REPORT ON PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

CORRECTED PROOF

At Jubilee Room, Parliament House, Sydney on Monday, 7 November 2016

The Committee met at 9:30 am

PRESENT

The Hon. S. Mallard (Chair)

The Hon. D. Clarke
The Hon. T. Khan
The Hon. D. Mookhey
Mr D. Shoebridge
The Hon. L. Voltz (Deputy Chair)

The CHAIR: Good morning. Welcome to the second hearing of the Standing Committee on Law and Justice review of the workers compensation scheme. I acknowledge the Gadigal people, who are the traditional custodians of this land on which we meet today. I pay our respects to the elders past and present of the Eora nation and extend that respect to other Aboriginal people present. Today is the final hearing that the Committee plans to hold as part of the review. Most of today's hearing is open to the public and is being broadcast live via the parliament's website. A transcript of today's hearings will be placed on the Committee's website when it becomes available.

In accordance with the broadcast guidelines, I inform members of the media who are here or who may be joining us that while Committee members and witnesses may be filmed or recorded, people in the public gallery should not be the primary focus of any filming or photography. I also 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 may say outside of their evidence at this hearing. So I urge witnesses to be careful about any comments you may make to the media or to others after you complete your evidence, as such comments would not be protected by parliamentary privilege if another person decided to take action for defamation. The guidelines for the broadcast of proceedings are available from the secretariat.

This is a public hearing. It is not an open forum for comment from the floor. Audience interruptions are not recorded in the transcript. They make it difficult for witnesses to communicate with the Committee. If members of the audience interrupt proceedings, I may have to stop the hearing and have them removed from the premises. There may be some questions that a witness could answer only if they had more time or with certain documents at hand. In those circumstances witnesses are advised that they can take a 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. Any messages from advisers or members' staff seated in the public gallery should be delivered through the Committee secretariat. Finally, would everyone please turn off their mobile phones or set them to silent for the duration of the hearing.

SHANE O'DONNELL, Local network member, Injured Workers Support Network, Wollongong, affirmed and examined

ROSS STIRLING, Local network member, Injured Workers Support Network, Parramatta, affirmed and examined

MARGARET CAMERON, Injured worker, sworn and examined

ROWAN KERNEBONE, Coordinator, Injured Workers Support Network, affirmed and examined

REBECCA WIECZOREK, Injured worker and member, Shop Distributive and Allied Employees' Association, before the Committee via teleconference, affirmed and examined

The CHAIR: I invite witnesses to make a brief opening statement, and then the Committee will proceed to questions. I invite Ms Wieczorek to make her opening statement first. That will conclude her participation because it is too difficult to ask questions of both a panel of witnesses and a witness appearing via teleconference.

Ms WIECZOREK: Good morning. I am 35 and the mother of five young children. I am employed by a large supermarket chain. I suffered an injured disc in December 2015 that was one millimetre from my spinal cord. It required surgery. I also suffered severely compressed nerves, rendering me unable to drive. I have a strong addiction to painkillers. Being unable to drive and living in a semi-rural area has increased my post-traumatic stress disorder [PTSD], as I am extremely isolated. I was initially refused help getting my boys to school as the insurer deemed it a claim for a nanny. EML repeatedly expressed frustration and distrust about my recovery. They sent me to various specialists and ordered painful nerve studies before considering any recommendation by my team of doctors. Even then, they ignored my surgeon's decision and did not approve it.

A representative of my employer is yet to come to a single appointment. I have been treated poorly by my employer, who is self-insured, and by my case worker, who is employed by EML. When first injured, I was instructed not to see a doctor and to go to a physiotherapist as part of the physiotherapy recovery program. After my injury I received 95 per cent of my pay in the first 14 weeks. Since then I have received 80 per cent. I earn $320 a week and I have the same bills that I had prior to my injury. EML refused to supply transport home from my month-long stay in hospital, as I had to lie down for all but 15 minutes a day and my trip home took approximately one hour. They also refused to supply a toilet chair and shower chair, leading to a stand-off with the hospital, which refused to discharge me, deeming it negligent on the part of the insurer. This showed me that my injury and recovery are of no importance to the insurer.

A taxi account was requested so that I could get to physiotherapy appointments. It was declined as they said it may be misused without tracking. After a phone conference with me, the insurer, the union and my employer, they agreed that if I paid the $130 for the trip they would refund it that day. They did not honour that agreement even once. That led to a complaint to the Workers Compensation Independent Review Office [WIRO]. It also led to me missing much-needed physiotherapy sessions, as $130 twice a week, refunded only every 28 days, which the insurer expressed as their legal right, was far more than we could afford. Our home loan now has to be paid on an interest only arrangement. My employer has been negligent. Because of their negligence, I have been left with permanent damage that affects me mentally and physically and has affected my whole family. There seem to be no consequences for EML or my employer.

The CHAIR: Thank you for sharing your situation with us. I want to say to all witnesses that this Committee is not empowered to investigate individual cases but your evidence helps inform us around policy issues and it is much appreciated. Ms Wieczorek you can listen to the remaining evidence if you wish or you can go about your day. It is up to you.

Mr O'DONNELL: My name is Shane O'Donnell.

The CHAIR: You do not have to stand.

Mr O'DONNELL: I would rather stand. I am an injured worker. I am a bricklayer. I injured my spine in 2014, requiring surgery to cut away part of the disc to relieve the pressure on my spine. Since I have been on the workers compensation system I have faced many problems. One of these problems was the insurer, using an independent medical consultant to deny treatment. This led to me waiting 97 days to get approval for treatment for psychiatric treatment. This is way too long—97 days—21 days it is supposed to be. They ignored emails. They used the wrong doctor. The doctor is not allowed to make comments on treatment or the necessity of treatment.

Also with my weekly wages both Allianz, overlooked by icare, did a review of my wages which said that I was $5,500 overpaid. I fought by myself—I was not allowed to use a lawyer as they were work capacity decisions. I went through two merit reviews and it found that I was not $5,500 overpaid, as they were trying to tell me, I was $500 a week underpaid and they had to repay me $6,000. There is no consequences for the insurers constantly ripping off injured workers. I mean, if I did not fight and fight, they would have been $500 a week in front. I mean, $5, $10, $15 or even a $100-a-week mistake, $500 I do not think so. That is just ripping off injured workers.

Mr STIRLING: My name is Ross Stirling. I am currently employed. I have been with my current employer now for 25 years. I got injured in 2014. It was a shoulder injury tendons. I was actually refused basically for my claim even though Allianz's independent specialist recommended that I did injure myself at work. They went back to that specialist and asked for a second report. They said that he had mixed things up. So a second report got through. It was a little bit harder: they denied. So, like many, I had to go through the tribunal where I clearly won and actually during the phone conference, even the adjudicator there said, "Look, even your own independent specialist" which was Allianz's independent specialist, had supported my case.

I would just like to say now that I am actually back at work but the insurance company makes it so hard for me to keep my job, okay? They want case conferences every month, even though I am doing 38 hours. Basically they want case conferences from my doctor on a monthly basis. They want my doctor to come out to my workplace. They send questions through to my employers such as, "What do you think are the long-term prospects?" Like, they are giving the employer options to say, "Well, you know, do we need to keep this person on."

I did a good position description review. Luckily, a few of the clients that we deal with, they gave me recommendations. But I have two days off a week, and one day off a week is basically going through all the paperwork. There is so much unnecessary paperwork, so much bullying. Even though all my specialists sent through all the information they said, "Look, he will just need physio for 52 weeks", okay, until the complete two-year rehab which I am on the system to December 16. I constantly get sent out "Okay, we're going to look to wrap your case up in January." They support nothing whatsoever. I go through so many different caseworkers. You have to go through the same whole story. It is just ridiculous. I want to stay at work but they are just threatening my position. They just want to hear my employer say—and luckily I have got the union. Luckily I always take witnesses through. I have to fight to keep my position. It is absolutely ridiculous. I want to stay at work.

Mr DAVID SHOEBRIDGE: Which insurance company?

Mr STIRLING: Allianz.

Ms CAMERON: Margaret Cameron. On 28 January this year I start work for nightshift at 10.30 p.m. At 2.30 a.m. I was assaulted by a resident with dementia who had shown signs of aggression and physical behaviours for three weeks prior to my incident. There are two staff rostered on at night shift to care for 52 residents. I have worked light duties since the assault. During this time I have been treated as though what happened to me was my own fault and I feel that I am continually being punished for it. I feel the Catholic Church insurance has not supported me through this. I have been denied treatment with my psychologist, recently not having an appointment for six weeks.

There has been a lack of communication between those that are treating me, and I am continually being told by the insurance company and the rehab service provider that the reason is because forms are not being filled out correctly and I cannot attend my appointment. I do not believe I should be involved in these discussions, after all I am the injured worker and having them blame each other is added stress for me. These organisations have the responsibility of supporting and assisting with the recovery of injured workers to resume back into the workplace. Not once have I been treated with compassion or understanding. I walked into my workplace that night a strong, independent, secure woman, proud of my physical ability of performing the job that I loved. I am now a different person. I have no confidence, security, say or control over what is happening in my life.

Mr DAVID SHOEBRIDGE: You are doing a good job, Ms Cameron, thank you.

Ms CAMERON: I fear for my future. I have days of absolute gloom and dread which I struggle to get through at times. I believe the lack of support, the horrible treatment I have endured in my workplace from the insurance company and rehab provider have hindered my recovery, and increased my post traumatic stress disorder. I only ever ask and expect to be treated with respect, after all, this is my life that has been changed forever.

The CHAIR: Thank you for sharing that very personal story.

Mr KERNEBONE: Thank you for the opportunity to address this inquiry. I am Rowan Kernebone, Co-ordinator of the Injured Workers Support Network. Since 2012 we have seen dramatic changes within the workers compensation system. We have seen careers and hopes destroyed, we have seen families broken and we have unfortunately seen too many lives change for the worse. Those who stood tall, employed and valued prior to their injury, and now treated in the worst possible way by the Government, the insurers and their employers. It is my view, and the view of my members, that the system has been purposefully broken. The concerns and recommendations of our network can be summarised in one sentence. The system needs to re-orientate itself so that its focus is always a return to health.

An individual's recovery and adaption to a health crisis does not form the basis of any KPIs of the regulator, the insurer, company or any other of the employees of those institutions. Yet in the minds of the working population the system is fundamentally geared towards a return to health. This is an unfortunate misconception. The real but erroneous focus of this system is to manage a manila folder, labelled for an individual, but never is that person's interests or basic needs considered, rather, it is the minimisation of a financial outlay for an insurer. The behaviour of insurers is beyond inhuman and, in my opinion, borders on systemic corruption.

The Victorian Ombudsman identified these practices as termination culture, one in which the pressures and profits stem from denying or delaying necessary health and financial support, and concentrates the efforts of all professionals involved on closing those manila folders as quickly as possible, commonly referred to in this system as a return to work. In reality, though, this end point allows insurers to put their wealth above the health of injured workers. Return to work is an important step towards a return to health. It is not an effective measurement of the success of the system. The legislation allows this misconception to occur.

The Injured Workers Support Network believes that the faith of our society and the Parliament has in the system does not in any way reflect the work conducted by the insurer and others. Injured workers need the system to re-orientate itself so the focus is always on return to health.

The Hon. LYNDA VOLTZ: The Committee has received a lot of complaints about case management from both workers and business itself in terms of turnover. Mr Kernebone, have you ever seen any evidence of any bilingual information that has been sent out or the provision of interpreters through the workers compensation system?

Mr KERNEBONE: The insurers will use an interpreter when making a phone call to an injured worker who does not speak English, and that is where it begins and ends. The information provided by everybody, apart from very basic information at the beginning of it, sent out by the regulator now is in English. All letters sent to injured workers are in English, all information that injured workers can access about the system is in English. It is very lucky for an injured worker to obtain information about the system from somebody who speaks their own language. We do offer a full service for people who do not speak English for that very reason and we have to use an interpreter service for that—we are able assisted by the Asian Women At Work in doing that. But if you do not speak English you have got no hope whatsoever.

The Hon. LYNDA VOLTZ: What about the documentation they are required to fill in? What happens with the quite extensive reports about the type of injury, eight or nine page reports, that need to be returned that the Committee has had evidence about?

Mr KERNEBONE: That is all done in English. We have one member who is at a university level in Vietnamese. She is quite capable of getting her accurate information to the insurer in Vietnamese, but when she has attempted to do that they have sent it back to her saying, "We don't understand this." They are not accessing interpreters for that so they are at a significant disadvantage.

The Hon. DANIEL MOOKHEY: In time you have been in the system how many case managers have you had to deal with and also how long have you been in the system?

Mr STIRLING: I have been in the system now for just over two years. I have had three caseworkers. They did not mention whatsoever that I was getting a new caseworker, they just pass it on. You just get a phone call, "I am such and such" then you go back having to tell the same story being recorded—they probably go back and compare that with what you told the other case manager just in case something was said differently or whatever. I do not know, maybe they are trying to find fault in your story or whatever. I think that is the whole basis about changing these caseworkers.

Ms CAMERON: Nine months and I have had three.

The Hon. DANIEL MOOKHEY: You have had three caseworkers in nine months?

Ms CAMERON: Yes, and I think I have had two phone calls from the actual insurance company in that time.

The Hon. DANIEL MOOKHEY: Have you been given an explanation as to why you have had one change every three months?

Ms CAMERON: It is just that they are changing positions, I gather. I do not really have any communication with them. With the rehab service I have had three as well and two return to work in my workplace.

The Hon. DANIEL MOOKHEY: What about you, Mr O'Donnell?

Mr O'DONNELL: Since August I have had four different ones.

The Hon. DANIEL MOOKHEY: Since August of 2016?

Mr O'DONNELL: Since August of 2016 I have had—sorry, I had one for long term, it finished in August of 2016, and I have had four since.

The Hon. DANIEL MOOKHEY: Four caseworkers in the last three months?

Mr O'DONNELL: Yes. And every time a new case manager has come on there has been a mistake with my wages.

The Hon. DANIEL MOOKHEY: What are the consequences of such turnover in your case management on your ability to access or complete a rehabilitation plan or access medical care or advice from your doctors?

Ms CAMERON: I feel I have not got any direction in my life. I feel I am just left in limbo and everybody around me is making all the decisions on my life. I am just up against a brick wall basically because the lack of communication is ridiculous.

The Hon. DANIEL MOOKHEY: Does anyone else want to add anything to that?

Mr STIRLING: I have been provided with a rehabilitator by Allianz, they just appeared one day at work to have a meeting with my employer. I know that I can get my own but I have heard stories basically or I have been told by the union basically that they give you a hard time anyway regarding that they try and put pressure on your rehabilitator. That rehabilitator even come into my workplace—the one that was provided by them—and I have had a sit-down meeting with him before and I said, "I think this is just basically you going in and speaking to my employer, you are giving him the options to actually sit back and think, 'Can I dismiss this worker?'" I said, "I don't want you to go and ask: 'Has he got any long-term prospects?' Go into my employer and ask how I am doing." So he goes in, and my union rep is there, what is one of the first questions? "Do you think Mr Stirling's long-term prospects are good here?" This type of thing.

All the reports sent through by specialists and my doctor through to Allianz and this rehabilitator, I will never go back to pre-injury duties. What is on the next work plan from Allianz? "We are looking for you to go back onto your pre-work injury duties in the first month of 2017." It is just that they do not have to pay any attention to any of the information given by specialists as I just said, I will fight for my job, to keep my job—that is all I want to do with a bit of physio and a bit of strengthening work on my shoulder. They just want to get you off the system and better more if your employer gets you off as well because you virtually have got no-one there. Thank you.

Mr DAVID SHOEBRIDGE: So you get a sense that the rehab is more for the insurer's interests than for your interests?

Ms CAMERON: Yes. I really feel I am on my own.

Mr DAVID SHOEBRIDGE: What about you, Mr Stirling?

Mr STIRLING: It is just for them. You know, it is all about reports. I sit down and have a case conference with my doctor and like a week later I am getting a call from the caseworker at Allianz, "So how are you today?" I go, "Aren't you listening to the rehabilitator? We had a 40 minute conference with my doctor. You have all the information."

Mr DAVID SHOEBRIDGE: Having the rehab provider come to your workplace is meant to be a good thing. It is meant to be about helping you at your work, but you are saying it is pretty much the opposite. You feel like the rehab provider is in there as an agent for the insurer?

Mr STIRLING: Exactly, but the question put through to the employer basically is, "Will you commit to specific duties for Mr Stirling long term?" That puts employers off, do you know what I mean? Who knows what is long term. They should be looking at the process. I am on the system for another 12 months, I am still going through my rehab—

Mr DAVID SHOEBRIDGE: Let us see where we get to.

Mr STIRLING: Let us see where we get to, that is it. Then we will go and see what we are up to. At the moment I am still supposed to be covered, I am still supposed to have a direction in rehab, but we are looking to close everything off and they want answers like yesterday.

Mr DAVID SHOEBRIDGE: Mr O'Donnell, when were you injured?

Mr O'DONNELL: I was injured in 2014.

Mr DAVID SHOEBRIDGE: For how long had you been a bricklayer?

Mr O'DONNELL: Since I left school at 16.

Mr DAVID SHOEBRIDGE: How old are you now?

Mr O'DONNELL: I am 34.

Mr DAVID SHOEBRIDGE: Given your injury, do you think you will ever get back into bricklaying?

Mr O'DONNELL: I will never be able to go back to bricklaying—I knew that from the start. Bricklaying is heavy work. There was no way, after having an operation on my spine, that I was ever going to go back bricklaying. They tried to push me to come back onto the building site; there was nothing I could do on the building site. They had me coming into the city three days a week. I was just coming in and standing on the building site doing a little bit of sweeping up and everybody else around me is working. I mean, I asked them, "Please, retrain me. Let me do a builder's course, let me do a first aid course." They did not want anything to do with it, all they wanted to do was push me back to work.

Mr DAVID SHOEBRIDGE: Push you back to work in the construction industry.

Mr O'DONNELL: Exactly.

Mr DAVID SHOEBRIDGE: What are your goals?

Mr O'DONNELL: My goals at the moment are to get my next—I am due to get an operation, again, I am waiting on approval from the insurance company. I need to have a disk replaced and a fusion but in the mean time the insurance company still wants me to look for work. What am I supposed to say to employers?

Mr DAVID SHOEBRIDGE: "Would you mind giving me a job? I am going to be off for a disc replacement."

Mr O'DONNELL: "I may or may not be able to work in a month's time, but will you give me a start?"

Mr DAVID SHOEBRIDGE: You have goals after that in your life, do you not?

Mr O'DONNELL: Of course. I want to work but at the moment I cannot because I have two ruptured discs and it is causing too much pain. I need to have another operation.

Mr DAVID SHOEBRIDGE: Has anyone from the insurer, rehab provider or trainer come in and worked out what your goals are with you?

Mr O'DONNELL: Yes. I have been working with someone since 2014 to try and get some sort of training in a working at heights course, a builder's course or something.

Mr DAVID SHOEBRIDGE: Has any of that happened?

Mr O'DONNELL: Finally they approved a test and tag course for me. I thought that is great, you know, at least I can do something. I was feeling good at the time because I had just had an injection in my back of cortisone. I was feeling okay so I went and done the course, but now I am qualified to do test and tag so, therefore, I need to look for four jobs every week, and if I do not they will cut me off immediately.

Mr DAVID SHOEBRIDGE: Despite the fact that you have got a major operation coming?

Mr O'DONNELL: Yes.

Mr DAVID SHOEBRIDGE: Is there any capacity for you to just phone up your case manager and say, "Look, this is just nuts. Why are you making me fill in this paperwork? Why are you reading the paperwork?"

Mr O'DONNELL: They do not listen—"We're just following the legislation".

Mr DAVID SHOEBRIDGE: Mr Kernebone, what we hear from Mr O'Donnell and Mr Stirling and Ms Cameron, is this unusual?

Mr KERNEBONE: Absolutely not. It is the story of nearly everybody who calls us up, in one way or another. For case managers the average length of time—I think for Shane it was very unusual to have a case manager for that length of time. We have had members who have had injuries at the same time go through 20 case managers. For retraining it is nearly impossible; unless it is extremely cheap and they can knock it over in two days it is unlikely to get approved. Trade certificates, as I said in my submission, it is very, very unlikely for somebody who has lost a trade certificate, even if they will be able to return to that work, will the insurer pay for that again. So once it has gone it has gone, and in the case of an injured nurse, that is significant because that is another two years' training.

For anybody dealing with an insurer, I would love to say something different, but the people that they employ have no capacity to do the job, and I do not blame case managers for that; that is a problem with the executives because that is what they aiming for.

The Hon. David CLARKE: What recommendations would you like to come out of this for your members, Mr Kernebone?

Mr KERNEBONE: First and foremost I would like automatic approvals for all medicals related to that injury, and not just for the first 13 weeks but for life. We need to go to a situation where maintenance of an injury is just as relevant as the emergency section of it. I would love the insurers to get out of it. I have got no faith that the insurers can actually do the job that they are employed to do; they do not hire the right people. I would like people with allied health experience to take over those roles. I would love the doctors in the first instance to do it.

In my submission I mentioned that the only good thing about this new legislation is the injury management plans, which are used throughout the medical system. They are not used in the system at all—they are complete rubbish, and in my conversations with the State Insurance Regulatory Authority [SIRA], the regulator, they would agree. I do not want to put words in their mouths but we did two studies and that was the case for both of us.

I would love people with psychiatric illnesses to not have to go through a constant barrage of questioning and investigation, which only leads to further psychiatric illness. The system needs to be revamped, starting from the bottom, with the emphasis placed firmly and solely on a return to health and not a return to work. So what I would love out of this inquiry is a recommendation that the whole system be changed, upended, so that return to health is the main and only priority—and return to work is part of that, a lot of things are part of that. But that is what needs to happen because that is not happening at the moment; I am seeing too many lives destroyed from it.

The Hon. David CLARKE: Let us take the case of Mr O'Donnell. What would you like to see specifically happen in his situation? What changes?

Mr KERNEBONE: When Shane was first injured I would have loved to have seen him go to a doctor, that doctor produce an injury management plan for him that was then submitted to an insurer or some other allied health professional to be followed to the letter, that that not be questioned. I would love that if there was a question about whether it was work-related or not that that go to a completely independent body and not the insurers to figure that out. If there is a question about Shane's capacity to return to work I would love that to go to an independent body. I would love rehabilitation services to actually be rehabilitation services and not be in the pocket or in the pay of the insurers, so that they can provide the service which they were professionally trained to do.

If those things were in place, if a return to health was in place for Shane, it is more than likely that he may not have returned to be a builder but he would have been retrained and do something—a surveyor, a building surveyor, or some other job which did not require the heavy lifting. I am certain that if a return to health focus was in place from the very beginning with Shane I would not know him.

The Hon. David CLARKE: What about this turnover of case managers? How would that be solved? You are not suggesting that that is done deliberately, are you, or you think that there is—

Mr KERNEBONE: I do not believe any management would deliberately try to turn over case managers as large as they are.

The Hon. David CLARKE: People change jobs and get transferred and so forth, that is just the way it goes. So how would you like to see that improved?

Mr KERNEBONE: I would like the insurers to get out of the case management entirely. I have got no faith that the insurers in their current form are able to provide that service. If the insurers were continuing to do so, I would love the Government to insist that people paid to be case managers are actually allied health professionals. That would stop a lot of the argy-bargy and the misunderstandings that the case managers have already about the health service and health matters. I personally in the two years have had to learn a significantly large number of illnesses and medications and all that ilk. I have got a background in health, I have got a background in disability health, so I am able to understand and ask the right questions and know where I am going.

I would love the KPIs to be centred around a return to health rather than getting them off the books, which is what it is now. So the whole culture of insurers would need to change for it to become a better system. I do not believe that that is the case at the moment. I do not believe that there is any wish in the insurers to change their business models. It is a financial company; they are there to gather the payments and invest them in financial markets. That is their emphasis; it is not health.

The Hon. David CLARKE: But getting people off the books and getting them back to work are different things, are they not?

Mr KERNEBONE: Yes, they are, they are completely different things. The Government statistics at the moment relate only to somebody who is returned to the workforce and not somebody who is returned to a position or a job. The figures for finding a piece of work an hour a week once-off during a year is very good in this system. Most people will go back to work for a period of time, but the sustained return to work is extremely less—it is about 65 per cent of people who are injured in any one given year will return to sustained work. The number of people who will need more than 13 weeks worth of assistance is less than that; it is 60 per cent. So it very much matches the people who will return back to their workplace without anything more than the basic assistance. That does not say that the system has actually done anything for those people. You would presume that would be a fairly natural cooperation if there was no workers compensation system to begin with.

Mr DAVID SHOEBRIDGE: All things being equal they would have gone back to work anyhow, is what you are saying?

Mr KERNEBONE: Yes.

The CHAIR: That concludes the time for the hearing this morning. Thank you very much for coming in today and telling your stories, and your professional contributions are really appreciated.

(The witnesses withdrew)

Mr KIM GARLING, Workers Compensation Independent Review Officer, Workers Compensation Independent Review Office [WIRO], sworn and examined

The CHAIR: You have kindly supplied to the Committee a copy of your opening statement.

Mr GARLING: I am content for it to be tabled. I draw attention to just four points perhaps. The first is that in a summary, workers compensation insurance is not entirely social insurance, it is an adversarial system, as it is currently legislated for. Secondly, the Workers Compensation Independent Review Office [WIRO] is unique: it does not exist anywhere else. Unlike the insurer and the regulator we actually deal directly with injured workers, and someone in my office actually reads all the information—claim forms, medicals, investigation reports, whatever. That does not happen anywhere else. It might happen scattered through insurers but in one place we have an enormous amount of information.

It is my experience, and the WIRO experience, that despite the complexity of the rules which govern the scheme, which are acknowledged by everyone as being confusing, ambiguous and difficult to manage, the conduct of claims by insurers is generally of a very high standard. While it is distressing to hear of persons whose perceptions and actual dealings with insurers have not been good, one must recall that the vast majority of people who are injured at work return to work promptly and are content with the way that they are dealt with. So it is a small number, and that is not to minimise the difficulties they face.

I regret that I have been less than successful in encouraging insurers with two things: firstly, the continual reference of injured workers to medical specialists who I might describe as having a conservative approach, which is well known, and which inevitably leads to a contested dispute and on our statistics, with a generally poor outcome for the insurer. The second similar issue is the reference of a request for surgery to a doctor who is not familiar with current medical practice and theory. One highly respected medical specialist put it in these terms, "I welcome having an insurer seeking to obtain the opinion of another specialist on the proposed surgery. It is good practice. But seeking to have a doctor who is not one of my recognised peers is offensive." I think that sums it up very simply. I am happy to answer any questions.

The CHAIR: Thank you for that submission. We have your correspondence which we have noted.

The Hon. LYNDA VOLTZ: I refer to statements about disputes about medical evidence. The Committee has received a lot of evidence that return to work, even with a rehabilitation plan, is sometimes difficult. The Committee has heard that often there may be an agreed rehabilitation plan but the insurer does a work capacity test and cuts a person off the rehabilitation plan. Is that the case?

Mr GARLING: Undoubtedly. I brought with me, not for the purpose of tabling it or referring to it specifically—

The Hon. LYNDA VOLTZ: I am happy for you to table it if you like.

Mr GARLING: I do not think it is necessary. That is a work capacity decision. It is 180 pages. But the effect of a work capacity decision is to immediately bring to an end any prospect of the worker returning to work in that sense because they are cut off from the various benefits, other than medical expenses which continue for a period of time, depending on when the worker was injured. But it is not productive necessarily. But again out of hundreds of thousands of work capacity decisions that are made every year, very few are contested, and that is the bigger problem.

The Hon. LYNDA VOLTZ: How many of those that are contested are overturned?

Mr GARLING: That is a guesstimate because there is no published material on the number of work capacity decisions that are actually made in a year. As to contested, the SIRA figures show that it is a very small portion. I think it is probably less than 1,000 that are actually contested at the initial level, that is, the internal review. At the merit review level it is even less and very few come through to us.

The Hon. LYNDA VOLTZ: How many of those that are contested at the merit level of the insurer's decision to suspend benefits are overturned?

Mr GARLING: I think it is about 40 per cent are overturned. I think at the moment the merit review service is running at 40:60 so they did 748 in the last financial year. We did much less than that so the procedure review is not high in number.

The Hon. LYNDA VOLTZ: Do you have statistics that show people who have had a work capacity decision that has cut off rehabilitation, how many of those people have subsequently not been able to return to their job? I assume you do not have those statistics.

Mr GARLING: I am not aware of any such statistic.

The Hon. DANIEL MOOKHEY: You conclude your submission with a remarkable case study about a litigant who was first assessed at 18 per cent then re-assessed at 32 per cent and then had a scheme agent who commissioned the re-assessment use the first impairment of 18 per cent in order to cut someone off from the additional benefits they were entitled to. Is that an exception story?

Mr GARLING: I think it is probably at one end of the extreme because of the particular circumstances but it is not unusual. This is a big issue. It is a big ethical issue. It is a big discussion issue about if you have a lawyer acting for you who is aware of circumstances other than what the plaintiff's lawyer is aware of, does he or she have a duty of disclosure? I think on balance the answer is not, as long as they do not refer to it or disparage it. So it is a fine balance. To me is not being a model litigant.

The Hon. DANIEL MOOKHEY: Indeed, and that then goes to the culture of the scheme agents in general in terms of how they go about applying their powers that are available to them.

Mr GARLING: Correct.

The Hon. DANIEL MOOKHEY: Your office which funds a lot of the people—

Mr GARLING: Other than exempt workers, we would fund 98 per cent of all disputes.

The Hon. DANIEL MOOKHEY: What is the quantum of that per year?

Mr GARLING: Approximately 11,000 a year.

The Hon. DANIEL MOOKHEY: Across that 11,000 you would have widespread opportunities to observe the cultures of the scheme agents?

Mr GARLING: Absolutely.

The Hon. DANIEL MOOKHEY: What views do you have about that culture? Do you think it is geared towards the objectives of the legislation or do you have other things you can shed light on?

Mr GARLING: It depends what you regard as the objectives of the legislation, with respect. Putting that to one side, it is a litigious environment. It is an adversarial environment. The insurers take such steps as they think are proper to fight the adversary, being the worker. It is not a friendly environment. We have been quite successful in encouraging insurers even through the dispute process to re-look at matters and look at it more in the light of an approach by a model litigant than an adversarial opponent. We actually have a program that when someone seeks from us funding, we refer it immediately to the insurer with a request that they re-examine the position and see if it cannot be resolved. I think the success rate is over 25 per cent so it is not too bad.

The Hon. DANIEL MOOKHEY: Are scheme agents subject to any model litigants, that you are aware of?

Mr GARLING: My understanding is they are and it is a published model litigant for the State.

The Hon. DANIEL MOOKHEY: Is it being followed in your view?

Mr GARLING: Not everywhere no, but it is hard to judge because you have to know what their instructions are and that raises the next point which I think rolls on from that, that is, in some areas the employers are more involved than in others. Specifically in TMF, that is a big problem where particularly departments of education and health seem to have a very pro-active involvement in the management of claims.

The Hon. DANIEL MOOKHEY: Is that of benefit to a worker's return to health?

Mr GARLING: Not that we have seen, no.

The Hon. DANIEL MOOKHEY: In what respect is it deficient?

Mr GARLING: It involves actively inserting themselves into the process. We had one particular matter, which is tragic, where a young worker suffered a reasonably severe injury and was assessed at 25 per cent, in round figures, prior to 19 June—but only just prior to 19 June—2012. That worker was able to have a further assessment four years later at which the worker was assessed at over 60 per cent, having deteriorated. During that four-year period the worker alleged that family, friends and colleagues had been the subject of surveillance and a very aggressive tactic to deal with a particular claim. When I discussed it with the insurer they said that was at the direction of the department.

Mr DAVID SHOEBRIDGE: At the direction of the department?

Mr GARLING: At the direction of the department, the employer.

The Hon. LYNDA VOLTZ: Sorry, I should not ask which department.

Mr GARLING: Health. I will not identify the particular sub-group or the—

The Hon. LYNDA VOLTZ: No, but I would like to know. You singled out Education and Health so I was just wondering.

Mr GARLING: Health. Health and Education are the two major problems we find.

The Hon. DANIEL MOOKHEY: From that can we conclude in general that to the extent to which the scheme agents engage in this behaviour, subject to the review that you have had to fund, this is happening with the close concurrence of the people for whom they are acting as an agent—that is, the nominal insurer and the employer?

Mr GARLING: I think it is fair to say that icare, under its current management, is attempting to seriously alter the attitude and approach of the case managers in the insurers; it is not an easy process and it is not going to happen overnight. But, at the same time, I am not sure that encouraging the case manager to be the worker's friend is also meritorious because that throws up itself conflict. To be fair—and I think it is important to be fair—I think the insurers are working hard at it. Some of the scheme agents are better at it than others but we have certainly noticed a change in four years.

The Hon. DANIEL MOOKHEY: Which of the scheme agents are better than others?

Mr GARLING: I think that is a difficult question because it comes down to our experience, but certainly—

Mr DAVID SHOEBRIDGE: Have you got any statistics?

Mr GARLING: —in different ways there would be some that would be better than others. Each of them have their own good work. It is all there in the stats. Right or wrong from day one we have been entirely transparent; we have published everything. If we are wrong, it is there for everyone to see. With the stats about complaints and funding, you will see which insurers perform better than others. Noticeably, there is one self-insurer that is at the far right of the extreme—they deny every claim and they lose every claim—and it sticks out when you look at the stats, but otherwise they are broadly comparable to each other.

The Hon. DANIEL MOOKHEY: You made the point that the Parkes project, which I understand your office convened, had its funding discontinued.

Mr GARLING: Yes, that was unfortunate.

The Hon. DANIEL MOOKHEY: Why?

Mr GARLING: It is an interesting question. There was a suggestion that the funding had not been provided strictly in accordance with the departmental rules. However, as the project was funded and the agreements were drawn specifically in accordance with the demand of the department I found it a bit of a challenge.

Mr DAVID SHOEBRIDGE: The Committee has had self-insurers and a group of legal representatives basically say the same thing about 59A—namely, there are historical versions of 59A and the current version of 59A and confusion about what applies. Can you explain to us in layman's terms how 59A operates now?

Mr GARLING: I am not sure that I can, but I will try. I think it is fair to appreciate that the powers of the regulator and the Parliament depend upon authority and it is not always possible to have a regulation that overturns the legislation unless it is moving forward. So with the various cases and changes it has been necessary to do transitional regulations, which are unsatisfactory because they deal with different groups of workers at different times—I think that is the problem with 59A. At the moment though, the latest iteration, which is governing the bulk of claims, is an unfortunate one, and I am not sure what the logic behind it was, because it ties entitlement to medical expenses to a level of permanent impairment. Now as you would recognise immediately, once you have reached a level of medical stability, and been assessed for permanent impairment, you probably do not need the medical expenses you need prior to that. So there was a two and five and life-time entitlement, depending upon your level of permanent impairment.

However, the problem which does not seem to be appreciated, is that you do not always need you medical treatment on day one. It may be near the end of year two that you suddenly decide or discover that you need medical treatment and therefore have to have it within the time period. That is unfortunate, as is the fact

that with deterioration into the future, in order to be successful in gaining a longer window, one has to have an assessment of your permanent impairment. Having had that assessment of permanent impairment and then being entitled to surgery, post-surgery your permanent impairment will have deteriorated significantly and that provides a real barrier for people with serious injuries needing medical treatment.

Mr DAVID SHOEBRIDGE: What about the fact, depending on when your claim is, that there are different time limits? Does that create confusion as well?

Mr GARLING: Of course it does but that is throughout the scheme, it is not just for 59A. There are multiple examples where, depending on when you are injured which provision applies, and the most stark of that is for injuries prior to 1 January 2002 notwithstanding the attempt by the Parliament to bring them under the one roof, that has not been accepted in the decisions of the Workers Compensation Commission, and they appear with the approval of SIRA and icare to be under a different system again.

Mr DAVID SHOEBRIDGE: Would there be merit in just saying, "This is the way 59A now operates." It operates for everybody who is not otherwise excluded, like emergency service workers, and removing the WPI reference?

Mr GARLING: That would be an advancement in terms of dealing with a section but that would require legislative change.

Mr DAVID SHOEBRIDGE: And also some costings?

Mr GARLING: And some costings.

Mr DAVID SHOEBRIDGE: I take it from your submission that the procedural review of work capacity decisions does not seem to work?

Mr GARLING: There are three steps, and the first is the internal review. If you do not get through the internal review, you don't go anywhere. That means that a worker has to understand, having got that pile of material, how to challenge that decision with the insurer. Once you get through that, you have then got to get through the merit review before you come to procedural review. The problem my office finds at the procedural review level is that initially every worker was successful, and that was for a particular reason, but as we have moved on the insurers are better at the procedures. So it becomes a little bit pointless in many ways. More importantly, we are only reviewing the original work capacity decision, not the subsequent decisions and, even if our office comes to a conclusion about work capacity and the validity of the decision, an insurer can simply make a new work capacity decision the following day.

Mr DAVID SHOEBRIDGE: There has been the initial review, there has been an internal review and there might have been a merit review—

Mr GARLING: There has to be.

Mr DAVID SHOEBRIDGE: You are saying that you are limited to only looking at—

Mr GARLING: The original decision.

Mr DAVID SHOEBRIDGE: So there could have been a stuff-up at either of the other two levels and you have to pretend that it does not exist.

Mr GARLING: Precisely.

Mr DAVID SHOEBRIDGE: Is that bizarre?

Mr GARLING: It is a bizarre system—perhaps the procedural review should be the first one before the merit review—but that whole concept has not worked. I think it is acknowledged by most participants that it is not a successful method of determining disputes involving injured workers. I think the Deputy Chair made the point about the language. There is no use of other languages other than English, and that does not necessarily mean that the whole of the injured workers in New South Wales all speak good English.

Mr DAVID SHOEBRIDGE: If I got 170 page decision in Vietnamese I would not know how to challenge it, and I assume a Vietnamese speaking worker who gets 170 pages in English would not know how to challenge it.

Mr GARLING: I think that is fair. I think we could show you examples of applications for procedural review in scratched handwriting saying, "It is not fair." That is the extend of the understanding of what is being argued, but that is the system and we work within it.

Mr DAVID SHOEBRIDGE: Your recommendation is that we do not have this bifurcated system between the Workers Compensation Commission on one hand and work capacity reviews on the other, that it gets brought into a single decision-making point. Is that right?

Mr GARLING: The evidence required to overturn a work capacity decision or the evidence required to overturn a liability decision are the same. By excluding any representation or any funding assistance to a worker going through the work capacity process is to remove their ability to challenge the decision effectively. It is the same information that they need to do before the commission and those that have been successful are particularly those who have had both; so they have been able to collect information as part of the liability challenge and use that as part of the work capacity challenge. But it is not recognising reality to think that the two are different in terms of the production of evidence.

Mr DAVID SHOEBRIDGE: In truth, the only way you can normally succeed in a work capacity decision is also to generate a liability dispute, gather the evidence in the liability dispute and then cross-apply it to the work capacity decision. Is that right?

Mr GARLING: I think that is one of the aspects that people are starting to realise, and, of course, a lot of people have a request for funding for permanent impairment inquiry and that enables them to generate some sensible material to use in a work capacity challenge.

Mr DAVID SHOEBRIDGE: But absent the generation of a liability dispute or a permanent impairment dispute, you have got an injured worker by themselves without any evidence to contest what happens in a work capacity decision.

Mr GARLING: We have not seen any matters outside the challenge to a liability where the evidence can be crossed over to any evidence of any worker obtaining their own information to challenge that of the insurer, and it would be a costly exercise.

Mr DAVID SHOEBRIDGE: So what, if any, rationale do you see—is there any positive rationale for dividing it between work capacity and liability?

Mr GARLING: I think there was. I think that the concept was quite a meritorious one back in 2012, but as it has moved on it has become complicated by the method in which it is adopted. So what was originally intended was you would have a certificate of capacity from a doctor that said yes you can go back to work or no you could not; you could challenge that and say that is not quite correct. A quick look by the insurer would say yes that is right, the merit review would have a quick look at it, and it would all be over and done with in 30 days and everyone would be content. It did not work that way. We now have, effectively, practice rules around merit, we have guidelines on proceeding to a merit review and internal reviews. It has become as complex as the Workers Compensation Commission process. That was not intended, but that is the way it worked out.

Mr DAVID SHOEBRIDGE: So do you think we have just created a whole new complex monster which is not producing positive results?

Mr GARLING: As I say, I do not think that was the intention, I do not think that was the plan, but that is the way it has turned out.

Mr DAVID SHOEBRIDGE: In terms of jurisdiction, do you think the Workers Compensation Commission has the capacity to pick up all of the jurisdiction, from your experience?

Mr GARLING: If you look at the statistics of the number of matters the commission handled prior to the changes, the reforms, there has been a substantial decline in the number of matters they deal with. So I do not think there is any difficulty in them having the capacity, provided they are well-resourced, to deal with all of the matters. I must say, maybe a little bit radically, I do not see any reason why they cannot deal with work injury disputes, with common law claims as well. I do not see the point of going to two different jurisdictions, but that is just a personal view.

Mr DAVID SHOEBRIDGE: As I read your submission, you are jurisdictionally agnostic.

Mr GARLING: Correct.

Mr DAVID SHOEBRIDGE: Provided it is a single jurisdiction with comprehensive jurisdiction, that would be a major improvement?

Mr GARLING: Correct.

The CHAIR: Your submission contends that there is a lack of transparency in reporting of reasons for complaints—presumably that is against scheme agents—transparent to you. We have also heard from other

witnesses who would like more open reporting of data. How would sharing data with scheme agents assist you in your operations?

Mr GARLING: I think what I was referring to there was that we have five scheme agents at the moment, each of whom have a complaints facility and a complaints line, if you like: we have SIRA with a complaints line, we have icare with a complaints line and I have the statutory obligation. We publish all our stats on a regular basis: these are the calls we got, this is what was said to be happening, we have published the stories. No other complaint facility publishes anything. So I do not know what happens with the SIRA complaints line or the icare complaints line except through information provided to us. For example, under the old customer service centre operated by the then WorkCover Authority, success was answering the phone. We do not regard that as a successful measure. I think, as I have said, we answer every phone call, so we have got a pretty good idea. But there is no publication of the same issues.

So we have got a system with multiple complaints coming in and we are only one part of it, but there is no measure of the success of those complaints or the reasons for it, which is unfortunate, and I think there could be a standard performance measuring and reporting that would assist. Then we might have a better idea across the whole scheme what is going on. I must say, and I have said it before, we find the cooperation from the insurers to our complaints solutions group is first-class. We can get results within 24 and 48 hours that, to my mind, are astonishing. We have had insurers accept that they have made errors and within 48 hours have payments of $50,000, $60,000 deposited into a worker's account; we have had medical treatment reversed, decisions reversed, within 48 hours. It has been spectacular and it is only spectacular because the insurers are willing to join with us in revisiting matters that are the subject of concern from injured workers.

It works in reverse, because if we say to the insurer, "We think you have acted properly as an independent body", a lot of the workers accept that and say, "Okay, someone else has had a good look at it and they say it has been done correctly", and that is used by the insurers often in response to further complaints. I may be of interest that there are a small number of regular complainants, but only a very small number—less than 100—and some of those are explicable because of mental illness. We have one or two workers who contact us frequently having forgotten that they have contacted us before, which is understandable. So it is not all bad, the fact that there is a complaint, and a lot of the complaints we receive are because of miscommunication and, I think, some of that is systemic issues that I have referred to.

By and large, I think the insurers could, across the board, be a little bit more efficient. A lot of the complaints about failing to make payments on time are just a nuisance; there is no reason why that could not happen, and I can illustrate that. Probably the first week we were in operation an injured worker tapped on our front door with his crutches in a threatening manner and was fairly abusive because he thought we were WorkCover. We went and sat down with him and said, "What's the problem? Can we help you?" He was surprised because that was the first time someone had sat down with him. But he said, "I got an award in the commission of X number of dollars 28 days ago. It was supposed to be paid within 28 days and it hasn't turned up and I need the money". We contacted the insurer, who said, "Yes, we sent the cheque off to his lawyer yesterday". As a result of that, the insurers—not necessarily all of them but this particular insurer said, "I tell you what will do in future, we will send the cheque after 14 days instead of 28 days and avoid the problem". So there are little things like that that are very miniscule which can contribute to the better efficiency of the scheme.

The CHAIR: Would collecting data, real-time data from the insurance agents back to you or to SIRA, whether it be transparent or otherwise, inform you of trends and issues emerging?

Mr GARLING: I believe so. We are probably at an advantage because we get more information in advance of the information that the insurers get because people come to us for funding first. So we can tell you what the trend is likely to be, and for some time it was not accepted that we had that additional benefit. But I think now the actuary appreciates that we may be able to predict a little bit more accurately that they can. An example of that is in hearing loss; we were able to demonstrate there was a spike coming, and it came.

The Hon. David CLARKE: You just gave an example of cheques being sent out a day or two before the 28 days and it has now been changed so that cheques will go out in 14 days and that angst and the sting are taken away. Are there any examples like that that you have come across where simple things like that can take away a lot of the anger, the angst and concern of injured workers that they are not being treated properly or they are just being discarded and treated with disdain?

Mr GARLING: Someone in my office, generally myself with one of my staff, meets with the scheme agents' case managers and senior managers regularly. Every month we have at least one or more of the scheme agents come and visit our office and we discuss those issues on a full and frank basis. I take a slightly different approach perhaps. I am not looking to blame the insurers in the complaints area, but to get a solution. Then we

look at the trend, having got the solution or having dealt with it, and see if there is an issue arising from the trend.

The Hon. DAVID CLARKE: So you do not have a built-up list of these things because, as these things arise, you deal with them and you normally get a good outcome, is that correct?

Mr GARLING: Correct.

The Hon. DAVID CLARKE: Is there a list where you have not got a good outcome?

Mr GARLING: I would have to look at that. I am happy to do that and to provide the Committee with a report.

The Hon. DAVID CLARKE: Would you like to take that on notice?

Mr GARLING: Absolutely.

The Hon. DAVID CLARKE: And give us a list of those matters that you have sought to sort out as you proceed and have come up against a brick wall. Would you like to forward to us a list of those cases?

Mr GARLING: I would be delighted. We will do it on an anonymised, redacted basis obviously. But that is a good idea and we can provide the Committee with that. There are a number of issues that are troubling, where we are unable to make any progress on what I view as commonsense or sensible projects and I would be happy to provide the Committee with a list.

Mr DAVID SHOEBRIDGE: Mr Garling, my day-to-day experience of the world shows that Woolworths and Coles are roughly the same size, yet when I look at the complaints that come out of those two systems, both as self-insurers, Coles has 286 complaints, compared to Woolworths' 58. In fact, Coles is two and a half times greater than any other self-insurer. What happens to that data? How do we allow that to continue?

Mr GARLING: We publish the data. I know that the self-insurers' legal representatives are interested in it and they discuss it but I am not sure what actually happens. It can reflect something as simple as an industrial relations issue within a particular area of a particular retailer. So in Coles, if it is a particular site that has a difficult manager, that can reflect in the complaints. And, in fact, we have taken the approach of discussing with the retailer that particular area but we are not always successful.

Mr DAVID SHOEBRIDGE: What about the role of the regulators? What about Insurance and Care NSW [icare]?

Mr GARLING: Well icare would not, because they are self-insurers.

Mr DAVID SHOEBRIDGE: What about the State Insurance Regulatory Authority [SIRA]?

Mr GARLING: SIRA would and I assume they have those discussions but I am not party to that, I am not kept in the loop.

Mr DAVID SHOEBRIDGE: You cannot, sitting there, point to anything in particular that explains that aberrant data?

Mr GARLING: I could, I could unpack that particular set of complaints and look at it but I would be fairly confident of what I have just said, that often it involves a particular site and a particular problem with that site and often, where it is highly unionised, there are more complaints come out. But I could not be specific about that particular group. I am happy to have a look at it and give you a report, if that would be of assistance.

Mr DAVID SHOEBRIDGE: I would appreciate that.

The Hon. DANIEL MOOKHEY: Mr Garling, you issued a newsletter last week in which you brought to attention a brochure that was being issued by scheme agents to do with assessment of people under section 39. In fact, in that newsletter you say that the information that was being put out by scheme agents was misleading. Are you able to explain to us what that relates to?

Mr GARLING: Yes, I can. Firstly, that was a Workers Compensation Independent Review Office Wire—one of our regular methods of communicating with everyone who wishes to hear from us. We have some two and a half thousand people who subscribe to that.

The Hon. DANIEL MOOKHEY: You now have 2001.

Mr GARLING: It goes out irregularly and only when there is something of relevance. What has occurred is, we have section 39, which is imprinted on some of my staff's brows, which is the 260-week cut-off which will start to cut in from 1 October next year. That was the policy, that is what the section deals with. It

requires, technically, a worker to have had a medical assessment certificate issued by the Workers Compensation Commission, as the gateway. So, in order to be permitted to have weekly payments beyond 260 weeks, you need to have gone through the gate, which says you are over 20 per cent whole person impaired. icare, in what I believe was a misguided attempt to be commercially sensible, issued a brochure or a program which said, "We will approach all the workers potentially coming into the 260 weeks in 12 months time"—which is admirable—"and we will offer them the opportunity to have an assessment of their whole person impairment now and then they will discover whether they are on track to be continuing beyond the 260 weeks or not".

I think that is admirable but the difficulty was that the brochure and the letter and the approach ignored the opportunity for the worker to challenge that outcome. So the worker reading it would be of the view that that is their one assessment and, if they failed, that was it. It made no mention of the fact that that was only a voluntary opinion proffered by the insurer and that worker should go and get some legal advice immediately, for two reasons: One, they have the opportunity to challenge it and go to the commission and the discrepancies between permanent impairment assessments are significant. So that is a real opportunity. But secondly, the complication is where section 322A comes in, which says you can have only one assessment in your whole life. So it may be that that worker had had a previous assessment but did not reach the 20 per cent mark and therefore, it does not matter what the insurer thought, they do not get through the gate. In that sense, while I am perhaps being a little technical, it is the inference and the imputation and way it is addressed that is the matter of concern. It would have been much better to say: "This is an opportunity. If you do not like the opportunity this is the opportunity to challenge it. You should get some legal advice".

Mr DAVID SHOEBRIDGE: Even proactively ensuring that there was some legal advice available for that class of workers.

Mr GARLING: That is a possibility but equally again referring that worker off to doctors with a particular propensity is not helpful.

The Hon. DANIEL MOOKHEY: Has that brochure been withdrawn?

Mr GARLING: Not to my knowledge. I am waiting on the outcome of my raising that with icare. One of the constant issues that is common across the scheme and has been for a long time is the belief in icare—and I do not know about SIRA—that workers can go to the Workers Compensation Commission. So you regularly get statements, "You can go to the Workers Compensation Commission—this is their address, this is their phone number—and have the matter reviewed." Well, no worker goes to the Workers Compensation Commission without a lawyer so it might have been wiser to say: "Go and talk to your lawyer about going to the Workers Compensation Commission". But the language is wrong and, in this particular instance, I do not think it helped the workers at all. Although let me say quite clearly, I admire the commercial sense and the approach, which I think is excellent. But the brochure itself and the style is what I regard as misleading.

Mr DAVID SHOEBRIDGE: There might be a trickle of those workers that are being cut off from October of next year but then, on 31 December next year, there is just going to be an almighty flood on one day. What is your estimate of the numbers that will be potentially cut off at the end of next year?

Mr GARLING: It is not easy to determine exactly how many but, working from the actuarial report from 2012 and working forward as to how many active claims remain, my recollection is it is somewhere between 6,000 and 10,000 that could be affected. A lot of those will already have a medical assessment certificate, so they will not participate. I should say that we have made some recommendations as to how that can be overcome, particularly in allowing insurers to make the decision to accept workers being over 20 per cent instead of them having to go through the system.

Under another section relating to high needs and highest needs workers there is a provision for an insurer to say, "Yes, we accept you are over 20 per cent". If you have fallen off the building and you are still in hospital six months later they can say, "We accept you are over 20 per cent for all practical purposes without having to have a formal assessment". That does not arise in section 39. The oddity is that some workers will already be assessed as high needs and accepted as high needs without a formal assessment but still have to go through the gate?

The CHAIR: Thank you for your evidence today and submission. You took some matters on notice. The Committee has resolved you have 21 days to reply to those matters. The secretariat will be in touch.

(The witness withdrew)

VIVEK BHATIA, Chief Executive Office, Insurance and Care NSW, affirmed and examined

NICK ALLSOP, Chief Actuary, Insurance and Care NSW, affirmed and examined

JOHN NAGLE, Executive General Manager, Workers Insurance, Insurance and Care NSW, sworn and examined

STEVE HUNT, Executive General Manager, Self Insurance, Insurance and Care NSW, affirmed and examined

DON FERGUSON, Executive General Manager of Workers Care, Insurance and Care NSW, sworn and examined

The CHAIR: Welcome to the first review of the workers compensation scheme. The Committee has the answers to questions asked of you. I invite you to make an opening statement.

Mr BHATIA: Thank you very much for the opportunity to speak about the significant importance of the workers compensation system in our society. The formation of Insurance and Care NSW is attributable to the recommendations of the Law and Justice Committee 2014, which led to the split of WorkCover from its regulatory and operational arms. The formation of icare occurred at that point in time to significantly enhance the delivery of service to employers and injured workers of New South Wales. We have historically had a very adversarial, process driven, legislative bound system in workers compensation. We believe that for us to move forward it is important to transform that into a more person centred system.

This is a personal injury scheme where somehow over the last couple of decades we have lost track of the person in the way the system is delivered. One of the key elements of the formation of icare is to work on a co-design principle to move towards a human centred and person centred delivery of service. It is important for us to understand that we do have a system that needs to balance the side of employers and workers. For us that is no different to managing any decision that we generally make in life, which means there needs to be a clear balance. What is important for us is that the delivery of health outcomes needs to be focused upon the injured worker.

It is essential that our systems are geared towards delivering a sustainable return to work outcome. I would go as far as saying the return to work should be classified as a return to wellbeing. From my perspective, it needs to deliver an optimal experience post injury to the person. At the same time the aim of icare is to deliver a competitive, value-based and a risk-measured insurance offering to the insurers of New South Wales to protect the human capital of the State. Through icare we insure 285,000 employers in the State and the three and a half million people who work for those employers. In short, we insure the human capital of the State. We take the job seriously. It is important for us to focus on better delivery and improvement not only within icare but also within the key players in the ecosystem. It is important to ensure that the system, which has a legacy of the past, moves into the future through more person centred systems and processes and moving away from the pure letter of the law to the spirit of the law.

The Hon. LYNDA VOLTZ: Mr Bhatia, can you provide the Committee with figures on how many claims have return to work criteria on full-time, how many people had a return to work on part-time work and how many people have had their benefits cut?

Mr BHATIA: We get about 80,000 claims per year. I do not have a breakdown in terms of the exact numbers. But 80 per cent go back to work on a sustainable basis within the first 12 weeks of having an injury.

The Hon. LYNDA VOLTZ: What about the 20 per cent who do not?

Mr NAGLE: After 52 weeks about 92 per cent of people have returned to full-time work or sustainable duties.

The Hon. LYNDA VOLTZ: They are either at work or on light duties?

Mr NAGLE: That is correct.

The Hon. LYNDA VOLTZ: And the remaining 8 per cent?

Mr NAGLE: That could be the complexity of the injury. Generally, you have about 10 per cent of the scheme every year where the complexity of the injury, complications in the recovery, complications going back to work, or complications through significant psychological injuries appear and they take longer to resolve.

The Hon. LYNDA VOLTZ: If you provided a return to work statistic to us that would be for people that have gone back to full-time employment?

Mr NAGLE: As best we know, yes.

The Hon. LYNDA VOLTZ: Yes or no?

Mr NAGLE: Yes, they go back to work.

The Hon. LYNDA VOLTZ: They go back to work. Then there are eight per cent that have not.

Mr NAGLE: That is right. At that time.

The Hon. LYNDA VOLTZ: How many people have a rehabilitation program to get back into work and have subsequently found that a work capacity decision has been made by the insurer, their benefits have been cut and therefore their return to work or rehabilitation program is cut?

Mr NAGLE: I do not have the numbers on that level of detail. Management of a claim calls for an injury management plan to be put in place as soon as possible. Many injuries, about 60 per cent, are over and done with in under four weeks. By the time the claim is advised, quite often the person is actually back at work. The other cases are a mixture of claims that go back about 12 or 13 weeks and those more complicated cases where the process through the claim has a number of checkpoints—

The Hon. LYNDA VOLTZ: I am asking a very specific question. Do you have any statistics on how many claims had an agreed return to work rehabilitation process, a decision was made by the agents to undertake a work capacity test and that person's benefits were cut and therefore their return to work plan is no longer available?

Mr NAGLE: I do not have those statistics.

The Hon. LYNDA VOLTZ: Would you be able to get them for us?

Mr NAGLE: I am not sure, to be honest. I do not think anyone measures the scheme in that way.

The Hon. LYNDA VOLTZ: You have on your webpage a complaints feedback process. How many complaints does icare receive through the feedback process that are negative?

Mr NAGLE: By their nature complaints are negative.

The Hon. LYNDA VOLTZ: You ask on your website for positive feedback as well.

Mr NAGLE: We do, and we get some of that. We have two sources of complaints feedback. Around 200 inquiries a month come through the State Insurance Regulatory Authority [SIRA] that are passed to us or our scheme agents. In addition, since March this year we have instituted net promoter scores. Net promoter scoring is allowing us to go directly to all sources and all paying points across the scheme.

The Hon. LYNDA VOLTZ: I am specifically asking about your online process.

Mr NAGLE: That is part of it. We have issued more than 81,000 invitations for people to give us commentary. We are getting about an eight per cent return at the moment. The mixture of comments ranges from very positive to poor.

The Hon. LYNDA VOLTZ: Would you provide that information to the Committee?

Mr NAGLE: Yes, absolutely.

The Hon. LYNDA VOLTZ: Dr Allsop, you may be able to answer this. While we are talking about providing information, a business complained that in the past actuarial reports were always made publicly available, so they could look at projections and work out their business plans, but they are no longer available. What is the philosophy behind that?

Dr ALLSOP: icare treats that particular document as commercial in confidence. We do appreciate the need for transparency in the liability assessment process. We are developing a summarised, more consumable version of the valuation report that we can publish on our website.

The Hon. LYNDA VOLTZ: But they want the actuarial report. Why is it commercial-in-confidence now when it has not been in the past?

Dr ALLSOP: The operating environment has changed since the formation of icare.

The Hon. LYNDA VOLTZ: What operating environment do you mean? Would you be specific?

Mr BHATIA: icare is not a monopoly. icare operates in an environment where there are specialised insurers and self-insurers. icare, as the nominal insurer, has only 73 per cent of the market share. So, yes, it is not a monopoly.

The Hon. LYNDA VOLTZ: Yes, but you had actuarial reports in the past.

Mr BHATIA: Yes.

The Hon. LYNDA VOLTZ: I want to know why you are not making them public.

Mr BHATIA: At that point in time the reports were made available by WorkCover, which was the regulator. We are the operator. We are icare. That question can be directed to SIRA, because they are the regulator. From our perspective the answer is that the documents are about assets and liabilities and funding ratios. That is by any means, as a whole, a commercial-in-confidence document.

The Hon. LYNDA VOLTZ: But that is exactly what WorkCover delivered in the past, yes?

Mr BHATIA: That is correct.

The Hon. LYNDA VOLTZ: So if SIRA decided to issue those actuarial reports it could make them publicly available. Is that what you are saying?

Mr BHATIA: They have access to the reports.

The Hon. LYNDA VOLTZ: And they can make them available.

Mr BHATIA: That is their call.

The Hon. LYNDA VOLTZ: You would not because they are commercial-in-confidence, but if SIRA makes a decision to do that then that is okay.

Mr BHATIA: That is a regulatory question. If the Australian Prudential Regulation Authority [APRA] decides to make QBE Insurance Group's reports public then that is APRA's decision, not QBE's. In the same way, if we put forward our report we put forward a consumable version which still gives the transparency that is required, in our opinion, about assets and liabilities.

The Hon. DANIEL MOOKHEY: Mr Bhatia, as at your last valuation, what are the net assets in excess of the target funding ratio?

Dr ALLSOP: I will field that one, if you do not mind.

The Hon. DANIEL MOOKHEY: Please.

Dr ALLSOP: We are moving away from the target funding ratio as it stands and working with SIRA to come up with a capital position that is in line with both our needs and their expectations.

The Hon. DANIEL MOOKHEY: Is that work completed?

Dr ALLSOP: No.

The Hon. DANIEL MOOKHEY: So you are still currently using funding ratios?

Dr ALLSOP: We are always going to use funding ratios. The question is—

The Hon. DANIEL MOOKHEY: I do not mean to be rude, but we have limited time. I return to my question, which is: As at your last valuation, what exactly are the net assets in excess of the target funding ratio?

Mr BHATIA: Because we do not have a target funding ratio at the moment, it is difficult to answer the question. However, I can answer by saying that as at 30 June 2016 the funding position was 123 per cent.

The Hon. DANIEL MOOKHEY: That would amount to approximately $1.5 billion to $2 billion.

Mr BHATIA: Probably.

Mr DAVID SHOEBRIDGE: In surplus.

Mr BHATIA: That is assuming that there is a target funding ratio.

The Hon. DANIEL MOOKHEY: Of course. Thank you.

Mr DAVID SHOEBRIDGE: The easier question is: what is the amount of funds that represents 123 per cent? What is that figure? We can work backwards from that to find the figure. What is the pool of funds that represents 123 percent?

Dr ALLSOP: The total asset position at 30 June 2016 was circa $17.5 billion.

The Hon. DANIEL MOOKHEY: That was not what Mr Shoebridge was asking.

Mr DAVID SHOEBRIDGE: No, it was. So $17.5 billion represents 123 per cent funding.

Dr ALLSOP: That is right.

Mr BHATIA: I can answer the question in terms of target funding ratio as well. Recently SIRA has put out guidelines on prudential management and its expectation of how insurers in the workers compensation scheme need to have prudential margins just like those required of insurance companies by APRA. We are working with SIRA on that process at the moment to ascertain the funding ratio that would be required if we were regulated by APRA so that there is a level playing field between us and the specialised insurers who play in the same market.

The Hon. DANIEL MOOKHEY: I understand the need for that. Has icare prepared any estimates of the number of people who will have their benefits terminated in accordance with section 39 next year?

Mr BHATIA: It is 6,000 to 7,000 people.

The Hon. DANIEL MOOKHEY: And how many will be affected in the following year?

Mr NAGLE: It will be roughly 200 people a month from that point on.

The Hon. DANIEL MOOKHEY: Is that indefinitely?

Mr NAGLE: Yes.

The Hon. DANIEL MOOKHEY: They are the people who will cease to have access to any benefits that they previously had access to.

Mr NAGLE: That is correct.

Mr DAVID SHOEBRIDGE: I will continue on that line of inquiry. Commencing in October next year, there will be about 200 workers a month who will be terminated under section 39?

Mr NAGLE: No. There will be a bit of a bottleneck from October 2017 through to February 2018 because of the way the regulation was brought in.

Mr DAVID SHOEBRIDGE: There is one large group of workers who are deemed to have their five-year benefit period terminated on 31 December 2017. Is that right?

Mr NAGLE: Yes.

Mr DAVID SHOEBRIDGE: How much is that? On that one night, how many workers will lose their benefits, do you estimate?

Mr NAGLE: I do not have the exact number. It ranges throughout that period.

Mr DAVID SHOEBRIDGE: But anyone who was injured prior to the commencement of the 2012 reforms was deemed to have had an injury for which the five-year benefit period will run out on 31 December. So a bunch of workers will lose their benefits on one night. You must have some idea how many of those workers will lose their benefits on that one night.

Mr NAGLE: From the nominal insurer perspective, I believe it is around 3,500.

Mr DAVID SHOEBRIDGE: And there are another 3,500 who will lose their benefits between October and February?

Mr BHATIA: That is right.

Mr NAGLE: That is correct.

Mr DAVID SHOEBRIDGE: You would have received representations from the WIRO office about the notification that has been sent out to those workers whose benefits will be at peril next year. This is your opportunity to respond to that. They were concerned that the notice did not give advice about their capacity to challenge whole person impairment assessments or did not give advice that those workers who already had a whole person impairment assessment would not benefit from a fresh assessment. What do you say to that.

Mr NAGLE: If I could correct a couple of things. Firstly, we understand that WIRO has a different interpretation and that interpretation is different to ourselves, the State Insurance Regulatory Authority and, indeed, the commission. However, we respect that position and we have engaged with WIRO to try to understand that.

Mr DAVID SHOEBRIDGE: What is the difference of opinion first of all?

Mr NAGLE: We do not believe that you need to go through the commission in the first instance. The process we have instituted is if you already have a whole person assessment, we are not asking you to do a new one. What we are doing is advising of the current position and advising you of the timelines and offering assistance through transition back to the community, back to work.

Mr DAVID SHOEBRIDGE: No-one is being critical of you advising people about what is going to happen well in advance. I think everyone agrees that is good, it is the nature of the advice.

Mr NAGLE: Following WIRO concerns we have re-established our brochure to make sure it is more prominent; that people should seek advice or approach WIRO, SIRA, or the commission for assistance. We have said that from day one. The reason we have instituted the process we had is we did not want an adversarial process from day one. So what we have tried to do is actually ensure people understand the process, understand the supports available and understand their rights all the way through.

Mr DAVID SHOEBRIDGE: But there is an essential element of an adversarial process in the Workers Compensation Commission, is there not?

Mr NAGLE: Yes.

Mr DAVID SHOEBRIDGE: If an insurance company sends a worker off to the usual suspect IME to get their assessment then the workers needs to know that they can challenge it.

Mr NAGLE: Absolutely.

Mr DAVID SHOEBRIDGE: But that was not put out in your initial pamphlet. That was a lack, was it not?

Mr NAGLE: No, I do not believe so. I think we are clear about that process. Equally, last October we changed the IME process so that injured workers have a choice about who they choose as their independent medical examination. We have empowered them to be able to say that they want to go to a particular specialist, or a particular IME in their area, or where they have had good reports from. So we have taken that power away from scheme agents.

Mr DAVID SHOEBRIDGE: How does a worker know which IME to go to?

Mr NAGLE: There is quite often information. Injured Workers Support Network have commentary running through its website. There is other information sources. There is new technologies around people like WICO who are actually grading and giving ratings on specialists and general practitioners.

Mr DAVID SHOEBRIDGE: Have you considered a far more, if you like, even handed approach might be to take the decision about which IME the workers go to, out of hands of both the insurer and the injured worker in most cases, and actually have icare appoint a specialist from a common pool, given the nature of the assessment so you get rid of that partisan choice?

Mr NAGLE: Yes, we have done quite a bit of work to look at the IME process and we are actually running some co-design processes at the moment to try to understand what are the options and pain points on the way through.

Mr DAVID SHOEBRIDGE: Is that where you are heading to? We had very clear evidence from WIRO that there is a real problem here, not just in terms of whole person impairment but in working out whether surgery will be approved, but insurers are sending workers off to their usual suspect doctor who just says, "No, no, no." And that is why they get the brief.

The Hon. TREVOR KHAN: That is somewhat overstated.

Mr DAVID SHOEBRIDGE: You know that that is the flavour of many complaints?

Mr BHATIA: I think we have acknowledged the fact that things have not been working properly. I think that is the first point which is the whole point for changing the IME process and why it was brought into the picture in the first place. In the first instance it was to give the choice back to the injured worker to choose the IME. But we do understand and acknowledge the point that you raise which is the fact that it is difficult for injured persons sometimes to go and choose the right IME. We are working at the moment with some of the medical fraternity groups, as well as some of the other providers who actually have medical panels in place, to see whether there is a more appropriate platform that can give choice, a more informed choice, back to the injured worker.

Mr DAVID SHOEBRIDGE: Are you following through and looking at the data and realising that there are particular insurers who keep using particular doctors and then when their opinion is challenged, that

doctor keeps losing because the doctor said X and the treating doctor has said Y? Are you following through on that kind of data?

Dr ALLSOP: That is an interesting point and that highlights the deficiency that we have in our data at the moment. It becomes incredibly difficult to trace medical providers through our system at the moment because the data has not been well coded. We do not know whether Dr J Blogs is the same as Dr John Blogs, is the same as Dr Blogs. So when we try to trace those pathways we hit barriers which is a big part of the reason we are looking at improvements to our system, better more robust collection—

The Hon. TREVOR KHAN: Really?

Mr DAVID SHOEBRIDGE: Are there Medicare provider numbers?

The Hon. TREVOR KHAN: Yes.

Dr ALLSOP: They have not been well populated in the past.

The Hon. TREVOR KHAN: What does "well populated" mean?

Dr ALLSOP: It means that they have not been consistently populated.

Mr BHATIA: By the scheme agents.

Dr ALLSOP: Yes.

The Hon. TREVOR KHAN: So keyed in?

Dr ALLSOP: Yes.

Mr DAVID SHOEBRIDGE: Could that be a basic directive that you issue?

Dr ALLSOP: But it will take time to collect enough data to actually be able to do the modelling.

Mr DAVID SHOEBRIDGE: Has the directive been issued that they must include the Medicare provider number and if they do not a penalty will apply?

Dr ALLSOP: I do not think the Medicare provider number has been specifically targeted. Because we have a number of scheme agents, directing them to change the way they collect information comes at a significant cost and at the same time we are developing what we believe is a more appropriate means of collecting this information with more accuracy, greater transparency, greater speed—

Mr DAVID SHOEBRIDGE: Will you give the Committee more information about where that program is going and why the Medicare provider number is not the best starting point on notice? That will be very useful.

Dr ALLSOP: Yes.

The Hon. DAVID CLARKE: A directive has not been issued?

Dr ALLSOP: Around Medicare provider numbers?

The Hon. DAVID CLARKE: Yes.

Dr ALLSOP: I do not believe so.

The Hon. DAVID CLARKE: Has it or has it not?

Mr DAVID SHOEBRIDGE: He said he did not believe so.

The Hon. LYNDA VOLTZ: I think that means no.

Mr NAGLE: It is not in the current guidelines.

The Hon. DAVID CLARKE: If you are not sure, will you take that on notice?

Dr ALLSOP: Yes.

Mr DAVID SHOEBRIDGE: I refer to working out a sustainable asset level for the scheme. Originally it was 100 per cent funding and then after the global financial crisis people thought maybe 110 per cent was a better level. You suggest following more of an APRA kind of model. Where would that take the scheme—slightly more than 110 per cent or slightly less than 110 per cent? What is the direction that would go.

Mr BHATIA: I can give a brief opening and Dr Allsop can probably give more details. From our perspective we are looking at the guidelines issued by SIRA. The guidelines from SIRA talk about what kind of

prudential margins should an insurer have and a nominal insurer is part of the purview of those guidelines. Also there are the principles of competitive neutrality, et cetera. It is probably better to ask SIRA the questions. But from our perspective the guidelines that have come out talk about maintaining an appropriate level of capital as a prudential margin that would be APRA-like.

Mr DAVID SHOEBRIDGE: What are the self-insurers? What is their asset level?

Mr BHATIA: The special insurers have APRA-like capital.

Mr DAVID SHOEBRIDGE: That is what I am asking you about.

Mr BHATIA: Yes, so the special insurers do have an APRA capital requirement. The self-insurers I think have a different level of ascertaining capital which is through deposits, et cetera.

Mr DAVID SHOEBRIDGE: So specialised insurers have an APRA level. I am assuming that if you want competitive neutrality that their level of funding is lower than the current level of 110 per cent?

Mr BHATIA: Much higher, yes. If I can translate that and say that if we want to today comply with APRA minimum capital guidelines, the funding ratio will need to be 127 per cent. So that is the minimum capital APRA requirements. However, that is at the 75 per cent, probable adequacy. We report on 80 per cent probable adequacy, so a higher risk margin.

Mr DAVID SHOEBRIDGE: We might un-package that on notice.

The CHAIR: Under the new system icare is essentially the insurer for the workers compensation scheme whereas the insurers like QBE, Allianz and so forth deal with the claims—correct me if I am wrong—so they are the scheme agents. In the past two days of hearings the Committee has heard about some challenges with the agents. How can icare manage the agent relationship with the insured and yourself better? How can that be improved?

Mr BHATIA: If I can just give a brief overview and then I will get Mr Nagle to speak about it. The workers compensation system, especially the nominal insurer, has had a predominantly outsourced relationship with the scheme agents. Over the last decade and a half the levels of oversight have been quite low. From our perspective, the focus for us is very clearly on ensuring that there is a consistency and quality of delivery through the scheme agents and a number of things are being done at the moment, which I will let Mr Nagle talk through, but predominantly geared towards consistency and quality of service delivery and, more importantly, quality of health care. The operating model, as currently stands, is under review and our current deeds with the scheme agents expire at the end of next year.

Mr NAGLE: What we have been doing is looking at the needs of employers and industry groups, so we have been engaging with them to ask those questions. Specifically we have a range of initiatives around asking various questions of industry groups—for instance, apprenticeship groups, training organisations have a very poor lose history and yet if we were to actually charge them the correct premium they would be uneconomic. So as an industry group how do they want to subsidise those organisations? For instance, are they aware of the subsidisation? Equally we have been looking at injury prevention and risk management and we have been encouraging employer groups to try and prevent injuries in the first place. We have done that through a series of discussions and premium incentives.

Additionally, we are also talking to employer groups around training. What kind of training is applicable to them? There is a lot of training available across the industry but there is no real evidence about what works and what does not. So we have got quite an involved program to get that information and discuss that with industry as we go forward.

The CHAIR: That raises the question of whether the scheme agents are the best way to manage the human face of the New South Wales workers compensation system. I note that you said the deeds with the scheme agents expire at the end of next year and the operation procedures are under review. Where are you heading with that? Is the model we have now the best model?

Mr BHATIA: I think what we do know is that the current model or the model of the past is probably not the model of the future. The actual transition to what the model of the future will be or the actual detailed blueprint of the actual model will be part and parcel of the next six to eight months of design with various key stakeholder groups. For us, as I have said, one of the key design principles is that we need to make sure there is consistency and quality of delivery both in terms of service and in terms of consistency and quality of health care outcomes for injured workers. We do believe that there is a huge opportunity for us to bring an allied health mindset into caseworkers. We have looked at various examples, not only locally but globally, where there has been a better outcome with more allied health background caseworkers and then supported by cognitive

intelligence technology tools that are available today, which help in triaging at the time of the injury but also coming up with a much more tailored service delivery model, as opposed to a one-size-fits-all approach that has been rampant in the past.

I think we are a lot more cognisant about the fact that there are a large proportion of injuries that are less severe and that need to be empowered with the injured worker able to navigate through the system with the support model. Then there are a lot more complex injuries, especially the more extreme nature of severe injuries, which we know are not better managed through the scheme agent model. Hence we have set-up the Workers Care model, and I will get Mr Ferguson to talk a bit about it because that is a really important shift in the way in the way we have managed workers compensation in the past. Our philosophy is more on the fact that if a person is injured to that level of severity, why is there a different system through the Lifetime Care model where we can support an injured person and their carer through a very long-term recovery and treatment process, whereas the workers compensation system does not afford that? So we have had the opportunity to try and combine them.

Mr FERGUSON: The purpose of the Workers Care program is to ensure that the quality of services and outcomes that we are achieving under the Lifetime Care and Support Scheme, which supports people with serious injuries from motor vehicle accidents, is also available to people within the workers compensation scheme. So from October of last year any newly injured person in the workers compensation scheme who has been severely injured is being supported under the workers compensation program.

Mr DAVID SHOEBRIDGE: What is the definition of "severely injured"?

Mr FERGUSON: Severe injury follows the same definition as the lifetime criteria. In essence, it is somebody who has a brain injury or a spinal chord injury. So a moderate to severe brain injury or a spinal chord injury are the two most prominent types of injury within that criteria. At this stage there are 89 people that are being supported within the program and we expect that to grow to about 300 by the end of the financial year.

Mr DAVID SHOEBRIDGE: Is it working? What is your initial assessment? Instead of there being the churn of case managers that we have heard about from others, is the idea that there is consistency?

Mr FERGUSON: The numbers we are talking about are very small for the scheme agents but they are the sole focus of Lifetime Care and Workers Care. The key benefits really are consistency and specialisation, which helps to drive quality. This is very early on so it is difficult to provide anything quantifiable about outcomes but certainly the anecdotal feedback has been positive.

The Hon. LYNDA VOLTZ: In the over 20 per cent what percentage do those 89 make?

Mr FERGUSON: I am not sure of the percentage of the over 20 per cent. Dr Allsop may know.

Dr ALLSOP: Off the top of my head I could not tell you that but as it grows out—

Mr BHATIA: We can take it on notice and come back to you.

The Hon. DAVID CLARKE: You said earlier that there needed to be an improvement in the quality of delivery. We have received a number of submissions that state that insurers have instructed injured workers to attend independent medical examination appointments that were not situated locally to where they reside. What is being done to deal with that? Earlier the Committee heard evidence from an injured worker who was sent to a doctor and it cost $120 for her to get there.

The Hon. LYNDA VOLTZ: No, $130.

Mr DAVID SHOEBRIDGE: She was from the North Coast and she had to come down to Sydney.

The Hon. DAVID CLARKE: She had to wait for a month or more to get that money back when she was on a very limited income. Would you agree that that is a major issue?

Mr BHATIA: We definitely acknowledge that the system is not working from that perspective and we know that there are IMEs who are situated where they have been directed in the past to go to a particular place, which has been very inconvenient and a very long period for them to go.

The Hon. DAVID CLARKE: Are a lot of complaints of that nature coming in?

Mr BHATIA: We do know that that is a constant source of frustration from the net promoter score that we generate.

The Hon. DAVID CLARKE: So what specifically are you doing about that? I assume these complaints have been coming in from the very beginning?

Mr BHATIA: They have been there for the last couple of decades. So this is not a new issue, it is an issue that probably, in our humble opinion, has not been sufficiently addressed in the past.

The Hon. DAVID CLARKE: Some people could say that it should not be an issue at all?

Mr BHATIA: Yes.

The Hon. DAVID CLARKE: Because if it has been going on for so long there presumably should have been some solution. Do you believe there is a solution to this issue?

Mr BHATIA: We do believe that there are things that can be done more easily and better—for example, being able to actually book appointments electronically, having the empowerment to be able to do so themselves, and having payment systems that do not rely on refunds. There is a whole raft of things that are out there at this point in time, through the advancement of technology but also through the change of philosophy.

The Hon. TREVOR KHAN: It is not a question of change in technology, some of the scheme agents are bloody-minded. If you have got a worker in a country area and you send them off to Sydney and you will not provide them with a taxi fare when they get to Sydney that is not a requirement of technology, that is just being difficult.

The Hon. DAVID CLARKE: As you say, this has been going on for a couple of decades and your response is, "Well, there are some things out there." Specifically what is being done to deal with the situation where injured workers are being referred to doctors, where it is costing them $130, and presumably more in some cases, out of their own pocket and for which they have to wait a month to be refunded? What has been done to rectify that situation or what is being organised to deal with that situation in the very near future?

Mr NAGLE: In October last year we changed the system. Firstly, we authorised scheme agents to offer the choice of three based on locality where an appropriate specialist or IME is not available in a reasonable distance, we then allowed a set fee based on the standard reimbursement schedules for travel. We have also asked that scheme agents pay that upfront, where it is appropriate. We have also taken steps where people are isolated, particularly in regional areas, and it would mean flying them into Sydney. What we have tried to do is group like appointments and then fly specialists to that area so that they can go to the injured worker, not the other way round. That has been happening since October.

The Hon. David CLARKE: So there should be no cases of people being out of pocket for $130 having to wait for a month or more to be refunded?

Mr NAGLE: I would be very disappointed. Having said that, a lot of people do not recognise the costs when they undertake a trip and so they ask for reimbursement and it just takes time. But it is something we are focusing on with the scheme agents: it should not take that long.

The Hon. LYNDA VOLTZ: I assume you have read the WIRO submission.

Mr NAGLE: Yes.

The Hon. LYNDA VOLTZ: On your employer's website you state that the premium is linked to their performance and you will see the case that is put forward in WIRO where they hit the $30,000 threshold and he gives a range of examples where it is not the employer that can effect the outcome of their premium. Do you want to make a statement in regards to that?

Mr NAGLE: It is a new premium model and it is going to take some time to work out all of the working parts. In the initial period we have tried to limit any impact to employers by bringing in the 30 per cent cap. We have tried to make it very plain through them and their advisers, generally the insurance brokers, who we have engaged with quite heavily, so that everyone understands the drivers of the new premium model. The drivers are about supporting return to work and preventing injury in the first place. So in terms of understanding those elements, the employer is entirely in control.

The Hon. LYNDA VOLTZ: Let us just go to return to work. As you know, the police are on a different scheme with far greater benefits, similar to the old scheme, and they have got much lower claims because they intervene early. I note your comments earlier that there is no evidence that intervention works. Obviously it is working where the Police Force is using it because that early intervention has meant no secondary injury and a whole raft of things. Yet constantly, across the board, from employees, from employers, we have heard that it takes three, four, five months to even get a claim looked at and rehabilitation. I am asking you where is your evidence to support your claim that it is the employer that can affect the premium, when that is not the evidence we are being presented with?

Mr NAGLE: We have been reviewing all of our portfolio in some detail. We can give you examples of employers who have taken specific action and reduced their premiums and their return to work rates considerably by working with us around loss prevention and risk management procedures. I think the differential you are highlighting is where a large employer can invest in significant actions. The average SME, who is the bulk of our employers, has one claim every nine years and, therefore, when it occurs they are not quite sure what to do, and it is difficult to get to them in a timely manner.

The Hon. LYNDA VOLTZ: I am not sure that the Business Chamber was presenting that case.

The Hon. TREVOR KHAN: They certainly were not.

The Hon. LYNDA VOLTZ: It is true, is it not, that if you have a claim against you over this three-year period and you are already paying the $30,000 threshold, your premiums are going to go up? So is there not a perverse incentive to not have claims actually approved?

Mr NAGLE: No, we think the opposite in that sense of the way we have designed the premium model is to encourage employees to put claims forward. We believe the old model, because it was designed around claims estimates, was disguising the true level of injury.

The Hon. LYNDA VOLTZ: But you just gave evidence that most people are returning to work before the claim even made it to the insurance company.

Mr NAGLE: That is right.

The Hon. LYNDA VOLTZ: So there is a claim going in and they are already back at work?

Mr NAGLE: Correct.

The Hon. LYNDA VOLTZ: And that was somewhere around 85 to 90 per cent of the actual claims.

Mr NAGLE: Sixty per cent.

The Hon. DANIEL MOOKHEY: Mr Bhatia, the five contracts you have got with scheme agents, do those contracts allow you to provide sanctions on scheme agents for malperformance or breach of performance standards?

Mr BHATIA: Yes.

The Hon. DANIEL MOOKHEY: How many scheme agents have been sanctioned for the duration of the contract so far?

Mr BHATIA: Every year we have calculations of incentive models. There is a base remuneration model and then there are performance-based remuneration structures.

The Hon. DANIEL MOOKHEY: Can you provide us with the components of the incentive model? Can you explain to us what are the inputs of the incentive model that are contained in the performance contracts from the scheme agents?

Mr NAGLE: The scheme is broken into its various cohorts. We have components for the base—just the operational expense; we then have a service standard that centres around underwriting the policy and billing; we then have service standards around return to work; and we have service standards around the best care available for people who are on the scheme past 52 weeks.

The Hon. DANIEL MOOKHEY: In terms of the penalties that can be applied under the contract for breaching performance standards or otherwise breaching the forms of the contract, how many scheme agents have been sanctioned and how frequently for the duration of the contract?

Mr NAGLE: It varies by scheme agent on their actual performance. For instance, on the policy and billing, none of the agents have reached their service standard.

Mr DAVID SHOEBRIDGE: None of the agents have reached their service standard?

Mr NAGLE: No—on that aspect. On some of the other service standards it ranges based on some agents perform very well, some agents perform adequately.

The CHAIR: Is that public information?

Mr NAGLE: No.

Mr DAVID SHOEBRIDGE: Could you provide it to us on notice?

Mr NAGLE: We can, yes.

The Hon. DANIEL MOOKHEY: There is third category as well that you mentioned.

Mr NAGLE: Which is people who are on the scheme for a longer period. That is around successful return to work for those people, or service in terms of care.

The Hon. DANIEL MOOKHEY: In terms of the return to work aspect of the incentive scheme, does that contain any incentives for a scheme agent to finalise claims within a set period of time?

Mr BHATIA: The scheme is incentivised for a sustainable return to work outcome. For example, if they do a premature return to work—that is, the injured worker is not ready but I want to return that person to work because I am going to get paid—if you do it in an unsustainable way there is a very strong likelihood that it will reopen and in the event of reopen there is a claw-back on the remuneration. For example, there is no incentive from that perspective to put somebody back to work in an unsustainable manner.

The Hon. DANIEL MOOKHEY: Would return to work include work capacity assessments?

Mr BHATIA: You would return to work through a work capacity assessment, yes.

The Hon. DANIEL MOOKHEY: So if an insurer decides that you have work capacity—

Mr BHATIA: The medical examiner.

The Hon. DANIEL MOOKHEY: Presumably if a person is deemed to have work capacity and is capable of performing suitable employment in accordance with the definitions under the Act, if it is the case that a scheme agent makes that decision, that would trigger the incentive scheme because they would be deemed to be able to return to work. Is that correct?

Mr BHATIA: Only if the person has returned to work in a sustainable manner.

The Hon. LYNDA VOLTZ: So if they have been deemed to have a work capacity but have not returned to work—

The Hon. DANIEL MOOKHEY: Can they get an incentive payment?

Mr NAGLE: Not an incentive payment, no. The incentive payment is only if there is sustainable return to work.

The Hon. DANIEL MOOKHEY: But they recover their costs through the base payment?

Mr NAGLE: That is correct.

The Hon. LYNDA VOLTZ: And you have the evidence of whether they have returned to work or they have just been deemed to have work capacity. Is that right?

Mr NAGLE: That is right.

The Hon. LYNDA VOLTZ: So you would be able to provide us with those details of people who have had work capacity and have been cut off?

Mr NAGLE: Yes.

The Hon. TREVOR KHAN: Can you just clarify what a sustained return to work is?

Mr NAGLE: The definition is generally back at work after, I think, three months. I would have to check that date.

Mr DAVID SHOEBRIDGE: You might give us that on notice.

The Hon. DANIEL MOOKHEY: Is that to the pre-injury position or is that—

Mr DAVID SHOEBRIDGE: Perhaps you could give us on notice what the definition of sustainable return to work is and the figures that underpin it. As I understand it, there are no penalty provisions as such in the deeds; the penalty is you do not get an incentive.

Mr NAGLE: Effectively, yes.

Mr DAVID SHOEBRIDGE: There have been a number of calls for the deeds to be made publicly available, or at least if you exclude the specific remuneration provisions, but the basic structure and the incentives or penalties in the deeds to be made publicly available, because for many people the structure of the deed determines the behaviour of the insurer. What do you say to those calls to get the deeds publicly available?

Mr NAGLE: My personal view around that would be it is a complex document. I think the summation that you are talking about we would be comfortable in publishing the elements of the deed.

Mr DAVID SHOEBRIDGE: Saying that it is a complex document has the suggestion that parliamentarians and lawyers and stakeholders are not up to the job of interpreting a complex document.

The Hon. TREVOR KHAN: Some of us are.

Mr DAVID SHOEBRIDGE: Some of us are and some of us are not. I am not saying which class any of us fall within. But both the summary and the document would be the most transparent way of proceeding, would it not?

Mr NAGLE: Yes.

Mr DAVID SHOEBRIDGE: Well, what are the barriers to doing that?

Mr NAGLE: That the deed at the moment is agreed between us and scheme agents as a commercial-in-confidence document.

Mr DAVID SHOEBRIDGE: But you are going through a whole process now of doing another one.

Mr NAGLE: Yes, we are.

Mr DAVID SHOEBRIDGE: And as I said before, the nature of the deed basically determines the behaviour of the insurers. Almost everybody wants to know what the deed is—if it is the deed's fault or if it is the insurer's fault. The only way we can do that is if we have transparency. Are we going to get that commitment to transparency in the next round?

Mr BHATIA: Yes, absolutely.

Mr DAVID SHOEBRIDGE: When is it a rational use of public money to put covert surveillance on somebody with a psychological injury?

Mr HUNT: Are you referring to the police issues?

Mr DAVID SHOEBRIDGE: The police, the prison officers, the fire fighters—basically anyone who has a psychological injury who says, "I am feeling anxious, I am feeling distressed about going out and there is somebody sitting outside my house in a car with tinted windows filming me and my family."

Mr HUNT: There are two issues there. Firstly, surveillance is not applied greatly. It is normally in response to some sort of advice from the public or from a fellow employee of some sort of wrongdoing. The other issue is, with some of those schemes there are also other schemes involved and it is not necessarily the Workers Compensation.

Mr DAVID SHOEBRIDGE: I am not going to blame you for the monstering of TAL insurance, for example. We are talking about scheme agents.

Mr HUNT: We have had cases where the scheme agent has been advised that surveillance is underway and they have checked and advised the worker, "No, not from us".

Mr BHATIA: I think the point Mr Hunt is making is that there sometimes can be confusion amongst the injured person as to whether the surveillance has come from the D and D insurer or from the workers compensation insurer. Notwithstanding that, if you look at the open file say for police court, which we have looked at very carefully, less than half a per cent of all open claims have got covert surveillance—sorry, have got overt surveillance.

Mr DAVID SHOEBRIDGE: Should there not be a very clear policy statement issued by icare that you do not put surveillance on an injured worker unless there is some cogent evidence of fraud that the covert surveillance will have some potential of proving or disproving?

Mr BHATIA: I think the point you make is absolutely valid. From our perspective, we have been having those conversations with the scheme agent to ensure that this matter is very high on the priority, from a conduct perspective and also it does not yield any benefits to anybody, contrary to people's expectations, either to the scheme, to the community or to the person themselves.

Mr DAVID SHOEBRIDGE: So, conversations are great but when is the directive going to be issued that implements that? "Stop wasting public money with monstering injured workers with covert surveillance." When is that directive going to be issued?

Mr BHATIA: We are in the process of making sure that there are, given the way the deed is, we have to make sure that the guidelines that we issue are in conjunction, especially when it comes to the Treasury-managed fund, that it is in conjunction with the employment agencies. At this point in time we are working with each of them to have the conversation and then issue a guideline to the scheme agent to

understand under what circumstances would surveillance be okay, and what is the approach that they undertake and do they need to seek permission with us before they do so.

The Hon. TREVOR KHAN: There has to be some oversight.

Mr BHATIA: Absolutely.

Mr DAVID SHOEBRIDGE: We are probably getting to the same point, there needs to be an external reference point before covert surveillance is permitted.

Mr BHATIA: Yes.

Mr DAVID SHOEBRIDGE: Is that the direction in which it is going?

Mr BHATIA: It is definitely the direction we are going at, absolutely, which is basically that, without a trigger which has very clear evidence, there should not be any overt surveillance.

The Hon. DAVID CLARKE: How far has that direction progressed? When you talk about a "conversation", can you be more specific than that?

Mr BHATIA: At the moment the conversation is just as to the guidelines.

The Hon. DAVID CLARKE: How long have these discussions been going on?

Mr BHATIA: They have been going on for the last three to six months.

The Hon. TREVOR KHAN: And how long will they go on for?

Mr BHATIA: Probably another three months or so before their advancement into a guideline.

The Hon. TREVOR KHAN: Does that mean that, by the end of the financial year, there will be a guideline in place?

Mr BHATIA: Yes.

Mr DAVID SHOEBRIDGE: Could we get some evidence on notice about what the cost of this covert surveillance is—what the individual cost is and what the scheme cost is?

Mr BHATIA: Sure.

Mr DAVID SHOEBRIDGE: I think most people are glad that we have seen the division and seen some real positives out of icare. But if icare is doing its job properly, it would not matter which scheme agent someone has got, they will be following a common set of guidelines, a common set of rules, and dealing with people in the same human, person-focused manner. Is that the basic goal?

Mr BHATIA: Absolutely right. So that is definitely the basic goal, which is to make sure there is a very clear, consistent way of delivering service.

Mr DAVID SHOEBRIDGE: What is the benefit in the scheme of having that service delivered by Allianz, GIO, CGU, Employers Mutual and QBE? If ultimately we want them to be providing exactly the same service, why do we go through the fiction of saying that there is some sort of benefit from having a market and product differentiation for a market?

Mr BHATIA: There is no product differentiation per se, but there is a service differentiation at this point in time. Service differentiation, in my opinion, is no good if I cannot choose my service provider. The concept of a market is only there if I can choose, as an injured worker or as an employer, my service provider. I think from our perspective, one of the key things, as I have said before, is that we are looking at the operating model. We do not believe that the model of the past is the model of the future.

Mr DAVID SHOEBRIDGE: Firstly I would like to say that it is lovely to have an actuary employed by the public on the scheme and it is very good to see you, Dr Allsop.

Dr ALLSOP: Thank you.

Mr DAVID SHOEBRIDGE: But what proportion of the scheme's funds, on an annual basis, goes to the insurers and the scheme agents, and what proportion goes to the doctors and investigators employed by the scheme agents? Can we get that breakdown? If you have a headline figure now I would be interested to hear it.

Mr BHATIA: I know that the total scheme agent remuneration for the nominal insurer is just shy of $400 million per annum.

The Hon. DANIEL MOOKHEY: As a proportion of the scheme, what does that amount to?

Mr BHATIA: So that is about 20 per cent of the premium collected.

The Hon. TREVOR KHAN: You touched on this before, claims officers or claims managers, what level of experience or education do those claims officers now have generally?

Mr BHATIA: I think that is a difficult question to answer because they are quite varied.

The Hon. TREVOR KHAN: I suppose what I am getting at is, are they people who have moved from assessing quotes for damaged cars into the workers compensation section of the same insurance firm, or is there a practice of employing people with some particular skill set? And if not, why not?

Mr NAGLE: No, it is mixed across the scheme agents. So a large number of the scheme agents employ people with allied health backgrounds, so nurses, physios, occupational therapists. There is difficulty retaining those people in the scheme because of the style of work that is involved. So you would say the bulk of people across most of the scheme agents have some form of background in that area.

The Hon. DANIEL MOOKHEY: So that is scheme agent discretion?

Mr NAGLE: That is right.

The Hon. LYNDA VOLTZ: So are you saying that the bulk of people who are doing workers compensation have some allied health background?

Mr NAGLE: That is right, in most of the scheme agents.

The Hon. LYNDA VOLTZ: Do you have a figure that you can provide for that?

Mr NAGLE: Not directly. That is based on anecdotal evidence that we have gone out to them—

The Hon. LYNDA VOLTZ: Because I know some people who work—

The Hon. TREVOR KHAN: Just hold on.

Mr NAGLE: So we have done work with the scheme agents, to look at their education frameworks and I understand the point about what is the standard that should be there. That investigation has shown that in their senior roles and many of their operating roles they do have people with those backgrounds.

The Hon. TREVOR KHAN: It is not the senior roles where the issue is, it is the interface with both the employer and the worker that perhaps is the most important. So I am directing my questions at those officers, not somebody who is half way up the chain.

Mr NAGLE: I am looking at the area of team leaders. The mix of staff are a mix of people they have employed from various roles and backgrounds.

Mr BHATIA: It is fair to say, Mr Khan, that there is a variance. There is no framework that has been established in terms of skills that are consistent across the scheme. This goes to the previous points, it depends upon scheme agent by scheme agent as to how they manage the workforce. It is within their discretion to find suitable people for those categories and roles.

The Hon. TREVOR KHAN: Is there any TAFE course or some form of certificate that can be attained or awarded for people in these roles?

Mr BHATIA: One of the things we have been looking at over the six to nine months is to design a course to get the 1,500 to 2,000 people across the scheme agents through a common frame of reference and a consistent training program. That is one of the core elements we are discussing. We are speaking with the Australian and New Zealand Institute of Insurance and Finance [ANZIIF] as to whether they have a course that we can look at that will accredit caseworkers and case managers.

The Hon. DAVID CLARKE: It is on the agenda to provide a situation where the claims officers have skills applicable to this industry?

Mr BHATIA: I would not want to come across and say that these people do not take their jobs seriously. Most of the people who work in workers compensation have their heart in the right place. We need to make sure that there is a clear framework for training and development and a clear articulation of expectations made through the employers to individuals.

The Hon. DAVID CLARKE: It is more than people having their heart in the right place?

Mr BHATIA: It is about making sure they have the right tools.

The Hon. DAVID CLARKE: Is this a conversation that you are having with others in the industry?

Mr BHATIA: There are multiple facets to that. One is looking at a case manager training program which is a conversation we are having. We are not in a state of development but in a stage of design as to what that will look like.

The Hon. DAVID CLARKE: In the general timeframe what are we looking at?

The Hon. DANIEL MOOKHEY: Will it be in the next deed?

Mr BHATIA: We will definitely have this designed before the next deed is entered into.

The Hon. LYNDA VOLTZ: But will it be included in the next deed?

Mr BHATIA: We do not know what the next deed will look like. But, yes, there will be a requirement for individuals to undergo a training program.

The Hon. DANIEL MOOKHEY: That will be an enforceable requirement of icare of all scheme agents?

Mr BHATIA: Yes.

The CHAIR: Your organisation is two years old?

Mr BHATIA: A year and two months, it does feel like longer than that.

The CHAIR: You have inherited remnant structures from other organisations and cultures of other organisations. I sense you are trying to culture-change, which does not happen in a year. How is that journey going and when you are back in two years time for the statutory review will the Committee see significant changes in the relationship?

Mr BHATIA: Absolutely. If there is not one I will not be here. From our perspective what we are trying to do is kick off a multi year change journey for a system that needs a lot of change. The reason I say that is from a delivery standpoint we have not delivered what I would call a best-in-class workers compensation system to our State. From a delivery standpoint there is huge change that needs to happen. In the formation of icare, as Mr Ferguson said, we have the opportunity to leverage some of the points that work well, for example the lifetime care scheme and its person centred model for long-term care. We can transfer that across to the most severely injured cohort of the workers compensation scheme.

I find it ridiculous that the cause of injury, whether work or road, should dictate the treatment pathway. The person injured needs care and we want to make sure that the type of injury, severity of injury and need drives that care rather than the fact they were injured at work—within the guidelines of the legislation. I am not planning to change any of those. The other point I would like to make is that there is a significant need for cultural change within the organisation and the ecosystem per se. The front line of workers compensation is as much the caseworkers as it is the employers, line managers of people who are injured, and the medical professionals.

Medical professionals range from doctors to rehab providers to allied health providers. We are starting to engage quite heavily in conversations with the colleges and the Australian Medical Association to see how we can increase awareness of the system to some of the doctors. How can we have a workers compensation course for doctors and general practitioners? If I walk into a doctor's surgery and Dr Allsop walks into another with the same injury why is the treatment different if Dr Allsop was injured at home and I was injured at work?

Mr DAVID SHOEBRIDGE: Why is the payment different?

Mr BHATIA: Why is the payment different? There are a raft of things that we know are foundational infrastructure issues that cause road blocks and an inherently adversarial system to be a lot more adversarial than it needs to be.

Mr DAVID SHOEBRIDGE: Some doctors say they will only do workers comp, given how miserable it is dealing with the system, if they are paid above market rates. There are two problems in one.

Mr BHATIA: We want the doctors to be in the system to deliver a better quality of health outcome for the person, not for payment or despite a system that is difficult to navigate and deal with. I was trying to say, and maybe it did not come across properly, that is where technology will play an important part. When we can integrate into the practice management software of doctors' registries and make those payments as easily as through QR codes or prepayment people will not be out of pocket when they are already out of work. I know that there are systemic challenges in the way we have delivered workers compensation in the past.

There is a strong commitment and a conversation that happens between the management and board every month in terms of how is it we are changing and what does the transformation agenda look like? We have

time-boxed a three hour agenda where some of these things will be addressed. Our challenge is that while it is being addressed we have instances where there is inconsistency. We want to make sure we can have a dual approach from a strategic standpoint to address some of those issues in the next 24 to 36 months. While that is happening, what are the checks and balances in place so we have a safety net for the people who have to deal with the current system?

The CHAIR: Remember that answer in two years time.

The Hon. LYNDA VOLTZ: Earlier you spoke of the service providers not meeting the criteria and there was a breakdown as to whether they were performing better or worse, could you provide what the breakdowns are sitting under that?

Mr BHATIA: Yes.

The Hon. LYNDA VOLTZ: Will you provide the current deeds?

Mr DAVID SHOEBRIDGE: You can take that on notice.

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

The Hon. TREVOR KHAN: Questions on notice can be put.

Mr DAVID SHOEBRIDGE: Is Dr Allsop in a position to answer a question about the potential cost to the scheme of reinstating certain levels of medical expenses? Would you be in a position to crunch the numbers on that?

Dr ALLSOP: Medical expenses, or are you talking about the section 39?

Mr DAVID SHOEBRIDGE: Section 39 is one, but the other is the reinstatement of section 60 expenses across the board, which probably impacts section 39.

The CHAIR: That is on notice. That concludes the evidence from icare. Thank you for coming in today. The Committee resolved that you have 21 days to respond to questions on notice. The secretariat will be in touch.

(The witnesses withdrew)

(Luncheon adjournment)

CARMEL DONNELLY, Executive Director, Workers and Home Building Compensation Regulation, State Insurance Regulatory Authority, affirmed and examined

ANTHONY LEAN, Chief Executive, State Insurance Regulatory Authority, affirmed and examined

The CHAIR: Welcome to the first review of the workers compensation scheme by the Standing Committee on Law and Justice. The Committee has received your submission and answers to questions on notice. Would you like to make a brief opening statement?

Mr LEAN: Yes. I thank the Committee for its important role in overseeing the effective operation of the workers compensation scheme and for the opportunity to make a statement as the Chief Executive of the State Insurance Regulatory Authority [SIRA]. In the interests of time I will make only a couple of points and I will provide a copy of the full statement for tabling. The reforms establishing SIRA and separating the regulatory and insurance functions formerly managed by WorkCover laid the groundwork for a new system that focused on the injured person, not the process, and on supervising insurers. Under the direction of the board we have been working hard to set up SIRA as a strong and effective regulator that puts our customers at the centre of everything we do. Our approach to improving the experience of injured workers has been grounded in genuine consultation that is responsive, transparent and inclusive. We are committed to achieving better workers compensation outcomes through smarter regulation. Key to this has been rebuilding our regulatory frameworks, including developing a new system performance framework, an inaugural system performance report, which we have provided to the Committee, and an insurance supervision model to manage insurer performance.

Both of these reflect our overarching approach, which is to move from simply managing compliance to driving outcomes and improving performance. The Committee may be aware that SIRA commenced a review of the self-insurer framework in September last year. We have recently released a proposed self-insurer licensing framework for consultation. The framework is intended to provide strong, fair and results focused regulation of insurance and improved outcomes for injured workers and employers. We have been very open in indicating that this same proactive, risk based approach can be rolled out across the rest of the system through our insurer supervision model. The proposed framework and the way that SIRA has been undertaking its regulatory functions clearly demonstrate our expectations about the way all insurance providers provide services. As I indicated, I will table the rest of the statement.

The CHAIR: Mr Donnelly, would you like to add any comments?

Ms DONNELLY: No, thank you.

The Hon. LYNDA VOLTZ: I will begin by asking about actuarial reports. As you know, they were previously publicly available documents. They are no longer publicly available. Will you make them public?

Mr LEAN: I have been in the role for 12 months; I am not familiar with the history. The current Act provides that certain information is to be treated confidentially. There is an exception, in that I am able to certify that it is in the public interest that information be released. I am aware that employers have argued that there is a need for an increased level of transparency in this area. That is certainly something that we will be looking at over the coming weeks. We received the latest valuation from icare quite recently. We will be looking at the document to work out whether there is more information that can be released over and above what has been put out in the past through summaries of the valuations.

The Hon. LYNDA VOLTZ: Given that they were publicly available in the past and there is public interest in having them released, surely there should be no prohibition on releasing them?

Mr LEAN: The Act contains the prohibition. As I said, there is the capacity to release them if it is in the public interest. I am not going to make a decision on the run in this Committee meeting. That is something we will be giving serious consideration to.

The Hon. TREVOR KHAN: Which section of the Act is it?

Mr LEAN: I think it is 248AA.[1]

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[1] Correspondence was received from Mr Anthony Lean, Chief Executive, SIRA, clarifying his evidence concerning the relevant legislative provision:
… the relevant legislative provision should be section 243AA of the Workplace Injury Management and Workers Compensation Act 1998, not section 248AA, as I advised.

Mr DAVID SHOEBRIDGE: Of the 1987 Act?

Mr LEAN: The 1998 Act. The point to make is that icare operates in a commercial market. It has competitors with specialist insurers. My understanding is that they hold the view that a lot of the information in the valuation is commercially sensitive. We need to work through those issues. But we are certainly mindful of the need for greater transparency.

The Hon. DANIEL MOOKHEY: I refer to the system performance report that SIRA has issued. I presume you have it with you?

Mr LEAN: Yes, I do.

The Hon. DANIEL MOOKHEY: On page 6 it says:

> The first transition of claimants from weekly payments will occur in October 2017.

This is about the five-year cap. It continues:

> It is likely to have a range of impacts on the system with a potential increase in disputes, a change in the composition of assessed levels of permanent impairment, and a reduction in weekly benefit costs …

Do you see where I am quoting from?

Mr LEAN: Yes.

The Hon. DANIEL MOOKHEY: Are you able to tell the Committee your forecast for the increase in the volume of disputes that you expect, as well as the change in the levels of permanent impairment and the number of workers who will be affected by the reduction in weekly benefits? On the last point, did you hear icare's assessment of how many people it expected would be affected?

Mr LEAN: No, I did not.

The Hon. DANIEL MOOKHEY: It is 7,000 to 8,000 at first, then 200 a month. Does SIRA have any basis on which to disagree with that or are you prepared to accept that number.

Mr LEAN: We are working through this at the moment, not just with icare but with all the specialised insurers and self-insurers.

The Hon. DANIEL MOOKHEY: Good.

Mr LEAN: At this point we do not have a precise estimate of the increased number of disputes or increased number of permanent impairment assessments that would need to be completed. We have asked all the insurers to verify the numbers of injured workers who will be affected by this change. We are working through the details at the moment. Ms Donnelly may like to add to that.

Ms DONNELLY: We have sought from all the insurers in the system estimates of the potential number of workers affected. The current estimates that I have indicate between 5,300 and 6,000. I did not hear the testimony from icare this morning.

The Hon. DANIEL MOOKHEY: Is that 5,300 to 6,000 in October? Over what period of time is that?

Ms DONNELLY: It is from the end of next year until early the year after.

Mr DAVID SHOEBRIDGE: icare said 6,000 to 7,000.

Ms DONNELLY: I did not hear that testimony this morning. I will be interested to read that. I acknowledge that the majority of those workers will be clients of icare. For that reason, we have asked them to start to identify and work through processes and test the approach, ahead of us giving more guidance to the rest of the insurers in the system. We expect that that will assist us to refine the estimates, particularly as there may be some workers who have not had a whole person permanent impairment assessment yet.

The Hon. DANIEL MOOKHEY: When do you expect all the insurers you regulate to have provided you with that estimate?

Ms DONNELLY: They have provided us with preliminary estimates, so the number I gave you is based on that.

The Hon. DANIEL MOOKHEY: Are you able to provide us preliminary estimates by insurer on notice?

Ms DONNELLY: I could take that on notice, but what I am expecting to do is implement by the end of the year a process where they will give us monthly updates as they contact workers and work with them and give us a more refined estimate as we go on.

The Hon. DANIEL MOOKHEY: Mr Lean, in the first paragraph of commentary on page 27 of the performance report you say: "Approximately 23 per cent of work capacity decisions issued are appealed through the internal review process and approximately 40 per cent of internal reviews result in an outcome that is better for an injured worker." icare told us there is a presumed 80,000 claims or thereabouts received per year—granted, there are more because there are more insurers—and if you apply the mathematics to that, it means close to 10,000 people per year have a work capacity decision made which they then have to appeal and in which they are then found to be correct. Does that strike you as a troublingly high number?

Mr LEAN: no, that is not the data that I have. I think in that report at page 27 the number of reported work capacity decisions and reviews is 10,636.

The Hon. DANIEL MOOKHEY: Work off the assumption that 40 per cent of them result in a claim that is upheld. That is roughly 4,000 or 5,000.

Mr LEAN: With respect, I think you might be mixing up one of the numbers. I think the 40 per cent there is talking about the internal review decisions that result in a different outcome and the 45 per cent is the outcome from the actual SIRA merit reviews. The number of insurer work capacity decisions is 2,513.

The Hon. DANIEL MOOKHEY: To simplify matters—I do not want this to be dragged down by data if I have not read it correctly— if it is the case that there is quite a high number of people whose decisions are overturned through an internal review or a merit review, should the Committee conclude from that that there is something systemically wrong with our work capacity assessments?

Mr LEAN: No. I think, of the 10,600 decisions, 2,500 seek a review and then about 40 per cent of those result in a different decision. Of that, 681 are then subject to appeal to the Merits Review Service, which is part of SIRA, and about 45 per cent of those result in a different decision. I do not think it is correct to take the 40 or the 45 per cent and apply it to the 80,000 or the 10,000.

The Hon. DANIEL MOOKHEY: Even on the basis of that explanation, do you not think that that is an incredibly high number to be overturned or to have an outcome applied to a review process that is better for the worker? Should we be concluding from that that there is a systemic problem amongst scheme agents when it comes to work capacity assessments or not? Or am I over-egging it?

Mr LEAN: The Merit Review Service already works with insurers to get them to improve the quality of their decision-making. I think over time there have been some improvements made in the way that the decisions are made, but it is one where we continually try to improve the quality of insurer decision-making.

The Hon. TREVOR KHAN: Is that a yes?

Mr LEAN: My answer was my answer.

Ms DONNELLY: I would like to—

The Hon. DANIEL MOOKHEY: Before you do, since perhaps you might like to answer this one too because it is thematically related and we have limited time, we have been told by the Law Society and the NSW Bar Association amongst many others—

Mr DAVID SHOEBRIDGE: Self-insurers as well.

The Hon. DANIEL MOOKHEY: —that the entire dispute resolution system, particularly the merit review system, has no validity, should be abandoned and should be replaced. This is your opportunity to respond to their submissions, which I presume you have some familiarity with either through this submission process or through your own dealings with them. Are they wrong? Should we keep the merit review system, or should we junk it?

Mr LEAN: We are aware of the concerns that have been raised by a number of stakeholders about the whole dispute resolution system. I think there are a number of issues that have been raised, including—

The Hon. DANIEL MOOKHEY: I am asking specifically about the merit review system.

Mr LEAN: —the multiple pathways. I think the Merit Review Service actually provides a quick and fair dispute resolution service. It is very different to your traditional adversarial dispute resolution process. It is quite simple for injured workers to access. It is a simple four-page form—

The Hon. TREVOR KHAN: Can I just note that Mr Garling just collapsed on the floor!

The Hon. DANIEL MOOKHEY: I accept that, yes.

Mr LEAN: It is an inquisitorial model which shifts most of the onus onto … Most of the work has to be done by insurers when the decision is actually reviewed. Is it perfect? I am aware of the stakeholder views on that—

The Hon. DANIEL MOOKHEY: Is it redeemable? That is the question.

Mr LEAN: That assumes that you think it is irredeemable.

The Hon. DANIEL MOOKHEY: It is not just me making that assumption. Many people have come to us and said that they have given up hope that it is redeemable.

Mr LEAN: They are issues on which we look forward to the Committee's recommendations.

Mr DAVID SHOEBRIDGE: We saw one example of a work capacity decision that was 170 pages long—

The Hon. TREVOR KHAN: I think it was 180.

Mr DAVID SHOEBRIDGE: Whilst that might be at the extreme end, there have been repeated examples given to this committee of work capacity decisions that are 50, 100, 120 or 170 pages long, and an individual worker without legal representation is meant to challenge that. Do you really think that that is a viable system?

Mr LEAN: I am not familiar with those specific decisions that you are referring to. We would be happy to have a look at that and take those on notice.

Mr DAVID SHOEBRIDGE: So you are not aware it is a problem that there are very lengthy work capacity decisions that workers are given and cannot chew their way through.

Mr LEAN: No, that is not what I said at all.

Mr DAVID SHOEBRIDGE: Deal with the substance of the concern, Mr Lean.

Mr LEAN: If decisions of that length are being produced by insurers—

Mr DAVID SHOEBRIDGE: They are.

Mr LEAN: —that would be a concern.

Mr DAVID SHOEBRIDGE: Sorry, stop: You say, "if decisions of that length are being" delivered. That is not an issue; they are being produced. Do not question the validity of that. They are being produced. You know they are being produced. What are you going to do about it?

Mr LEAN: As I said before, we already use what we see coming through the Merit Review Service to help encourage insurers to improve their decision-making processes.

Mr DAVID SHOEBRIDGE: But what you see coming through the Merit Review Service is a tiny proportion of work capacity decisions. You accept that, do you not?

Mr LEAN: There are 600 to 700 appeals made each year.

Mr DAVID SHOEBRIDGE: Out of how many work capacity decisions?

Mr LEAN: About 10,600.

Mr DAVID SHOEBRIDGE: Less than six per cent. That is a tiny proportion, is it not?

Mr LEAN: Yes.

Mr DAVID SHOEBRIDGE: Do you do any sort of review or audit of work capacity decisions to find out exactly what is happening on the ground with injured workers, or do you just rely upon the small subset that comes to you for merit review?

Mr LEAN: At this point we are very much focusing on what we are seeing come through the merit review service.

Mr DAVID SHOEBRIDGE: So you are looking at 6 per cent!

The Hon. TREVOR KHAN: Let him answer.

Mr LEAN: We identify issues where improvements could be made, and the Merit Review Service provides feedback to insurers to improve the quality of decision-making.

Mr DAVID SHOEBRIDGE: You can take this on notice: What is the longest work capacity decision, including all the attached documents, that has come through to the merit review service? What is the average size?

Mr LEAN: I will have to take that on notice.

Mr DAVID SHOEBRIDGE: What is the average size? What do you reckon the average size would be?

Mr LEAN: Off the top of my head, I do not know. I will take it on notice.

Mr DAVID SHOEBRIDGE: You must have looked at them. Are they five pages long?

The CHAIR: Mr Shoebridge, I think Mr Lean has said he will take it on notice three times.

Mr DAVID SHOEBRIDGE: Mr Lean, you must have looked at them. Are they normally five pages, 10 pages or 30 pages long? You are at the head of this organisation. What is the average size?

Mr LEAN: I am going to take that question on notice.

The CHAIR: I am not going to say it again, Mr Shoebridge. Mr Lean has said three or four times that he will take it on notice. You will not get any other answer.

Mr DAVID SHOEBRIDGE: Do you not accept how woefully inadequate it is for the regulator not to be going out and looking at what is actually happening on the ground but instead to be limiting your review of the system to that tiny subset of cases that have found their way through internal review to merit review? Do you not accept how woefully inadequate that is as a regulator?

Mr LEAN: No, I do not necessarily accept that that is the case. The other way of looking at the data around work capacity decisions and what actually comes through to appeals is that people accept the decisions and they decide not to appeal. The process to actually lodge a merit review in the Review Service is very simple. We are looking at the issue of whether there should be increased payments made for people to obtain legal advice to access that system, and that is being considered at the moment. But the process to actually get in there is very simple. It is a simple, I think, four page form.

Mr DAVID SHOEBRIDGE: We have heard that the process to some extent is simple but that injured workers are so absolutely confronted by the enormity of the task of coming to terms with working out what is wrong that they do something as simple as scribble a handwritten note saying "This decision is unfair." Now that is a simple process but a bloody awful process in reality, is it not?

Mr LEAN: I am not sure of your question.

Mr DAVID SHOEBRIDGE: They can fill in a form to say that "I've got this huge bunch of documents and I have been told I am being cut off." It is simple to put in a form that says, "I couldn't read it. It was all too bloody complicated. The decision is unfair." That is a simple but an awful and inadequate process, is it not?

Mr LEAN: I am not going get into making judgements like that. Accessing the process is simple. It is an inquisitorial process. It is then up to the decision-maker in the Merit Review Service to remake that decision. It is intended to be a simple straightforward process for people to access. At this point we do have 600 to 700 coming through a year. That is the way the system is operating at the moment.

Mr DAVID SHOEBRIDGE: Is it true that overwhelmingly on those internal and merit reviews that the worker is not in a position to put in additional information or medical reports that assert their case unless they have parallel proceedings going on in the commission?

Mr LEAN: The way the process works is that they lodge the form. They can attach any documents that they like—this is my understanding of the process—they can attach any additional documentation. The matter is then triaged through the Merit Review Service and they go about gathering the additional information that they need whether it be from the worker or the insurer. It is not like your traditional adversarial process where it is up to each party to prepare their case; it is a fresh decision.

Mr DAVID SHOEBRIDGE: It is not like the usual adversarial process in so far as all of the evidence is provided by the insurer and the worker has bugger all opportunity to put anything in themselves? That is what distinguishes it from the adversarial process, is it not? It is all one sided.

Mr LEAN: No, I do not agree with that. The form enables the worker to attach additional documentation if they so choose.

Mr DAVID SHOEBRIDGE: How often do they do it?

Mr LEAN: Off the top of my head, I do not know. I could take that on notice as well.

Mr DAVID SHOEBRIDGE: You must have some basic understanding. Are they normally attaching a bunch of evidence—

The Hon. TREVOR KHAN: He said he would take it on notice, David.

Mr DAVID SHOEBRIDGE: You must have some basic understanding of how the system works. It is your organisation. Are they normally attaching a bunch of additional evidence that allows them to properly contest what the insurer has put or not?

The Hon. TREVOR KHAN: Point of order: I have made the observation over the table, that the witness said he will take the question on notice. Just hold on before you jump down my throat as well. I understand the theatre but the reality is asking the same question over and over again will not produce a better result.

The CHAIR: I uphold the point of order. The witness has answered the question.

Mr DAVID SHOEBRIDGE: What is the rationale for having two quite completely distinct decision-making processes in terms of a work capacity process that goes down an internal review, the merit review, the procedural review and then a liability process that goes to the Workers Compensation Commission? What is the rationale? Have any objects of that rationale been achieved in practice?

Mr LEAN: My understanding from the 2012 reforms is that a separate process was put in place for work capacity review decisions to provide a quick, fair and just process that enabled those work capacity review matters to be resolved more quickly. I am obviously aware that there are stakeholder views that the process does not deliver that and that is something we would certainly look forward to recommendations from the Committee about.

Mr DAVID SHOEBRIDGE: I will give a simple scenario. If an insurance company issues a decision to a worker that says "We believe that the effects of your injury have now resolved and you can return to your pre-injury work and therefore we are terminating your benefits." Is that a liability decision or a work capacity decision?

Mr LEAN: Based on what you just said then my understanding is it is a work capacity decision.

Mr DAVID SHOEBRIDGE: The fact that the effects of the injury have now resolved, you say, is a work capacity decision? Is that right? Have you reviewed the recent Court of Appeal decision?

Mr LEAN: In the St George case?

Mr DAVID SHOEBRIDGE: Yes.

Mr LEAN: I have not read the whole thing but I have certainly been briefed on it. I recognise that there is some confusion between what is a section 74 decision and what is a work capacity review decision. Certainly the recent Court of Appeal decision has sought to clarify that. We have also, as the regulator, written to insurers reminding them of the need to exercise caution when issuing section 74 liability disputes.

Mr DAVID SHOEBRIDGE: What do you mean "exercise caution"?

Mr LEAN: That they should be extremely careful where they go down the section 74 path to make sure that it is a proper use of the provision and it should not actually be dealt with as a merit review matter.

Mr DAVID SHOEBRIDGE: Do you accept that this artificial distinction between a liability matter on the one hand and a work capacity decision on the other hand, which produces two totally different dispute resolution schemes, creates an enormous level of complexity and unnecessary strain on the system?

Mr LEAN: It is complex. I am not going to sit here and say it is not. We are certainly aware of that issue and a number of other issues that have been raised in the dispute resolution process generally. Stakeholders have raised those in the various consultations that we have been doing. Obviously they have been raised in submissions with this Committee as well. It is a matter of government policy as to whether there should be a review of the dispute resolution system—that is not something that I am able to commit to.

The Hon. DAVID CLARKE: WIRO has recommended that SIRA publish all recommendations by the Merit Review Service on its web site with any identifying details removed. What is your response to that suggestion?

Mr LEAN: We already publish some merit review decisions on the SIRA web site. We de-identify them. We do not just black out the names, we actually put them up as a bit of a case study but we already publish decisions on the web site—not all of them.

The Hon. DAVID CLARKE: That is right. WIRO made that recommendation taking into account that you already publish some of them on the web site. Is that right.

Mr LEAN: I am not sure when that recommendation was made by WIRO. The view that we have certainly taken is that there are some decisions that it is useful to publish, because it helps in the understanding of particular issues within the scheme. We do not believe it is necessary to publish all of them. We identify ones that we think would have value in terms of educating scheme participants, and publish them on the web site.

The Hon. DAVID CLARKE: How many could you publish if you published all of them?

Mr LEAN: If we published all of them?

The Hon. DAVID CLARKE: How many are we talking about?

Mr LEAN: I think there is about 600 to 700 decisions made every year. I think we only publish a small number at the moment—somewhere between 10 and 20. We do continually update them so if a better decision comes along which is more informative or whatever then we will replace them from time to time.

The Hon. DAVID CLARKE: Do you say you publish approximately 20 per year?

Mr LEAN: I will have to take that on notice to confirm the precise numbers that we publish.

The Hon. DAVID CLARKE: If it is a figure around about 20, would that represent the broad array of decisions?

Mr LEAN: We certainly look for decisions that we think it is useful to publish. Yes, you can draw the assumption that we think the number that we publish reflects the issues in the scheme that are worth reflecting on through the publication of the relevant decision.

The Hon. DAVID CLARKE: How long have you been publishing these decisions?

Mr LEAN: Only this year. I think it was about August that we changed some of our guidelines to enable that to occur.

The Hon. DAVID CLARKE: When did you receive the recommendation from WIRO to publish?

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

The CHAIR: Mr Lean, you mentioned customers in your opening statement. I am confused because icare deals directly with customers, and it had a very customer-oriented dialogue with the Committee. How do you see your relationship with customers?

Mr LEAN: Who are the customers?

The CHAIR: As opposed to icare.

Mr LEAN: As the regulator and the supervisor of the overall system, we see customers as primarily the injured workers and the employers. While we do not have a direct relationship with employers in terms of policies or on every claim, they come to us where there are particular issues and we have an obligation to treat them fairly and with respect, and to try to resolve their issues.

The CHAIR: They come to you in the appeal process?

Mr LEAN: Not only through the appeal process or the merit review process that I referred to earlier. Workers and employers approach our call centre with issues. I think we get about 55,000 inquiries every year and we deal with those matters, some of which are complaints, and endeavour to resolve them through intervention with the insurer or with other participants in the scheme.

The CHAIR: I heard earlier that each of the agents has a call centre to deal with complaints. WIRO, icare and you also have call centres. That is eight or nine call centres for complaints. You said that dispute resolution pathways are complex. What do you suggest is the way forward? There has been extensive evidence about confusion and function overlap.

Mr LEAN: Generally the principle should be that the business or the agent should endeavour to resolve any complaints. It is appropriate that there is a direct point of contact. We are there very much as a fall-back in the event that the issue cannot be resolved either by the insurer or the relevant scheme manager. We are certainly there as the regulator to take inquiries or complaints, and we endeavour to deal with them as well.

Ms DONNELLY: That is looking at the view of the individual worker or the employer who has an issue or who has raised a question or complaint. I believe we have a very strong role to play as a proactive regulator looking at the whole system. We have already published our intent in terms of self-insurers and using data to drive better performance. We want to have a system to rank insurers and to indicate whether we think they are in whichever tier related to performance. We have stated that we intend to include measures around customer experience—that is, the worker with an injury and the employer for whom the system exists. We have stated that we would seek to measure independently the worker's own rating of their experience and potentially their outcomes as well.

Our intention is to be able to hold a mirror up to the whole system, whether it is the nominal insurer, the Treasury Managed Fund [TMF] managed by icare or the self-insurers and specialised insurers. We want to create visibility and incentives to improve with a balanced set of measures. We intend to issue a discussion paper by the end of this year to explore and to seek input from people throughout the workers compensation system and any stakeholders who are interested about what we should measure, that matters to employers and injured workers. We will then work to improve those measures and make them public to provide transparency about the performance of all the providers in the scheme.

The Hon. TREVOR KHAN: When will that be done?

Ms DONNELLY: We are working on the discussion paper at the moment. We intend that it will be the last of the series of discussion papers that we put out for broad consultation this year.

The Hon. TREVOR KHAN: It being 7 November, you are saying that this will be done by before the end of the year.

Ms DONNELLY: We obviously recognise that people will need to be able to give it some thought, to consult and to come back to us early next year. We intend to have a new licensing framework for self-insurers in place by the middle of next year. We also intend to review the licensing conditions for specialised insurers. Effectively, that would mean we would be using the licensing framework to push beyond looking at compliance with legislation, towards whether they are achieving the objectives as outlined in the legislation and improving performance. We think there needs to be a stronger focus than there has been on the experience of the workers and the employers.

The CHAIR: You are the regulator of the whole market. The Committee has heard that icare is about 72 per cent or 73 per cent of the workers compensation market, and self-insurers and specialised insurers are the other component. Do you agree with that in general?

Ms DONNELLY: Yes. There is also the Treasury Managed Fund, which is also managed by icare.

The CHAIR: How is the performance of those other funds? Are they performing to standard and going forward?

Ms DONNELLY: That is a good question and it is the reason we published this baseline performance report. I have been open with people to whom I have spoken that we do not see this as the be all and end all of performance measurement. It is simply what we are able to do now. The market involves self-insurers that are, in the main, large employers, but they are in a range of different industries. There are some that would be better performers than others. We intend to place them transparently in a tier by the middle of next year. Specialised insurers are unique, and, as you said, they are a minority of the market. One of the things which we need to be able to do and which we intend to do is to become more granular in our ability to compare like with like.

There are some self-insurers that are in high-risk industries. I know the Committee has had submissions from the police, and they are effectively self-insured by the Government. There are some industries that experience higher risk than others, and we need to be fair in comparing like with like. What we want to do is to work with the higher-risk industries in a constructive way and to provide regular feedback about how they are travelling. We will then enlist them in innovation or research that will enable us to ask what could happen differently to get a better outcome.

Workers have a number of different choices to make about lodging a complaint, and the WIRO constructively publishes that information. We would like to be working with all of those sources of information to give a single view. Apart from publishing, we intend to engage with each of the insurers. I have allocated each insurer a portfolio manager, who rings them regularly and visits them. If we need to, we go to them wherever they are in New South Wales to engage and to get the full picture of how they are travelling and their performance. Above and beyond publishing information, we want to let them know that someone is watching, is engaged and is able to help, but will also be expecting improvement.

The CHAIR: Is it an efficient system?

Ms DONNELLY: That is a big question in terms of what is an ideal market, and it is probably one that would take a while to answer. There are probably diverse views as well. We need to get enough data to be able to explore where it is working and where it may not be.

The Hon. LYNDA VOLTZ: Do you have access to the agreements that are signed?

The Hon. DANIEL MOOKHEY: Between the agent and the nominal insurer.

Ms DONNELLY: I have seen them personally, and SIRA has the power to access them.

The Hon. LYNDA VOLTZ: icare said that none of them have met their service criteria. Is that correct?

Ms DONNELLY: I was not here to hear that testimony.

The Hon. LYNDA VOLTZ: You have people overseeing them. Is that your experience?

Ms DONNELLY: I would have to look at the context of that comment.

The Hon. LYNDA VOLTZ: Can you take that question on notice?

Ms DONNELLY: Yes.

The Hon. LYNDA VOLTZ: On 5 May submissions closed for the regulation of pre-injury average work earnings [PIAWE]. What has happened with that report?

Ms DONNELLY: We have developed some options and had a further round of consultation on a confidential basis with a range of stakeholders. We have taken their advice back on board and are working on that further.

The Hon. LYNDA VOLTZ: Which stakeholders did you meet with?

Ms DONNELLY: On a confidential basis—

The Hon. LYNDA VOLTZ: You only need to group them.

Ms DONNELLY: I believe it was Unions NSW, WIRO and some legal peak bodies. I am happy to go back and check the list because I do not have it with me.

The Hon. LYNDA VOLTZ: That is alright. What has happened?

Ms DONNELLY: The intention now is that we would provide further advice to government. It obviously needs to go through a machinery-of-government process and what is recommended is a regulation. We anticipate that being completed early next year.[2]

The Hon. LYNDA VOLTZ: So you have put up an option to government to change regulations?

Ms DONNELLY: Yes, because there was a regulation-making power that was brought in in the legislative amendments 2015.

The Hon. LYNDA VOLTZ: And that has been very confusing for people.

Mr LEAN: Can I just clarify something? Are you talking about PIAWE or the work capacity review legal costs?

The Hon. LYNDA VOLTZ: The pre-injury average work earnings.

Mr LEAN: Sorry.

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[2] Correspondence was received from Ms Carmel Donnelly, Executive Director, Workers and Home Building Compensation Regulation, SIRA, clarifying her evidence concerning the progress of consultation on the PIAWE regulation:
On review of the transcript I believe I was mistakenly referring to the consultation progress on the work capacity review legal costs regulation rather than the PIAWE regulation consultation. I wish to clarify that while work is ongoing on development of options for a potential PIAWE regulation, no specific proposal has yet been put to Government regarding the form that any such change to the regulation regarding PIAWE may take. It is correct that further consultation is underway.

Ms DONNELLY: Certainly we got about 21 submissions and a range of issues were raised. They were quite divergent views so there was a lot of complexity to work through. Some of the suggestions go to changes that are beyond the ability for us or the government to do in a regulation.

The Hon. LYNDA VOLTZ: Because the divergent views speak to the complexity itself?

Ms DONNELLY: In some cases they do. In some cases they go to a view that the whole PIAWE concept should be abolished altogether and return to pre 2012. In some cases they are actually saying to uncouple it from work capacity decisions and that would then go to dispute resolution pathways. A number of these things actually require legislation and cannot be solved in a regulation.

The Hon. LYNDA VOLTZ: Mr Lean, you said you have put up cases. Do you put up any appeals to those cases?

Mr LEAN: Sorry, this is merit review decisions?

The Hon. LYNDA VOLTZ: Yes.

Mr LEAN: No, I do not believe we publish—after our merit review decision the only way to appeal those is through a judicial review application to the Supreme Court. My understanding is that there is only a small number that have gone down that path. Decisions from the Supreme Court are normally published but I would need to check specifically whether these ones are. It would be a matter for the court but not necessarily for us.

Mr DAVID SHOEBRIDGE: The system is complex but there is a procedural review of the original decision as well through WIRO?

Ms DONNELLY: There is, yes.

Mr LEAN: That is correct.

Mr DAVID SHOEBRIDGE: So it is not really true to say that the only remedy is through the Court of Appeal. I know that it is an unnecessarily complex system.

Mr LEAN: I was picking up on the point about an appeal from our decision.

The Hon. LYNDA VOLTZ: I understand that you have printed merit cases where there has been subsequent judicial review that have found errors in determinations in cases that you have had.

Mr LEAN: Sorry, I would need to take that on notice. My understanding is that the number has been very small. We can get you more details about that on notice.

The Hon. DANIEL MOOKHEY: What proportion of the premium dollar is returned to injured workers in benefits?

Ms DONNELLY: An estimate would be about 85 per cent of the premium dollar is returned, not necessarily just to the worker but also to pay for treatment and other benefits for the injured worker.

The Hon. DANIEL MOOKHEY: Is that an upward or downward trend?

Ms DONNELLY: I actually do not know. I could take that on notice. I think it is reasonably stable but I am happy to check and take that on notice.

The Hon. DANIEL MOOKHEY: Do you mind taking that on notice?

Ms DONNELLY: No, not at all.

The Hon. DANIEL MOOKHEY: Do you mind itemising it over the relevant period of time you have reported?

Ms DONNELLY: Absolutely.

The Hon. DANIEL MOOKHEY: What is the total volume or quantum of compensation that is paid to injured workers in benefits?

Ms DONNELLY: I probably do have it somewhere. If you do not mind me turning pages I can get it now or I am happy to take it on notice.

The Hon. DANIEL MOOKHEY: You might want to take it on notice to save time. How many enforcement actions has SIRA launched against insurers in the last two years?

Ms DONNELLY: Enforcement actions? What does that mean?

The Hon. DANIEL MOOKHEY: You are the regulator, are you not?

Ms DONNELLY: We are.

The Hon. DANIEL MOOKHEY: It is your responsibility to undertake enforcement action for insurer behaviour that is found to be outside the rules and regulations, the law, is it not?

Ms DONNELLY: Do you mean non-compliance with the legislation—

The Hon. DANIEL MOOKHEY: Yes, non-compliance with the legislation.

Ms DONNELLY: —or unsatisfactory performance?

The Hon. DANIEL MOOKHEY: Non-compliance with your guidelines and unsatisfactory performance. Please feel free to itemise the enforcement actions by category for the last two years.

Mr LEAN: In terms of things like licence suspensions or some of the other stronger sanctions that we have, certainly in the time that I have been in the chair I am not aware that we have taken any. But that said, there are a range of other interventions so I mentioned that complaints escalated—

The Hon. DANIEL MOOKHEY: So what is the most frequent intervention?

Mr LEAN: Do you mind if I finish?

The Hon. DANIEL MOOKHEY: I understand that. I do not wish to be rude, but if you are going to expand on this I ask you to clarify for the Committee the form of intervention.

Mr LEAN: We can certainly do that. I mean the primary intervention form would be through escalated complaints that come through our customer care centre and then we would take action to intervene with individual insurers to get a different outcome for the complainant. That is the primary—

The Hon. DANIEL MOOKHEY: How many have you taken?

Mr LEAN: I would need to confirm the numbers on that.

The Hon. DANIEL MOOKHEY: Which insurer is the most frequent?

Mr LEAN: I will take that on notice and give you a full report.

The Hon. DANIEL MOOKHEY: It is a slightly different question, but which scheme agent of the nominal insurer is subject to the most amount of escalated actions?

Mr LEAN: I will have to take it on notice and come back to you.

Mr DAVID SHOEBRIDGE: Have you reviewed the report from WIRO, which is issued on a regular basis, that shows the number of ILARS issues that are raised with the different self-insurers?

Ms DONNELLY: Yes.

Mr DAVID SHOEBRIDGE: As well as the licensed insurers?

Ms DONNELLY: Yes.

Mr DAVID SHOEBRIDGE: Did you notice in the most recent one that there was one self-insurer, Coles, which had more than five times as many issues as another comparable self-insurer, Woolworths?

Ms DONNELLY: Yes.

Mr DAVID SHOEBRIDGE: What have you done?

Ms DONNELLY: What we have done, we are close to finalising consultation with all of the self-insurers about this shift that we want to make in their licence conditions and how we manage their performance. We have begun putting in place a process where we look at what is happening in terms of complaints and the data that we have—we obviously can have access to that from the WIRO. In raising that with those insurers we intend to formalise that as a performance expectation as part of the new licence conditions from next year and have a much more formal and transparent insurer supervision model that I mentioned before. I think that we do have work to do, and it is what we propose to do, to ensure that the performance indicators that attract action from the regulator on our watch at SIRA are more detailed and are more responsive to protecting the experience of injured workers.

Mr DAVID SHOEBRIDGE: Did you pick up the phone and call Coles and say, "What is going on here?" That surely is the first thing. Did anybody from your extremely well-funded, large government department pick up the phone and call Coles and say, "What is going on?" Any one person?

Ms DONNELLY: They may well have. I certainly have discussed it with that part of the business, I am not sure that they have at this point.

Mr DAVID SHOEBRIDGE: You say you have discussed it, then you would know whether or not they had. Just the most basic, fundamentally simple thing to do is to phone up and find out what happens and you cannot even tell me that happened.

Ms DONNELLY: I can tell you that we have put in place an insurer supervision model where that happens. In this particular instance I am happy to take it on notice and find out whether it has happened yet. I can assure you that it will happen.

Mr DAVID SHOEBRIDGE: Can you understand the frustration of injured workers and those who are observing the scheme, seeing you, with all the resources of the regulator, not even doing this most basic function when the data is in front of you to see as plain as can be?

Ms DONNELLY: I disagree with the suggestion that we are not supervising the insurers. My view is that we are supervising them, ringing them up and visiting them at a much higher level of intensity than has happened previously. You are asking me about a specific number published by the WIRO recently and whether we have picked up the phone. I do not have the precise answer about that.

Mr DAVID SHOEBRIDGE: Well, here is a simple question: What is going wrong at Coles? You can take it on notice if you like.

Ms DONNELLY: I am happy to.

The Hon. DANIEL MOOKHEY: How many enforcement actions have you taken against Coles?

Ms DONNELLY: I will take that on notice. What I will say is that I would like to have a system where we are not waiting for it to be an enforcement action in which it is a prosecution; we are actually having an early intervention.

Mr DAVID SHOEBRIDGE: But you have got to have some enforcement action, have you not, otherwise the terms of the deed, the conditions of their licence, are not worth the paper they are written on? So what enforcement action have you taken?

Mr LEAN: We will take that on notice. As Ms Donnelly has indicated, we are just not sure in this particular case whether there has been a direct intervention. We will take it on notice and get you a full response. There may have been individual interventions in relation to specific cases as well. We will happily cover that off too.

Mr DAVID SHOEBRIDGE: But individual interventions are fundamentally different from an intervention that has got the benefit of a large amount of data in front of it and shows a systemic problem. You understand that, do you not, Mr Lean?

Mr LEAN: Yes.

Mr DAVID SHOEBRIDGE: So an answer which just iterates a series of individual actions will be one that would be woefully inadequate in the circumstances. You understand that too?

Mr LEAN: Yes, but I think, as Ms Donnelly has indicated, we are developing our insurer supervision model at the moment and through that there will be much better linkages between the complaints that we receive, the complaints that WIRO receives, and we can feed that back in to drive insurer performance.

Ms DONNELLY: I could happily provide for the Committee the five documents about that detailed insurer supervision model that are now currently available on the Government's Have Your Say website. The fact that we have not implemented it is to give fair notice to those insurers that we intend to change their licence conditions.

Mr DAVID SHOEBRIDGE: The process for work capacity decisions, the final process, is a procedural review by WIRO. Are you aware of that?

Mr LEAN: Yes.

Mr DAVID SHOEBRIDGE: Let us assume that an initial decision is made, then an internal review is made which has a procedural flaw in it, then the merit review affirms the internal review, and then it goes to WIRO and WIRO realises that there is a substantial procedural flaw in the internal review. Can WIRO remedy that?

Mr LEAN: WIRO would make its decision on that procedural flaw and, as I understand it, refer it back to the insurer for action.

Mr DAVID SHOEBRIDGE: You are saying that WIRO is not stuck with just reviewing the procedural flaws in the original decision?

Mr LEAN: Sorry, I misunderstood the question. So it is more than a procedural issue that is identified.

Mr DAVID SHOEBRIDGE: There had been a procedural flaw in the review decision.

Mr LEAN: Technically, legally, I do not know the answer as to whether they could require that decision to be changed, but I am sure in practise they raise those issues with the insurer if they identify them.

Mr DAVID SHOEBRIDGE: Can they require any decision to be changed?

Mr LEAN: They conduct a review of whether the correct procedure was followed, and my understanding is if they—

Mr DAVID SHOEBRIDGE: I am asking you can they require a decision be changed?

Mr LEAN: My understanding is if they find the correct procedure has not been followed the decision would then need to be remade by the insurer.

Mr DAVID SHOEBRIDGE: Do you accept, Mr Lean, that this conversation that we have just had, where you do not know what WIRO can and cannot do, you do not know where the boundaries are, you do not know if it is about the original decision or the internal review, shows how extraordinarily and pointlessly complex this entire system is and why it needs reform?

Mr LEAN: Whether or not the system needs reform is a matter for the Government.

Mr DAVID SHOEBRIDGE: What about whether or not it is so ridiculously complex you cannot answer a simple question about it?

Mr LEAN: I have acknowledged that there is some complexity in the system, and certainly what we try and do is make the system as simple as possible, as simple as we can, but in terms of whether there is a need for wholesale reform of the system, that is a matter that the Government will need to consider.

The Hon. David CLARKE: WIRO has noted that SIRA's Merit Review Service has made recommendations which contradict the assessment of insurers, sometimes to the detriment of workers. What is your response to that concern?

Mr LEAN: As I understand the question, there are some cases where the decision is remade by the Merit Review Service and it is less favourable to the worker than what the original decision was.

The Hon. David CLARKE: Yes, even when it is contradicting the assessment of insurers. In other words, it is contradicting the insurers and the interests of the worker. Are you aware that there are cases in that situation?

Mr LEAN: It is certainly a possibility with the decision-making process because the Merit Review Service remakes the decision. It is not your traditional appeal and if they form a different view about what the correct decision should be it is theoretically possible it would be less advantageous to the worker.

The Hon. David CLARKE: That would be an unusual situation, would it not, that you would make a recommendation which contradicts the assessment of insurers and the detriment of the workers at the same time? Would that not be unusual?

Mr LEAN: It would be unusual, I would have thought. I am aware that it is certainly open to the Merit Review Service to talk to the parties as they are going through the process. I do not have the precise numbers of where that may or may not have happened.

The Hon. TREVOR KHAN: Can I just ask whether there is a procedure that provides that a worker is advised of the possibility of an adverse outcome before the finding is made?

Mr LEAN: We have to apply the rules of procedural fairness when we are remaking the decision. So, as part of that, my understanding would be that they are given some indication. But I will take it on notice and confirm that.

The Hon. TREVOR KHAN: You see, even if you go into the District Court on something as basic as a licence appeal—

Mr DAVID SHOEBRIDGE: Or a severity appeal.

The Hon. TREVOR KHAN: —before the matter proceeds to a conclusion, an appellant will be advised that he may be heading south and can withdraw the appeal at that point in time.

Mr LEAN: I will confirm the precise procedure that we follow, but certainly my understanding is the rules of procedural fairness should ensure that that happens.

The Hon. David CLARKE: And you will take on notice the issue that I have raised?

Mr LEAN: Yes, I will.

The CHAIR: I have a totally out-of-left-field question. I am not sure if you are the right witnesses to ask. We had a submission from a person who touched on an issue that I have certainly experienced myself, which is that for telecommunicators, people who work from home, there are regulations whereby employers have to inspect their home or where they are working from and their opportunity to work from home can actually be declined. Would that be a regulator area?

Mr LEAN: It is not part of the State Insurance Regulatory Authority's jurisdiction but it is a Safe Work issue—it goes to work health and safety.

The CHAIR: But they are citing workers compensation concerns.

Mr DAVID SHOEBRIDGE: It is the OH and S regulator, SafeWork

Mr LEAN: The general principle is wherever an employee is working the employer has an obligation to take steps to ensure that they meet their duty of care, and that applies whether they are working from home or they are working somewhere else.

The CHAIR: I think it is submission 55 and it cites burning himself in the kitchen is viewed as too high a risk. I do not want to go to the individual case but I know when I worked in local government the same rules were there, though that is a self-insurer, they would not inspect a home-based work environment. I was just looking at the question of flexibility of a modern workforce, helping a telecommunicator stay home and be a carer and still work on a laptop, on the wi-fi and still be productive. It just seems to be that it has not caught up with the modern era, but you are saying it is not an issue for SIRA.

Mr LEAN: No, it is not an issue for SIRA; it is for SafeWork. But we could certainly provide you with a more detailed answer.

The CHAIR: I would like that, and I think the young man who made the submission would like that too. If you could provide more information on notice for that—I think it was submission No. 55, but the secretariat can confirm that.

Mr DAVID SHOEBRIDGE: You came into existence on 1 September last year, so it has been more than 12 months?

Mr LEAN: That is correct.

Mr DAVID SHOEBRIDGE: I checked before this hearing and I have just checked again—I go to hunt for you and I get the WorkCover website.

Mr LEAN: What we did originally, we created a SIRA website, which was essentially just a landing page, which then referred back to the information that was contained in the old motor accidents and workers comp site. I can advise the Committee that we have launched a whole new website just last week.

The Hon. DANIEL MOOKHEY: I cannot find it.

Mr DAVID SHOEBRIDGE: It is not going well.

Ms DONNELLY: You may need to clear the cache.

Mr DAVID SHOEBRIDGE: If I were to see the current claim form, would that still have "WorkCover" on it?

Ms DONNELLY: We still have official forms that have "WorkCover" on them.

Mr DAVID SHOEBRIDGE: I am not talking about forms generally, I am talking about the primary form, the claim form, the one that kicks off the whole system, that is meant to be setting the worker on the path. Does that still have "WorkCover" on it?

Ms DONNELLY: I believe it does.

Mr DAVID SHOEBRIDGE: How on earth do we have that system? More than 12 months down the track, you are pointing workers to the wrong path at the outset. It does not even exist. Why are we there? It is a simple question: Why are we there, 12 months down the track?

Mr LEAN: There is a range of documents, guidelines and forms that we have to go through the process of reviewing. In the case of the website it was an extraordinarily large job to look at all the information that was on the motor accidents and the workers' compensation website. It is a big job. I take your point. I will certainly have a look at the claims form itself because most people access that online now and it should be something we can fix relatively quickly. The only thing I would put a caveat on around that is whether there is some issue with the fact that it is a prescribed form under the regulation but that should have been fixed when we remade the regulation.

The CHAIR: You will take that on notice?

Mr LEAN: Yes.

The CHAIR: Before I go to the last question from Mr Mookhey, I just want to clarify that it is submission 16, so do not go looking down the 50 or whatever it was I said.

The Hon. DANIEL MOOKHEY: Throughout the course of these hearings we have heard multiple accounts from a variety of people—employers, unions, medical professionals, the whole bunch—about the coercive pressure that is applied by insurers in the rehabilitation phase. That is a view that is being expressed, that medical professionals do not provide the insurer with the report that they expect. They are subject to implied or direct threats to their future ability to obtain work. We have also heard multiple evidence of, I guess you would call it medical expert shopping, or approved medical specialist [AMS] shopping, to find the right person that will provide the evidence that an insurer seeks. Should we be putting store in those claims and what is SIRA doing about this?

Mr LEAN: Could I just clarify, do you mean AMS's or independent medical examiners [IME's]?

The Hon. DANIEL MOOKHEY: Both.

Mr LEAN: Both, okay. So the independent medical experts, we are aware of concerns that have been raised by stakeholders through this inquiry and we will be commencing a review of the framework for IME's early next year. In terms of AMS's, that is actually a matter for the Workers Compensation Commission.

The Hon. DANIEL MOOKHEY: If you could take the AMS's and IME's on notice that would be great. But my question is actually less to do with those two specific forms and more about a culture that has set in amongst insurers, or at least allegations of a culture that has set in amongst insurers and their scheme agents. I am more interested in firstly, whether or not you share those concerns; and secondly, if so, what is being done about it to ensure that the powers that insurers have are not being abused?

Mr DAVID SHOEBRIDGE: Deleting the "I" from "independent" would be an honest start because they are not independent, they have been chosen by the insurers because of the outcomes they produce.

The Hon. DANIEL MOOKHEY: But the whole point is less about those two as specific instances but I am very interested in whether or not the regulator considers there to be a cultural problem here and, if so, what exactly is the regulator doing about ensuring that insurers are not abusing their powers?

Ms DONNELLY: I meet with a range of stakeholders and from time to time with injured workers as well. And I have had some concerns raised with me as well. The first thing I would say, on an individual basis, we are obviously looking through the submissions and taking on board what we see there. If there are individual matters which I know are beyond the scope of this inquiry but that we can look into, I am very prepared to do that. At a more systemic level, and to your question, that is part of the reason why I have been having conversations and prioritising which of the guidelines, which of the, if you like, architecture of our regulatory powers we should be reviewing, refreshing and consulting about, to improve.

The intention to more actively and more rigorously supervise insurers, that I have spoken about already, comes from our wish to see that insurers' performance is improving in terms of the culture. We clearly do not want an adversarial system or one in which workers are not treated with respect and so we do intend to see that the conduct of insurers and independent measures of and reports of the experience of injured workers in accessing their entitlements, that that becomes part of the model for supervising insurers. So we do want to drive a culture in which injured workers experience respect, where it is not overly adversarial, they are having the legislation applied correctly and they have every chance to assess prompt, appropriate treatment and return to work and recovery.

The Hon. TREVOR KHAN: Ms Donnelly, do you think we should perhaps seek to delay the tabling of our report for a couple of months into next year in order to allow you time to come back to us with progress on the development of these issues?

The CHAIR: The secretariat just fainted.

The Hon. LYNDA VOLTZ: They are just saying that they agree wholeheartedly.

Mr DAVID SHOEBRIDGE: The secretariat agreed.

The Hon. TREVOR KHAN: I realise it is a bad time of year to be kicking things off but if, for instance, we delayed our report to say, the end of April, would that give you enough time to be able to progress some of these matters so that we did not just have a blank page but something substantive?

Ms DONNELLY: I think that the timing of the Committee's report is a matter for the Committee. Discharging our responsibilities is a matter for us. We are working hard on that and will progress along the path that I and Mr Lean have outlined, regardless. Mind you, as soon as we get your report we are very keen to consider that. Obviously, it is a matter for the Government as well, depending on what the recommendations are. I would hope that, in two years time, when we have our next review we have very thoroughly embedded an insurer supervision model that makes it very clear to insurers that we want a system in which it is not so adversarial, there is a culture of respect and care and that it is oriented towards achieving the objectives of the system, as is outlined in the legislation.

Mr LEAN: I add to that, the basis of the insurer supervision model is set out in the self-insurer licensing framework consultation that we have got underway at the moment. That contains quite a bit of detail of the approach that we are going to take in that space. We would certainly welcome the Committee to have a look at that and provide its views on likely effectiveness, based on what it has learned through this inquiry. This is not something that is going to change overnight. That model will take some time to implement and to start to have an impact on the ground.

The Hon. DAVID CLARKE: So you do not think it would assist you to delay our report for a few months?

The Hon. DANIEL MOOKHEY: They are not wishing to express an opinion.

The Hon. DAVID CLARKE: Or we could have an interim, we could have another review.

The Hon. TREVOR KHAN: Could I just observe that these issues with regards to the selection of medical practitioners to do assessments is not something that has arisen since 2012, this was a problem in 1986 when I started practice. So it should not come as a bolt from the blue. There just seems to have been a failure by regulators to address what are fairly basic problems with the system.

Ms DONNELLY: The Committee in its last review recommended a separation of the functions. And Committee members would be aware that there was a fairly widely held view that there was at least a perceived conflict of interest in the regulatory function and the operational commercial functions being in the same agency. So yes, I agree that there have been these sorts of issues in the past but it is only since the establishment of SIRA that you have had an organisation that is charged with impartially looking at how do you proactively operate as a regulator to safeguard and steward those outcomes, without any conflict, without fear or favour?

The Hon. TREVOR KHAN: It is a good start.

The CHAIR: On that point we will conclude the evidence. Thank you both for coming today and giving of your time. You have quite a few things on notice. The Committee has resolved that matters taken on notice need to be returned to the Committee within 21 days and the secretariat will be in touch with you regarding those matters.

(The witnesses withdrew.)

JOSH MENNEN, Principal Lawyer, Maurice Blackburn, affirmed and examined

JOHN COX, Principal Lawyer, Specialist PTSD and Injury Lawyers, sworn and examined

The CHAIR: Welcome to the hearing. The Committee has your submissions. Would either of you like to make a brief opening statement?

Mr COX: Yes. Chair, Deputy Chair and Committee members, I thank you for the opportunity to appear before the Committee today in respect of what is a very important issue. The New South Wales workers compensation scheme impacts upon a vulnerable group in our society, injured workers. I prepared a submission for the Committee dated 25 September 2016 and provided annexures, that is submission number 47. I will make a brief introductory statement. In doing so I will set out the main points and look forward to answering questions and clarifying any issues of interest or concern held by the Committee. As can be seen from my submission, I focused on a narrow area of the workers compensation scheme, namely, the handling of compensation claims brought by injured New South Wales police officers and particularly psychological claims.

The overwhelming illness suffered is post traumatic stress disorder [PTSD]. The reason for my narrow focus is that as an accredited specialist personal injury lawyer the legal practice of which I am the principal, Specialist PTSD and Injury Lawyers, has as its main focus psychological claims and in particular we represent police and other first responders such as NSW Ambulance and Fire and Rescue NSW. There are five main concerns I addressed in my submission: Number one, the general overall approach of the scheme insurer, Employers Mutual Limited [EML], an issue that the Committee has heard extensive evidence on. Number two, the manner of the utilisation of surveillance by the insurer, EML, both physical and online, which has a significant deleterious effect upon claimants.

Number three, my assertion that often such evidence is at times conducted outside of the law and I refer not only to physical surveillance undertaken, but specifically what are known as desktop investigations. These desktop investigations, by my reckoning, are at worst illegal and contrary to section 308 of the Crimes Act and at best a gross invasion of a claimant's privacy and causative of increased trauma and exacerbation of a claimant's psychological symptoms. It is my submission that the use, with respect, reflects extremely poorly upon the State and causes a significant degree of distress to psychological claimants.

Putting aside the definitive question of the legality of the desktop investigation, to quote from my submissions, "Do we as a community want a compensation scheme that tolerates such intrusion upon a segment of claimants, ex NSW Police men and women, who I suggest deserve better given the sacrifices they have made during their careers for the citizens of this State". Number four, my assertion that the NSW Police Force is aware of the practice of its insurer, EML, in commissioning and relying upon the desktop investigations. I understand that a formal criminal complaint has been lodged regarding one of the desktop investigations conducted by EML.

The NSW Police Force is currently dealing with that. With the greatest of respect, I call upon the NSW Police Commissioner, Mr Scipione, to today direct its insurer to abandon the process. Number five, the operation or, indeed, non-operation, of the model litigant policy for civil litigation. It is a code which is meant to bind and direct the State and its associated entities as to its fair and ethical response to litigation as a safeguard to those involved in litigation against the State. I am happy to take questions and assist the Committee in any way I can.

Mr MENNEN: I thank the Committee for the opportunity to appear. I am also the spokesperson for Australian Lawyers Alliance on insurance and superannuation. I hope I can be of assistance. My practice consists predominantly of life insurance claims, total and permanent disability [TPD] and income protection. There is often significant crossover with workers compensation. There are a number of parallels that can be drawn between workers compensation surveillance and other claims assessment approaches seen in life insurance. I will particularly focus on a couple of areas. One, the surveillance practices observed across the insurance industry broadly. My colleague touched upon it. It seems to be an area that is crying out for some regulation in order to give certainty and protection to consumers, insured and disabled individuals making claims.

There is a culture among insurers, I believe, of initiating surveillance as a routine claims assessment process and not in circumstances where they have some reasonable basis to believe that the claimant is exaggerating or feigning their condition. It is being used, rather, as a fishing expedition. I can give a brief example of the potential traumatic impact that surveillance can have on claimants. A client who worked in the NSW Police Force was exposed in her occupation to hours and hours of footage of child pornography, as part of a prosecution that she was putting together. She was horribly traumatised by that experience. When it came time

to make a claim with her insurance company she was subjected to surveillance, followed around by cameras, including to events that she was attending with her children. Her children were on camera. She was shown that footage, which substantially exacerbated her medical problems. It sent her into relapse and had deleterious consequences for her health generally. That type of insurance surveillance approach ought to be controlled and regulated more comprehensively. I see it as a major problem. In relation to desktop surveillance, I agree with the comments of my colleague.

The issue of doctor shopping is also of substantial concern. I routinely see claimants being subjected to multiple medical examinations at the behest of the insurer. They are so-called independent medical examinations. It concerns me to see individuals who are unrepresented being sent to multiple medical specialists of the same or similar discipline. Where there are a number of medical issues that would require an examination by different specialists, I would have thought one of each specialty would be ample. In one case of mine, a gentleman making a claim in relation to a mental health problem was sent to six medical examinations, at the insurer's request, by people with the same or similar medical speciality, whether psychiatrist, psychologist or neuropsychologist.

I would also like to make the point that the preclusive nature of our workers compensation scheme in this State has the flow-on effect of pushing individuals into other safety nets. Centrelink is the obvious one. It also forces them to go to their superannuation insurance. That is causing some ructions within the life insurance industry, which has been well demonstrated in the media and through a Federal Government inquiry this year. It has contributed to the spike in premiums and the continuing derogation of the superannuation accounts of working Australians, which are having to pay for these insurance premiums.

The CHAIR: May I interrupt you. Is your opening statement almost finished? We are running out of time to ask you questions.

Mr MENNEN: I beg your pardon; yes. I just want to say that it also contributes to the overall underinsurance problem that we have generally in Australia. Thank you.

The CHAIR: I invite the Deputy Chair to begin questions.

The Hon. LYNDA VOLTZ: I have a question about surveillance. Unremitting lower back pain cannot be captured on camera. It might mean that you should not lift things, but it does not mean you cannot lift things. What has been the outcome when surveillance evidence has been used in workers compensation claims? What is the reaction to it when it is used in an appeals process?

Mr COX: My submission deals with psychological injuries alone.

The Hon. LYNDA VOLTZ: It makes even less sense to have surveillance in that case.

Mr COX: Exactly. The point I would like to make is that there is a school of thought, confirmed by doctors such as Professor McFarlane and Dr Selwyn Smith, who have significant experience with police with post-traumatic stress disorder [PTSD] that there is no utility or value in the physical surveillance of those with psychological injuries. It happens. Lawyers such as me are forced to watch video that is of no probative value. I had a case where there were 100 hours of video and the insurer put together 46 minutes from that 100 hours. That is because, for most of the time, the police claimant with a psychological injury did not leave the house. When they leave the house it is for routine, very mundane travel to the local shop to pick up food. They drop their children at school. They might have a coffee. The overwhelming feeling when you watch the video is sadness at the cloistered nature of their life. My assertion is that there is no utility or value in this type of surveillance of those with a psychological injury. As Professor McFarlane and Dr Smith have said, the surveillance does not show what is going on in the claimant's mind.

The Hon. LYNDA VOLTZ: How is it being received in appeals processes?

Mr COX: The problem is that the workers compensation scheme is somewhat front-end loaded. Very few matters go before appellate courts so that we can get some real judicial guidance on this matter. The hurt is done along the way, when we are before the Workers Compensation Commission, which is loath to deal with this sort of definitive—

Mr DAVID SHOEBRIDGE: What about in other similar jurisdictions where there is a court case and a merit review? How is covert surveillance evidence for psychological claims treated then?

Mr MENNEN: It has been recently acknowledged by the New South Wales Supreme Court in the matter of *Wheeler v FSS Trustee Corporation*, representing First State Super and MetLife, that where a subjective and insidious medical condition is the subject of a claim the use of surveillance, covert or otherwise,

may be of very little probative value, for the reasons that my colleague has mentioned. I have brought a copy of that judgement with me. I am happy to read it a couple of paragraphs by His Honour Justice Robb in that matter.

The Hon. LYNDA VOLTZ: That would be good.

Mr MENNEN: At paragraph 273 he says:

> … the medical evidence suggests that both PTSD and major depressive disorder are insidious mental injuries, which can be extremely detrimental to the sufferer's ability to hold down regular employment, whether full-time or part-time; but the symptoms of the disorders are not permanently and consistently manifested … when a person is suffering from these psychological disorders, what you see is not necessarily what you get. The sufferer may, at various times and periods, appear reasonably normal, and capable of engaging in many forms of employment. The presence of the psychological disorders is not necessarily inconsistent with periods of happiness and sociability. Indeed, treating psychiatrists and psychologists are most likely to advise sufferers to do their best to get out into the real world and try to live a normal life, as a remedial exercise. In short, the ordinary person cannot safely look at evidence of the occasional day to day activities of a person suffering from PTSD and major depressive disorder, and conclude that the person is not suffering from disabilities that may make the person practically unemployable, because the person is able from time to time to engage in the sort of activities of which healthy people are capable of doing.

I respectfully agree with His Honour.

The Hon. DANIEL MOOKHEY: You referred to desktop surveillance. Presumably we are talking about social media profiles?

Mr COX: Yes.

The Hon. DANIEL MOOKHEY: We are talking about Instagram and other photograph accounts.

Mr COX: Yes.

The Hon. DANIEL MOOKHEY: Are you of the view that that also lacks probative value for the purpose of assessing a psychological disorder?

Mr COX: I do. One could say that it has no probative value, so you do not need to worry about it. But we are dealing with people who have psychological injuries and, in my situation, police.

The Hon. DANIEL MOOKHEY: That brings me to my next question. In your view, is that compounding the injury?

Mr COX: Yes, without a doubt. Exacerbating the injury and causing a significant deal of distress. The Committee will hear witnesses up next who, I am sure, will amply demonstrate that.

The Hon. DANIEL MOOKHEY: I will not ask you for an example if you anticipate we will be hearing some after. You are saying that one particular insurer, EML, uses this practice routinely. Firstly, have you initiated any of the internal complaint processes with EML on behalf of any of your clients? If so, how did it go? Was it effective? Secondly, what about SIRA? Have you brought this to the attention of the regulator? Do you have a view as to how it is handling this matter and the seriousness with which it is taking it?

Mr COX: The issue of the desktop investigation is that they started a year or 18 months ago. I had a number of mediations in the latter part of last year where the insurer and the police were relying on these desktop investigations. At those mediations, which I attended, and which the insurer attended—and indeed the workers compensation manager for the New South Wales police attended—I made my views very clear on what I believe is the illegality of those reports. In short, I have yet to make a complaint to SIRA regarding that; in fact, I think the timing was that SIRA was being established at that time. What I am very pleased to see is that there is now one formal criminal complaint before the New South Wales police. I suspect, because the conduct alleged possibly includes the police, it will need to go to the Police Integrity Commissioner or the Ombudsman, but I will be very interested—

The Hon. TREVOR KHAN: It will not be the Police Integrity Commissioner, then.

Mr COX: —to see what the result of that complaint is.

The Hon. DANIEL MOOKHEY: Given that you have not lodged a criminal complaint but there is now a pending criminal investigation, has that led to a suspension of this practice by the insurers?

Mr COX: As far as I am aware, no.

Mr DAVID SHOEBRIDGE: Mr Mennen, do you agree with Mr Cox that the use of covert surveillance can lead to aggravation of the injury?

Mr MENNEN: Most definitely. The example I gave in my opening statement is, I think, testament to that.

Mr DAVID SHOEBRIDGE: What about the desktop reviews? Have you seen these things as well—a private investigator, for example, trawling through somebody's Facebook and online persona?

Mr MENNEN: We routinely see social media surveillance being conducted by insurers in-house or by external investigators. One particularly unseemly example was of a female police officer with a psychological condition making a claim for a disability benefit. Her treating psychologist recommended that she adopt a hobby to keep her engaged in some way in the community, so she learned how to make nice cakes. She took some photos of those cakes and put them on her Facebook account, and the insurer then relied upon those, among other things, to deny her claim and assert that that was positive evidence of a capacity to run a cake-making business. That sort of conduct is not unusual in this area.

Mr DAVID SHOEBRIDGE: If someone has a psychological injury—say, quite a severe case of PTSD—it can sometimes be difficult for them to leave the house, can it not?

Mr COX: Yes, that is right.

Mr DAVID SHOEBRIDGE: Is that your experience, Mr Mennen?

Mr MENNEN: Yes, that is right. Secondary agoraphobia is common.

Mr DAVID SHOEBRIDGE: For that class of injured worker, sometimes social media and their online social life is pretty much the only life they can be actively engaged in because of the nature of the injury. Is that right?

Mr MENNEN: Yes, I think I agree with that. There is a number of online support groups which injured workers can access, and there is no doubt that they gain some sort of comfort in communicating with other individuals in similar circumstances without having to physically go out into a public space where they might not feel comfortable.

Mr DAVID SHOEBRIDGE: For those injured workers the thought that there might be an insurance company private investigator sitting like a spider on top of all their social media interactions must be quite distressing for them.

Mr COX: It is devastating. I made the point in my submission—you are quite correct—that for many police claimants who suffer from acute symptoms the only real forum or the only real community is often the online community, yet that is being watched and they are being watched and stalked. The insurers try to draw really quite pathetic conclusions from that data.

The Hon. DANIEL MOOKHEY: Is that predominantly used for liability denial or work capacity assessments?

Mr COX: Yes, denying liability.

The Hon. DANIEL MOOKHEY: But is it also used for work capacity assessments?

Mr COX: I see it for denying liability.

Mr DAVID SHOEBRIDGE: Because of the nature of the scheme, you do not get involved in work capacity assessments.

Mr COX: That is right.

Mr DAVID SHOEBRIDGE: What is the remedy? We have two classes of covert surveillance. One is visible covert surveillance. I do not know whether you heard icare, which oversees the way the insurers operate in their workers compensation schemes, but it was suggesting that it is getting a model where there will need to be external approval before covert surveillance is allowed by an insurer. Would you support that?

Mr COX: Yes. Josh made a point which I made in my submission: It is my legal assertion that an insurer cannot just of right engage in the type of surveillance that we are seeing in these cases. It needs to have some reasonable grounds to doubt either the veracity or the bona fides of a claim. No-one—least of all my clients, former police officers—wants to argue with the right of an insurer to properly investigate a claim. I think Josh used the word "routinely", and that is what we see. Surveillance is used as just a routine process in these matters.

Mr DAVID SHOEBRIDGE: Mr Mennen went a bit further: He said it was a fishing exercise.

Mr COX: I agree. The thing is, and I do not know whether or not Josh would agree, the result of it is a lot of trauma to very vulnerable, fragile people. I have never seen a claim affected by any insurance video.

Mr DAVID SHOEBRIDGE: Other than that the injury might have become aggravated and the damage is larger.

Mr COX: Exactly that. But in terms of the outcome of the claim, discrediting the claim or causing some suspicion to fall upon that claim, I have never seen it.

Mr DAVID SHOEBRIDGE: Mr Mennen, what do you think about the external reference point before covert surveillance is used? What should be the test that is applied?

Mr MENNEN: I believe that the test should be that the insurer must have a reasonable basis on an objective standard that there is an inconsistency in the claimant's asserted level of incapacity and their behaviour in some way to justify a rather extraordinary set of claims assessment measures.

Mr DAVID SHOEBRIDGE: When it comes to PTSD, because of the rationale applied by His Honour in that most recent case, it would be pretty hard to satisfy that.

Mr MENNEN: That is right. There is no doubt that it is necessary for insurers to test a claim—for example, with somebody with an orthopaedic injury who is found in a rugby scrum, there are absolutely legitimate bases for that to occur. If the insurer has a reasonable suspicion that that individual is participating in some physical activity which is inconsistent with his claimed condition, then of course it should be able to conduct surveillance. But we are talking here about individuals with psychiatric conditions. Surveillance is of very little probative value. One thing that I believe the insurers do know is that there is a certain proportion of claimants who will give up on their claim when they feel like their privacy has been violated.

Mr DAVID SHOEBRIDGE: You have come to where I was going to go, which is: Why are they doing it? You think it is a claims management strategy.

Mr MENNEN: Yes. I refer to it as claims filtering. There are individuals who will drop their claim because they become exhausted and intimidated by the process.

Mr DAVID SHOEBRIDGE: Mr Cox, you are nodding.

Mr COX: I have little doubt about that. If I can just say about surveillance, Josh used the word "intimidating". I want to give two quick examples. I had a client who was a young mother, a police officer with very bad PTSD, who took her two young kids to a shopping centre. She was surveilled by a man. As she put her children in the car and sat in the car, he came up to her with his recording device. It was an Apple iPhone and he wanted her to know that he was surveilling her. She took a photo of him. I saw that. There is no doubt that was meant to intimidate her.

I also had a client who again, very badly affected, she was a quite senior police officer who had been medically discharged. The insurer sent out a surveillance operative to surveil her when she was 8½ months pregnant. As part of the brief the private investigator was asked "Has she had the child yet because she is heavily pregnant? Let us know whether she has got the child." He found that out by looking in her car and noticed the child seat there. What value could there be by any insurer sending a private investigator out while a woman is 8½ months pregnant? How could that assist the insurance company in formulating their response to her claim?

The CHAIR: Is there not a deterrence value in the notion that you could be surveilled? Not that you are going to be surveilled but you know that the industry does it? Is that a deterrence for potential fraud?

Mr COX: I think you are assuming there. I am not naïve but I must say within this area of police and psychological claims I just do not see fraud. I have got to say that. Maybe you could think I am naïve about it. But there is a difference between knowing that there could be surveillance, you are quite right, and that acting as a deterrence, but then doing surveillance in every single matter?

The CHAIR: That is the next question. What is the quantum of this issue? What percentage of claims are under surveillance?

Mr COX: I suppose I could take that on notice and have a look but I would say, my feeling is it would be 80 or90 per cent.

The Hon. TREVOR KHAN: Of your files you say 80 to90 per cent of them involve surveillance of your clients?

Mr COX: Yes. It has become a routine practice and it was not always like that.

Mr DAVID SHOEBRIDGE: What about you Mr Mennen?

Mr MENNEN: I would not put my practice that high but it is high. I would say it would be closer to around 50 per cent.[3]

The CHAIR: But you are not talking police now—

Mr MENNEN: I am talking about all claims made through their life insurance.

The CHAIR: Life insurance by your firm.

Mr MENNEN: I am talking about life insurance claims.

The Hon. DAVID CLARKE: Is your position that you do not oppose outright the use of covert surveillance in psychological claims but only routine covert surveillance?

Mr MENNEN: Yes. There are clearly circumstances where covert surveillance may be warranted—that is not in dispute—but there needs to be some measures around that—

The Hon. DAVID CLARKE: Some guidelines?

Mr MENNEN: Some guidelines. The life insurance industry has had this debate and there is now a code of practice in place as of last month which regulates the use of surveillance and investigations by insurance companies. One of the requirements is that they have some reasonable basis to believe there is an inconsistency before they launch surveillance.

The CHAIR: Will you provide that to the Committee?

Mr MENNEN: Yes, I have brought copies of that code with me today and would table it if you would like me to.

The CHAIR: Please do.

The Hon. DAVID CLARKE: Do you say that been accepted by the insurance industry?

Mr MENNEN: The Financial Services Council [FSC] is the peak body for the life insurers within Australia. This has been developed and agreed to by the insurers in consultation with consumer groups.

The Hon. DAVID CLARKE: Does that mean within that area governed by the Financial Services Council that they have resolved it be a self-regulation?

Mr MENNEN: Yes, good question.

The Hon. DAVID CLARKE: In that part of the industry there is no longer an issue because the industry has resolved it satisfactorily to all sides?

Mr MENNEN: I do not agree with the proposition you are putting because this has been in play for one month and is in response to a deep systemic crisis within the life insurance industry in respect to aggressive claims assessment. It is yet to be seen whether the measures in play in this code will cure the problem or improve circumstances for claimants.

The Hon. DAVID CLARKE: Do you agree with these recommendations?

Mr MENNEN: No. I say that the FSC's code did not go far enough in respect to consumer protections. I made submissions to the FSC throughout that process and, indeed, ASIC itself handed down a scathing report in respect to the assessment practice of life insurance claims a couple of weeks ago and noted that this code is a starting point and needs enhancements.

The Hon. DAVID CLARKE: So it is early days?

Mr MENNEN: It is early days. One of the points that ASIC made was specifically in respect to surveillance and its concerns around consumer protections for those being subjected to surveillance.

The Hon. DAVID CLARKE: Is it your view that with regard to that part of the industry that this Committee should give some time to see how it pans out?

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[3] Correspondence was received from Mr Josh Mennen, Principal Lawyer, Maurice Blackburn, clarifying his evidence concerning the rates of files in his practice where surveillance is conducted:
Where I referred to the rates of files in my practice where surveillance is conducted, I am referring to litigated matters involving mental health claimants.

Mr MENNEN: It is my view that if there are concerns about the surveillance practices by insurers within the workers compensation sector then something ought to be done immediately to provide insured's with some confidence that their privacy and other rights will be respected through a robust and accountable process.

The Hon. DAVID CLARKE: This self-imposed regulation does not apply right across workers compensation but only to one section?

The Hon. TREVOR KHAN: Only to life insurance.

Mr MENNEN: Correct.

The Hon. DAVID CLARKE: Do you suggest that what is proposed by the Financial Services Council is something that could be applied to workers compensation?

Mr MENNEN: I agree with ASIC that this is a good start. This is one way to regulate it. It is a form of self-regulation through robust consultation and I would suggest that this is certainly better than nothing for somebody who is making a claim because at least it gives you a document to point to if you feel like your rights have been violated by the insurers.

The Hon. DAVID CLARKE: Do you suggest that those insurance companies involved in the workers compensation area take on as a starting point the recommendations made by the Financial Services Council?

Mr MENNEN: That is why I brought it to the attention of the Committee.

The Hon. DAVID CLARKE: Do you suggest that?

The Hon. LYNDA VOLTZ: I think you are badgering him now.

The Hon. DAVID CLARKE: Do you suggest that would be the basis of some form?

The Hon. LYNDA VOLTZ: He said it is a good start.

Mr COX: It does not go far enough in my opinion.

The Hon. LYNDA VOLTZ: It is better than nothing.

Mr DAVID SHOEBRIDGE: I heard the Hon. Daniel Mookhey say sotto voce but there is something missing. That test is a good test. There needs to be some inconsistency or some reason to actually engage in covert surveillance.

The Hon. DANIEL MOOKHEY: But it needs a second limb which is that the surveillance itself will be useful to determine whether that is happening.

Mr COX: Exactly right. I go back to the fact I do not argue an insurer's right to properly examine a claim.

The Hon. DANIEL MOOKHEY: But the basic principle is there has to be a reasonable basis on an objective level, and the surveillance is likely to help determine that question.

The Hon. TREVOR KHAN: I think you might have unanimous support around the table on that.

Mr DAVID SHOEBRIDGE: And it is the second limb that is missing from the FSC.

The Hon. DANIEL MOOKHEY: It is not there. That second limb of actually the surveillance has to have probative value is not contained in this code.

Mr COX: I go back to the pregnant lady, what value could that have been?

The CHAIR: Thank you for giving evidence that has been very informative and it is very much appreciated. You have taken some questions on notice and the Committee has resolved that you will have 21 days to reply to them in writing. The secretariat will assist you in that regard.

(The witnesses withdrew)

(Short adjournment)

BERRICK BOLAND, Administrator, The Forgotten 000, sworn and examined

BRENDAN BULLOCK, injured worker, sworn and examined

The CHAIR: Welcome to the Standing Committee on Law and Justice First Review of the Workers Compensation Scheme. Do you wish to make an opening statement?

Mr BOLAND: As the administrator of The Forgotten 300 and The Forgotten 000's Facebook support pages for the past four years, I have been involved in listening to and reading the hundreds of tragic stories of injured police officers, emergency service workers and veterans, and of their families' secondary damage. The most disturbing and dangerous aspect of the current system is what I call cash-for-comment, or so-called private insurance independent medical examiners, who continue to fraudulently misrepresent reporting of cases of injured workers for their own ongoing financial gain from the insurance companies. Another issue is the attitudes, practices and procedures of insurance companies and their employees with regard to injured workers. There is also an industry practice of delaying and delaying requested medical treatment and operations based on the opinions of their cash-for-comment doctors and so-called specialists.

Governments of the day continue to hide to behind the private insurance industry to balance Treasury-managed funds at the expense of injured workers. There is abuse and threats from so-called rehab providers, who are briefed to focus on getting injured people back to some hours of work at any cost. They are instructed by the insurance companies to get them back to work regardless of their injuries and fitness for employment. I have been informed by email that insurance companies have incentive programs for case managers to get people back to work quickly. There are also inexperienced case managers and a total lack of supervision by mid-level management, and a disgraceful amount of unethical conduct on the part of case managers and their employees. Insurance industry employers, cash-for-comment doctors, specialists and lawyers and the court system engage in various stalling and delaying tactics.

Many suicides occur as a result of personal treatment, denial and delays, and tactics used by the workers compensation and court systems to frustrate and prolong the agony. There is also an unacceptable attitude on the part of the Liberal Government towards the injured worker, especially its blatant resistance to accepting post-traumatic stress disorder and other mental illness as being work related for police officers, emergency service workers, and veterans. There is also what I call the "grave very train" attitude on the part of all stakeholders involved in the injured worker's case from the injury to the Court of Appeal.

Mr BULLOCK: Thank you for the opportunity to appear before the Committee today to contribute to the parliamentary inquiry into the New South Wales workers compensation system. I am a former NSW Police Force detective senior constable. In 2012, I was medically discharged from the force having been diagnosed with chronic post-traumatic stress disorder. My psychiatric injury is attributed to exposure to many traumatic incidents spanning a 15 year career. In 2012, I made application for compensation for my injury in accordance with sections 66 and 67 of the New South Wales Workers Compensation Act 1987. The insurer of the Treasury Managed Fund was Employers Mutual Limited [EML]. I retained a legal firm to assist me with this application.

From the outset of my application for workers compensation I was subjected to the following treatment by EML. It included continual pressure by case managers to participate in an interview with a private investigator about the causation and nature of my psychiatric injury, despite being provided with a lengthy statement outlining my experience. I was continually told that if I did not comply my claim would be declined. I was subjected to intrusive and relentless physical surveillance by private investigators contracted by EML, and to desktop surveillance by private investigation companies on behalf of EML. I was lied to by unethical case managers about being surveilled by private investigators contracted by EML. I was examined by psychiatrists appointed by EML as part of an independent process in relation to my whole person impairment. I believe the psychiatrists were commissioned by EML because of the favourable medico-legal reports they provide to the insurers.

The workers compensation process has exacerbated my psychiatric injury causing the following: 10 admissions to psychiatric hospitals; drug and alcohol addiction, which is currently in remission; onset of a major depressive disorder; a serious suicide attempt; cognitive brain impairment as a result of my suicide attempt; trauma and psychological distress in my family members, including my children; and, finally, the destruction of my marriage.

In 2015, I made a complaint to the chief executive officer of Employers Mutual Limited, Mr Mark Coyne. He contacted me and I provided him with a statement I prepared at the end of 2014 about my

experience. I highlighted the systematic failures of his case management team, and the unjust and unethical actions by his staff in an attempt to mitigate any financial liability on the part of his corporation against the interests of my health and welfare as an injured worker of the State of New South Wales. I was advised by the chief executive officer that he would be reviewing and changing policies and procedures. I have had no further contact with the chief executive officer. My case has been widely publicised by Australian media outlets including: the *Illawarra Mercury*; an audio production entitled "Police impact statement insight into police suicide"; ABC Radio National; ABC *Four Corners* report entitled "The Shameful Truth: Insult to Injury", and 2GB's Ray Hadley talkback radio show.

The manner in which Employers Mutual Limited have managed my claim for compensation under workers compensation legislation is appalling. From the onset of my claim I believe that EML held a presumption that my claim was fraudulent and that my claim should be treated as such until proven otherwise. This process has caused significant damage to my life. I hold Employers Mutual Limited and other insurance companies accountable for the predicament that I find myself in today. I have never acted in contravention of my applications as an injured worker. I have complied fully with the current New South Wales workers compensation legislation. I have a copy before me of the statement that I provided to the CEO of Employers Mutual Limited. I would like to read it onto the record of this inquiry, if I am allowed to do so.

Mr DAVID SHOEBRIDGE: Given the time, perhaps if you present it to us we can read it.

Mr BULLOCK: I do have six copies available. If you would like me to tender the statement I will.

Document tabled.

The CHAIR: On behalf of the Committee I thank you for being open and frank about your circumstances. We understand that it takes a lot to come forward with this information**.** Indeed, over the past few days the Committee has heard a lot of information from a lot of people about this situation. This Committee is not empowered to investigate your direct grievance but we are empowered to look at the industry overall, inquire into its performance and to make recommendations. Your evidence will help to inform us and we thank you.

The Hon. LYNDA VOLTZ: Mr Bullock, you said that you were lied to about surveillance. How did you ascertain that the insurance provider had lied to you about that?

Mr BULLOCK: As part of my training and skills acquired from the NSW Police Force, I have been trained in physical surveillance and I have performed that role at the highest level of law enforcement in Australia. I was a person of hyper vigilance. I had a number of death threats made to my life over the term of my employment. I considered those to be imminent and real, and I was constantly watching my back. It was easy for me to be able to identify such surveillance activities; however, I was not aware of whether the person watching me was a surveillance operative from an insurance company or a criminal who was about to severely injure or maybe kill me. On one occasion I contacted my case manager at EML to question him as to whether I was under surveillance. He was not available and I got put through to his senior supervisor.

I asked her directly if I was under surveillance. She said to me, "Not that I am aware of." I asked her further, "How would you become aware that I was under surveillance?" She told me that she would have to approve any surveillance requisition. I then informed her that I would be approaching a gentlemen down the road who I believed was a surveillance operative or a person there to cause me ill will or harm and that I would meet them with extreme hostility, which could potentially end up being violent. I terminated the call. Approximately two minutes to five minutes later she called me and said, "Brendan, we do have you under surveillance. Please do not do anything stupid." I said, "You have basically lied to me. I will be taking this up further with my legal representatives."

The Hon. LYNDA VOLTZ: She either lied to you or it could have been done without her approval because she said approval was a prerequisite.

Mr BULLOCK: Correct.

The Hon. DANIEL MOOKHEY: Was the case manger who misled you about whether or not you were under surveillance the same case manger who was responsible for your injury rehabilitation plan?

Mr BULLOCK: Most certainly, and I expected that.

The Hon. DANIEL MOOKHEY: What effect did that have on your ability to trust them when it came to your injury rehabilitation?

Mr BULLOCK: To be quite frank, it totally undermined the process that I thought was set up to assist me and yet the distrust that came from that was devastating for me. From that point on I could not trust the process and I could not trust any insurance companies or case managers operating on their behalf.

The Hon. DANIEL MOOKHEY: Later, in your experience with the insurer, in any liability hearing, in any work capacity assessment or anything of that sort, was any of the evidence that was collected under surveillance presented to you?

Mr BULLOCK: Yes.

The Hon. DANIEL MOOKHEY: When did you see it?

Mr BULLOCK: When I started a litigation process and wanted my claim for workers compensation reviewed by the Workers Compensation Commission.

The Hon. DANIEL MOOKHEY: And the insurer produced that surveillance in those proceedings?

Mr BULLOCK: I am not sure if they produced it before, but I am most certainly aware of it after.

The Hon. DANIEL MOOKHEY: But it was utilised in that proceeding?

Mr BULLOCK: I believe so, as a process of discovery.

The Hon. DANIEL MOOKHEY: But the insurer never actually produced it in that hearing, or any other hearing, to substantiate the claim that they were making?

Mr BULLOCK: No.

The Hon. DANIEL MOOKHEY: Essentially you were surveilled, your relationship and trust with the insurer and your case manager was destroyed, and you were subjected to further compounding injury for nothing.

Mr BULLOCK: There was no reason to surveil me, none whatsoever.

The Hon. DANIEL MOOKHEY: Mr Boland, is this common?

Mr BOLAND: Absolutely, yes.

The Hon. DANIEL MOOKHEY: How big are the Facebook groups that you administer?

Mr BOLAND: How big?

The Hon. DANIEL MOOKHEY: What is the size of the Facebook community that you administrator?

Mr BOLAND: Until the Police Media intervened and closed us down, it was just short of 55,000. Now we have just short of 9,500.

The Hon. DANIEL MOOKHEY: Were the practices to which Mr Bullock referred routine?

Mr BOLAND: Absolutely.

The Hon. DANIEL MOOKHEY: Is this the issue that stood out most amongst the issues that were circulated in that group or were there other things that occupied the attention of your community more?

Mr BOLAND: As in general complaints or surveillance?

The Hon. DANIEL MOOKHEY: Is it the case that surveillance is the biggest issue in that community or are there other issues?

Mr BOLAND: That is one issue with the psychiatric injuries because a lot of them are paranoid. It is one of the symptoms. A lot of these police officers, myself included, through their career have had death threats or contracts taken out on their lives. It can be a pretty dangerous thing to surveil a cop who has had death threats or a contract taken out on him because he is going to assume the worse. Paranoia is one of the symptoms of major depression and PTSD under the DSM-5 psychiatric code. It is a big problem and a lot of them are getting really upset about it.

The Hon. DANIEL MOOKHEY: Are you getting a sense from NSW Police, in their capacity as an employer, that they are getting better at mitigating and preventing or otherwise dealing with people who are affected by this?

Mr BOLAND: No, not all. They actually encourage it behind the scenes.

Mr BULLOCK: Can I add to that?

The Hon. DANIEL MOOKHEY: Yes.

Mr BULLOCK: At the time that I was under surveillance and lied to by Employers Mutual Limited I was still an employee of the NSW Police Force and had not been discharged at that stage. I made contact with my then commander and I made him fully aware of my objections as to what the police insurer, EML, was currently doing to me.

The Hon. DANIEL MOOKHEY: What did he do?

Mr BULLOCK: Nothing.

Mr BOLAND: Brendan will probably tell you this. When he says he attempted suicide he is going to tell you exactly what he did, the circumstances leading up to it and who found him.

The Hon. TREVOR KHAN: It is in the statement. There is no need to go into that.

Mr DAVID SHOEBRIDGE: Is there something specific you want to draw out of Brendan's circumstances that would illustrate a bigger problem in the police?

Mr BOLAND: Not so much the police but the insurance industry. In Brendan's particular case he was sent to numerous psychiatrists, but 12 months before his suicide attempt one of EML's own psychiatrists they sent him to said that he was a high suicide risk, he should be medically discharged—

Mr BULLOCK: Sorry, that was actually through a different process—through a total and permanent disability.

Mr BOLAND: But the bottom line is they sat on the report for 12 months and then 12 months later he attempted suicide after still continuing surveillance, harassments, sending him to various doctors after they had their own—

Mr DAVID SHOEBRIDGE: Mr Bullock, that was a report that was obtained in the TPD claim, was it?

Mr BULLOCK: It was, yes, and from that independent medical examination the psychiatrist formed the opinion that my condition was severe, that I was badly depressed and that I was at risk of suicide. Nine months later I attempted to take my life, unbeknown to the independent medico-legal report that that doctor had provided to MetLife. MetLife held onto that knowing that I was a serious suicide risk yet they continued to surveil me.

Mr DAVID SHOEBRIDGE: So they not only held onto the report and did not give it to you to help you, they actively worked to—

Mr BULLOCK: My honest opinion is that from that point on my application for a total and permanent disability should have been finalised on the basis of that report. It was not, I was continued to be surveilled, intimidated, felt threatened, my condition deteriorated, I was dependent on alcohol and drugs and in an irrational state I hanged myself in front of my children and wife at my family home.

Mr DAVID SHOEBRIDGE: Mr Bullock, can I just ask you, has that claim now finally finished?

Mr BULLOCK: The claim for the TPD has been accepted and the insurance company has accepted liability for it, yes.

Mr DAVID SHOEBRIDGE: How long did that take?

Mr BULLOCK: Three and a half to four years.

Mr DAVID SHOEBRIDGE: What about your claim with EML under the workers compensation scheme?

Mr BULLOCK: Roughly a nine-month process.

Mr DAVID SHOEBRIDGE: So it was less brutal than the TPD one?

Mr BULLOCK: EML started off a chain of events that I believe has pretty much destroyed my life.

Mr DAVID SHOEBRIDGE: So even though it went for a shorter period, the fact that they contested, ran you through the hoops, sent you to multiple doctors at a time when they should have been referring you off for assistance, that initial period set in play exactly the wrong chain of events. Is that right?

Mr BULLOCK: Correct. My case is not an isolated case.

Mr DAVID SHOEBRIDGE: We had the FBU—the firefighters union—the police union and the PSA all basically say to us that where you have a psychological injury claim for a first responder, someone working in corrections, that a better way of treating it would be a presumption that the claim is valid rather than, if you like, a presumption that it is not. Would that have made a serious difference in your case, Mr Bullock?

Mr BULLOCK: Definitely, and, as I said in my opening address, I provided a statement outlining my traumas over a 15-year period, which was an example of my diagnosis of chronic post-traumatic stress disorder. They were provided with that statement. However, as part of due process, they wished to challenge it.

Mr DAVID SHOEBRIDGE: And did you have a treating doctor at the time?

Mr BULLOCK: Yes, I did.

Mr DAVID SHOEBRIDGE: Who was your treating doctor?

Mr BULLOCK: Dr Selwyn Smith.

Mr DAVID SHOEBRIDGE: Did Dr Selwyn Smith, who is a well-recognised psychiatrist with expertise in PTSD, support your claim?

Mr BULLOCK: Most definitely.

Mr DAVID SHOEBRIDGE: And at the end of nine months they eventually accepted the workers comp claim?

Mr BULLOCK: Effectively it was settled, but I had to take it to the Workers Compensation Commission because of the percentage of whole person impairment.

Mr DAVID SHOEBRIDGE: So they accepted liability but they still argued about how much?

Mr BULLOCK: Correct.

Mr DAVID SHOEBRIDGE: So you have a treating doctor who is one of the most eminent experts in dealing with post-traumatic stress disorders, particularly from police and the armed forces; you have a detailed statement setting out 15 years of trauma that you have been exposed to as a police officer; and they still did not accept your claim and they still sought to contest it?

Mr BULLOCK: Correct.

Mr DAVID SHOEBRIDGE: Mr Boland, would that be unusual, that you have got someone who sets out this detailed story of exposure to trauma, who has got some of the best supporting medical evidence, but there is almost like a culture of contesting, is there not?

Mr BOLAND: Of course, yes. It is take them right to the Court of Appeal if they can. One particular member had a 10-year court case. He won the court case in around October/ November of one year after 10 years and about, who knows how many, consultations. In the following year, in the February/March, the particular insurance company told me to send him to a further—and he took his own life; he hanged himself in the kitchen of his family restaurant.

Mr DAVID SHOEBRIDGE: Mr Bullock, I am going to apologise for what has happened to you. I think it is shameful.

Mr BULLOCK: Thank you.

The CHAIR: Government questions?

The Hon. TREVOR KHAN: I do not have terribly much but can I just ask, in terms of that confrontation that you did not have, I suppose, with the private investigator, was there any further surveilling by the insurer after that in terms of your workers comp?

Mr BULLOCK: In relation to workers comp?

The Hon. TREVOR KHAN: Yes. It does not make it any better; I am just wondering if they gave up at that point.

Mr BULLOCK: No, they did not give up. I will say that as progressing forward into a total and permanent disability claim, for which I was subjected to basically the exact methodology by MetLife Insurance, as from Employers Mutual Limited, case managers requested—and I have documentation of this—a private investigation company and a private investigator to conduct further surveillance on me. That private investigator advised the principal of that private investigation company that I was surveillance-aware; he had previously

worked me on a different claim; that he noted that I was conducting anti- and counter-surveillance techniques and that "we should let him lie and let him relax until we have another go at him".

The Hon. TREVOR KHAN: I am going back now to try and remember your statement. Was there any surveillance in terms of your computer use as well or has it been restricted to physical surveillance of you?

Mr BULLOCK: No, it is not restricted to physical; it has been desktop, however, at the time I did not have a social media account such as Facebook. My wife did at the time and my movements were—I guess the private investigation companies looked into her Facebook account in obtaining evidence that they believed that they could use against me in the process.

The Hon. TREVOR KHAN: In the process of the Workers Compensation Commission litigation, were you provided with access to that collected Facebook material as part of the discovery process?

Mr BULLOCK: Only at the end.

The Hon. DAVID CLARKE: When did you cease employment with the New South Wales police?

Mr BULLOCK: My last day of work was 8 October 2011 and my discharge was towards the mid, end of 2012.

The Hon. DAVID CLARKE: When did you finalise your workers compensation case?

Mr BULLOCK: For the record, I am not good with dates.

The Hon. DAVID CLARKE: Just roughly.

Mr BULLOCK: It would have had to have been probably around that time or later in the year 2012.

The Hon. DAVID CLARKE: And what about the settlement of the Police Blue Ribbon death and disability scheme? When was that settled?

Mr BULLOCK: That was finalised or accepted, I believe, around mid this year.

The Hon. DAVID CLARKE: A few weeks ago.

Mr DAVID SHOEBRIDGE: It is now November.

Mr BULLOCK: Mid this year.

The Hon. DAVID CLARKE: You have not worked since 2011?

Mr BULLOCK: I am unable to be reintegrated back into the workforce because of my diagnosis and my injury.

The CHAIR: A quick question to Mr Boland. Is Mr Bullock's case widespread, unique?

Mr BOLAND: Widespread, common.

The CHAIR: Can you give us some quantity around this at all? Are you dealing with a dozen people in this situation?

Mr BOLAND: No, it could be in excess of 1,000.

The Hon. DAVID CLARKE: Do you have any idea as to the statistics of police officers who claim benefits under the death and disability superannuation scheme, what percentage are successful?

Mr BOLAND: I do not have data, just from feedback from the members. They generally are. The judges in the system are quite favourable to them because of the nature of their employment and their illness so that a lot get settled at mediation but for reduced amounts because, by four, five or six years—that is another thing—I am dealing with members of up to six or seven years and they are still hanging out and have not got paid. And they do not even look like getting into court until—they do not know. They are getting frustrated. They are continually getting sent to doctors, surveilled, the lawyers are busy.

The Hon. DAVID CLARKE: So you understand, anecdotally, that the great majority of these cases that are started, the majority of them do not settle for a number of years?

Mr BOLAND: Yes, six to eight years. Some longer, if they go to court.

The Hon. DAVID CLARKE: And your understanding is, does the great majority of them eventually settle?

Mr BOLAND: I cannot say that but I have got a lot of feedback that some settle, but they settle at a very reduced rate because they have had enough, they have lost the fight. Seven or eight years and then when they are faced with having to go to court and then perhaps to the Court of Appeal, they have just had enough. I have had people settle for $150,000 when they should have settled for $550,000 to $600,000 et cetera.

The CHAIR: Thank you Mr Bullock for coming to talk to us today. We really appreciate it, and Mr Boland. I do not think you took anything on notice but if you did, you have 21 days to supply that to us. The secretariat will contact you if you have taken anything on notice.

(The witnesses withdrew)

FIONA CAMERON, Senior Manager, Government and Industry Relations, Insurance Council of Australia, affirmed and examined

VICKI MULLEN, General Manager Consumer Relations and Market Development, Insurance Council of Australia, affirmed and examined

The Hon. DAVID CLARKE: You have provided a brief letter and some other submissions to other inquiries. Do you want to make an opening statement?

Ms MULLEN: Yes. Thank you Chair and Committee members for the opportunity to give evidence to the Law and Justice Committee inquiry. I will give a brief opening statement including a brief overview of the Insurance Council of Australia [ICA] and the role of our members in the New South Wales workers compensation scheme. The Insurance Council of Australia is the representative body of the general insurance industry in Australia. In relation to State- and Territory-based compulsory compensation schemes, our members are involved in a number of motor accident and workers compensation schemes as both insurers or scheme or claims agents.

Insurance Council members are agents for the workers compensation schemes in New South Wales, Victoria and South Australia. In New South Wales five ICA members act as scheme agents to the workers compensation scheme. They are, Allianz, CGU, Employers Mutual, GIO and QBE. Catholic Church Insurance and Guild Insurance also act as specialised insurers in the scheme. Catholic Church Insurance provides workers compensation insurance to the Roman Catholic Church and its institutions in Australia. Guild Insurance provides workers compensation insurance to pharmacies operating and registered in New South Wales.

Our members who are scheme agents in the New South Wales workers compensation scheme were appointed initially by WorkCover. Their role includes administering and issuing workers compensation policies, determining and collecting insurance premiums, managing workers compensation claims through case managers providing support to injured workers, paying workers compensation benefits to injured workers and managing third party services such as medical and rehabilitation services.

Our scheme agent members do not insure or underwrite the workers compensation scheme and do not manage any funds of the scheme. We wish to advise the Committee that the ICA is not privy to the contractual arrangements between the New South Wales scheme agents and icare and previously with WorkCover. Therefore, the ICA is unable to provide any comment in relation to the specific arrangements in these contracts, these include matters such as fees, key performance indicators and other performance measures.

As part of our submission to this inquiry the ICA has provided its June 2014 submission to the Competition Policy Review and Finity Consulting's Best Practice Workers Compensation report from May 2015. This report was commissioned by the Insurance Council. The Finity report draws on features of various schemes in Australia and identifies features of these schemes that, based on experience, are most likely to deliver financial sustainability as well as best outcomes for workers and employers. This report may be a useful reference in relation to any future changes or reforms to the New South Wales scheme.

In relation to achieving best outcomes for workers, the ICA is currently in discussions with Comcare in regard to participation in their proposed collaborative partnership which will investigate ways in which insurers, governments, doctors, health care professionals and other stakeholders in workers compensation schemes can work together to achieve better health and return-to-work outcomes for injured workers. This collaborative partnership will include undertaking extensive new research to identify new and more effective approaches to managing work injuries. We now welcome any questions from Committee members.

The Hon. DANIEL MOOKHEY: Thank for your appearance before the Committee. Accepting that you are not here to represent the scheme agents themselves and you are not privy to the contract deed, does the insurance council maintain any code of conduct in respect to surveillance, in so far as it reflects workers compensation?

Ms MULLEN: I did not catch the question.

The Hon. DANIEL MOOKHEY: Does the insurance council maintain any codes of conduct in relation to the use of surveillance in claims, liability and work capacity assessments?

Ms MULLEN: The short answer in relation to workers compensation insurers or scheme agents is, no. We do have the general insurance code of practice which has been around for more than 20 years. Our code for general insurers does not currently include any specific provisions around the surveillance of people with claims. I am aware that the life insurance code recently published by the Financial Services Council does

include provisions concerning surveillance. What I can say to the Committee members is that under our general insurance code of practice we have an independent body called the Code Governance Committee that is responsible for monitoring and enforcing the standards under the code.

The Code Governance Committee is in the process of doing an own motion inquiry into service suppliers under the code. The definition of "service suppliers" includes investigators. What I can say is that we anticipate a report from the Code Governance Committee within the coming months. That should give the industry guidance around the use by insurers of investigators. I do need to point out that the general insurance code of practice does not cover workers compensation or compulsory third party [CTP] insurance. However, I can say that in recent months, the State Insurance Regulatory Authority, as the regulator of CTP insurers, has taken inspiration from the general insurance code of practice in relation to claims management and taken on board some of those principles. The answer is, no, but in the future we may have some interesting developments in the area.

The Hon. DANIEL MOOKHEY: On notice can you provide us a copy of the general code?

Ms MULLEN: I am very happy to.

The Hon. DANIEL MOOKHEY: I conclude from your answer that the general code does not apply to workers compensation?

Ms MULLEN: That's correct.

The Hon. DANIEL MOOKHEY: Therefore, any variation you might have in respect to surveillance will not apply to workers compensation?

Ms MULLEN: That's correct.

The Hon. DANIEL MOOKHEY: Can you provide us with information about the professional requirements needed of claim managers in the workers compensation space?

Ms MULLEN: I will take that on notice to an extent. What I can say is that my general understanding of the way our member companies recruit for claims managers is that they typically come from a wide range of occupational backgrounds. It is fair to say that there is no specific standard as far as people recruited into that space. The insurance industry has a number of sources of occupational and professional training courses. There are a number of courses run by the Australian and New Zealand Institute of Insurance and Finance [ANZIIF] for those people in the claims management space and there is the Personal Injury Education Foundation based in Geelong. It specifically sets up academic training and courses for people who specifically work in the personal injury field.

The Hon. DANIEL MOOKHEY: On notice can you provide the details of that and the extent to which you are aware of your members' compliance with that?

Ms MULLEN: I cannot tell you about the compliance because it is not a compliance requirement, but we can give you information about the courses.

Mr DAVID SHOEBRIDGE: This is a list of opportunities as opposed to current practice?

Ms MULLEN: Yes.

The Hon. DANIEL MOOKHEY: In respect to your insurers' activities as litigants, are they subject to any form of model litigant codes?

Ms MULLEN: No, not that I am aware of.

The Hon. DANIEL MOOKHEY: Each insurer determines its own policy with respect to litigation?

Ms MULLEN: That is my understanding.

The Hon. DANIEL MOOKHEY: What about the employment of service providers? You would agree that an insurer that applies coercive pressure against a service provider, such as a medical specialist, to produce a report that is not based on their medical opinion would be unconscionable?

Ms MULLEN: As a statement of principle that would be unconscionable. In saying that I need to make it clear that I am not in any way, shape or form admitting that our members behave that way.

The Hon. DANIEL MOOKHEY: At this point I am not asking whether it is happening. I conclude from your answer that you have a view. On a matter of principle you would agree it is unconscionable?

Ms MULLEN: Medical assessments should be based on medical evidence and should be independent.

The Hon. DANIEL MOOKHEY: The practice referred to by multiple people appearing before the inquiry of "doctor shopping", that is, an insurer that received one opinion from a medical specialist with which it disagrees and then looks for another doctor to produce it—would you find that equally as unconscionable?

Ms MULLEN: No.

The Hon. DANIEL MOOKHEY: Are there rules or codes of practice that govern interactions between who can and cannot be a service provider?

Ms MULLEN: I cannot give you a detailed answer. I imagine the arrangements between icare and scheme agents would speak to those arrangements. I do not have the details of those arrangements between icare and the scheme agents.

The Hon. DANIEL MOOKHEY: The insurance council, in addition to the other things you do, you foster conversations around what is best practice, correct?

Ms MULLEN: We do, in a very general sense.

The Hon. DANIEL MOOKHEY: Has the insurance council issued an opinion about what should be the accreditation requirements of people referred to independent medical examiners [IMEs] or approved medical specialists [AMSs]?

Ms MULLEN: No.

The Hon. DANIEL MOOKHEY: Is it correct to infer from your evidence that is fundamentally a matter between icare and the scheme agents?

Ms MULLEN: Yes.

The Hon. DANIEL MOOKHEY: What about with respect to self insurers or specialist insurers?

Ms MULLEN: We do not represent self insurers, they are typically large companies.

The Hon. DANIEL MOOKHEY: You are allowed to have an opinion.

Ms MULLEN: We do not represent them so it would not be correct to speak on their behalf. In relation to specialised insurers, again, they are licenced by icare and they would have arrangements with icare in terms of meeting the conditions of their licence.

The Hon. TREVOR KHAN: They are licensed by SIRA.

Ms MULLEN: My apologies.

The CHAIR: It is only in the last 12 months.

The Hon. DANIEL MOOKHEY: The evidence you provided with respect to the ideal design of the insurance market: It is your view that perhaps it would be better if the nominal insurer was to be privatised. Is that a correct summation of your view?

Ms MULLEN: That's correct.

The Hon. DANIEL MOOKHEY: Have you had the opportunity to read the contribution by the NSW Business Chamber?

Ms MULLEN: I have read a summary of it.

The Hon. DANIEL MOOKHEY: The business chamber tells us that they believe such a policy will lead to what they expect to be a 5 per cent increase in premiums. Are they right or wrong?

Ms MULLEN: I could not give you a specific figure. I understand that icare itself as the nominal insurer is looking at mechanisms to meet more stringent prudential requirements. Members of the Committee are experienced with hearing from the Insurance Council of Australia [ICA] and our member companies over a number of years.

The Hon. TREVOR KHAN: I have not.

Ms MULLEN: Insurer capital authorised by the Australian Prudential Regulation Authority has costs attached to the prudential management of capital. That is a given. Clearly insurers need to have a profit margin embedded into the price.

The Hon. DANIEL MOOKHEY: That is my next question.

Ms MULLEN: Can I answer the question? You asked me about 5 per cent, I neither agree nor disagree with that percentage. What I would say is that what insurers bring to the table is more direct risk pricing. What more direct risk pricing does is gives everyone an indication of those employers that do not have appropriate work health and safety arrangements in place. It can drive an interesting dynamic to improve and as risk comes down price comes down.

The Hon. DANIEL MOOKHEY: I accept that you nominate risk pricing as being the biggest advantage you would bring.

Ms MULLEN: That is one of the many advantages.

The Hon. DANIEL MOOKHEY: You provided us with 66 pages. Should the Committee contemplate adopting your suggestions, what is the profit margin the Committee should allow for?

Ms MULLEN: I cannot give you that.

The Hon. DANIEL MOOKHEY: What return of capital?

Ms MULLEN: Typically listed insurers seek a figure on return of capital which is transparently released to the market. The equation between return on capital and profit margin is complex. It links to the actual risk.

The Hon. DANIEL MOOKHEY: Should we use the 12 per cent suggestion of compulsory third party [CTP] insurers?

Ms MULLEN: No, I would not use that suggestion because the risk involved in the portfolio for workers compensation is not necessarily the same as for CTP. I would not be prepared to commit to anything that is the same as the CTP scheme.

The Hon. DANIEL MOOKHEY: Should we be committing to something that is between the risk-free rate of the 30-year bond and 12 per cent?

Ms MULLEN: That is different from a profit margin.

The Hon. DANIEL MOOKHEY: I am not asking about the profit margin. I am asking about return on capital.

Ms MULLEN: We are talking about the returns on investments.

The Hon. DANIEL MOOKHEY: No, I am asking about the return on capital.

Ms MULLEN: We can take that on notice.

The Hon. DANIEL MOOKHEY: Would you?

Ms MULLEN: I can give you the statements that insurers make to the market. I need to clarify that the statements that listed insurers make to the market on their target return on capital are across their whole portfolio. They are not specifically linked to their personal injury liability portfolios. I need to make that really clear.

The Hon. DANIEL MOOKHEY: I appreciate the distinction. Just to be clear, I am asking you to provide on notice your views or a survey of your members' views—

Ms MULLEN: I am sorry, I cannot give you a survey of our members' views. That would be anticompetitive.

The Hon. DANIEL MOOKHEY: Just clarify to, I am not interested in your members' target return on capital for the purpose of an Australian Stock Exchange [ASX] disclosure. I am looking at it from the perspective of a privatised workers compensation scheme. What should we be allowing for in respect of return of capital and profit margins?

Ms MULLEN: I will try to be helpful rather than being obstreperous.

The CHAIR: You are being very helpful.

Ms MULLEN: I emphasise again that you cannot necessarily directly compare the CTP risk with a portfolio of workers compensation risks. The Committee would be well aware that Trevor Matthews released a report into CTP competition and profits about 12 months ago. If the Committee wants an expert opinion about what that profit margin might look like for the personal injury portfolio—

The Hon. DANIEL MOOKHEY: That is where I got the 12 per cent from.

Ms MULLEN: Yes. I understand that.

Mr DAVID SHOEBRIDGE: Which was at the lower end of the range.

The Hon. DANIEL MOOKHEY: Yes.

Mr DAVID SHOEBRIDGE: What would be the range of return to capital for general insurers?

Ms MULLEN: We would be privy to that information only where that has been placed in the public domain and only for those insurers that are listed. . We can take that on notice.

Mr DAVID SHOEBRIDGE: If the insurance company is going to tie up its capital in a scheme like workers compensation, it obviously wants a return for that.

Ms MULLEN: Of course.

Mr DAVID SHOEBRIDGE: Do you know how much capital is currently tied up in the New South Wales workers compensation scheme?

Ms MULLEN: Our members do not have any because they are scheme agents.

Mr DAVID SHOEBRIDGE: But the State Government does. Do you know how much we are talking about?

Ms MULLEN: I would have to go to the icare annual report to find out what their assets and liabilities are, specifically linked to the nominal insurer fund.

Mr DAVID SHOEBRIDGE: What if I told you that they had $17.5 billion?

Ms MULLEN: I would believe you if you had sourced that from the annual report.

Mr DAVID SHOEBRIDGE: So if your members wanted a 10 per cent return on capital, which would hardly be out of the ballpark, they would want to take an additional $1.75 billion out of the scheme every year, would they not? No wonder it is attractive to your members.

Ms MULLEN: I am not going to enter into a complex discussion about assets and liabilities.

Mr DAVID SHOEBRIDGE: That is not complex. If there is $17.5 billion and you get a 10 per cent return, that would see your members get an additional $1.75 billion from the scheme every year. No wonder you have come to us.

Ms MULLEN: I dispute that.

Mr DAVID SHOEBRIDGE: If they have $17.5 billion tied up in capital and they get a 10 per cent return on that capital, what is the figure other than $1.75 billion?

The Hon. TREVOR KHAN: We are here to review the existing scheme.

The CHAIR: That is a valid point. This is hypothetical.

Ms MULLEN: Our member companies do not get a 10 per cent return on their capital. According to APRA requirements they are required to invest the capital that underlies their liabilities in very prudential manner. Members of this Committee are probably aware that we are currently in a really low bond yield environment. I suggest that where there is capital sitting around to back up personal injury liabilities you do not get 10 per cent return on that capital.

Mr DAVID SHOEBRIDGE: Let us say it is a 5 per cent return—

Ms MULLEN: It is not even 5 per cent.

Mr DAVID SHOEBRIDGE: Let me finish the question. We are still talking about hundreds and hundreds of millions of dollars additional drain on the scheme than currently applies with Government underwriting.

The Hon. TREVOR KHAN: Point of order: My point of order goes to whether this has any relevance to the terms of this inquiry.

Mr DAVID SHOEBRIDGE: Have you read their submission? It is all about private underwriting.

The Hon. TREVOR KHAN: We are engaged in a process of reviewing the scheme. We are not engaging in some flight of fancy about the future. It does not matter a rat's what is in the submission.

The CHAIR: Thank you. I take your point of order.

The Hon. DANIEL MOOKHEY: To the point of order: this is well within the terms of reference because we are charged with looking at alternatives to the system. Secondly, 66 pages of this submission are about this proposal. If we are not entitled to ask questions about what the alternative would look like, should it be recommended by this Committee, this inquiry and this evidence has no utility. The entire submission should be disregarded.

Mr DAVID SHOEBRIDGE: Plus the additional 17 pages of the submission that they gave to the Commonwealth competition review. That is a very old submission. It is all about private underwriting. That is their position.

The CHAIR: It is a major component of your submission. We are questioning you on your submission.

Mr DAVID SHOEBRIDGE: I am happy for them to withdraw the submission.

The CHAIR: If you do not wish to answer the hypothetical question, please indicate that. It would be good to move on to discussion of other parts of the scheme.

Ms MULLEN: Thank you, Chair.

Mr DAVID SHOEBRIDGE: Hundreds of millions of dollars of additional funds would be drained from the scheme if it were privately underwritten.

Ms MULLEN: I dispute that.

Mr DAVID SHOEBRIDGE: Perhaps you might take that on notice.

Ms MULLEN: We can take that on notice.

Mr DAVID SHOEBRIDGE: Would you indicate what kinds of additional funds would be drained from the spend if the $17.5 billion were in private hands and we had to compensate insurers for the $17.5 billion in assets that they put aside for the scheme?

Ms MULLEN: We can certainly give you some general information about the cost of capital.

Mr DAVID SHOEBRIDGE: Are you aware of how work capacity decisions apply in the workers compensation scheme?

Ms MULLEN: In a very general sense. I am not an expert.

Mr DAVID SHOEBRIDGE: So there would be no point in asking you questions about that?

Ms MULLEN: No.

Mr DAVID SHOEBRIDGE: Are you aware of the different jurisdictions and of where decisions are made in the workers compensation scheme, divided between insurers, internal reviews, merit reviews, WIRO and the Workers Compensation Commission?

Ms MULLEN: In a very broad sense.

Mr DAVID SHOEBRIDGE: If you are thinking about best practice design for a compensation scheme, is it good to have four alternative places in which decisions about liability and quantum are made? Is that best practice?

Ms MULLEN: I accept that that is very complicated. My colleague Ms Cameron may like to speak about some of the findings of the Finity Consulting report on best practice.

Ms CAMERON: The Finity Consulting report, as the Committee would be aware, sets out what would be good for each State to look at in claims handling and dispute resolution.

Mr DAVID SHOEBRIDGE: I was really just asking about dispute resolution. Is the New South Wales system the best practice?

Ms CAMERON: The New South Wales system has different layers, and the Committee has received a number of submissions on the issues to do that. That is something that we have looked at as part of this review. Whether it is best practice was disputed by some of the witnesses today.

Mr DAVID SHOEBRIDGE: I am asking you. You are the Insurance Council of Australia. Is it best practice? Yes or no?

Ms CAMERON: We have not taken a view on the best practice outcomes of the Finity report because it is an independent report.

Mr DAVID SHOEBRIDGE: You commissioned it.

Ms CAMERON: Exactly. We think it should form part of the debate and discussion, where governments are looking at changes to the scheme.

The CHAIR: I know you came into this inquiry late in the process, but it would be helpful for the Committee if you would survey your members so that we can understand their views about the situation.

Mr DAVID SHOEBRIDGE: That is exactly where I was going.

The CHAIR: One of the industry to groups did that once before and it was very helpful. It gives us a hint for the next inquiry.

Mr DAVID SHOEBRIDGE: What do your members, who are the licensed insurers and the two specialist insurers, think about the current system? Do they think that the dispute resolution system is best practice? Have you asked them?

Ms MULLEN: We have not asked them directly.

Mr DAVID SHOEBRIDGE: I have nothing else to say.

The Hon. TREVOR KHAN: Do not be so petulant.

Mr DAVID SHOEBRIDGE: We get a 2½-year-old submission and they have not even asked their members.

The CHAIR: Mr Mookhey touched on the fact that much of the evidence has been in the form of complaints about case managers and insurance agents and the turnover. We are looking at it through a certain frame. I acknowledge that. No evidence was given that the turnover is extraordinary or unusual. We have been told that people have had up to seven case managers in two years. We do not know if that is consistent across the industry or if it is to do with a particular insurer. The quality of case management and the turnover is a concern. Would you like to comment on that?

Ms MULLEN: Yes, I would. We accept that there are some challenges with recruiting and maintaining good claims management staff. what I would say about that is I think historically the management of the claims in this space has been somewhat transactional. What we as an industry would really like to see is the evolution, if you like, of that occupation into one that is much more of a case management approach. I alluded earlier to the partnership that the ICA is very interested in becoming part of, the collaborative Comcare partnership, and a key element of that is taking that approach around the health benefits of work and return to work outcomes and looking at how the various parties in that arrangement can really focus on the needs of the injured worker in a way that can hopefully in most cases get that person back to work. That is absolutely a case management approach. With things like mental health issues, psych injuries can be appropriately acknowledged and dealt with with the benefit of the best medical evidence that is to hand.

Yes, we acknowledge that there are some challenges with the retention of staff. What we would like to see is the adjustment of that occupation, which will obviously take some time, from being a transactional approach to the management of a claim to much more of a case management approach that takes the needs of the individual much more into account with hopefully an outcome of getting that person back to good and safe work.

The CHAIR: The culture of the insurance industry from the previous scheme was that it was looking for reasons to say no. Is that still a legacy cultural issue of the industry?

Ms MULLEN: I could not say that is a cultural issue right across the industry. However, I go back to my earlier comments. I think traditionally, historically, the role of claims manager has probably been more transactional than what we would like to see.

The Hon. TREVOR KHAN: What does "more transactional" mean?

Ms MULLEN: The way I view it is that typically a claim would come in and someone would put it into a process file rather than actually trying to understand exactly what the underlying factors were for that individual that might need to be addressed or assisted so that that person can actually get back to work.

The CHAIR: In your covering letter you talked about a scheme of consistency and design in management. That is what I was getting at: There is not a consistency of management of claims across the board. Clearly there are some that are being managed very well. We do not get those people coming to talk to us, but I assume that would be the majority. But between Allianz and QBE we are not getting a sense of consistency of management at all.

Ms MULLEN: Again, I cannot speak to that. icare would be the organisation that could tell you, and presumably SIRA as well. I understand you have heard from both of those organisations today.

The CHAIR: The icare gave evidence that it was concerned about that.

Ms MULLEN: I can only imagine: I do not have the data to hand that icare does.

The CHAIR: As the peak body you could take it on board and take it back to the insurance companies to look at that area.

The Hon. TREVOR KHAN: I think Mr Mookhey asked a question about doctor shopping. I took your answer to mean that you did not, in a sense, object to doctor shopping. Is that right?

Ms MULLEN: There might be good reasons why a scheme agent might need to get a second opinion.

The Hon. TREVOR KHAN: That goes without saying.

Ms MULLEN: I would not rule that out. If any organisation was shopping around to five, six or seven doctors, clearly they should get some different doctors.

The Hon. TREVOR KHAN: We clearly know that in the compulsory third party area some doctors have very strong relationships with plaintiff's lawyers and those doctors will provide favourable reports. The insurers will have doctors that will provide them with equally conservative reports. That is the reality of how that style of litigation has worked for years. The problem in the workers compensation area is that, if what the insurers are doing is referring workers to what we will describe as conservative doctors to give a report that knocks them out of the system, would you not find it troubling that the worker is then forced into a litigious process to obtain a benefit simply because of the selection of that conservative doctor?

Ms MULLEN: I think we would all hope that any medical practitioner—and this might be a little bit pie in the sky—is actually giving an opinion based on proper evidence and proper assessment of that injured worker. That would be the best practice outcome. We at the Insurance Council absolutely support medical assessments that are based on proper assessment and proper evidence.

The Hon. DANIEL MOOKHEY: Should we accept your recommendation to privatise the scheme, this would be a moot point, but, assuming that we do not, do you think there is utility in the scheme agent system? Does it add value? Should we be contemplating its abandonment, replacement, modification or reform? It is not treated in your submission, and I ask because it has been advanced to us by multiple people that the scheme agent scheme itself is fundamentally useless and should be abandoned in its totality. That is the extreme of one view; the other view is that it should be reformed. As a matter of policy, I am asking whether the Insurance Council has a view on that. If you do not, is it something that you would be prepared to develop a view on?

Ms MULLEN: We absolutely do have a view about that. I think, as with anything, we believe there are benefits to a competitive dynamic. I would imagine there is a competitive dynamic between the scheme agents. I presume they will have to meet certain indicators that would be attached to the fees that they are paid. I need to emphasise I am not privy to those details but I think, as with anything, where you have more than one provider you have a competitive dynamic and that is a good thing.

The Hon. DANIEL MOOKHEY: Did you hear the icare evidence today?

Ms MULLEN: I did not, but I have a broad awareness of what was covered.

The Hon. DANIEL MOOKHEY: The gist of icare's evidence was that in respect of at least a few things it would be a bit more prescriptive as to the behaviour it expects of the scheme agent. Should it do that, do you think that it would vitiate the competition aspects you just referred to? That is, if one person who is charged with paying for them all is going to essentially be prescribing the identical product, is there utility in the scheme? We had evidence from icare saying that it was inclined to work down that path of further prescription when it comes to things like claims management, agreed medical evaluators and approved medical specialists. If icare goes down that path, I wonder whether the utility of the competition benefits that you referred to would be less or non-existent.

Ms MULLEN: If you went down a path that was wholly prescriptive, all paths would lead to a situation like in Queensland, which I understand is wholly run by a single government agency. That is obviously a political decision. Whether you want exactly the same approach on every single detail around the management of the claim or whether you want to leave some room for competitive dynamics, that is the best I can say. My understanding is certainly that SIRA, for example, takes a very strong principle-based approach to regulation. If

that were to be applied to the scheme agent space, then maybe there would be more room for a competitive dynamic.

The CHAIR: There are not competitive dynamics because, unlike compulsory third party insurance, the employer cannot choose who they are doing the workers compensation insurance with.

The Hon. TREVOR KHAN: Yes, they can.

Ms MULLEN: They can choose who they take out the premium with.

The Hon. TREVOR KHAN: They can, but the problem is they do not have the financial advantage of choosing one over the other because of the way the premiums are constructed, and they are not the beneficiary of the insurance policy, are they? Apart from whether they may or may not have a good relationship—

Ms MULLEN: That is right. It is a classic third party arrangement in that sense, yes.

The Hon. TREVOR KHAN: The basic concepts of competitive tension and the like are a bit hard to apply, are they not, when you are looking at these mandated statutory schemes.

Ms MULLEN: Sure. I accept that, but I think in terms of the role that the scheme agent plays—

The Hon. TREVOR KHAN: I think the agrarian socialist is coming out in you!

Ms MULLEN: I grew up in Armidale. I know all about that!

The Hon. DANIEL MOOKHEY: I got married in Armidale. Let's all have a reunion!

Ms MULLEN: Now I have forgotten your question, but it is certainly the case that, if insurers were underwriters, they would have a much bigger role than actually pricing the risk and that would create a much stronger competitive dynamic.

The CHAIR: That is the end of our time. Thank you for coming this afternoon. It was important that we heard from the Insurance Council of Australia, as a lot of the commentary was leading to questions for you. You took plenty of questions on notice, and you have 21 days to return that to us. The secretariat will assist you with that.

(The witnesses withdrew)

The Committee adjourned at 16:38.