REPORT ON PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

2018 REVIEW OF THE WORKERS COMPENSATION SCHEME

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At Jubilee Room, Parliament House, Sydney, on Tuesday 24 July 2018

The Committee met at 9.30 a.m.

PRESENT

The Hon. Natalie Ward (Chair)

The Hon. Trevor Khan
The Hon. Taylor Martin
The Hon. Daniel Mookhey
Mr David Shoebridge
The Hon. Lynda Voltz

The CHAIR: Thank you and welcome to the first hearing of the Standing Committee on Law and Justice 2018 Review of the Workers Compensation Scheme. I thank all who made written submissions to the Committee; they were all very helpful. My name is Natalie Ward and I am Chair of the Standing Committee on Law and Justice. The Committee has an important role in overseeing a number of insurance and compensation schemes, including the Workers Compensation Scheme. In the last review the Committee completed it was recommended that the New South Wales Government consider the benefits of developing a specialised personal injury jurisdiction for workers compensation and compulsory third party disputes. With this in mind, the current review will be focusing on the feasibility of a consolidated personal injury tribunal for these matters.

Before I commence, I acknowledge the Gadigal people, who are the traditional custodians of this land, and I pay respect to elders past and present of the Eora nation and expand that respect to other Aboriginals present today. Today we will be hearing from the legal panel, with representatives from the Law Society of New South Wales, NSW Bar Association and Australian Lawyers Alliance. Following that, we will hear from a number of unions and industrial associations, followed by the Insurance Council Australia and the National Insurance Brokers Association. Tomorrow we will hear from the Workers Compensation Independent Review Office, State Insurance Regulatory Authority and Insurance and Care NSW.

Before we commence, I will make some brief comments about the procedures for today's hearing. Today's hearing is open to the public and is being broadcast live via the Parliament's website. A transcript of today's hearing will be placed on the Committee's website when it becomes available. In accordance with the broadcasting guidelines, while members of the media may film or record Committee members and witnesses, people in the public gallery should not be the primary focus of filming or photography. I would 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 the hearing, so I urge witnesses to be careful about any comments they may make to the media or to others after they complete their evidence, as such comments would not be protected by parliamentary privilege if another person decided to take an action for defamation. The guidelines for the broadcast of proceedings are available from the secretariat staff.

There may be some questions that a witness could only answer if they had more time or with certain documents to hand. In these circumstances, witnesses are advised that they can take a question on notice and provide an answer within 21 days. Witnesses are advised that any messages should be delivered to Committee members through the Committee staff. To aid the audibility of this hearing, I remind Committee members and witnesses to speak into the microphones. Persons in the public gallery who have hearing difficulties should let us know. Finally, I remind everybody to turn their mobile phones off for the duration of the hearing.

DAVID POTTS, Partner, Kells Lawyers, Law Society of New South Wales, sworn and examined

ROSS STANTON, Common Law Committee Member, NSW Bar Association, affirmed and examined

ANDREW STONE, NSW State President, Australian Lawyers Alliance, affirmed and examined

SHANE BUTCHER, NSW State Committee Member, Australian Lawyers Alliance, sworn and examined

The CHAIR: Do any witnesses have an opening statement for the Committee?

Mr STONE: Collectively, on behalf of us all, I thank the Standing Committee for having us here. We very much appreciate the opportunity to make submissions and being invited to speak to the submissions. We recognise the importance of the work that the Standing Committee does in terms of accountabilities of compensation schemes within New South Wales and in terms of reviewing the operation of those schemes. Having reviewed the submissions from each of the three groups, there are some modest differences between us in terms of our levels of enthusiasm for a specialised independent tribunal looking at compulsory third party [CTP] and workers compensation.

Where I can say we are one is in terms of the array of principles we say ought to guide decision-making about whether or not a tribunal should exist and what its qualities and features should be. I had the opportunity to review the submissions from the Insurance Council of Australia and we are not miles apart from them as to what they put forward as the qualities that such a tribunal should possess. The one thing missing from their list is independence and that features very high on the top of all our lists. When you have the opportunity this afternoon, Committee members might ask how they feel about independence. We are big fans of it for understandable reasons. You have our submissions from the three organisations on those principles.

There are three supplementary matters I wish to briefly address that tie in in part regarding the principles we raised. The first is that all three organisations stand shoulder to shoulder and as one it is better that systems be independent and that, in turn, means not operated or controlled by the State Insurance Regulatory Authority [SIRA]. I read again this morning the submissions that SIRA had made to the Standing Committee and they have provided a joint submission on this aspect of the operation of the workers compensation scheme and the compulsory third party scheme. You will note from the Australian Lawyers Alliance [ALA] submissions in relation to the CTP scheme, and I appreciate that is an inquiry yet to come, but we were complimentary of various aspects of the motor accident division of SIRA in terms of their willingness to have meetings and willingness to talk to us and the collaborative approach to issues developing within the CTP scheme.

It is extremely unfortunate that same degree of openness and collaboration does not extend to whoever at SIRA is responsible to putting submissions before the Standing Committee. If you read the submissions from SIRA it would not tell you about a single issue that exists within either scheme of any difficulty whatsoever. If you read it the only impression you could come away with is that these schemes are operating perfectly. They do not volunteer a single deficit or difficulty within the schemes. It is a puff piece. They are enthused to tell you how many phone calls they have made and answered in their advisory scheme but they do not feel it is necessary to tell you that there was a major drafting flaw in the CTP legislation that is going to necessitate an amending Act in the next session, and the Minister has committed to making the amendment, because of a mistake over the interplay between the CTP and workers compensation schemes that will have a devastating effect on injured workers also involved in a car accident.

The Minister has fessed up to it. He said it is going to be fixed and he said it is going to be fixed retrospectively. Yet here you have a report to the Parliament from the government agency concerned that does not say, "Oh, by the way, there is this problem in the CTP scheme". SIRA is chronically incapable of fessing up to anything to this group. They just cannot do it year in, year out. If anything warranted a mention to this group it might have been, "Oh, by the way, there is a drafting error that needs fixing and we are working on it." But not a mention of it in their report. I would be delighted if you wanted to ask them why they did not feel that was a matter necessary to draw to the attention of a parliamentary committee with oversight of the scheme. It is that attitude from SIRA that in part drives—on the ALA's part—our enthusiasm for them to have no involvement whatsoever in the dispute resolution mechanisms and to keep them at arms length from it as a regulator.

By way of further example, the ALA has provided within the motor accident submissions examples of numerous teething problems with the new CTP scheme. There is not a mention of any of that from SIRA. We will get to more of that when we get to the CTP component. The second issue I wanted to briefly raise was that one of the principles we have put forward from the ALA is that it very much helps to have experts dealing with the topic. There have been times where the view has been held by some at SIRA or WorkCover that dispute resolution is bringing in experts in dispute resolution, they do not need to be subject matter experts, and that approach does not

work. The two pieces of legislation concerned are complex, they are difficult. I do not profess to be an expert across all matters of the workers compensation field, Mr Butcher is. The complexity of these mean that you want subject matter experts as your dispute resolution experts. You want the people you are appointing to hear and determine disputes to know things backwards.

That has been one of the positive features of the Central Accounting and Reporting System [CARS]. It employs people who really know what they are talking about. It was not one of the initial features of the workers compensation system but I think over time it is fair to say they have weeded out most of the people who were brought in because they knew something about dispute resolution and knew nothing about workers compensation, and what you are left with is a group that know all about workers compensation. SIRA has not yet published the names of its newly appointed Dispute Resolution Services [DRS] assessors under the new scheme. I hear worrying tales that they may comprise people from a variety of backgrounds with little expertise in CTP. Until I see the list that is speculation on my part. It is a shame we have not had a list by now, six months into the operation of the new scheme. It would be a concern if they are appointing people to be DRS assessors who have never come across or handled a CTP claim and do not have any practical experience in the CTP scheme.

Mr STONE: The third was by way of update. The Australian Lawyers Alliance raises in its submissions two case studies to show our general lack of enthusiasm for internal review. We gave one example of a truly appalling internal review decision that once its inadequacy was pointed out the insurer withdrew. The second example we gave was again in the motor vehicle sphere of an insurer rejecting statutory benefit payments because the claim form was lodged on the twenty-ninth day and you have to lodge on the twenty-eighth day in order to be eligible to recover the first 28 days. It is their way of incentivising people to put in a claim form quickly. No issue with that. The difficulty is that the twenty-eighth day was a Sunday. The insurer still cut it off, presumably because the insurer, NRMA, was ignorant about the operation of the Interpretation Act.

Mr DAVID SHOEBRIDGE: Or godless.

Mr STONE: That is better coming from you than from me. I have to deal with them day in and day out. Lawyers got involved to assist the claimant. The submission was then made to NRMA, "Don't be so silly, here is the Interpretation Act." At the same time the issue was drawn to SIRA's intention. One might have thought at that point, the insurer would have said, "Gee whiz, missed that one. Our bad, here's your first 28-day payment." No, they did not, they ran it all the way to a Dispute Resolution Services dispute and in fact argued before the DRS assessor that despite the clause in the Interpretation Act that says that this applies to everybody, that somehow motor accidents were special. Whether the person making that argument from NRMA was legally qualified, I do not know. The DRS assessor has produced its decision saying, "Of course the Interpretation Act applies. Of course you get the twenty-ninth day when the twenty-eighth day is a Sunday, you are entitled to your first 28 days of payment."

Mr DAVID SHOEBRIDGE: Can you table the circular from SIRA where they make that clear to all insurers?

Mr STONE: No, I cannot, because I have not been shown it. I can table the decision, and propose to do so. I have not de-identified it. I am happy for anything within it, other than the claimant's name, to be publicly shared. I have five copies of it I can provide to you. The two questions that arise out of that is: Why did NRMA not back down? And I cannot answer that. But the really good question is, we drew the attention of this case to SIRA. One might have thought that at that point SIRA might check the law and send something to NRMA saying, "Look, they are right, you are wrong, back down." But instead SIRA chose to let the dispute run its course. That is not my view of what a regulator ought to do. If a regulator thinks we are right about the law, the regulator ought to say, "They are right about the law, you are wrong, you pull your head in." And it did not happen.

I would hope that SIRA has now contacted all the insurers and advised them about the decision. I would hope that they have contacted the Claims Advisory Service, or Claims Assist, as it is now called, and educated them in it. It is all very well printing statistics and data about how great the Claims Assist service is and how many phone calls it is making and receiving, but that is a practical, ground level example of things just not working and SIRA not wanting to bring that to attention, and in my view SIRA falling short as a regulator in terms of letting it get the result. The right outcome occurred but only because a group of lawyers came in to assist the claimant, and with no credit to SIRA out of the exercise. I appreciate that is somewhat at length for a case study but I wanted to follow through and bring you up to date on where that had ended, given that we had raised it in our submissions.

The CHAIR: Are there any other opening statements?

Mr STANTON: In relation to the topic the Committee is looking at currently, the association's overall position is that it would be a better use of financial and human resources to consolidate workers compensation dispute resolution within the existing Workers Compensation Commission and to make some changes of detail to

try to help it deal with those matters, and presumably for that organisation to continue to be funded out of effectively the premiums collected from employers. With compulsory third party, the association's position again is that it would be a better use of human and financial resources to consolidate that dispute resolution work in the existing and now very experienced Claims Assessment and Resolution Service, commonly referred to by its acronym of CARS. We cannot see any utility in there being a new separate dispute resolution service. The association's position is that its activities should be folded into CARS. We think it is very important, as Mr Stone has already alluded to, that then CARS should be completely independent of SIRA, as the Workers Compensation Commission is completely independent of SIRA.

Mr POTTS: There is one matter that I would seek to put before the Committee. The Committee is looking at the feasibility of the consolidated personal injury tribunal. One of the aspects the Committee is considering is where such a tribunal should be located. It does not feature as part of our written submission but it is the position of the Law Society of New South Wales that there should be no retraction of the provision of services in rural and remote areas. It is perhaps worthwhile pointing out that the Workers Compensation Commission sits currently in about 20 venues, including Sydney. The Claims Assessment and Resolution Service does better. It sits in about 33 regional centres. The position of the Law Society of New South Wales is that we do not want to see any further retraction of the provision of legal services in rural and regional areas. We have seen a substantial retraction of those services over the years. If a new tribunal is to be established we would like to see at least the current level of access to justice for people in rural and remote areas. Other than that, there is some written material that the Committee has from us where we talk about the tribunal being feasible, and we list very similar criteria to those that Mr Stone has said, or what we think the tribunal needs to be a workable tribunal.

The CHAIR: Thank you. You can take it that the Committee has read those submissions and we appreciate you forwarding them to us earlier to enable us to prepare for today.

Mr DAVID SHOEBRIDGE: Do any of you believe that SIRA should have a role in resolving disputes in CTP? If so, why? If not, why not?

Mr STONE: No.

Mr STANTON: No.

Mr POTTS: No.

Mr BUTCHER: No.

Mr DAVID SHOEBRIDGE: Do any of you want to develop the reasons?

Mr STONE: I think we set those out in some detail in the submission but it still does not have the requisite level of independence and we have seen that historically through the Claims Assessment and Resolution Service. It is a fine line between SIRA providing training to its assessors and SIRA training its assessors as to how it wants the outcome to be. If that is the regulator responsible for scheme performance—we talk in our submission about the Westminster system and the separation of powers, and we meant that very seriously. The Attorney General does not get to sit down with the judges of the Supreme Court or the District Court and expand on his or her philosophy for sentencing and what they ought to impose. There is nothing that stops the chief executive of SIRA or anyone else from SIRA, for example, walking into a room full of CARS assessors and saying, "There is a fraud problem in the scheme. Let me tell you about our fraud problem, not that I want to influence anything you are doing in any of your individual decision-making, and not mentioning that I am responsible for your reappointment in three years time."

Mr DAVID SHOEBRIDGE: Is one of the other problems that if the regulator is spending a significant amount of its time and energy on the resolution of the hundreds and thousands of individual disputes, that it might be failing to focus on what the real job of a regulator is, which is the systemic problems and keeping an eye on the overall system?

Mr STONE: SIRA might tell you that they have tried to address that by setting up two separate silos to deal with it, but we believe that does not satisfactorily address the issue.

The Hon. LYNDA VOLTZ: Is the problem that to get the independence that you are talking about an outside structure is needed? Is that not fundamentally what your submission states? Mr Potts, you go to the criteria you need to see to have independence within an assessment scheme.

Mr POTTS: Indeed. It is not just the independence, it is also the quality of the decision-making and the process that has been adopted. The process which SIRA has used is an administrative process, largely paper driven without proper hearings and proper reasoning. Now the strength of the systems that we have is that we have good

systems which work generally relatively well where people can actually go along and have a proper hearing. There is much to be said for that still in this day.

Mr DAVID SHOEBRIDGE: The Insurance Council of Australia, you say in your opening, Mr Stone, largely supported where you were going, and said that one of the essential principles and attributes of any scheme should be perceptions of fairness. It said that research highlights that people generally have a better recovery if they feel they have been treated fairly. A perception of fairness is promoted by having an open and transparent system which sits separately from the original decision-makers or scheme stakeholders?

Mr STONE: Yes.

Mr DAVID SHOEBRIDGE: Would you endorse that position?

Mr STONE: Yes, and if you endorse that, then what on earth do we build into the CTP scheme? What we are just in the process of abandoning in the workers compensation scheme, which is internal review by insurers? Why on earth is your first step to resolve a dispute to ask the insurer that just made the decision, "Oh, by the way, would you like to change your mind?" It is just a completely pointless exercise. I might invite Mr Butcher to say a few words about the experience of the internal review and the workers compensation scheme and why it ought not to be a feature of the CTP scheme.

Mr BUTCHER: I have had a large number of clients in workers compensation as my primary practice and we are often faced with people coming to us and asking for advice in relation to their work capacity decisions, which, as you might know, at the moment are supposed to go through the merit review process. Most firms, most of my colleagues, stay away from it, partly because of the funding and the work that is required to be able to get a good result for your client. We just stay away from it. I am not aware of many practitioners who spend a lot of time getting involved. The decisions we see come out do not get published. It is just operating in a cone of silence, which is not a pleasant experience and practitioners will stick to what they can get paid for because at the end of the day we are a business. We want to get on with the job and get a good result for our clients. Going down that path makes it difficult for them and difficult for us.

Mr STONE: And I do not think there has been any history of substantive change of mind by insurers on internal review where it is a substantive issue. If you can point out a mathematical error to them, they will correct it, but there is just no history of, "You have reached this view about causation. Would you change your mind?" And the answer I think is a universal no.

Mr BUTCHER: My experience is that is right. The Workers Compensation Independent Review Office [WIRO] would probably have better statistics than anyone as to how often matters of a substantive issue are overturned upon submitting a request for review but my experience is it is not that common. Mathematical issues or matters where they have not received a response yet or maybe you were a day or two late, we can sort those things out, but in terms of you have denied liability, here is the evidence as to why you should change your mind, my experience is usually—

The CHAIR: So it is administrative, not substantive?

Mr BUTCHER: That is my experience.

Mr DAVID SHOEBRIDGE: Do you think one useful way of looking at what might be dealt with internally and an insurer and what needs to go to an independent body is the kind of distinction between a complaint and a dispute—"You know, you are two days late on this, you stuffed up the maths on this", little incidental things about the way the scheme is operating, maybe those could be dealt with by complaints that go down one path and genuine disputes about liability or the like—

Mr BUTCHER: Sometimes with those complaints such as being late, from our side of the fence, we are not aware that you are late. As far as we are aware you have not responded. You may have put it in the post yesterday. We are not aware until we find out. Often that is dealt with through the WIRO office. We report back to them as to when we are ready to go to the Workers Compensation Commission. They can talk more to their procedures but I understand they will make a phone call sometimes and see what is going on. Often they will find out it is just a lag in time and those problems can be fixed but generally speaking I would say you are right.

Mr STONE: You would hope in circumstances where it is a mathematical error a letter would get that fixed without there having to be a formal mechanism or that once you launch down the dispute path, if there is a dispute because the maths is incorrect or there is a need to hear something more substantive, the first thing an insurer looks at is, "By crikey, yes, we got that wrong. We do not need this dispute. Here is the make good." I am not even sure that you necessarily need two different channels. If there is a dispute channel and sensible people, don't let things get very far down the dispute channel.

Mr DAVID SHOEBRIDGE: And less complexity is good?

Mr STONE: Yes, and building in that "You must do certain things. You must do them within 28 days. There must be forms, et cetera, et cetera" is really just building in disincentive for people to dispute decisions. It really is, in both schemes, a way of protecting the insurers from things getting into real disputes. It is not an efficiency, clean it up before we get there measure. It is a disincentive measure.

Mr DAVID SHOEBRIDGE: When these schemes have been designed they run the costings through actuaries. Do you think it would be unfair to suggest that one of the reasons that there is an internal review mechanism is because a proportion of claimants drop off with an internal review mechanism and that helps the actuarial outcomes rather than it being a substantive way of genuinely fixing real disputes?

Mr STONE: We know that schemes are subsidised by a large number of people not asserting their full or proper rights, which is a way of rephrasing the proposition you put and agreeing with you.

Mr POTTS: I have never seen an internal review on a matter of substance as being successful and I have been doing this work for a long time.

The Hon. LYNDA VOLTZ: Can I ask a question on the claims? Now they have changed the case management is that reducing those instances of late notices and information coming back to people? A lot of the problems in the past have been that case management has been across-the-board difficult with a high turnover of staff.

Mr BUTCHER: Are you referring to going down to one insurer and the procedures they have adopted?

The Hon. LYNDA VOLTZ: Yes.

Mr BUTCHER: My experience is that more claims are being accepted. Icare has introduced, as I understand, a procedure whereby treatment disputes will head off to a panel within icare to help manage those disputes. I have seen fewer disputes in relation to treatment disputes. That seems to have been a success in the sense that if you want majority of treatment requests approved. I have seen surgeries where in the past I would have thought the insurer would have disputed being accepted. I have seen psychological claims where in the past my experience would have been these type of claims were likely to have been denied being accepted. I do not know whether that is someone looking at it properly or "we do not have time to look at it so it is easier to approve it than it is to decline it". I would not know; I am not on that side of the fence but I have seen an increase in acceptance of psychological claims anecdotally. I do not know if the data reflects that but that is my experience.

The Hon. LYNDA VOLTZ: Given that the case management is probably better because you are not getting that turnover, why do things have to come in the snail mail for those kinds of claims? In these days of instantaneous electronic communication why is it taking so long for things to come out?

Mr BUTCHER: I do not know the answer. Some things are emailed, some things are posted.

The Hon. LYNDA VOLTZ: I was just wondering if there was a legal reason for it.

Mr STONE: I can tell you on the CTP side that the SIRA CTP database is not set up to direct communications by email. It is an old and outdated computer system and I have had some continued interchanges with SIRA where, in the throes of dispute, they are trying to deal with something expeditiously and they have asked you to respond to something within two days and have proceeded to put the letter asking you to do so in the post to solicitors in Mildura and that, as I understand it, is because their computer system is not actually set up to send emails. It has to be manually programmed.

Mr DAVID SHOEBRIDGE: Emails are not particularly novel?

Mr STONE: That is a question for them and their IT people.

The Hon. DANIEL MOOKHEY: To what extent has the Workers Compensation Commission required specialist expertise and to what extent could that be lost if it was to be formed into a general tribunal?

Mr STANTON: It depends ultimately on what you do with the individuals but certainly if one looks at history for a guide to this, when the Compensation Court of New South Wales was abolished, there was a great loss of a great deal of expertise, both administrative and judicial. We elaborate on this point a bit in our paper.

Our observation has been when a new tribunal is set up it is actually quite inefficient to start with. It is obviously difficult to set up a new tribunal from scratch and they all seem to struggle for a number of years until the people acquire the expertise about the legislation, if they are new to it, and on the administrative level that the they evolve their procedures to develop systems that make sense.

That is one of the reasons we think it would be a better use of human resources, that is the knowledge of these individuals and financial resources, the costs associated with setting up a bureaucracy and administration's computer system and so on, to use two existing systems which have actually been working reasonably well for most things. There are always going to be problems. In workers compensation there is a particular problem in more complex cases. Some of those problems stem from the costs structure, which is incredibly inflexible, and you might have picked up in our submissions that that really does need to be reviewed.

The current costs structure has the potential to pay too much in costs for very simple disputes and nowhere enough for the more complicated disputes. The more complicated disputes tend to struggle a bit in terms of the procedures at the moment and that is why we have suggested in our paper that with the Workers Compensation Commission you do something similar to what is done with CARS. With CARS we have truly complex matters. The principal claims assessor issues a certificate of exemption and the matter goes before the District Court. There would be a number of procedures you could adopt within the workers compensation context to take the more difficult matters and remove them from their general system, which works quite well for typical straightforward disputes involving only a few issues. All of these things are difficult in practice to apply.

In our paper we made a note about the quite high number of appeals in the early years of the Workers Compensation Commission compared now to the very small number of appeals. It is supposed to be about one-tenth of the number of appeals occur now and that is because the individuals have acquired knowledge and the system has evolved. In our view, it is not a great idea to get rid of something that has worked intolerably well. By all means improve it—everything is capable of being improved. That is our position in relation to that.

Mr DAVID SHOEBRIDGE: Mr Stanton, realistically nobody is suggesting blank sheets. The realistic proposal that is on the table is the Workers Compensation Commission adopt a full set of jurisdiction; all disputes in workers compensation. Then the CARS assessors and the like find their way incorporated into an expanded Workers Compensation Commission that gets re-badged as a statutory compensation scheme. We are not having a standing start: we retain the expertise of the Workers Compensation Commission and you would bring within that structure the expertise that is already found in the CARS scheme. No-one is suggesting we start with a blank sheet of paper, as I understand it.

Mr STANTON: No. An amalgamation would be enormously preferable to starting with a clean sheet.

Mr DAVID SHOEBRIDGE: Yes. I do not like forced amalgamations. This would have to be voluntary. A new system being established with all the faults and the inefficiencies and the uncertainties is the DRS model.

Mr STANTON: Yes.

Mr DAVID SHOEBRIDGE: Surely that should be our focus?

Mr STANTON: We see the DRS model as a retrograde step. It is the CTP equivalent of the Merit Review Service in workers compensation, and after a number of years of experience the Minister's recent press release indicated an acceptance that that was probably a bad idea so it folded into the commission, as it were, hence the association suggestion that DRS be folded back into the CARS. My colleague, Mr Stoner, has a better idea of what is actually occurring there but our understanding is that the DRS is almost being made out of bits of the CARS, anyway, so it would not be a terribly difficult thing, I do not think, to fold it back in.

The Hon. DANIEL MOOKHEY: Are there enough similarities between the two schemes as such that the disputes are likely to be similar or is it the case that the two schemes have very different designs and configurations and, as such, generating disputes of a different nature?

Mr STANTON: The legislation is very different. The new statutory scheme for motor vehicle accident victims has some similarities but I think there are more differences than similarities.

The Hon. TREVOR KHAN: That is the legislation, but are the nature of the disputes similar or dissimilar?

Mr STANTON: An able lawyer, well versed in the legislative provisions and well experienced with decision making can do both. Senior Arbitrator Bamber at the Workers Compensation Commission was previously both an arbitrator and an assessor at CARS. Yes, it can be combined but there are a lot of differences.

The Hon. TREVOR KHAN: I observed that Mr Stone seemed to make an interesting head wobble. I did not know whether it was a yes or a no. Does he want to make a contribution?

The Hon. LYNDA VOLTZ: Maybe Mr Stanton could finish his answer.

Mr STANTON: My suspicion is that the differences are such that if, for instance, you had a combined tribunal doing both, it would naturally turn into two bits. You would have those who would have greater expertise

and comfort dealing with the workers compensation matters and a number with a greater degree of efficiency dealing with motor vehicle disputes. I am sure you would have some who do both but I think you would probably end with two divisions; two parts of the one organisation if you were to combine them.

The Hon. DANIEL MOOKHEY: Mr Stone, you seem to have ambiguous attitudes to some of that?

Mr STONE: No, in part my head wobble came about because I was unaware that somebody had got married and changed their name. The answer my friend was giving did not make sense to me until Mr Butcher wrote a note explaining who is who. I congratulate Jo on having married.

The Hon. TREVOR KHAN: There is nothing wrong with Jo getting married.

Mr STONE: No. I take this opportunity to put my congratulations on record.

Mr DAVID SHOEBRIDGE: You do not know who Jo married.

Mr STONE: Okay, she may have divorced. Anyway somebody has changed their name and that is what was confusing me.

The Hon. LYNDA VOLTZ: Perhaps we will leave it there.

The CHAIR: I am quite convinced that is outside the terms of reference.

Mr STONE: The point was that, yes, I think we need two streams because, yes, there are people who can deal with both and there are people whose expertise falls more heavily within one. To give you the idea of some of the nuance differences in terms of treatment, in workers compensation the treatment has to be reasonably necessary whilst under the motor accidents scheme it has to be reasonable and necessary. Apparently there is a difference between the two. More significantly, for example, nobody in workers compensation has to deal with concepts of contributory negligence and relative culpability because they are dealing with a straight statutory benefits scheme whereas in motor accidents where you are dealing with lump sums and damages they do have to be familiar with some, at times, quite complex concepts of relative culpability and apportionment between driver and passenger or pedestrian, and that is more complex. But you can deal with that.

The Hon. DANIEL MOOKHEY: If we were to lead to a circumstance where effectively you have established one jurisdiction with two streams, what is the substantive difference between what we have now? Is it all worth the effort?

Mr STONE: You can give the motor accidents stream the independence it currently does not have.

The Hon. DANIEL MOOKHEY: Other people in this inquiry have advanced the proposition that we could do that without having to form a consolidated tribunal between the two schemes. In fact, we could just amend the CTP scheme and give it its independence. Do you have a view on that?

Mr STONE: You probably do not need two judicial heads of two different tribunals and I would love the CTP to have a judicial head and not a bureaucrat reporting into SIRA.

The CHAIR: Your written submission goes to that in the sense that you have said there should be a judicial rather than an administrative focus. I think that is consistent across each of your submissions.

Mr STONE: Yes.

Mr STANTON: The recent appointments I understand for the deputy presidents have a tenure or a contract period of seven years, which is getting close to a pretty good compromise. We have previously suggested 10 years would be a suitable compromise on this important issue. The current and recent people who have been deputy presidents and acting deputy presidents have been very able lawyers. Their decisions are of quite good quality.

The Hon. LYNDA VOLTZ: We cannot hear you. Can you please bring the microphone closer to you?

Mr STANTON: The deputy presidents I understand in the most recent round of appointments have been given seven-year contracts, which seems to be a reasonable compromise—we would suggest that 10 years would be better. The people who have been filling those roles in recent times have been highly qualified and experienced lawyers. Their decisions are actually quite good. The procedures are actually fairly flexible. Largely they are done by way of paper submissions but they do conduct oral hearings on occasion. There are issues with the costs payable on appeals. Funnily enough, if there is an oral hearing conducted the legal professionals involved do not get paid anything extra for acting up to do the oral part of the hearing, which is strange. As an appellant body it has actually worked reasonably well.

Mr DAVID SHOEBRIDGE: Mr Butcher and Mr Potts, what is your experience, given your case loads?

Mr POTTS: I agree with much of what was said. I think there is a tremendous amount of expertise that exists within the deputy president level in the Workers Compensation Commission. That specialist expertise is important for the scheme. Occasionally you will get some unusual results from arbitrators and it has been a useful ability to be able to access an appeal. It is also relatively accessible compared to going to the New South Wales Court of Appeal. It is substantially more accessible than that. I share what was said about it, I think it is a valuable process.

Mr BUTCHER: I think the decisions are timely.

Mr DAVID SHOEBRIDGE: One question I had relates to whether or not that internal appeal process would apply to what matters currently are being dealt with in the Claims Assessment and Referral Service or should it just be the statutory benefits in the motor accidents scheme that goes to that appeal process or do you retain the current appeal rights from CARS to the District Court? What are your thoughts on that?

Mr STONE: We certainly want to retain the current exemptions from CARS that proceed to the court because in particular in its current format it is in inappropriate that CARS have jurisdiction in relation to children and other people with a legal disability. That requires very much independent judicial supervision—that is historically well grounded. In terms of confining statutory benefits to CARS and putting all the damages claims back into the District Court, I think that would cause the scheme actuary to have conniptions.

Mr DAVID SHOEBRIDGE: That is not what I suggested.

Mr STONE: Sorry.

Mr DAVID SHOEBRIDGE: What I suggested was if the current CARS resolution model is incorporated in a new tribunal, would you incorporate it with having the existing appeal rights to the District Court or would you incorporate it within the scheme to have an internal appeal like you do with statutory benefits?

Mr STONE: Given that you are trying to deal with statutory benefits quickly, there is a good deal to be said that you would create some internal review ahead of going to the District Court, which is time-consuming and slower.

Mr DAVID SHOEBRIDGE: On statutory benefits?

Mr STONE: On statutory benefits, yes.

Mr DAVID SHOEBRIDGE: But what about the modified tortious claims that are currently being dealt with by CARS?

Mr STONE: The rehearing rate of those to the District Court is minuscule.

Mr DAVID SHOEBRIDGE: I am asking you again, would you want to retain the method whereby instead of creating a new internal appeal within the statutory scheme, if the consolidated body deals with the matter like CARS currently deals with the matter, the only appeal mechanism would be to the District Court?

Mr STONE: My concern with the proposal that CARS assessors' awards be capable of internal review by a CARS Court of Appeal so to speak, is that that would be a right given to both parties. The burden of shared suffering that came with the Motor Accidents Compensation Act 1999 and the introduction of the CARS scheme, was two trade-offs for the claimant and one trade-off for the insurer. The two trade-offs for the claimant were the 10 per cent whole person impairment threshold and the regulating of legal costs. Those were the two big changes for the claimant that came with the 1999 Act. The change that came to the insurers was that you get the protection on premiums of the 10 per cent threshold, you get the protection on premiums of regulated legal costs, but you do not get to challenge the CARS assessment. So only the claimant was given the right to challenge it. Now it turns out that claimants barely exercise that right; most of them live with the CARS assessor's result.

The recourse an insurer currently has if they do not like a CARS assessor's result is that they can run an administrative appeal to the Supreme Court, which is a right that you cannot take away as we have discovered across a variety of different efforts to do so. We actually reached the point a couple of years ago where insurers were bringing more administrative appeals, exercising the right they did not have, than claimants were bringing rehearings, exercising the right they did. I would be concerned at the proposal that you create an appeal panel with CARS that insurers would say, "That needs to be opened up to us." You would see a whole lot more claimants being dragged through another level of dispute at the behest of the insurers.

Mr DAVID SHOEBRIDGE: To be clear, I was not putting the proposal; I was testing whether or not that is a good idea. The answer is: If it's not broken then don't fix that part of it.

Mr STONE: That would be my concern about that. Claimants are by and large living with CARS assessors' results. There is the odd rough one but by and large it is delivering relatively well, in part because it is

staffed by some very good people who are external contractors who have now had an awful lot of experience within the system. The CARS system has worked tolerably well, in part because they are an independently minded group. They have been very good at that.

The Hon. DANIEL MOOKHEY: Can I draw you on the differences between the way in which CARS goes about its dispute resolution model and the way the Workers Compensation Commission does? The Workers Compensation Commission has advanced the proposition in its submission that it relies primarily on conciliation and arbitration methods traditionally derived from the industrial relations sphere, whereas CARS does not seem to at all. To what extent are those two compatible and to what extent would any new tribunal have to incorporate either or both methods of dispute resolution or choose between them?

Mr STONE: I think there is a university thesis in the answer to that. I am not sure that that is not some overstatement of the degree to which the Workers Compensation Commission really engages in conciliation versus decision-making.

The Hon. DANIEL MOOKHEY: It is designed to be slightly provocative to draw out these differences.

Mr POTTS: If I could just say that there are more similarities between the two processes than your question gets at.

The Hon. DANIEL MOOKHEY: Can you please address that?

Mr POTTS: Indeed. They both rely on a telephone conference as the first point of call in terms of the dispute resolution and ultimately either an arbitration or an assessment hearing. So there are a lot of similarities between the processes. Admittedly the terminology adopted is different and, indeed, in the Workers Compensation Commission it is a little different in terms of a hearing as opposed to an assessment hearing, but there are some distinct similarities between the processes in essence. You prepare papers, they go to a teleconference, you have an assessment hearing or reconciliation or an arbitration. There are similarities.

The Hon. DANIEL MOOKHEY: Are the scope of arbitral powers that are available at the end of each process as described similar enough for the Committee to say that it is not a massive concern? A lot of people have advanced submissions that it is.

Mr STONE: If I can come back to the conciliation and arbitration distinction. Arbitration is, "I am here. Let each party give me their evidence. I will make a decision and impose it on you. I will arbitrate between the two of you to reach a conclusion."

The Hon. DANIEL MOOKHEY: "Within the scope of my authority as an arbitrator."

Mr STONE: It is decision-making, yes. Conciliation is where I in effect, not as the decision-maker, attempt to bring the two parties together by pointing out their differences and what would be a commonsense solution. The CARS model is very much to trust the parties to try to reach agreement, if they cannot negotiate a hearing between themselves then I will have a hearing and I will determine it. I will turn to my three colleagues and say, "Is there really that much conciliation that goes on at the Workers Compensation Commission or by the time it gets to an arbitrator they are arbitrating?"

Mr STANTON: In my experience of appearing in both jurisdictions there is actually not a great deal of difference. The decision-makers in CARS and the Workers Compensation Commission at the arbitrator level are in a similar situation in that they cannot really mediate in the way a professional meditator would because they cannot speak to the parties individually and they cannot be seen to be prejudging the matter. In my experience, although there might be differences in the terminology used, the processes are actually broadly similar.

Mr DAVID SHOEBRIDGE: To go to a more controversial area, if we assume there is a statutory dispute resolution stream that has two elements in it—motor accidents and workers compensation—but with the statutory benefits, can we all agree that there is benefit in it going to a tribunal or tribunals with experience in the statutory scheme? Do we all agree on that?

Mr STONE: Indeed, and I can go a step further and say that when it is just statutory benefits, the two are very similar and there are no issues of contributory negligence and the causation issues are the same. That is one area where I do not know that we necessarily need a wide degree of separation.

Mr DAVID SHOEBRIDGE: There are two other distinct non-statutory benefits in the two schemes, including what CARS currently delivers—

Mr STONE: Lump sum damages.

Mr DAVID SHOEBRIDGE: —which is lump sum damages through modified common law, and work injury damages, which is a lump sum damage through modified common law in the workers compensation

scheme. If we were to have a statutory scheme with a single tribunal that dealt with the modified common law in motor accidents, would it make sense to have it deal also with the modified common law in work injury damages?

Mr STANTON: I suspect that would not work well. With work injury damages claims, non-employer tortfeasors are often involved. There is also the problem of people being under a legal incapacity. There are good and cogent reasons for damages claims being best done in courts exercising a general jurisdiction. Another example of the sort of practical problems that arise is that there might be some insurers declining indemnity for some of the tortfeasors, so there might have to be cross actions to bring in insurers. In the District Court, everyone can be made cross defendants and everything can be done within the one jurisdiction, effectively, and under one set of proceedings. If we tried to do that in the context of a tribunal it would be very messy—the tribunal dealing would be dealing with certain things and then the matter would be going off to the District Court to deal with indemnity issues or matters dealing with other tortfeasors. I think it would be a step too far.

Mr BUTCHER: Over the years the coincidence of non-employer tortfeasors is increasing. That might be a sign of the changing shape of the labour force. More labour hire companies are involved so there are multiple defendants. In my experience it is becoming more and more common to have multiple tortfeasors.

Mr DAVID SHOEBRIDGE: Obviously for those non-employers defendants, we would have to come up with some very complicated scheme to rope them into a tribunal, which is well beyond what we are discussing today.

Mr BUTCHER: Yes, and currently they are not even required to attend a working injury mediation.

Mr STONE: It is hard enough to get them to the mediation.

Mr DAVID SHOEBRIDGE: Can you explain how that works in the current scheme?

Mr BUTCHER: Currently, we just write to them and say, "Would you like to come along?" More often than not, they will say no. We may have already commenced proceedings in the District Court and they may already be a defendant, but we might have had to commence because we are approaching the limitation period but we have not yet met the requisite 15 per cent personal impairment to bring the employer in, so those proceedings are sort of on hold while we wait for the work on damages to catch up. Maybe we have not, but, either way, the answer is often the same. Sometimes they come along, but, generally speaking, we do not hold our breath.

Mr DAVID SHOEBRIDGE: Do you see benefit in retaining that current mediation process for work injury damages?

Mr STONE: It seems to resolve a reasonable number of cases on the way through.

Mr POTTS: I think the statistics show that it resolves almost three quarters of matters deemed resolved in the Workers Compensations Commission in the work injury damages claims.

Mr BUTCHER: We have trouble resolving psychological claims, so that might bring the statistics down a bit. For the straightforward claims, the statistics would probably be higher. I would not know.

The CHAIR: I might interrupt you there, if I may. It has been an hour and I am conscious that there is only half an hour left. I have some questions, as my colleagues may?

The Hon. TREVOR KHAN: No, I am listening quite contentedly.

The CHAIR: I have heard what you have had to say about SIRA and the commission. I am interested in the injured worker or the customer. I would like to hear your views about what benefits the one, consolidated tribunal—or a tribunal with specialist parts—would bring to the injured workers?

Mr STONE: The vast majority of injured workers, motorists and road users want fair compensation delivered expeditiously. That is what they are after. Preferably, they would like it without the legal costs involved in obtaining it chewing up a large chunk of the benefit but, equally, they do not want to be left alone in the more complex cases to fend with the insurance companies themselves. They want to be treated fairly. They want to be told about their rights. In my experience of dealing with them, I have never had anyone complain to me, "Why do I have to go to CARS; why can't I go to court?" They accept that is the forum, just as we accept that is the forum, and they get on with it. The forum is utilised in a minority of cases. When the parties cannot agree about what ought to happen, we need the dispute resolution process. That invariably means that they are the more complex cases. It is the abnormal, rather than the normal, when something proceeds to dispute resolution. We resolve the vast majority of disputes, usually with some assistance from the legal profession.

The CHAIR: On that point, do you agree or disagree that one of the benefits is that we do not get to that dispute point and that early intervention and an earlier, clearer claims process through one instead of three options would perhaps assist in avoiding that?

Mr STONE: It is usually not the dispute resolution mechanisms that drive disputes; it is the facts, the misinformation, misunderstanding or, sometimes, outright insurer belligerence or claimant issues that drive disputes. It really is not the forum that generates the disputes. The dispute comes first and then we have to say, "What is the most efficient way of dealing with the dispute?" It does come in that order and it comes for a variety of reasons, some of the fault of which lies on the claimant in terms of being non-cooperative and some of which is beyond their control because some things are complex. Why somebody's back needs surgery can sometimes be a complex question when there have been three or four issues with their back over a number of years and then a traumatic incident. What follows can be complex. What they then want is for their medical expenses to be dealt with and they want a fair system that places an emphasis on what their treating doctor has to say, who listens to them, and that does not gear up for hired guns of medical experts to decide what they do and do not need and does not involve someone who is sitting in an ivory tower proselytising about what their medical needs are.

The CHAIR: And part of being fair is being efficient in time and cost, having transparency around decisions and having independence, as you have proselytised.

Mr STONE: Yes, indeed. They want to know that the decision-maker will listen to them. I have never met anybody who is very excited about the idea of making an internal review to the insurer to reconsider the decision.

Mr BUTCHER: The qualities that the Chair just listed mean that the outcome is predictable, or is as predictable as it can be. When it is as predictable as it can be, the advice we can give our clients is going to be more solid and we would be more likely to get less disputes because at least people could understand that either they were not going to succeed or had a good case. If we do not have transparency and independence—that sort of stuff—people might just say, "Let's give it a crack."

Mr POTTS: Later today I will see a 21-year-old student who has spinal injuries that have resulted in surgery. She has received a work capacity decision that says she has no entitlement to weekly compensation. I will explain to her that her right is to request an internal review. We will do that—I do not think we will not get paid for it. We will then request a merit review, which will not provide her with any joy. She is 21, she has had spinal surgery, and she cannot get any weekly compensation. That is the best our system can currently deliver her.

The CHAIR: Presumably she cannot understand what all the reviews are for?

Mr POTTS: She is well educated, she is better than many. People will receive this amount of documentation with a notice about their rights to request an internal review. The system is not delivering fairness to people in that sense. Moving to a tribunal that provides the things that we advocate will help us to achieve that. At least people will get an opportunity to see a real person to explain their case, hopefully to have someone advocate on their behalf, and a clear decision-making process. There is substantial merit in improving the system.

The CHAIR: Mr Stone, you said that NSW Civil and Administrative Tribunal is not an appropriate forum. Can I ask you to comment on that? The basis for that opinion is that it is complex enough and has enough jurisdictions within it?

Mr STONE: You cannot take somebody who has devoted the last 10 years to learning the ins and outs of building disputes and suddenly plonk them down in the middle of a personal injury dispute and say, "Go for it."

The Hon. TREVOR KHAN: You can.

Mr DAVID SHOEBRIDGE: It is been done in the past.

The CHAIR: It may not be optimal or efficient.

Mr STONE: I am not a fan of the likely outcome. There are no doubt skilled people in building disputes who, given time and effort, could learn but it seems silly to waste the specialist expertise that we have and I think it is a much bigger migratory effort to shift it all into the NSW Civil and Adminstrative Tribunal [NCAT] than it would be in some of the other models we talked about.

The CHAIR: Again, all of us lawyers are focused on the tribunals or the various entities. I would like to get back to the worker and ask you to comment on the experience of the worker. You mentioned in your submission about the WorkCover Independent Review Office and accountability and transparency; would you care to comment on the benefit of that in light of the experience of the injured worker, claimant or customer?

Mr STONE: WIRO has been very effective as being, in effect, a government agency critiquing the operation of the workers compensation scheme. It has identified shortcomings and has spoken up. Where we do not have that on the motor accident side you are reliant upon what we, on a volunteer basis, can raise as being the shortcomings in the system or what SIRA volunteers are the shortcomings in the system. There is no equivalent, there is no outsider that looks at the operation of the CTP scheme to illustrate its shortcomings. Where that impacts upon the individual is that unless, to go back to the case study we gave you about the twenty-eighth versus the twenty-ninth day, that is something where WIRO can say, "There has been a problem, who else has been duded by this? How many other decisions have NRMA made ignorant of the law? Can we ask NRMA to go back and review whether there have been any other decisions?"

The other case study we gave was of a truly appalling internal review decision that once we started thumping the tub about it GIO withdrew within minutes. You either rely on SIRA to say, "How did this person get into the position where they made it? What training did they have? How many other decisions do they have and are they reviewed?" and you rely on SIRA to carry out the work as a regulator, which is what they should be doing, or you have someone external who can also be looking at it. The problem is when SIRA are responsible for it it is opaque. We do not know what SIRA have done in either of these case studies. They have given us some general reporting back saying, "We are on to it, we are reviewing it and making sure it is not happening elsewhere". But that does not have the same independence. Where WIRO are valuable in the workers compensation scheme is that they take individual issues for individual workers and say, "Is this a systemic problem that needs to be broadly addressed?" They are more public in their process than SIRA, where there may be reluctance to be more public about something they are running that has not worked.

The CHAIR: From the customer perspective that can be dealt with quickly and efficiently.

Mr STONE: Yes. In both of the case studies we gave you the problems were eminently capable of being sorted out because they were just so hopelessly wrong we were always going to get them sorted out for the individuals concerned. The broader issue the Australian Lawyers Alliance has and the reason the ALA took each of the cases to SIRA and asked would they look at them is not because we necessarily needed SIRA to fix the individual problem, we were always going to get that outcome, because they were so hopelessly wrong. It was how can they be this hopelessly wrong and, "Can you do something to check that there are not a whole lot more people who do not have the benefit of coming to see a lawyer who are not getting the same hopelessly wrong outcome?" That is where somebody independent of the regulator with the capacity to look at it becomes valuable. It is not about delivery of justice in an individual case, although that can sometimes be helpful. It is making sure there are not systemic problems and that these are rogue results rather than institutional errors.

Mr POTTS: WIRO's function in the current system, given the current legislation in workers compensation, is vital. Without that you would not have funding for lawyers to bring cases and you would not have advocates for people and, given where the Workers Compensation Act is at the moment, they play a vital role. To take up Mr Stone's comments, the complaint role that they do is also very useful.

Mr BUTCHER: I would echo that. The injured people probably do not realise how lucky they are with the Independent Legal Assistance and Review Service [ILARS] system. Prior to 2012 their fees were being paid by someone, since 2012 their fees were being paid by someone. They probably do not have a full understanding of who is paying it, how and on what basis. It is explained to them, but the role that the ILARS team and what they call the solutions team interact with each other to help resolve disputes they do understand. I do have clients who call a lot I am sure and raise issues and they are issues that do not warrant a solicitor rocking up to the Workers Compensation Commission to resolve why a payment is late for five days or three days or something was missed. But the solutions team can deal with those things and see them pull out bulletins where they give examples of large payments made through a simple maths calculation where they have helped out. That is where the injured person's experience is with WIRO, with the solutions team.

The CHAIR: You have referred to the education role as a result of those investigations, inquiries or solutions resolutions. Do you see education as part of the role for any tribunal or entity that is contemplated? Or do you see that staying with WIRO?

Mr BUTCHER: I think it works well with WIRO. They see our view and the insurer's view before proceedings are even commenced. If you leave it to a tribunal you are not getting someone to look at it until after everyone has gathered evidence, sat down and taken lengthy statements from injured people, witnesses, sent them off to medico-legal assessments and then you are logging paperwork. That would be the current Workers Compensation Commission model, you lodge the paperwork and off you go. WIRO can get in there sometimes days or hours after I have met the person for the first time. I might submit an application for funding and they realise we think we can help with this one. Sometimes in a conference with the client I realise I can help and I do not need to go and file an application, I can pick up the phone and call someone at WIRO.

Mr DAVID SHOEBRIDGE: WIRO is small and nimble and not hemmed in by a whole lot of procedural legislative restrictions. It seems to be universally supported in the workers compensation scheme. Would that be fair to say?

Mr STONE: No. I think SIRA would take WIRO out behind the shed with an axe in 10 seconds flat.

Mr DAVID SHOEBRIDGE: Apart from SIRA, would you say it is universally accepted as the fair cop on the beat?

Mr BUTCHER: Yes.

Mr STONE: Yes.

Mr STANTON: Yes.

Mr DAVID SHOEBRIDGE: Given that, do you think there is—my personal view—enormous merit in having WIRO undertake the same role in the motor accidents scheme or do you not see some benefit in that?

Mr STONE: We advocated that. I qualify that by saying and repeat what we said in our CTP submission that there are good and hardworking individuals within the motor accident branch of SIRA now where I can pick up the phone and say, "This is a problem," and they get on to it. They have been good at responding to the letters of complaint we have sent in, they have been generally good at dealing with the individual cases, and they are good at having consulted at meetings where we are raising teething problems with the new scheme. That in part depends upon the goodwill and industry of the individuals concerned and in any public service environment I am always keen to see it not rely upon the competency of the individuals concerned.

Mr DAVID SHOEBRIDGE: Good structures, not good people is what we should be aiming for.

Mr STONE: Correct.

Mr DAVID SHOEBRIDGE: And WIRO is a good structure.

Mr STONE: Correct, and I know it is unfair that I always pick on them, but you are only ever one transfer away against that being filled by somebody from the Department of Agriculture who happens to fit the public service criteria and has no prior experience or knowledge or culture. It is very much the view I take towards lifetime care. Lifetime Care is populated by very good people trying to do the best for injured scheme participants, but again, the guidelines, structures and rules are critically important because they will not last the 60-plus years of the lifetime of people in lifetime care. I did want to compliment that the motor accident sphere is being very good but I do not think they have the same structural footing that WIRO has. Similarly, I have not seen the work that the Claims Assist service is providing. They apparently are generating huge numbers of phone calls. I have not had feedback on what those phone calls are actually doing and the productive outcomes.

Ever since the CTP advisory service has existed I have never really understood how they can claim it does not provide legal advice. The moment you tell somebody that yes, you have a motor accident claim or no you do not, you are providing legal advice. The moment they try to describe whether certain types of accidents are motor accidents or not, they are providing legal advice. The moment they say you have a right to claim your loss of earnings, but fail to mention you also have the right to claim your loss of superannuation, they are not only providing legal advice but they are providing negligent legal advice. I have never understood just how they think they keep this fine line between we do not provide legal advice and we do. Again, if that was in an agency outside of the regulator where the regulator is ultimately responsible for premiums and scheme performance, that would probably be a better thing as well.

The Hon. TAYLOR MARTIN: Are there any dispute resolution models in other jurisdictions with features that you would include to be recommended? It is always good to learn from the mistakes of others.

Mr STONE: We probably pull more out of the court system than they do in most other jurisdictions around Australia. We were slower on the NSW Civil and Administrative Tribunal front than a number of States, but in terms of compensation schemes, Queensland still has court access, Victoria still has court access, the Australian Capital Territory still has full court access. We are probably more—at the risk of coining a dreadful word—tribunalised across compensation schemes than most other jurisdictions in this country. Again, if you want international comparative analysis we will find somebody doing a PhD.

Mr DAVID SHOEBRIDGE: Vanuatu's legislation I think is six sections long. One matter of substance as opposed to procedure I think is section 44C of the Workers Compensation Act. I could be wrong, there is AB, BC, BD. It is the pre-injury average weekly earnings, or PIAWE. It has seven subsections and I challenge any of you to give the Committee a summary of what it means.

The Hon. TREVOR KHAN: Mr Shoebridge, this is not on.

The CHAIR: I think it is outside the terms if the inquiry.

Mr DAVID SHOEBRIDGE: No, because many of the disputes that grind their way through work capacity decisions involve, I would suggest, the insane complexity of the definition of pre-injury average weekly earnings, and what should we do about that?

Mr BUTCHER: I think it is insanely complex. I said earlier that we try to stay away from it. Work capacity decisions until recently we were not paid at all to get involved in, and the fees we get now are inadequate, in my view, for the work that is required to go through those insanely complex provisions, to give advice and to represent people where in one stage you do not get paid and in the second stage you get between $1,200 and $1,800. I have a little experience in having to go through PIAWE, as we call it, for that reason.

Mr DAVID SHOEBRIDGE: Mr Potts, you must have grappled with it?

Mr POTTS: I think the Committee is well aware of this problem. One of the recommendations in the Committee's last report was that this be looked at as a matter of urgency and I would agree with that. This is a devilishly complicated section that many lawyers do not understand. I will not say that I understand. I do not. It is ridiculously complicated and it is time that this be changed. I think it is in the process of being changed and I very much hope that is right.

Mr STANTON: It would be a vast improvement to simply abolish those provisions and bring back the equivalent provisions that existed before 2012. It was one of those strange things. No-one was agitating to have PIAWE created, no-one was complaining about the old provisions of how things were done. The old provisions in fact had a lot of inherent flexibility to them that was much easier to deal with in practice. The association's position is that it would be a great improvement to go back to what you had before 2012.

Mr DAVID SHOEBRIDGE: Going back to the Hon. Taylor Martin's proposition, this is perhaps one clear area where we could look around the rest of the jurisdictions in the country and perhaps pick something that is far simpler with a body of interpretation around it already that could replace PIAWE, rather than yet again churning through SIRA and the bureaucrats and coming up with another model. Do you think there is some merit in that? If so, would you be willing to take that on notice?

Mr STONE: As I understand Mr Stanton's answer, you do not need to look at other jurisdictions, you just need to pull out one of the historical law books that I see sitting around this room and look at what we used to have and it worked all right.

The CHAIR: Except for the deficit, I would say.

Mr STONE: I do not think that was the cause of the deficit.

Mr DAVID SHOEBRIDGE: I do not think there is any suggestion that the definition of pre-injury earnings was the reason for the deficit.

The CHAIR: I am not sure the scheme in 2012 was perfect.

Mr DAVID SHOEBRIDGE: Maybe it is back to the future, maybe it is down to Victoria, or off to Tasmania, maybe there is some other solution. Could you take on notice a version, historical or current, that would be a great improvement on that terrible acronym PIAWE?

Mr STONE: Yes.

The CHAIR: Mr Stone, your paper will be distributed to Committee members. The identifying details will be removed. Thank you for providing that to the Committee.

Mr STONE: I think with both our submissions on this tranche of the inquiry and on the motor accidents we have provided submissions with confidential annexures and in each case the confidential annexures have not been published, and we appreciate that. Where people have been referred to in the substantive submissions that are published, we have used acronyms. Thank you for having us.

The CHAIR: The question on notice will be due back to the Committee within 21 days. The secretariat will contact you in relation to that. Thank you for your time today, we are very appreciative of your input and feedback in this process.

(The witnesses withdrew)

(Short adjournment)

NATASHA ALEXANDRA FLORES, Industrial Officer, Work Health and Safety, Workers Compensation, Unions NSW, affirmed and examined

The CHAIR: Welcome to the inquiry. Would you like to make a short opening statement?

Ms FLORES: Yes, thank you. Firstly, I would like to say that Unions NSW fully supports the submissions made by its affiliate unions, many of whom will appear today after me. We provided a fairly brief submission because I say personally that compulsory third party [CTP] is not my area of expertise. However, Unions NSW is concerned at the prospect of consolidating the workers compensation and the CTP dispute resolution processes. We have argued previously that the workers compensation dispute resolution system is in need of a comprehensive review. We are very pleased to see that this is taking place. We need to address the inability or lack of ability to ensure that injured workers are supported and returned to work as soon as is practicable.

We fear that the merging of the two dispute resolution processes and the undertaking of what is a much larger reform process may result in injured workers being worse off as we are concerned that their issues may be lost in an increased bureaucracy which is unresponsive to their needs. We have also argued that whilst the two systems deal with injuries, there are great differences in the nature of the relationships of the injured parties within both systems. Those involved in CTP do not have an ongoing employment relationship and they do not have any form of relationship other than as a result of a road accident. However, the workers compensation system involves quite complex relationships. Parties involved in workers compensation disputes have that employment relationship, which we believe needs to be managed with the utmost care in order to assist the recovery and return to work of the injured worker and to maintain the relationship between the employer and the employee and to ensure the injured worker's industrial and legal rights are maintained throughout the process.

Unfortunately, from our experience injured workers are extremely vulnerable generally and often experience difficulty enforcing their legal rights whilst they are injured and in pain. Given the complex and adversarial nature of the workers compensation system, injured workers are frequently diagnosed with secondary psychological injury as a result of the trauma associated with the workers compensation system and the failure at this stage to manage delicately the important nature of the relationship of the parties. Not only does this lessen the likelihood of the return to work for the injured worker, it also, we believe, diminishes the capacity of the injured worker to remain engaged in a fulfilling and worthwhile manner in society.

By the time the injured worker reaches the workers compensation dispute resolution stage they are often completely isolated, they have limited financial means and they are often well on the way to being completely broken and often beyond repair, which is completely counterproductive to the objectives of the scheme. It is for this reason that we fear the merging of the two systems may further reduce the capacity of the scheme to assist injured workers to recover and return to worthwhile fulfilling employment and social engagement. We do understand there is a strong likelihood that the two systems will be merged to provide for a one-stop shop for personal injury disputes.

In acknowledging the likelihood, we argue that it is imperative that the regulator should play no part in the dispute decision-making process. We feel there is an inherent conflict of interest in this. We also feel that the regulator must focus on the sole task of regulating the industry. Unions NSW continues to argue that the Workers Compensation Commission is the appropriate location for the resolution of workers compensation disputes, given the resources and expertise of the commission. We believe the commission could also act as a dispute resolution body for the CTP scheme, if necessary, in a two-streamed manner. Unions NSW supports the Independent Legal Assistance and Review Service [ILARS] and also supports the very important role played by the Workers Compensation Independent Review Office [WIRO] as the independent body. Time and time again WIRO is able to quickly resolve disputes well before they escalate and sadly often where they should never have occurred in the first place. Unions NSW supports the referral of disputes, where not resolved promptly, to WIRO and anticipates that WIRO will be adequately resourced to continue to undertake this role. Thank you.

The CHAIR: Thank you for your statement.

Mr DAVID SHOEBRIDGE: Ms Flores, thank you for coming. As I understand it, one of your core concerns is that you want to ensure that the limited rights that workers already have in the scheme are not diminished or diluted, is that right?

Ms FLORES: Absolutely.

Mr DAVID SHOEBRIDGE: But of course one of the changes that is hopefully working its way through the system is a consolidation of all dispute resolutions in the Workers Compensation Commission after a previous recommendation of this inquiry?

Ms FLORES: Yes.

Mr DAVID SHOEBRIDGE: I assume you support that direction?

Ms FLORES: We do support that direction and we do have faith and confidence in the Workers Compensation Commission. Obviously the devil is in the detail and we have limited detail at this stage and much is to be decided but, yes, we do have confidence in the Workers Compensation Commission, absolutely, though we do have concerns that workers' capacity to navigate the system may be further diminished if the bureaucracy is expanded. At this stage, quite honestly, we see the results of a system that does not support injured workers and does not get injured workers back to work so we are somewhat sceptical and very concerned.

Mr DAVID SHOEBRIDGE: But the concept of having a single jurisdiction, which is the Workers Compensation Commission, and maybe even hopefully a single access point for all disputes is something that Unions NSW has strongly advocated for for some time?

Ms FLORES: We have, yes, as long as it offers workers a simple and secure form of relief and actual genuine support. We do not see workers being genuinely supported through the system.

Mr DAVID SHOEBRIDGE: On the assumption, with all its limitations, that there is an agreement that there is the independence and the specialised capacity in the Workers Compensation Commission—

Ms FLORES: Yes.

Mr DAVID SHOEBRIDGE: And that benefits your members when they have a workers compensation dispute?

Ms FLORES: Correct.

Mr DAVID SHOEBRIDGE: And, so far as possible, having the Workers Compensation Commission make these decisions and not the State Insurance Regulatory Authority [SIRA] is essential, do you agree with that?

Ms FLORES: Absolutely.

Mr DAVID SHOEBRIDGE: Given that your members can also be road users and given that the current motor accidents scheme has SIRA deciding all the statutory benefits, do you not also see a benefit to your members having access to an independent tribunal when determining motor accidents claims?

Ms FLORES: For some unions in particular, and I know that the Construction, Forestry, Maritime, Mining and Energy Union [CFMEU] certainly has interest in that area because their members also operate machinery and they fall into the two jurisdictions. We are not without hope. We just want to see a system that truly works for both users because we have not seen a workable system for some time for our members.

Mr DAVID SHOEBRIDGE: As I read it, pretty much every union submission and that of Unions NSW is that nobody thinks SIRA should be determining statutory benefits for the motor accidents scheme?

Ms FLORES: That is correct.

Mr DAVID SHOEBRIDGE: If SIRA does not do it, then who?

Ms FLORES: I do not have all the answers. We see WIRO has having the capacity to do more certainly in the workers compensation field and we would like to see that strengthened and we would like to see them further resourced because they get results. We just believe that SIRA, as the regulator, should simply be regulating and that there is a conflict if they are not. Being a decision-making body and also having that role as the regulator, we believe that is a conflict and we have concerns around what we believe to be generally a lack of regulation in the system where we see issues arising that should have been dealt with by SIRA but are not dealt with by SIRA.

Mr DAVID SHOEBRIDGE: Assume for the moment that I fundamentally agree with the prospect that SIRA should not be both the regulator and the decision-maker and we want to put the decision-making that they currently have with some other body. My question is, if not an expanded Workers Compensation Commission with the adequate resources to pick that up, where?

Ms FLORES: I do not have a problem with an expanded workers compensation system having that role so long as the expanded workers compensation system is adequately resourced and has the capacity or the expertise to deal with both of those areas. They do a pretty good job in the workers compensation field, they just

need to have the resources to be able to handle both. I would not like to see the organisation overloaded, under-resourced and without the speciality needed to deal with those matters.

The Hon. DANIEL MOOKHEY: I return to your opening statement where you referred to a substantive difference between motor accident disputes and workers compensation disputes is that workers compensation disputes involve an employment relationship. By way of contrast, a motor accident typically occurs between people who do not know each other beforehand and are unlikely to have much contact with each other afterwards.

Ms FLORES: Yes.

The Hon. DANIEL MOOKHEY: Therefore, will you explain what are firstly the cultural differences that have arisen within the Workers Compensation Commission which address that and therefore either should be retained or should at least be considered seriously should we not proceed with the proposal? Secondly, are you able to explain to what extent is that ability to nuance dispute resolution so that it suits the needs of both the employer and the worker lost if we move towards a more general system or be otherwise retained?

Ms FLORES: Would you repeat your first question?

The Hon. DANIEL MOOKHEY: Can you explain the culture that has arisen in the commission?

Ms FLORES: A lot of the disputes that we see we believe are quite unnecessary and could be resolved quite quickly if SIRA were regulating more effectively, hence our support for WIRO. We often see very quick results through WIRO. The longer a dispute is drawn out the less likely you are to get that worker back to the workplace.

The Hon. DANIEL MOOKHEY: The more likely you are to destroy the trust—

Ms FLORES: To destroy that relationship.

The Hon. DANIEL MOOKHEY: —between the employer and worker?

Ms FLORES: The health of the worker too often declines quite rapidly the longer they are in the system. You may have a worker who begins with a physical injury which is not dealt with—

The Hon. TREVOR KHAN: Develops a psychological component?

Ms FLORES: Yes, develops a psychological element because of the nature of the dispute, the concern that this is their income and this is their livelihood and this is how they keep a roof over their head. Obviously seriously injured people in car accidents will probably have similar concerns. But where that relationship breaks down completely is if you have a worker who has been in one particular workplace, or one particular industry, for a very long period of time, it is often very difficult for them to go beyond that particular workplace or that industry. They often do not have a lot of choices. From where we sit we believe that nurturing that relationship between both parties, the employer and the employee, is crucial in getting that worker back to work and ensuring that that worker is able to maintain some sort of contribution to our society.

We are very tired of the adversarial nature of the system. We are despairing at section 39, and I receive phone calls daily from people who have no way of putting a roof over their head and are completely desperate—suicidal. I have one in my inbox right now that I have to go back to. We are dealing with a crucial part of the lives of people. People identify themselves as teachers, truck drivers, butchers, whatever. When that is destroyed you are destroying a part of that person's identity. So that is where we believe there is quite a sort of nuanced relationship and it is different, if you like, to me getting in my car and having an accident with someone that I do not know.

The Hon. DANIEL MOOKHEY: When you describe specialist knowledge, you are not just describing knowledge of the law?

Ms FLORES: Correct.

The Hon. DANIEL MOOKHEY: You are describing knowledge of a culture and a context?

Ms FLORES: Correct. When the 2012 changes came through the mantra was getting workers back to work. We want to see that. We want people to get back to work where they are able to. We also want people to be supported when they are not able to get back to work. But we know that for many people getting back to work as quickly as possible is the best outcome for their health, psychologically particularly. It can deteriorate very quickly. It does not take very long for a worker's psychological health to deteriorate in this system. I think that has quite a bit to do with that relationship and that concept of your identity as a worker and the work that you undertake and the possible end of that. That is what I would say is particular to workers compensation. When we

talk about relationships, culture and expertise we are talking about not just the legal framework or the legislation but also about having an understanding of the nature of that injury and how important it is to get those parties to work well together and to get that person back to work as quickly as possible in the most dignified way possible.

Mr DAVID SHOEBRIDGE: Realistically in the current system by the time a matter has got to the Workers Compensation Commission it is very rarely a return to work dispute.

Ms FLORES: It is very rarely, yes.

Mr DAVID SHOEBRIDGE: Much of that relationships has broken down.

Ms FLORES: Yes.

Mr DAVID SHOEBRIDGE: And to maintain that relationship you are probably looking at an earlier stage?

Ms FLORES: Correct.

Mr DAVID SHOEBRIDGE: Like straight after the notification in the first few days or weeks of the claim.

Ms FLORES: Yes. But we also are talking about getting the medical treatment that is needed quickly. If an injured worker needs to have a scan, that needs to be done quickly. We are really quite tired of seeing our members questioned, and their doctors questioned, over medical decisions. We also believe that the drawing out often of these decisions has quite a bit to do with that.

Mr DAVID SHOEBRIDGE: To that extent the changes that icare brought in from 1 January where instead of those treatment disputes going off to an independent medical specialist were going another acronym, an internal medical review panel.

Ms FLORES: Yes.

Mr DAVID SHOEBRIDGE: The data that I have seen suggests that those decisions are now taking five days rather than weeks.

Ms FLORES: Yes.

Mr DAVID SHOEBRIDGE: Has that been well received?

Ms FLORES: Personally I do not work with members until desperate people ring our organisation. I am not working daily with members so it is probably a better question for my colleagues who will be after me. I would imagine though it would be a great improvement. We were very supportive of that process being a quick process absolutely. Certainly I would ask my colleagues what they are seeing out there amongst their membership.

Mr DAVID SHOEBRIDGE: If we want a system that focuses on maintaining relationships and getting people back to work that is where the really important work is being done.

Ms FLORES: Absolutely.

Mr DAVID SHOEBRIDGE: It is not so much down in the dispute resolution.

Ms FLORES: That is correct, although the nastier and the more bureaucratic the system is it does not help things. We are not just talking about getting that worker maybe back to the workplace that they came from. That is not always possible and it is often not the best decision for the worker or the employer, but we are talking about getting that person back to meaningful work. That particular relationship may have broken down but I do not want to see workers broken to the point of not being able to ever work again. There will be some physical injuries where that will be the case. It saddens me to see workers who have been broken psychologically as well to the point where they cannot participate in society really in any capacity. We are not only talking about work but also about living any sort of meaningful life. Mr Mookhey, you had a second question?

The Hon. DANIEL MOOKHEY: I think you have covered it.

The CHAIR: Thank you for providing the flowchart, which is helpful in terms of simplicity and efficiency. I think that goes to the heart of what we are talking about.

Ms FLORES: Absolutely.

The CHAIR: Returning to the injured worker or let us call them the customer in this case.

Ms FLORES: Yes.

The CHAIR: The person who is at the centre of this.

Ms FLORES: I think we said claimant.

The CHAIR: One of your contemporaries has submitted that it is about putting an injured worker at the centre of this. I know that you have not necessarily endorsed the one tribunal approach but if there were to be one tribunal, taking away the complexity, what would be the benefits of that?

Ms FLORES: If it takes away the complexity. We absolutely support any removal of complexity. The adversarial nature of the system is probably one of our greatest concerns and the time that is taken to do simple things. The failure of insurers sometimes to understand basic legislative requirements and then the failure of the Securities Industry Regulatory Authority to push, slowing everything down unnecessarily. Simple and efficient we absolutely support.

The CHAIR: In that vein, are you able to comment on the benefits of independence of the Worker Compensation Independent Review Office?

Ms FLORES: We have found the WIRO to be extremely helpful. We have had very good feedback from members who have been assisted by the WIRO. We have found that they often resolve matters quickly—not always but very often. When we are unable to and the injured worker is also unable to, we have found that often a simple phone call from the WIRO will resolve a matter. We love the WIRO. We just want them to continue to be adequately resourced to do what they do.

The CHAIR: In order to get the outcome for the injured worker or customer?

Ms FLORES: Correct.

Mr DAVID SHOEBRIDGE: If you or one of your members were injured in a motor accident, do you think having the WIRO on the beat would be useful?

Ms FLORES: Provided the WIRO has the resources, absolutely. We would not like to see the WIRO struggling to undertake its tasks or its role. If the WIRO had to engage in another area we would hope that the WIRO would be adequately resourced to do that but we would not have a problem with that.

Mr DAVID SHOEBRIDGE: Do you have any observations about pre-injury average weekly earnings [PIAWE]?

Ms FLORES: Fortunately, I am extremely fortunate not to have very much to do with PIAWE. My colleague, Sherri Hayward, I am sure will have quite a bit to say about and to add to the PIAWE situation, given that she is probably the only person in New South Wales who really understands it. It is so complex; it needs to be simplified. In my own dealings I have not had anything to do with PIAWE so I really cannot talk with any—

Mr DAVID SHOEBRIDGE: It is like some sort of Mary Shelley figure stalking the scheme, is it not?

Ms FLORES: I hear the stories.

Mr DAVID SHOEBRIDGE: No-one wants to go near it. Do not open that door.

The Hon. DANIEL MOOKHEY: Have you or anyone else in Unions NSW or the organisations with which you have relationships maintained data and information on what his happening to people who have lost entitlements under section 39 beyond the point of the system?

Ms FLORES: We have a few contacts, people who do speak with us. They are struggling. They are in the Centrelink vortex now. That is a whole other world and it does not seem to be a very pleasant world for them. We do want to do some investigating in that. We were told that there would be a seamless transition for section 39 workers who were entitled to some sort of entitlement.

The Hon. DANIEL MOOKHEY: Who told you that?

Ms FLORES: We met with SIRA, we met with icare, we met with the Minister. The Minister appeared to be concerned that there would be a breakdown, if you like, of the systems particularly given the time of year this was happening—this was at Christmas and we were concerned that, first, it is a pretty horrible time to cut people off from their income and, secondly, everyone is on holidays. That was a concern but I do not believe that that was an issue. I think the issue is that there are still people trying to get some sort of income. As I have said, I have someone who has gone to their local member today and has been passed onto me. I do not have any answers for that person. That person cannot afford to keep a roof over their head.

Mr DAVID SHOEBRIDGE: Given how awful section 39 is for the individual, is there any data or additional material that you would like to give the Committee on notice about section 39?

Ms FLORES: I will come back to the Committee definitely with a particular concern around section 39 and the possibility of transitioning to a disability pension. I have questions. I am working with a particular women who made an application last November and is still waiting. She is on Newstart at the moment but the last I heard that was going to end. She is in her sixties and she cannot work. I have questions on that. I will certainly get back to the Committee with some questions and some information on her experience. That would be helpful.

The CHAIR: Thank you for appearing before the Committee today. The Committee has resolved for witnesses to have 21 days to answer any questions taken on notice.

(The witness withdrew)

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

ALAN MANSFIELD, Workers Compensation Officer, Australian Manufacturing Workers' Union, affirmed and examined

RITA MALLIA, State President, Construction, Forestry, Maritime, Mining and Energy Union (NSW Branch), affirmed and examined

SHERRI HAYWARD, Legal/Industrial Officer, Construction, Forestry, Maritime, Mining and Energy Union (NSW Branch), affirmed and examined

ROBERT TONKLI, Assistant Secretary, Shop, Distributive and Allied Employees' Association NSW, sworn and examined

MONICA ROSE, Industrial Officer and Women's Officer, Shop, Distributive and Allied Employees' Association NSW, sworn and examined

The CHAIR: I thank and welcome our next witnesses. Do any of the witnesses have an opening statement they would like to make? I ask witnesses to keep their opening statements under 10 minutes if possible.

Mr HENRY: First, we thank you for the opportunity to be here today. We note that the scope of this inquiry was fairly limited and narrow in relation to the feasibility of consolidating the personal injury tribunal with the compensation of third parties and workers compensation. We went back and had a look at the submissions that were provided as part of the first review of workers compensation by this Committee and noted that the matter was addressed only by a minority in the first review, and of that minority only a few suggested a unified approach would be beneficial. What we struggled with in providing a submission was that those few who suggested that it would be beneficial failed to articulate or provide evidence about what benefit would be derived from a single, unified jurisdiction. Workers are already put at a disadvantage under the current system for workers compensation. Our concern is that any merge with an unrelated system is likely to do those workers further harm.

We put forward that we think it is essential that we fix the current system before there is any further consideration about a potential unification or merger of jurisdictions. We note that Minister Dominello made an announcement on 4 May in relation to dispute resolution. However, to date, there is still a lack of detail in relation to what is proposed to be done. There has been a failure to consult with injured workers and their representatives and, to date, no changes have been implemented. We put forward to the Committee that this process needs to be implemented and given a chance to work out the bugs before we consider any further drastic reform. We would also like to draw to the Committee's attention that whilst this was a recommendation of the first review into workers compensation put forward by a few of a minority, in our view there were other, more pressing initiatives of the first review that, to date, have not been actioned or implemented and which the Government supported.

Some examples of some of those things are recommendation 4 in relation to the completion of the Parkes review, recommendation 5 in relation to State Insurance Regulatory Authority [SIRA] developing further information around pre-approvals for treatment of injured workers and recommendation 10 in relation to a easier way to determine pre-injury average weekly earnings [PIAWE]. Our view is that these areas should be the focus of the work that is now being done and that these areas have been agreed to and supported by the Government following the recommendations of the Committee. Until such time as the barriers that currently face the workers compensation jurisdiction have been ironed out and resolved, there should be no further consideration in relation to any merger or unification with another jurisdiction.

Ms MALLIA: Along similar lines as the Australian Manufacturing Workers' Union [AMWU], we also want to raise some broader concerns with the scheme as we have decision-makers in the room. From our perspective, in December 2017, 4,500 people lost access to weekly benefits under this system because—

The Hon. DANIEL MOOKHEY: Sorry, how many was that?

Ms MALLIA: More than 4,500 people lost access to weekly benefits due to the scheme deeming them "not injured enough" to receive ongoing support. From our perspective and our members' perspective, that is 4,500 families that were abandoned by this Government. Injured workers are losing much-needed access to medical expenses. They have been knocked off the system because the insurance companies believe they can work in industries that they have got no experience in. The system continues to be complex, confusing and unworkable. None of the bandaid solutions that the Government has come up with at the moment can fix the fundamental issues of injustice that appear. This system is unjust, unfair, and unnecessarily punishes injured workers for being injured. Fixing the dispute resolution system is, for us, yet another example of a bandaid solution

to a bigger problem. We can create a wonderful dispute resolution system, but until we address and fix the fundamental problems in our scheme that create the disputes in the first place, I think we are just ignoring the more important issues, as Mr Henry already alluded to.

We need to do away with work capacity decisions. We need to make it more difficult for employers to dismiss injured workers. We need to prohibit employers from asking workers if they have had a previous workers compensation claim before they even consider hiring them. We need insurers to use rehabilitation providers not as tools to take work capacity decisions to take rights away but to ensure that workers are retrained and rehabilitated. As alluded to, the PIAWE definition is a joke and I do not know how you expect any injured worker to come to grips with what it is that these insurers are entitled to pay them. It seems to us that fixing some of these issues will in fact reduce the amount of disputation in the system and save the scheme money.

I know we are here to discuss dispute resolution. Like the metalworkers and other unions we do have some concerns about a merger between the compulsory third party [CTP] and workers compensation system. We have members who are affected by both because many of our members have CTP claims arising from injuries from registered plant and vehicles. However, we think the two schemes are fundamentally different on the premises on which they are based. Workers compensation is about the continuing relationship between employers and employees and the consequences of workplace injury. CTP is more of an arms-length, let us get the claim sorted, open the claim, deal with the issues, close the claim, and it has a different sort of mentality. We do not want that CTP sentiment to infiltrate workers compensation.

The workers compensation scheme already suffers from an abandonment of worker mentality. Workers feel abandoned by their employers, their insurers and the State, quite frankly, if you are seriously injured. We do not want to see workers isolated even more than they already have been. It is, as we understand it, a favoured proposition to try and merge the two schemes or to consolidate them in some fashion and we are not about not having savings to the scheme that could otherwise put money in workers' pockets. If that is to be the case, our approach would be that the Workers Compensation Commission is the place where all of this should reside. We do not think the regulator in SIRA should go anywhere near it and have any role in terms of dispute resolution. We are surprised and concerned by the extent to which the regulator has powers in respect of CTP.

If there is to be a one-stop shop, if that is the approach, we want it to be independent, simple and accessible. People have to have access to legal advice, they have to have access to proper representation and we think the Workers Compensation Commission is best placed to provide that sort of structure, even with its current limitation. We commend our submission to the inquiry. We have concerns, like everyone here, that this is the back end trying to deal with issues when there are many more significant issues facing injured workers. I do not know if you have the benefit of hearing injured workers at this inquiry. I know we have had them come to these inquiries in the past. If you have had to listen to a man who has been the breadwinner of the family whose job has been taken away because they have a bad neck, back and shoulder and cannot provide for their family—they find themselves five years hence off the compo system trying to make their way by living off a measly bit of superannuation and a Newstart Allowance—it is pretty horrendous.

Like Mr Henry and the Australian Manufacturing Workers' Union, we think there are higher priorities that we could be more constructively spending our time on. If there has to be a merger, we say the Workers Compensation Commission is the model you should be adopting and not the CTP one.

Ms ROSE: By way of background, I am an industrial officer with the Shop, Distributive and Allied Employees' Association, or SDA, and we represent the interests of more 70,000 retail, fast food, warehouse, distribution and pharmaceutical employees in New South Wales. In relation to workers compensation, the SDA's industrial officers are largely involved in the early stages advising injured workers about the claims process and assisting to liaise with employer and insurer regarding claim payments, rights in their medical appointments, return to work and suitable duties. When a claim is declined or a workers compensation dispute becomes more complicated we often refer those matters to a solicitor for further assistance.

We have developed our submissions in consultation with solicitors that we refer our members to. The SDA does not support the proposal for a consolidated personal injury tribunal. The reason for this is similar to what has been expressed. Workers compensation disputes are more complex in nature and involve the employer and employee relationship, which unlike CTP is often personal in nature and ongoing. These disputes are more focused on the injured worker rather than the claim, unlike CTP. We also submit there should be development of a more comprehensive workers commission expanding to encompass all types of disputes, including weekly compensation, work capacity decisions, whole person impairment, PIAWE and return to work disputes.

A more comprehensive commission we believe is more likely to encourage better engagement at the early stages of a dispute. The SDA supports submissions made by Unions NSW and by our colleagues here as well. Unions NSW's submission comprehensively outlines what an appropriate dispute resolution process would

look like. We submit that the Independent Legal Assistance and Review Service [ILARS] funding should be increased to sufficiently compensate lawyers for the work performed on behalf of injured workers. It is worth noting that the rates have not increased since 2010. The funding should be reviewed to ensure it sufficiently covers necessary costs, for example, the cost of obtaining medical evidence, which is quite onerous on injured workers.

Should the consolidated tribunal be implemented, it is the SDA's view that workers compensation matters are heard by such a tribunal, which we recommend should be the Workers Compensation Commission, that those matters must be heard by experts in workers compensation legislation. As stated previously, it is a more complex area of law and as such an expert decision-maker is necessary to make sure those matters are fairly and adequately heard.

The Hon. LYNDA VOLTZ: With regard to the PIAWE, we had the Law Society and legal representatives saying that they were not taking on cases because it is so complex and the costs that they would be awarded is such an insignificant amount. Given how many members you have had go before the tribunals, what is your experience in this area in terms of representation?

Ms HAYWARD: In terms of representation generally?

The Hon. LYNDA VOLTZ: Yes, whether they get assistance.

Ms HAYWARD: With regard to PIAWE the CFMEU handles that for our membership. It is an area that our affiliated lawyers struggle with. They often refer other cases they have back to us in order to look at that. Our members are lucky enough that we have become pretty good experts in that area, having done a lot of research and work into negotiating with insurers about how best to handle a PIAWE decision. That does not mean that every injured worker in the system has that luck. There are a lot of workers who do not come to the union and are pretty much on their own. I do not know many lawyers that do work capacity decisions alone generally, let alone doing PIAWE decisions.

The Hon. LYNDA VOLTZ: That was the evidence that the lawyers were presenting to us, that it was far too complex for them to handle within the fees they were receiving.

Mr DAVID SHOEBRIDGE: Ms Hayward, you may be the one person in New South Wales who has a handle on PIAWE. Almost no lawyers have the time or capacity to come to grips with it.

Ms MALLIA: Sadly.

Mr DAVID SHOEBRIDGE: Having come to grips with it, would you want to reform it?

Ms HAYWARD: Absolutely. I have made submissions on so many occasions.

The Hon. TREVOR KHAN: Including to us?

Ms HAYWARD: Exactly. In at least six or seven submissions I have discussed the necessity to reform PIAWE. It is the most fundamental aspect of a workers compensation claim. If you do not get the PIAWE right that will upset the rest of your relationship. It is the first dispute in the system because it is the only thing that happens in the first seven days. It needs to be reformed. We have had a whole inquiry into whether it should be reformed. Professor Tania Sourdin released a report which said it should be reformed. I sat in a workshop where representatives from all walks of life, insurers, employers, unions, government, we all agreed it needs to be simplified. We all agreed on what it should look like and yet we still do not have a simple definition.

Mr DAVID SHOEBRIDGE: "I think it should be reformed", is a good summary and should be recommendation one?

Ms HAYWARD: Absolutely, as a priority.

The Hon. TREVOR KHAN: In terms of that workshop that you referred to, did any written material come out of it?

Ms HAYWARD: There was a report. Professor Tania Sourdin released a report that is available.

The Hon. TREVOR KHAN: That came out of the workshop?

Ms HAYWARD: Absolutely. She discussed the discussions at the workshop, the ideas and she made it clear that we had consensus. I understand that report is available on the SIRA website. It is difficult to find, but it is there.

The Hon. TREVOR KHAN: The Workers Compensation Independent Review Office [WIRO] might assist us with a copy.

Ms HAYWARD: I can assist you with it.

The CHAIR: If you can take it on notice to provide a copy to the Committee.

Mr DAVID SHOEBRIDGE: Employers agree, insurers agree, unions agree, any injured worker who has had to deal with it agrees, lawyers agree. It seems to me that SIRA is the problem here in getting the reform done, or is there some other obstacle? I am not putting you on the spot, Ms Hayward.

Ms MALLIA: SIRA and political will to get it done. At the end of the day the problem is pretty clear, the solution has been proffered, we need Parliament to do its job.

Ms HAYWARD: The issue is it has to be legislative change. The regulation that was released will not fix the problems, and no matter what regulation you come up with it needs to be legislative change, and whether or not anybody is willing to write concise legislation in this area seems to be the issue here. I know that Tania Sourdin raised that as an issue with us at the workshop, the will for legislative change.

Mr DAVID SHOEBRIDGE: If you have a form of words that you would recommend please provide it on notice.

The Hon. TREVOR KHAN: They are not legislative drafters and I do not think they hold themselves out to be.

Ms MALLIA: No, we do not. That is not our job.

Mr DAVID SHOEBRIDGE: The elements of consensus were clearly identified.

The Hon. LYNDA VOLTZ: It will possibly come to us in the report.

The Hon. TREVOR KHAN: The form of words is a bit hard.

The Hon. LYNDA VOLTZ: Getting back to the tribunals, you have put forward a view. Again, the legal representatives were quite clear on having an independent judicial tribunal for both CTP and workers compensation. Now that the Workers Compensation Commission is back in the frame, those changes have been made, that seems to be working much better. Their view was that even though CTP and workers compensation are quite different in terms of the relationship between employers and employees, the fundamental approaches to them are quite similar and that one tribunal that was judicial and independent would possibly be appropriate for that kind of process. I note that you were concerned about having them rolled into one and if SIRA was the decision-maker on dispute resolutions, but if it was independent and judicial would you feel more comfortable with that model?

Mr HENRY: Certainly in relation to independence, there is no question that needs to be part of it. The problem that we face in answering the question is that to date no-one has put forward any evidence to support the claim that there would be some benefit for injured workers by merging the two jurisdictions. It makes it very difficult for us then to put forward a proposition, and we are not akin to putting forward propositions without evidence to support them. If as a result of what the Committee is looking at some evidence is going to be put forward that demonstrates that injured workers will benefit from such a scheme, we are open to having a look at it. The problem we face is that at this point in time that evidence has not been tabled. As I said in my introductory remarks, to date all we are going by is a small minority who said, "We think it would be a good idea."

Mr DAVID SHOEBRIDGE: Do we all agree that SIRA as the regulator should not have a role in determining disputes in either workers compensation or CTP?

Ms MALLIA: My view is the regulator should be there to administer the system and ensure that all the different players are doing what they are required to do under whatever bits of legislation that applies to them. I have been doing this for 22 years and I think every time we have had this argument that we do need an independent, judicial, resourced jurisdiction where if in the event there is a dispute that is intractable, you need to go somewhere that has some credibility and it has some skill so those disputes can be dealt with, they can be dealt with consistently, you can have precedent. People, especially injured workers, feel like even if they do not win their case at the end of the day they have a respectful jurisdiction that has heard their case. You do not know how important that is psychologically to feel that justice has been done, even if you do not get 100 per cent of what it is you are asking for at the end of the day. You do not get that by having some administrative process with a whole bunch of bureaucrats—no disrespect to them—making these decisions in a very willy-nilly, unaccountable sort of way. Whatever the tribunal is, or two tribunals, we have always at the CFMEU argued for independent, judicial, a proper court, or proper court-like tribunal like the commission to make sure that there is fairness on all sides.

The Hon. TREVOR KHAN: I think every litigant would agree with you.

Mr DAVID SHOEBRIDGE: I will put a proposition from the Insurance Council of Australia to you and I think we may find agreement on it. I will let you answer it. In terms of a dispute resolution process they talk about the following principles and attributes:

> Perceptions of Fairness—Research highlights that people generally have a better recovery if they feel they have been treated fairly. A perception of fairness is promoted by having an open and transparent system which sits separately from the original decision makers or scheme stakeholders;

Are we having an outbreak of agreement?

Ms MALLIA: I will not always say that I agree with the Insurance Council of Australia, but I have to say I would probably agree with that, yes. It seems like not a bad proposal.

Mr DAVID SHOEBRIDGE: I will put it to the other unions.

Mr HENRY: The principle is sound.

Ms ROSE: I do not have anything further to say except that there also should be the effect of justice as well.

The Hon. DANIEL MOOKHEY: Is the tenor of your collective position that this might be to the advantage of people who are in the CTP scheme but it is not at all clear how it is going to advantage people in the workers compensation scheme?

Mr HENRY: That is the proposition that we have put forward. No evidence has been provided or tabled that shows us how this benefits injured workers.

The Hon. DANIEL MOOKHEY: The corollary to that position is the extent to which the two are merged, the risk is that the dispute resolution system, as faulty as it currently is, could be made worse if it imports features of the CTP dispute resolution scheme. Is that the gist of your concern?

Ms HAYWARD: Correct.

The Hon. DANIEL MOOKHEY: Are there particular features of the CTP dispute resolution system that you are most worried about cross-pollinating into workers compensation to the detriment of workers compensation? That might be more for the CFMEU.

Ms MALLIA: I think it is more that they are two different systems. You have a system that has to manage an ongoing relationship that at least will last for five years—it used to be lifetime—with one that is more about someone has had a crash, as I understand it they have to deal with getting medical expenses, maybe access to a little bit of compensation, case closed, end of story. They are not necessarily apples for apples. But if you had to bring them together because that seemed like a good idea, it should be based on the sorts of principles that Mr Henry has outlined and we have spoken about having that sort of proper tribunal.

The Hon. TREVOR KHAN: Let us suppose that we agree to all those propositions that Mr Henry advances. By the time you have a dispute that is going before a tribunal in the workers compensation environment, would you agree that a lot of the core ideas of what is sought to be done with workers compensation, that is getting the worker back to work and assisting the worker in a variety of ways, have essentially broken down? It is an intractable dispute by the time you get before the tribunal? I can see some nods, some agreement, some not.

Ms HAYWARD: I think you have the added difficulty about the amount of merit review matters and how they are handled by the system. We know in workers compensation worker's capacity decisions and merit review matters how that operates currently. We are not quite sure how that will operate with the new amendments that have been announced. Then you look at the CTP system and you have got a tranche of merit review matters, which in our submission should not be the purview of the regulator at all. But how those are dealt with is not clear to us because everything is done in house. It is difficult to say that disputes are dealt with in a similar manner once you have a dispute, when there is no transparency around how these merit review matters and CTP are done. Just looking at the way the dispute resolution service is set up under CTP, it is not clear to me that anything is transparent over there or that it needs to be. We cannot say definitively that a dispute in those is going to reach the same destination or have the same principles or processes because we just do not know what is happening over there.

Mr DAVID SHOEBRIDGE: But we all agree, do we not, that merit reviews in the workers compensation scheme have been a non-transparent, non-independent disaster and they should be brought into the Workers Compensation Commission?

Ms HAYWARD: Absolutely, yes.

Mr DAVID SHOEBRIDGE: Assuming that, surely we can all agree that having a similar model in CTP is almost certainly going to produce the same disaster and we should not be doing that?

Ms HAYWARD: Presumably, depending on what this new system looks like.

Mr DAVID SHOEBRIDGE: Is that not part of what this Committee is trying to grapple with—whether or not we continue down the path of having a non-transparent bureaucratic, statutory dispute resolution model in CTP or do we say, "Given the disaster that produced in workers compensation, we should put that to an independent tribunal", and look around for an independent tribunal that best fits it without having to come up with a whole new model of the Workers Compensation Commission and that is why the proposed merger is happening. Given that, do you perhaps see some merit in it? I do not mean to put you on the spot, Ms Hayward.

Ms MALLIA: I think that is what our submission basically says.

Mr MANSFIELD: The thought that comes to mind where Mr Henry finished is that there is the undescribed, unarticulated work announced in the beginning of May, which starts at the beginning that someone has a grievance or a problem and you have appropriately qualified people at that first contact point.

Mr DAVID SHOEBRIDGE: Just stopping you there, Mr Mansfield. That is almost certainly not the tribunal. That is going to be icare, the union or WIRO at that point.

Mr MANSFIELD: But it flows to there and I was thinking of the issue that not all matters are intractable when it gets to the Workers Compensation Commission and probably the simplest ones that are not intractable are expedited payment disputes and injury management disputes. They can have that illusion but that problem-solving process is about mediation and understanding what is the evidence and is it possible to have suitable duties of work and do we need a doctor, rehabilitation provider or some other expert to gather some evidence on behalf of the Workers Compensation Commission to get someone back to work?

That is where I have a concern. We talk about the tribunal and then we forget about what occurs. I use what you said about the Insurance Council. The thing left out there is that you have first contact officers. It is my experience—and I can imagine what happens to a worker—that they get frankly lied to about the legislation. They are told that they not entitled to a report; they are told they have to do these things. When I ring them up I get those answers and I say, "That is not how the legislation is constructed."

Mr DAVID SHOEBRIDGE: First of all, you hope that SIRA is doing its job as a regulator and is ensuring the scheme agents are not doing that but if scheme agents, icare or the self-insurers are doing that, is that not the role of WIRO or an ombudsman's role at that point, as opposed to coming up with a whole dispute resolution system to adopt that? You are quite right that there are all these nuances in the workers compensation scheme and horses for courses.

Mr MANSFIELD: I would say to you that SIRA is one of those people who provides incorrect answers on first contact.

Mr DAVID SHOEBRIDGE: I was not proffering SIRA as a solution.

Ms MALLIA: We are very cynical about workers compensation reform. We have been doing this for such a long time. We saw the abolition of the Workers Compensation Court. That seemed to work okay for our members. You have the establishment of the Workers Compensation Commission. It has gone through all sorts of iterations and then there are all these other add-ons trying to keep people out of court or out of jurisdictions where they can actually have their matters resolved and resolved professionally and properly.

If the Government or this inquiry was to suggest that we would have a tribunal that did look more like a proper tribunal, whether it was like the Industrial Relations Commission or whatever it is, then we probably would have much more comfort that people, whether they are CTP claimants—some of them are our members; I have just said that—all workers in a workers compensation situation are going to be treated fairly and that the legislation itself is fair. There is no point having a great dispute resolution process if the result of the legislation is they have no rights to enforce. Putting that aside, there is this element that has been missing where disputes cannot be properly dealt with. We are left with a whole bunch of other people trying to work out what peoples' rights are. Some know what those rights are themselves; some do not and there would probably be some comfort for us if this inquiry were to resolve that there was a tribunal of some gravitas at the end of the day.

Mr DAVID SHOEBRIDGE: Judicial membership and oversight?

Ms MALLIA: Exactly.

The Hon. DANIEL MOOKHEY: But, Mr Mansfield, your point seems to be that the whole system would be better if everybody knew what they were doing at all points in the process?

Mr MANSFIELD: That would be nice.

The Hon. DANIEL MOOKHEY: Mr Shoebridge's point is that the earlier you have people who know what they are doing the less likely you are to fall back on a dispute resolution system.

Mr MANSFIELD: I will use what Mr Khan raised, that what has been lost in the Workers Compensation Commission—and I think I have got the title correct—is dispute resolution officers. I think Ms Mallia's experience is longer than mine but they were the officers who dealt with expedited matters and had a very practical mediation approach to matters and could make the decisions. They are now lost. In the limited experience we have, we are finding that we get a very black and white approach in the Workers Compensation Commission when we go for a simple injury management dispute.

Mr DAVID SHOEBRIDGE: This landscape is constantly changing but from 1 January icare put in place a different way of resolving particularly medical disputes and instead of an injured worker who is in dispute with the insurer about a particular course of treatment having to go off to get an independent medical specialist, the insurer gets an IMS and three months later deciding whether or not their surgery should happen, icare put in place an internal medical review scheme that has a kind of five-day turnaround that does not go to an IMS. The reports that I have seen suggests that that is positive. What, if any, response do you have on the ground?

Ms HAYWARD: It works where we are talking about Employers Mutual and I have to say that there is less—and I do not want to give them credit—but there is less disputation with Employers Mutual than there is with GIO or TMF insurers. I know they are not icare's area but this medical panel has worked to the benefit of some of our members. I think it is a step forward. When we are dealing with EML it is much easier than when we are dealing with GIO.

The Hon. TREVOR KHAN: I am right that EML is doing the vast bulk?

Ms HAYWARD: It is. Our members tend to be on the system long term so we do have a bulk of them with GIO. We also have a couple of employers who are part of the exemption list and who are still with Allianz. If we are dealing with GIO and Allianz it is difficult. TMF is especially difficult. I know that is not icare but it needs to be said and with Employers Mutual it is working.

Mr DAVID SHOEBRIDGE: I have a question for the Shop, Distributive and Allied Employees' Association because some of the big retailers have their own separate insurance. Have they adopted any of these changes and if not do you think the Committee should formally recommend that they be required to?

Ms ROSE: I might have to take that question on notice.

Mr TONKLI: We do have a dedicated workers compensation officer who was not able to be here today so we will have to take that question on notice.

The Hon. DANIEL MOOKHEY: Mr Shoebridge and I have a similar line of questioning. In respect to the self-insurers and their dispute resolution procedure, given that your association has slightly disproportionate levels of exposure to the self-insurers, are you able to tell us a little more about how they are going?

Mr TONKLI: I will take that question on notice also.

Mr DAVID SHOEBRIDGE: I return to dealing with CTP. I assume for the moment that none of you think that SIRA should have a dispute resolution role in CTP, is that right?

Mr HENRY: Correct.

Mr DAVID SHOEBRIDGE: If we do not recommend to send those disputes to the one tribunal that has a record of independence and broad stakeholder acceptance, which is the Workers Compensation Commission, where do we send them?

Ms HAYWARD: I think our submissions are clear on this. As discussed, our relationships are different. That is why we do not think they should be moved, but it should go to a tribunal like the Workers Compensation Commission. If we are talking about it going somewhere it should go somewhere where it is fair, independent, accessible and simple.

Mr DAVID SHOEBRIDGE: Assuming we all agree, it has to land somewhere. If not the Workers Compensation Commission—and that it is the challenge—or an expanded version of it, then where?

Ms HAYWARD: You may have to create another body. I do not see that it can go somewhere else. I am a little bit concerned. There has been some discussion about it going to the NSW Civil and Administrative Tribunal [NCAT]. I do not believe NCAT is an appropriate tribunal for that. The appeal mechanisms within NCAT mean that you are going to lose your personal injury experts when you go to the next appeal level.

Mr DAVID SHOEBRIDGE: Not NCAT?

Ms HAYWARD: Not NCAT. That is why we have looked at it and we have said a workers compensation commission, or a similar tribunal, that can offer the same expertise, the same access, and the same independence. That is exactly where it needs to be. If that means creating a new tribunal, then so be it, but it should not go to NCAT.

Mr DAVID SHOEBRIDGE: Can I suggest that one of the potential benefits—you are asking what the potential benefits are of bringing the two together—would be to have greater critical mass. Then you would be more likely to be able to maintain a presence in other parts of regional Australia that currently are not reached by workers compensation. Do you see that as a potential benefit?

Ms MALLIA: It might well be that some consolidation means that it is a better use of the buck, basically. It is really just what the system looks like.

Mr DAVID SHOEBRIDGE: But also an expanded geographical footprint.

The Hon. DANIEL MOOKHEY: And that is assuming, of course, but the money is not lost.

Ms MALLIA: Yes, it may well be that. Rather than duplicating a jurisdiction, actually amplifying one that already exists.

The Hon. TREVOR KHAN: The evidence we received earlier today was that essentially under compulsory third party there is a footprint in 30-odd locations across the State for dispute resolution services whereas workers compensation has 20.

Mr DAVID SHOEBRIDGE: Yes.

Ms HAYWARD: But that is the regulator who is doing the majority of the dispute resolution and CTP.

Mr DAVID SHOEBRIDGE: That is the Claims Assessment and Resolution Service model.

Ms HAYWARD: That is the CARS, which is kind of the Dispute Resolution Services [DRS], which is the regulator.

The Hon. TREVOR KHAN: But it is simply if it were possible to replicate the footprint. We are not suggesting who will do it or the model, but it will be to ensure that services are provided in as wide a range of locations as is possible across the State.

Ms HAYWARD: I think that is good, and I think you could look at the Anti-Discrimination Board for an example of that. They seem to go into regional areas. It might be worth looking at their processes in order to determine whether it is something we could use in personal injury.

Mr DAVID SHOEBRIDGE: Often tribunals use NCAT facilities while not being NCAT. But if we were to have a recommendation for consolidation, one of the goals should be to increase the geographical footprint.

Ms HAYWARD: Yes.

Ms MALLIA: You want to make this accessible to the people who need to get access to it as much as you possibly can.

The Hon. DANIEL MOOKHEY: I address this question to Ms Mallia and the panel: In your opening statement you referred to some continuing connection with people who have lost their entitlements under section 39. Are you able to tell us more about what has happened to them and their plight?

Ms MALLIA: Generally, they end up going mad and blame everybody for causing the injustice that really started at their workplace. The average construction worker leaves this industry at about 55 or 56 to 58 years of age. They do not even get anywhere near what will soon be the age of retirement or the pension age in this country of 70, if they get there, so they end up utilising all of whatever little superannuation they have. I sit on our construction industry board of Cbus as a trustee director. On average, our members who have to exit the scheme now have superannuation accounts of somewhere between $50,000 and $80,000. They chew that up. They do not really have savings. They hope that there is a little bit of social security at the end of the day, if they can manage it.

If they are lucky enough to have held their families together, their partners become the principal income earners. They are often not in industries that are equivalent to a construction worker in an organised sector. They do not earn the same sort of money that they had prior to their injury, and they do not have access to meeting ongoing medical expenses. They have to find a way in which to cope with either getting the Medicare system to

pay or just cope with their injuries. In trying to come to grips with how to help these workers, there is not much we can really do for them because there is not anywhere for them to go. I am thinking of one man now but I do not want to mention his name. He is just a broken shell of the man that he was when he was a very productive construction form worker who was working in a unionised sector. It is a tragedy.

If there is one thing that we need to address it is how we provide more ongoing support to people who are long-term injured. Members in our industry do not go back to work if they have a bad back, a bad knee or a bad neck. They just do not because the employers do not make jobs available to them or the jobs are just so significantly difficult that it is hard to do the jobs with those sorts of injuries, and yet they are cut off the system after five years on really paltry amounts of money.

The Hon. DANIEL MOOKHEY: Before the other unions have the opportunity to comment, insofar as the intended effect of section 39 was to provide incentives for people to work, if they are capable of doing so, in your view has any of them been able to do that?

Ms HAYWARD: No.

Ms MALLIA: Seriously injured people want to go back to work. The idea that some would sit at home twiddling their thumbs! Some people do drag themselves back. They do security jobs. They somehow manage to do bits and pieces, but mostly if you have been totally and permanently disabled from being a construction worker, it is very hard to find alternative employment and physically you cannot do it. It is a challenge.

Mr DAVID SHOEBRIDGE: Does the regulator ever offer to sit down with you and the sector and say, "Look, it is a tough industry. People get injured, but there are elements of the industry where you can do the work even with an injury, like traffic control and the like." Do they ever sit down with you and say, "How can we work with employers to ensure those bits of the industry where you can work with an injury are available to injured workers?"

Ms HAYWARD: They only sit down with us if they want something.

Mr DAVID SHOEBRIDGE: Do you think it would be useful?

Ms MALLIA: We have made those submissions many times.

The Hon. TREVOR KHAN: That is like life.

Ms MALLIA: There probably are jobs that people could do, even the hoist operations, traffic. Unfortunately, a lot of backpackers get those jobs. That is an absolute fundamental problem we have in the industry.

The Hon. TREVOR KHAN: And it is all subcontracted.

Ms MALLIA: And it is all subcontracted. We have long argued from the days in 1996 when I first started doing this that the industry needs to take a little bit of collective responsibility for the long-term injured in our industry—not the subbies, necessarily, who may largely have 20 employees or fewer. The project builders, the principal contractors who run some of the biggest jobs in the State, need to make some of those positions available. But they just do not because the system does not allow it to happen. There is a lack of will for it to happen.

Mr DAVID SHOEBRIDGE: Surely that is what a good regulator would do.

Ms MALLIA: You would hope so.

Mr DAVID SHOEBRIDGE: They would see this type of opportunity and they would go into the industry and talk to the big contractors and say, "Let's make this work. Let's not throw all these people on the scrapheap. They know how a construction site works. They have got a role for them. Let us find a place for them."

Ms MALLIA: A regulator would also enforce safety laws and a regulator at the moment does not even enforce basic safety laws. Yes, Mr Shoebridge, you are very right, but it does not happen.

The Hon. DANIEL MOOKHEY: Mr Tonkli, as opposed to the CFMEU, you represent a mostly female workforce.

Mr TONKLI: That is right. The majority of our members are female. I was just going to add, really in support of what Ms Mallia was saying, that we have similar experiences, except that many of our members in that situation find themselves predominantly with injuries perhaps not as significant as those in the construction industry, but they would include rotator cuff or back injuries whereby they cannot lift, they cannot bend, and they are limited to perhaps at the checkout lifting items below a certain weight. Many of them are put off. We have had great difficulty getting them back to work because of trying to find suitable work.

When they cannot work or they find great difficulty in finding work, they will be finishing up with superannuation balances even less—far less—than what Ms Mallia said. It is a real issue. Anything that we can do to establish a proactive involvement of the regulator to get through the great difficulties we have with members trying to find work in situations where the injuries are not life-threatening, but employers are using it as a barrier to find them work, a proactive involvement of the regulator would be a great outcome for workers.

The Hon. DANIEL MOOKHEY: Ms Mallia, you referred to employers asking applicants to disclose their history with workers compensation and, therefore, according to your evidence, they are encountering discrimination at the point of their next or potential employer who is facing a decision to employ or not. Are you able to tell us more about that?

Ms MALLIA: Basically, if you apply for a job anywhere, one of the questions on the application form will be, "Have you had a previous workers compensation claim?" You either tick yes, if you have got one and you tell the truth, or you run the gauntlet of not telling the truth and maybe down the track they will find out that you did not tick yes and you will be sacked for not being an honest person. But on every application form that I have ever seen, that is what an employer asks.

I will bet you any money that a human resources [HR] manager who is faced with 1,000 or 100 applicants will put aside the pile that says they have a workers compensation injury. No employer wants to carry that liability. Why you should even be able to ask that question is beyond me. We have made submissions time and time again that employers should not be able to ask that. If something happens in the future and an injury is aggravated, so be it: The scheme will have to deal with it. That is why they pay their insurance premiums. But that is just an everyday occurrence.

The Hon. TREVOR KHAN: I have some sympathy, actually having been an HR officer, for the proposition you advance. I suppose the problem is this. Let us suppose you have an employer who obtains a loading when there is an aggravation. It becomes a relevant criterion, does it not, if there is the aggravation and the worker has to go off again? It is the current employer who actually incurs the increased premium.

Ms MALLIA: That is the way the system works.

The Hon. TREVOR KHAN: That is a real problem, is it not, in terms of how you deal with that circumstance?

Ms MALLIA: That is the way the system works.

The Hon. TREVOR KHAN: That is a real problem, is it not, in terms of how you deal with that circumstance?

Ms MALLIA: We have thought about that. In the past, we actually did put up propositions that there should be some of those sorts of injuries that are shooted home to the industry as a whole, not just necessarily to the one employer. I am a little sympathetic to that as well.

The Hon. TREVOR KHAN: I do not think we are as far apart as you think.

Ms MALLIA: It is about the opportunity for injured workers to continue to make income to support their families. If that comes at the cost of an employer having to pay more premium, so be it. There are models that we have talked about over many years to try to deal with some of that stuff.

The Hon. LYNDA VOLTZ: Is that not the fundamental underlying problem with the scheme, that it is about the cost of the premium as opposed to an injury which is, one, why people are often sacked or put off early; and, two, why people are not being employed? The changes to the scheme were all about getting the employee back to work. Is that not a fundamental conflict in the scheme?

Ms MALLIA: I think the changes in the scheme were all about getting people off the scheme. There was not any thought of what happens to these people when they get off it.

The Hon. LYNDA VOLTZ: The Government put forward the proposition that this was about getting people back to work early.

Ms MALLIA: It does not work that way because employers do not take them back.

The Hon. LYNDA VOLTZ: Is it a fundamental underlying problem that it is the monetary incentives that underlies it?

Ms MALLIA: I think so.

The Hon. TREVOR KHAN: But there is a monetary incentive that works, is there not? If an employer has a bad safety record—we will not deal with the aggravation—that employer should bear at least part of the cost

of the operation of the provision of the workers compensation scheme compared to an employer that goes out of their way to make a safe work environment? The two should not be treated the same under the workers compensation system surely?

Ms HAYWARD: Can I just say there is a complication to that, particularly for our industry, in that phoenixing does create an issue with that. You phoenix and you create a new record. I know that SIRA had created some idea that it was going to look at theirs. They had one meeting with me and it has gone nowhere since then. But that becomes an issue because the employer with the bad record is not the same employer tomorrow.

The Hon. TREVOR KHAN: I absolutely agree. Phoenixing is a real problem. But if there is a financial incentive to behave, surely that is a good thing?

Ms HAYWARD: It is, but it needs to be coupled with a stick if you do not.

Mr DAVID SHOEBRIDGE: When we are talking about the idea of aggravating a pre-existing injury, and how we develop a good scheme design to ensure that employers are not deterred from engaging somebody, surely that is the job of the regulator to step in and look at a good design scheme so that impost on premiums is spread across the industry and we do not pick out the employers who take on injured workers. Where is SIRA in all of this?

Ms ROSE: I do not know.

Ms MALLIA: I do not know but we have certainly tried to talk about those issues in the past.

The CHAIR: Ms Rose, you talked about referring complex claims to solicitors. Did you refer those to ILARS or the WIRO? In that context, if we are looking at a tribunal, each of you has emphasised the importance of the independence of that tribunal, and if we are agreed on that, can you comment on the role of ILARS and WIRO in relation to that tribunal, in your experience?

Ms ROSE: Our solicitors who we refer those matters to, as I understand it, they do apply to ILARS for funding. We have had some feedback that that process can be time-consuming and onerous at times. Evidently, the process is beneficial in that the matters are able to go ahead by virtue of the existence if ILARS.

The CHAIR: And they are funded?

Ms ROSE: Yes, and I think the issue is that they be sufficiently funded and resourced so that that time frame can be reduced, if possible.

The CHAIR: What about the role of WIRO in any tribunal?

Ms ROSE: We would support the ongoing role of WIRO, particularly, as I said, that they are well resourced in what they do as well. We generally do the majority of handling those early stages of disputes but into the WIRO's role in that ILARS process, we support that and sufficient resourcing.

Mr DAVID SHOEBRIDGE: In terms of efficiency on ILARS, it is all online and it is all done within five days. Can you think of a more efficient way of doing ILARS?

Ms ROSE: I might need to take that question on notice. I have had some feedback about having further questions asked about the application and having a bit of back and forth and getting further evidence.

Mr DAVID SHOEBRIDGE: Please provide some detail on notice.

The CHAIR: Will each of you comment on it?

Ms HAYWARD: We support ILARS. I think it is a great way for lawyers to be paid at each step of the process. My understanding is at each step you make an application for funding. It means that our lawyers are not out of pocket. We would absolutely support it moving forward. It is certainly a better system than the way you get your legal costs for merit review—

The CHAIR: Or not.

Ms HAYWARD: Well, that has become difficult. In terms of WIRO, we use WIRO regularly. If I am overrun, I certainly tap into their expertise in the area and they can help us resolve matters that do not necessarily need to go to a tribunal. We tend to refer our liability matters to our solicitors and that is when they will seek ILARS funding. We fundamentally support ILARS and we are continuing the system.

Ms MALLIA: I think Ms Hayward has answered the question.

Mr HENRY: Certainly in relation to our solicitors, they have indicated that they are supportive of the current ILARS system and so would not be seeking any change. In relation to the WIRO, we have certainly with

our members had some dealings with WIRO. Most of those experiences have been quite positive. I also note, and I think it was Mr Shoebridge who actually used "WIRO" and "Ombudsman" almost in the same sentence. I think there is a point to be made here because the regulator SIRA, if you want to make a complaint against SIRA, you are directed to the Ombudsman. We have actually taken that pathway. The New South Wales Ombudsman has responded with no understanding of the problem we had because they do not understand the system.

I think there is a lacking. Continually we are hearing concerns and problems with the regulator, with SIRA. There is a problem with oversight and I think it is imperative that we need to have some oversight put over the regulator. If that is WIRO or someone else, the Committee can probably deliberate and consider what would be the best option. The current system where they direct people off to the New South Wales Ombudsman who does not have the resources, experience or knowledge in relation to the legislation is absolutely unacceptable and unfair for New South Wales people.

The CHAIR: I think a copy of that was put in someone's submission.

The Hon. TREVOR KHAN: In terms of what the Ombudsman does, I do not really know whether they are equipped to do the—

Mr DAVID SHOEBRIDGE: They have the statutory remit to deal with SIRA but in their own Ombudsman, you wait.

Mr HENRY: The issue is that SIRA is directing ourselves and others to that pathway. Whether that is correct or not that is what we are being told by the regulator.

The Hon. TREVOR KHAN: Yes, I am sure.

Mr DAVID SHOEBRIDGE: If you had to pick one entity from all the players—insurers, icare, WIRO, the commission—that is under-performing, could you name the entity it?

Ms HAYWARD: SIRA.

Ms ROSE: SIRA.

Mr HENRY: SIRA.

Ms MALLIA: Bring it home.

Mr TONKLI: Yes, SIRA.

Ms MALLIA: Yes, SIRA, or the regulator.

The CHAIR: I thank you for the preparation of your submissions and for sending them early, which was very helpful. The Committee has resolved that any questions taken on notice should be returned within 21 days. The secretariat will contact you in relation to those questions.

(The witnesses withdrew)

(Luncheon adjournment)

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

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

ANGUS SKINNER, Research Manager, Police Association of New South Wales, affirmed and examined

The CHAIR: Welcome. Would any of you like to make a brief opening statement?

Mr REMFREY: Thank you for the opportunity to appear before the Committee. The Police Association of New South Wales represents the professional and industrial interests of approximately 16,5000 members, covering all ranks of police officers in New South Wales from student police officers through to the Commissioner of Police. Police officers were exempt from the 2012 and 2015 amendments to the workers compensation system, therefore some of the deficiencies identified by the Committee's previous review do not affect police officers. The working relationship between the Police Association of New South Wales, the NSW Police Force and the insurers—being EML for workers compensation and Tower for our death and disability scheme—has also improved and processes have been established so that the injured police officer's experience of workers compensation claims has now improved and is superior to the experience of those workers affected by the 2012 changes.

Policing is a dangerous profession and injuries, both physical and psychological, do occur, particularly due to the number of stresses that police officers face. This impacts on their physical and mental health, including concerns about their financial security and procedures relating to injury management, return to work and the claims process, and these factors still exacerbate physical and psychological injuries. In recent years the Police Association of New South Wales, the NSW Police Force and the insurers have had considerable success in improving the prevention and early intervention health services available to police officers to prevent or mitigate injury—one such effective example being the Recon program. Specific to the tribunal, which provides dispute resolution in the workers compensation system, exempt workers are subject to a process that is preferable to any of the options so far contained in the proposals for consolidation.

The Workers Compensation Commission undertakes all dispute resolution for exempt workers. This is our members' preferred provider of dispute resolution and the feedback we have received from the lawyers acting on behalf of our members, with significant experience in representing our members in such matters, report that the Workers Compensation Commission performs this function effectively. There is considerable reluctance amongst these stakeholders for reforms that may alter this effectiveness or limit access to the Workers Compensation Commission in any way. In a response to a recommendation by this Committee, the New South Wales Government recently announced that the Workers Compensation Commission will undertake all dispute resolutions once an internal review is completed by an insurer. Further details have not yet been provided, but on the terms of the announcement it appears this will not alter the process for exempt workers in any way. It is our understanding that this announcement was welcomed by all the affected unions and advocates for injured workers, confirming the Workers Compensation Commission as the preferred dispute resolution service provider and the most appropriate tribunal to resolve workers compensation claims.

Our members also make claims under the compulsory third party [CTP] insurance system. The need for police to access entitlements under this system was brought to the public's attention when an officer was seriously injured by a motor vehicle when performing random breath testing duties—in fact, two officers were severely injured. One of those officers lost a leg and the other officer continues to suffer significant injuries to this day. Due to an unintended consequence of the interaction between the workers compensation and CTP provisions, and but for the intervention of Minister Dominello, those officers would have lost a considerable proportion of their entitlements under the CTP system because they were in uniform at the time. We hope the situation is rectified promptly, as was committed to by the Minister, and we acknowledge his intervention. There are aspects of the CTP dispute resolution system that replicate some of the deficiencies in the workers compensation system identified by this Committee in its previous review. We therefore support the creation of pathways in the CTP dispute resolution system to give injured persons access to review by a fully independent decision-maker, as well as providing injured persons in the CTP system with an equivalent to the Workers Compensation Independent Review Office [WIRO].

As confirmed by the submissions to this inquiry, there are improvements that can certainly be made to the workers compensation and CTP systems. However, at this stage the Police Association of New South Wales is not convinced that a consolidated personal injury tribunal is the way to achieve that desired improvement. Based on our reading of the submissions to this Committee, it appears that this is a fairly common view held amongst other stakeholders. Our opposition somewhat arises out of the proposals contained in the discussion paper released by the Department of Finance, Services and Innovation. The models included in that discussion paper attracted

widespread opposition from almost all stakeholders. In its submission, the Police Association maintained its opposition to consolidation, but outlined a number of key components that we would see as crucial in any proposed consolidated dispute resolution system and a single tribunal. This was consistent with many other stakeholders who made submissions. These key components include maintenance of the Workers Compensation Commission tribunal, with responsibility for dispute resolution; maintenance of the tribunal's independence, with no control by the regulator; and specialisation.

If there is consolidation of two categories of insurance into one dispute resolution system, the commission should have two separate arms to provide dispute resolution services specialised to workers compensation and CTP. WIRO should be responsible for handling complaints against insurers, resolving disputes and overseeing the compensation systems. The Independent Legal Assistance and Review Service [ILARS] should be the chosen model for funding legal costs. If these components were adopted, it is not clear why they would need to be adopted as part of the consolidation process. That is our opening statement. We are happy to take questions.

The CHAIR: Thank you for your written submissions. You can assume we have read them. We are appreciative of your time in providing those beforehand. I note that in your submission you said that the intention is to improve the experience for injured people in the resolution system but that you oppose consolidation. You then go on to say that if consolidation is inevitable, it should be one tribunal with two specialist areas. Is that correct?

Mr REMFREY: Correct.

The CHAIR: Could you tell me about your views on what tribunal would be appropriate? I think you referred to the Workers Compensation Commission. Could you outline that? My emphasis in questions to other witnesses today has been about the injured worker, or consumer or customer. How do you see one tribunal benefitting the worker, user or customer?

Mr SKINNER: We certainly believe that for the benefit of injured workers who are seeking dispute resolution in the workers compensation space it is without question that the Workers Compensation Commission must be maintained as the sole provider of conciliation and arbitration for those disputes. In any consolidation system, we would be saying that the maintenance of access to that as the decision-making body must be ensured and that its independence must be maintained. With regard to the benefits of a single tribunal for injured persons, as yet we are unconvinced of the benefits to customers within this service of consolidation.

Certainly, on the contents of the models proposed so far, such as those in the discussion paper, at this stage we would not perceive that there is considerable benefit in that. Perhaps the question is alluding to where there would be a benefit to those accessing or making claims under both systems and therefore having a dispute to resolve if they were located in the same tribunal. Nothing that we have been made aware of suggests that that is a significant problem at the moment, that individuals who are accessing entitlements from either system would have a better experience because of the location of the dispute resolution system. Most of the issues that give rise to disputes arise much earlier in the process and as a result of the legislation rather than the source of the dispute resolution provider.

Having said that, we do acknowledge that there is a fair few components of the CTP dispute resolution system that seem like they could be improved, possibly by adopting components of the workers compensation dispute resolution system as it applies to exempt workers—not the 2012 system. In that sense, users of the CTP system could benefit from improvements. With regard to improvements inherent from consolidation, as yet, we are not convinced that there are any. If a model was put forward that had those contents, it would be something that we would be willing to consider.

The CHAIR: Some have posited issues such as different bodies determining different pathways for review and the complexity and delay associated with that. In your view, would it not be a benefit if there was one pathway which was clear and articulated, and decisions, having been made through those pathways, be clear and available? Would it not be a benefit to workers to have that clarity and simplicity?

Mr REMFREY: I think the issue around these schemes is that the devil is in the detail. Whilst it is easy for us to talk in a theoretical way about these things, until we see the detail of such a scheme it is impossible for us to make a judgement around those issues. Our concern would be that it is a race to the bottom and the course that might be adopted would be to adopt the processes which are the least satisfactory, such as the ones in the CTP area, as opposed to our position, which would be to adopt the processes that are most satisfactory—not perfect, of course—in the exempt area of the Workers Compensation Commission.

Mr DAVID SHOEBRIDGE: I have not heard from the State Insurance Regulatory Authority [SIRA] yet, but I have not heard a single person suggest that the dispute mechanisms that are currently being developed in CTP for statutory benefits should form the model for anything. The discussion is about how we prevent the

same kind of disaster we had with merit reviews in workers compensation developing in CTP. I have not heard anybody say that we should gravitate towards the Dispute Resolution Services [DRS] model in CTP.

Mr SKINNER: I think much of the source of concern, certainly for unions that have participated in this inquiry, arises from the reaction to the department's discussion paper, which contained models which were scarce on detail. But, reading between the lines, some people thought that was an intention to consolidate along the lines of the CTP system, maybe not exactly, but one in which the regulator is the decision-making body. That was the first cause of concern for stakeholders that have taken the same position as we have. In the second reading speech of the Motor Accidents Injuries Act there was an indication that the workers compensation dispute resolution system was the next cab off the rank for that form of amendment. There is a view amongst some stakeholders, and certainly us, that there is an intention by the department that it perhaps goes down that road. Perhaps no members of this Committee or people submitting to this Committee expressed that intention but the other material surrounding it, including the proposals put forward, did contain that intention. There is a lot of concern from that.

The Hon. TREVOR KHAN: You can rest assured that is not the basis upon which I am here, whatever that is worth.

The CHAIR: The intention is to improve the experience for injured people. I do not think there is any underlying complexity in that.

Mr DAVID SHOEBRIDGE: I know you say the devil is in the detail but sometimes the principles are extremely important. I put one principle to you that comes out of the Insurance Council of Australia and see if you agree to it, in terms of dispute resolution. They talk about a scheme that should have a series of attributes but the first one is:

> Perceptions of Fairness—Research highlights that people generally have a better recovery if they feel they have been treated fairly. A perception of fairness is promoted by having an open and transparent system which sits separately from the original decision makers or scheme stakeholders.

Do you agree?

Mr REMFREY: That would be difficult to argue with.

Mr DAVID SHOEBRIDGE: I am not asking you to argue with it, I am asking whether you adopt it or not? Feel free to argue with it if you want to.

Mr REMFREY: It is a motherhood statement and as such it would be something you naturally support. Having been involved in this space for a considerable number of years, probably not quite as long as yourself, I get fearful until I see the detail.

Mr DAVID SHOEBRIDGE: You say it is a motherhood statement. If that was adopted it would say that the model of dispute resolution that is currently dealing with statutory benefits in CTP needs to stop and it needs to go to an independent tribunal. It is more than a motherhood statement, it has an impact. Do you agree with that?

Mr REMFREY: I am not disagreeing with you, Mr Shoebridge, I am just making the point that until we see the detail I am not going to accept pretty much anything at this point. As a matter of principle it makes sense.

Mr DAVID SHOEBRIDGE: Then what you and other stakeholders would say is let us see an exposure draft of the bill that we can engage with. Is that part of what you would be asking for?

Mr REMFREY: That has not always been our experience.

Mr DAVID SHOEBRIDGE: Going forward is that what you would like to see?

Mr REMFREY: Absolutely. That level of detail in the areas of complexity around both the schemes is something I am more au fait but not an expert in workers compensation but certainly less au fait in respect of the CTP area. We would need to get a lot of advice. This area of law is not something I would like to see rattled through the upper House at 1.00 o'clock in the morning as has been the case with previous arrangements.

Mr DAVID SHOEBRIDGE: Or a four-day turnaround with a cooked inquiry, you would not want that?

The Hon. TREVOR KHAN: I have not been involved with those.

Mr REMFREY: It is hideously difficult to make sensible policy decisions in an environment like that. Our position is extremely cautious based on those experiences.

The Hon. LYNDA VOLTZ: The legal representatives that came in today put a clear process raised by everyone that the process must be independent from the regulator and a judicial process, in that there is someone making a decision. Fundamentally a starting point going forward are those two principles. I assume you would support that?

Mr REMFREY: Those principles are something we would support as underpinning a system in respect of CTP.

The Hon. DANIEL MOOKHEY: I like the implication that you think the decision-making in the upper House is better in the afternoon than the evening. That is not necessarily the case.

Mr REMFREY: They are your words, not mine.

The Hon. DANIEL MOOKHEY: Secondly, you said you have a mixture of members in the workers compensation and CTP, and I assume it is work-related CTP claims?

Mr REMFREY: Correct.

The Hon. DANIEL MOOKHEY: What is the balance in terms of quantum?

Mr SKINNER: The stats I have are not exact. If you wanted more detail you would need to go to the Police Force. They publish the categories of mechanism of injury that give rise to a claim. One of those categories would cover CTP injuries but it is lumped in with "other", so it is not an exact figure. It would not form that significant proportion. Most of our members accessing compensation would be accessing workers compensation not CTP.

The Hon. DANIEL MOOKHEY: In the workers compensation system you are in the exempt workers category. Is it right to say that your concern is there are positive features of the workers compensation that they could be at risk if merged with the CTP system and the practical effect is that that will disproportionately affect the exempt workers in the current workers compensation system because that is where the quantum of the workers are?

Mr REMFREY: Yes.

The Hon. TREVOR KHAN: You would want existing members' rights and entitlements protected under any new scheme?

Mr REMFREY: Correct.

Mr DAVID SHOEBRIDGE: Another grandfathering clause, which is not an unreasonable request.

Mr REMFREY: To an extent that is right. You will recall the last changes to the Workers Compensation Scheme related to improvements to the death benefit which were initially, I suspect by accident rather than a direct decision, not provided to our members in the scheme. We had to come down here and negotiate at some ungodly hour of the evening to get those members covered. It is not entirely grandfathering. There are some aspects and improvements in the workers compensation scheme from time to time that would need to apply.

The Hon. DANIEL MOOKHEY: Are there any features of the existing CTP dispute resolution system which you think would be to the benefit of your members if incorporated into the workers compensation system?

Mr SKINNER: I do not believe so. There are potentially details beyond our level of expertise regarding medical assessments and the like but our experience is that the procedures that apply to exempt workers is preferable to any of the categories in the CTP. There are some differences with the exempt workers and the 2012 workers who access a separate system through WIRO and ILARS that exempt workers do not access. In regards to CTP, no, we much prefer the system we currently access.

The Hon. DANIEL MOOKHEY: To be fair, the association has maintained the view for a while that what exempt workers have all workers should have?

Ms MEMBRENO: Correct.

Mr REMFREY: To add to that, it is one piece of the whole puzzle. There are a number of aspects of injury management within the NSW Police Force which have led to positive outcomes and we do not want to see that put at risk. In fact, we want to see it enhanced. We have demonstrated we have a number of programs in place around the preventative space, which is far superior to a claims space, and the NSW Police Force will be as one with us on this, which have reduced workers compensation claims and improved return to work outcomes.

The Hon. LYNDA VOLTZ: How did the anomaly come up between the CTP and the officers who were hit on the RBT?

Mr REMFREY: It is very technical.

Mr SKINNER: I personally do not have carriage of that individual member's matter, so I am not aware of their specific details. My understanding is that the issue has been raised with this Committee through this inquiry or the review of CTP. I may need to be corrected on this: I believe there are issues surrounding access entitlements under the workers compensation system and later making a damages claim, having to pay back some of the entitlements that you have received to ensure that you are not double dipping. In workers compensation that works as intended but when there is an interaction between the two systems and you claim damages under the CTP system, the provisions require you to pay back the entitlements that you originally accessed under workers compensation even though you have not double dipped, because the heads of damages do not match up. Officers have had to pay back money out of their damages that they did not actually receive to ensure that they were not double dipping and that is covered in a few of the submissions to the CTP review.

The Hon. LYNDA VOLTZ: Does that require legislative reform?

Mr SKINNER: Yes.

Ms MEMBRENO: Yes.

Mr REMFREY: That is our understanding. The Minister made an announcement, which we absolutely welcome.

Mr DAVID SHOEBRIDGE: There is a commitment to fix it but we have not seen it yet.

Mr REMFREY: Correct.

The Hon. LYNDA VOLTZ: Have you seen the draft?

Mr REMFREY: Not yet, is the answer, but we take him at his word, and I am sure he will do it.

Mr DAVID SHOEBRIDGE: You mainly deal with the Treasury Managed Fund [TMF]?

Mr REMFREY: Correct.

Mr DAVID SHOEBRIDGE: Are you aware that icare has changed the way in which it deals with medical disputes about treatment, particularly, so that they have an internal review mechanism where there is a dispute? Rather than having to go off, the worker gets an independent medical specialist, the insurer gets an IMS, and the decision is made three months later in a sort of grinding, bureaucratic method. Icare are now convening an internal review panel and getting it all done within five days. Are you aware of that change in icare?

Mr REMFREY: I am not across it at this stage.

Ms MEMBRENO: No.

Mr DAVID SHOEBRIDGE: Is anything like that happening with the TMF?

Ms MEMBRENO: Not that we are aware of, not in terms of independent reviews along those lines, no. But we would be happy to canvass that with a number of our injured workers.

Mr DAVID SHOEBRIDGE: If you would. Have a look at what icare is doing, then feel free to take it on notice whether or not you would want that to happen in the TMF as well. I assume you would because almost uniformly the response has been that it has been very positive.

Ms MEMBRENO: Five days is a fantastic turnaround.

Mr REMFREY: There is little doubt that any of these systems—and part of the reason that we have developed a close working relationship, attempted to and have successfully done so, between our two insurers, because we have death and disability, and workers compensation insurers to prevent the medicalisation, if you will, of injured workers and get decisions made more quickly. They have worked cooperatively, which has been very good. It is still not ideal, and a system of the kind that you have described sounds—

Mr DAVID SHOEBRIDGE: Superior.

Mr REMFREY: Very superior, if it is not too good to be true.

Mr DAVID SHOEBRIDGE: You can make that call yourself.

Mr REMFREY: We will check with our lawyers.

Mr DAVID SHOEBRIDGE: With the consolidated tribunal, I think we all agree that SIRA should not have a role in dispute resolution in motor accident cases? You are all nodding?

Mr REMFREY: Yes.

Mr DAVID SHOEBRIDGE: Therefore we need to find an independent tribunal to decide those statutory benefits. That is priority for Parliament, do you agree?

Mr SKINNER: Yes, to improve the DRS.

Mr DAVID SHOEBRIDGE: We all agree that the Workers Compensation Commission is not perfect but at least it has respect amongst stakeholders of having independence and specialty skills in dealing with workers' issues and also personal injury matters. Do you agree with that?

Ms MEMBRENO: Yes.

Mr DAVID SHOEBRIDGE: If we do not send those statutory benefit motor accident disputes to the Workers Compensation Commission, tell us where else? That is the challenge.

Mr REMFREY: I think our position is this; the fear we have is that you would dilute the Workers Compensation Commission arrangements and put at risk what we consider to be a superior system. If you were to do as you described, you would want to have two distinct arms of the Workers Compensation Commission, or whatever you describe the new body as, so as to ensure the specialist skills in workers compensation matters are maintained and the system is not put at risk, and at the same time have the same procedures but on the other limb of the organisation, as it were.

Mr DAVID SHOEBRIDGE: You see why it is going down that path, do you not? If not there then where? Nobody has an answer other than the Workers Compensation Commission.

Mr SKINNER: Yes, or I suppose a new tribunal would be the only other solution.

Mr DAVID SHOEBRIDGE: With all of the uncertainties and costs and duplication that that involves.

Ms MEMBRENO: Effectively replicating the Workers Compensation Commission, noting that there are different pieces of legislation and different thresholds that apply to CTP, allowing the two tribunals to separately have their own level of independence, but also specialisation and ensuring that does not get watered down and lost amongst what we say is a reasonable system under the workers compensation system, develop a similar system. Yes, the costs are unknown but we have demonstrated, we feel, and other stakeholders have, that the Workers Compensation Commission is quite effective for workers. I think that could be replicated in a separate arm for CTP.

Mr DAVID SHOEBRIDGE: Two streams, is that what we are getting to?

The Hon. TREVOR KHAN: No, that is not what they said at all.

Mr DAVID SHOEBRIDGE: You say "separate arm".

The CHAIR: One tribunal.

Mr DAVID SHOEBRIDGE: Arm is different to a separate body.

The CHAIR: Their written submission says one tribunal, two specialised streams.

Mr SKINNER: On the understanding that if the systems will be consolidated, we are saying if they are going to be in the same body they have to be in two different operationally separate branches of that body.

Mr DAVID SHOEBRIDGE: But you acknowledge the need to get the statutory claims into an independent tribunal?

Mr SKINNER: Yes.

Mr DAVID SHOEBRIDGE: In CTP?

Mr SKINNER: Yes.

Mr DAVID SHOEBRIDGE: Having acknowledged that—

The Hon. TREVOR KHAN: I think Mr Remfrey is less enthusiastic about this.

Mr REMFREY: I think I have outlined the position, and that is that we do not want to see the positive aspects of the Workers Compensation Commission impacted by the incorporation of the CTP aspects, if that was the case. The only way in our view that you would be able to achieve that is if you housed them under the one tribunal but kept them as separate operating arms, if you will. That is assuming the decision is made to do that.

The CHAIR: Thank you for attending today. If there are any questions on notice the secretariat will contact you about those.

(The witnesses withdrew)

ELIZABETH MEDLAND, NSW Claims Managers Subcommittee Member, Insurance Council of Australia, affirmed and examined

FIONA CAMERON, General Manager Policy–Consumer Outcomes, Insurance Council of Australia, affirmed and examined

DALLAS BOOTH, Chief Executive Officer, National Insurance Brokers Association, sworn and examined

TIM WEDLOCK, President, National Insurance Brokers Association, sworn and examined

Ms MEDLAND: I am a consultant subject matter expert and legal specialist currently working with Allianz on the New South Wales compulsory third party [CTP] reform project.

The CHAIR: Do any of you have an opening statement you would like to make to the Committee?

Mr WEDLOCK: As I said, I am President of the National Insurance Brokers Association [NIBA] of Australia. I am also the managing director of Ausbrokers AEI Insurance, an insurance broking firm in North Sydney operating across most areas of New South Wales. As we have heard, Mr Booth is our CEO. NIBA represents over 320 insurance broking firms across Australia, advising their clients on risks and risk management, insurance programs and on claims. Insurance brokers process over $20 billion in insurance premiums each year, nearly half the total amount of general insurance premiums. Many insurance brokers in New South Wales advise and assist their clients with their workplace injury risk management and their workers compensation insurance and with the handling of claims under these policies.

For the medium and larger businesses in New South Wales their workers compensation insurance premiums are also the largest insurance premium they pay each year and brokers help their clients manage their businesses to reduce and remove the risk of injury to their employers, thereby reducing the cost of their insurance coverage. The inquiry is focusing on the benefits of developing a specialised personal injury jurisdiction in New South Wales. This concept was mentioned in the March 2017 first review of the workers compensation scheme. There was no discussion or analysis and the idea was only raised by a minority of stakeholders.

Nevertheless, the committee came to the view that there would be some merit in the idea. In the meantime on 4 May 2018 the New South Wales Government announced a new dispute resolution process for workers compensation primarily based around the Workers Compensation Commission. Our submission to the Committee indicated that it would be difficult to form a view one way or the other on the proposal. To do so would require detailed analysis of the number and nature of disputes in each scheme, the complexity of those disputes, matters typically in dispute, and the factors giving rise to the disputes occurring in the first place, the efficiency or otherwise of current dispute resolution arrangements, noting the Government's decision to reform dispute resolution in workers compensation and options for establishing a consolidated tribunal, including a clear indication of the costs and potential benefits of each of those options.

It is important to note that in addition to claims within the compulsory third party and workers compensation schemes some claims can cross both schemes, for example, when an employed driver is injured in a road crash which is the fault of another driver. This could initially be a workers compensation claim but would ultimately be paid by the CTP insurer of the vehicle at fault. Other submissions have called for detailed analysis of the type mentioned in the NIBA submission. Once that information is available, NIBA would be very willing to consult with our members and provide a more informed view to the Committee or to the Government. We are happy to take any questions on these or any other matters relating to the operation of the workers compensation scheme. Thank you.

Ms CAMERON: Thank you for the opportunity to contribute to the inquiry. The Insurance Council of Australia [ICA] is the representative body of the general insurance industry. Its member companies include the four insurers that underwrite the New South Wales CTP motor accidents compensation scheme. The ICA's short submission is made on behalf of the four New South Wales CTP licensed insurers. It is the position of the New South Wales CTP insurers that a consolidated dispute resolution tribunal for workers compensation and CTP is worth consideration and may provide benefits such as improved efficiency and economies of scale, triaging of disputes, data sharing between schemes that could be used to improve people's recovery and reduce claims leakage. However, a consolidated tribunal will only achieve these benefits if it is appropriately designed. It is the experience of the New South Wales CTP insurers that dispute resolution processes within statutory insurance schemes must focus on the needs of injured people.

To achieve this, insurers suggest that a dispute resolution process should be based on principles of fairness, transparency, simplicity and consistency in decision-making but with a level of flexibility in order to be able to adapt to changing needs over time. A critical aspect of an effective and fair resolution tribunal is that

decision-makers are knowledgeable, impartial and can effectively communicate with all stakeholders in the scheme. To further assist the Committee, appearing with the ICA is Elizabeth Medland, a New South Wales claims managers subcommittee member, who is able to offer her expertise in dispute resolution. We are happy to answer any questions the Committee may have.

The CHAIR: Thank you for your written submissions. I am pleased to see that in your written submission you referred to the customer or claimant, and that there should be a customer-focused approach. There has been much discussion—and there will be more discussion—about what the tribunal should look like, if there is to be one, where it should come from, who should stay and who should go. The focus in all of this should be the customer or injured worker. I am interested in your view on the benefits of a consolidated tribunal and the benefits to customers of such a tribunal—and you have referred to some of them in your written submission—as opposed to the current scheme.

Ms MEDLAND: Yes. An injured claimant who approaches a compensation scheme is often overwhelmed. It is very difficult to navigate and anything that is more simple will obviously help the customer in dealing with this. Both the New South Wales CTP scheme and workers compensation scheme can be overwhelming for a claimant so one tribunal would be a more simple process and they would be less likely to be confused.

The CHAIR: I ask you to comment specifically on dispute resolution where it seems complexities exist around the different avenues that are available and the existence of the Workers Compensation Independent Review Office [WIRO] and the Independent Legal Assistance and Review Service [ILARS] processes in that?

Mr BOOTH: We are not sufficiently close to the dispute resolution processes within either workers compensation or CTP. We would certainly strongly support measures that go to protection for injured people and injured workers. In our submission, though, we said that there really has to be careful analysis of what are the sorts of disputes that are occurring and what is driving those arising in the first place. In workers compensation, in theory there should be very little dispute on causation. It should be relatively clear whether there has been a workplace injury or not. It can get a little bit more complicated for soft tissue injuries and it might get further complicated with disease but overwhelmingly there should not be much dispute on causation.

Secondly, if the systems are working appropriately there should be hopefully relatively little dispute on the nature and extent of injuries and prospects for recovery and return to work. Unfortunately all of those things seem to result in significant disputes, for whatever reason. One of the things we need to do is make sure we really understand why those circumstances are resulting in formalised disputes requiring tribunal resolution. Where you have effectively no fault schemes with defined benefits, one would have thought that the great majority of claims would be assessed, resolved and paid, treatment provided and injured workers returned to work without formal dispute resolution processes. In the world of insurance, overwhelmingly the great majority of claims are made, assessed, determined, resolved and finalised without the presence of formal dispute processes. Personal injury seems to have history of other experiences.

Mr DAVID SHOEBRIDGE: I have a question for Mr Wedlock and Mr Booth. In the principles of design put in the submission of the Insurance Council of Australia when they are talking about what kind of dispute resolution process is appropriate for statutory and non-statutory claims CTP, their first principle is that it must have perceptions of fairness. It says:

> … Research highlights that people generally have a better recovery if they feel they have been treated fairly. A perception of fairness is promoted by having an open and transparent system which sits separately from the original decision makers or scheme stakeholders.

Do you adopt that principle?

Mr WEDLOCK: We would support that.

Mr BOOTH: We would support that.

Mr DAVID SHOEBRIDGE: Assuming you adopt that, what do you make of the current statutory benefit dispute resolution system that is in the CTP scheme where the State Insurance Regulatory Authority [SIRA], the regulator, is also making the decisions?

Mr BOOTH: We have not studied the new processes carefully. I am really not in a position to offer a view. The design, from the way you have described it, sounds to me to be rather off.

Mr DAVID SHOEBRIDGE: Mr Wedlock?

Mr WEDLOCK: I have no further comment at the moment.

Mr DAVID SHOEBRIDGE: Assuming that what I have put to you is right, if the regulator is also making the decisions on disputes about statutory benefits, that is poor system design because it does not have the independence. Would you agree?

Mr BOOTH: One would have thought.

Mr DAVID SHOEBRIDGE: Assuming we want to get away from that poor system design and we want to have statutory benefits determined by an independent arms-length tribunal, have you put your mind to where that would happen? I put that question to any of you.

Mr BOOTH: We have not.

Mr DAVID SHOEBRIDGE: No?

Ms CAMERON: We have not either. We have not turned our mind to that but we would be more than happy, should the Committee determine a preferred model, to provide a further input as to that.

Mr DAVID SHOEBRIDGE: I might ask you to consider this on notice then because the model that is sitting in front of all of us is expanding the Workers Compensation Commission to deal with the disputes in the CTP scheme. Of course, the Workers Compensation Commission proposal is that they would have a broader jurisdiction in workers compensation as well and deal with all the miscellany of disputes that are currently going in different directions. They would all come to the Workers Compensation Commission.

The Hon. TREVOR KHAN: It is not a proposition that is in front of all of us. It is a proposition that you may be advancing.

Mr DAVID SHOEBRIDGE: It is one of the propositions in the Government's discussion paper. It is a discussion that has been around. It is in front of us. I am not saying it is our proposition. It is in front of us.

The Hon. TREVOR KHAN: Yes.

Ms CAMERON: The Insurance Council did not make a submission to that review. We would need to consult with our members.

Mr DAVID SHOEBRIDGE: Yes. I am giving you that opportunity on notice, if you want to take it up.

Ms CAMERON: Yes, certainly.

The Hon. DANIEL MOOKHEY: Ms Cameron, this question is not related to the design of a tribunal but it arises from the conversation we had at the first review when we had the opportunity to talk about premium setting, especially the extent to which SIRA is making their premium setting transparent in the workers compensation system, which was a major criticism by employers in that review. In your view, have they got any better or worse at this?

Ms CAMERON: I am sorry, I am not in a position to provide any comment on that today. I guess the best place to look for that kind of answer would be SIRA.

The Hon. TREVOR KHAN: But I do not know about that.

Mr DAVID SHOEBRIDGE: It may be a good place to look.

The Hon. TREVOR KHAN: You could ask them but, really, on a question like this it may be from the users of the scheme—that is, in this case, the employers. They may have quite a different perception of the performance of SIRA in regards to transparency or otherwise. It seems to me it is actually a matter for your organisation rather than for SIRA to comment.

The Hon. DANIEL MOOKHEY: That would be my view.

Mr DAVID SHOEBRIDGE: If you choose to.

The Hon. DANIEL MOOKHEY: Ultimately, it is your choice.

The CHAIR: You are welcome to take that on notice, if you would like to, and contemplate your answer.

Ms CAMERON: Thank you, Chair.

Mr DAVID SHOEBRIDGE: We had submissions from lawyers, for example, on the timeliness and capacity of SIRA. In one of those submissions they said that, as I understand it, SIRA's computer system was not designed to interact with emails and was actually designed around paper correspondence. If you have things like two-day turnarounds on things, by the time the letter gets down to the Riverina and turns up at the lawyer's office it is not very timely. Do you have a view about SIRA's structural capacity to deal with things in a timely fashion?

Ms MEDLAND: In terms of the paper method, I believe that is more in the Motor Accidents Compensation Act scheme. There has been quite a focus on digitalisation in DRS for the new scheme under the Motor Accident Injuries Act. I know there is a DRS portal being worked on at the moment so everything would be electronic. Certainly, the experience so far with DRS has been all via email. There has not been any paper correspondence to date that I am aware of.

Mr DAVID SHOEBRIDGE: So it is more in the medical disputes area which is paper driven?

Ms MEDLAND: For both. In terms of the experience with DRS in the new scheme—and certainly I am not aware of any paper in either a medical or merit review matter—it has all been via email so far.

The Hon. DANIEL MOOKHEY: Another criticism that was brought to my office's attention was that SIRA's premium setting was late and, as such, the scheme agents in workers compensation were not able to get out the renewals. At least it became a very anxiety-inducing process to get the renewals out in time in order to collect the premiums and to meet the requirements. Is there any light that you can shed on that?

Ms MEDLAND: Your question is about workers compensation premiums?

The Hon. DANIEL MOOKHEY: Yes.

Ms MEDLAND: I do not think we are here to represent CTP insurers. I am not sure that we are here for—

The Hon. DANIEL MOOKHEY: Is CTP any better at this or not?

Ms MEDLAND: It is obviously a different process. It is a privately underwritten scheme. It is entirely different.

The Hon. TREVOR KHAN: Since we are onto CTP, can I ask this: Do any of the insurers relate any matters to you with regards to SIRA's regulation of them and their reporting requirements? This question is directed to Ms Cameron.

Ms CAMERON: I think that you are going to have your hearing on CTP matters in the next few months.

Mr DAVID SHOEBRIDGE: Yes.

Ms CAMERON: I believe we have made a submission specifically relating to the current scheme, the new scheme. I think from the view of insurers when we meet with them, there are obviously issues we are working very closely with SIRA on to make sure that the transition and implementation of the new scheme is smooth for all involved. From the industry's perspective, we have been closely engaged through program managers and the like to make sure that that has been effective.

Mr DAVID SHOEBRIDGE: In terms of the dispute resolution scheme in the CTP, do any of you or those you represent have any relevant experiences they would like to tell us about? It has been going now for six months or so.

Ms MEDLAND: Could you be any more specific?

Mr DAVID SHOEBRIDGE: Is it working? Is it timely? Is it transparent? Can people lift up the bonnet, so to speak, and see how it works?

Ms MEDLAND: It is certainly in its infancy. It is only really a handful of matters so far that are in the DRS at the moment. I think it is probably too early to make an assessment of whether it is working or not. Certainly there is the perception of transparency. The people who are working within DRS seem to be wanting to provide the information that either party is seeking.

Mr DAVID SHOEBRIDGE: Have you seen any published decisions?

Ms MEDLAND: I have, yes.

Mr DAVID SHOEBRIDGE: Have they been published?

Ms MEDLAND: Not that I am aware of, no.

Mr DAVID SHOEBRIDGE: Do you not think that a minimum in such a scheme that meets a perception of fairness is that the decisions are published?

Ms MEDLAND: Insurers have made their position clear that publication of decisions would benefit all stakeholders.

Mr DAVID SHOEBRIDGE: What has SIRA's response been?

Ms MEDLAND: I do not think there has been a formal response. I believe that they do have an intention to publish some decisions. Maybe it is too early for them. I am not sure what their exact position is, but I do think that they have an intention to publish at least some, if not all.

The Hon. LYNDA VOLTZ: But your exact words were that it is transparent. If they are not publishing the decisions, how is it transparent?

Ms MEDLAND: I could not disagree with you there.

The Hon. LYNDA VOLTZ: But that was your description of it.

Ms MEDLAND: Yes.

The Hon. LYNDA VOLTZ: That it was transparent.

Mr DAVID SHOEBRIDGE: No. I think the description of it was that there was an intent to be transparent.

Ms MEDLAND: I am not arguing against you.

The Hon. DANIEL MOOKHEY: In some respects.

Ms MEDLAND: Transparency to all parties to a dispute—

The CHAIR: In some respects, that is not really your purview.

Ms MEDLAND: If there is transparency in that particular individual dispute between the parties, that is probably what I was more speaking of than transparency across the scheme itself.

Mr DAVID SHOEBRIDGE: We are not getting them published.

Ms MEDLAND: I am not sure if they are published or not.

Mr DAVID SHOEBRIDGE: We do not know whether they have been published.

Ms MEDLAND: Yes.

Mr DAVID SHOEBRIDGE: Which is probably as bad. Do we know who is making the decisions? Do we know their qualifications and tenure?

Ms MEDLAND: Yes, from what I understand, there is a publicly available list of decision-makers who have gone through a selection process and have appropriate qualifications.

Mr DAVID SHOEBRIDGE: Selected by who?

Ms MEDLAND: I understand it would be SIRA.

The CHAIR: I am not trying to cut you off, Mr Shoebridge, but I am not sure these questions are appropriate to be answered by these representatives. I am not trying to shut down the discussion but I am saying that perhaps they are best directed to those parties.

Mr DAVID SHOEBRIDGE: I suppose I am testing the perception of fairness.

The Hon. LYNDA VOLTZ: And transparency.

Mr DAVID SHOEBRIDGE: Insurers are a pretty key stakeholder and can put one side of the record about what the perception of fairness is.

The CHAIR: Perhaps you might base the question on that basis, in their perception.

Mr DAVID SHOEBRIDGE: I just want to know what you know about the dispute resolution service.

Mr WEDLOCK: Mr Shoebridge, just on behalf of the insurance broking community, as an association we have not had any complaints from any of our members to date in relation to how the new CTP scheme has been going so it is very hard for us to comment too much either.

Mr DAVID SHOEBRIDGE: Yes, I got that sense that it had not been brought to your attention. You do not know about the decisions and the publication of decisions. You say there is a list of decision-makers with their qualifications. We will try to hunt that down.

Ms MEDLAND: I am not sure if their qualifications are on the list. But they are certainly known to the people within the scheme. They are well-known individuals.

Mr DAVID SHOEBRIDGE: Do we know what kind of quality control there is internally on the decision-making?

Ms MEDLAND: Those are questions we could not answer. They are internal.

Mr DAVID SHOEBRIDGE: Do you not think if it is going to have the perception of fairness, you need to know? It is your money that is being divvied out in this scheme. I am not criticising you but you are not able to tell the Committee the key elements of the dispute resolution system that is divvying out your money.

Ms MEDLAND: That is SIRA's policy. I am sure those policies are availably publicly for anyone who wants them but I am not going to sit here—

Mr DAVID SHOEBRIDGE: Will you remind me of your position title?

Ms MEDLAND: I am a consultant subject matter expert and legal specialist.

Mr DAVID SHOEBRIDGE: With a particular focus on the CTP reform process.

Ms MEDLAND: At the present, yes.

Mr DAVID SHOEBRIDGE: You would have to be one of the most engaged individuals in all of New South Wales on this issue.

Ms MEDLAND: I am almost ashamed to say that is correct.

Mr DAVID SHOEBRIDGE: But you cannot tell us how it works.

Ms MEDLAND: I can but what I am saying is I am not going to speak on behalf of SIRA. I am not here to represent SIRA.

The CHAIR: The witness has answered the question. I understand that Mr Shoebridge is not having a go at the witness or the entity she represents.

Mr DAVID SHOEBRIDGE: I think Ms Medland is doing her best in the system and I am not suggesting otherwise. I am just pointing out if she cannot put her finger on all these elements, and we have talked about being customer focused. Ms Medland, if you put yourself in the shoes of an injured road user, they would have no idea, would they?

Ms MEDLAND: I am not sure if I said that I could not put my finger on the policies. I just said that I am not here to defend those policies.

Ms CAMERON: I should point out the Insurance Council's submission stated that we support all tribunal decisions being published in full.

Mr DAVID SHOEBRIDGE: I know. That was why I was asking the questions.

The Hon. LYNDA VOLTZ: Is the list to which you referred a list of the claims assessors?

Ms MEDLAND: Yes, I understand there are three columns. Whether they are appointed to make decisions under the Motor Accidents Compensation Act, the Australian Capital Territory scheme—

The Hon. LYNDA VOLTZ: And some of those people are SIRA employees?

Ms MEDLAND: Yes, I do understand some are SIRA employees.

The Hon. DANIEL MOOKHEY: Gentlemen, you represent broker networks. How many people are in your association?

Mr WEDLOCK: There are about 350 broking networks around Australia.

The Hon. DANIEL MOOKHEY: Do you have an idea as to the value of the policies that your network would write in the CTP market?

Mr WEDLOCK: Not in the CTP market.

Mr BOOTH: It is about $20 billion overall across Australia.

The Hon. DANIEL MOOKHEY: Twenty billion dollars of insurance policies are written by the people in your network?

Mr BOOTH: Yes.

The Hon. DANIEL MOOKHEY: It is fair to say that you are somewhat expert in the marketplace in insurance. Would you say insofar as CTP that you are also quite expert in market dynamics?

Mr WEDLOCK: It is a statutory class which is different to giving advice on general insurance products.

The Hon. DANIEL MOOKHEY: Is the CTP market competitive?

Mr WEDLOCK: Depending on what class you are talking about. If you are talking about class one and class two, or sedans and utes, yes. When you start talking about over 16 tonne carrying capacity it starts getting a little bit ugly.

The Hon. DANIEL MOOKHEY: How many insurers in New South Wales currently offer CTP?

Mr WEDLOCK: About five.

The Hon. DANIEL MOOKHEY: As you go up towards north of 16 tonnes what are we talking about?

Mr WEDLOCK: They are all meant to offer it. It is a really good point you raise because if I put my insurance broking hat on I get very frustrated that there are only about three that will be accepting of reviewing it because the others do not want to touch it because they think it is high risk. But they do not do anything outside the parameters to actually review a risk properly to see how it is managed, what fatigue management programs are in place and what safety programs are in place. They just categorise it and say, "That's it. It's over 16 tonne. Don't want to touch it." And there is not enough competition.

The Hon. DANIEL MOOKHEY: Have you drawn such concerns to the attention of the regulators or any other people, or the insurers themselves?

Mr WEDLOCK: It is a work in progress. Generally when you asked earlier about the advice, this is all learning a statutory class as opposed to giving advice on a general insurance product.

The Hon. DANIEL MOOKHEY: I recall from the first review we did in CTP that although you say there are five I am aware that in the mid-1990s there were about 15. Mr Booth, is that correct?

Mr BOOTH: That is correct.

The Hon. DANIEL MOOKHEY: The trend in terms of competition in the CTP market over the past 20 years has been downward?

Mr BOOTH: Yes.

The Hon. DANIEL MOOKHEY: What effect has that had on products?

Mr WEDLOCK: It has made it harder. Zurich were one of the last major Australian insurers to withdraw from the CTP market and a lot of their decision-making process was because of the cost of claims and the increasing involvement of legal representation that made it unsustainable for them to remain in play. Everything you are talking about wanting to do makes sense if we can come to a system that will make it fairer and open up more competition to give consumers a better choice.

Mr DAVID SHOEBRIDGE: In terms of assisting new entrants, if there is a kind of independent, accessible tribunal that deals with disputes, and everybody can see how it works, that is the kind of environment where it is easier for a fresh competitor to come in rather than one where there is a sort of unknown black box relationship with the regulator. Do you agree?

Mr WEDLOCK: I would. I have had an example recently personally that was on the news where a third party went in front of another vehicle. It was all on camera. The vehicle that was minding its own business that had the camera footage was completely innocent. But there seems to be rules and regulations behind the scenes where CTP insurers are going 50:50 and all these things that happen that just are not right.

The Hon. TREVOR KHAN: That is nothing new, is it?

Mr WEDLOCK: No, but we are talking about reform and trying to make it fairer. The people who have spent all the money to get all the safety right just to save a life then find out that they have got to contribute towards a cost because of the way a scheme works, is that fair? Absolutely not, and I dare say these are some of the things that you guys are working through. This is why we would like to see more about how all the statistics are made up and what we are doing to add value where we can.

Mr DAVID SHOEBRIDGE: There has been discussion at different times. There are different terms for it but the trendy term is called a data lake where data can then be de-identified and extracted. Do you think if that kind of data lake gets set up it should be open to potentially external insurance players who may want to enter the scheme so they could get a sense of how the scheme operates, assuming it is de-identified?

Mr WEDLOCK: I could not see why you would not if it was going to add better value for the consumers.

Mr DAVID SHOEBRIDGE: Obviously if insurers get access the general public would need access as well. You would not give privileged access to insurers.

Mr BOOTH: The other element of encouraging new entrants is that in CTP historically and today there are large elements of community rating. There are regulatory processes that dictate how pricing will be structured so young boys do not pay a full risk rated premium and so on. There are rules and regulations around how prices are set. Any insurer coming into the system has to be comfortable that they can put their capital on the line, operate within that sort of a system, operate within the pressures of the marketplace and still generate a return on the capital invested in the business.

The Hon. DANIEL MOOKHEY: We can infer from the fact that there was once 15 and now there are five, that at least 10 of them have concluded that is not possible.

Mr BOOTH: Clearly they have spoken with their feet. That is an interesting concept.

Mr DAVID SHOEBRIDGE: Part of the changes last year was to change the way in which the community rating and risk was shared amongst the different insurers to avoid the situation that had been developing where the pure vanilla high-profit part of the market was avariciously marketed for and obtained whilst the rest was being ignored.

The Hon. TREVOR KHAN: It was not being ignored; it was falling disproportionately on some insurers.

Mr DAVID SHOEBRIDGE: Those who did not have the big retail networks. From the Insurance Council of Australia's view have those changes been working? Have you had feedback on them?

Ms CAMERON: I know that as part of our submission to the upcoming or pending review of CTP we do look at that. We say that it is pretty much still very early days but we are hopeful. We think that the reforms look to be achieving their aim.

The Hon. DANIEL MOOKHEY: When you say there is a competitive dynamic in CTP, is that competition built around price, service or claims processing? What would you describe as the most competitive and least competitive aspect of that market in terms of differentiation amongst the five?

Mr WEDLOCK: From a consumer's point of view it is pretty well priced because of the cost. If we go back, a lot of underwriters did have a few extra benefits like driver cover versus just passenger cover and a few things like that. I think it has got to the stage where a lot of that has tightened up now and depending on which suburb you live in or if you are country based or metropolitan based, and what class you come under, namely, are you a sedan ute versus a four tonne or a 15 tonne will determine who is going to offer the most competition because it is compulsory and they have to have it.

To take it a step further, we get challenged on why it is compulsory to have the bodily injury part of the registration but it is not compulsory to have third party property damage mandatory on vehicles. Why are cars allowed to be registered but not have any insurance to protect against third party property damage? We have put that argument forward but that seems to fall away. They are the things and people are just trying to survive, especially with some of the increases that went on as the number of insurers started exiting.

Mr DAVID SHOEBRIDGE: The answer is that we rate people higher than property and the additional cost to everybody to have third party property might put car ownership out of reach for some people.

Mr WEDLOCK: Correct. On the flipside, when we talk about entrants coming into the market, with all of the evolution of opportunity in direct insurance that has come into Australia there are a hell of a lot more motor vehicle insurers now offering that cover.

The Hon. DANIEL MOOKHEY: Can you please explain what direct insurance is?

Mr WEDLOCK: Instead of going via a broker to source a placement you would go straight on the phone to NRMA, Allianz, Youi, Coles or Woolworths and all these new pop-ups that are everywhere that you can buy your insurance these days.

Mr DAVID SHOEBRIDGE: Would you like some insurance with that?

Mr WEDLOCK: Correct, but if it is going to help the consumer then that is a good thing.

Mr DAVID SHOEBRIDGE: Going back to the idea of a consolidated tribunal, when you are talking with your clients about insurance products is there ever any discussion with them about, "Where do we go if something goes wrong?" Is the tribunal part of the decision-making?

Mr WEDLOCK: Would you believe it is more on workers compensation than CTP because CTP from my personal experience as an acting broker is because it is what it is—it is a statutory class. You often do not know that a claim has been put in because it goes through the legal system. You do not even hear about it and you do not even know the outcome. With workers compensation you do find out about the outcome when you review it on an annual basis because it affects your premium immediately when a claim is lodged.

Mr DAVID SHOEBRIDGE: What discussions are you having now with your clients about the dispute mechanisms in workers compensation? Are they saying, "This is great. It ticks over like an eight-day clock. We love this." What are they saying?

Mr WEDLOCK: It is a new scheme and it is very hostile at the moment. I know icare are doing their best to try and make changes to the new scheme but it is not perfect. We are trying to represent our members the best we can, we are trying to open the communication channels. You talk about transparency, if I refer back to a general insurance product and there are losses, it is very simple to explain why your premium is going to go up if there has been a fire loss or a motor vehicle accident. We can explain why and talk about market conditions. When you talk about workers compensation in New South Wales, because of all the changes that have been made and the fact that a lot of the new portals and changes that they are making in claims are not actually up and running yet, there is not yet that understanding that we need to help the clients know. That is why it is a lot of talk.

Mr DAVID SHOEBRIDGE: Since January of this year icare has made some significant changes in dispute handling. For example, there is a lot earlier determination, particularly of medical disputes. Have you had any feedback from your clients about that?

Mr WEDLOCK: We are more trying to work with icare to help the system because we know it has been rolled out but it is still far too early. They will be talking tomorrow, as we know, but the amount of claims they had to deal with when they made the changes was overwhelming. A lot of the earlier experiences were not good and they know that, they have mentioned that. We are trying to support them with that as we work through it but at the same time how long is a piece of string before you go, "We need these systems right to help the employers at the end of the day."

Mr DAVID SHOEBRIDGE: If the Government is going to go to a new dispute resolution model with the Workers Compensation Commission, I assume you would be urging the Parliament and the Government to be putting through a system that allowed the changes icare has already made to be incorporated in it? We would not want to turn all that on its head again, would we?

Mr WEDLOCK: You would not want to in theory because of the amount of money that has been spent but at the same time if the feedback suggests that all of those changes have not been properly engineered in the first place then I would beg to put up a case on behalf of our members to give feedback because at the end of the day we are representing the people.

Mr DAVID SHOEBRIDGE: This is an opportunity to give feedback. Feel free to provide on notice any further feedback on that.

Mr WEDLOCK: Thank you, but not at this stage. The whole reason we are here is to be part of everything that is happening and to let you know that we are really keen to support as we know more.

Mr DAVID SHOEBRIDGE: It sounds to me as if you have a relationship with icare. There is discussion between you as to who this is rolling out. How would you describe that relationship?

Mr WEDLOCK: Improving. It was quite us and them at the beginning because I think when they rolled out their new scheme they were quite adamant that it was all about going out to the customer and forgetting about the fact that we represent $20 billion worth of premium in the marketplace and 50 per cent of those transactions are done through an insurance broker. The bigger businesses look for their broker to be their advocate. We do not want a war with icare. We are here to say, 'We are going to work with you, but if you do not work with us and allow us to give you the feedback then no-one is going to help the end user at the end of the day."

The Hon. DANIEL MOOKHEY: How are you finding the transparency of the premium setting processes of both icare and SIRA and how are you finding both their reforms to the scheme's agent system?

Mr WEDLOCK: SIRA has been very good because we have started talking to them independently and I think as a result of talking with them icare has now realised that we are talking with SIRA and icare. It should not be that way, but that is what is starting to happen. Let's face it, we have just gone through 30 June. That is one of the biggest dates at the end of the financial year where a lot of people have their workers compensation policies due and icare and SIRA—I do not know which one delayed the process—made an announcement of changes to the scheme in the last week of June. You sit back and go, "Is that really fair?" To this date, right now, we have

still got a whole lot of our 30 June renewals without the renewal calculation and we cannot tell them how it is calculated because we are waiting.

Mr DAVID SHOEBRIDGE: Is that on the premium prices?

Mr WEDLOCK: Yes.

Mr BOOTH: We certainly had a significant number of concerns expressed to us by broker members about the fact that they were not in a position to explain the new premium prospects until mid to late June. We made it clear to both icare and SIRA that our brokers and their clients were screaming for information about what was going to happen and that the regulatory process has to operate much earlier than it did this year so that brokers are in a position to talk to their clients about what they can expect for their renewals as of 30 June.

Mr DAVID SHOEBRIDGE: In terms of price setting on premiums, that would be a SIRA matter, would it not?

Mr BOOTH: No. SIRA constructs the premium filing guidelines and icare then constructs its own proposed premium structure. It then has to lodge the premium structure with SIRA for approval.

The Hon. DANIEL MOOKHEY: If there is a delay in any of that process, it ends up with a whole bunch of people who have no idea what they are buying when—

Mr BOOTH: The pricing does not come out from icare to brokers and to clients until that regulatory process is finished.

Mr WEDLOCK: We are working with icare to try to help the customers understand that it is a work in process. "Bear with us, and in the meantime keep paying your premiums as they are. When we know more we will let you know." But it is not an ideal position to be in and if icare was here it would acknowledge that as well, which is a positive because we are trying to work through it together.

The CHAIR: That may inform our questions to them. Thank you very much for attending today. If you have taken questions on notice, the Committee secretariat will contact you. They are returnable within 21 days. Thank you for your time today. We appreciate it.

(The witnesses withdrew)

STUART BARNETT, NSW State Practice Group Leader, Workers Compensation and National Manager for Union Services, Slater and Gordon, sworn and examined

JASMINA MACKOVIC, Practice Group Leader, NSW Workers Compensation, Slater and Gordon, sworn and examined

The CHAIR: Thank you for coming today. You have not made any written submission to the Committee. Would you like to make an opening statement?

Mr BARNETT: I will make a short statement. There was an oversight regarding the submission, so I apologise for that. What is worth indicating is that I am a practitioner of some 31 years standing. I have worked in the Compensation Commission, Compensation Court and the Workers Compensation Commission. My speciality these days, I manage workers compensation in New South Wales but I specialise in coalminers' workers compensation.

Ms MACKOVIC: I am a practice group leader working out of Ashfield. Pretty much my whole career has been in workers compensation. It has been about 15 years in total. I am primarily here to support Mr Barnett in terms of the day-to-day running of a workers compensation file, the commission and like matters.

Mr BARNETT: Having read all of the submissions, we formed our own view that workers compensation is a specialist jurisdiction in its own right. Having practiced for all those years in the various jurisdictions, we submit that the knowledge bank built up by tribunal members, judges and the like, the practices developed and the precedents set lead to consistency, certainty and a level of comfort for claimants, who are often in these jurisdictions for the first time. I am not a compulsory third party [CTP] practitioner. I have a broad knowledge but I am not an expert in that area. Our primary submission is that we are dealing with a very different type of injury claim and that having the same tribunal members or persons determining is not appropriate. They should be separate so they get a consistent experience in the jurisdiction in which they are practicing.

In terms of what the Committee is looking at with one tribunal or another model, our primary submission is that, in terms of workers compensation, benefits aside—which is a separate issue for us and probably for many—the Workers Compensation Commission is working. Our general observation is that our lawyers have learned the process. The Workers Compensation Independent Review Office [WIRO] and the Independent Legal Assistance and Review Service [ILARS] process is working. Again, there was obviously a process of learning the new ways, but by and large it is working. Our view is that whether there are two separate tribunals or one tribunal, there needs to be two streams where there are specialists in workers compensation and specialists in CTP claims. Having come through the Compensation Court system, which to this day I maintain was the most efficient way to deal with matters, but I accept that we are probably not going back to that model—

The Hon. TREVOR KHAN: I think that would be a fair guess.

Mr BARNETT: I know it was on the nose towards the end, but with current models of managing tribunals, I think the court actually could work, much like the Dust Diseases Tribunal. We would submit that there needs to be two streams. I suppose it does make some sense for administration purposes—and essentially the cost of the system—to utilise administration across the jurisdictions where possible. We would urge that there are separate streams. We think it is important that there is a judicial head of that jurisdiction, as there is in the Workers Compensation Commission. We have picked up the tenor of a lot of the submission and I suspect people would have spoken to you about the separation of powers, review by independent tribunals, the perception of bias—which is as important as actual bias for a person before a tribunal for the first and perhaps only time in their life—and the preservation alongside the tribunal of the WIRO and ILARS system, which has evolved into an efficient system.

Workers compensation can be quite personal. The individual may have worked for the employer for many years before he or she brings a claim, which could include multiple injuries over many years or multiple employers. The employer has a lot of skin in that game, as does the employee. In a CTP environment, it is often one injury and one incident. The parties often do not know each other and, on one view of it, the parties just want the thing to end. The compensation scheme is in many ways designed as a longer term system in some cases. I simply add that to add emphasis to our view that there needs to be two clear streams so there is consistency for workers and consistency for injured drivers, for example. That was the emphasis we wanted to put as an opening statement.

Mr DAVID SHOEBRIDGE: Thank you for your submission. In terms of system design, do you agree the regulator should not be making decisions about compensation and liability; there should be a distinction between the regulator and the decision-maker?

Mr BARNETT: Absolutely. It will not surprise, coming from a lawyer, but the undertones from clients and participants in the scheme, at least on the claimant side, is that the regulator makes the rules, they are perhaps there to oversee breaches of those rules, set up the framework, but there should be an independent tribunal determining what could be one of the most important things in a person's life.

Mr DAVID SHOEBRIDGE: The first principle that the Insurance Council of Australia puts, in terms of tribunal design, is:

> Perceptions of Fairness—Research highlights that people generally have a better recovery if they feel they have been treated fairly. A perception of fairness is promoted by having an open and transparent system which sits separately from the decision makers or scheme stakeholders.

Do you agree with that?

Mr BARNETT: Yes. My experience is that it is often about the journey. People like to feel they have had their say, they have had people listen and if they perceive that that decision or that listening has been done by someone who has already made their decision or wants it to go a certain way, then even if they have a reasonable result they come away a bit disgruntled because they have not been heard.

Mr DAVID SHOEBRIDGE: You understand with the current CTP that the dispute resolution scheme or service, the DRS, the way statutory benefits are determined is done in house by the regulator State Insurance Regulatory Authority [SIRA]. Are you aware of that?

Mr BARNETT: Yes, I understand it. I am not a regular practitioner in that jurisdiction, but I do understand that to be the situation.

Mr DAVID SHOEBRIDGE: In terms of scheme design how would you rate that?

Mr BARNETT: I would not rate any scheme where the body who is setting up the system, the rules and is accountable to government, for example, is also determining a person's rights.

The Hon. TREVOR KHAN: And yet the Law Society operated essentially the misconduct division for decades, did it not? I do not remember as a member of the profession that we fell over ourselves to criticise the way in which our professional conduct was oversighted.

Mr DAVID SHOEBRIDGE: You had to be forced there.

The Hon. TREVOR KHAN: I think so did the Bar Association.

Mr BARNETT: You are dealing there with largely like-minded, educated, similarly trained people who know the system by their training and work to the rules. I appreciate there are breaches. You are dealing with a different class of people in that circumstance.

Mr DAVID SHOEBRIDGE: More fundamentally, it was reformed.

The Hon. TREVOR KHAN: I do not know that clients necessarily shared the same view.

Mr DAVID SHOEBRIDGE: It was reformed and there is now a separate independent office that looks at it. Having explored this territory we can agree that where the current statutory disputes are being resolved in CTP is inappropriate. We can agree on that?

Mr BARNETT: Yes.

Mr DAVID SHOEBRIDGE: You are objecting to a consolidated tribunal, but if you agree it is not right there where do we send them? Where do we send the statutory disputes?

Mr BARNETT: In CTP?

Mr DAVID SHOEBRIDGE: Yes. Which independent tribunal do we send them to which has the perceptions of fairness and the reality of fairness, if not to an expanded Workers Compensation Commission? Where do you think we should send them?

Mr BARNETT: We are not objecting to a tribunal for CTP purposes. The two options are if there is not to be a separate tribunal determining CTP then our next option would be something like the Workers Compensation Commission or the Workers Compensation Commission with a definite divide within it to deal with the two streams.

Mr DAVID SHOEBRIDGE: I want to explore with you the idea that setting up a whole new tribunal is the preferable outcome. If you set up a tribunal you then have to populate it with decision-makers, establish a set of rules and guidance and you have uncertainty and transactional goals in setting up a new tribunal, not just the cost of running it. Then it is tested by the litigants and participants and it does not bed down for years. Do you

see there might be a benefit if there is a workable, viable, respected tribunal expanding that has system-wide benefits rather than creating a new one?

Mr BARNETT: I understand the practicalities.

Mr DAVID SHOEBRIDGE: It is more than practicalities, it has a meaningful impact upon participants.

Mr BARNETT: What we do not want to see is a weakening of the workers compensation system in order to drag along a CTP system. I did say in opening that if the momentum is towards one rather than two tribunals, which I can understand, then we would want that divide within for the purposes that I have stated. I understand what you are saying and what I suggest may not be achievable, but that does not mean I should not explore it. In an ideal world I would see it as a separate tribunal. I can accept there are valid reasons why that would not be.

The Hon. TREVOR KHAN: What does "divided within" mean?

Mr BARNETT: Officers, whether they be arbitrators or judicial officers and the like, effectively being in the workers compensation division, if we are going to use that example, of the Workers Compensation Commission. And, likewise, officers of the CTP division of the Workers Compensation Commission, or whatever it may be called, so that on any given day a tribunal member is not dealing with a workplace injury matter at 11 o'clock and a CTP rear end claim at 2 o'clock. That way you build the body of knowledge and experience in the individual areas.

The Hon. TREVOR KHAN: Would you say it is inappropriate for a judge of the District Court to be dealing with a common law civil claim matter in the morning and either a plea or a criminal trial in the afternoon?

Mr BARNETT: What I would say is that preferably experience in areas civil, to use your word, and experience in criminal, it would be preferable for people in that area to deal with it. I understand the dealings of the workings of the District Court full well and I know they rotate through various divisions. Is that perfect? I am not sure it is. I do not come here to be critical of the judiciary, of course.

The Hon. TREVOR KHAN: Best not.

Mr BARNETT: Different judges, when you are running cases you have to adapt to their knowledge of the particular area. They may not have been involved in that sort of matter for a long time and I am saying that is not ideal.

The Hon. TREVOR KHAN: In terms of the members of the bar that you might brief from time to time, are all barristers appearing in workers compensation matters members of the bar that practice strictly workers compensation or do they do CTP or civil claims matters as well?

Mr BARNETT: In terms of those that I brief it is a very individual question. Almost invariably workers compensation but I think to be fair to your question there would be—

The Hon. TREVOR KHAN: You do not have to be fair to my question.

Mr BARNETT: —in regions and other mixed practices we would have in the business there is no rule that says you must only use a barrister that does workers compensation. There would be practitioners who would do CTP and workers compensation.

Mr DAVID SHOEBRIDGE: What you are saying is there are elements in a workers compensation dispute that bring in long-term relationships between an employee and employer and the possibility of return to work and those kinds of things require not just academic learning but are best dealt with by people who have an experience with those complex relationships. Is that what you are saying?

Mr BARNETT: Yes, and often those things, to someone who has not been exposed to that sort of system, do not become apparent. Not every claimant has the ability to articulate how they are feeling about things.

Mr DAVID SHOEBRIDGE: Assuming it is handed over to a competent tribunal with a judicial head, do you think the Parliament should be prescriptive in saying how those streams are allocated? Or do you think the Parliament should be saying let us establish a tribunal, put a judicial, independent head in charge of it and set out these principles of how we want it to operate, but pretty much let the expertise and the independent judicial head of the tribunal—perhaps with the benefit of a chief executive officer—work it out?

Mr BARNETT: As a matter of principle, I do not know necessarily the Parliament is in the right place to choose the right person.

Mr DAVID SHOEBRIDGE: We would not choose the person. We would say an independent judicial head with tenure—with the seniority of a District Court judge or Supreme Court judge—heads the tribunal and it

has these jobs, these are the principles, but you work out the streams and how to do it. We are not going to be prescriptive about it.

Mr BARNETT: If I am understanding your question, what I was going on to say was, I do not know the Parliament is in the right position to appoint this person as the workers compensation tribunal member for that tribunal, and this person as the motor accident tribunal member.

The Hon. TREVOR KHAN: We never make the appointment. We create the position.

Mr BARNETT: I think I would have enough trust in a head of jurisdiction to say I know I have to have dedicated tribunal members in each stream and I can appoint accordingly. As long as we do not get to the stage where we are saying: today you are here, today you are there.

The CHAIR: I would have thought there are enough lawyers in this place to be able to make that decision.

Mr DAVID SHOEBRIDGE: Is not part of the problem that it has been so prescriptive coming from the Parliament at the direction of the regulator: This is how it will work and this is the nuance of the process? Ms Mackovic, you are a practitioner with experience in this field. It is so prescriptive that it ends up defeating the purpose, which is to try and make things better, easier and quicker. We might be better off handing over some autonomy to the head of a jurisdiction to work out the processes.

Ms MACKOVIC: Yes.

Mr BARNETT: The Parliament makes the law and the tribunals interpret and enforce that law.

The Hon. LYNDA VOLTZ: You would think or hope, but it does not necessarily always happen that way.

Mr DAVID SHOEBRIDGE: Have you read sections 44AB through to AD followed by section 44C and the various subsections, and the transitional provisions and the elements that this Parliament has made to the Workers Compensation Act and the Workers' Compensation and Injury Management Act?

The Hon. TREVOR KHAN: I suspect he has.

Mr DAVID SHOEBRIDGE: You say what is ideal, but that is not how it has worked in workers compensation.

Mr BARNETT: You are now going to the particulars. Can legislation be simplified? Of course. I would say that legislation should be simple but it does not always end up that way. I thought what you were asking me is whether the Parliament would need to place a person in a role or whether the head of jurisdiction would place the person.

Mr DAVID SHOEBRIDGE: It is my fault. I have not explained myself clearly.

The CHAIR: I think that has been asked. It is clear we are not.

The Hon. TREVOR KHAN: That is where I started with this. You were essentially positing a quite rigid, two-stream model and what I was inviting was whether that level of rigidity was necessary or whether competent practitioners were capable of a greater degree of flexibility than you were suggesting. I practised in the country, and the members of the bar and the members of the judiciary, perhaps, who appeared had to do multiple things from day to day and week to week. It seemed to me that the model that you were suggesting was saying that in the 12 years that I have been in this practice, suddenly members of the legal profession have become so specialised they are incapable of that level of intellectual flexibility, and I find that pretty remarkable.

Mr BARNETT: Except I was not suggesting that practitioners would be restricted from practising.

The Hon. TREVOR KHAN: I will include judicial members as well.

Mr BARNETT: Yes. I was suggesting that for the tribunal to specialise in the streams that we have talked about for me would be a better model. I am not suggesting that an experienced practitioner would not be versatile enough. That is a very different situation. The judicial officer is presented with something on the day. In some tribunals they do not have the support that judges have to be writing judgements, to be researching. It is a lot to ask someone to be swapping jurisdictions day in, day out, if you like, without that additional support.

The Hon. LYNDA VOLTZ: I think the example that the Law Society and the Bar Association put forward was that the processes can be quite similar in terms of the documentation and the structure. In that context those dealing with workers compensation could do that in a judicial setting because there are processes that are

followed. Rather than it being decided by the regulator, which is the other option. That was nobody's preferred solution.

Mr BARNETT: No.

The Hon. LYNDA VOLTZ: I think what they were getting to is it needs to be independent and judicial. A lot of the processes are the same and could be dealt with in the one commission.

Mr BARNETT: You could. I have come today to give the benefit of my experience. Even if you did it under the one tribunal, and you would obviously merge as many practices and processes and administration as you could, but I would still lean towards a situation where you had a person dealing with workers compensation.

The Hon. LYNDA VOLTZ: It is a bit like planning where you have the Land and Environment Court because it is such a specialised area that they have the expertise.

Mr BARNETT: Yes, that is an example.

Mr DAVID SHOEBRIDGE: My proposition was somewhat different. Rather than saying there are arbitrators who can deal with A or B because they have those skills, that may be the case. Maybe it is right to say that these kinds of disputes should go down this stream, and these kinds of disputes should go down that stream. It is all finely grained dispute mechanism structures. What I was putting to you is rather than Parliament try and say in statute or regulation that these are the streams and these are the decisions that go down this path, if we empower a competent jurisdiction with a judicial head, such as an expanded Workers Compensation Commission, and say we want you to deal with these kinds of disputes, and we want you to deal with them with these principles of independence and fairness and integrity, but you work out with stakeholders the best way of dealing with them. Is that a preferred model, rather than Parliament trying to be prescriptive? Prescription does not seem to have worked very well to date.

Mr BARNETT: You do not want the system changing every time a head of jurisdiction changes, for example. There would need to be principles or guidelines, or however you want to phrase it, because otherwise, as I say, if a head of jurisdiction retires, someone else comes in and says we are now going to swap all that around. I do not see that as ideal. As long as they had to adhere to those guidelines—I will use that word for the moment—I think that could be manageable.

Mr DAVID SHOEBRIDGE: We do not see those changes when the head of jurisdiction in the Local Court changes. We do not see some huge renovation of the rules. We do not see it in the District Court or the Supreme Court.

The CHAIR: I think we will move on. The question has been posed sufficiently. It is fabulous for us lawyers to contemplate which tribunal should go where and who should move around. Many of us in this room are lawyers or recovering lawyers. While it may be fascinating for us to contemplate our navels and talk about who should move where, at the centre of all this is the injured worker, claimant or perhaps we might call them the customer. Would you care to make a comment to this Committee about the benefits that might flow to the injured worker or the customer in having one tribunal or one body that can determine these disputes and perhaps pose a better experience, if I can put it that way, for the injured worker in dealing with these claims, matters and disputes? You have many clients in this space.

Ms MACKOVIC: I can probably provide a workers compensation perspective, not so much a CTP perspective.

The CHAIR: Sure. I raise it because you referred earlier to it being the first time for some people in this area and it can be a traumatic experience for them.

Ms MACKOVIC: I think from the workers compensation perspective, we have now had the commission for quite some time and there are quite definitive ways in which matters are dealt with. Being able to provide a client with an overview, showing them, "These are the steps and this is kind of what you can expect," gives them a little bit of comfort. When you see them for the first time you have got to explain to them where this is going. Uprooting that and changing it to something else will just create so much uncertainty for people who are already traumatised and injured. They do not really know where their future is going to be. From an injured worker's perspective, I think keeping things as they are is probably in their best interest. I cannot really speak for CTP.

The CHAIR: As to the complexity, such as the different avenues for dispute resolution, do you not think that there is some benefit in having clear pathways? You have alluded to a transparent pathway, transparent decisions and certainty in outcomes as opposed to one merit review here or one procedural review there. Do you not see an upside in that for the customer experience—

Ms MACKOVIC: Yes, definitely.

The CHAIR: —no matter where it is? I mean, they do not hear what the tribunal is; they just know they have to turn up and get this claim dealt with.

Ms MACKOVIC: Yes. I suppose it goes back to what Mr Barnett said earlier about having their say. If they have an ability to actually articulate their perspective and have a legal representative actually put their case forward, I think people walk away feeling like the system has done them some justice in what felt like an unjust situation.

The CHAIR: I mean, they do not know the difference between icare, SIRA, tribunals and compensation commissions and such.

Ms MACKOVIC: No, but it is quite hard if they cannot tell their story. I think this is why the commission is such a good place because there is a decision-maker that they can sit with at a table. They can kind of understand that they are in pain and all the rest of it but if you just have papers that get moved around, then they do not really get that same experience.

The CHAIR: There are no further questions. Is there anything further that you would like to say to the Committee?

Mr BARNETT: No. Thank you very much for the invitation. If you wanted something done on notice, I am more than happy to provide more detailed information.

The CHAIR: If there are further questions from Committee members they will be sent to you. Questions on notice are required to be responded to within 21 days. The secretariat will contact you about that.

Mr BARNETT: Thank you very much.

The CHAIR: Thank you for your time today. We appreciate it.

(The witnesses withdrew)

(The Committee adjourned at 3.33 p.m.)