11 per cent or above it is five years. If you are 20 per cent or above it is longer, but that is essentially what it has. The vast majority of workers will be 20 per cent or less and, in fact, the vast majority of workers will be 10 per cent or less.

Mr CONCANNON: I think 5 per cent is the figure for those who are more than 20 per cent, if you read the Macquarie University report.

The CHAIR: So simply put, you would suggest extending the time?

Mr DAVID SHOEBRIDGE: Removing the time.

Mr CONCANNON: We would say removing the time limit altogether.

The CHAIR: It is all subject to assessment.

Ms MAY: The provision of medical treatment is further constrained by the fact that the treatment has to be given or provided within those two years. So that if at the 18 months point, for example, someone is referred for surgery, and there is a dispute about whether that surgery should take place, that dispute is unlikely to be resolved in the remaining six months, and that particular worker, if the dispute is resolved in their favour, will not be entitled to the surgery because the two years has expired. So there are at least two aspects of the provision of section 59A, which is the limit on medical expenses, that are very cruel. First, treatment has to be given or provided, and secondly the time limit. The third aspect is that you have to assert your impairment before you know how long you are going to get treatment for. That is putting the cart before the horse.

Impairment evaluation principles have been referred to in a number of submissions, particularly the Bar and the Law Society and our views about having impairment as the tool by which you measure whether

someone gets treatment or not is an inaccurate, imperfect, improper tool. Impairment should not be used and, in fact, it is warned against in the impairment guide, the American Medical Association guides.

The Hon. TREVOR KHAN: Just going back to the time limits because that was where the question went, when we had those famous inquiries in 2012, I think it was, part of what we recommended was based upon the experience in other States. Are any of you in a position to indicate how our scheme differs in terms of those time limit issues? I am not talking about the length, but rather those interaction issues?

Ms MAY: The first comparison is probably Victoria which is where in 2012 everyone was looking to.

The Hon. TREVOR KHAN: It was not only there but I will concede it was—

Ms MAY: No, but a number of the 2012 amendments to the legislation were actually borrowed or taken from the Victorian legislation with change. They do not base their treatment on impairment.

The Hon. TREVOR KHAN: No, that is not what I am going to.

Ms MAY: In terms of time, it is two years, there is a fixed time period.

Mr MACKEN: I can probably assist. My understanding is that Victoria has a very short period of only one year. Queensland has no restriction. The Comcare system has no restriction. The ACT has no restriction. The Northern Territory has no restriction. South Australia has a restriction, I just cannot remember what it is off the top of my head—

Ms MAY: It is two years.

Mr MACKEN: My friend might be right that it is two years. Tasmania has a time restriction, although I understand it is capable of being extended, although I have not actually looked at the circumstances in which it can be extended.

The Hon. TREVOR KHAN: I am reluctant to cut you off, but I am not really going to the length of time. I was aware that there were different schemes. But in those jurisdictions where there are time limits because you have referred to what you would consider to be perverse outcomes in terms of the application of it, I am interested in those States where there are time limits if they deal with them differently?

Ms MAY: They do. I know in some States they have an exception so that if you have a significant deterioration of a condition that requires further treatment you can extend the period or you can get that treatment outside the time period. It is as simple as that. We do not have that.

The Hon. TREVOR KHAN: I am grateful for that. I invite any of you, if you are aware, if in other States with time limits they deal with them in different or slightly different ways.

Mr CONCANNON: It is my understanding, for instance, that in the Victorian system the work capacity decisions are processed in the hands of the authority instead of the insurer as I understand it.

Ms MAY: Yes.

Mr CONCANNON: And in South Australia that test of suitable employment that we have talked about before, that second limb that really makes an issue a theoretical assessment of capacity in the labour market is not there, even though I understand that definition has predominantly been taken from the South Australian model. So we have taken unfortunately the worst bits from both the Victorian and the South Australian models.

Mr MACKEN: Safe Work Australia produces a document which runs a comparison across the schemes which might be of assistance in addressing your question and we can undertake to provide it to the Committee.

The Hon. LYNDA VOLTZ: I refer to medical expenses. I know that you have given some examples in your submission. But if a worker injures their knee at work but the doctor recommends that a knee replacement not occur now because the worker is too young but they will need to have it done when they are about 40 years of age, which may be five or eight years down the track, how would that be assessed under the medical costs?

Mr MACKEN: You would not have the entitlement to get that treatment paid for, assuming that your impairment assessment did not exceed 20 per cent.

Mr CONCANNON: Except there is an exception for fixation devices or appliances, whatever the wording of it is in the 2015 amendment. You might be able to get around it that way but it would be a technical way of getting around it.

Ms MAY: And in fact there has been someone.

The Hon. LYNDA VOLTZ: That was essentially the prosthetics. Under the legislation as it existed in 2012 if you had your leg amputated below the knee you came under the 20 per cent impairment and, therefore, after five years you would not have been entitled to prosthetics until the amendments were introduced in 2015. Is that right?

Mr CONCANNON: Yes, exactly right. For instance, I have got a client at the moment with skin cancer. He has continued to work as a farm worker all the way through his years and it is getting gradually worse, but he has never received weekly payment because he is self-employed by his own company. We have real issues there. Theoretically they should be cutting him off. I do not understand why, frankly, they are paying him because he has not been assessed for impairment. He has to see a skin specialist every few months.

Mr DAVID SHOEBRIDGE: He must be having repeated injuries.

Mr CONCANNON: Yes, maybe that is right.

Ms MAY: There is a case but I suspect it is not going to hold where someone claimed the cost of a knee replacement. Perhaps it is not the best example because the arbitrator found that the work to be done inside the knee constituted one of those prosthetic or artificial aids. But I do not think—

Mr DAVID SHOEBRIDGE: There was an artificial result.

Ms MAY: Yes, an artificial result, exactly.

The Hon. LYNDA VOLTZ: We can refer to a spine fusion. A good example is a furniture removalist who has their back injured and a spinal fusion which is a marginal operation with a 50 per cent chance it will make it better and a 50 per cent chance it could aggravate the injury. It is something that you tend to do later on. That would fall into that category you would think.

Ms MAY: And a spinal fusion will get you over that 20 per cent. But if that worker has, in the interim period while they are having conservative treatment and not pursuing that operative result, is assessed for permanent impairment and is assessed that 10 per cent whole person impairment—

The Hon. LYNDA VOLTZ: But is the problem with that that you only get one assessment?

Ms MAY: Absolutely.

The Hon. LYNDA VOLTZ: It is relevant because if you have already been assessed for the back injury the spinal fusion tends to be the operation of last resort rather than the first, you are only assessed at 10 per cent which gives you only a two-year cut off rather than the five year cut off for a spinal injury.

Ms MAY: And that demonstrates why impairment is an inappropriate measure for the determination of whether or not someone needs reasonable necessary medical treatment.

The Hon. LYNDA VOLTZ: Can I just go back—

The Hon. TREVOR KHAN: I think that has been argued each time, actually, has it not? I am not being dismissive, but that is—

The Hon. LYNDA VOLTZ: Sorry, can I—

Ms MAY: Sorry, but "impairment" only was inserted in section 59A in 2015.

The Hon. TREVOR KHAN: Right.

Ms MAY: So that is a relatively new amendment.

The Hon. LYNDA VOLTZ: I want to go back to the surpluses that we were talking about. Essentially what we find under this scheme is that the actual payments in compensation dropped from somewhere over $3 billion to $2.6 billion. The reality is there is half a billion there that is just not being paid out in workers compensation; it is going straight back into the scheme—is that correct? I am looking at the SIRA figures.

Mr CONCANNON: Which ones? I have got the report here with me.

Mr MACKEN: All other things being equal it sounds like it would be correct. It is perhaps best directed to SIRA.

The Hon. LYNDA VOLTZ: I will be asking SIRA.

Mr MACKEN: I am sure you will.

The Hon. LYNDA VOLTZ: When we are talking about a surplus we are talking about a State with a growing population and more workers, because that is the natural trend that takes place. That is why there are budget increases every year—because the population always grows. So there is a growing population of people with injuries but decreasing payments in workers compensation specifically from the date of this scheme coming in. There are decreasing premiums that are going to employers, decreasing payments to workers compensation—but is the surplus actually growing within the scheme? Are the funds that are being held increasing?

Ms MAY: We believe so.

Mr MACKEN: That is what it appears to be year on year.

Ms MAY: We believe so if only for the reason that the last time this inquiry heard evidence from the scheme actuary I think in answer to questions on notice we were told that the funding ratio—the only way for us to judge it, because we do not get the scheme valuations, is to look at the funding ratio in the reports that are given externally or publicly—was at 118 per cent.

Mr DAVID SHOEBRIDGE: The evidence at budget estimates was the scheme is in a $1.4 billion surplus.

Ms MAY: At 120 per cent.

Mr DAVID SHOEBRIDGE: That is $1.4 billion over and above the 110 per cent funding ratio that they believe is the base.

Ms MAY: That is true but if you look a little bit further into the material that came from SIRA to the Law Society there is an unquantified amount of money. First of all they have increased the claims handling expenses[1] percentage to 16.2 per cent. They have also assumed an 80 per cent for some sort of funding ratio whereas previously the accounting standards have been 75 per cent. They have strived to reach the 75 per cent. I am not an actuary. Mr Khan would remember that Mr Concannon and I were both questioned as to our capacity as actuaries in 2012—

The Hon. TREVOR KHAN: Very effectively by Mr Speakman—look what that did for him.

Ms MAY: Yes, very effectively. I am going to go red now. That has only made us even more intrigued by actuarial calculations. Looking at the pure figures it seems to me even from the material they gave the Law Society that there is further money in reserve. There is an unquantified amount, firstly, to deal with the 2015 amendments, the cost of which they say they do not know. So they have got money in reserve that they do not specify. Also they have changed the funding ratios so that more money is kept aside. They are more conservative in their estimates. That is basically what it is.

The Hon. DANIEL MOOKHEY: I have a quick question on the theme of return to work. The Bar Association makes a point about the emergence of a standard question in job application forms about people's previous history in the workers compensation system. That is, at the point of application for a job, people are asked whether or not they have had any previous claims. That can create either an opportunity for discrimination or otherwise an incentive for an employer not to proceed.

The Hon. TREVOR KHAN: I am sure it was on my employment forms in 1980.

The Hon. DANIEL MOOKHEY: In your view is that the type of practice which we should be looking at either regulating, outlawing, penalising or otherwise?

Mr CONCANNON: Absolutely. I think the other issue is very often they are required to actually sign statutory declarations to the effect that they have never had a previous workers compensation claim. That can create real issues if they have made a false statutory declaration, apart from anything else. But the number of clients that come through my door who say that they have been told this—not only in a workers compensation context but also in a motor accident context—is just too frequent to be dismissed. It is something that should be seriously looked at and legislated for.

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[1] Correspondence was received from Ms Roshanna May, State President, NSW Branch, Australian Lawyers Alliance, clarifying her evidence:
The reference to 'claims handling expenses' is inaccurate and I seek to correct the record to substitute the words "risk margin". The correction of the date "2000" to "2012" has been made on the Transcript attached.

Mr STANTON: Another aspect related to all of that is the question of experience adjustments on premium calculation. If you have a claim, by and large your premium goes up. Sometimes it goes up quite a startling amount. It is my observation that that is probably the main reason why that question starts to appear in forms and gets canvassed in job interviews. The employer might be utterly sympathetic to an individual's plight but it is the risk that their premium might go up if they employ the person which I think creates a strong practical disincentive to giving that person the job.

The Hon. TREVOR KHAN: It really does.

The Hon. DANIEL MOOKHEY: They are financially penalised.

Mr STANTON: Exactly.

Mr DAVID SHOEBRIDGE: And particularly small employers where if one of three workers goes off with a workers comp injury that has a much more significant impact upon their premium.

The Hon. TREVOR KHAN: Actually, I do not know if that is correct. I think it is on the medium sized and large employers where they are—

Mr MACKEN: It is only on medium and large employers. There is not a claims rated experience factor in a premium for employers that are not in the top two categories. It only affects small employers in terms of the operation of their business, which is not an insignificant effect if you have only got three employees and one of them cannot work.

Mr DAVID SHOEBRIDGE: What is the size of a medium one?

Mr MACKEN: A premium above $50,000 is where it starts to apply.

Mr DAVID SHOEBRIDGE: Okay. Sorry, we probably had—

The Hon. TREVOR KHAN: The effect on the premium where there is a premium of above $50,000 can be very substantial in itself as well.

Mr MACKEN: Although bear in mind the premium order has gone now and the manner in which the premiums are calculated is presently being revisited, so you might want to direct those questions to SIRA.

Mr DAVID SHOEBRIDGE: This could be resolved by a statutory provision that prohibits employers from discriminating on the basis of having a workers compensation history.

Mr MACKEN: Theoretically that already exists if it is unlawful discrimination. There is a distinction of course between lawful and unlawful discrimination. An employer has an obligation to guarantee people safety so on one view asking them whether they have been injured previously at work is part of fulfilling that obligation. One of the ways, ironically enough, that really would solve it is giving workers the opportunity to settle their claim so that they could safely go to new employers having absolved their workers compensation history with a so-called clean slate. We know that improves return to work.

Mr DAVID SHOEBRIDGE: Could you perhaps provide us with your collective wisdom on notice about how best to resolve this problem? That would be really useful.

Mr MACKEN: Sure.

Mr DAVID SHOEBRIDGE: Ms May, you were talking about the circumstances of a worker who has a back injury which may ultimately come to a fusion. Is it the case that a fusion is likely to get someone over 20 per cent whole person impairment?

Ms MAY: That is correct.

Mr DAVID SHOEBRIDGE: Does that not create a perverse incentive to bring forward the operation for the worker? The conservative advice may be, "Do not have your fusion operation until you are 50. Keep working as best you can. Struggle on with the pain." They go and see their lawyer and their lawyer says, "If you put your fusion operation off for five years, you will be outside the period of medical benefits." Does that ever happen in practice with those sorts of really difficult decisions?

Ms MAY: I think it does.

Mr MACKEN: Well, it definitely does. There have been matters that have gone before the Workers Compensation Commission where operations have attempted to be rushed through so they come within the qualifying period.

Mr CONCANNON: Obviously lawyers would not be encouraging that sort of thing but we have to explain the law as it is and then it is a matter for them to make that decision themselves.

The CHAIR: Ms May was asked the question. That is the danger of a panel of lawyers.

Ms MAY: It is always a danger with a panel of lawyers. I agree with my colleagues. I would also say this: We have heard from a number of doctors who say that they are concerned about the perversity of that outcome and it is against their best practices for them to be rushing through surgeries.

Mr DAVID SHOEBRIDGE: But if they have the interests of their patient at heart—

Ms MAY: Absolutely.

Mr DAVID SHOEBRIDGE: —they might say, "This is a suboptimal time to have the operation but otherwise you are not going to be able to get the operation." So the legislative regime that we have is actually imperilling the health of injured workers in those circumstances.

Ms MAY: I would agree with that.

Mr MACKEN: It is certainly influencing health outcomes and decisions made about treatment and those sorts of things—it definitely is.

Mr DAVID SHOEBRIDGE: How is it influencing them?

Mr MACKEN: By changing the normal course of the treatment that a doctor would prescribe because of the issue of financial considerations.

Mr DAVID SHOEBRIDGE: Or worse.

Mr MACKEN: It may be for worse. It usually would be for worse because, self-evidently, it is not what the doctor would normally do. The doctor is doing something different because they are being dictated to by the manner in which the scheme will or will not accommodate the treatment.

Mr DAVID SHOEBRIDGE: And the way of resolving that is by removing these arbitrary time limits attached to arbitrary whole-person-impairment assessments.

Ms MAY: Yes.

Mr CONCANNON: Correct.

Mr DAVID SHOEBRIDGE: Just going quickly back to dispute resolution, could I ask you if there is any agreed position, or do you have separate positions, about if we were going to give the role of deciding all of these matters to a single jurisdiction, what would we pick?

Mr MACKEN: The position of the Law Society for a long time has been it should be an independent court with properly qualified judicial officers who have tenure, for want of a better expression—they are not subject to reappointment every three years and therefore may be influenced in their decision-making by reason of the term of their tenure. The Law Society's position is that it should go to a properly constituted court.

Mr DAVID SHOEBRIDGE: All right.

The CHAIR: With lawyers.

The Hon. TREVOR KHAN: They talk about "properly qualified", so that means lawyers.

The CHAIR: I was using irony as well.

Mr MACKEN: If Telstra has a dispute, it gets access to the most qualified judges in the land in the Supreme Court whereas, unlike Telstra for example, if an injured worker has a dispute, they get sent to some administrative tribunal—administrative and bureaucratic decision-makers. It is pathologically unfair, frankly. I do not see why major corporations should get access to a court but the injured and maimed in this State do not.

Mr CONCANNON: The other thing is we would say that the whole decision-making should be within the one organisation rather than in disparate organisations, such as we have at the moment.

Mr DAVID SHOEBRIDGE: The basic fundamental point is bring it into a single decision-making organisation. That is one you can all agree on, is that right?

Ms MAY: With access to paid legal representation. That is the other aspect.

Mr DAVID SHOEBRIDGE: Because otherwise you have got an individual worker confronting a well-resourced insurance company and obviously you need to have the worker properly represented. Is that your position?

Ms MAY: Yes.

Mr CONCANNON: Yes.

Mr DAVID SHOEBRIDGE: What about the prospect of re-enlivening the jurisdiction of the Workers Compensation Commission—just expanding the Workers Compensation Commission to pick up all these various disputes?

Mr MACKEN: That would be good. There are elements of the manner in which the Workers Compensation Commission resolves its disputes that are problematic. At the moment they go to arbitrators whose first obligation is to resolve disputes. Arbitrators operate in a conciliation mode. If they cannot resolve a dispute, they then have to determine the same dispute over which they have presided in a conciliation mode. That model, with respect, is not a very good model. It would be better if the person determining the dispute had not been trying to persuade one or other party to settle, for example. Apart from that, the commission could do it.

Mr CONCANNON: I think the other thing is that it would be ideal for all personal injury decisions to be made in the one tribunal, not just workers compensation decisions. If we are dealing with third-party, then—

The Hon. TREVOR KHAN: Oh my gracious goodness!

Mr MACKEN: The alternative is to maintain State-sanctioned disability discrimination.

Ms MAY: Well, it is an appropriate point, given you have already heard recently on the proposed compulsory third party [CTP] reforms—and we do not know whether or not they will come in—

The Hon. TREVOR KHAN: Nor do we, so why do we not leave that alone.

Ms MAY: No, that is right, but please let me finish my point—because one of the principles of those proposed reforms is that the CTP scheme borrows the merit review service or the merit review processes, internal reviews, from workers compensation. If the Government is going to have similar processes in two different schemes, then it makes sense to have them dealt with in the same place.

Mr DAVID SHOEBRIDGE: Mr Macken, it may not be your Rolls-Royce, or perhaps we could say your Holden Commodore, court view that you have, but one other option would be getting a personal injury division in the New South Wales Civil and Administrative Tribunal and allowing legal representation.

Mr MACKEN: Yes.

Mr DAVID SHOEBRIDGE: Would that be better than the current system?

Mr MACKEN: It would be better than the current system, assuming it was set up in a model that had the objectivity and fairness that we have talked about.

Ms MAY: And subscribed to those Council of Australasian Tribunals [COAT] principles—the excellence framework that Mr Concannon referred to.

Mr MACKEN: I hasten to say that I say that without any criticism at all of the Workers Compensation Commission. They have chosen a certain model and they consider it to be the best model. It is just not a view that we agree with, necessarily.

The Hon. DAVID CLARKE: Mr Concannon, we have only a few minutes left. What would be the main two or three recommendations that the Law Society would like to see coming out of this review?

Mr CONCANNON: I think I have already indicated one, which is the removal of the restrictions that are imposed on medical expenses, particularly by reference to impairment. That would probably be number one. Secondly, we would say dismantle the current dysfunctional dispute resolution process and replace it with one dispute resolution process that is simple, and provide access to legal representation within that dispute resolution model.

The Hon. TREVOR KHAN: Can I ask a question that leads onto something very tacky?

The Hon. LYNDA VOLTZ: So unlike you!

The Hon. TREVOR KHAN: I think it is on page six of your submission you referred to an attempt to remove the anomalies from professional costs some time ago, 2008-2010. Do I take it from your submission—

and I think it appears also in the ALA's submission regarding the issue of costs—that the issues of anomalies just have not been addressed since that attempt?

Mr MACKEN: That is right.

Ms MAY: I think I should answer that because I was the one who was on the committee dealing with the anomalies. In 2008-09 the Law Society prepared a schedule of anomalies when we had a WorkCover legal and regulatory reference group. We presented them to WorkCover. A lot of work was done to amend schedule 6, which is the schedule that provides the limits for legal costs which the WIRO works under, and, of course, that the exempt workers work under. A lot of work was done. About 12 months later a revised regulation was prepared and signed off on. Twelve months after that, it still had not been gazetted. Very shortly after that—

The Hon. TREVOR KHAN: You went into an election.

Ms MAY: No.

The Hon. TREVOR KHAN: We did.

Ms MAY: Very shortly after that the reforms were announced at the end of 2011—that there was going to be a reform process—and we have not had any traction since.

Mr MACKEN: There is inconsistency between the Act and the regulation so far as legal costs are concerned. The inconsistencies have been drawn to the attention of the regulator repeatedly. To date the regulator has done nothing.

Ms MAY: In fact, the regulator has now been provided with all the work that was done in 2009 and 2010, and we do not know—you would have to ask the regulator to see what they are doing with it.

The CHAIR: Ms May, you refer in your submission to the Parke's review and I think you said at the beginning that you chaired that?

Ms MAY: I was the director.

The CHAIR: Can we just touch on that? What is unfinished business there? You have made a recommendation regarding funding to finalisation. What was that about? You have four minutes.

Ms MAY: Mr Garling is in the room. I was engaged by Kim Garling, the independent review officer, to direct a project to look at the anomalies, ambiguities and mechanical problems or operational problems of the legislation in accordance with his power of inquiry under section 27 (c) of the Workplace Injury Management and Workers Compensation Act [WIM].

The CHAIR: Which year was that?

Ms MAY: Last year—I am sorry, end of 2014. We convened. There was a chair of an advisory committee in the Hon. Justice Conrad Staff. We convened an advisory committee inviting every stakeholder group that we can think of, and we had somewhere between 26 and 35 representatives of all stakeholder groups represented on that and advisory committee, and terms of reference. We engaged in an examination of the issues relevant to any of those stakeholders dealing with the operation of the legislation. We had a number of issues that were submitted and they were narrowed down to 12 key issues by a working party, including Mr Macken, Mr Concannon and various others from the Bar, the commission and the Law Society, et cetera—mainly lawyers.

Those issues were discussed in the advisory committee and a statement of principles was unanimously accepted in relation to each of those issues, which I think I have attached to the ALA submission. There were three interim reports delivered to the then Minister, who was Mr Perrottet, not Mr Dominello. I thought at one stage it might have been Minister Constance, but no, it was Minister Perrottet. We got to the end of my contract and we needed further time to then deal with the recommendations. Unfortunately, so far as I know, funding was not continued.

The CHAIR: What were the outstanding recommendations that you refer to?

Ms MAY: I have attached draft recommendations. They have not been fully discussed with the advisory committee. There was some opposition to some of the recommendations. There was no opposition to the statement of principles. It remained a matter for the advisory committee or the working group to reconvene and for a final report to be delivered to the Minister by the independent review officer [IRO].

The CHAIR: Are there any other questions? One minute remains.

Mr DAVID SHOEBRIDGE: Nothing that can be resolved in a minute.

The CHAIR: Thank you for attending the hearing today and thank you for your submissions, which are very informative—especially for those of us who are new to this, as I am. The Committee has resolved that answers to questions taken on notice—I think there was one, from memory—be returned within 21 days. The secretariat will contact you in relation to the question you have taken on notice.

(The witnesses withdrew)

(Short adjournment)

MARY McGOOKIN, Senior Case Worker, Family and Community Services, affirmed and examined

STEWART LITTLE, General Secretary, Public Service Association, affirmed and examined

PETER REMFREY, Secretary, Police Association of New South Wales, sworn and examined

KRISTY MEMBRENO, Industrial Manager, Police Association of New South Wales, sworn and examined

DARREN SULLIVAN, Fire Brigade Employees Union, affirmed and examined

CLAIRE PULLEN, Senior Industrial Officer, Fire Brigade Employees Union, affirmed and examined

The CHAIR: Welcome. I understand each of you would like to make a brief opening statement. I ask you to keep it brief because you have made submissions and we have obviously read them.

Ms MEMBRENO: We would like to thank the Committee for giving us the opportunity to attend here today. Police work is obviously a dangerous occupation and it is for these reasons that police officers in 2012 secured an exemption from the workers compensation changes. We see this exemption as being vital for police officers. They, on an ongoing basis, require the payment of medical expenses and weekly benefits due to the nature of injuries that police officers suffer and the recurrences of those injuries.

The ongoing commitment to this exemption is vital to emergency service workers where in today's environment policing is becoming more and more dangerous. It should be noted that the exemption has not resulted in an increase in workers compensation costs but rather, as evidenced in the recent Audit Office report, since 2013-2014 the total annual cost has reduced from $443 million to $333 million. The 2016-2017 costs are expected to be further reduced when hindsight adjustments are made.

Over the past five years the number of new workers compensation claims have been on a downward trend of 1.7 per cent. This is during a period where there have been increases to police numbers and increases to pay rises. This is obviously due also to more officers now undertaking suitable duties and not remaining unfit for work. This has also been attributed to the workforce improvement programs that NSW Police has implemented, which are designed to prevent injuries and assist in the rehabilitations of return to work efforts of police officers.

We want to see these important programs continued; not dependent upon funding but continued and have a permanent place in supporting police officers in New South Wales. These programs are frontloading the system; basically where they are spending the money upfront, being proactive in terms of resolving issues before they actually become a claim for workers compensation. It is in the preventative space, aimed at assisting officers before they get injured. There is a reconditioning program, which assists officers who have been injured but it allows them to get early intervention for injuries that are mainly on a physical basis where they get specialist sport instructors in the first instance.

The CHAIR: We will probably come back to that during questions as I note it is in your submission.

Ms MEMBRENO: Yes.

The CHAIR: Have you concluded?

Ms MEMBRENO: There is a little bit more if you do not mind?

The CHAIR: Yes, sure.

Ms MEMBRENO: In terms of our day-to-day claims issues, we have a pretty good process and escalation process that we adopt with our insurance company, EML. There are obviously the ongoing weekly benefits that do get delayed, medical benefits and so forth, but we have adopted a process with that. Our main aim in terms of the culture that we are really trying to promote is that of return to work, recovery at work and supporting injured police officers in meaningful, suitable employment.

That is our big focus—really trying to push through policies with deployment and NSW Police Force, and making reasonable adjustment to all position in NSW Police, not just cubby holing those individual positions that are non-operational but all positions and allowing them to have graded access to their arms and appointments, moving them closer to their pre-injury position than they have ever been before. That is our big focus. We really want to see the insurance companies having a little bit more of a proactive approach in providing retraining and job modification to positions, having a bit more buy-in in the redeployment space and in the recovery at work space. We tend to find that in cases where no suitable duties are offered it is left to the employer to make those decisions. We see the insurance company having a greater role to play in that.

The CHAIR: I am sure we will come back to that. Thank you for your opening statement. Would the Fire Brigade Employees Union like to make statement?

Mr SULLIVAN: Yes. By way of background, I am a serving firefighter and station officer on the South Coast. I have been an official of the union for about 11 years. I am joined today by Claire Pullen, senior industrial officer for the union. I will keep it simple. Workers compensation and the level of protection we have been afforded are vital for firefighters in New South Wales. We would like that to be maintained. We have been involved in this process over time and have made submissions. We stand by those submissions. We are pleased to be here today. We appreciate the Committee providing us with the opportunity to appear.

The CHAIR: Thank you for coming. Would the Public Service Association like to make an opening statement?

Mr LITTLE: Thank you. The Public Service Association of New South Wales [PSA] represents workers in a diverse range of public sector agencies, including universities, schools, prisons, disability services and child protection. Our members have a long and proud tradition of improving the lives of the people of New South Wales through the delivery of a diverse and valuable range of services. We represent 37,000 members, spread across 5,000 work sites throughout the State. I welcome the opportunity to give evidence today. I am proud of the skilled professionalism and dedication of our members in working for safer workplaces and a fairer deal for those who have suffered injury or illness at work. The PSA was at the forefront of the campaign to oppose some of the changes made to workers compensation in New South Wales in 2012.

Workers compensation and returning to work continue to be issues of genuine concern to our members. Like other workers in New South Wales, our members have been profoundly affected by the changes made to workers compensation laws in 2012. The cost of workplace injury has shifted onto injured workers, their families, their carers and the community. The current workers compensation scheme in New South Wales does little to hold employers to account for work related illness and injuries or to make workplaces safer. Instead, it unfairly penalises workers who have had the misfortune to suffer an injury at work. This is particularly the case for our members who are engaged in high-risk occupations. The current workers compensation scheme has established a two-class system for emergency workers. Prison officers, Juvenile Justice workers, rural firefighters in the National Parks and Wildlife Service and State forests, and government employees involved in dangerous occupations in disability services and child protection deserve better protection and should be afforded the same protection as other emergency service employees.

Prison officers go to work each day in one of the most difficult and dangerous jobs in our community. Our jails are bursting at the seams. It is our members who, on a daily basis, manage murderers, rapists and paedophiles, on behalf of the community. They are expected to do so without adequate protection for them and their families. Our members in Juvenile Justice are currently dealing with a new class of offender—those suspected of plotting terrorist attacks. They have no specialist facility in which to work and have not been provided with training or specialist support. We also represent staff in the Rural Fire Service and the National Parks and Wildlife Service who are frontline firefighters. Just over a year ago, a civilian police employee was murdered outside his workplace for no reason other than that he worked for the police. The workers who were the first responders to that incident and who bravely prevented further loss of life were special constables. They are the same people who provide security to this building, and they are PSA members. Despite the risks inherent in their work, neither the victim nor the special constables have the same exemptions as other emergency service personnel.

Much remains to be done to wind back the harsh and unnecessary changes made in 2012 to workers compensation in New South Wales. A step in the right direction would be to recognise and acknowledge the dangers and risks faced by our members in providing essential frontline public services and to extend to them the same exemptions granted to other emergency service employees. On behalf of the members that I represent, I invite this Committee to conduct inspections of Long Bay or Goulburn prison. I invite this Committee to inspect Cobham juvenile facility. I also invite this Committee to inspect our members conducting back-burning operations at the nearby national parks. Other issues worthy of consideration of this review are highlighted by the experience of Ms McGookin, who is with me today. I will hand over to her. Thank you.

Ms McGOOKIN: In April 2015 I was on my way home from work when I made a regular visit to the bank. I tripped and fell, sustaining a dislocation of my right shoulder, a fracture of my right shoulder and damage to my tendons. I also suffered shock. I was taken to hospital by ambulance. Today I have very limited use of my shoulder. I have not had surgery but I have had extensive physiotherapy. I now suffer a lot of pins and needles in my right shoulder. At the time, I was not able to lodge a workers' comp claim because journey coverage has changed now and it does not include any break in the journey. I had 10 months off at that time. I used up all my long service leave, my sick leave, my recreational leave and withdrew all my super. While I was

off work, I did not hear from my employer until I was off six months. They rang and asked when I would be coming back. The conversation was, "You are coming back to work and you will not need a return to work plan, will you?" February 2016, 10 months after being off, I thought I would try returning to work. My doctor recommended two days a week and I thought, in all fairness, I would try to do three and I could get a reasonable amount of work done during those three days.

My return to work did not go well. As soon as I arrived back to work I was harassed and bullied. At the first meeting with my supervisor I told them that I had a medical clearance to work three days a week and could do my normal field days, and he refused to allow me to do that. He said, "No, you cannot do that sort of work until you are working full-time", and until he knew I was capable of doing that work. He then advised me that I would be treated differently because my injury was not related to work and he did not have to accommodate me. I was also advised by him that if I was not able to return to full-time duties within three months, I had to make some decisions around my job. This is very confusing for me. I was not aware of the policy changes at that time, or if there were any. I could not believe they even said that to me. It was very, very confusing, so I took it as a threat that I would lose my job.

I had regular return-to-work meetings which were frightful every time. The return-to-work officer was not accommodating in any way and really did not listen to what I had to contribute to the meetings. I did put in a grievance about my treatment and requested a change of management, and that has not happened. I finally managed to get a case load, but only because I fought and questioned and queried every step of the way. I now have a work-related psychological injury, but I have not put in a workers' comp claim for that yet. I do not sleep and I get migraines, but I am very discouraged because I do not want to put myself through unnecessary grief and stress because I do not think I would get workers' comp. I am not sure what will happen with work. I might leave. I will just have to see what happens. I am still three days a week, but the whole thing has probably cost me around $170,000. That is not including medical bills, my used-up super, my recreational leave, my sick leave, and my long service leave. I have nothing—no compensation at all.

The CHAIR: Thank you for sharing that with us.

The Hon. LYNDA VOLTZ: I have a question for the Police Association and the Fire Brigade Employees Union. Your unions were exempt from the cuts to this scheme, but despite that you are still getting medical coverage and payments, the Auditor-General's report found that there was a downward trend in claims within police of 1.7 per cent, and within the fire brigade from 415 to 196. Could you outline to the Committee the difference between still getting the payments that you receive and what has actually made the difference to decreasing compensation claims and those figures that the Auditor-General presents to us?

Mr REMFREY: In our case, there has been a lot of work, as Kirsty said in her opening statement, with respect to programs designed to prevent injuries from occurring, and also to treat those injuries in a much more expeditious way than perhaps was the case in the past and getting the people back to work, so reducing the duration of the claim. There are probably 51 different programs that the Government has funded, which we are really pleased about. It has been a cooperative arrangement between us and NSW Police in the preventative space, and we attribute the reduction in workers' compensation claims and costs to those programs. The one that we highlighted in the submission was a reconditioning program, so physical injuries, for example. They took the model of what happens in an National Rugby League [NRL] game, and a couple of the people that run these programs work for the NRL clubs in their spare time.

In the NRL, if we someone come off the field with an injury, they are immediately treated. They are not sent off to wait for an approval from an insurer three weeks later, then go to a doctor several months later. They are immediately treated. That is the concept that has been put in place for the physical injuries. Not only is that getting, we think, significant success, it has buy-in with our members who want to get back to the work environment that they joined and get over the physical injuries quickly. Obviously that is not just a workplace issue. Those physical injuries impact on their private life, their sporting life and a range of other things. It also has a massive effect on secondary psychological injuries, so the quicker we can get people fixed up physically, the less chance there is of having problems from a secondary psychological injury perspective, which is a major problem in policing, as you can appreciate. That is working extremely well.

From discussions that we are having as we speak with NSW Police, we are hoping to introduce similar conceptual arrangements with psychological injuries. Early treatment, not related necessarily to a workers' comp claim, getting people back, doing what they joined the police to do, but in a safe environment. It is proving to be very successful. That is one of a myriad of programs that we have jointly agreed on and it is working extremely well. That is what we have talked about—spending a little bit of money at the front, saving a lot of money at the back, if you want to look at it from a financial perspective. If you want to look at it from a human perspective, it is much more significant.

Mr SULLIVAN: I did miss in my initial statement an apology from me with respect to my semi-unshaven appearance, so my apologies to the Committee.

The CHAIR: Did not notice that.

The Hon. LYNDA VOLTZ: We did not notice.

Mr SULLIVAN: I am participating in Movember again this year.

Mr DAVID SHOEBRIDGE: We are glad we held it early.

Mr SULLIVAN: If I understand the question for firefighters in relation to jobs claims over that same period, even with an exemption, I suspect that it is probably due to other factors within the occupation and the culture. Whilst the workers' comp changes were occurring across the workforces across the State, at the same time Fire and Rescue were also implementing other changes within the job, which included starting to sack firefighters who were medically unfit, which had a fairly large culture change within the industry and put a lot of pressure on people to start to change how they report and what they report with respect to injuries. We have got that. There are several of these factors that are happening separate to workers' compensation legislation within our occupation. Another is that there is a commitment on both sides—the union and the fire brigade—at the moment to negotiate a health and fitness assessment process as well. There are these things that are filtering into the minds of firefighters and we are trying to, again, get our workforces healthier and fitter and more knowledgeable about their health and that type of thing. I suspect that we are seeing a change in those figures probably unrelated to the workers' comp changes. That would be my view.

The Hon. LYNDA VOLTZ: Essentially the changes are not related only to cutting benefits and medical procedures after two years? Perhaps, Claire, you would like to elucidate.

Ms PULLEN: In my experience, dealing individually with the members who are going through making a workers' comp claim, but generally at the policy level with the employer as well, it is a policy change, or a program introduction at the employer level that is making the difference. In my experience with assisting these members, the employer is doing a better job of making individual adjustments for firefighters. That is particularly difficult for us. Without wanting to sound disrespectful, a clerk can go to work with a cold, but a firefighter cannot put on a breathing apparatus if they have a cold. What we have been able to do, working closely with the employer, is make adjustments around that kind of injury and return to work. It is happening at a lower level than legislative or benefit; it is policy or procedure, if you will. We are negotiating through that.

Mr SULLIVAN: Can I go to that quickly. Notwithstanding the changes to workers' compensation benefits for people across the workforces, what we are still seeing is the behaviour of insurance companies within the workers' comp scheme and the pressure that they are putting on workers who are involved, so even though firefighters are exempt from the majority of those laws, the members—firefighters and union members—who are going through the workers' comp system are still subject to the pressures that we are seeing from the insurers. I would imagine that would have an impact on that as well.

The Hon. DANIEL MOOKHEY: That is a wonderful segue to my question. Starting perhaps with the firefighters and moving across, could you tell us, in your opinion and from your interactions with the scheme agents and with the insurers, whether or not the manner in which they exercise their powers are consistent with best practice return to health of affected claimants or whether or not the manner in which they exercise their powers is perhaps motivated by things other than return to health? Can you give us a view as to how you think the scheme agents function—whether or not they act in good faith, whether or not they apply their powers appropriately with return to health?

Ms PULLEN: Without speculating about why it might be happening, the engagement with our members indicates that engaging with the insurers is not a good experience. I am tested on this but I understand that some of the submissions from other parties talked about the rate of rejection of claims by the insurer, which are then upheld on appeal—whatever the process is that they go through—is quite high, and certainly members have communicated to me a view that insurers reject claims or parts of claims on a commercial basis, taking a punt, essentially, that the worker will give up and go away. We see a range of secondary psychological injuries and also, for our members with post-traumatic stress disorder [PTSD], the process of dealing with the insurer is traumatic, in a way, entirely separate to the injury, but I cannot say that our members experience the insurers having any comprehension or even compassion around dealing with someone with those kinds of injuries.

Ms MEMBRENO: I would probably have to agree with Claire in that respect, particularly regarding the psychological injuries. We do have a number of injuries that, in our view, are unreasonably declined. Putting people who already have a psychological illness through a disputed process where they have to engage lawyers and seek assistance from the association puts a lot more pressure and a lot more stress on them. They do not

have access to the treatment and the services that they need immediately because of the cost associated—there is a limit on what they can get through their GP. So they do become probably more unwell through that period.

Our success rate through our solicitors is obviously quite high in regards to overturning a lot of those dispute claims, and you would have read throughout our submission in regards to the presumptive psychological assessments that we are seeking for psychological injuries. Just on the nature of the duties and what they are exposed to on a daily basis, we say that emergency service workers should not have to prove what they see every single day; it should just be given as to what they may be suffering from. But that needs to come with a really supportive psychological framework as well. So it is not just about the benefits in saying you have a psychological injury; it is about early intervention, it is about getting the treatment for them upfront and having that supportive workplace.

From the insurers' perspective—and we highlight this a little bit in our submission—we probably do not see them having a very active role in the return to work space; there are a lot of decisions in terms of suitable duties or the lack of suitable duties, really just being the employer's decision, and we have really tried to engage the insurance company in trying to assist with the modification of jobs, trying to get people back to the workplace in workplaces where they are saying, "Sorry, we don't have anything for you". We probably see that the insurer needs to play a greater role in that respect, not so much a focus on sending them for an independent assessment, paying them the weeklies and the medicals; it is also about engaging them in the workplace and putting a bit more pressure on the employer to modify jobs and get them suitable positions, not just out in the back office but actually doing meaningful duties that are going to assist the other officers that are there in the workplace.

Mr LITTLE: Certainly from our experience, obviously we have a large and diverse range of, if you like, individual agencies—my experience would be that it is an area where if Government took a whole-of-government approach and coordinated proper return to work and introduced corporate policy, particularly similar to what we see in the police, which I am quite familiar with, and less so with the Fire Brigade. But the resilience training and the programs they have in place at police are first-class and excellent, and they are supported by the employer. Obviously that would go a long way to reducing workplace injuries.

As far as return to work goes, I find in the general public service there is always resistance, unfortunately. You have heard from Ms McGookin here that there is resistance by the employer to actively help employees recover at work. We all know that the best place for employees to recover is at work with the support of their peers, no matter what industry, rather than having them sit at home and then lead to secondary injuries, particularly psychological injuries that, unfortunately, as Mc Gookin has just said, can arise. You would actually save money if you had a proactive whole-of-government approach and good corporate policy in that particular area. Why would you want injured workers sitting at home being paid by lifting your insurance bills when they can actively be deployed just for a period and supported?

We have just heard the example, and I know, with the sports approach to recovery at work. Often, prison officers, for example, have a huge rate of injury and that is reflected in their sick leave because they do not claim workers compensation, particularly for short periods, because if they do, and the way that they work out the average weekly earnings, they are penalised. It is then reflected in the higher rates of absenteeism. It just gets shifted.

Mr DAVID SHOEBRIDGE: Psychological injuries, particularly for first responders, can be extremely common and extremely distressing and probably are not being dealt with as they should. Ms Membreno, you are proposing that there be a presumption that if a police officer suffers from a psychological injury it is work-related. How would that benefit?

Ms MEMBRENO: It would only benefit in the fact that they will not have to go through the disputed appeal process. Prior to the dispute even occurring, 90 per cent of our members phone us when the investigator first rings them. So they have put in what is called the P902 or the workers comp certificate, and the first thing they do is get a phone call, they have gone off, they are really distressed—either they have seen something or it is a build-up, it is that snowball effect, whatever it might be—and the first contact they have is from an insurance company investigator who wants to come and speak with them.

Mr DAVID SHOEBRIDGE: Just stopping you there. If the first contact was from a doctor or an immediate provision of support, just stopping right there, that would be an improvement in the system, would it not?

Ms MEMBRENO: It would be. There is a three-point contact, and this is the difficulty with officers who have a psychological injury. There may have been five people that could have been in touch with them before that—the case manager, the injury management adviser, somebody else—but the person that sticks in

their mind, unfortunately, because of the distressing nature of what they are being asked or the language that is being used, "We want to come and speak to you. We want a statement", those sorts of things probably do distress officers, and that is a process that for a claim to be assessed they do need to go through and demonstrate, obviously, what they have been through.

What we are proposing is that whilst there would need to be some level of understanding as to what their claim would be about, which is generally what is in the initial notification, if it was accepted from day one that they are suffering from a psychological injury, they are an emergency service worker, they have had 15 years in the cops, this is what they have probably been exposed to, whether evidence or not, our view is that if there was a presumption that most emergency service workers would be suffering some type of psychological injury, the first call should really be "Here is the immediate treatment and assistance we can provide you because we know that you are distressed, you are at home", not necessarily an interview-type arrangement questioning them about what has occurred but more just trying to say, "We understand what has occurred", or "We have some level of understanding and appreciation, but let's try and make you better. Let's get you early intervention and immediate treatment and assistance".

Mr DAVID SHOEBRIDGE: And "Let's not make you put a 30-page statement together explaining all the horrors you've seen over the last 15 years".

Ms MEMBRENO: It is extremely distressing.

Ms PULLEN: I might pick up on that last point. Speaking to our members about their workers comp claims is inherently distressing for them because it is the snowball effect of "You've been doing this for 15 years", and they will often talk about the last traumatic event, but then will start talking about all the trauma that has led to that point. What our members are asked to do, essentially, when a claim is contested or when the insurer rejects the claim initially, is relay every single one of those events over and over and over. What happens then is they ring me up, and Sally, and speak to us in very distressed circumstances, saying, "I've just been to see an insurance company doctor for seven hours and they grilled me"—if you will excuse me being graphic—"about the burnt babies and the traumatic amputations and the heads that were separate from the body at the car accident, and then they came out and said I was fine".

Not only are they experiencing the trauma, they are having to relive it for their own doctors, on the condition that their own doctors are up to standard in terms of dealing with that, but they are actually having their own psychological state questioned again by the insurer saying "I fundamentally do not believe that you are unwell." It is an appalling position to put someone in, and the delays in having that dealt with mean that they ruminate on this. Some of our members can go 12 or14 months from when the insurance company rejects their claim, and when, in the main, most of these are won. During that time when they are using all their own leave, their own sick leave, recreation leave, annual leave or long service leave, they often have no connection with their workplace, no-one calling to check in and see how they are going, someone is questioning whether or not they are sick. The delay in that process is absolutely fatal to them coming back to work in some cases.

Mr DAVID SHOEBRIDGE: Or if they are sick, whether it is work-related?

Ms PULLEN: Indeed. One particular member who comes to mind whose own doctor diagnosed him with post traumatic stress, he served 15 years as a firefighter and is an entirely reasonable diagnoses in my view. The insurance company's doctor said, "No, it's something else. It's a borderline personality disorder." And then in the end, of course, we won the case and it was found that he did have PTSD. But during that time he was asked to relive not only the traumatic events of 15 years as a firefighter but also a range of other things that had happened to him as a child in the course of the insurance company trying to find a reason that they did not have to pay the claim.

Mr DAVID SHOEBRIDGE: It is not the 15 years of those traumatic incidents, it must be something related to a problem in fourth class?

Ms PULLEN: That is right.

Mr DAVID SHOEBRIDGE: Do you find that same searching for alternate rationales happening in the police?

Ms MEMBRENO: We do. And there is always a concern when they do start to probe about one's childhood, and obviously pre-existing psychological injury. The biggest difficulty is that when they first present themselves they think it is something that happened yesterday, but they have just had 25 years of exposure and there is a heavy focus on "What happened the workplace yesterday?" And what happened in the workplace yesterday might have been a silly blow up with a colleague when, in actual fact, the symptoms have probably been there for the past eight years.

Mr DAVID SHOEBRIDGE: That would not be uncommon?

Ms MEMBRENO: Absolutely not.

Mr DAVID SHOEBRIDGE: If somebody is decompensating at work, they have not had their initial diagnoses dealt with, they might behave with a very short temper or very poorly when they are being criticised?

Ms MEMBRENO: Absolutely. And performance issues, I guess you have probably hit the nail on the head there as well. People who are probably not performing or are very much going into their shell and not being themselves and behaving very differently to what they ordinarily would in the workplace can sometimes be the 25 years of exposure that they have had, and the fact that they are trying to hide their injury and their suffering inside, that it comes out in a different way. That is where we get section 11A issues. They end up being won in the end but unfortunately on the occasions we are 12 months down the track with a lack of treatment, usually a lack of recovery at work. So things compound.

Mr DAVID SHOEBRIDGE: Indeed, it is not just a neutral process, is it, contesting the history and the diagnoses, it can actually seriously aggravate and entrench the condition, can it not?

Ms MEMBRENO: It makes them worse.

Mr DAVID SHOEBRIDGE: Your proposal was based upon loosely something that exists in some Canadian Provinces, Alberta and Ontario? Is that right? Could you either expand on that now or maybe give us some detail on notice about how it works there?

Ms MEMBRENO: Yes, we can definitely take that on notice.

Mr DAVID SHOEBRIDGE: The key point here is, someone who has been working for a significant period of time as a first responder, if they present with a psychological injury they should be believed unless there is a compelling reason not to? Is that right?

Mr REMFREY: That is the presumptive approach. However, we want to take it one step further, and that is to introduce the same arrangements that are working successfully with physical injuries and say, putting aside whether the person is genuinely ill—assuming that they are and do not worry too much about whether it was caused by work or otherwise—the focus should be on getting them well. Early intervention getting them back to work as quickly as possible, but more importantly, getting them back to health is where we want to be with the system. Part of the proposal to which you alluded in terms of the Montreal experience ,and that is happening at the extreme end around suicides, is to have a system that is not predicated on a decision about whether it is work-related or non-work related, it is an individual who is ill—

Mr DAVID SHOEBRIDGE: It is wellness focussed.

Mr REMFREY: Let us go and give them the assistance they might need at a very early stage in the process and get away from the stigma of mental health which is a major problem not only in policing and other emergency services but in the community generally.

Mr DAVID SHOEBRIDGE: If somebody is suffering from post traumatic stress disorder or even a very severe anxiety disorder one of the most destructive things that can happen to them in the course of the investigation of their worker's compensation claim is covert surveillance. Do any of your members have experience of that?

Mr SULLIVAN: Certainly we do.

Ms PULLEN: Yes, they do and our submission goes to this very briefly. We had a member contact us about this specifically. I might briefly go through his circumstances. He was actually surveilled on an overseas holiday. He only found out about it because the insurance company gave the wrong address to the surveillance company in the Philippines. The owner of that particular house complained to the Philippine police and they eventually, after speaking to the insurance company, said "Oh you are meant to be down the road at that hotel looking after that person." He ended up, I think, in hospital certainly in emergency care because of his blood pressure and the anxiety that this caused. He was a firefighter who was retired and one his injuries was post traumatic stress disorder.

I cannot see any reason that you should presume that an injured worker is lying. I cannot speak for other industries but certainly what you can see with our return to work programs over the past couple of years is that firefighters want to get back to work. They do not want to be sitting at home with no-one calling them, leaving a connection to a job that they have been in for 30 years, in some cases, and care about very deeply. Unless there is some reason to assume that someone is defrauding the insurer there is no reason to conduct

surveillance of them. If you have proper preventative care and good triage and get them back to work you will not need to do it.

Mr DAVID SHOEBRIDGE: Do you agree with that?

Ms MEMBRENO: Yes, we are of the same opinion in terms of claims. Unless there is some evidence that there is a fraudulent claim then there would be no reason to conduct surveillance on our members. We have in the past had members complain of surveillance. There is a bit of confusion in terms of which insurer it might be. Obviously we have got other insurance arrangements as well. But our position is very firm.

The Hon. TREVOR KHAN: When you say "which insurer"?

Ms MEMBRENO: There is the workers compensation insurer, a superannuation and a total and permanent disability insurer. So at times there has been some confusion about who may be following them.

Mr DAVID SHOEBRIDGE: Who is the person in the car behind the tinted windows following them?

Ms MEMBRENO: What insurance company is it? But if we are focussing from a workers compensation perspective, our position is very clear that unless there is some evidence of some type of fraudulent claim there is no space for surveillance.

The CHAIR: What is the criteria now? Is it just a standard operating procedure for them or is there evidence of something else?

Ms MEMBRENO: We are advised by the insurance company which is EML in our case, that it is on rare occasions that they conduct it. There has been a new code of conduct introduced by that particular insurance company regarding minors and family members and things like that because there were some issues some years ago in respect to some images containing those people which is completely inappropriate and very distressing for our members. We operate in a space where with a psychological injury they are completely paranoid, concerned to leave their house as it is. When they do leave their house they are already wondering who is following them behind because that is how they are trained as a police officer.

The CHAIR: What triggers the decision to conduct surveillance?

Mr DAVID SHOEBRIDGE: Whenever the insurer wants to.

The CHAIR: I am asking the witness, if you do not mind Mr David Shoebridge.

Ms MEMBRENO: Yes, we are not entirely clear on exactly what the threshold is as to when they may conduct that. We have asked EML directly as to what are their clear parameters on when that might be the case and they advise us it is in rare circumstances or when they are obviously tipped off by somebody in respect of some claim either being fraudulent or there is some sort of contrary evidence from a neighbour or somebody across the street, who would know? That sort of information I am not absolutely concrete on.

Mr REMFREY: More fundamentally, if I may, what is the point of conducting a surveillance of someone with a psychological injury? If they are outside mowing the lawns or doing exercise it is probably something that the doctors have suggested is a good idea. It does not achieve anything.

The Hon. LYNDA VOLTZ: More importantly, I think, is for police officers and probably the same for prison officers, the idea that you are being surveilled when you are dealing with hardened criminals and some of these not very pretty—

The Hon. TREVOR KHAN: That is what I was mumbling before. That was the ground for concern.

The Hon. LYNDA VOLTZ: Yes. I assume, Mr Little, that prison officers are getting the same treatment even though they are covered by a different scheme?

Mr LITTLE: It is slightly even worse than that for our members. I have got some information from a member, because of the fact that they are not exempt in terms of ongoing medical expenses, who suffered severe facial injuries during a riot at Silverwater. He watched his mate bashed to death in the same riot. He requires ongoing work to his teeth, basically, he has to get them replaced every few years. That is not covered anymore. He is out of pocket now by $70,000. He has huge issues. It has caused a great deal of stress to his marriage. He is still working because he cannot afford not to work. His particular plight is an issue that we raised with a former Minister. But in many cases it is even worse—with surveillance and things like that, absolutely. We have had members who have had to be relocated after members of outlawed motorcycle gangs have tried to intimidate them and so forth. We have had to relocate them. With the greatest respect to my colleagues at the

witness table, sometimes it is worse because of how they have been treated. Particularly when it comes to ongoing care, they do not get it or if they do get it they have to pay for it.

Mr DAVID SHOEBRIDGE: Having someone sit on the street outside their house with tinted windows filming them takes on a whole new perspective for someone in the areas of law enforcement, police or prisons.

The Hon. TREVOR KHAN: I do not think you have to labour the point, Mr Shoebridge. I think we really do get it.

Mr DAVID SHOEBRIDGE: Well, nothing has happened for five years.

Mr REMFREY: There is probably another dimension to that at the moment for police officers in particular—it is the current threat environment. Police officers are the target. It is the intelligence that we have. So you can imagine someone who is already suffering psychological injury. We have had this in the past where someone was involved in that sort of work in police work dealing with very serious criminals. The paranoia that would emerge on seeing someone following them in the current threat environment is taken to a whole new level. We are working with the insurer to minimise it. I just do not understand the concept of doing surveillance on someone with a psychological injury. It is not like a back injury where you can catch someone out carrying a bunch of spuds down the street. It does not make any sense.

The CHAIR: Did you say the Public Service Association [PSA] covers the Rural Fire Service [RFS]?

Mr LITTLE: Yes, we do.

The CHAIR: And they often work alongside the general fire brigades. So there are two different workers compensation schemes going.

Mr LITTLE: Yes. That is right.

The CHAIR: How does that affect the relationships?

Mr LITTLE: I would perhaps rather let my colleague answer that. As far as we are concerned, often the members of the Rural Fire Service obviously oversee a lot of the volunteer fire fighters. Certainly we have specialist units within the RFS. In national parks, for example, they do what is called remote area fire fighting where they will often get winched in in a helicopter in a wildfire with a can of petrol on their back and put in back-burns and then tap it out. Again, they are scratching their heads: "Why are we treated differently?" Rural Fire have specialist units. Often they tend to do more coordinating of volunteers but they do conduct some frontline fire fighting and are obviously involved in fire mitigation. As far as their relationship goes, I think they act professionally in protection of the community but I suppose in the cold light of day they shake their heads and wonder, "Why has government forgotten us?"

The CHAIR: What do the volunteers fall under? Are they insured separately?

Mr LITTLE: I would probably have to take that on notice. I am not sure. I think they do receive some type of protection but they are not employees so it would be slightly different.

The CHAIR: Could you come back to us on that? It would be interesting to know.

Mr LITTLE: Yes, absolutely. I will take it on notice.

Mr DAVID SHOEBRIDGE: Some of them are covered while fire fighting, during the actual process of fire fighting, but not getting to the fire fighting or moving back from the fire fighting, so it is actually more complex, is it not?

Mr LITTLE: And back-burning is an area of contention. We had five members killed in a tragedy at Lane Cove not that long ago. I had to personally deal with those members. Again I had to go and see Jamie Shaw spend a year in a lanolin bath after that. Under these current regimes god knows where they would be.

The Hon. LYNDA VOLTZ: And of course the changes to journey claims would impact on that as well, of course, as we have seen there.

Mr LITTLE: Absolutely.

The Hon. LYNDA VOLTZ: With any emergency service worker—nurses, police, fire brigade and so on—it is shift work. They do not know what time of day, night or morning they will be out until.

Mr LITTLE: Yes, that is right, even in areas like disabilities and child protection. One of our members was murdered up in Lismore not that long ago by someone obviously suffering mental health issues. Again they are issues that are very real and again they want to know why they are being treated differently.

The CHAIR: Your submission notes concerns with the calculation of injured workers' pre-injury average weekly earnings [PIAWE]. First of all, could you please explain for the benefit of the Committee how it is calculated now and how you would propose that be resolved? Because I do not understand it.

Mr DAVID SHOEBRIDGE: Good luck!

Mr LITTLE: I will do my best—and thanks for the question.

The CHAIR: You are the first person I could put it to.

Mr LITTLE: My understanding is it generally affects a person if they are injured for a short period of time. It is very common particularly in the jails and elsewhere because if they get belted, for want of a better term, or something like that on the job or injured on the job they are often back to work because they are encouraged to get back to work. They might be off for a couple of days and then they come back to work. If they then end up doing a couple of shifts which involve penalty rates, the way it then works is that it is calculated on the income from the year before and averaged over a week. So if the person ends up earning more in that week, it is reduced, so they lose the money that they have earnt during an overtime shift.

Obviously if they realised that at the time they probably would not work that, but obviously they are directed to do that—that is the situation in the jails at the moment because they are so short staffed. They are told, "You may have to work an extra shift because you are on a security post." They do that and they get overtime, but when the pay is done they are told, "Your average weekly earnings based on the year before chopped up week by week is this much," so that overtime is deducted for that week. I think that is pretty well right. I know it is complex. It is slightly different for the police because again they are exempted, so they calculate it and get the full rate, as I understand it. Our members get 95 per cent for zero to 13 weeks then it drops to 80 per cent after 14 weeks, so that is after a relatively short period.[2]

The CHAIR: Are you saying that if they are off work on compensation and they usually worked overtime—

Mr LITTLE: That is in a short period. Say they are off on workers compensation for three days, they come back to work for two or three days and one of those is night shift or includes overtime because they have been asked to do a double shift or whatever the case may be, for that week they have earnt, let's say, $2,000, but because of the way the calculation is done their normal average weekly earnings is $1,000 based on that year, they are told, "Sorry, but you were off on workers compensation for three days so we are only going to pay you $1,000."

The CHAIR: Including the two days you worked?

Mr LITTLE: Yes. They have to be penalised.

Mr DAVID SHOEBRIDGE: In other words, the net effect is that you do not get paid for your days off on compensation.

Mr LITTLE: I suppose that is one way of looking at it.

The CHAIR: I have worked in the public service. They are pretty quick to work out not to do it. Are you saying they are compelled to do overtime?

Mr LITTLE: I would suggest that perhaps the culture would have changed but I know that was originally a very hot issue. A lot of people did not realise that they would be caught that way.

The CHAIR: What would you recommend to change it?

Mr LITTLE: They should not be penalised by virtue of the fact that they are on workers compensation.

The CHAIR: Breaking down just those three days and averaging them.

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[2] Correspondence was received from Mr Stewart Little, General Secrtary, Public Service Association, clarifying his evidence concerning PIAWE:
A worker injured and unable to work will receive a compensation payment for the following seven-day period of an amount that is either 95 per cent of their PIAWE or the maximum weekly compensation amount, whichever is lesser. The problem arises when the worker is away from work for less than a week, as the legislation effectively creates a cap on the amount that can be earned in that seven-day period so that it cannot be greater than the compensation amount.

Mr DAVID SHOEBRIDGE: It is a very simple solution, is it not? If you have been off for part of a week, for that part of a week you are compensated on a daily rate as opposed to a weekly rate—problem solved.

Mr LITTLE: That is right—work it out on a day by day basis as opposed to a week by week basis.

The CHAIR: Is this a big problem?

Mr LITTLE: I would have to look into it more but it is certainly something that exists. It has definitely been relayed to us as a major issue within the prison system. Again our members see the way accountants work as strange and they do not understand.

Mr DAVID SHOEBRIDGE: Compensation claims are more often shorter rather than longer.

Mr LITTLE: Yes. They are more prevalent.

Mr DAVID SHOEBRIDGE: It is more common to have one, two, three or four days off, so it is probably a more common problem than not.

Mr LITTLE: And the problem is that as people realise that they are not going to put in for workers compensation. They are not going to report injuries. They are not going to report situations, which can obviously lead to more dangerous situations. They are going to take sick leave. That is what is going to happen because at the end of the day they do not want to be penalised.

The CHAIR: Thank you for that. I think I understand it.

The Hon. DANIEL MOOKHEY: Broadly speaking, training a police officer or a fire fighter is not a cheap exercise. So presumably if a person is not returned to their suitable duties or to the duties they perform at their peak capacity, essentially we have spent a lot of money training people and are using them at a far lower level than they are capable of, thereby diminishing the return available to the community at large from their skill and expertise—is that right?

Ms MEMBRENO: Yes, absolutely.

The Hon. DANIEL MOOKHEY: Can you tell us more about that?

Ms MEMBRENO: Our position at the present moment—and I indicated this earlier—is that there is no point returning an officer back to unsuitable duties if they are not meaningful duties. With a detective sergeant, do not make him just sit there and answer phones. He could work on briefs. There are a number of things that a detective sergeant with a physical injury, for example, could do. The only thing that they probably cannot do is go out and lock up the crook or go to a warrant search, but there are a number of other functions and core duties that that person could do.

There are some restrictive policies in place at the moment that prohibit them having a firearm if they have an injury. They cannot undertake their retraining to ensure that they keep their skills and their defence tactics [DEFTAC] up to speed, which are obviously their physical requirements to have their arms and appointments. Our position is that, in order to get some return on investment and to keep people involved, keep people in meaningful work. These are people who want to continue their careers in the NSW Police. They do not necessarily want to leave but they want to be undertaking meaningful work, and equivalent to what they are trained and skilled to do. So that is the policy that we are really pushing up on. It has been supported by the Audit Office.

The Hon. DANIEL MOOKHEY: Why is it not happening?

Mr REMFREY: There are a lot of reasons. It is cultural. But we have now had a breakthrough. The deputy commissioner is on side. We expect that there will be a change to the deployment policy that will open up a range of not so much positions but modifying positions to accommodate injured officers. The Police Force has had a long history of doing so in some situations, but not all. For example, we had a police prosecutor who is in a wheelchair. We have had individuals who were looked after, as it were, properly in the past but that has not been universal. We need it to be

Mr DAVID SHOEBRIDGE: The fact that you can remember the individuals and name them emphasises there is a—

The Hon. DANIEL MOOKHEY: Novelty.

Mr DAVID SHOEBRIDGE: Yes.

The Hon. DANIEL MOOKHEY: What about the fire brigades?

The Hon. LYNDA VOLTZ: I just want to ask this question. If it has worked so successfully in the Police, why is there such a resistance to it in Corrective Services?

Mr LITTLE: That is an outstanding question. I think it is a probably question that is best asked of the Commissioner of Corrective Services.

The Hon. LYNDA VOLTZ: I am still waiting for responses to the last list of questions I sent.

Mr LITTLE: Yes.

The Hon. DANIEL MOOKHEY: Is it right for us to conclude that there is a huge aspect of discretion that is available for the agency?

Mr LITTLE: There is resistance to it because it is a cultural thing. The agency tends to—again, we heard from Mary McGookin before that, unfortunately, if you end up injured, you end up being, "Oh well, you can't do the full range of duties", so it is a problem.

The Hon. LYNDA VOLTZ: But if we could get it into Corrective Services, we could probably see the downward trend that we are seeing in the Police that is not relying on just cutting benefits and medical expenditure.

Mr LITTLE: Yes, absolutely correct.

Mr REMFREY: In our case, it is also different within the Force. We have moved a long way, but it is nowhere near perfect. We have places that do an extraordinary job and we have places that are still what we would describe as in the Dark Ages, which we need to drag them out of.

The Hon. LYNDA VOLTZ: As you know, I am ex-Army, so I understand that concept all too well.

Ms PULLEN: Our members' skills are highly specialised and they do represent a significant investment by the Government in training them and then deploying them. What we are doing at the employer level—and this is ongoing work; I am not going to pretend that it is done, by any stretch—is bringing it to perhaps a level below legislation and talking about benefits, which are a blunt tool in some cases. We are talking about work adjustments, role adjustments, individual station and zone work with the employer at that kind of level. I cannot speak again for any other group of workers, but firefighters cannot wait to get back to work and in some cases will go back injured, if that is the choice—to go back and exercise those skills and practise their craft. It is that kind of level of work of how you accommodate the individual and what their injury might be. There is some cultural change that needs to happen around the idea that you either have the fully functional übermensch or nothing at an employer level.

Mr DAVID SHOEBRIDGE: Ms Membreno, earlier you were talking about DEFTAC. Do you want to explain what that is?

Ms MEMBRENO: Defensive tactics. It is the training that a police officer has to go through every year in order for their increment to progress. You are exempt if you are injured, but basically it is where you wrestle a person on the ground, you do your handcuffs, you do your baton, you do your oleoresin capsicum [OC] spray, and you do your pistol shoot. There are a whole lot of very physical components—the taser—that you have to meet in order to continue to have your baton, your handcuffs, your firearm, et cetera. What we are proposing is that there needs to be an appreciation that not everybody can be 100 per cent fit and not every position needs you to be 100 per cent fit. There are a number of tasks and functions within the NSW Police Force that you may only have to be 80 per cent fit to do. You might not be able to wrestle somebody on the ground and restrain them with handcuffs, but you might be able to pass the taser training and you might be able to carry a baton and you might be able to pass your pistol shoot. But at the moment they choose that you get nothing or you get everything. There is no between.

Mr DAVID SHOEBRIDGE: And having your appointments taken off you is quite a humiliating process in the NSW Police, is it not?

Ms MEMBRENO: Absolutely. In the current threat environment, where alert is high for police officers, if they are working on the front counter at the station, with or without a front counter screen, those officers are saying, "I feel exposed. I feel naked because I don't have my arms and appointments and I am injured."

Mr DAVID SHOEBRIDGE: Is there a similar type of threshold in Corrective Services and the fire brigades?

Mr LITTLE: With Corrective Services, they are meant to do a yearly shoot because, obviously, many officers in transport carry Glocks and they have shotguns on board the truck. I am not sure if I should be saying

that or not. Obviously, in the towers they carry Rugers and they have to go for annual shoots. They do some defensive tactics as well, slightly different. Certainly that is something they are required to do, depending on where they work and what facility they are in and so forth. It is slightly different in that we have always worked with them to try to identify posts within jails or within transport where they can go, but again there is always that resistance to it. It has often unfortunately been without the threat of industrial action where there has been movement on that.

Ms PULLEN: Very briefly, that is part of the ongoing work that we are doing now with the employer to break down the work of the firefighter into component parts, if you will, at a very broad conceptual level about what everyone needs to do and when. It is not just the initial skills training, which is very important, but like everyone else we have ongoing breathing apparatus [BA] refresher training. We have to do recertifications every year in some of the schools to make sure that they are current. One of the things that my members report back to me that they dislike the most about being off on workers compensation and the delays in the process is that they miss out on their recertifications and they miss out on their retraining.

They say things to me like, "I was trained as a firefighter. I am just sitting here doing nothing and now I am out of my basic life support [BLS] and I can't go and save someone by the side of the road if I'm driving past a car accident." The early engagement and being able to actually reprogram them back into the ongoing training and skill work is something that they report back as very useful in terms of the workers compensation process. Again, it helps at the secondary psychological injuries to have that connection and to feel like they have not been isolated and shunted out of their craft.

The CHAIR: That concludes that part of the evidence. Thank you for coming in today. The Committee very much appreciates your submissions and your evidence. A number of you took questions on notice. The Committee has resolved that answers to question on notice be returned within 21 days. The secretariat will contact you in relation to the questions you have taken on notice. Thank you very much for attending today.

(The witnesses withdrew)

EMMA MAIDEN, Assistant Secretary, Unions NSW, affirmed and examined

MARK MOREY, Secretary, Unions NSW, affirmed and examined

GAIL LAY, Injured Worker for 34 years with the Department of Education, sworn and examined

PETER LAY, Injured Worker, affirmed and examined

BELINDA SCOTT, Injured Worker, affirmed and examined

SHAY DEGUARA, Industrial Officer, Unions NSW, affirmed and examined

The CHAIR: Thank you very much. I invite you to make an opening statement. Mr Morey, I imagine that you want Ms Lay to tell her story. Will that be part of the opening statement?

Mr MOREY: Yes, that will be part of it and Ms Scott as well.

The CHAIR: That will be fine and then Committee members will have questions.

Mr MOREY: The opening statement for us is that you have obviously gone through the facts and figures. Our position is that the scheme is broken; this scheme has lost the focus of returning injured workers to work. The scheme has actually become an impediment to returning workers to work. Particularly our research has shown with Macquarie University that there has been a cost shifting from the scheme to the individual. The insurers' initial position on many of the claims or most of the claims is to deny them. That means injured workers have to fight to get medical services and medical attention.

The prolonged amount of energy and time taken to actually fight the system means that many of these workers then have a secondary psychological injury that compounds their initial injury which makes it almost impossible for them to return to work. The system is a great business model for the insurance companies. There is no focus in the system anymore returning people to their workplaces. Indeed, the system does not work in harmony with other parts of law enforcement and safety enforcement ensuring that there are not injuries at work and when there are injuries at work there is no onus on the employer to return people to their jobs even in a partial capacity and the fact that it is 100 per cent or nothing to go back to work means that people spend longer and longer periods of time away from work.

The scheme needs to be refocused to actually assist injured workers to return to work as quickly as possible without always having to prove that they have an injury that was legitimately sustained at work; that they have to then pay for their own medical costs in many circumstances currently and in fact the pressure of the system now on those workers, we would say, is actually exacerbating many of the psychological injuries that these people have.

The CHAIR: Ms Lay?

Ms LAY: I have several injuries. I am out of the system. I have been paid out. I taught 16 years in a school where we had significant emotionally disturbed, sexually abused and physically abused children. I loved teaching there. We had a fantastic staff until the end of my time there before I had a breakdown where we had significant problems within the school, significant levels of violence. The department came in and told us not to tell anyone about it at the threat of losing our jobs.

People who stood up like me were bullied, victimised and undermined until the point where I had a breakdown. I then moved to another school. I was extremely sensitised towards child protection issues. In my next school we had significant problems with a particular teacher bullying children, staff and other people. I again spoke out. We had cover-ups; we had cover-ups of sexual abuse between primary school students. I have taken these matters to the Department of Education. I have been through the whole gamut. I had a breakdown due to that.

I went back to my work on a return to work program. When I returned to my workplace my principal was moved to district office. They knew everything that was happening. They failed to tell the relieving principal. I walked back into a workplace with a return to work plan and was told, "Get out in the playground. Fight it out with the other teacher or go out the front and tell her to "f" off." There was no understanding whatsoever of my psychological injury or the suitable duties, what they meant or what was required of me. It did not matter what I said; it was disregarded.

I had a pile of evidence and things to have the case investigated. In the end I went over the heads of all my superiors. I went to the department. They came back to me and made me put my complaints back to the people that were perpetrating the victimisation on the children and allowing children and telling me to let other teachers— "Let her dig the hole a bit deeper so we can get rid of her." They wanted me to put those children at risk. That resulted in me, in the end, having a massive breakdown and not being able to return to work. During

that I also had physical injuries. I was beaten up by a child and hurt my back—a long time ago. I have just had a spinal fusion 10 weeks ago.

I am out of the system. While I was in the system what was perpetrated on me—the words I would use are bullying, vilification, discrimination, unethical and unprofessional behaviours from claims staff management. They continued to harass me. They failed to follow WorkCover guidelines to get me to a particular independent medical examiner [IME] where I was bullied and harassed. I went home and tried to kill myself. I have tried to hang myself, drown myself and I have slashed my wrists—all because of case managers and the lack of oversight. There is no significant oversight about what the insurers are doing to people. There is no oversight when they are found guilty.

I have made that many complaints to my insurer, Allianz TMF. They have found themselves to have done the wrong thing; there is no penalty for anything. I have a book here that apparently did not get to you where I got my file from Allianz where it is documented how they set out to commit fraudulent behaviours to find the particular IME that would write a report. I have the referral from the solicitor to them saying, "We don't think her injury's work-related. The things that happened to her were rather minor". They failed to give that IME the documents to show—my whole 160 pages of documented evidence—they did not give it to him. We did further research on this particular IME. We have found several, probably six or seven cases, where every time this person is used, his evidence is rejected by the court on the basis he is never given the information on which he can make a decision.

Peter and I have both been in the workers compensation system. When I spoke to my son about it last night he phrased it as "endemic institutionalised corruption". So much of the system is self-regulating. There is no one-stop shop where you can go and say, "They did this and this to me." You end up having to go to the Health Care Complaints Commission and the Workers Compensation Commission. You have to have legal knowledge, knowledge of the Medical Practice Act, the Government Information (Public Access) Act and the Health Records and Information Privacy Act. We have been to every department. You get shuffled off. You go to the next one and the next one. We have been to the top of every department. They shuffle it off or, when you give them the evidence in black and white, they say, "There is no substance to your complaint." One person did a 16-page summary of the substance of Peter's complaints and then said, "There is no substance to your complaints."

We have been victimised for making complaints. We have the evidence in black and white. This folder is full of print-outs of the Facebook pages of my case managers. While I was writing to them to say that I had been to a particular independent medical examiner [IME] and had come home wanting to kill myself, they were writing on Facebook that I should be on the "loco" motion or that I am an "f-tard". They were referring not to me in particular but to all workers. The people who write to me saying, "Your health is important," are saying in the background, "Call 1800 Wah Wah Wah," or "Call Dr Sniffle." Every case manager at the legal branch of my insurer has commented on those posts and said, "Do not worry about it. Soon these people will be on the dole." It is absolutely disgraceful. I cannot stress enough how bad this system is when you are in it. Peter and I both have our file notes. We have his file notes from the Workers Compensation Commission and we have mine, and that proves it. When you have claims you can see what they are doing. People think that is what is happening. We can prove it.

Mr DAVID SHOEBRIDGE: Ms Lay, do you want to tender that document?

Ms LAY: Yes, I do.

The CHAIR: Ms Lay, thank you for sharing your personal story. The Committee is not empowered to investigate your specific case.

Ms LAY: I do not want you to.

The CHAIR: We can learn from it and look at the culture and your recommendations and consider the issues you have raised.

Ms LAY: We do not need anyone to fight for us. We just need someone to go to—for example, an ombudsman.

The CHAIR: The Committee has noted that. Thank you for sharing your very personal story. Ms Scott, would you like to make your statement?

Ms SCOTT: I will read my story. I am a permanent appointed teacher with the New South Wales Department of Education. I am extremely good at my job and I love my job. I am an injured worker; I am not an incompetent teacher. I have been the victim of five violent assaults in my workplace. The last assault was in February 2012. Liability was accepted immediately by the Department of Education's insurer, Allianz, and I was

paid workers compensation from February 2012 to October 2013 for a psychological injury and post-traumatic stress disorder. From August 2012 my doctor certified that I was fit for some suitable duties, but none were provided my by my employer and I remained on workers compensation payments for a further 14 months. My first return to work plan was not organised for 15 months after my injury, due to the department restructuring its work health safety section.

I completed two days of the return to work plan, then a motorcycle accident meant I had a medical certificate for three weeks. After three weeks, when my knee was healed, I was informed that the return to work plan could not continue. The insurer work capacity tested me, which was not based on medical evidence. There is no evidence to say what it was based on. I was found fit to work, and workers compensation payments from the insurer ceased in October 2013. For more than four months I tried to communicate with my work health safety officer in the department. I continually asked for assistance, a return to work plan, suitable duties and help. I received no acknowledgement from June 2013 until October 2013. When I finally did get a reply I was told to resign, which is not an option for a tenured teacher. I was also told to apply for transfers, which I did. They were rejected. I was also told to apply for new positions, which was impossible for me without a return to work plan, or to return to Murwillumbah High School, which was in breach of my medical certificate.

In conversations and emails I was advised to use all my personal leave provisions and then take leave without pay. I was told that I had to choose an option or I would be in breach of my employment contract. I applied for a month's leave without pay as I thought a return to work plan would be done by then. It never was and it still has not been. All the above is documented and attached to my affidavit. With no assistance from my employer I found myself some casual teaching work at Southern Cross Distance Education. I was then made a nominated transfer and requested to be moved above establishment level. This was rejected. I lodged an application to resolve a workplace dispute with the Workers Compensation Commission. The department argued that I was in suitable employment, albeit casual and not at comparable salary or conditions. Later, in relation to all my job applications the department claimed that work at the school was unsuitable for me. Recommendations from the Workers Compensation Commission were not followed by the department, so the matter went before an arbitrator. The resulting orders were not followed and a further set of recommendations was made by the Workers Compensation Commission. These were not followed either.

My casual teacher teaching work was removed by my employer once they discovered that I was a workers compensation case on leave without pay, so I took the matter to the Industrial Relations Commission. I resumed work at Southern Cross Distance Education and then the bullying, discrimination and blatant exclusion from vacant teaching positions and breakdown of professional relationships began. I am employed pursuant to an award and believe that under that award I am entitled not only to be provided with work but to be paid. I can be placed above establishment level with the director's signature and continue my career. I have applied for 52 teaching positions since my last assault. All those positions met my medical requirements. I was unsuccessful in all of them. The department has not put me back to work. None of my rejections stated that the position was unsuitable because of my medical restriction. Most of my applications are not acknowledged. Again, in December 2015, my casual work was taken away from me. I was placed on an acute mental health care plan and I have not worked since.

It is a criminal offence under section 49 (1) of the Workplace Injury Management and Workers Compensation Act 1998 to refuse to supply me with suitable duties. I have been forced to take action in the District Court against the New South Wales Department of Education because there is no remedy available for me and the Workers Compensation Commission cannot assist me beyond recommending that my employer comply with the law. The judge in the District Court found I have reasonable cause for action and criticised the department. My case is scheduled to go to trial in March. I am several hundred thousand dollars out of pocket. My name and reputation as a teacher are destroyed. I live in a small rural community and the rumours are rife. I am still an injured worker, with the additional stress of legal costs. I exist on Centrelink payments, despite having three degrees. I am unable to afford adequate medical treatment and I have rapidly deteriorating mental health due to the State's neglect and my employers wilful obstruction by excluding me from work and not providing me with the full salary that I am entitled to. That is my story.

The CHAIR: Ms Scott, thank you for sharing your personal story. The Committee appreciates that.

The Hon. LYNDA VOLTZ: Mr Morey, if the Government cannot meet the return-to-work criteria, how is it going in the private sector?

Mr MOREY: I would have to say it is worse. The information we have, and certainly from our research, which is a Macquarie University research, and the stories we have been told is that people who try to get jobs or return to work to suitable duties or jobs that they are able to do, they just cannot get there, and there is no assistance for them. They are abandoned by the system. One case that I know of is a gentleman who was a

truck driver who injured his back. He wanted to get a job training people to be a truck driver, which would allow him to do that, earn a living, and be able to manage his injuries. The insurance company, or the return-to-work provider, wanted him to get a security guard licence and were forcing him to do that. There is no rhyme or reason to the way in which these providers operate. There is no oversight of the way in which people are treated and there is no obligation on anyone anywhere to deal with these people with any compassion or common sense.

The Hon. DANIEL MOOKHEY: Thank you for your appearance and thank you for sharing your stories. In your submission, you make multiple allusions to a systemic failure—I guess you would describe it—the entire system at various levels. I can understand from the stories how it manifests itself. Of all the different features of the system, which one is the worst and which one should have priority if we are trying to bring some aspect of repair? Should we be concentrating on the income effects, the return-to-work aspects, or the behaviour of the scheme agents? If you can tell us why you think that should have priority would be useful.

Mr MOREY: I think the function of the system or the goal of the system has to shift. It has to be about returning injured workers to work as quickly as possible.

Mr DAVID SHOEBRIDGE: That is meaningful work, not just for one hour?

Mr MOREY: That is right, meaningful work. People have their identity around their work and so that should be what that meaningful work is about. The scheme agents, it is Wild West out there. Basically you are put in a position as an injured worker where you have to fight the bureaucracy, fight the endless circles. There is no adequate complaint process or enforcement process within the system that allows people to make a legitimate complaint, have that investigated quickly, and then have a binding legal decision made, either on their employer or the scheme agents.

Mr LAY: Or the doctors.

Mr MOREY: Or the doctors. As soon as you become an injured worker, you are left to your own devices, basically. The priority in the system is—and we know this from the research—if you get an injured worker back to work quickly, they are more likely to retain ongoing employment, meaningful employment, and if you want to be really harsh about it, it saves the State money. But the system is not set up to do that. The system takes the people who are injured and actually makes it harder for them to get back to work. We have spent probably the last 16 years advocating for reform of the system, ways of fixing the system. We are here today to say that that system is broken. It does not work.

The Hon. DANIEL MOOKHEY: As you rightly put it, if the culture of the system is be return to health than return to work, is the best way to achieve that by putting in place more forms of contestability of scaring major powers? Is the best way to achieve that to create more proactive obligations on people? Do you have a view as to the type of reform agenda that is needed here?

Mr MOREY: It is a significant reform agenda for which we are advocating. The way in which the system is structured is that the initial position the insurers take is to deny a claim. That is the starting point. From there, it is about disproving the position that injured workers are actually put in. There needs to be a reversal of that. There needs to be a way in which—while those claims are being processed—the return to work aspect of it is actually put in place, that there are initial processes and services put in place that allow those people to go back to work to access the appropriate medical treatment, the appropriate return to work programs while those cases are actually being investigated. We are basically saying, "You are not injured. You have got to prove it", and, "We will not give you any assistance whatsoever to come back to your workplace." That is the problem with the system. The fundamental basis on which it operates is you now have to justify why you should be allowed back to work.

Mr DEGUARA: Mr Mookhey, the Police Association talked this morning about front-ending things. You have to get into the gate to have your liability accepted. Then every medical thing has to be approved, getting rehab services has to be approved, the choice of rehab has to be approved. It is a pile of gates that are put up for injured workers. The example the Police Association provided this morning about having an independent group working for you would be a good way of changing things.

The Hon. DANIEL MOOKHEY: Feel free Ms Lay and Mr Lay, to weigh in on this if you wish to. Do you have a view that injured workers are capable of engaging meaningfully with some aspect of the power balance—with an insurance company that has tremendous power—or is it the case that the resources of the insurance company, when compared with the resources available to the worker, are so out of kilter that whatever rights people currently have, they cannot get meaningful access?

Mr LAY: Can I comment on that?

The Hon. DANIEL MOOKHEY: Please.

Mr LAY: Because I have first-hand—Gail and myself—

Ms LAY: He has had 28 assessments.

Mr LAY: You can fight the insurers, but you have to fight them up-front and you have to give them the guidelines. Once you start quoting the guidelines, they cannot handle it because they do not know what the guidelines are. It has become a system of normal practice, and that is it. That is how they do it. Everything is just the way it has been done for years and years. Nobody knows. Once you bring the guidelines into it, the insurer has to start following them. We had the general manager at WorkCover help us at one stage by telling the insurer that they had to follow the guidelines.

The Hon. DANIEL MOOKHEY: Am I to infer from that that their default position is not to follow the guidelines—

Mr LAY: Yes.

Ms LAY: Yes.

The Hon. DANIEL MOOKHEY: —and therefore the onus is on you?

Ms LAY: I had four months in my claim when I was saying, "You have not followed the guidelines for independent medical examinations." I have written evidence of them saying, "We do not have to follow them" until I was sent to the independent medical examiner [IME]. My file notes say, "Send to IME for defence in court." They do not say, "Send to IME for medical opinion" for those four months. I went to him. I had the breakdown. I was in contact with [EVIDENCE OMITTED BY RESOLUTION OF THE COMMITTEE 4 NOVEMBER 2016] at that time, who was very helpful to us. She contacted the general manager of Allianz, [EVIDENCE OMITTED BY RESOLUTION OF THE COMMITTEE 4 NOVEMBER 2016], and said, "You do have to follow those guidelines. They are gazetted and mandatory." They did not know that. Allianz, after that, said, "We will retrain our staff so that they follow the guidelines from now on."

Mr DAVID SHOEBRIDGE: Ms Lay and Mr Lay, probably you cannot speak to this, but you would be the very rare exception of a worker who (a) knows about the guidelines and (b) found one of 60 guidelines that is applicable to you?

Ms LAY: Yes.

Mr DAVID SHOEBRIDGE: Then read the guidelines, asserted your rights and then enforced it all the way to the top of the tree in Allianz.

Mr LAY: Yes.

Ms LAY: Yes. My daughter rang me. I put on my Facebook page yesterday that I was going to speak at Parliament. A whole raft of people started commenting about their injuries and how they were sacked because of it, people that I know that I did not know about. I said to my daughter, "If only they knew what their rights were." She said, "Mum, no injured worker should have to know what their rights are. The insurance company should say, "These are your rights."

Mr DAVID SHOEBRIDGE: We will go to you, Ms Scott, in respect of your experience. You have been twice to the Workers' Compensation Commission. Is that right?

Ms SCOTT: Four times to workers' comp. I have three lots of recommendations and one lot of orders.

The Hon. TREVOR KHAN: Sorry, that was?

Mr DAVID SHOEBRIDGE: Three lots of recommendations.

Ms SCOTT: One lot of orders and three lots of recommendations.

Mr DAVID SHOEBRIDGE: Were any of the recommendations followed?

Ms SCOTT: No.

Mr DAVID SHOEBRIDGE: What were the orders?

Ms SCOTT: The orders were to investigate suitable vacant positions at the school that I was at, and there was a large cover-up to do with that.

Mr DAVID SHOEBRIDGE: They were investigated but none were provided?

Ms SCOTT: None was provided.

Mr DAVID SHOEBRIDGE: None of the four sets of proceedings, even though you effectively won them all—

Ms SCOTT: Yes.

Mr DAVID SHOEBRIDGE: —resulted in you getting back to the work that you love?

Ms SCOTT: No, and I have been dismissed, fired each time I have tried to go back to work.

Mr DAVID SHOEBRIDGE: And that is just the four trips to the Workers Compensation Commission. You have also been down to the Industrial Relations Commission to get a reinstatement order. Is that right?

Ms SCOTT: Yes, and now I am in the District Court, at a huge cost.

Mr DAVID SHOEBRIDGE: A question to you, maybe Mr Morey or Ms Maiden. Surely we should have just one single jurisdiction which can actually do its job and enforce the law, should we not?

Mr MOREY: That is right, and that their decisions are legally binding and that their decisions are implemented. That is correct.

Mr DAVID SHOEBRIDGE: Ms Scott's example is probably at the worst end of the spectrum, but that experience of injured workers going to tribunals and getting no effective result or going to internal reviews and getting no effective result, that is kind of the workers compensation system in New South Wales writ large, is it not?

Mr MOREY: That is right, and these are not exceptions to the rules. These are basically what goes on every day for injured workers who have, I guess, the tenacity and the resources to actually fight the system.

Ms MAIDEN: Can I make a point? We have got two very strong fighters here telling their stories. It takes an enormous amount of time and energy and courage to be able to do that. A lot of workers try to fight that hard, but some of the stories we also heard from workers from non-English-speaking backgrounds who had been injured at work and they have no chance of trying to navigate the system. They fill out their form and they say what language they speak, and yet every letter they get from their insurer is in English. There are some telephone interpretive services but they had no idea whether they were on Centrelink or on workers comp. They rely on their lawyers who obviously do the best job they can, but it is incredibly hard for any worker. I think it has to be recognised as well that it is very hard for workers in non-English-speaking backgrounds.

Mr DAVID SHOEBRIDGE: Is there a distinction, from your members' experience—I am probably talking more about the union and affiliated unions—between work capacity decisions and liability decisions, that part of the Workers Compensation Scheme where there is no legal assistance available? Is that throwing a very big burden on workers and unions?

Ms MAIDEN: Absolutely. The fact that workers when they have work capacity decisions means the workers cannot be legally represented and get legal decisions, which means that if they are members of a union obviously the unions will help them through that process, but a lot of workers are not as well. We have got to recognise that, and they have really no-one to turn to. There is meant to be a change coming there, but it is taking months and months and months. It is a real problem that there is not that legal support on a very complex decision. A work capacity decision is a very complicated process.

Mr DAVID SHOEBRIDGE: Ms Lay, I think you want to say something?

Ms LAY: When you are first injured you have no idea this is a legal system. I did not. This has only happened to us because lots of things happened where we had to actually know what we were talking about. It took us a long, long time to learn—

Mr DAVID SHOEBRIDGE: So you are understanding your injury and then, at the same time, you are trying to understand this hideously complicated system.

Ms LAY: You do not even know that you have to get a solicitor. I was injured at work. All I knew was that I wanted to get back to my job. I loved teaching, I loved my kids. My kids are missing me. The parents are saying, "When are you coming back?" I had no idea of anything in the whole system. I went back innocently thinking, "Well, I'm going back to work now". I sat down with my return to work coordinator and I said, "I don't think the department are following the work health and safety legislation. They are allowing kids to be bullied, they are telling me that". I put that in my return to work plan; I said, "I want them to say in there they have to follow the legislation to protect me". That was all I knew; that was as much as I knew. We gave that to the department and they said, "Oh, we can't have that in there". So you have no idea of when you are going to get into the legal part of it.

Mr DAVID SHOEBRIDGE: And you slowly get trapped by it. Ms Scott, is that your experience? You start off thinking it is going to be reasonably straightforward—you put your claim in and then the complexity, the monster, almost eats you up.

Ms SCOTT: And you cannot get WIRO funding if you are just applying for suitable duties as I was. I did not want money; I was not after anything like that, I just wanted to go back to work. I could not get WIRO funding so I had to represent myself.

Mr DAVID SHOEBRIDGE: So you represented yourself in the commission each time?

Ms SCOTT: In all but when we went before the arbitrator. So in front of all the registrars and maybe well over half a dozen teleconferences I represented myself. I have actually had to go back to uni. I am getting a law degree at the moment to assist me—

Mr DAVID SHOEBRIDGE: To run your own case.

Ms SCOTT: To assist me with this.

Mr DAVID SHOEBRIDGE: If you had been wanting money the scheme would have paid for you, but because you wanted to go back to work they would not pay for your case?

Ms SCOTT: Correct.

Mr DAVID SHOEBRIDGE: That is beyond perverse, is it not?

Ms SCOTT: Well, yes. God help the people who are from non-English-speaking backgrounds because I like to think of myself as articulate and intelligent—I might not have come across as that today—but I had to represent myself and it was very, very difficult.

Ms LAY: That is exactly the same, and I know other teachers who have been through exactly the same thing. There should be an investigation.

Ms SCOTT: If you look at the Workers Compensation Commission decisions, which are all on their website, lots of suitable duties from the Department of Education are there, and they never resolved them.

The Hon. TREVOR KHAN: This is a question directed to Mr Morey and Ms Maiden initially. We have spoken about the scheme agents and their performance. Is something that you would like this Committee to consider an increase in the oversight of the performance of the scheme makers or is it you want to get rid of the scheme agents as a player in this scheme? What do you see is the way forward?

Ms MAIDEN: We would like to get rid of the scheme agents. One of the workers comp reform principles that we put in our submission is to get rid of the whole system of scheme agents and to bring it back within the role of government. We think they are fleecing, taking nearly 20 per cent profit margins, and they are not adding the value that they should be. The case managers are not doing a good job in terms of managing the cases and there are perverse incentives in terms of cutting off workers to maximise their profits.

The Hon. TREVOR KHAN: Can I just stop you there? What, in a sense, troubles me, not with regards to the evidence that is given but with regards to how this works, is that my understanding would be—and you can tell me if I am wrong—that the scheme agents are paid a fee essentially for administering their part of the operation of the scheme. That is right, is it not?

Ms MAIDEN: Yes, that is right, but the individual workers that work for the scheme agents are paid bonuses.

The Hon. TREVOR KHAN: I absolutely understand that part of the exercise.

Mr DEGUARA: And they are paid perverse bonuses because they get paid to close files. They get paid to minimise the cost on the claim. So if you have got an injury, you want to have health care but there is an incentive not to give you that health care.

The Hon. TREVOR KHAN: And I am not being rude when I say this, but do you know that for a fact that there is that bonus scheme that applies?

Mr DEGUARA: This is the problem. We knew what it was like, say, six years ago, but now when we GIPAA it and it used to be reported, now we cannot even get GIPAA's reports in the annual report.

Mr DAVID SHOEBRIDGE: This is the standard deed that negotiates the compensation paid to the scheme agents between, now, SIRA and the scheme agents, and you are saying you cannot get that standard deed, which sets out the basis on which they are paying.

The Hon. TREVOR KHAN: I do not think it is SIRA.

Mr DAVID SHOEBRIDGE: Sorry, icare.

Mr DEGUARA: There is a standard one and then there are the individual ones, which have the KPIs and all those sorts of things in it. What we have seen is things like the care awards, which had in there nominations for certain sorts of scheme agents officers.

Mr DAVID SHOEBRIDGE: But you are saying there should be transparency. It is public money and there should be transparency.

Mr DEGUARA: There should be transparency, absolutely. It is a role of government, it is a government scheme; they should be able to do it.

Mr LAY: The scheme agents are spending more money trying to get people off their treatment. They will spend $100,000 to deny you $2,000 worth of treatment, and that happens all the time.

Ms LAY: That is an exaggeration.

Mr LAY: That is an exaggeration, but they will; they will spend more money trying to get you off that treatment. If they left you on the treatment you would still be able to work because you are getting the physio that you need, but it is not reasonably necessary physio because you are not improving, but then they will send you to the commission—in our case we have to travel down from Taree, stay overnight—they are sending you to doctors in Sydney when there are doctors up there. They have got their select doctors that they want to send you to, which is another serious problem. Instead of being a pool of doctors they just have their own selective doctors now.

Mrs LAY: Icare were tendering for their own doctors—

The Hon. TREVOR KHAN: Sorry?

Mrs LAY: I do not know who they are now, the TMF agencies were tendering for their own doctors. How do you tender when WorkCover regulates the costs that are paid to the doctor? How do you tender? Do you say, "Are you willing to comply with giving us fraudulent reports?" I might be saying that but that is based on my experience. I am not just talking out of my backside, so to speak.

The Hon. TREVOR KHAN: I am not suggesting you were.

Mrs LAY: No, I know you were not.

Mr DAVID SHOEBRIDGE: You are suggesting there should be a common pool. If they are accredited as IMEs they should be—

Mr LAY: No, it should be selected by—

The Hon. TREVOR KHAN: Please do not lead. The witnesses are speaking quite well for themselves.

Mr LAY: They should be selected by WorkCover. If you want to send someone to an IME you put in your submission to WorkCover, or whatever they are called now, you have met all the requirements, they pick the doctor who has got the right qualifications, who is easily accessible to the injured worker and who is geographically close. In the case of our neighbour, they demanded that they send her to a doctor in Sydney because he is an AMS.

Mrs LAY: And we are choosing IME because they are also AMSs.

Mr LAY: Because they are AMSs. In Taree eight minutes from her door is an IME and an AMS. There are two assessors there. No, they said, "You have to go to Sydney to see this doctor." She questioned it. "No, it is easily accessible by public transport." The lady has had a hip replacement, a knee replacement and they want her to drive past the doctor's door either to Taree airport or if there are no planes running to Port Macquarie which is 80 kilometres away, to catch a plane to Sydney—

The Hon. DANIEL MOOKHEY: For Hansard, will you explain the difference between IME and AMS?

Mr LAY: An IME is an independent medical examiner. When WorkCover started with them they had a pool of doctors, all qualified. They were trained by WorkCover to do it. AMS is an IME who has applied for the position at the Workers Compensation Commission. Their decisions are definitive at the moment, an AMS, and they are meant to be totally independent. But many of these AMSs are working now, as I said, specifically

for the insurance companies. They work for medico-legal companies. I had to see one AMS in the office of a medico-legal company. How can he be independent when he is working—

The CHAIR: And you are directed by the insurer to go to—

Mr LAY: I was directed by the Workers Compensation Commission to go to see an AMS.

Mr DAVID SHOEBRIDGE: An AMS is an IME engaged by the commission?

The Hon. Lynda Voltz: Point of order: There are about five people speaking at once. Hansard is having difficulty. Would you please slow down?

Mr LAY: And he has had training—

The Hon. DANIEL MOOKHEY: They have privileges in the proceedings of the commission in so far as they are—

Mr DAVID SHOEBRIDGE: Their findings.

Mr LAY: Yes.

Mrs LAY: Approved medical specialists [AMS] are appointed by the President of the commission. They apply. They have to be trained to follow the WorkCover guidelines. They have to do a course with WorkCover. The IME guidelines say that when you get an IME trained they have to have expert qualifications in a specialty related to your injury. It does not mean, what we have found is that they are using people outside their speciality. So a colon-rectal specialist is doing Peter's shoulders and neck. Now they get their position as an IME. They then apply to the commission to be an AMS. An AMS fulfils a supposedly independent role. However, at the same time they can be performing as a preferred assessor, and that is the way the insurance companies do it. We prefer him over this person because he is also an AMS. They can be performing here "I have five IME assessments for this insurer today." "Tomorrow I am going to be independent and work for the Workers Compensation Commission" but, you know, do not tell them I working for the same insurance company over here. As an approved medical specialist this is the person who now makes the last percentage of whole person impairment. This is the one that the legislation says that their percentage of injury is conclusively presumed to be correct.

Mr DAVID SHOEBRIDGE: Are you aware of any code of practice that would prevent an AMS in those circumstances sitting on a matter where the insurance company has engaged them as an IME?

Mr LAY: No, there is no code.

Mrs LAY: Because there is no cross reference. The Registrar of the Workers Compensation Commission stated to us that they had no power to investigate whether the AMS—

The Hon. TREVOR KHAN: I think that would be right.

Mrs LAY: No, sorry, I have probably phrased it wrongly. They had no power over what they were doing as an IME because as an IME they are employed by the other.

The CHAIR: As the Hon. Trevor Khan said we will explore this on Monday with icare and so on. We have to conclude this session none the least because I think our union friends have to go out the front and we do not want to delay them from their protest.

Mr MOREY: Are you coming Chair? You are welcome to have a word.

The CHAIR: I can assure you I have addressed rallies out there before. Answers to questions on notice must be returned within 21 days. The Secretariat will contact you in relation to any questions taken on notice. I thank you for sharing your stories today. It was brave of you to present them publicly, we appreciate that and it will inform us in the inquiry.

(Witnesses Retired)

(Luncheon Adjournment)

RITA MALLIA, State President, Construction, Forestry, Mining and Energy Union, affirmed and examined

SHERRI HAYWARD, Industrial/Legal Officer, Construction, Forestry, Mining and Energy Union, affirmed and examined

DAVID HENRY, Work Health and Safety Officer, Australian Manufacturing Workers' Union, affirmed and examined

LEIGH SHEARS, Injured worker, Australian Manufacturing Workers' Union, affirmed and examined

BRETT HOLMES, General Secretary, NSW Nurses and Midwives' Association, affirmed and examined

STEPHEN HURLEY-SMITH, Industrial Officer, NSW Nurses and Midwives' Association, sworn and examined

The CHAIR: Welcome to the first review of the workers compensation scheme. Now with us are the Construction, Forestry, Mining and Energy Union [CFMEU], the Australian Manufacturing Workers' Union [AMWU] and the NSW Nurses and Midwives' Association. I invite each organisation to make a brief opening statement. I assume Mr Shear is going to give some evidence of his experience.

Mr HENRY: That is correct. We have a statement which we will table but Mr Shears will give a short summary of his story.

The CHAIR: We can do that in that process. Who would like to go first?

Ms MALLIA: I will start. It goes without saying that working in the construction industry can be a death sentence. Since 7 January 2016—so just this year—nationally we have witnessed 28 construction workers fatally perish through no fault of their own from electrocutions, falls from heights and injuries caused by malfunctioning machinery, to name just a few of the causes. That is 28 families that will not be celebrating Christmas in six weeks time. This is the reality of our industry. The most recently killed worker in New South Wales—on 25 October, just a week or so ago—was Iremar De Silva. He plummeted three metres to his death because he was impaled on a starter bar. He was 55 years of age—a spouse and child left to grieve; another life extinguished basically in the pursuit of profit. The common theme of all of these fatalities is every single one of those incidents is preventable.

Construction workers are also more likely than most to suffer injury. The statistics in respect of injury and disability are equally horrifying. Nationally around 57,000 construction workers are injured at work every year—that is 156 a day—with 98 per cent of those reported being male. This is around 5.9 per cent of the total number of construction workers of 1.03 million. On average 12,600 employees needed a week or more off work due to serious injury and the average payment for a serious claim was around $11,000 and 6.4 weeks off work. This is approximately 35 construction workers injured ever day. Sixty-three per cent of reported injuries involve some time off work in total. Twelve per cent of injured construction workers never return to work compared to 3 per cent for most other industries. As I have mentioned, the common causes of injuries are falls from heights; being struck by falling objects; and lifting, pushing or pulling objects—they are basically the main causes of injury in our industry.

Our members deserve to know that when these injuries occur—and a lot more should be done to actually prevent these injuries in the first place—they will be appropriately protected by a fair, just and effective workers compensation system. Unfortunately we do not have one of those systems in New South Wales. The system is broken. A bandaid approach to the issues is creating more complexity, more unfairness and more injustice. When icare touts that it has delivered $188 million in premium reductions, the experience in our industry is that that is not converting into safer workplaces so we are not quite sure what that profit is actually going to.

Another point worth mentioning is that in the next year, the fifth anniversary of the scheme, there are going to be thousands of injured workers who will be relegated to the scrapheap when their weekly benefits are cut off because they have reached the magical five-year limit. There is no option for review and no option for appeal. That is it. You are cut off. Everyone who transitioned in 2012, the long-term injured workers, will no longer receive benefits. The permanently injured but not those with 20 per cent whole person impairment [WPI]: no more weekly benefits just because you did not get better in that miraculous period of five years. I expect this is going to save more to the scheme but at some horrendous human cost.

I acknowledge the work of my colleague Ms Sherri Hayward who has put together our submission which makes some clear recommendations. The system is overly complex, unjust, inaccessible and unfair

towards injured workers. Many of our members do not come from English speaking backgrounds. They are not articulate. They do not fill out forms. They find dealing with bureaucracy one of the most stressful experiences of their lives. And many do not even have access to proper legal representation—and those lucky enough to be members of unions like the ones before the Committee are probably in the best of positions but there are a lot of workers who are not afforded that benefit. A bandaid approach just cannot fix the problem that we are seeing now. The work capacity process has to be abandoned. It does not result in safe and durable return to work. Its only purpose seems to be to punish workers for being injured. It is complex, it is biased and it is inherently unfair.

The workers compensation system currently provides several different categories of entitlements for medical expenses depending on how long you have been on the scheme and how impaired you are, and this is completely unnecessarily bureaucratic. If someone needs medical expenses paid, they should get medical expenses paid. If doctors are requiring people to be treated, they should be given that treatment and there should not be these hurdles to be overcome. The definition of pre-injury average weekly earnings [PIAWE]—even I do not understand it and I have been doing this job for a long time—needs to be simplified. I do not know how it can be so difficult to determine average employees' wages when they have lost income through an injury. The interpretation boggles my brain. I do not know who wrote that piece of legislation.

Our members have reported increased hostility, complacency and ignorance from case managers in the last 12 months. We really just want an independent investigation into the management of the workers compensation system because this one is built on making it as difficult as possible, effectively intimidating workers to abandon their rights. They do not have any recourse to prosecute their rights and entitlements at the end of the day. I have been an official for the CFMEU for 20 years and I feel like I have given this speech and this evidence time and time again. The Chair mentioned this was the first review of the workers compensation system. I reckon this is my twentieth review of the workers compensation system. It is really hard not to be cynical, but we come here and make submissions and people like Leigh Shears come and tell their story so bravely, yet it falls on deaf ears.

If people around this table are genuinely concerned about the suffering of injured workers in this State and want to see them properly compensated and properly supported—back to work if they can go back to work but supported if they cannot go back to work—we need to address those issues now. The recommendations of all the unions are a great starting point, I think, to rebuilding the system. We can reverse the injustice that exists. We hope that there is some genuine attempt by this group to move that way because it is just not fair that workers who have contributed to the prosperity of this State, the profits of their employers and the profits of insurance companies get relegated to poverty, and sometimes suicide, to because of the injustice that is inherent in the system.

Mr HOLMES: The NSW Nurses and Midwives Association thanks the Committee for giving us the opportunity to yet again present on issues that we think could make a difference in the workers compensation scheme, acknowledging that the overall unfairness has not changed. We believe there is a way that the Government can dramatically improve return-to-work outcomes in the workers compensation scheme and simultaneously save the scheme a considerable amount of money. That is by putting in place robust mechanisms to encourage, and if necessary force, employers to provide suitable work for their injured employees. A great deal of our association's time and resources are spent representing injured workers against employers who refuse to provide them with suitable work. Too often this is in circumstances where there is clearly work available for those workers to perform.

By refusing to provide suitable work, employers are able to shift the cost and responsibility of injured workers to the general workers compensation scheme. In any other insurance context, an insured party who behaves in that fashion would be guilty of insurance fraud. This is the third time the association has provided evidence to the New South Wales Parliament focusing on this issue. On each occasion we have provided case studies illustrating our argument. Those case studies show that employers who do the wrong thing end up forcing injured workers to rely upon workers compensation benefits for months and sometimes years whereas in actual fact those workers could be working and earning wages. I also note that in October 2017 more than 50 of our members will strike the five-year cut-off period and they will be in limbo. They do not meet the seriously injured category. They have been able to do some work as required but are unable to return to full-time hours and they will not qualify for disability benefits from Centrelink.

Many of those nurses will be in severe financial distress as a result of workplace injury but have nowhere left to go. I fear for their safety—their mental, physical and wellbeing safety. I think the New South Wales Government should carefully trace the suicide rates for this group of workers. This Government has left those people in a horrific situation where they will fall through the cracks. I acknowledge that in 2012 the Government responded to our submissions by introducing two changes to the return-to-work provisions within

the workers compensation legislation. Then in 2014 this standing committee made positive recommendations on this issue. While those changes and recommendations are welcome, we believe more needs to be done. We have again provided more case studies of instances in which even the New South Wales Health system will not look after injured workers properly and does its best to shed the risk or the burden of utilising those highly skilled people's capacity. Instead, it does everything it can to shuffle them off to become someone else's problem.

Mr HENRY: I thank the Committee for the opportunity given to the Australian Manufacturing Workers' Union [AMWU]. I am trying not to echo the voices that we have already heard. The AMWU built a significant part of its submission in relation to the Victorian Ombudsman's report. The reason we did that is that the New South Wales scheme, set up with scheme agents, was mirrored directly on the Victorian scheme. In 2003 the McKinsey report recommended that course of action. The Ombudsman's report reads like a horror story but, with no surprises, it has the same stories that we are hearing and I am sure that everyone on the Committee has heard today. Those stories are echoed throughout the Ombudsman's report.

The area that we have particular concern about is what incentivises this behaviour. We do not necessarily believe that there is a group of people who are sitting around plotting and planning, necessarily, to harm injured workers but we do believe that there are perverse incentives sewn into contracts that are leading to this behaviour. We can only say that we believe it because no-one can access it. A number of years ago I had the privilege position to sit on the New South Wales Workers Compensation Health and Safety Advisory Council. While that advisory council was in place, on a number of occasions we requested access—and not to specifics but just generics—the terms and conditions that were set out for the scheme agents. That was refused on the basis of commercial-in-confidence. Those people are carrying out the claims management activities on behalf of the State. I believe that advisory council had a responsibility to reflect the interests of the people of the State.

If that advisory council had asked for that information, my view is that it should have been provided. Whether confidentiality within the advisory council needed to be maintained is a separate issue, but I think that the people of this State deserve better as far as concerns a body that could offer some level of transparency for the protection of injured workers. That was never afforded. As you are well aware the advisory council was disbanded in 2012. I note that the New South Wales Business Chamber has asked for its re-establishment. I take this opportunity to ask that you also note that within the AMWU's submission, we also have asked for its establishment. We believe that by working together in partnership we are able to deliver good things for the people of this State.

The other area that is concerning and we are focused on has been in relation to the management of injured workers. I deal with injured workers day in and day out. I have to say that I am at a loss to understand how a medical specialist can be writing a report for a patient, telling the patient that they need an operation for surgery, and that report is ignored. I am dealing with a gentleman right now who works for Sydney buses and who has torn a tendon off his shoulder. The surgeon has recommended surgery to repair that tendon. It is keyhole surgery. This is not major surgery. I suppose all surgery is major, but this is not great surgery with great costs. We are still waiting on the insurer to make a decision. I do not understand that. I cannot understand how a clerk in an insurance company is somehow given a higher level of expertise in medical matters than a specialist. I struggle with that. I think that these delays are having detrimental effects in the timeliness of workers being able to return to work. We know from research that has an effect on prognosis.

Today I have provided, and seek to table, a statement from Mr Shears, who will shortly give a briefing on his horrific story. I do not believe within the time we have today that his experience could be done justice, so we submit his statement to supplement what he will provide today.

Document tabled.

The CHAIR: We are just reviewing that.

Mr SHEARS: Just sitting there listening to everyone else I do not know where to start to be honest, but in short it has been a horrific couple of years for me and my family. I was nearly brought to tears when they started talking about suicide and depression. As a boilermaker I was injured in 2011 and sustained injury to my lower back. After a period of six months I was dismissed or terminated. I sought the assistance of the Fair Work Commission with an unfair dismissal. That was successful.

I will start back. The day I was terminated, that afternoon I was contacted by the insurer to inform me that my wages would be terminated also. Upon the successful unfair dismissal dispute the insurer refused to acknowledge that as an unlawful dismissal and continued with the termination of wages. I spent a good part of a year without income. I am married with three children. My first son was born a couple of months after I was initially injured. So I had a new bride and a young son. Initially we had our life ahead of us.

I want to just touch on the depression and the dark space that I went into and that is the experience of injured workers that I have spoken to. I was a boilermaker and I discovered that being a boilermaker made up a lot of what I felt and thought about myself as a man. I was able to earn good wages and go anywhere around the country and get a job. So I had all that to offer my wife and my future family. When I was injured I knew straightaway; I felt the shame of being on workers compensation. I felt that in the workplace. I was stuck into a store; the employer did not know what to do with me.

There was the innuendo of "You're playing it up; there's nothing really wrong with you". You are pretty much isolated from the workplace—and everyone feels it. As long as I have been a worker, everyone feels that shame and guilt that comes with being on workers compensation or even the idea of being on workers compensation. After six months I knew I was not returning back to boilermaking and I had done nothing else in my life as a worker. I didn't know what to do. I didn't know how to fill out a resume. I knew how to fill out a resume and talk the talk when it comes to getting a job as a boilermaker or welder but I did not know what to do. I had no idea and I had no support. I suppose for the next couple of years I just fought depression.

I suppose in a nutshell this is what this fucking system has done to me. I am one of the lucky ones. I suppose one of the benefits of this system is that it actually provided for an income supplement and I was fortunate enough to be able to get a job with a supportive employer who knows that I have got an injury, knows the extent of my injury and gives me the flexibility to be able to manage it. Now, I know I am one of the lucky ones. I know a lot of people out there that don't have any money and have lost their jobs and their income and have broken their families; people who have attempted suicide, and I was close to that sort of stuff.

I am a bit surprised at my response today but that is how raw the system has left me. It is not that far below the surface and I spend most of my time grateful for where I am today; that I have found an employer who will give me that start—and I know that is not normal circumstances for most. I also spend most my time trying not to think about this sort of stuff because for the last five years—I was injured in 2011; I went back to work because I had to and tried to manage this injury. I went back to boilermaking. It was two or three months before I was reinjured.

It has just been a horrible five or six years; it's nearly six years now. A couple of weeks ago I came up to the period of the ending of my entitlement to medical support. Eight months prior to that the insurer said they would no longer pay for physiotherapy. I found physiotherapist that worked for me. I found a physician that worked for me and gave me the ability to be able to get up in the morning and manage my life, to be able to get to work, regardless of the pain that I experience every day of my life, regardless of the restrictions that come and go every day of my fucking life.

Then they told me, "No, we are not in the business of management. We are in the business of providing services or access to medical specialists that will lead to a recovery." I have an injury where there is no chance for recovery. I have been told that by six or seven specialists. Some of the top neurosurgeons in the country have told me, "There's no chance. You've just got a life of managing that injury. At some stage in the future you may need an operation but at this stage you're not quite there yet".

So like I was saying, two weeks ago the period of entitlement had expired and I spent last weekend unable to walk. I played with my son, my kids in the backyard, and I was running around with him for about 10 minutes. I dropped to my knees; my back went out on me. I was sore all Friday and I spent Saturday and Sunday laying on my bed popping a whole pile of drugs to manage the pain and I had to slide out of the side of the bed and crawl up the hallway so that I could have something to eat—and then just struggled to stand. I had to take three days off work this week. Now, no-one pays for that but me if I do not have any leave. I have a good and supportive employer but I still have to accrue my leave, take it out of my leave or I take time off work without pay, and that is six years after the initial injury.

The first injury was 8 per cent whole person impairment. From what I understand 8 per cent is insignificant. It is pretty much looked at as a cut on the finger; I spent times without walking. Earlier this year, in January and February, I had three weeks off; I had to go to the hospital. I had to call an ambulance to come and assist me to get me off the floor after I had been lying on the floor in the lounge room for two days, hoping that at some stage, if I could try to get that one stretch in, where I could put that cricket ball in the right spot it would just trigger me to be able to get up and get myself to the bed.

I had to call an ambulance to come and assist me off the floor and take me up to the hospital and shoot me up with all these sorts of drugs, anti-inflammatories and whatever else, just to be able to move and waddle around. I had to have three weeks off work. Initially I was told by the insurer that I had an entitlement to be compensated for that time off for wages. Then I was told that I was not eligible for that. Not that long ago I was told that I was eligible for that and I needed to submit forms. I submitted forms and then they came back and told me that I was not eligible because of some deal that was done frigging two years ago that said I had no

entitlement to income support or wages into the future. In a nutshell that is my story and it is a fucking horrible story and I really don't like to think about it that much.

The CHAIR: Thank you for sharing it with us. I am sure it is not isolated.

The Hon. LYNDA VOLTZ: I have so many questions I am not sure where to start. Perhaps a question to you, Mr Henry, about return to work. The Committee has had evidence from the government sector about the difficulties getting back into employment. Can you, or Ms Mallia in respect of the private sector, inform the Committee of how the return to work scenario is working? I note also for your attention that the Australian Industry Group has also complained that within the scheme there is a lack of consistent support from scheme agents in relation to managing claims and providing direction to employers so perhaps you might include any feedback you have had from the private sector?

Mr HENRY: I find storytelling is a better way to convey a message. I am dealing with a lady at the moment who works for a food manufacturer in Western Sydney. She sustained an injury. Her employer has refused to provide her with suitable duties, despite the fact that a rehabilitation provider said that there are suitable duties. We have had to take that matter to the Workers Compensation Commission. These things take time, so all this while this lady has been isolated from the workplace. She has complied with everything that she has been asked to do, has attended all the medical appointments and has provided all the certificates. She wants to get back to work. I do not know where this attitude comes from, but I hear people talking about workers who do not want to go back to work when they are injured. Find me the worker does not want to go back to work. I do not know where they are.

We are now in a situation where the Workers Compensation Commission has directed an injury management consultant to be involved. Unfortunately, as a result of—I will call it for what it is—utter mismanagement by SIRA of its ability to maintain injury management consultant lists in New South Wales, there were no injury management consultants available who could deal with this matter. That created a further delay. We have only just overcome that hurdle. An injury management consultant is supposed to try to facilitate an agreement between the parties. Despite our best efforts, the employer has refused to provide suitable duties.

What I find of particular concern is that when we are in the Workers Compensation Commission the scheme agent does not sit with us. The scheme agent does not sit beside the injured worker who wants to return to work and say to the commission, "This is wrong. The employer has obligations and duties under the law and should be facilitating a return to work for this lady." They sit with the employer, arguing that the employer is right not to provide suitable duties. I do not understand that. As a scheme agent their role is to manage claims on behalf of the State. The role of the State is to implement legislation. The legislation says that the employer has to provide suitable duties unless it is not reasonably practicable. We already have a report that tells us it is. It is frustrating. I do not understand the employer's motives. I do not know whether it is naiveté or whether it is because they have heard terrible stories about the recurrence of injuries and they believe that they should never allow an injured worker back into the workplace. I do not understand the motivation. What I really cannot understand is why a scheme agent would be sitting there, lining up with the party, trying to stop the return to work.

The Hon. LYNDA VOLTZ: Ms Mallia, would you like to comment?

Ms MALLIA: For us there are extremes of behaviour. There is no doubt that, in the construction industry, if an employer knows that a prospective employee has made a workers compensation claim in the past they will not get a start. They have to tick a box on a form saying that they have not made a claim. If you do not honestly answer those questions you risk being terminated. We have had to sometimes say to workers, "If you do not answer the question and they find out later, you might be lucky enough to pick up a few extra weeks work before they find out that you have a claims history and they do not want a bar of you because of the risk that they perceive that carries for their business."

There are also structural problems in the industry. Our industry often involves manual work. If someone has ruined their back or their shoulder from doing their work, it sometimes is very difficult to rehabilitate those workers in another role because those roles do not exist in the industry. There is nothing in the system that supports people to genuinely retrain and do something else. As Mr Henry says, everybody wants to get back to work. It is untrue that there are malingering workers sitting in the system profiting from the largesse of the State. If we had a system that supported people to genuinely retrain and gave them some income loss compensation, which section 40 of the Workers Compensation Act used to do, that would help. We had members who retrained as security guards, car park attendants, barmen and bus drivers. Their loss of income was massive. There was a section in the legislation, which does not exist today, that compensated them for some of that loss until their retirement age. It was not overly generous—it was the statutory rate—but it was something. They could earn $500 a week in their new role and $300 or $400 in compensation would come in,

giving them $700 or $800 a week. It was not the $1,000, $1,200 or $1,500 a week that they earned when they were a construction worker, but it was something. There is nothing that helps people transition from a serious injury to return to work. Employers do not want a bar of them. The system does not support people to retrain. The industry struggles because it is very heavy manual work and if you have a physical injury you can no longer do that work safely.

Most of our members and workers in the industry work for small business. People are not directly employed by the Lendleases and Multiplexes of this world. They are employed by businesses of fewer than 20 employees. They operate out of the back of a truck. It is very hard for those employers to provide suitable duties once it is clear that people cannot do their original work. A lot of people can return to work. There is a resistance by employers to facilitate that in a fair way. It is easy when you meet someone and go through their medical history to determine whether they will go back to bricklaying. The system does not come to grips with different cases.

There are a multitude of barriers to people returning to work. The system needs to support people to genuinely retrain. It needs to take into account that people come from non-English-speaking backgrounds. They may not necessarily have had the benefit of going to university or TAFE. If you are a labourer or a bricklayer and you have laid bricks for 30 years and suddenly you cannot do that anymore, that is a very difficult situation to recover from. The system is not practical. As an example, there are a bunch of backpackers out there who are working as traffic controllers. There are injured workers who could to that job. If the construction industry came together, builders and subcontractors, and thought outside the box about where there are jobs that people could do to earn a decent wage, and about how to support those who can no longer lay bricks or bash in formwork, then we could do that. Instead we have an industry that is completely profit driven. If you cannot contribute 100 per cent to making a profit then you are relegated to the scrapheap. That is the mentality of the industry. It needs to change. The culture needs to change.

The Hon. LYNDA VOLTZ: Mr Shears, was that what made the difference to you—having some way that you could get back into work eventually, with a return to work plan?

Mr SHEARS: The wage subsidy?

The Hon. LYNDA VOLTZ: Getting back to work.

Mr SHEARS: Yes, absolutely.

The Hon. LYNDA VOLTZ: You had someone who understood what you could do and put you in that role.

Mr SHEARS: Yes. Providing the opportunity to get back into work was the key.

The Hon. LYNDA VOLTZ: The CFMEU submissions talks about the posting of notable submissions. The Merit Review Service published a notable decision but that decision was subject to subsequent judicial review, which led to a number of errors in determination and errors of fact. Did you ask them to amend that notable decision to reflect that?

Ms HAYWARD: I did. I sent a letter to Carmel Donnelly at SIRA and advised that the CFMEU had been heavily involved in the decision. We did the applications and we supported the worker in the Supreme Court matter. That decision has now been removed from the website on the basis that the person was easily identified, not because of the issues I had raised about that decision. That decision was removed only because I had realised it was one of our workers. I understand their purpose in putting up those notable decisions, but they needed to be clear about exactly what that meant. It was misleading not to say that that decision was subject to further proceedings, particularly when we had made serious accusations about the conduct of the Merit Review Service decision. That decision has now been removed.

The Hon. LYNDA VOLTZ: Perhaps you could take this question on notice. I am interested in the impact of journey claims. The Committee has recently reviewed the compulsory third-party scheme. People would previously have been entitled to make a journey claim. Nurses in particular raised this issue at the time of the changes. Have there been any subsequent cases where what would previously have been a journey claim now no longer provides any benefit? As we know, it is an at-fault benefit arrangement under the compulsory third-party scheme. Mr Holmes, would you have any examples of that?

Mr HOLMES: Not in front of me, we obviously provide insurance for our members around that, but it does not match the workers' comp or third party insurance, and, of course, we have to make sure that when we are providing assistance to our members that all of the other opportunities are used first before the insurance scheme that we have for journey claim. There are significant numbers of our members who would have been ruined financially, losing their house whilst they have been injured, and some of them have had a claim that has

been extended for up to two years. So significant injuries have occurred and the minimal amount of insurance that is able to be provided to them does not replicate the workers' compensation, so medical cover and so forth is not there, but we do have a long list of our members who suffer injury.

The Hon. LYNDA VOLTZ: If you can take that on notice and give us some cases that have previously been covered.

Ms MALLIA: We also do the same. Like the nurses, we have provided some insurance to our members so that they get a little bit of income replacement for a short period of time, if they are injured travelling to or from work. The other thing is that if workers are killed travelling to or from work, their families do not get the benefit of the death benefit either. For our members, travelling to or from work is exactly what you do as a building worker. You are not travelling from your home to one fixed establishment; you can be travelling all around New South Wales at very early hours of the morning and hours at night, and you are at considerable risk of an injury travelling to and from work. For us, that was a crucial part of the scheme.

I know it only made up a small number of claims but I would say a fair chunk of those would have been construction workers. We have taken out, like the nurses, a little bit of insurance on behalf of our members. So basically the State has shifted its responsibility to those of us who can provide something in replacement, but the abolition of that section of the legislation, we think, is terrible. Certainly we will provide some examples.

The Hon. DANIEL MOOKHEY: Mr Shears, thank you for coming. How long did it take you to find your current employment after you commenced looking when you were capable of looking?

Mr SHEARS: Probably two or three months, something like that, so it did not take me long.

The Hon. DANIEL MOOKHEY: How many jobs did you apply for or did you find this one first up?

Mr SHEARS: I had been—oh, jeez, 40, 50.

The Hon. DANIEL MOOKHEY: In the applications that you made, were you asked to disclose your history under the workers' compensation history?

Mr SHEARS: I disclosed it straight up because I was aware I had the availability for the wage supplement, and I included that as part of my—I was not filling out applications because there were jobs available, I was just sending out resumes and I had put a letter together about my skills, my background, my current circumstances and added in the subsidies that were available to injured workers and re-employment, along with the two-year workers' comp—the freedom for the new employer not to be pinned for another injury or whatever around the same stuff, so that was actually part of the process.

The Hon. LYNDA VOLTZ: Essentially you found the job yourself?

Mr SHEARS: Absolutely.

The Hon. DANIEL MOOKHEY: Did you retain any assistance from the scheme agents?

Mr SHEARS: No. I would also note that I had received some retraining, but that was not freely given either. That was under the support of my union, Australian Manufacturing Workers' Union [AMWU], that initiated a work health and safety course to be paid for.

The Hon. TREVOR KHAN: Can I clarify that. Did the AMWU pay for the course—

Mr SHEARS: No.

The Hon. TREVOR KHAN: —or put pressure on the scheme agent to come to the party?

Mr SHEARS: Exactly, yes.

Mr HENRY: We ended up needing the assistance of the Workers Compensation Independent Review Office [WIRO], and between WIRO and ourselves, we put enough pressure on the insurer to foot the bill for a Certificate IV in health and safety.

The Hon. TREVOR KHAN: I am still having difficulty. They are scheme agents that are paid for administering the scheme. I find it profoundly difficult as to why they are reluctant to, in a sense, assist getting an outcome. It strikes me as perverse. I accept that they are doing it, but it strikes me as perverse.

Mr HENRY: I think perverse incentive was part of my opening statement.

The Hon. TREVOR KHAN: Yes.

Mr HENRY: I do not think any of us would disagree with you that a rational person is going to struggle to understand the behaviours of the scheme agents. None of us can put a finger on it. Then again, we

are set aside from the contractual arrangements that they have with icare. I looked at the Ombudsman's report in Victoria, and it clearly identified a link between payments for certain outcomes. In Victoria, it was about terminations at 130 weeks. It talked about this fever within the scheme agents to sit there and terminate workers at 130 weeks, and there were financial incentives for the insurance company to action that. On the basis that our scheme is mirrored on the Victorians, so far as the utilisation scheme agents, I can only surmise that there is something not dissimilar happening in New South Wales, and that is why in our written submission we are asking this Committee, in all seriousness, to consider whether New South Wales should, in fact, look at an inquiry with the same powers of the Ombudsman to find out whether those same perverse incentives are having any effect on these irrational behaviours.

The Hon. TREVOR KHAN: I did not mean to take your time.

The Hon. DANIEL MOOKHEY: Technically, I am taking your time.

The Hon. TREVOR KHAN: That is why I am handing back to you.

Ms MALLIA: Can I also talk about other irrational behaviour. There is the other extreme of injured workers employed with larger employers and the insurance companies lob up to doctor's appointments with workers and monster doctors to change medical certificates. I cannot fathom how doctors feel about that.

The Hon. TREVOR KHAN: Perhaps poorly.

Ms MALLIA: Sometimes doctors feel compelled to be bullied into changing certificates so that people fit into some thing that is basically to do with their claims experience and statistics, because this is where it starts impacting on the larger employers. So there is irrational decision-making and conduct across the system. None of it is supporting an injured worker to be supported because they need the time to heal or get back to work if they are ready to come back to work. There is resistance to provide training and support. It is bizarre. It is like the money comes out of the pockets of the insurance claims agents themselves.

The Hon. TREVOR KHAN: We are being cooperative, so go to it.

The Hon. DANIEL MOOKHEY: Thank you.

Mr SHEARS: If I can add to that, it is not easy to find a doctor that will take on a workers' comp patient. They do not want to do it. I would suggest that it is because of the pressure that gets put on them. I have assisted people in the workplace prior to me being injured and that is their experience as well. You have work health and safety officers in companies who are told to get on the phone to the doctor and change the medical certificate so that they can be suitable for duties, open up their hours and get back to work.

Mr HURLEY-SMITH: Can I add one thing on illogical behaviour. One of the consequences when an employer decides they are going to take away suitable duties for an injured worker is that the insurer will send them a notice telling them they have to job seek. It is this bizarre situation where someone has got a job, they have been working in that job in suitable duties, the employer makes a decision to take those duties away, does not terminate them, and then they get a letter from the insurer saying you have to look for work. I have got work, I am employed. It is a completely bizarre situation. To workers, it is unfathomable, those who do not understand what is really happening. To us, they have already got work, they have got a job; it is employers doing the wrong thing.

The CHAIR: Mr Holmes, can I go back to the five-year cut-off that is coming up. That is the incapacity—what is the percentage for five years?

The Hon. LYNDA VOLTZ: Twenty per cent.

The CHAIR: Mr Holmes, can I go back to the five-year cut-off which is coming up? That is the incapacity—what is the percentage for five years?

The Hon. LYNDA VOLTZ: Twenty per cent.

The CHAIR: You said you have got 50 members that would come into that area. Obviously that 20 per cent incapacity has some longer-term effects. What is your suggestion, without opening it up to unlimited again, to look at that? Would you be looking at some sort of process of a case-by-case review to ensure that the reach has got 50 or 100 people in the same situation?

Mr HOLMES: Yes, and 50 are just the ones that our legal firm that deals with our workers comp is aware of immediately. We think there are probably hundreds more who do not use our services. The problem is five years is this arbitrary figure and if people have an injury and a serious injury such as a back injury that likely is at a point where the surgeons say it is not the best time to take that intervention but they will need it at some point in the future, then I think that every case should be looked at to say where can we go? But where

does an employer obligation end, having injured a worker so seriously that they cannot return to normal duties? What is this arbitrary thing that says, "Oh well, it doesn't matter after five years. That person is on the scrapheap. It is somebody else's problem'? It is not the community problem either through social security or they are just on their own through no fault of their own. The nurse has injured her back saving a life and that is their punishment? How does government live with itself in terms of having decided this arbitrary figure because it suited it to recover some money and stop expenditure? These people do not go away. I cannot say that five years, 10 years, whatever—these have to live the rest of their life. The idea that it is somebody else's problem and it is the worker's fault is just—

The CHAIR: It is an arbitrary cut-off. There is no appeal from that.

Mr HOLMES: That is right.

The CHAIR: So would you suggest that there should be consideration of a case-by-case appeal process for someone who is hitting the five years, or the two years?

Mr HOLMES: There should be an appeal mechanism. There should be a review capacity to say these people need ongoing assistance.

Mr DAVID SHOEBRIDGE: Should there not be no cut-off in the first place?

The Hon. David CLARKE: Do you concur with that, Ms Mallia?

Ms MALLIA: I would say that there should not be a cut-off—I am with Mr Shoebridge on that. I just think at some point you have got to recognise that these people have been injured at work through no fault of their own and there needs to be some mechanism, as there was, to compensate them. It might be if you are a 35-year-old construction worker who has fallen off the side of a building and you cannot ever work again, why should you not receive something by way of compensation for the fact that you are impaired and your capacity to earn an income has been reduced? You are not going to get it from social security, you are not going to get it from the superannuation system because you have not got that much money in your account. So, for me, it should not just be a cut-off. But also, people do not want to be on a drip-feed for ever either.

One of the things my union has advocated for every time I come to these things is that we do need to have a decent common law arrangement. There should be a capacity for people to receive some sort of lump sum, and I have never warmed to this idea that there is some gravy train or pot of gold that people hang out for. Where people are seriously injured and it is very clear that they are not going to return to their pre-injury employment, options of retraining have been exhausted, why should they not get a lump sum to pay off that mortgage, to come to grips with life with a disability and have some compensation for future medicals, because a lot of workers just want to get off the system as well; they do not want to be beholden to an insurance company until they are 65 years of age—that, in itself, is a stress and an anxiety that they do not want. But there is no capacity for that. We went through commutations—people should get decent lump sums. We are supportive of a scheme that does provide some lump sum compensation to allow people to rearrange their financial affairs and live life with a disability and not necessarily be beholden to the claims agent at the end of the phone, who might decide not to send out the cheque or transfer that money to the bank account for some spurious, illogical reason. There really needs to be a redesign of the system.

The Hon. David CLARKE: Do you have a specific proposal?

Ms MALLIA: I would go back to some element of lump sums for workers who do go back to work but can show that they are losing income as a result of that injury, as we did under section 40 of the Workers Compensation Act—compensate for that loss right through to retirement age. That was a good part of the scheme. That benefited a lot of our members to find work in other industries and other sectors without losing all of the income that they would otherwise have gained working in the construction industry. So there was a lot that was thrown out with the bathwater that was good in previous iterations of this scheme, and for some reason no-one wants to talk about it. There are accusations that it is ambulance-chasing, and yet there were good aspects of the scheme.

The Hon. TREVOR KHAN: No, it was more complex. You know I was involved in it.

The Hon. LYNDA VOLTZ: The other problem with the five-year mandatory cut-off fundamentally is that medical conditions do not just end at five years, and we have already had that example of the back injury where people, to get their spinal fusion, may do it under the five years to meet that criteria when it should really come later in the scheme.

The Hon. David CLARKE: Do you have a specific proposal?

Ms MALLIA: Yes, we have got a proposal in our submission that goes to the 12 principles upon which you should place the scheme: good incumbent placement, lump sums, proper support and retraining, support for employers to do the right thing—it is all there, it is in all of our submissions. We have written submission after submission ad nauseum about this stuff.

The Hon. David CLARKE: I am talking about the situation where you have someone who it has been suggested have an operation but they do not want to have the operation because of the consequences that come from that.

Ms MALLIA: Well, that should be respected. No-one should be able to tell you when to have an operation.

Mr DAVID SHOEBRIDGE: We are going to get the regulators in. Surely we should be asking them what the cost of the scheme will be if you reinstate lifetime medical benefits, and then if that is able to be satisfied out of the current surplus, happy; if it requires a modest increase in premium well that should be a benefit that is paid out of the scheme. Do you agree or not?

Ms HAYWARD: Can I provide the Committee with some additional information about the five years?

The CHAIR: We are going to have to wrap up this part of the inquiry. We have your statement. Do you want to add something?

Ms HAYWARD: It is just about the five years. It is one thing for us to sit here and say that a person with a 20 per cent impairment is entitled to benefits after five years. I am not sure that the Committee has heard evidence about this yet today, but the interplay of section 322A of the 1998 Act is really of significance when it comes to the five-year mark. In order for a person to be eligible for benefits beyond five years they must get a MAC; they must have their assessment determined. That may not be in their best interests in terms of seeking a lump sum under the other provisions of the Act, and because section 322A says you only get one assessment, you lose your chance at other benefits just so you can see whether you are eligible for weekly benefits. That is inherently unfair. Other sections of the Act allow the injured worker and the insurer to have a look and see whether or not you are close to the 20 per cent, not the five-year limit.

Mr DAVID SHOEBRIDGE: So you say there should be the opportunity to have a second assessment after there has been some significant deterioration and the like. Is that right?

The Hon. TREVOR KHAN: This is dealt with at length in, I think, in the ALA's submission, is it not?

The CHAIR: That concludes this session of the hearing. Thank you for coming in today. Mr Shears, thank you for sharing your personal story; it is not easy, we know that. You have helped inform us in trying to look at some ways to improve the system going forward. Some of you took questions on notice and you have 21 days to respond to those. The secretariat will contact you in relation to those questions you have taken on notice. Thank you all for being here today.

(Witnesses withdrew)

Ms TRACEY BROWN, Manager, National Safety and Workers' Compensation Policy and Membership Services, Australian Industry Group, affirmed

Mr MARK GOODSELL, Head, NSW and Manufacturing, Australian Industry Group, affirmed

Ms JILL ALLEN, Manager, Research and Policy, Australian Federation of Employers and Industries, affirmed

Mr GARRY BRACK, Chief Executive, Australian Federation of Employers and Industries, affirmed

Mr LUKE AITKEN, Senior Manager Policy, NSW Business Chamber, affirmed

Mr GREG PATTISON, Consultant, NSW Business Chamber, sworn

The CHAIR: Do you want to make an opening statement?

Mr AITKEN: The NSW Business Chamber represents almost 20,000 businesses right across the State. Our members overwhelmingly consist of employing businesses, that is, businesses that fund the workers compensation scheme through the payment of insurance premiums. The chamber takes an active role in discussion and debate on workers compensation workplace health and safety [WHS]. The chamber is a committed advocate for the need for a workplace injury management system, a WHS regulatory framework that is both sustainable and fair over a longer term. The chamber recognises the need to support injured workers and the benefit, wherever practical, of encouraging this recovery to occur at work.

It needs to be emphasised, however, that support for injured workers needs to be appropriately balanced against maintaining the long-term sustainability of the scheme. It is fair to say that there has been significant reform of the scheme in recent years. The chamber was a leading advocate for the Workers Compensation Legislation Amendment Act 2012 which helped divert, by our measure, a premium hike of 28 per cent and a potential loss of 12,600 job opportunities in New South Wales. Since that reform the chamber has actively engaged on other changes, including appropriate increases in benefits for injured workers, the separation of the functional operations of the WorkCover Authority and more flexible premium options for larger employers.

Although insurance schemes and workers compensation schemes, in particular, need constant monitoring and targeted refinement, we believe that that at a principle level the current legislation governing the scheme and the agencies is consistent with the underlying aim to support injured workers recover at work in a manner that is affordable, efficient and sustainable. But that said, there are some key areas requiring attention which we have detailed in our submission. Most notably, the need for consistent and transparent data release, the need to better understand the impact of the new premium system on employers and a willingness to make appropriate adjustments to the system and better communication from all three agencies with key stakeholders.

Mr BRACK: These are the issues about which we have concerns. I will not elaborate on them in detail, and I will just give you the headings. Across the scheme: the inflated premiums; the failure to publish comprehensive data on scheme performance; lax administration and management in many areas; the spending of premium dollars on public issues, such as sponsoring Paralympics, SIRA advertising all over the place, spending our premium dollars, indicating what a good monopoly it is and how it is helping everybody under the sun, except, by the way, employers; the massive dollars spent on lawyers in the scheme; the whole cost of the work health and safety regulation; and employers' premiums funding SIRA itself; there is no-one on the boards representing employers and we see that lawyers are siphoning off a lot of money in the scheme, and they want more; we are concerned about that and we worry also about the fact that in some cases doctors are unable to distinguish between their role as gatekeepers of the scheme on the one hand, and their role as servants of their customers, their patients; a premium formula which is not only difficult to understand but it has got in it a whole series of black boxes, as we describe them, in other words things where you cannot decipher what the content is, and which can be used to manipulate premiums up or down, and sadly normally up. We are worried about those sorts of things.

We are concerned about and we watch out for the incurring of claims of any significant kind for employers because if they are claims experience cost rated then their costs go through the roof. It is not really an insurance scheme at all in the ordinary sense. It is really a levy scheme. You pay a levy up-front. For smaller businesses the levy is the totality, broadly, but for larger businesses—over $30,000 in premiums—it is only a levy and if they have a claim then the cost goes up massively. Not so long ago the Government was talking about reductions in premium cost but really that was only in the premium rate for the industry, not in the end product. Again for small businesses end product was okay but for larger businesses end product was almost always up and in many cases very significantly up. So we are worried about those sorts of things.

We have no difficulty in a scheme that operates on the basis that genuine claims are met and genuine doctors' reports are accepted, where the scheme operates efficiently and expeditiously and people come back to work at an appropriate point in time. We do not have any woe with the workers compensation scheme achieving those outcomes, but when you add very significantly to the cost by factoring in all those other things including the advertising, the lawyers, the doctors et cetera then costs go up in our view unreasonably. We want to talk about and we are happy to answer questions on all of those issues even though there are many more that one could cite.

The Hon. TREVOR KHAN: So you are generally happy with how things are going!

Mr BRACK: I think you have worked it out.

The CHAIR: You are on the same side there as the unions, it seems. Mr Goodsell?

Mr GOODSELL: Thank you for the opportunity. A stable, fair and viable workers compensation system is as important for employers as it is for workers. We have had the opportunity to read a number of the submissions that have been made to this inquiry and note that most of the issues identified by stakeholders have previously been canvassed in a lot of other forums—in the Centre for International Economics [CIE] report, the Parkes Project initiated by the Workers Compensation Independent Review Office [WIRO] and some recent consultation that SIRA has implemented. Indeed there is not a lot new or surprising in the issues we have raised in our submission or that have been raised by other bodies. Many of them are not unique to New South Wales either. That is not to downplay the effect that injuries and the operation of the system can have on people's lives. Indeed it serves to emphasise that workers compensation systems are complex.

With many interaction provisions within the legislation and with multiple stakeholders it is not possible to pick one specific area of entitlement and decide that it should be changed without very carefully considering all the other entitlements and behaviours that may be impacted by that change. In addition to the legislative complexity, the administration and management of the scheme will have an impact on how the legislation is applied. It is our experience that there is inconsistency in this application. Some of the issues in the scheme may result from poor interpretation, poor management or poor communication rather than legislative flaws. From our members—large, small and in-between—we receive feedback quite often about claims being accepted where an employer believes that they should not have been. Employers who are being frustrated in their genuine attempts to assist workers to manage their injury and return to work appear to be frustrated by other players in the system. We also hear of situations where employers believe that adverse decisions have been unfair to their workers.

The challenge that no scheme in the country has managed to resolve completely to date is threefold: providing appropriate support to workers that have a reasonable compensable injury to recover and return to productive employment; ensuring that the necessary boundaries and decision points of the scheme operate in a compassionate yet predictable way given the variability of individual circumstances; and assisting all participants in the scheme to make the right decisions at the right time—above all, making sure the system itself does not make people worse. The Australian Industry [AI] Group will continue to work with the Government, relevant agencies and even our colleagues in the union movement to identify how the scheme can be improved for all those involved. Thank you.

The Hon. LYNDA VOLTZ: I am very interested by what Mr Brack has to say but I would like to start with the submission from Mr Goodsell and Ms Browne. There is no homogenous employer-employee relationship but the return to work is obviously an area where there are difficulties. What I get from your submission is that it is not just the employees that are having problems; some of the employers are also having problems with the agents, constantly having to follow them up and chase them. Rather than the agents acting between the two parties to get a good outcome, in fact on both ends there are problems dealing with the agents themselves. Is that the kind of negative feedback that you are getting, particularly in the return to work area?

Mr GOODSELL: Yes, generally I think it is. If you look at the scheme as a whole, most claims are resolved very quickly and cheaply. No-one ever hears about them—certainly not in inquiries like this. You only hear about the exceptions.

Mr DAVID SHOEBRIDGE: We do not have that submission that says, "I have put my claim in. it was paid on time. My compensation as all fine."

The Hon. LYNDA VOLTZ: Thanks, Mr Shoebridge. We will go on with their evidence.

Mr GOODSELL: It is in the stats. In my 25 years riding shotgun with the New South Wales workers compensation system I have seen that the debate is always about the pains of the budget.

The Hon. LYNDA VOLTZ: That is that survey model with the 82 to 87 per cent on return to work. It is always those top 10 to 15 per cent of cases that are outside the seven- to nine-month period.

Mr GOODSELL: It is possibly even less. The rule of thumb I have used in the four or five workers compensation crises I have been involved in in this State is about five per cent of claims. If you look at what can drive multibillion dollar blowouts on the premium side, for example, or on the cost side, it can just come down to maybe four or five per cent of claims being systemically badly handled. Returning to your question, I think the agents are probably still trying to work out what exactly their role is in facilitating return to work. It does work well in a lot of workplaces. It is not only employers who have had difficulties. There were also some difficulties at workplaces with absorbing people on light duties. We have had reports of companies saying, "We are happy to have the person back and they are happy to be back but there is some aggro amongst the team about how they fit in when they are not doing their normal job." Companies quite genuinely get quite anguished in how to deal with that kind of situation. I do not know how well equipped the agents are to deal with those kinds of issues but—

The Hon. LYNDA VOLTZ: Maybe that is where we should be spending the advertising dollars.

Mr GOODSELL: I think some of the focus does need to be there. We would probably be on a unity ticket with the unions to the extent that there needs to be—

The Hon. DANIEL MOOKHEY: Do not tell them.

Mr GOODSELL: We probably tell them more often than people think. We do not want communication issues and poor skill and training issues amongst the agents to get in the way of what are already difficult system issues to play it out properly. There is probably a good deal of benefit that can be played out in making sure that the agents play that role with as little friction as possible.

The Hon. LYNDA VOLTZ: Yes, that is right. Mr Brack, I was interested in your comments about premiums and the base rate and that they have been pushed up above that. At the moment the scheme is sitting at 110 per cent plus—

Mr BRACK: At 130.

The Hon. LYNDA VOLTZ: Yes—plus about $1.4 billion on top of that that should in some way be returned possibly through reduced premiums or we would have arguments about where it should go back into the economy in some way. Have you approached the Government regarding those additional funds that are sitting in the scheme?

Mr BRACK: We have had discussions with the Government and with the bureaucracy about those very issues. Some years ago the scheme was in significant surplus. When the Government of the day thought it would be a nice idea to unilaterally increase benefits by a very significant margin the scheme went from a very significant surplus into very significant deficit. So you have to be careful about how you treat what looks like a current surplus because if you make that a zero by either improving benefits or reducing premiums then you find in no time flat that you are up for a big problem in the scheme. We were worried about that kind of approach. Recently the Government had the idea to increase benefits very significantly. That came out of the surplus. So unless you force yourself to increase premiums as an ongoing liability—which I think is the wrong approach, but nevertheless—unless you think you are going to do that then spending money out of the surplus is like the Federal Government saying we are going to spend more money and just add it to the deficit.

The Hon. LYNDA VOLTZ: You possibly misunderstand. What I am saying is that this is not just a surplus because a surplus is always there and actuaries look at what the projection should be and you should have that amount, but there is probably actually more than that sitting in the scheme at the moment. And, yes, the scheme is to some extent dependent on what the global economy is doing at any given time in terms of flexibility and how elastic it is. For example, if the scheme overall is actually increasing premiums, that is not the design of where it is going. If that is the total outcome, I understand that small employers are getting premium reductions. But from what you are saying, that does not appear to be the overall outcome.

Mr BRACK: There is no doubt that it is not the overall outcome. If you have a surplus but employers are being charged over the amount that is necessary to reach a reasonable break-even position, then obviously you are going to wind up with a surplus and then you will have the discussion, "How should we spend the surplus?" But you should not have had it in the first place.

The Hon. DANIEL MOOKHEY: Your organisation is consulted by the State Insurance Regulatory Authority [SIRA] on the design of the market practice premium guidelines that were issued in May this year. You were? I am sorry, you were nodding.

Mr AITKEN: Yes. We were.

The Hon. DANIEL MOOKHEY: Were all three organisations consulted?

Mr AITKEN: Yes.

The Hon. DANIEL MOOKHEY: Mr Brack, your concern about, essentially, experience rating—that is, claims factored in for larger employers as a risk factor that should be assessed and that results in higher premiums—is it your view that the experience rating system should be abandoned and we should return to pure insurance principles and move away from user-pays?

Mr BRACK: I am not saying that you should do that necessarily, but I am not saying either that it currently works. The extent to which it does not work is clouded in mystery because, when you look at the formula which has 59 hieroglyphs in it, you have to see what is the definition of each one of those and how one might operate on the other—what the multipliers are. The fact is you do not know what the content of all those elements are in the formula, so therefore you ultimately cannot work out your final premium.

The Hon. DANIEL MOOKHEY: Why do we not know?

Mr BRACK: Because it is not published.

The Hon. DANIEL MOOKHEY: Are they not telling you?

Mr BRACK: They are not published.

The Hon. DANIEL MOOKHEY: Right. They are not published.

Mr BRACK: That is right.

The Hon. DANIEL MOOKHEY: The cost model that is used to assess premium applications—is that what we are talking about—as in the insurer puts that together in accordance with the formula?

Mr BRACK: No, we are talking about a statutory formula, with all of these letters in it.

The Hon. DANIEL MOOKHEY: For each insurer?

Mr BRACK: Therefore you look to each one of those letters to see what the definition is, but what you know is that, ultimately, you cannot work it out because some of the elements are not defined. Therefore, you do not know what the outcome is going to be.

The Hon. DANIEL MOOKHEY: They are defined but you just do not know what the definitions are.

Mr BRACK: Yes.

The Hon. DANIEL MOOKHEY: Is that correct?

Mr BRACK: Yes.

Mr PATTISON: And how they are compiled.

The Hon. DANIEL MOOKHEY: One of the recommendations that we as a committee could take up would be for full transparency around that equation?

Mr BRACK: It is not just that equation but, yes, I accept that proposition. Indeed, that should happen; but it is the failure to publish data generally which is also a problem. Once upon a time the data used to be published. You used to get a full copy of the actuarial reports. You could then have a look at it, analyse it, and have debates. The union side could do it. We could do it. But to the extent that it is not published, you cannot really see where the scheme is going month by month or year by year. It is a fundamental problem.

The CHAIR: Is this the SIRA data or are you talking about the insurer?

Mr PATTISON: Scheme evaluations.

The Hon. DANIEL MOOKHEY: Did you see the report that SIRA published last week about what it would describe as their New South Wales workers compensation inaugural performance report?

Mr BRACK: I saw it briefly, yes. I have not looked at it in detail but the fact is that the full actuarial assessment was not published. That is not it.

The Hon. DANIEL MOOKHEY: No. And it was not published in this last week either.

Mr BRACK: No.

Mr PATTISON: No.

The Hon. DANIEL MOOKHEY: To the extent to which we have a surplus and to the extent to which we do not have a surplus, and to the extent of what we can afford or cannot afford, we could only really conclude that if we have the actuarial estimate.

Mr BRACK: That is one thing you do need, but as actuaries will tell you, they need to have three to five years worth of data before they can tell you with a reasonable degree of confidence how the scheme is performing. Here are we as the employers who actually funds the whole scheme—everything, including the advertisements—yet we do not know how the scheme is performing month by month, year by year, or what have you. We are not able to make appropriate assessments about where it is going. When you ask the question, "What should happen to the surplus?" You cannot answer that question properly. Of course, we could do it generally, but you cannot answer it properly unless you can see where the data are heading.

If you listen to the actuaries around the table, as we did when there used to be an advisory committee, they would have said something like, "Well, we are concerned perhaps about the return-to-work rates. That is an issue, yes." Then you would move on in the discussion at that meeting. But six months later, they would be saying, "As we told you, there is a serious problem." It is a fundamental shift and you get that six months later. Then 12 months later you say, "The scheme is going down the drain", and nobody has actually been able to look at that beyond the bureaucracy.

The Hon. DANIEL MOOKHEY: Moving on to the premium notification procedures and effectiveness, I think it was either the Business Chamber or the Australian Industry Group [AIG] that made some reference to the quality of the forewarning about premium adjustments and whether or not it is adequate. Do you have a view that employers are receiving adequate indication of likely premium costs to facilitate business planning?

Mr PATTISON: I think there are a couple of elements to that. One is the speed with which premium notices come out. In the last year we have had, I guess, the disruption of the change in the premium. SIRA had to put out market practice guidelines in fairly short order, albeit that week rates and those things do not change. But nevertheless lots of employers got premium renewal notices quite late. Some of them got them well into the premium year. That is not good. That needs to be avoided. One would hope going forward, with SIRA now doing the latest version of premium guidelines, that they will get those out a lot faster and we will see premium notices being able to be issued a lot earlier in the process.

The Hon. DANIEL MOOKHEY: But it has been a problem for forward business planning.

Mr PATTISON: It has been a problem and it has been a problem historically with the initial public offerings [IPOs] as well—

The Hon. DANIEL MOOKHEY: Indeed.

Mr PATTISON: —and trying to get those moved forward. I think at one stage the IPO did come out in the middle of May, and that was quite an achievement to get it out that early, but in June and late in June at times has been the norm. I think that is one element of it. The second element of it and the question of premiums and understanding premiums goes to the employer's understanding. The premium does a couple of things: it works out how you split up the cake, which is the total premiums that SIRA has to collect. That is one part of its role. The other part of the role, in the experience-rated side anyway, is to try to influence employer behaviour. If employers cannot see connections with the sort of stuff that Garry Brack was alluding to—you cannot see a connection between what is appearing in the premium notice and the outcomes and the things that you are doing—I think the tendency is to think that the premium system is a bit of a crock and you actually do not get the behaviours that you are looking for.

What are we seeing now? We are seeing employers saying that under the new premium formula they have these are really low claims costs—$40,000, $50,000 or $60,000 claims costs for the year—because of what has been pulled out, but now their premiums have gone through the roof and they do not understand. Alternatively, they have a premium notice that compares them to the rest of the scheme, but they are in a relatively high-risk industry compared to most other employers. Therefore, what is the relevance of their performance against the whole scheme? Prior to that they were able to do some comparisons against the industry claims cost rates so at least they could compare themselves to what they perceive are their peers.

I do not doubt that the maths is all right and icare and WorkCover worked out all this stuff and mathematically it all makes sense, but I do wonder if the current approach is in fact generating or encouraging the sorts of behaviours and understandings that you need to get employers as engaged with the system as they need to be. It seems to me it may be timely, not for a complete rejig of the premium system, but perhaps the premium system and premium formula, do need some review to see if that is actually achieving the outcomes they should be achieving.

Mr DAVID SHOEBRIDGE: The AIG in its submission says that the current premium calculation allows employers to predict their premium much more easily than the previous approach and they can also easily calculate their minimum-maximum premiums for planning purposes. So there are some good aspects about it. Is that right?

Ms BROWNE: One of the key changes was the removal of the estimate of future costs, and no longer a direct comparison with your peers in the industry. With the old premium calculation, you did not know until the rates came out whether you are going to be better or worse than your industry, even if you may have improved yourself. That part of it is easier. The schedule that applies the maximum and minimum multipliers is very straightforward, so you can at least say, "The maximum I am going to pay is X." It might be a bit harder to work out where you are going to fit in that role, but you can do that more easily than under the old scheme.

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A lot of the information that is being provided now is being provided in a much clearer way in the premium notices than it was in the past. There are particular industries where it is still very difficult to understand because of the particular issues in those industries. The other thing that was a major issue for the 2015-16 premium was the significant changes that had occurred. Into 2014-15 we had stabilisation for 2015-16, which was good, but people had been modelling what their premium was going to be for 2014-15 based on the old calculation and got a terrible shock.[3]

The Hon. TREVOR KHAN: Not modelling, budgeting?

Ms BROWNE: Exactly, budgeting for that and so got an awful shock when it had changed, particularly for those that went up and, as Mr Pattison has already said, the premium went up when the reported claims costs went down because the claims costs were being used differently.

Mr DAVID SHOEBRIDGE: So they open up the *Daily Telegraph* and find out there had been a 15 per cent general cut and they have got themselves a 30 per cent increase in their own premium—

Mr BRACK: Thirty per cent plus. If it was only up to 30 per cent you could not go to WorkCover and say, "You must have got this wrong. Please look at it again." If it was over 30 per cent you could, but 30 per cent is a big whack.

Mr DAVID SHOEBRIDGE: Well, the AIG says that in order to ensure that employers do not experience significant increases in premiums from one year to the next there should continue to be a provision where the premium calculations require a cap on the premium of 130 per cent compared to the previous year's rate. That is the kind of status quo—130 per cent?

Ms BROWNE: But it is in there as a transitional rate so it was introduced with the change of the premium calculation.

Mr DAVID SHOEBRIDGE: Do you think that is a good thing going forward?

Ms BROWNE: Our current understanding is that it is the intention of icare to remove that cap next year. We just think it puts too much volatility into the scheme to not have some form of cap.

The Hon. TREVOR KHAN: Would that not then mean that other employers are essentially carrying the can? I am talking about the medium and larger employers?

Mr BRACK: But in an insurance scheme there has to be some kind of cross-subsidisation; that is the nature of insurance. It is a question of how much you have cross-subsidisation. So up to $30,000 there is a rate, which is the standard rate, and beyond that you get all these additional add-ons and the question then is: if you have no add-ons, then you just have one rate. Theoretically you could have one rate for the entire industry.

Mr DAVID SHOEBRIDGE: But there would be no incentives?

Mr BRACK: Which means that businesses that have got no risk in one employee would be paying a tiny amount and businesses that have got 1,000 employees still in that low risk industry would be paying 1,000 times what they pay. You could do that but there is a significant legacy associated with that question: is there a

[3] Correspondence was received from Ms Tracey Browne, Manager – National Safety & Workers Compensation Policy and Membership Services, AiGroup clarifying the evidence:
The other thing that is a major issue for the 2015-16 premium was the significant changes that had occurred. We had stabilisation for 2016-17, which was good, but people had been modelling what their premium was going to be for 2015-16 based on the old calculation and got a terrible shock.

message about some of your claims experience? A lot of claims that happen are not the employer's fault, even though the unions find it very convenient and so does WorkCover or its current iteration, to blame employers and say, "Well, you have got these claims because you're hopeless".

That is just a load of codswallop. Yes, of course there are things that they sometimes do wrong and they might get things wrong and there might be an injury as a result of the things they get wrong but a lot of them have got nothing to do with those sorts of things yet they carry that can. The unions seek to argue they should bear the entire cost and "let's build the cost up even further by whatever means because they are guilty", such is the moral argument. We do not accept that moral argument except in relation to a fairly small proportion of claims.

Mr DAVID SHOEBRIDGE: I turn now to the ministerial advisory council. When you say that you would like the ministerial advisory council re-established, which Minister do you want, or both?

The Hon. TREVOR KHAN: They may not have a choice.

Mr BRACK: When you are the Minister—

Mr DAVID SHOEBRIDGE: I am not so much thinking personality; I am happy for that to be explored but I was more thinking: Do you want both SIRA and icare? Do you think the ministerial advisory council should have Ministers for SIRA and icare on it or just SIRA?

Mr PATTISON: That is a good question. I am not sure that you can readily divorce the two because of the interaction, so on balance it would probably make sense to have some engagement with both.

Mr DAVID SHOEBRIDGE: But SIRA should probably be the lead in that because it is the policy setting?

Mr PATTISON: Yes. Theoretically SIRA is setting the policy. It also has a wider brief than icare because it is also looking at self-insurance and specialised insurers; it is looking at the whole thing in total but clearly employers are interested not only in the regulatory framework and what may be going on, and the fact that the scheme is being kept in a financially sound position, which is part of SIRA's brief, but also how the scheme which affects most employees, which is icare, is also operating and what might be done there.

Mr DAVID SHOEBRIDGE: Is that the view generally? Is there general support for the re-establishment of the ministerial advisory council?

Mr GOODSELL: We would support the re-establishment of a process that allows stakeholders to jointly monitor the scheme. It did not work perfectly before. As Mr Brack and Mr Pattison said, it gave us access to information that we do not get any more, which is very helpful for all of us, including the unions, to understand the beast that we are trying to be experts on. Where it suffered, however, was that I am not sure we actually shared a view about what we were trying to do with the scheme. You would have a consultation process where there are five different views about what you are trying to achieve then it can be a bit empty so a process that exposes us to more information is essential but it would be good if that process tried to generate a shared, to the extent that it can be politically achieved—

Mr DAVID SHOEBRIDGE: Collective responsibility.

Mr GOODSELL: —a sense of shared responsibility that we need a sustainable scheme within certain general parameters. We will have our debates about share of the pie but in the last two decades we have had both sides of politics having to reform the scheme and we have had these kinds of hearings where we have all been in reverse positions about supporting reform so it is almost beyond politics but I think you can fashion out some basic criteria about stability and affordability. I think it would help the process if, whichever Minister guided it, there was an understanding that that would help.

Mr BRACK: I think one of the crucial things is that when schemes go down the drain, which are generally three to five years after they have last been theoretically fixed, people have not been looking at the real data coming through and have not therefore been saying, "This is a problem. Fix it." Unless you have got somebody with guts in the ministerial roles it will not be fixed nonetheless and if you look at the last committee that operated, it operated in an almost vacuum because WorkCover increasingly denuded that committee of real information.

Mr DAVID SHOEBRIDGE: So really it starts with transparency about the scheme's performance and giving that information to the stakeholders. Now I am not suggesting that Family and Community Services is a great example of government but recently they have developed a quarterly dashboard where key indicators are put up and published on a departmental dashboard which says how particularly its child protection figures

are tracking. Surely at a minimum we should be insisting on a quarterly dashboard coming out of the compensation system?

Mr BRACK: Can I suggest to you that the data in this scheme is so complicated that the dashboard kind of summary with pretty pictures and a few lines and graphs, et cetera, does not actually give you the answer at all.

Mr DAVID SHOEBRIDGE: Well a dashboard would be a starting point. Why should the actuarial reports not be made available to stakeholders so you can see for yourself and be informed about a scheme you are paying for?

Mr GOODSELL: They were very useful in the past. Even in hindsight you can see now that some of the trends you did not understand at the time were influential.

Mr DAVID SHOEBRIDGE: And if the information is made available to employers and unions they can be tracking what has happened to the scheme in real time and seek a nimble response from the regulators. It is the lack of a nimble response from the regulators that allows systems to fall into a crisis over time? You guys having the information—

Mr GOODSELL: It is not just nimbleness, it is also understanding the whole system; it is falling into the trap that the first simplest answer is the one that gets implemented unless you understand the consequences of pulling one lever and where something is going to fall off in an unrelated area. Workers compensation history is full of that kind of legislative reform

Mr DAVID SHOEBRIDGE: Unintended consequences.

Mr GOODSELL: Which is no good for workers and employers also hate it.

The Hon. LYNDA VOLTZ: And without that information you cannot see whether there is a problem.

Mr GOODSELL: You cannot see the full picture.

Mr BRACK: It raises a question about who in SIRA and icare has the experience in this sort of scheme to be able to make the decisions, identify what is going on, issue instructions to agents—if there are still agents, by the way—and get the right outcomes. The answer is that they do not have that experience. They may be wonderful in a range of other areas, but not here.

Mr DAVID SHOEBRIDGE: That brings me to my next point. I have looked at the SIRA board. There is no longer a tripartite board. There is no longer an employer representative or a union representative.

Mr BRACK: Mark Lennon represents all of us.

Mr DAVID SHOEBRIDGE: That is right. Mark Lennon is there because he is experienced, but he is not there as an employee representative. Do you think there is some sense in overtly restating that there should be an employee and employer representative on the board?

Mr BRACK: It is unarguable.

Ms ALLEN: We have asked for that in our submission.

Mr DAVID SHOEBRIDGE: Should there be an employee and an employer representative, so that there is someone with experience from both sides sitting there when the decisions are being made at board level?

Mr PATTISON: Yes.

Mr BRACK: There is also a question about what power the board has. I have not looked at that closely. Under the old scheme the board had no power. WorkCover used to tell them a load of the proverbial and they would go away and do whatever they wanted. Therefore, even if the board could see things going wrong, it had no power to fix them.

Mr DAVID SHOEBRIDGE: The icare board now has much more statutory independence, but the SIRA board is a little bit more independent. Would you take on notice to look at the way those two boards operate and see if either model is more effective?

Mr BRACK: The proposition is not debatable. There should be representation, certainly on our side. It does not matter who it is. There should be people who understand what is going on and who have the capacity to say, "That is the wrong answer." They have to make them think about those things again.

Mr DAVID SHOEBRIDGE: Or they could say, "From my 30 years experience as an employer, that is going to create the following problems." There needs to be collective wisdom around the table.

The Hon. TREVOR KHAN: I do not think you will ever say that.

The Hon. LYNDA VOLTZ: Is that the lawyer from Tamworth talking?

The Hon. TREVOR KHAN: No, just the traffic court lawyer.

Mr DAVID SHOEBRIDGE: Or the self-employed barrister.

Mr AITKEN: To go back to your initial question about the ministerial advisory council, we supported it being disbanded in 2012. Part of the reason was that it had morphed and membership gone beyond employers and employees, whom we see as being the key stakeholders in the discussion. Everyone else is a service provider in the scheme, but we believe employers and employees should be there, having those debates and being represented.

Mr DAVID SHOEBRIDGE: There are two options, and they are not necessarily contradictory. One is to re-establish something like the two ministerial advisory councils—that is, a ministerial advisory council that has representatives of both ministers on it. The other option is to have tripartite representation on the board.

Mr PATTISON: I will take that on notice and think it through. It might depend on how information may or may not flow and whether just having the board option places restrictions on the participants. Information may or may not flow sensibly with an advisory body. I want to share one story about information sharing that I think is important. There was a lot of debate at the time provisional liability was brought in. There was a lot of concern from our side of the table that it would be abused.

Mr DAVID SHOEBRIDGE: We are going back to 1998 now.

Mr PATTISON: Yes, the significant change when the advisory council was in place. We were getting good information flows. Provisional liability came in and we were able, as employer representatives on that committee, to see the impact on the scheme and see that it was achieving what it was meant to achieve. That then put us in a position to talk to our constituents, who were saying, "What is all this provisional liability rubbish? The scheme will be ripped off."

Mr DAVID SHOEBRIDGE: "Why is no one checking?" Yes.

Mr PATTISON: We were able to enter into debate with our constituents in an informed way and support what turned out to be, certainly then, a very sensible change, which we were apprehensive about at the time.

Mr DAVID SHOEBRIDGE: Mr Brack, that is a more persuasive form of communication than an advertisement that you see during the six o'clock news.

Mr BRACK: We cannot afford advertisements. It needs to be recognised that something like that proposition is not universally true. Agents have gone to a position where they approve just about everything and are reticent about talking to the employer about the circumstances of the claim. They get it and they approve it. That is lovely. It cuts down the amount of labour involved. The employer is paying the cost and there is no downside to the agent. That is an inadequate strategy if it is operating in that fashion. If it is operating on the basis that there is proper investigation, there is a considered examination of the medical certificates and the facts and they are proven then that is okay, but not if you are just saying, "Tick. Give us a dollar."

Mr DAVID SHOEBRIDGE: We do not have time to explore provisional liability, which has not been raised as a concern in any of your submissions.

Mr PATTISON: I was using that only as an example.

Mr DAVID SHOEBRIDGE: It is an example of the information flow benefiting broadly. Is that right?

Mr PATTISON: Yes, that is the intent.

The CHAIR: This question is for the panel in general. One part of the reform in 2012 was the linking of premiums to workplace safety performance. In its answers to pre-hearing questions, icare outlined how premium discounts are available to good performing employers. There is a 10 per cent discount at the beginning of each policy period to help employers invest in making their workplaces safer. This discount can be retained if all injured workers are returned to employment within four weeks of their injury. There are some other examples. Have you seen evidence that employers and businesses are making improvements to their workplace safety in order to take advantage of these incentives?

Mr BRACK: First of all, you have to ask the question a little cynically. If you increase the premium by 10 per cent before you reduce it by 10 per cent then you get 100 per cent. It is not mathematically true, but it is roughly true. There is a lot of cynicism about whether they are getting a reduction or whether the number in the black box is being manipulated to get it up here before they take it down there. Employers are always up for a discount. They are always struggling with the question of how effective their safety mechanisms are. Sometimes they see that they have failed on something that they could have fixed if they had seen it in advance. Big businesses generally are much more sophisticated than small businesses. Small businesses say, "Tell me what I have to do and I will do it." That is not a silly comment; that is a much more difficult thing to achieve than it appears when you have a small business person in front of you saying, "We had the toolbox discussion and then Bill did X." In the good old days you would say, "You are 100 per cent liable, no matter whether you told him 10 times." That is a worry for us, but the discount is worth having if indeed the first calculation is genuine.

Mr PATTISON: The observation I make is that if there was some data sharing with us we might know how it is working.

Ms BROWNE: With that approach applying to small employers, often the amount that we are talking about, 10 per cent, is not a lot of money. Therefore, it is looked at as something that can be spent on safety that might not achieve much. That is an issue. I am not sure that larger employers understand that they can get 10 per cent up front. From my discussions with our members, they definitely do not understand the return to work incentive that has been provided to large employers in the current premium mix of reductions of claims costs at 13 weeks, 26 weeks and 52 weeks. They do not understand. There is no guidance about how it is applied. Is very hard for us to sell that to our members because we are yet to see the impact that that has had. We are not able to say, "Here is an example of an employer that has done it and this is the premium reduction that they have got from that."

The CHAIR: Where would the guidance come from?

Mr DAVID SHOEBRIDGE: Could you explain it to us?

The Hon. TREVOR KHAN: Before you do that, would you explain what a so-called large employer is?

Ms BROWNE: It is one with a more than $30,000 base tariff premium.

The Hon. TREVOR KHAN: What does that mean?

Ms BROWNE: It depends on the industry that they are in.

The Hon. TREVOR KHAN: It is a "how long is a piece of string" question.

Ms BROWNE: It is a multiplication of their wages and their industry rate.

Mr PATTISON: I do not know why she does not know that.

The Hon. TREVOR KHAN: I have a concern that what is considered a large employer is actually a medium employer. It is not really that big.

Mr DAVID SHOEBRIDGE: In a high-risk industry.

Ms BROWNE: In a high-risk industry it could be a relatively small employer. In a low-risk industry they could be a much larger employer because the tariff premium is lower.

Mr PATTISON: But you are looking in that group at about 14,000 employers out of a total premium pool of 250 to 80,000 policies, so it is—

Mr DAVID SHOEBRIDGE: But a significantly greater number of employees because of the nature—

Mr PATTISON: Yes.

The Hon. TREVOR KHAN: Sorry, I interrupted, but I think the large employer is misleading, to say the least.

The CHAIR: It has been helpful to explain it.

Mr DAVID SHOEBRIDGE: So it is these undefined large employers. What benefits—

Ms BROWNE: They are defined, it is just hard to pick it up and say here is one example. When they use the claims cost in the premium calculation for the return-to-work incentive, they take the claims costs that

have been incurred and put that into the formula. If you have been able to get your employee back to work within 13 weeks you will get a 15 per cent discount on those claims costs. If you have been able to get them back to work within 26 weeks you will get a 10 per cent discount, and within 52 weeks you will get a five per cent discount. What is not clear is whether or not the person has to be at work not receiving any weekly compensation, or whether they only have to be back at work. My reading of the legislation is that they have to be back at work. The feedback we have had from icare is that they have to be not receiving any weekly compensation.

The Hon. TREVOR KHAN: Which is a real problem, is it not?

Ms BROWNE: Which is a very different factor. I am yet to see any guidance from icare for employers about how that gets applied.

The Hon. TREVOR KHAN: Because a lot of people will come back to work on a part-time basis and be on a part-time basis for quite an extended period of time.

The Hon. LYNDA VOLTZ: Also, they are not receiving benefits; they have been cut off.

Ms BROWNE: That is the advice we have had from icare about how it will be applied.

The Hon. LYNDA VOLTZ: Yes, so they just cut off benefits and that makes them—

Ms BROWNE: No, back at work and not receiving benefits.

The CHAIR: You have said that it is not explained clearly. Who has to explain it? I take it that icare needs to—

Ms BROWNE: Well, it is icare that applies the formula.

The CHAIR: —communicate better with employers. icare have started a new online service portal—I guess you are aware of that—which should shift their relationship with employers. Have they engaged you in the design of that portal for employers to use?

Ms BROWNE: No.

Mr GOODSELL: No. They have shared the logic behind taking that function back in-house and trying to drive some innovation.

The CHAIR: Well, dealing with that function—

Mr AITKEN: It commences, I think, first quarter 2017.

Mr GOODSELL: They are looking at first quarter next year.

Mr PATTISON: It commences first quarter.

Mr BRACK: It has not started.

The Hon. LYNDA VOLTZ: I want to ask about the payments and the cut-off. Based on the way they are doing their assessments, icare should be able to tell us who they have back at work full-time on return to work, who they have part-time and receiving partial benefits and who is not receiving benefits?

Ms BROWNE: Yes, but at the moment they have to get that date from the agents because there is not a central portal for it. They are relying on the agents to give them that data at the moment.

Mr DAVID SHOEBRIDGE: One of the best performing employers in that scenario is somebody who has got a worker back at work doing light duties and who is making up some income loss. That is in many ways the employer doing everything you want of them. Surely, they should be eligible for the benefit?

The Hon. TREVOR KHAN: Yes.

Mr DAVID SHOEBRIDGE: Are they?

Ms BROWNE: They get a direct reduction by the fact that their claims costs are down because they have got the person back at work.

Mr DAVID SHOEBRIDGE: Yes.

Ms BROWNE: It is this extra bit, which is the percentage reduction.

Mr DAVID SHOEBRIDGE: Are we of one mind? That employer is the very employer who should be eligible for the incentive because they are basically doing everything you want of them.

Ms ALLEN: It is more complicated than that. As Tracey said—

The Hon. LYNDA VOLTZ: Oh, good.

Ms ALLEN: The formula is complex as well for employers. This is another stumbling block for them. Frequently we hear from our members that they are trying to have that worker back at work. They have suitable duties, they want them in the workplace, they understand the benefits of recovering at work. They know all of that, but they cannot get through what is going on in the claims management process.

Mr DAVID SHOEBRIDGE: What I am saying to you is, if they have managed somehow to navigate that extremely difficult terrain and got the worker back on light duties with some make-up compo, they should be rewarded, absolutely.

Ms ALLEN: Of course they should be rewarded but we cannot see that flowing through. Our members say to us, "We can see we might get a reward, but we can see we have absolutely no hope of getting to that point."

Mr DAVID SHOEBRIDGE: What would need to be fixed to make the return to work easier?

Ms ALLEN: That is the claims management process. That is working with the agent because the agent is a key factor. We have the agent who is managing the claim, and we have the nominated treating doctor, and we have the rehab provider. The employer is actually reduced to a bit player a lot of the time in that process. Many times the insurer, the agent—I am using the terms interchangeably—does not contact the employer to find out if there are suitable duties or what the circumstances of the workplace are. We do not even get to square one.

The Hon. LYNDA VOLTZ: We go back to the original problem with Mr Goodsell where the employees are often chasing different claim managers and agents all the time, anyway.

Ms ALLEN: Yes, often not having their calls returned.

Mr GOODSELL: We share. The stories that workers have with that problem is something we have.

Mr DAVID SHOEBRIDGE: Employees, workers express with frustration that they are on their sixth claims manager. I assume that is the same on the other side of the record?

Ms BROWNE: Yes.

Ms ALLEN: Absolutely.

The Hon. DANIEL MOOKHEY: Do you think the agent management structure works?

Mr BRACK: It depends on the agent and it depends on the contract we have got and—

The Hon. DANIEL MOOKHEY: Why does it depend on the agent?

Mr BRACK: —what things are being remunerated. Being good capitalists, if you remunerate them to do X, they will do a lot of Xs. If you remunerate them to do X by a certain date within 21 days, they will do X by 21 days. Tick, tick, tick. So they can be good. There are some agents who have a reputation for effective performance and there are other agents who do not.

Mr DAVID SHOEBRIDGE: Do you not believe that the deeds under which they are remunerated, or the standard deed under which they are remunerated should be on the public record for people to see?

Mr BRACK: Not necessarily the money figures.

The Hon. DANIEL MOOKHEY: The performance status.

Mr DAVID SHOEBRIDGE: The performance indicators.

Mr BRACK: You are being remunerated for A, B, and C.

Mr PATTISON: And we have struggled for some time to get performance data out so the employers can make some choices.

The Hon. LYNDA VOLTZ: They are not the only one who has complained about it.

The Hon. DANIEL MOOKHEY: Given that we have a nominal insurer that nominates up to four scheme agents, or slightly more—

Mr PATTISON: Five.

The Hon. DANIEL MOOKHEY: Five. We are not that complicated a market here, are we? We are not talking about 50 or 60. Why do you think there are such variations when we only have five scheme agents?

Mr BRACK: Between the performance of one and another?

The Hon. DANIEL MOOKHEY: Presumably they all have a similar set of performance benchmarks? There is a common deed.

Mr BRACK: Like any range of businesses, five businesses doing plumbing, one of them you will ring back because you say he or she came when they said they were going to do it. Their price was good, their work was effective; the tap did not drip. The next one did not get there for three days and then they had to go away in the middle of it because they got another call and the tap dripped, and blah, blah, blah.

The Hon. DANIEL MOOKHEY: It is slightly different though, is it not? The employer is not hiring the plumber. It is being done on behalf of the State and you are not being asked to pay for it, are you?

Mr BRACK: We are.

Ms ALLEN: We are.

The Hon. DANIEL MOOKHEY: My point is—

The Hon. LYNDA VOLTZ: You are just making their argument for them.

Ms ALLEN: Again, this comes down to transparency. We know guidelines are issued by icare, and we know that they have to be followed to the letter. We know that there are directives issued by icare, none of which, or much of which we do not see. We know that icare does issue fairly specific instructions, shall we say, to the agents as to how they are to conduct their business.

The Hon. DANIEL MOOKHEY: I am trying to figure out who is the bad capitalist.

Ms ALLEN: So that needs to be monitored and we do not know how that is monitored.

The Hon. DANIEL MOOKHEY: Is the bad capitalist the agents or icare?

Mr BRACK: There is no such thing as a bad capitalist.

Mr DAVID SHOEBRIDGE: The one who loses money is their definition.

The Hon. LYNDA VOLTZ: He walked straight into it.

The CHAIR: On that point, we will wind up.

Mr BRACK: Before you do, talk to South Australia. Have you already talked to South Australia?

Mr PATTISON: Greg McCarthy and the guys down there.

Mr BRACK: Talk to Greg McCarthy.

The CHAIR: We will take it on board.

The Hon. DANIEL MOOKHEY: Good capitalist.

Mr BRACK: He is on your side.

The CHAIR: Thank you for coming today and giving evidence to the inquiry; we appreciate your time. You have taken some questions on notice, which need to be returned within 21 days. The secretariat will contact you regarding the questions on notice.

(The witnesses withdrew)

(Short adjournment)

MICK FRANCO, NSW Self Insurers Association, affirmed and examined

STEPHEN KEYTE, NSW Self Insurers Association, sworn and examined

The CHAIR: Welcome to the first review of the Workers Compensation Scheme under the new Act. Mr Keyte, would you like to make a brief opening statement?

Mr KEYTE: Yes, I would. In regard to, firstly, the submission that we put in, the one-pager, it was only on the basis, as you can see, that your terms of reference were quite broad, as in the whole Workers Compensation Scheme. We appreciate the opportunity to be able to come and give evidence and to be able to narrow it down to the theme in particular that you are looking at in the scheme and also any of the issues that come up that are particularly relevant for self insurers.

The CHAIR: I will get you to outline what your organisation does, for the purposes of the inquiry, but, Mr Franco, do you want to make a statement?

Mr FRANCO: I have prepared some topics for discussion. In the absence of a written submission beforehand I thought that that was a good idea—topics that are relevant to our members.

Mr DAVID SHOEBRIDGE: It might be useful. There will be specific issues that self insurers face that are not faced by the employers who deal with scheme agents. Maybe that would be the best starting point. What are the specific issues?

Mr FRANCO: I will try and keep it brief, even though the notes are about five pages. There are about five issues that we come prepared to discuss. The primary issue—and I understand that you may have heard about this earlier this morning from the lawyers—is the issue of simplification of the claims determination process and a dispute resolution process. We would, as an association, support the Law Society's submission in that regard, and I can go into some detail about what the association sees as problems both in the determination of claims and in dispute resolution. The second topic I wanted to touch on, and it is an issue that is increasingly troubling self insurers, is the question of medical expenses and the application of section 59A. There are some tricky legal issues in relation to all of that, some of which I do not believe have seen the light of day yet, and I will come back to that.

I would like to make some remarks about work capacity assessments and decisions. I would like to also affirm the association's long-held support for the introduction of a simple commutation mechanism.

The Hon. TREVOR KHAN: It had better be quick.

Mr FRANCO: It will be quick, but, nevertheless, it is something that the members of the association believe in passionately.

The Hon. TREVOR KHAN: Not everyone wants it.

Mr FRANCO: No, not everyone wants it, but it is part of our agenda. Finally, I would like to make some brief remarks about SIRA's role as a workers compensation system regulator, without wishing to be critical and recognising that it is early days yet in its evolution. They are the five topics.

The CHAIR: Mr Keyte, would you just give us a quick overview of your association and who your members are?

Mr KEYTE: The association has been in existence since 1970. It represents, as we speak today, 56 large employers and specialised insurers, which are apparently about 10 per cent of the workforce in New South Wales—mainly large employers. To be a self insurer, one of the licence conditions is you must have greater than 500 employees. But most of the large employers in the State—the energy companies, retail, local government—have mainly over 1,000 employees.

The CHAIR: You are specialist insurers.

Mr KEYTE: Specialised—Catholic Church insurance, the Thoroughbred Racing Board, StateCover, Guild Insurance for the pharmacies.

Mr FRANCO: They are industry groups. If you take the local government sector, StateCover Mutual Limited is a specialised insurer for a pool of local government authorities. The Guild is a specialised insurer for a pool of pharmacies.

The CHAIR: And they are all captured by the current Act?

Mr FRANCO: Yes.

Mr DAVID SHOEBRIDGE: I would be interested to know, Mr Franco, what you see in terms of the problems in the process now and what your solution is.

Mr FRANCO: We have significant technical and content requirements in relation to decision-making on claims, whether it be disputes that go before the commission or work capacity decisions. The requirements are too complex, they are onerous, difficult to administer and the construction of the notices, whatever system you are operating in, just consumes too much by way of resources. One of the particular problems that self insurers face is the ability to explain the decision-making and the outcomes and the rights that workers have to the injured worker. It is a real problem. In the world of self insurance the injured worker is often still an employee of the organisation so there is an added tension there. In the opinion of the association the legislation as it currently stands fails to adequately delineate between what is a liability decision and what is a work capacity decision.

Mr DAVID SHOEBRIDGE: Earlier lawyers talked about supermega, the most recent Court of Appeal decision.

Mr FRANCO: Yes, I was going to mention that. That case highlights that problem and even though it has had the attention of the Court of Appeal the problem still exists. There are many permutations of liability disputes and disputes about work capacity that potentially can end up in both forums. If you look at the main possibilities these days you have got liability disputes on injury, causation and weekly payments, for example, but only if the weekly payments are within 130 weeks of the injury.

The Hon. TREVOR KHAN: I do not want to cut you off but I am mindful of the time that you have got. You could have been sitting with the Law Society on that panel this morning. Everything you say in that sense has been said.

Mr DAVID SHOEBRIDGE: I would want to know because self insurers have a different role in some ways because you are both the employer—so you have got an employee relationship—and an insurer relationship.

Mr FRANCO: That is right.

Mr DAVID SHOEBRIDGE: How do you find the workers responding to these notices? You give them long notices that are compliant with what you need to comply with—

Mr FRANCO: I do not deal with it at the coalface.

Mr KEYTE: I do because my day job is managing claims for my employer. Recently I had a work capacity decision that is going to merit and the worker is a tractor driver. I work for Wollongong Council and he has been a tractor driver since he was 17 and he is now 56. He came in to see him last week. "I have got this merit review. What are the reasons I have to put in?" I said, "Well, I can't answer that for you; that's your decision." However, he was so confused by my notice which is seven to eight pages long, with a lot of references to legislation and timeframes, to amounts and thresholds which he did not understand at all.

The CHAIR: That is a consistent theme in the evidence.

Mr DAVID SHOEBRIDGE: Let alone the bulk of evidence that you have attached to it that this tractor driver is meant to navigate through.

Mr KEYTE: Go through doctors' reports, medico-legal reports—

The Hon. TREVOR KHAN: What is the solution to this?

Mr FRANCO: The problem, in short, is there are too many pathways for different claims or different components and it is too complex for both injured workers and employers who are self insured to negotiate and to get to a clear outcome. The association recognises that it is even more of a problem for the injured worker in the work capacity space in the absence of paid legal representation.

Mr DAVID SHOEBRIDGE: Is it a single, comprehensive jurisdiction that deals with everything?

Mr FRANCO: Yes.

Mr KEYTE: A simple dispute notice in plain English so the worker can understand, hopefully, on what grounds the decision was made and why, what can be done about it.

Mr FRANCO: That deals with all issues.

Mr KEYTE: That was the problem with the gentleman last week, that is, I cannot point him in the direction of a lawyer.

Mr DAVID SHOEBRIDGE: You feel like you have an obligation to them.

Mr KEYTE: I did explain to him as much as I possibly could without putting any conflict in my position. But that is one of the advantages of being a self-insurer.

Mr FRANCO: The association considers that the time has well and truly come for a single and simple form of notification to the worker of what are their entitlements in a concise and understandable way across all different claims types.

The Hon. TREVOR KHAN: Does there have to be a service of, in a sense, the evidence separately from the service of the notice?

Mr FRANCO: At the moment the system is described as front-end loaded so the notice must attach to it every piece of paper.

The Hon. TREVOR KHAN: Accepting that, that is why I am asking, do you have to have a process of service of essentially a notice of dispute, and then subsequently a procedure for the service of the evidential material that backs up the dispute?

Mr FRANCO: Well it is not two-pronged at the moment. At the moment it is the notice with all the evidence attached in one ago.

The Hon. TREVOR KHAN: I understand that. I am talking about what the solution is.

Mr FRANCO: I sometimes think that the service of the additional material, the supporting material, complicates the story even more.

The Hon. TREVOR KHAN: Somebody is going to have to make a decision in due course and you would expect that both parties would be entitled to the evidential material that would back up what the decision maker is going to be confronted with.

Mr DAVID SHOEBRIDGE: But dumping a big bucket on an injured tractor driver right at the beginning with a seven page covering letter—which you need to do to comply with the Act—helps nobody.

The Hon. TREVOR KHAN: I think we are ad idem.

Mr DAVID SHOEBRIDGE: I know.

The Hon. LYNDA VOLTZ: There is a legal love-in going on here.

Mr FRANCO: It may come down to what the legal representation looks like down the track. So in addition to the notice the association would advocate the establishment of, if you like, a specialist independent tribunal or a court. It was probably described as a one-stop shop in evidence previously given, with an appointed judicial officer dealing with the determination or resolution of the issues. All issues under the workers compensation legislation.

Mr DAVID SHOEBRIDGE: Mr Franco, you also need to talk about section 59A, work capacity.

Mr FRANCO: Yes, okay, I will move on. There are some fundamental problems in the design of section 59A at the moment that no doubt will result in further test cases that will trouble the system. At the moment there is still the prospect of the old version—there have been two versions of section 59A—which provides for medical costs to be paid for a period of 12 months after a claim, or after weekly payment stopped, can still apply. There is a transitional provision in the legislation that enables the old version to apply. So it is not necessarily the version that was promulgated last December, and that is a big problem because there are still thousands of old claims, potentially in the system.

Mr DAVID SHOEBRIDGE: What differentiates an old claim from a new claim?

Mr FRANCO: The transitional provision says that if you were in receipt of weekly payments in September 2012, or if your first claim for weekly compensation for the injury was made between October 2012 and December 2015 the new version applies. If you do not fall within those parameters the old version applies, subject to the reform that came in in 2014. Now I cannot simplify it more than that.

Mr DAVID SHOEBRIDGE: Could you give us this on notice as it would be really helpful.

Mr FRANCO: I could. The short point is that we have got potentially two systems that operate in relation to medical expenses that will confuse the participants, the injured worker and the employer, and it will be a recipe for more disputation.

Mr DAVID SHOEBRIDGE: I think your submission on confusion is well received, but we do need to see the detail.

The Hon. TREVOR KHAN: What is your solution?

Mr FRANCO: I think the only solution is a complete redesign of the section starting from scratch. I do not think it can be patched up in this piecemeal fashion that has occurred since 2012 and then in 2014 and then again in 2015.

Mr DAVID SHOEBRIDGE: But at a minimum one potential solution is the 2015 one applies across the board?

Mr FRANCO: Applies across the board, yes.

Mr DAVID SHOEBRIDGE: That would be the simplest.

Mr FRANCO: But it is not without problem.

The Hon. DAVID CLARKE: We have about 11 to 12 minutes left. The point I am making is that you have four pages of notes there.

The Hon. TREVOR KHAN: Questions not answers.

The Hon. DAVID CLARKE: I suggest you prepare a decent submission for the Committee and put the matters you have been raising in it. I think the Committee would be very interested to hear what you have to say.

Mr FRANCO: Yes.

The Hon. DAVID CLARKE: Something of some substance.

Mr DAVID SHOEBRIDGE: I think we are getting there, the Hon. David Clarke.

The Hon. DAVID CLARKE: I know, but we have got 12 minutes. What I am saying is it does not matter if we go non-stop, in 12 minutes you are not going to cover everything that Mr Franco has—

Mr DAVID SHOEBRIDGE: Now we only have 11½ minutes.

The Hon. DAVID CLARKE: I know. I will move for an extension of time for that two minutes that I have used.

The CHAIR: The observation is a submission is always helpful. I know you are an honorary solicitor and doing that around everything else. That is fine. If you want to make a late submission we could take that.

Mr DAVID SHOEBRIDGE: I think we have touched upon the concerns with the work capacity already in your initial point on process. Was there anything specific about work capacity that you wanted to say?

Mr FRANCO: Just briefly, the application of the work capacity methodology is troubling for self-insurers because there are a number of ingredients in work capacity that are undefined—you would have heard of things like pre-injury average weekly earnings [PIAWE], the reckoning of a week and the absence of a template letter across the system.

Mr DAVID SHOEBRIDGE: It would not seem beyond the ken of an organisation the size of SIRA to come up with a template letter for determining average weekly earnings.

Mr FRANCO: That is correct. And the other problem the association sees is that there is a difference of approach between the merit review agency and the Workers Compensation Independent Review Office [WIRO] on certain issues in work capacity which adds to confusion. They were the only two points I was going to make.

Mr DAVID SHOEBRIDGE: What about the difficulty you have in trying to tease out what is a liability issue and what is a work capacity issue? When you are making decisions, whatever you put at the top of your decision is likely to send the worker down one path or another. Is it easy for you to work out what is a work capacity decision and what is a liability decision?

Mr KEYTE: Yes. I understand what the differences are.

Mr DAVID SHOEBRIDGE: But there must be grey areas?

Mr KEYTE: Not really. I have not encountered them. The liability issues to me are clear: an incident or accident occurred and the resulting injury is related to the employment—medical treatment and permanent impairment liability. Work capacity is about the return to work and the ability to work.

Mr DAVID SHOEBRIDGE: What about any current incapacity that is unrelated to the work injury? Where does that fit?

Mr FRANCO: I think it is a liability issue.

Mr KEYTE: That is the liability issue—yes.

Mr DAVID SHOEBRIDGE: But others would say that is a work capacity issue.

Mr FRANCO: Correct.

Mr DAVID SHOEBRIDGE: And there is some dispute, is there not, between WIRO and the merit reviewer on some of these issues?

Mr FRANCO: On some of these issues.

Mr DAVID SHOEBRIDGE: If two organisations that are paid to do this full-time cannot agree, how does a worker work out which path to go down?

Mr FRANCO: Or how does the employer implement it if it is a self-insurer?

Mr DAVID SHOEBRIDGE: And does this not get back to the problem of the bifurcation? What problems does this bifurcated system fix?

Mr FRANCO: I think it creates problems because you can have cases that end up in both forums and they get stuck there.

Mr DAVID SHOEBRIDGE: Mr Keyte, has that happened as a matter of practice?

Mr KEYTE: It depends. Not really. That would not normally happen.

Mr DAVID SHOEBRIDGE: Mr Franco, what about in your experience?

Mr FRANCO: I have seen dispute notices in the Workers Compensation Commission and simultaneous work capacity decisions. The worker has not gone down the review path in the work capacity and the confusion then arises in how the Workers Compensation Commission should deal with the dispute before it.

Mr DAVID SHOEBRIDGE: After 130 weeks of benefits the Workers Compensation Commission cannot determine the benefit.

Mr FRANCO: That is correct.

Mr DAVID SHOEBRIDGE: What happens in those circumstances?

Mr FRANCO: Occasionally the parties find ways of putting aside their differences and resolving part of the claim to clean up arrears in weekly payments, if I can put it that way. The future is left untouched.

Mr DAVID SHOEBRIDGE: So the complexity has people concocting a solution.

Mr FRANCO: Yes. There are examples of artificial settlements that resolve parts of disputes that might be before the commission but claims remain hanging and that may have an impact on other workplace issues such as return to work.

Mr DAVID SHOEBRIDGE: You said the last thing you want to touch upon was SIRA and the other regulators.

Mr FRANCO: Commutation is part of the mantra of the Self-Insurers Association. The short point there—and I know this is not a popular view industry wide—is that employees and self-insurers are well able to realise when they have reached the end of the road in terms of rehabilitation and return to work. The association would suggest that allowing the parties to finalise their claims and their entitlements is a good way of allowing the injured worker to put it all behind him or her and move on with their life.

The Hon. TREVOR KHAN: Do I take it that you make that submission essentially that self-insurers should be carved out and that employees and self-insurers should have a different deal from that of employers otherwise covered by the scheme?

Mr FRANCO: I do not want to speak for the scheme. If that is what it takes to achieve that outcome for self-insurers that would be well received.

The Hon. DANIEL MOOKHEY: But is your contention that that is a general thing that every person should have?

Mr FRANCO: I personally think that it is a good idea across the system.

Mr DAVID SHOEBRIDGE: But particularly with self-insurers where you have a much deeper relationships with the injured worker—you have an employment relationship and an insurance relationship with them; you know each other well.

The Hon. TREVOR KHAN: I think you might be overstating the relationship.

Mr DAVID SHOEBRIDGE: Well, you have a lot of information about each other.

The Hon. DAVID CLARKE: That is right.

Mr DAVID SHOEBRIDGE: You might have had a 15-year relationship of one form or another. There is an argument, is there not, that if that relationship has broken down then perhaps if there is legal representation to the lawyers you can negotiate a permanent exit from each other?

Mr FRANCO: Definitely.

The Hon. TREVOR KHAN: The rationale when the 2012 amendments went through was that the commutation was creating a pattern of behaviour, rightly or wrongly—

Mr DAVID SHOEBRIDGE: This is the 2001 amendments.

The Hon. TREVOR KHAN: —that was affecting the viability of the scheme. That is not a relevant criteria in terms of self-insurers.

Mr DAVID SHOEBRIDGE: But, the Hon. Trevor Khan, the commutations were taken out in 2001.

Mr FRANCO: That is correct.

Mr DAVID SHOEBRIDGE: The inability to have an exit payment created a whole lot of tail claims which was part of the crisis.

The Hon. TREVOR KHAN: I apologise but it is part of the debate.

Mr FRANCO: One other thing about commutations is that they were not completely taken out. They are available but they are heavily restricted in terms of access. The main criteria is achieving this 15 per cent permanent impairment to get to first base, if you like. The reality is, though, with the way the system is currently designed if an injured worker gets to 15 per cent they will not be interested in commutation—they will be interested in a work injury damages settlement because they have had their access to other benefits severely curtailed.

Mr DAVID SHOEBRIDGE: And in fact it is easier, bizarrely—or less bureaucratically difficult—to settle a common law claim as a work injury damages claim than it is to get a commutation through.

Mr FRANCO: I agree.

Mr DAVID SHOEBRIDGE: Some of them are kind of commutations disguised.

Mr FRANCO: I agree, Mr Shoebridge. The final point was SIRA's role as regulator. The association understands that it is relatively new and it is still in an early evolutionary stage in terms of infrastructure and engagement with the industry so it does not wish to be critical.

The Hon. LYNDA VOLTZ: However—

Mr FRANCO: The association is concerned that the system is not getting a sufficiently clear and accurate policy interpretation position on the legislation quickly enough. I appreciate that SIRA is involved in a whole range of activity but the legislation and the fragmented, disjointed nature of the system require better explanation for participants. In this regard we have observed that icare, for example, another part of the system, is able to put out policy statements on certain things—for example, the operation of the section 39 issue which is exiting injured workers from the system after five years. There is information going out from icare through its scheme agents to injured workers, so that part of the system is getting some information.

I am not sure about how accurate that information is, but it nevertheless is information whereas self-insurers and specialised insurers do not have the benefit or the ability to put out statements of policy and are reliant on the regulator, icare. Another good example was in the Sabanayagam case during one of the appeal stages, the presidential appeal, in which both icare and SIRA put out policy statements on how a particular issue might be handled. There were major inconsistencies in that policy statement. That was in relation to section 33 and whether that is a liability issue or a work capacity issue.

Mr DAVID SHOEBRIDGE: Could you provide us on notice with those references?

Mr FRANCO: If I can find them. I will try to hunt them down. But the basic issue was that icare said that section 33 was a work capacity issue at that point, and I think SIRA left it open, potentially, as still a liability issue. The final point is that what the association would encourage is that the regulator assumes a more leading role in developing and articulating policy positions on the interpretation of the legislation.

Mr DAVID SHOEBRIDGE: Or you could make a legislation less hideously complex.

The Hon. TREVOR KHAN: That is like asking for a simplified tax Act.

Mr DAVID SHOEBRIDGE: Yes.

Mr FRANCO: That was the initial submission, but if we are stuck with legislation that is substantially what we have, then I think it is even more important that the regulator does adopt this role. Clearly, there are policy statements coming out of one part of the system, which is icare.

The Hon. DANIEL MOOKHEY: On notice, can you provide us with a bit of a description as to the quality, calibre and frequency of interaction that the association has had with the regulators?

Mr FRANCO: We do not have any interaction with icare because we are not part of that.

Mr KEYTE: We are not part of that, yes, but they are the regulator.

Mr FRANCO: Yes. At the moment, the main source of discussion between the association and its members with SIRA is a discussion about revamping the licensing criteria for self-insurers. That is the headline item.

The Hon. DANIEL MOOKHEY: That is pretty important for self-insurers.

Mr DAVID SHOEBRIDGE: The last time self-insurers came to this Committee, they were particularly concerned about the enormous cost of the biannual audit at the time.

Mr FRANCO: Yes. That is part of this current discussion.

Mr DAVID SHOEBRIDGE: Is that partly been fixed?

Mr KEYTE: Well, it looks like it, by the current draft framework. That will be removed.

The CHAIR: We will take the last question from the Hon. David Clarke.

The Hon. DAVID CLARKE: This is just a continuation of what I raised before. Would you be prepared to undertake to produce something for the Committee? What goes in it—I have confidence you will know what will go in it.

Mr DAVID SHOEBRIDGE: Just this last thing on that, the employers that we heard just before afternoon tea were very conscious about wanting to get more data and more transparency about the overall scheme. Maybe that is not such a concern for you with your self-insurer role, but to the extent that you would want further transparency in the scheme, could you pick that up in your latest submission.

The Hon. DAVID CLARKE: We would like some reflections on that.

Mr KEYTE: We would like to see how we compare with the scheme—having apples and apples across the whole scheme.

Mr DAVID SHOEBRIDGE: That would be really useful.

Mr KEYTE: It would be useful to have the same data, regardless of whether you are a self-insurance scheme, or whatever.

The CHAIR: Do you sit on a sort of conglomerated funds base for self-insurers?

Mr KEYTE: No.

The CHAIR: Each one has their own?

Mr KEYTE: Yes. Each individual employer has their own provision.

The CHAIR: They have their own provision and they look after their own.

Mr KEYTE: Yes.

The CHAIR: Okay. Thank you for coming in today and giving evidence. The Committee has resolved that answers to any questions you took on notice—I think there were some questions on notice that you are

asked to take—should be provided back to us within 21 days. The secretariat will be in touch with you about those matters and clarify that so that you know which ones they are. Thank you for coming in today.

Mr FRANCO: Thank you.

Mr KEYTE: Thank you.

(The witnesses withdrew)

The Committee adjourned at 16.03.