REPORT ON PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

2020 REVIEW OF THE WORKERS COMPENSATION SCHEME

CORRECTED

At Macquarie Room, Parliament House, Sydney, on Tuesday 28 July 2020

The Committee met at 09:30.

PRESENT

The Hon. Wes Fang (Chair)

The Hon. Anthony D'Adam
The Hon. Greg Donnelly (Deputy Chair)
The Hon. Scott Farlow
The Hon. Trevor Khan
The Hon. Rod Roberts
Mr David Shoebridge

PRESENT VIA TELECONFERENCE

The Hon. Catherine Cusack

The CHAIR: Welcome to the first hearing of the Standing Committee on Law and Justice's 2020 review of the workers compensation scheme. Before I commence I would like to acknowledge the Gadigal people, who are the traditional custodians of this land, and I would also like to pay respects to the Elders of the Eora nation, past and present, and to extend that respect to other Aboriginals present. Today is the first of two hearings we plan to hold this inquiry. Today we will hear from two panels of unions including representatives from the NSW Teachers Federation, Police Association of NSW, Unions NSW, the CFMEU and the Australian Manufacturing Workers' Union [AMWU]. We will also hear from Business NSW, formerly known as the NSW Business Chamber, and representatives from the Australian Rehabilitation Providers Association.

Before I commence I would like to make some brief comments about the procedures for today's hearing. While Parliament House is closed in terms of public access at the moment, today's hearing is a public hearing and will be 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 any filming or photography. I would also like to remind media representatives that you must take responsibility for what you 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 you may make to the media or to others after you complete your evidence as such comments will not be protected by parliamentary privilege if another person decides to take an action for defamation. The guidelines for broadcast of proceedings are available from the secretariat.

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 the Committee members through the Committee staff. To aid the audibility of this hearing, may I remind both Committee members and witnesses to speak into the microphones. Finally, could everyone please turn their mobile phones to silent for the duration of the hearing.

ANGELA CATALLO, Research/Industrial Officer, NSW Teachers Federation, affirmed and examined

KIRSTY MEMBRENO, Assistant Secretary—Industrial, Police Association of NSW, sworn and examined

ANGUS SKINNER, Research Manager, Police Association of NSW, affirmed and examined

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

The CHAIR: Would each of you like to start by making a short opening statement? If so, please keep to know more than a couple of minutes.

Ms FLORES: I would like to thank the Law and Justice Committee for the opportunity to appear today as a witness. For many years now, long before I became an employee of Unions NSW, Unions NSW has lodged submissions, appeared before this Committee and supported injured workers. These injured workers have asked for nothing more than health treatment, help with returning to work and, most of all, to be treated with respect, kindness and dignity. For the many injured workers I have spoken to and worked with, sadly that health treatment is often lacking. Injured workers are sent to doctor after doctor, often mocked and abused in the process, as the insurer shops for a medical practitioner who will provide them with the diagnosis they are looking for—usually, no injury, no treatment required, claim denied. The injured worker has often been ignored and abused, sometimes hassled, lied to, placed under surveillance and fed misinformation by the insurer. These workers are then often forced to go into battle to have their claim accepted and the necessary treatment provided. In many cases, this process will often lead to a secondary psychological injury. I have seen the secondary injuries cause the workers to decline so rapidly that many will never be employable again. Many of these workers began with physical injuries that, if dealt with quickly and humanely, could have seen them return to work in a reasonable period of time.

I personally am tired of advising injured workers to be prepared to fight. I have spent hours counselling injured workers, preparing them to be abused, disbelieved, ignored, followed, surveilled and I too am tired of the scheme that does little but punish injured workers. Most workers I speak with believe that in this country we have safety nets. We have a social security system that will help one when in need. Most workers believe the workers compensation system is a reliable safety net that will feed them and provide a roof over their head and for their family, should they ever need it, should the worst happen to them. The reality is the safety net that is workers compensation has so many holes in it that most workers will fall through these holes.

The workers compensation system, I believe, should be focused at its core on the provision of health care. It should aim to provide high-quality health care in a timely manner with an aim to restore the injured worker to pre-injury health. It does not. Where pre-injury health is not achievable, injured workers should be provided with the highest level of care required that will allow them to live a dignified life, hopefully pain-free, where they may be able to participate in the community and, if able, to return to some form of fulfilling and dignifying work. It does not. Finally, where a worker is injured and unable to return to work, the scheme should provide for lifetime care for all. Again, it does not.

Mr SKINNER: We thank the Committee for inviting us to appear today. Ensuring the recovery, health and financial security of police officers and their families is one of the top priorities of the Police Association of NSW and therefore this review is of great importance. In the current scheme, the elephant in the room is strategies to help injured workers get back into the workplace. Return to work is one of the most important metrics of success of the scheme. For the injured worker, it represents return to capacity, return to health and return to relative financial security. For the employer, it is the return of a skilled workplace asset. And for the insurer and the scheme as a whole, it is a return to earning capacity and reduced claims cost. Measurement of this key metric over the past four years shows us that without a doubt the need for improvement on return to work is urgent. The deterioration of return-to-work rates has been felt across the scheme.

While some cohorts have experienced a more severe deterioration, it is affecting all workers. In our experience, the most readily available and influential strategy to address this deterioration is innovation and flexibility to deploy a workforce of diverse skill sets to meet work demand, including the skills of injured workers. This includes identifying suitable duties and modification of duties and a commitment to fully utilise the capacity of injured workers to the benefit of the workforce rather than seeing their incapacity as a burden carried by the team. While the four-year trend of return to work deterioration may have created a recent financial imperative to focus our minds on return to work, obsession with incapacity rather than capacity has harmed the health and financial security of injured workers long before this recent trend began. We must use this current imperative as an opportunity to rectify that harmful approach to injury management and the union movement is here to assist the Committee to identify such strategies in any way we can.

Ms CATALLO: Thank you for the opportunity to speak to you concerning the New South Wales compensation scheme and the experiences of our members, the teachers in the New South Wales public education system and TAFE NSW. Since the implementation of the current legislative framework in 2012, the federation has taken every opportunity to voice our concerns over the difficulties it has produced for our members who are injured at work. It should be acknowledged that there have been a number of incremental improvements to the legislation over the last eight years. Such improvements include access to funded legal representation, simplified access to appeal work capacity decisions and the recent change to the calculation of pre-injury average weekly earnings [PIAWE]. I thank the members of the Legislative Council who have been instrumental in passing these amendments, but in reality the 2012 legislation still stands and it still fails to provide adequately for injured teachers—both those looking forward to a durable return to work and those who, as a result of the injury, will never be able to return to work.

Ongoing concerns for unions and their injured workers include weekly monetary payments and medical expenses, seeking a set number of weeks after injury, and difficulties in obtaining suitable duties for workers with psychological injuries. The current concerns, which we highlighted in our submission, both related to faults in the implementation of the workers compensation legislation and schemes. Firstly, the necessity for an independent source of information and advice for injured workers: The workers compensation review office was established to fulfil this role. Overall they do so effectively and the federation often encourages our members to take their concerns to the Workers Compensation Independent Review Office [WIRO], especially when Allianz, as the scheme agent, has failed to approve medical treatments in a timely manner.

However, the complaints role is not the only function of WIRO under the current legislation. They also have powers to run inquiries and reports system faults and present proposals for improvements directly to the Minister. To enable the implementation and the independence of that role the WIRO should be a directly funded statutory body via the Ministry. One can only wonder what role WIRO may have been able to play in the current situation if it had not been dependent on the State Insurance Regulatory Authority [SIRA] as the regulator for ongoing funding. Secondly, the federation is concerned with the role of SIRA in supervising all of the workers compensation schemes in New South Wales. As employers of the New South Wales Government, federation members are covered by the Treasury Managed Fund [TMF] is operated by Allianz.

Since mid-2018, SIRA has concentrated its concerns on the icare system and conducted the Dore inquiry. In the meantime TMF has not undergone a similar level of scrutiny. The federation contends that many of the concerns presently faced by workers injured under the icare scheme are also faced by our members under TMF. Many of the Dore inquiry recommendations should be considered as relevant and effective reforms, which should be rolled out across all of the New South Wales compensation schemes. In our submission we highlighted recommendations concerning timely allocation of case managers and a rolling survey to measure the experience of injured workers, not just the customer service but the return to work rates.

Another example of review created by SIRA is the way that it has considerably reduced the details in the guidelines for the claims administration and the claims guidance. In these documents it is moving towards a customer service approach and SIRA has also used this customer service approach in the review that it is doing. It has done a review but it is all to do with customer service. It is not to do with the return to work rates, which should be the emphasis of the scheme. The federation is hopeful that this inquiry will lead to further improvements in the legislation which will remove the barriers that presently stand between injured workers and access to weekly payments, medical treatment and either a sustainable return to work or a dignified and funded way to continue with their lives.

The CHAIR: Thank you very much for all those opening statements. Are there any questions?

The Hon. ANTHONY D'ADAM: Obviously, many submissions have highlighted the issue around climbing returned to work rates. I would be interested to hear from each of the sectors what you think the key impediments are to a return to work. Is it employer obstinacy? What are the barriers that are impeding return to work in the system? Perhaps if we could begin with Ms Catallo?

The Hon. TREVOR KHAN: Or perhaps not promoting return to work?

Ms CATALLO: I would agree with both of those statements. The most difficult area of return to work for teachers is for a teacher who has a psychological injury. The doctor often suggests that the safe and sensible place for them to have a graduated return to work is at another school site, but within the complexities of the Department of Education the person who then has to find that is the Director of Educational Leadership, who has a million other things on their plate. So the difficulty often is within the school system there is not an efficient process for finding suitable placements for teachers who, in the short term medium term, are capable of return to work but simply at another school site—one of the other 2,000-odd schools that are available.

Ms MEMBRENO: I would be probably comment from a policing perspective. Operational police officers are pivotal to obviously reducing crime and commanders are all assessed against Command Performance Accountability System, or COMPASS. Those primarily look at the reduction in crime rates. For an injured officer who cannot put a gun on their hip, cannot get in a police truck and go and patrol the streets that does not in their eyes contribute to that reduction in crime, which is what their targets are and what they are assessed against. Putting them in a back office is not always a primary function that they want to be able to put them in. Being able to identify suitable duties that can fulfil the goal of the organisation, that being reducing crime, they really struggle to be able to identify what sort of duties and tasks they can do away from those front-line core services. So that is a big hurdle and an obstacle for many operational police officers who do get injured, who find themselves restricted without a firearm and in their eyes, and sometimes their colleagues' eyes, and who are unable to contribute to the overall goal of the NSW Police Force, which is a real struggle.

The Hon. ANTHONY D'ADAM: Are there suitable duties available?

Ms MEMBRENO: Probably similar to teachers. With psychological injuries, particularly if they cannot have contact with members of the public and they need to remove themselves from aggressive situations, it is really difficult in terms of identifying them because a lot of the roles are back office. There is a heavy reluctance to be able to probably break functions down and say, "You're an injured officer. You could do just these functions." They tend to have an inability to be able to identify all of those roles that could be performed. A lot of it also comes down to engagement with the injured worker. There is an assumption that the boss or the commander has to identify those duties, but really if you spoke to the workers, if you spoke to the constables and said, "What do you think you could do?", and have a two-way conversation and identify what sort of roles and duties they could do, that would be pivotal to being able to increase that capacity for that officer to feel motivated and wanted to be able to return to that workplace.

The Hon. ANTHONY D'ADAM: Why are those conversations not happening already?

Ms MEMBRENO: They are, but is also around the ability for that injured worker to feel like they have a role to play to be able to really identify them themselves. This is a paramilitary organisation where they get told what to do daily. To give them a level of autonomy and ability to be able to identify within that workplace particular duties that they can do, it is not overly encouraged. It is a little bit, "This is what we have available for you. You either like that duty or you don't." That is not very encouraging for a person, particularly with a psychological injury, who is already struggling to be able to come back to the workplace and feel supported. So, yes, all of those factors definitely contribute to a difficulty in the recovery at work plan development space.

Mr DAVID SHOEBRIDGE: Ms Flores, do you wish to comment on that?

Ms FLORES: Yes. At Unions NSW we are the peak body for unions so we do not necessarily deal directly with particular industries or members. However, often we see the very, very severe cases. In many of the cases I see there is a psychological injury, sometimes a secondary psych injury, that is so extreme I can see myself—and I am not a medical practitioner—that this person will struggle to probably ever again any work ever again, their mental stability is so damaged. Unfortunately I see a lot of those injured workers and I can see myself that they have very, very little chance of gaining employment. I think the word "autonomy" was used.

Where a worker has greater autonomy I think that there is a greater opportunity for that worker to return to suitable duties. Unfortunately where a worker has limited autonomy there is often very little opportunity for that to happen. Even though teachers are professionals, unfortunately, they have limited autonomy in their jobs—and I am speaking as an ex-teacher myself and someone who has worked in another teachers' union, principals of schools, boards of schools. In the case of the schools I worked with which were independent Catholic schools they were very, very hesitant to place an injured worker in front of a group of students. Mostly, the concern was that parents would complain.

The Hon. TREVOR KHAN: I am not arguing with anything that you have said. But I will just tell you I have a little experience which is CTP experience, but I think it is sort of applicable to my mother who is 93, had a serious motor vehicle accident just before Christmas—actually run over in a carpark—and looked like she had died. We had all the sort of experience of that but surprisingly she recovered. But in the course of the recovery the CTP insurer has allocated to her, amongst other people, both a very responsible claims officer and also an occupational therapist who has rolled out a whole series of supports around her—in some cases absolutely uninvited by us—and quite innovative suggestions. The effect has been, it seems to me, highly encouraging to recovery because of that level of support coming from the insurer. I am wondering in terms of any of your experiences, how your members have found dealing with any of the insurers as to whether they would respond with a similar story of supportive encouragement to recover.

Ms FLORES: I think the answer to that is it would vary. Obviously the most simple injuries—I am talking about a worker that can be possibly back at work within two or three weeks—tend to be treated effectively and fortunately cause no harm to the worker. But certainly one of the problems is getting that very timely, quick treatment to the injured worker. From what you are saying, your mother had that treatment very quickly and it was obviously very effective. If injured workers received treatment in many cases very quickly I believe that we could avoid a lot of the problems that we have. I do know that in particular industries there are unfortunately employers who will send their workers to doctors that the employer finds preferential. They have a list of particular medical centres. They will often drive the injured worker to that medical centre where the injured worker will be told "You don't have an injury. You're back to work tomorrow." And two weeks later the injured worker finds themselves in quite a lot of pain, goes and visits their GP only to find out that they did have a significant injury.

So two weeks later after being at work, putting strain on that injury, then unfortunately the injury is often far worse than it was had it been treated very quickly. A story that was shared with me from the Nurses Association is of nurses who work at St Vincent's Hospital being driven to a medical centre in Maroubra, I just could not understand why on earth you would drive a nurse in one of the top hospitals in our city to a medical centre when you have everything at hand to treat that nurse on site. The only thing I can think of is that that medical centre perhaps will give the employer the diagnosis that they want, not the diagnosis that is the accurate diagnosis.

Mr SKINNER: The elements of the claims management system you have identified are undoubtedly influential in recovery and return to work. We have seen through numerous reviews at the moment that the claims management system of process is central to some of their findings. But we should not let that lead us to an assumption that the claims management process is the only problem or the only solution in that, yes, those very positive elements that you have identified would have significant benefit when they are utilised and if they were utilised more. At the same time there are injuries which, no matter what level of treatment, and how effectively provided that treatment is, some injuries will reach a maximum level of recovery and improvement, and that level might not be pre-injury level.

The Hon. TREVOR KHAN: I absolutely accept that. I am not suggesting otherwise.

Mr SKINNER: Of course, yes. So in those cases we cannot just assume that the solution will be a claims management process that achieves those things, it is also elements of being more innovative and flexible with identifying ways to deploy injured workers where, rather than we have to scour the position descriptions within our organisation to find one that we can you fit that position description when clearly there will be more injured workers than there will be those positions. There has to be a level of innovation in starting to say "Okay, we have this make-up of a workforce, and we have to meet this work demand made up of the following tasks and the following hours." We can start to identify that this injured worker can do lots of things. Even if they cannot do 100 per cent of that position description, they can do the things that they can do and the work team, as a whole, can meet the work demand of that unit.

The Hon. TREVOR KHAN: I accept that but I know Natasha has been here before, and I think you have. This is a discussion that we have had over a number of years but what we are now seeing is a long-term deterioration in returns to work. I suppose one of the questions that comes to my mind is: Is that as a result of a change in employer behaviour or is it a deterioration in the management of the scheme? That to me seems to be one of the questions that this Committee has to look at.

Ms MEMBRENO: Can I make an observation?

The Hon. TREVOR KHAN: Absolutely, go for it.

Ms FLORES: I am not a follower of rugby league but my boss, Mark Morey, is absolutely a follower. He is often saying to me that if we had, if you like, a treatment scheme or schedule that somewhat replicates what happens in rugby league where players are injured and the treatment is, you know, they go hard, they go fast, they go quick and they get them back out there because they have to, we would have a very different situation. So I am not a specialist in the treatment of rugby league injuries. I know that they get them, and they are significant and common. They do seem to be treated quite successfully and quite quickly. I would say that the lag in treatment for the injured worker probably comes down to perhaps the case management—I am not blaming case managers. I know that they are often quite young and inexperienced. They have large amounts of cases to manage. But I do believe that there is a problem at that level. Workers are often chasing, chasing and chasing the case manager. They are asked again and again but, "No, you need this paperwork. No, we need that from your doctor. Your doctor hasn't signed this." There is a huge amount of bureaucracy that seems to get in the way of that treatment happening very quickly. As I said, my boss Mark Morey, believes that the treatment scheme is the way to go.

Ms MEMBRENO: That is a really good example to demonstrate, because they get them back in the paddock very quickly because they are worth a lot of money. At the end of the day, in our experience, often an

operational police officer, when they first get injured, has no idea who to go and see. They go to their GP and they are clearly guided by what that GP says and how experienced that GP is. But quite often they do not know who they need to go and see. Our experience is also that the case manager or the insurer does not really provide them with much guidance in the treatment space. It is left up to that injured worker, who does not really know who they should be seeing. When they are told it is a six or an eight-week wait, they wait for six or eight weeks because that is what has been recommended by their medical practitioner. The insurer pays them their wages. That is the only role they really saw the insurer, the person who pays them their wages.

But whether they are involved in what we would call an appropriate case management strategy of identifying whether they are seeing the right medical practitioners, whether they are being referred appropriately, whether those time frames are adequate, but quite often we will see a physical injury that will wait sometimes two months before that person has even been seen by a specialist. In that period of time, depending upon the severity of the physical injury, they are off work and they have had limited access to treatment. That injured worker is probably a person who has never been injured before and probably used to just go to the GP to get the flu jab. When you look at that in isolation, they should be looking to that insurer in the injury management space to really guide them and case manage them.

From the union's perspective, we receive hundreds of phone calls from injured police officers asking what to do from the union's point of view. That information should be readily available to that injured worker to assist them. Whether they would trust the insurer—and I hate to use that word—but whether they would trust the advice of that insurer as to who would give them that guidance as to what was an appropriate referral to a medical practitioner, would be questionable. But the way we see it quite often from our injured workers is that they do not see the insurer as being that person who is a guiding source of being able to help them with treatment. They might just say things in terms of, "I haven't received your email. We haven't got the sign off. We haven't got the referral." All of that contributes. It starts from that injured worker not knowing where to turn and then when they eventually get that referral, papers get lost, it is stuck in someone's inbox who is off for three days. All of those delays contribute to that worker being off for the entire provisional period without someone even looking at their knee.

Mr DAVID SHOEBRIDGE: What is the position in schools?

Ms CATALLO: With the physical injuries, I think the speed and the amount of treatment that comes to a member is very much dependent on the GP they see, the nominated treating doctor. In a best case scenario, things work like they do with the CTP example we have given, where there is a quick and timely treatment put forward by the GP and there is occupational therapy involved, if that is needed. But too often that does not happen, with the person left without getting the treatment they need. As part of the process, I think the claims managers sometimes get involved in things like meetings and the rehab provider. If the rehab provider and GP are working together well then things can be done in a timely manner. But that point in the process does not always work effectively.

Mr DAVID SHOEBRIDGE: From a teacher's perspective it is a lottery about what your GP is, what you nominated treating doctor is. That is a lottery and from a—

Ms CATALLO: I guess that is my observation, because my normal position is as a professional support officer. I have injured members ringing up and talking to me and sometimes asking me to be in the case conferences with them as a support person.

Mr DAVID SHOEBRIDGE: And from a police perspective, it is really up to the individual officer to try to push to find and identify the opportunities to get back to work for treatment.

Ms MEMBRENO: Yes, I would say that is our observation.

Mr DAVID SHOEBRIDGE: These are two extremely large workforces with very distinct cultures and needs in each of these workplaces. Why on earth do the department, in terms of teachers, and the Police Force, in terms of police, not have units whose sole job is to help guide to find the positions to be doing that? Why is it left to an injured worker and an insurer or an injured worker and private insurer and their doctor? Why are these organisations not doing that?

Ms CATALLO: No, the department does. The department has, within their health and safety directorate, injury management advisers [IMAs] who are the go-between between the insurer and the injured worker. That is an example of where things can work really well. Sometimes that process works. Things can work well, but things do not always work well. This is supposed to be about the legislation, so it is about making sure that the insurer and the employer know exactly what their roles are and they are all fulfilling it.

Mr DAVID SHOEBRIDGE: But if the insurer is remunerated under a deed to pay them on the basis of a set of arbitrary outcomes, their behaviour may well be determined by their remuneration under the deed rather than on the long-term interests of the injured worker.

Ms CATALLO: You would hope not, but sometimes yes.

Mr DAVID SHOEBRIDGE: And therefore, if you had the worker and the employer working directly and we did not have the intervention of a private insurer in that space, do you think that would be more useful in terms of getting return to work?

Ms CATALLO: I do not know. Allianz have been becoming more involved in getting their claims managers involved in some of the case conferences earlier. I have seen that work, because having the case manager involved can stop the delays because if the case manager and the employer and the doctor are all communicating earlier in the piece then that case manager can actually verbally approve treatments within that meeting, so that the doctor does not then have to go away and write and get it approved later. There can be advantages to having the insurer involved, if it allows them to approve things in a more timely manner.

Mr DAVID SHOEBRIDGE: Ms Membreno, do you think there is a benefit in having somebody in the police whose job is simply return to work?

Ms MEMBRENO: They do have that. Very similar to teachers, there are the injury management advisers within the workforce safety command. However, in my experience, those numbers have increased in terms of IMAs that they have got and they still do have quite a heavy caseload. A lot of the injuries are psychological in nature so they do have those people. Can I also say that because they work for the employer, they are not deemed to be independent and often the injured worker, who is a police officer, does not necessarily trust the advice or the guidance being given from an internal rehab—we will call them—officer, which is essentially the injury management adviser. Whilst they are involved in the process, they do have a high caseload, but furthermore not every injured worker who is off with a psychological injury and might be quite paranoid, might be off because of bullying and harassment, do they trust the injury management adviser who works for the NSW Police Force and works out the same office as their commander that they have lodged a complaint against? Probably not. It does not work on every occasion.

In terms of case conferencing with the insurer, that has definitely improved over the years. With EML, who is the insurer for the NSW Police Force, case conferencing has been of assistance. What I do find, though, is that there is very limited scope for the insurer to have any influence in the return-to-work space. Even the injury management advisers, who are employed with the NSW Police Force in the injury management space, have limited capability to be able to influence the boss or the commander to say, "You need to put this injured worker back in this workplace doing these duties."

Mr DAVID SHOEBRIDGE: Maybe they need some statutory independence and statutory powers. Nods and wry looks do not turn up on the record.

The Hon. TREVOR KHAN: That was a yes.

Mr DAVID SHOEBRIDGE: Was that a yes?

The Hon. GREG DONNELLY: Hansard does not pick up nods.

Mr DAVID SHOEBRIDGE: This is important.

Ms MEMBRENO: It would definitely be of benefit to be able to have some influence over key decision-makers within the employer to force them to be able to put an injured worker back in the workplace.

The Hon. ANTHONY D'ADAM: Who has the authority? Is there any body within the system that has the capacity to order an employer to return a worker to work?

Ms MEMBRENO: In our experience, the decision in that recovery-at-work meeting or the case conferencing, the decision about the particular duties and the location where that worker would return to work would be the commander of a particular section. If that commander said, "No, those duties aren't available" or "Those duties that you would like to do are not available," in my experience, the decision rests with that commander.

The Hon. ANTHONY D'ADAM: That dispute cannot be elevated anywhere?

Ms MEMBRENO: It can. It does, but can you imagine what that injured worker feels when we say to the injured worker, "We'll dispute it to your boss's boss and if that person disagrees we will dispute it further."

Mr DAVID SHOEBRIDGE: And have fun coming back to the command where the boss does not want you.

Ms MEMBRENO: That injured worker then suddenly feels very much a lack of motivation particularly if they have not yet stepped or put a foot back in the door at all.

The Hon. TREVOR KHAN: Can I just raise this? With some private employers there is an inducement to encourage return to work that may impact on their premium. That is right, is it not? But in terms of New South Wales police, for instance, or the education department, those potential inducements just do not exist at the level at which the decision-making takes place.

Ms MEMBRENO: That is correct.

The Hon. TREVOR KHAN: So the one, in a sense, lever that exists under the current scheme of private employers just does not exist at all in the public sector.

Ms MEMBRENO: It is up too high that it does not influence the people who actually make the decisions to return the injured worker to work.

The Hon. TREVOR KHAN: Indeed.

Mr DAVID SHOEBRIDGE: Nor are they—those individuals responsible for making the decisions—responsible for the loss of their corporate knowledge, the loss of the training, and the loss of all that investment in the teacher or the police officer as the case may be.

Ms CATALLO: Though to go back to the example that Ms Flores used of employers trying to organise for an employee to go to certain doctors, et cetera, they are the perverse outcomes in private industry where there is incentive to return people to work. There are also perverse outcomes where people are pushed to return to work before they are actually medically well enough to be there, so one of the advantages in being in these larger schemes is that at least that push is not there. You have not got at a local level are pushed to return because it is saving somebody money.

The Hon. SCOTT FARLOW: With respect to return to work, particularly when it comes to police and teachers and the psychological injuries that are occurring, are you finding they are much more difficult to have a return to work plan than what you are finding with physical injuries?

Mr SKINNER: Yes.

Ms MEMBRENO: Absolutely.

Ms CATALLO: A hundred per cent.

Mr SKINNER: The return to works stats show that our employer probably does not do too bad a job of return to work for physical injuries but the deterioration in the trend that we are all focusing on is primarily in the psychological injury space.

The Hon. SCOTT FARLOW: I take it as well that in terms of psychological injuries, they have increased over recent years to be a higher proportion, which is effectively shown in that whole decline in return to work outcomes.

Mr DAVID SHOEBRIDGE: Sorry, but I do not think there is any evidence to tie the return to work declines to arise in psychological injuries. I have not seen that evidence, other than in the police.

Mr SKINNER: The trends—

The Hon. SCOTT FARLOW: Well, I am looking forward to hearing about the trends.

Mr SKINNER: The trends do indicate that there has been an increase in the number and rate of workers compensation claims primarily driven by, I believe, body stressing and psychological injury. They are the two main drivers of the increase. But then the return to work rates and the cost of claims and the length of claims are increasing. Overwhelmingly in psychological injuries and beyond what would be caused by the increase in absolute number and rate of claims, they are taking longer to return people to work.

The Hon. SCOTT FARLOW: Now, with respect to that, let us say doctor shopping, effectively: Is it correct to say that largely some of the doctors do not have an appreciation of psychological injuries as well, and the rate of psychological injury impairment? Is that something that your members are reporting to you?

Ms FLORES: I have members who see a particular specialist probably not far from here and apparently he is very, very aggressive and hostile in his manner.

The Hon. TREVOR KHAN: Well there are a lot of specialists that would fall into that category.

Ms FLORES: I avoid them myself because I see a few, but when I too was working in the independent education sector teachers can be quite naive, unfortunately, when it comes to nasty things out there in the world. As soon as they would see this particular specialist, they would break down and ring me in tears and they were an absolute mess. This particular doctor would basically berate them and tell them that it was all in their head, they were an idiot, go back to work, et cetera. The harm that that particular person did was significant and then of course the job for us was to try to get that person to someone who could then repair the damage. But this is the sort of person that the insurers—and in that particular case the Catholic Church Insurance—always send their teachers to him because that was exactly the sort of treatment, if you like, they wanted for their workers. Catholic Church Insurance is a highly litigious insurance company, rather like the Catholic Church itself.

Mr DAVID SHOEBRIDGE: There is a whole separate hearing on that.

Ms FLORES: Yes, sorry.

Mr DAVID SHOEBRIDGE: Both the police and the teachers are covered by the Treasury Managed Fund and therefore you have not seen the full brunt of those automated changes to the icare model, have you?

Ms MEMBRENO: No, we have not.

Ms CATALLO: No. Our members, when the report and injury, do so verbally to a phone number to a human being who takes down the situation and the notes from them, not via a website.

Mr DAVID SHOEBRIDGE: The data from SIRA suggest that there has been a significant decline, though, in return to work under the Treasury Managed Fund, but not as significant as we see under the nominal insurer. I think we have heard from the Police Association about what they ascribe that decline to, but what about from the Teachers Federation or perhaps from your other public sector affiliates, Miss Flores? What do you ascribe that decline to?

Ms CATALLO: Some of it is to do with the fact that I think you will find there is an increased percentage of psychological competitive to physical injuries. Often we also talked about the injury management advisers who work for the department. The department has hired an increased number of injury management advisers so that has reduced the caseload number, but a lot of them were relatively young and inexperienced people and it has taken a while for them to be able to gain the skills and the experience. So a member who has a work capacity certificate from a doctor that says that they have presently no capacity is unlikely to even get a phone call from the injury management adviser. There is nothing in their workload to enable them to be able to do the catch-up calls because they are so busy with the members who are looking for suitable duties and who have some capacity on their certificates of capacity. So there becomes a time lag between an injury and when the employer has efficient—and it is simply a matter of the people who are the injury management advisers doing what they can for the people who are ready to go back to work.

Mr DAVID SHOEBRIDGE: They cannot pull the others out of the too-hard basket because there is so much of that that they have not got the time.

Ms CATALLO: Not so much that they do not have the time. People say, "Nobody has rung me", or, "They're are too busy talking to the other people", and I end up explaining to members that the employer is not ignoring you; the employer is just so busy helping somebody else. I think that does not help.

Mr DAVID SHOEBRIDGE: Ms Flores?

Ms FLORES: I do not have a lot of experience of the public sector, or I have not heard a lot other than from my colleague sitting here about the public sector. Probably I get more private sector people or affiliates who cover the private sector coming to me, so I probably cannot give an educated response.

Mr DAVID SHOEBRIDGE: All right. Well, we have seen that dreadful example of a Corrective Services officer when the report was basically rewritten.

Ms FLORES: Yes.

Mr DAVID SHOEBRIDGE: That has been reported today. You do not have any fresh information about that, Miss Flores?

Ms FLORES: I do know of that case and I do know it is a case that has gone on for probably close to six years now and it is a horrific case very, very, very poorly managed by the employer and the insurer. It beggars belief. The initial injury could have been dealt with. It should not have happened in the first place. It just should not have happened. The injured workers in the particular case have explored every avenue they can possibly explore from the Industrial Relations Commission, where they won that case. SIRA has eventually come along

and helped. It has taken quite some time. Obviously they reached out to their union, the Public Service Association, who then assisted with some of those issues.

Mr DAVID SHOEBRIDGE: If you could give us anymore details of that on notice, that would be appreciated, Ms Flores.

Ms FLORES: I would do. That would be fine. Yes, that is fine.

The Hon. GREG DONNELLY: I raise this with a caution but I would just like to sound you out for your opinions. We obviously have the incidence of the number but also, I think, the overall recognition in the community of psychological injury and the impact of it. It is appreciated that it does impact on people who are in the workforce, who are exposed to it. If one steps back and asks the question: Is there anything that can be done in the context of the training a person for a particular profession, be it through their university training, in the case of people involved in education, and in the context of a professional life the NSW Police Force a training through the academy that there is a need to understand, to prepare the people in the development of their respective professions to be able to recognise and respond more rapidly to the effect of being exposed to a psychological injury and the impact of it? In other words, that they are able to almost get ahead of, in some respects, the manifestation of the psychological injury.

In other words, they are alert to the fact that they are in professions or vocations which have a reasonable chance, perhaps, of being exposed to psychological injury and that they should be alert to that and proactive to being able to assist in its identification so it can then be attended to. I am wondering in the training of teachers through the university courses, and with police through the academy, whether there is any attention to that given in terms of the development or training before they actually enter the workforce per se?

Mr SKINNER: That can be beneficial and it is certainly a strategy that our union has advocated for. We pushed for the development and adoption of psychological fitness training to be delivered to officers and recruits.

The Hon. GREG DONNELLY: Is that happening?

Ms MEMBRENO: Yes.

Mr SKINNER: It is happening although it has not been delivered as widely through the NSW Police Force as initially we would have hoped had occurred by now. The plan has always been to deliver it throughout the Police Force but on the last numbers I had I think there is still a long way to go to reach the majority of officers. There is now training delivered at the academy stage. So that is certainly something that there is a benefit to, but I think there is probably a bigger element of causation and addressing psychological injury which is that most of the literature now has identified that the predominant cause of psychological injury is even in professions that are exposed to traumatic work content still the primary cause of those injuries tends to be certain workplace factors, psycho-social factors in the workplace like work demand and work intensification, workplace conflict. So those sorts of factors are the bigger causes of tipping something into "I'm in a profession where I am exposed to trauma" and turning it into" I have a trauma-related injury."

The Hon. GREG DONNELLY: So it is almost systemic in terms of the nature of the job?

Mr SKINNER: Yes, so the training at recruitment phase and then throughout a career is beneficial but the bigger impact on preventing or reducing the severity of psychological injuries comes from a WHS approach to mitigation of psychological risks.

Ms FLORES: I agree entirely with that. Personally, many, many years ago when I did my Diploma of Education there was absolutely nothing at Sydney university: that was not even considered. I fact, we were usually told that if there were any sort of problems with students we needed to look at our own teaching and that unfortunately can, and I find still is, a very common approach within schools. So where a child may throw a chair at a teacher, the teacher is often disciplined for that. So that is a problem. That also comes down to just not enough bodies in the classroom. If you go to somewhere like Finland you will have probably more adults in a classroom than you will have students. You will have everyone from an occupational therapist to a speech pathologist, you name it. We do not have that here. We have one person. That person is expected to deal with a full range of behaviours, abilities and that person is expected to cater to all of those abilities and all of those behaviours.

It is why I left the profession. It is almost an impossible task. It is very, very stressful. The workload is intense. It really never ends. You could work 24-hours a day, seven days a week and still never come close to seeing the end of your work pile because the marking just alone is phenomenal. So when you are dealing with the workload and then you are dealing with a very, very diverse set of behaviours, a very diverse set of abilities, the stress is enormous. Again, as I said, in a lot of the schools when I was an organiser, unfortunately teachers were performance managed when problems occurred within the classroom. So there was a general view that "Well, you

are just not up to the job. You can't handle the kids. You can't teach to the different abilities in the class so we will performance manage you out of the job."

Ms CATALLO: Training needs to not just be a one-off thing. It does not need to be training, it needs to be ongoing support. One thing the department has done improved since the mentally healthy workplaces and some of the strategies that have come out of SafeWork NSW more than out of SIRA is they now have documents and processes if there is an incident in a school—whether that was floods, fires COVID, an injury to a student or a tragedy in the community—they had process to go in and support the teachers through those processes. It needs to be something that is ongoing. The caveat though is even if somebody is trained and supported not everyone is going to be the person who has the internal strength to get through things without being injured. At the same time as saying "Yes, there has to be a work, health and safety view and there has to be training and information to support teachers as a way of avoiding psychological injuries" you have to move away from any stigma as well. "Oh, if you're the person who got the injury you're just not the safe one, you're not the reason." There has to be a balance between the training and the support. Members still feeling that it is safe to say "Look, this has injured me. I am unwell. I need some time out or I need some support."

The Hon. ANTHONY D'ADAM: I want to ask Ms Flores in particular about the operation of two sections of the Act. The first one is section 248 which is about dismissal of workers and other one is about the impact of section 39 and how that is impacting on workers who are cut off from benefits. Can you tell us a bit about how section 248 is operating?

Ms FLORES: The section, in my view, is meant to offer protection to an injured worker. It is a section that states that the employer can dismiss the injured worker within six months of the injury. Unfortunately, from our experience the employers tend to interpret this section as being, well, once the six months mark has hit the injured worker can be dismissed and often will be dismissed. So that was a very, very big and significant problem when I was an organiser working in independent schools. It was almost a countdown by the employer to get to that six months point where they could then say, "Okay, you're injured. You're of no use. We dismiss you." As section 39 was being introduced, we did all received many, many calls and we had a lot of injured workers who were extremely distraught because they had no income, they had very, very slim chances of gaining employment. For the most part, these workers are middle-aged—50 to 60-year-old—men. They have physical issues. They have spent their lives working in physical labouring jobs. Their education may be limited. English may be their second language. There are often many, many barriers to these people gaining employment again, plus they still have a significant injury. When you factor all of those things in, they stand very, very little chance of finding a job.

I am no expert on Centrelink or the disability pension, but what I do know from speaking to these workers is it is virtually impossible for these workers to access the disability pension. They are put onto Newstart and they get told that they have to search for work. One particular person I have spent quite a lot of time with is in her early 60s. She has back injuries, hand injuries, carpal tunnel. She spent her life as a stenographer. She has to search for work. She has not been able to find paid work. She has been made to do voluntary work. She actually quite enjoys the voluntary work because she gets out of the house. She is one of the fortunate injured workers in that she also lives in community housing so she can afford to keep a roof over her head. But for many of the injured workers who were basically cut off benefits due to section 39, they have had to move very, very, very far away from Sydney. They have lost all contact with family, friends, their doctors, their specialists because they just could not afford to stay in Sydney anymore. Some of them have become extremely mentally unstable because they just have no options. Unfortunately, many are also suicidal.

Further to that, section 59A comes in a couple of years later, which basically prevents injured workers who were on section 39 from getting medical treatment. If they cannot get that medical treatment through Medicare or they cannot afford that treatment through Medicare, they do not get that treatment. For many of these workers who have had ongoing pain or chronic illness, seeing a specialist regularly or getting physiotherapy regularly does not happen anymore or cannot happen if they cannot afford that. That has been extremely worrying to us. Unfortunately we feel that many of these workers have lapsed into deep depressions and we would not be surprised if there have been suicides as a result.

The CHAIR: We have reached time, so thank you very much for attending today. I do not believe there were any questions on notice.

The Hon. GREG DONNELLY: Can I just foreshadow, because we have run out of time, that with respect to Ms Flores' very useful submission in which you made specific reference to the matter of secondary psychological injuries, as opposed to a psychological injury, I will put a question on notice to all asking whether or not you are aware of if there has been any work done to attempt to work out what might be the cost associated with the effect of secondary psychological injuries for the police, education and generally the labour force of New South Wales.

The CHAIR: There may be some other questions on notice from the other Committee members as well. Ms Flores, you have one question on notice from Mr Shoebridge to provide further information. If you could provide that within 21 days, the secretariat will be in contact. Thank you very much for your time today.

(The witnesses withdrew.)

SHERRI HAYWARD, Legal/Industrial Officer, Construction and General Division, NSW Branch, CFMEU, affirmed and examined

RITA MALLIA, State President, Construction and General Division, NSW Branch, CFMEU, affirmed and examined

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

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

The CHAIR: Would you like to start by making a short opening statement? If so, please keep it to no more than a couple of minutes.

Ms MALLIA: I will go first, if you like. I would like to make an opening statement. I feel like I have made this speech a hundred times in the 24 years that I have worked for the CFMEU and had to deal with issues like workers compensation. It is nothing but pure frustration on behalf of the union and members that we are here continuing to make the same complaints and the same representations. Hopefully, this will not fall on deaf ears.

We have heard a lot this week about the actions of agencies—the icare board, computer systems, modelling, statistics, money—and we are not actually hearing a lot about the impact that scheme has an injured workers. The suffering is not just at the hands of icare or SIRA. The suffering is at the hands of the legislation itself. I commend injured workers who this week have shown the courage to publicly tell their stories because that is not an easy thing to do in a system that is so punitive. Since the early 2000s workers compensation reforms—and I have been involved in workers comp reforms since 1996—have just unfairly targeted the injured workers. The 2012 amendments blamed systemic problems on injured workers and sought to punish them in the form of reduced benefits. But then we watched the budget turnaround in a matter of six months but employers were handed awarded of 14 per cent reduction in premiums.

And still injured workers suffer. We have a legislative scheme that is not based on fairness and not based on compensation. It is focused on reducing premiums and overall costs for business by punishing injured workers. We have a legislative scheme that is so ridiculous that workers have to seek pre-approval to get basic medical treatment and when there is a glitch in the system that medical treatment, which is what will get them better and what will get them back to work, is not provided and they are hung out to dry by time limits. The system is broken and if the legislation did not require even such a simple thing as pre-approval of medical benefits, some of the claims issues and management issues we are seeing now complained about would have less impact or would not exist at all.

We have a legislative scheme that sees injured workers removed from the system 136, 130 or 260 weeks if they are 20 per cent or more whole person impairment. That is an extraordinary and significant barrier or hurdle to get over. There is no evidence to suggest that any of these cut-offset really get people back to work. All they do is just throw these workers onto some other scrapheap, whether it is social security or Medicare. Literally we just chew people up and we throw them out when we are done with them. It is a legislative scheme that punishes injured workers for delays in lodging their claim and yet you will see in our submission many examples of employers who refused to lodge claims on behalf of their employees. It is not until, if they are lucky enough to be members of a union, that they get to see their union or their lawyers and lodge a claim on their behalf that the process can start. It is just extraordinary that that is where we find ourselves in 2020.

It is a system that allows an employer to overcome the requirement to provide suitable duties by dismissing their employees from their employment. We recently had a delegate exercise his right to suitable employment. The return to work inspector he contacted agreed that the employer, a large employer, had the capacity to provide suitable employment. The employer's response was to terminate his employment. It is a legislative scheme that allows employers to underreport their payroll and to cheat on their premiums. There has been a lot of talk about the finances of the fund. We know that when you start talking about the finances of the fund it will inevitably result in talking about reducing benefits, but we never talk about making the employers, who cheat the system even by way of premiums and by the way they treat their employees, held accountable. You have some examples in our submission around the issue of certificates of currency and the lack of robustness when it comes to ensuring that companies pay the premium they are supposed to pay for the industries they work in, the risks that their industry represents and their own claims experience.

So, yes, there are many issues in the management of the system. But let us not forget who the system is meant to be for. The system was built to compensate injured workers way back in 1926 when they suffered injury

at work—an injury that invariably is not caused by their own fault—and to assist them to return back to work. The system is not doing that. We have got some turf war between two agencies, SIRA and icare. Those wars need to be put aside. Issues need to be properly resolved. People in the system need to come together and remember what it is here for—to compensate injured workers—and to look after those who have been injured either building the city, producing, providing services, contributing to the broader economy of New South Wales and yet are being left to the scrapheap once they are injured. I hope that this inquiry leads to some proper reform that remembers who we are here to look after.

The CHAIR: Thank you. Do we have an opening statement from the AMWU?

Mr MANSFIELD: I will speak to that, thank you. I think it goes without saying that I support everything that Ms Mallia has said and the length of time of my exposure to this is not quite as long, thankfully. I will not talk to our submission because I am happy for you to take note of the submission. What I want to say in short is that our concern is that the objectives of the Act are still not being met and the objectives of the Act are about actually assisting workers to recover, to recover either their pre-injury health or to recover their best health and then to return to work in either their pre-injury employment or the best employment they are capable of recovering to. A couple of things that we will highlight during our opening our that we believe that the then diseases work that was done by Safe Work Australia and agreed to by representatives of the New South Wales Government should actually be brought into being in New South Wales. That has been done in other jurisdictions and it is a sound piece of work and it would bring the legislation up to date in 2020.

We continue to believe that a ministerial advisory council made up of the three social partners is essential. Whether there is a place for subject matter experts, that is a different issue, but we believe there should be a tripartite body made up of the social partners ongoing to oversight the scheme, as there was. You will see in our submission it was swept away in 2012. I will highlight throughout our submission the ongoing issue of delays, unreasonable and unknowable reasons for medical treatment being delayed and deferred, challenges over whether it is the appropriate treatment. That links back to where I began—these continuous delays for what seemed to be procedural administrative purposes do not actually meet the purposes or the objectives of the Act, which is a safe, timely and durable return to work and treatment that is appropriate. I will conclude there, apart from saying that what we have brought to today is a case study that we had the permission of the injured worker to speak to. My colleague, Dave Henry, has had to speak to them and we are happy to talk to that case study to illustrate these issues. Thank you.

The CHAIR: Thank you very much for that. I will use the Chair's discretion to open up questioning, if that is all right. It just comes out of your opening statement, Ms Mallia. I leaned across to the Deputy Chair when you were talking about the turf war between icare and SIRA and I said to the Deputy Chair it is interesting that one of the comments that that is recurring throughout this inquiry is that they are too close so there is no turf war. Could you expand on that?

Ms MALLIA: I can only tell you what I have observed. We have one body saying they have got responsibility for certain things and another body saying it has got certain responsibilities. They are criticising each other. Both apparently have not done their job so that is why I describe it as a turf war. I do not know what all of it ends up meaning but for the injured worker it is just a shemozzle, a mess, and one that has to be fixed. If these people are not doing their job, then someone has to hold them to account and I assume ultimately that is the Parliament. They need to be doing their job. I do not know why we have all these different bodies. In the day we had WorkCover NSW which was the regulator. They looked after workers comp and they looked after safety. It seemed to work albeit there were lots of issues around benefits, et cetera. But it seems we have this inordinately complex structure. We have WIRO on the other side. I do not know: It just seems very complicated and a bit of a mess. If these people are not doing what they are legislatively bound to be doing, then of course they should be held to account. But in all of this it seems like to us, like I said, we have forgotten the whole point, and that is what is happening to injured workers. Why are they not being given the proper service and care they deserve and are entitled to under the legislation?

Mr DAVID SHOEBRIDGE: You put in your submission the case study of that dysfunction, which is the PIAWE review—a disastrously complex formula that was put in and the years and years it took to try to resolve that. I think that might be a good demonstration of the dysfunction and the turf war.

Ms HAYWARD: Yes. The PIAWE issue is something that I have spoken to this Committee about I think every time that I have appeared before the Committee and it is an area that I have been heavily involved in. This issue was first raised as an issue with the centre for economics report that was part of the statutory review of the 2012 amendment in 2014. From there every single inquiry has seen that PIAWE is a super complex difficult to understand and apply process. We had the Parkes inquiry look at it. In fact a discussion paper was issued on this issue of PIAWE. We have had a regulation issued that was never going to address the actual issue, which was

the base definition of what pre-injury average weekly earnings was. The regulation that was to be issued was very specific and related to who can be excluded from certain calculations and what does base rate of pay mean? That was the only impact it could have.

It was not until 2018 when we finally got legislative reform when it came through with the dispute resolution changes. Even then we then another 12 months of consultation on an issue that we had had consultation on since 2015 to try to work out exactly what "average weekly earnings" means. In our view it should never have been this complicated. In our view it should never have been this protracted. It was a matter that was very firmly in the forefront for quite a significant period of time. I have put a timeline in our submission which really details how long we have been talking about this issue.

The Hon. TREVOR KHAN: Can I stop you there because at least one or two Committee reports had commented on this?

Ms HAYWARD: Yes.

The Hon. TREVOR KHAN: At least for some of us, even if we do not understand it, we know it has been an ongoing matter?

Ms HAYWARD: It is something—correct.

Mr DAVID SHOEBRIDGE: March 2017 is what the time frame says.

The Hon. TREVOR KHAN: I suppose the question is: accepting that there has been this issue, can you link that to what seems to be the turf war between icare and SIRA or is this just a demonstration that sometimes governments of all persuasions and public services of all persuasions get it wrong?

Ms HAYWARD: Yes, so I can link it very clearly. This PIAWE review that has occurred recently which has shown that there are definitely some issues with the way that people's weekly benefits have been calculated—and there are over payments and under payments as a result of this current review—what we are seeing here is SIRA saying "This is entirely icare's fault." This is not entirely icare's fault. This is the fault of legislation. This is the fault of a regulator who did not watch.

The Hon. TREVOR KHAN: And that regulator, you say, is SIRA?

Ms HAYWARD: Is SIRA. Correct. It is the regulator of the system. Its job is to oversee the conduct of the nominal insurer. It has not been doing that. The value of the PIAWE blowout—if we are going to call it that—would be less had SIRA conducted consultation quicker and more meaningfully and had looked at the way it issues guidance compared to the way that icare issues guidance. PIAWE has been a turf war between them for some time. There was an issue, I think, two inquiries ago where icare had issued its separate PIAWE form without discussing it with SIRA. We had for a time competing PIAWE forms which created a bit of confusion. Icare said it issued its form because the SIRA one was too complicated. SIRA said it did not know about the icare form, despite the fact that it had been given copies of the form before it had been published. So this is an ongoing issue between the two of them. They are both to blame. It is not fair to sit here and put the blame in one basket. We need to spread it out. The PIAWE review is a perfect example of two agencies being at fault and one agency copping all the blame for it.

The Hon. TREVOR KHAN: I will explain that the reason I was wanting you to be explicit is because both those organisations will come along and it is better if the transcript is precise in terms of—I will call it—your allegation so that each of them can have a shot at answering it. I say that publicly now because they might be watching.

Ms HAYWARD: Yes. I appreciate it. PIAWE is not the only area. We have seen this week, and actually I have mentioned a couple of newspaper articles in my submission. There was an article in which SIRA participated that said that the icare submissions to the health care review said that the workers would have to pay the gap for the health care. That is not actually what the submissions say. There is no discussion in the icare submissions about who pays this so-called gap in the health care costs. So it is this ongoing thing where they want to come out better than the other and do not necessarily look to all the facts before doing so. I am not saying they are not truth but they are not looking at context. They are not looking at the situation when they make the discoveries.

Mr DAVID SHOEBRIDGE: Nobody, no major insurer dealing with the mess that was the statutory formula for PIAWE would have got it right all the time.

Ms HAYWARD: No.

Mr DAVID SHOEBRIDGE: Icare did not get it right—obliviously to blame for that—but also you are saying that the regulator needed to fix that and step in and fix that and letting it run for 4½ years just aggravated the mess.

Ms HAYWARD: We had a report in March 2017 which said that everybody agrees there should be legislative change. We did not get legislation until October and then we did not get the regulation which would allow the legislation to commence until the following October—more than 12 months after the passing of the legislation because the way the consultation was handled was very poor in the beginning to the point where they disbanded the working group and had to restart everything again.

The Hon. TREVOR KHAN: It might be in your submission but when was the working group established and when was it disbanded?

Ms HAYWARD: The working group was originally established for the purposes of Tania Sourdin consultation so that would have been the end of 2016. Her report was issued in March to SIRA. It was not on the web site until later that year. The working group was then recommenced just before the passing of the dispute resolution reforms. It continued from September to December where it was disbanded and then consultation picked up again I think around February but it was as if we were starting from scratch. As if everything that we talked about in 2018 had never happened.

The Hon. TREVOR KHAN: Who initiated the re-consultation phase?

Ms HAYWARD: That was SIRA but it was headed by a different person within SIRA at that point. So Nicholas Cobb had taken over the consultation phase by that stage and things moved very quickly from there.

Mr DAVID SHOEBRIDGE: If we are going to have a kind of turf war session—

The Hon. TREVOR KHAN: Apologies—

Mr DAVID SHOEBRIDGE: No, it is perfectly fine. The current turf war is about the data on return to work?

Ms HAYWARD: Yes.

Mr DAVID SHOEBRIDGE: And it has been going for the better part of two years now with icare saying its data on return to work is better and then SIRA saying no, its data on return to work is better. And repeated exchanges back and forth between them about the basis upon which their measurements are made and each critiquing the other. Are you aware of that?

Ms HAYWARD: I know that they are using two different methods of calculating return to work. The return to work data thing is a bit of a problem and I know that SIRA is currently looking at consulting as to what approach it should take to data. I was invited to talk to them about it, and I flicked it to these guys instead. So they are probably better to talk to the return to work stuff.

Mr MANSFIELD: I would just observe, and we have not touched upon it in our submission so I am happy to respond later if you want more detail. If you think about the milestones in the legislation and in the guidance material there is slippage and there has been slippage that has crept back into the scheme I would say since 2015-17. It is hard to judge but '17 in particular. There is not just the behaviours of the two bodies we are talking about but there are other parties who were employers, insurance brokers and other people involved, and even workers sometimes where there is a delay to notify the injury or delay to report, delay to notify, delay to make a decision about provisional liability, delays on medical treatments and all of those things. Until there is some meaningful analysis of either a cohort of claims to understand why it has shifted, I do not know what we are talking about. To be honest it is a metric and it is a metric that I do not think actually really measures what happens to injured workers because it does not measure if the worker if terminated.

Ms HAYWARD: No.

Mr NAPIER: They just fall off the system, and that is an Australian New Zealand jurisdiction issue, not just a New South Wales issued.

The Hon. TREVOR KHAN: Could I just ask a question in terms of slippage? I am interested in the change of what I will call the structure of the claims agents to essentially consolidation—this is in the nominal scheme, the private sector—to EML essentially being in charge of being the primary claims agent, I suppose in an awkward way of describing it. Is that a point where we have seen a change in behaviour or a change in outcomes, or is that not relevant criteria?

Mr HENRY: I do not think the advent of EML becoming the sole agent actually changed behaviour. What it did was put a spotlight on a problem that was pre-existing, which was exacerbated as a result of there not

being enough case managers and a lack of training. Yes, I am mindful that the Dore report sits there and identifies that we have 100 per cent churn within that insurer every eight months. That is unbelievable. It means that there is no corporate knowledge within that organisation. It means that workers are dealing with people who have not got experience. There is no training and there is no investment in these people. You can understand the strategy of EML. "Why would we sit there and invest in a group of people that we know are going to be out the door in eight months?" We have some real problems, but as I said I think that what it did was put a spotlight on a problem that was pre-existing. It would be wrong to say that these issues did not exist prior to the single agent.

The Hon. TREVOR KHAN: I am not suggesting that, because we have been in earlier inquiries when we have talked about this with multiple agents involved. The question is: Did it exacerbate the problem, or is that wrong?

Ms HAYWARD: I do not think it is the one-insurer model that exacerbated the problem. I think it was the automatic triaging process. The problem was when the automatic triaging process came in, there was a six-week delay in getting a case manager, because those who were deemed to be non-complex did not necessarily have somebody there straightaway. I understand that icare has now moved that down to two weeks, so it is now a two-week delay, but that would also have contributed to the return-to-work figures that we are seeing, the fact that people are not having a person talking to them about their claim for six weeks.

Mr DAVID SHOEBRIDGE: But was that not a response to the fact that EML did not have the scale and complexity it needed, did not have the case managers, did not have the grunt needed to become the only claims agent?

Ms HAYWARD: Potentially. I am going to be honest, it was the smallest one, from our perspective, and we had the least amount of claims with EML prior to the conversion to the one-insurer model. It was a bit of a shock, although they were the agency that had the best person-to-person communication, in saying that, prior to the one model. But it was the smallest. I know the reports are all saying that they did not have the people that they needed in order to run a one-insurer scheme.

Mr DAVID SHOEBRIDGE: Your issue is not with the concept of a single insurer, it is how it was operationalised.

Ms HAYWARD: Yes.

Mr DAVID SHOEBRIDGE: Did they have scale and capacity and, in particular, the computer-generated triaging and how that aggravated the return to work problems?

Ms HAYWARD: I do not have a problem in either model so long as it works.

Ms MALLIA: But it is also about the values that underlie the system. You have a system that is based on punishing workers because they are injured; employers just want to wipe their hands of the problem because they have too many other things to worry about, let alone an injured worker. You have a system that is actually not premised to looking after people when they need it, but let us get them off the system as quickly as we possibly can. It does not really matter what model you have, because if that is the culture that that organisation and that operation is going to be based on then you are always going to have these problems. But if you actually had a system, whether it is one insurer or 50, but the premise and object is we are going to look after these people—employers have paid their premiums and these people have been injured at work and should be supported to get back to work, or if they cannot get back to work then supported to live with the disability they have—but we do not have a system that even has that as a fundamental value. We have a system that is all about cost and getting people that are costly off the system. Whilst that exists, you can have many models but that is not going to solve the problems we are seeing today.

The Hon. TREVOR KHAN: If you have a churn of claims agents going out every eight months, there may not actually be any underlying philosophy to the organisation at all.

Ms MALLIA: At all.

The Hon. TREVOR KHAN: They are trying to work out how to find the toilets before they are working anything else out. It is potentially a very practical problem in terms of claims management that is disadvantaging everyone who is involved in the system, but particularly the workers.

Ms HAYWARD: Yes.

Ms MALLIA: If you are in pain and you have underlying psychological issues and your return to work is impeded because your employer will not give you a start or you just have a lot of medical problems associated with your injury and you have someone at the end of the phone who cannot even empathise with you and help you through the process then that whole system is going to fail. The worker is going to be annoyed and give up

on the system and is not going to behave well in those circumstances. People who are claims officers are going to quit their jobs. I do not know if you have dealt with people who are injured, but it is a really stressful time. They cannot pay their bills and they have kids to provide for. They have lost their means of employment, some of them. That is a really difficult situation, and to care for these people takes some skill and some capacity. It is not just about ticking boxes or making sure the cheque gets out at the end of the day.

The Hon. TREVOR KHAN: In the late 1970s to early 1980s I was a personnel officer for Australian Paper Manufacturers. I ended up looking after drunks in the local courts because it was far more rewarding than some of my work.

The Hon. ANTHONY D'ADAM: Just on this, perhaps Mr Henry's case study might be helpful at this point in time in terms of illustrating some of the deficiencies.

Mr HENRY: Sure. I have to say historically, when we have attended this Committee, we have had the opportunity to have the injured worker present, but with the current circumstances it was felt safer not to do so. We present this case study not because it is an example of a worst-case scenario, but actually because it is contemporary. As I go through this case, you will see that the latest incident affecting this worker happened last week. That is how contemporary it is. It is an example of the sorts of issues that we are dealing with on a regular basis, coming through the door workers seeking assistance from ourselves. For the purpose of this presentation, I will refer to the worker as Mr H, just so he cannot be identified. He is employed as a leading hand. Mr H was a labourer for a large mining engineering company and had worked for a number of decades for this organisation in which time he had worked himself up to being a leading hand.

He suffered an injury on 14 January 2016. He had a right shoulder rotator cuff tear and a tear to his bicep muscle, where the bicep muscle had been torn off the bone. His insurer is GIO and that, of course, is operating under the icare system. On the day of injury, Mr H reported the injury to his supervisor. Unfortunately, the employer took no further action. In August 2016, Mr H is diagnosed with a depressive disorder, so a secondary psychological claim as a result not only of the disablement of the injury but of the fact that he had received no assistance from his employer. To this point, as we have now become aware, the insurer had not been notified either, so there is actually no treatment, no intervention, no assistance for this worker at all. Probably not surprisingly, he then suffers the depressive disorder.

He tolerated the pain for six months before confronting his employer and was sent to the employer's preferred doctor. He was not advised of his legal rights in relation to choosing his own doctor. Fortunately, the doctor sent him to a specialist who ordered an MRI and, following the MRI, there was a decision to have surgery, which occurred in October 2016. Once he was directed to medical assistance and was provided that medical assistance, it would appear that the surgery happened relatively timely. He returned to work on suitable duties post-surgery in January 2017. Approximately 12 months later he suffered an aggravation to the injury, which led to a reduction in his suitable duties hours. The employer arbitrarily started paying any non-worked hours out of his sick leave, annual leave and long service leave and Mr H was not notified that his employer was doing so. This issue was only rectified after Mr H engaged a lawyer and the intervention of the lawyer resulted in those unlawful payments being rectified.

During all of this period Mr H continued with physiotherapy on the right shoulder. In March 2019 the nominated treating doctor certified Mr H as fully incapacitated as a result of the shoulder not getting any better. He was then sent to a specialist and the specialist recommended another MRI to find out why the shoulder was not repairing. GIO refused the request for a diagnostic MRI and decided, totally independent of any specialist's advice, that an ultrasound would do. Not surprisingly, the ultrasound did not identify any problem. Fortunately for Mr H, his specialist was very persistent and eventually the GIO relented and allowed an MRI and the MRI identified scar tissue in the affected regions, which would require further surgery. That further surgery that occurred on 15 October. Mr H has suffered ongoing pain to his left shoulder. Last week—

The CHAIR: Sorry to interrupt. Is that a separate injury? We were talking about the right shoulder.

Mr HENRY: Yes, that is right. Thank you for highlighting that. Yes. He suffered and has noticed pain in his shoulder for the past three months and only last week was diagnosed with a torn rotator cuff and swollen bursa. The specialist has diagnosed causation as likely occurring from overuse due to compensating for the right shoulder injury so he is now bilateral, both shoulders. In the meantime, in June this year he received some pain management—a process called radiofrequency ablation, which is a process to deaden the nerves in the area, blocking the pathway to his back. He had pain radiating from his right shoulder down through his back, particularly affecting his balance.

GIO on 1 July this year provided notice of intention to make a work capacity decision. Attached to this notice was a functional assessment, a vocational assessment, provided by a rehabilitation service appointed by

GIO—again Mr H was not made aware of his right to choose his own rehabilitation provider—and a certificate of capacity from a nominated treating doctor. Mr H was unable to complete the functional assessment due to a loss of balance and was not assessed for the range of movements in the right shoulder. The report does not reflect the assessment or lack thereof that occurred on that day. In fact if you were to read the report, you would think that he underwent the full assessment that he was supposed to undergo. The vocational assessment was not done in consultation with Mr H and conflicted with the advice provided by Mr H who, when becoming aware of the report, advised his doctor he would not be able to get into a truck's cab, let alone manual handling which would be required, and did not possess the qualifications for the other roles, construction manager or facility manager.

So a rehabilitation provider appointed by the insurance company, and this is probably from one of their panels—they have panels of pet providers—with a worker who has got by now bilateral shoulder damage and his right shoulder of course is not repaired. Three jobs were identified. The first is a long haul truck driver. He rightly identifies and says, "Well, that is terrific, but I cannot even pull myself into the cabin of the truck. How am I supposed to be a long haul truck driver?"—let alone what one would expect to be the heavy manual handling that would likely be involved in being a long haul truck driver. The other two positions that were identified was to be a construction manager. We have had a look at the requirements for construction managers and most construction managers actually have qualifications sometimes coming out of university. Remember that Mr H's background was a labourer who had worked for many decades up into a position of leading hand with no formal qualifications whatsoever.

The other position identified for him was a facilities manager which, similar to a construction manager, required formal qualifications of which he had none. It is worth noting that Mr H also is computer illiterate. He cannot use a computer so those positions become problematic. Despite all of this the doctor signed off on the reports and this of course was the doctor that was assigned to him by his employer all those years ago. It is against this that Mr H is assessed for his capacity. So GIO continue to assess him for his capacity despite the fact that his functional capacity does not match these occupations. Not surprisingly last week on 20 July GIO determined Mr H as having no entitlement to weekly benefits. This matter will now proceed to the Workers Compensation Commission. We have an issue where not only has this worker's rights, as set out under the legislation, been offended on multiple occasions, and not only has Mr H not received the timely treatment that he requires, and not only is he not receiving meaningful rehabilitation but in fact the rehabilitation provider in this case provided advice which one struggles to understand or comprehend, even without being familiar with the workers compensation system, how they generated the recommendations.

But you have also got these billing costs that deliver nothing. A worker is sent for an ultrasound when the specialist is saying that an ultrasound is not going to do it. We have got issues in relation to lawyers having to intervene in relation to money being diverted by the employer out of leave entitlements. Now we have an issue in that the matter will be taken to the Workers Compensation Commission as a result of a capacity decision that is insane and making no sense whatsoever. That is another cost to the scheme. We sit here today asking ourselves, "Why have we got these cost blowouts?" Here is one example. As I said, it is reflective of the sort of things that walk through our door every day.

Mr DAVID SHOEBRIDGE: And that is his life. It has ruined his life for the last four years.

Mr HENRY: That is right. That has been his life for the last four years. I do not need to add that the depressive condition has not gone away. He is still suffering with mental health issues. Now he is suffering with bilateral shoulder injuries and instead of being supported by the insurer, instead of being supported by the other service providers, everyone has lined up to sit there and see if they can knock him off the scale. Thank you.

The Hon. ANTHONY D'ADAM: It seems that all the incentives in the system are just wrong. There does not seem to be an incentive for the employer for early notification. What can be done to fix something like that?

Ms HAYWARD: It is a major issue. It is actually a penalty provision that you notify of an injury once you become aware of it. The problem is that that provision is not being used. So employers continue to engage in this action because nobody is there saying, "Well, don't do that." Instead what happens is the insurer reasonably excuses the claim because there has been a delay in lodgement. If you lodge a claim six weeks after the date of injury that is one of the reasons they can reasonably excuse it. So there is no incentive or stick to ensure that these things get lodged. We have an employer who has not lodged a workers comp claim in two years. I have lodged every single workers compensation claim that that employer had come across them.

The Hon. ANTHONY D'ADAM: Whose job is it to enforce the penalty provision?

Ms HAYWARD: The regulator.

Mr MANSFIELD: I would add maybe to just keep that focus, if you like, is a question that you could ask. I am conscious of when—David Henry and other members of the union movement and other stakeholders are on the advisory board—the dwell time had come down from in the teens and in the twenties for small, medium and large employers notifying injuries in 2002. But by 2010 or so the time of notification was down to something like four, five or six days because that provision was in force—that if you do not notify us we will exercise that penalty, which had been $500 but which I think is now wage related. That is my recollection. But it might be a question worth considering putting to those who have the information.

The Hon. TREVOR KHAN: For instance, how many employers have been prosecuted for late lodgement of claims?

Ms MALLIA: Zero. You probably would not have to go very far. No employer gets prosecuted for breaches of the workers compensation legislation.

The Hon. TREVOR KHAN: Consistent with that, on notice would you consider questions like that—I do not necessarily guarantee that they will be asked by me—that you would like answered by the likes of SIRA?

Mr DAVID SHOEBRIDGE: And probably before this time next week, it would be useful for us to get that information.

Ms MALLIA: I think Alan gave a perfect solution—if the employer does not lodge, and an insurer hears of the claim six weeks after the event the employer should pay the six weeks of the benefits out of their pocket. Can I tell you—they will lodge. That is the kind of very simple stick you could use to help. There are always going to be people who will do the wrong thing but if they are being penalised out of their own profits they will do the right thing. It is very simple.

The Hon. GREG DONNELLY: Thank you for your very able submissions and for the opportunity to ask questions of you today. I will present a couple of statements to you and seek your response to these statements about the current situation of the workers compensation system in New South Wales now. The system is the totality of what we are aware of the legal framework for the provision of support for injured workers in this State. If you want to qualify these two statements or agree with them that is a matter for you but I would like the response from both organisations. I think Ms Mallia was very precise in her opening statement about the expression of her frustration having been through this over such a long period of time, in terms of her direct involvement with her union.

If we look at the legislative change that took place in 2012 which was significant what we actually have now from the point of view of injured workers—I say unashamedly that the workers compensation scheme ought be weighted towards assisting and providing care for injured workers to obviously hopefully fully recover from their injury and failing that, because of the nature of the industry, are properly looked after over time. We can look at all the issues that are before us, some of which have been discussed today, but we actually have a workers compensation system in this State that is intrinsically structurally flawed in terms of the interests of workers in this State, injured workers. Will you comment on that first statement?

The second statement which is related to it is that the workers compensation system we have operating now in the State of New South Wales is a manifestly worse legal framework for injured workers than it was prior to the changes in 2012, notwithstanding efficiencies, imperfections, problems with that system. I invite both unions to comment on that? We have working in this State now an intrinsically structurally flawed system and workers are manifestly worse off. I know they might appear to be obviously Dorothy Dix questions, and why I am asking them, but I think a very clear statement on both of those would reaffirm previous statements made and provide us with still a clear understanding of the position of the respective unions of where we are in 2020.

Ms MALLIA: From the CFMEU perspective, qualifying our agreement with both your comments I would have to say, there were a lot of problems with previous iterations of the workers compensation system. We would never say that what existed before 2012 was necessarily great either but you would have to say where we have ended up in 2020 is a real disaster for injured workers. Their rights are reduced, their access to representation is reduced. Yes, there are some improvements in benefits—and you have got to accept that there are weekly benefits that are more beneficial at certain times but ultimately when you have a system that throws people off at various points in the scheme to get them off the system as being the structure of the system then it is flawed, and from that perspective workers are worse off. They cannot even be properly represented.

The Hon. GREG DONNELLY: Can I interrupt you? That point you made in your opening statement and made in other evidence you believe is an intrinsic feature of the current system? It is effectively geared in such a way to product that result?

Ms MALLIA: Yes, I think it is a totally punitive system. It blames the worker for their injury and does its best to get them off the system, and not the employer's or the system's problem. It could be somebody else's problem but not the system's problem. It is not a system designed to support people long term. Some aspects of the pre-scheme looked after people who could not return to work until they were retired. They were members of our union—construction workers who have serious back injuries who cannot go back to work. The old system, as flawed as it was, and we had many fights around it, did actually in some part look after people until their retirement or they were able to access decent common law rights to make sure that they got an amount of money that helped them deal with the new situation in which they found themselves or they were able to wind up their rights so they were not on a drip feed forever which had its own problems. I would say this iteration of the scheme has probably got to be the most punitive of all of the one with which I have had experience. It is then the multiple people who are supposedly responsible for it overlaying it all I think is a big disaster. I have forgotten your second comment?

The Hon. GREG DONNELLY: You have actually touched on it. The workers have been manifestly worse off?

Ms MALLIA: I think workers are worse off.

Ms HAYWARD: Just to add on to what Rita Mallia was saying, the previous system did not have a section 39 or a section 59A. They are the two big problems and it did not have a work capacity process.

The Hon. GREG DONNELLY: What about the AMWU?

Mr HENRY: I suppose there are a number of issues. Mr Mansfield's opening for us, I think, captured one of the key areas and that is, there is an objective of this legislation in section 3 of the 19198 Act. When we have a look at the components of the legislation from both Acts, how many of those pieces of legislation actually align with the objective of the legislation? Everyone in this room would acknowledge that the reforms of 2012 were not in relation to meeting the objectives of the legislation but in relation to a financial position of the scheme that was presented. But, of course, that does not help in dealing with the objectives of the legislation. So are there problems with the legislation? Absolutely. I agree with what Ms Mallia said that the legislation pre-dating that certainly was not perfect and it also had its problems in meeting those objectives.

Some of the problems also though are not related to just the legislation. Yes, we have got problems with the legislation but we have also got problems in relation to the model that has been put in place to deliver this scheme in New South Wales. The scheme has been unable to rid itself, it would appear, of perverse incentives. When we talk about the use of scheme agents and service providers, and just the example I gave in relation to Mr H. Why would service providers, why would a rehabilitation provider provide, as an example, advice that is contrary to their professional training? Is it because possibly to remain on the panel for the insurance company they need to provide reports that are written in such a way? I do not know.

Mr DAVID SHOEBRIDGE: Maybe we should remove scheme agents and bring it all in-house instead of having insurance—

The Hon. TREVOR KHAN: I think you have run that argument a number of times.

Mr DAVID SHOEBRIDGE: But it gets rid of the perversive—we coming back to perverse incentives, and trying to reword the deed, and trying to reword remuneration—

The Hon. TREVOR KHAN: Let him have his say. You can give your evidence later.

Mr HENRY: I do not disagree with what is being proposed, because of remembering where New South Wales borrowed scheme agents from. Victoria, and now look at what is going on down there. Three Ombudsman's reports, each one of them identifying issues mainly directly related to perverse incentives. Yet again, in December last year, the third Ombudsman's report and the issues never seem to be fixed, despite three Ombudsman's reports. I think there are issues that we need to focus on around perverse incentives, so that parties are working towards those objectives.

The CHAIR: We are almost out of time, so please conclude any statements you have. I know Mr Shoebridge is desperate to ask one more question before we finish up.

The Hon. TREVOR KHAN: He always is desperate to ask the last question.

Mr HENRY: The other thing that very quickly I will conclude with in relation to changes that have occurred in the legislation is that for whatever reason we have moved away from changes based on evidence. We need to get back to evidence-based decision-making. We have an objective of the legislation and the evidence should align with that objective. Only then should we be considering whether it is fit for purpose within our legislation.

Mr DAVID SHOEBRIDGE: I am going to ask Ms Hayward or Ms Mallia to do the impossible and explain your concerns in relation to section 151A of the Workers Compensation Act, which provides for the termination of workers compensation benefits and the repayment of any workers compensation payments made whenever an injured worker has recovered damages in relation to their injury.

Ms HAYWARD: I am going to do my best, because this is a provision that has been around for quite a while and the impact it has is really dependent on what scheme is operating at the time. The original intention of the section is that it is colloquially called the election section. You used to elect between common law or workers compensation benefits. It now acts as a disentitlement section, so where you receive damages in respect of an injury you are no longer entitled to receive compensation of any sort under the workers compensation legislation. The problem is it used to operate in a scheme where we had common law and the point was you would bring a common law claim for which you would get economic loss, non-economic loss, pain and suffering. In that circumstance, the damages you received from your common law claim would mean you no longer get benefits in workers compensation. That makes sense and that was the original intention.

The system is now work injury damages, which is a different kettle of fish. It is only about economic loss. It is not the traditional common law approach that we have seen before, but the section remains. Where this is having the most impact is in claims of discrimination and adverse action claims, sexual harassment claims if the injury that is being claimed is also linked to those rights. A perfect example is a sexual harassment claim—and in our annexures we have set out a couple of examples of this—where a person suffers abhorrent sexual harassment in the workplace and, as a result of that harassment, they suffer a psychological injury. They make a workers compensation claim and ultimately they should have rights to make a claim either under the Anti-Discrimination Act or the Sex Discrimination Act, the Federal one. However, because the two are so linked, the injury and the right under the discrimination Acts have the same damages in that they both have the psychological injury, if you reach a settlement in your anti-discrimination or sexual harassment matter, and that has the potential to impact on any compensation you might receive under the Workers Compensation Act.

It is effectively causing people to choose between their workers compensation claim and their right to get justice for abhorrent behaviour. It should not operate in that way. It was never intended to extinguish rights in another statutory scheme. There is a whole history of case law in this. There is a decision, I think last week, *Gardner v Laing O'Rourke*, which switches the other way, but there is still a long history if your psychological injury is mentioned in your deed of settlement, the insurer is not going to pay you anymore. There is a long list of cases in the Workers Compensation Commission. Sexual harassment matters not only serve an individual good but they serve a social good. We do not have a discrimination regulator. The only way in which behaviours can change in the workplace is by individuals stepping up and bringing these cases. But if they need to choose between a discrimination matter and their ongoing workers compensation, we as a society suffer because that behaviour is not being brought to account.

Those people are subject to time limits in the discrimination sphere, very strict time limits. They need to make decisions about their future. They are not getting the justice they deserve for the behaviour that has been enacted upon them. We are not asking for it to be broadened out. I understand its intention and I understand it was meant to cover common law claims. What I am asking is that it be given its true intention, that it not be intended to operate in other schemes, it not be intended to disentitle you to benefit because you exercised a right under another legislative scheme.

Ms MALLIA: Or vice versa.

The CHAIR: We have run out of time. Thank you very much for your evidence today. I note that Mr Khan has suggested that submissions probably not fall under the—

Mr DAVID SHOEBRIDGE: Are there any questions you would like SIRA to respond to?

The CHAIR: The normal 21-day time frame would probably not suffice for those to be asked in a week, so I ask you to keep that in mind.

Ms MALLIA: We will do our best.

The CHAIR: Thank you very much for attending today.

(The witnesses withdrew.)

ELIZABETH GREENWOOD, Policy Manager, Workers Compensation, WHS and Regulation, Business NSW, before the Committee via teleconference, sworn and examined

MARK FROST, Chief Economist, Business NSW, before the Committee via teleconference, affirmed and examined

The CHAIR: Would you like to start by making a short opening statement? If so, please keep it to only a few minutes.

Ms GREENWOOD: Yes, of course. Business NSW, formerly the NSW Business Chamber, is one of Australia's largest business support groups working with government and other key stakeholders to provide a voice for our members. Operating throughout a network in metropolitan and regional New South Wales, Business NSW represents the needs of business at a local, State and Federal level. Business NSW welcomes the opportunity to appear before the Committee in relation to the 2020 review of the workers compensation scheme. The New South Wales workers compensation scheme was established to ensure that workers who are injured at work receive proper and prompt medical treatment and income support during their incapacity and have access to medical and vocational rehabilitation services so they can return to work in a timely and appropriate way.

The New South Wales workers compensation scheme is a statutory scheme funded by New South Wales employers. Both those employers and their workers are the beneficiaries of this scheme. To ensure its survival the New South Wales workers compensation system must be fair, affordable and financially viable. This can only be achieved if the scheme's objectives are delivered efficiently and effectively. Over recent years Business NSW has become increasingly concerned by member feedback which indicated that the scheme's statutory objectives were not being met. It is for this reason that Business NSW called for an independent review into the performance and management of the scheme. That review has since been held and casts doubt over whether the scheme's statutory objectives are being met. We believe this phenomenon is largely attributable to the legislative changes made in 2015 to the design and management of the scheme.

For this reason it is our view that legislative changes are needed. This will include strengthening the level of regulatory oversight over the nominal insurer and restoring the overall level of transparency throughout the scheme, particularly in relation to the premium formula and liability decision. More needs to be done to address the underlying drivers behind the scheme's decline, especially in relation to return to work and stakeholder engagement. Accepting the complexity of the issues at hand and the need to ensure a broad range of stakeholder interests are considered our submission recommends further consultation with stakeholders to investigate how the statutory framework can be strengthened to ensure timely and appropriate return to work measures are implemented.

The CHAIR: Thank you very much for that. I will now turn to questioning.

The Hon. ANTHONY D'ADAM: I want to draw your attention to the two graphs that are on page 6 of your submission that I think are very similar to the graphs that are in the submission from SIRA. The supposition of your submission is that the changes to the claims management model of the nominal insurer is the primary driver for the decline in return to work rates. I just want to ask you this: If that is the driver, how do we explain the decline—a very similar pattern of decline—for self-insurers?

Ms GREENWOOD: I am sorry, I cannot hear.

The Hon. ANTHONY D'ADAM: My question was this: How do you explain the parallel decline in return to work rates for self-insurers?

Ms GREENWOOD: For health insurers?

The Hon. TREVOR KHAN: Before we go any further, I think everyone has to know whether we are relying upon the teleconference machine or the microphone? Otherwise everyone will have to come over to the teleconference machine to ask their questions. I think that is probably the safest course of action. I will move out of my chair.

Mr DAVID SHOEBRIDGE: Ms Greenwood, can you hear us if we speak loudly like this?

Ms GREENWOOD: I can, if you speak loudly. It was just that question faded out and then back in. But as I understand the question you were comparing the decline as shown in the graphs with the decline in health insurers. Is that correct?

The Hon. ANTHONY D'ADAM: No. The nominal insurer's decline in return to work rates parallels the self-insurers rate. There is a similar pattern of decline in terms of return to work. If the reason for the decline

is the change in the case management model of the nominal insurer, that does not actually explain what is happening to the self-insurers. I was wondering whether you have an explanation for what is going on with the self-insurers.

Ms GREENWOOD: I do not. I did ask that same question, I must admit, and apparently there was some sort of an issue with the data. But that was a concern of ours and I am relying on the Dore report's findings that it is largely attributable to the 2015 changes.

Mr DAVID SHOEBRIDGE: But of course the Dore report did not look at the self-insurers or the specialist insurers.

Ms GREENWOOD: No, it did not. I am relying on the Dore report's findings.

Mr DAVID SHOEBRIDGE: Okay. In terms of the quite significant reduction in return to work rates, apart from changes to how icare manages claims, are there any other policy legislative changes that you think would be useful to help get injured workers back to work?

Ms GREENWOOD: I think it is primarily the problem with the claims management model and to address those issues I think the way to address it is to strengthen the regulatory oversight of the nominal insurer. The most important aspect from our perspective is the fact that the nominal insurer's licence—that SIRA cannot place any conditions over the nominal insurers licence. The only condition it is subject to, and that is in the Act, is what is contained in the market premium and practice guidelines.

Mr DAVID SHOEBRIDGE: Do you have any of the jurisdictional examples you could point to where the regulator has those kinds of powers and uses them effectively?

Ms GREENWOOD: I am confining myself to—I have looked through all the legislative changes since 1987 and it seems to me that there is quite a degree of regulatory oversight. There have been differing degrees over the years and now it seems as though that degree of regulatory oversight just does not exist.

Mr DAVID SHOEBRIDGE: Do you have examples where SIRA has sought to actually exercise that oversight or has indicated sufficient powers?

Ms GREENWOOD: They cannot change the conditions of the nominal insurer's licence. They have indicated that. But the interpretation of the Act, when you look at section 168, it says:

> (6) It is a condition of the licence of an insurer (including the Nominal Insurer) that the insurer:
>
> (a) complies with the Workers Compensation Market Practice and Premiums Guidelines …

Later on in the act if you look at sections 181, 182, 183 and more importantly for us, 192A, the claims administration manual, it says, "(5) It is a condition of the licence … [to] comply with … [a] direction"—that the authority gives. But there seems to be an interpretation issue that the nominal insurer does not believe it is obliged or that the regulator is able to place any conditions on its licence other than as per the statute.

The Hon. SCOTT FARLOW: I just want to ask about this. Funnily enough there is quite a lot of alignment between you and the position of the unions in terms of some frustrations with the system.

Ms GREENWOOD: Yes.

The Hon. SCOTT FARLOW: Obviously that is the theme felt by all parties in the system as well who want to create a better outcome where you are not effectively losing it in the bureaucracy or the organisations. In your submission you have indicated a recommendation to improve the position of the regulator. In your view would that be done by SIRA or by a completely new regulator in the system?

Ms GREENWOOD: I had not turned to my mind to that question, to be perfectly honest.

The Hon. SCOTT FARLOW: You are agnostic at the moment, okay.

Mr FROST: I think one of the things that we have said in relation to recommendation 5 of our submission is that one aspect of the system that we believe could be strengthened is regulatory oversight in its broader sense. What we have said there is that we would like some sort of process to consult with stakeholders, identify what those practical improvements are. We do not necessarily come to it with a very prescriptive view of what the end product should look like, however, in terms of what the current system has, and an opportunity to improve it, particularly in light of some of the findings and comments made in the Dore report, is that from our perspective that is one area where we could improve and strengthen the system.

The Hon. SCOTT FARLOW: A large focus today has been with return to work outcomes. We heard some evidence in the public sector with respect to the difficulty of return to work outcomes when it came to

psychological injuries. Is that something that you would say you are receiving from your members as well, that is, difficulties with psychological injuries and return to work?

Ms GREENWOOD: It is definitely an issue. In actual fact I co-chair a SIRA recovery at work reference group which is focussed entirely on that.

The Hon. SCOTT FARLOW: You have seen that as a deteriorating position, I take it?

Ms GREENWOOD: Again the Dore report points out that there has been an increase in psychological injury and a marked decrease in return to work outcomes so it is definitely an issue and it is definitely a concern to us.

The Hon. SCOTT FARLOW: From your observations what do you think can be done to address that?

Ms GREENWOOD: Psyche injuries is a very difficult area because of the current state of research. It is something that we are very much focussing on, as I said before, with the recovery at work reference group. It is something we are turning our minds to as well in relation to whether there should be a regulation for psychosocial risks. It is very difficult because of the multi-layered triggers and the individuals. Different individuals react in different ways. It is definitely under done. It definitely needs attention.

The Hon. ANTHONY D'ADAM: Just following on from that, are you aware of Taking Action: the best practice framework for the management of psychological claims in the Australian workers compensation system that has been issued by Safe Work Australia?

Ms GREENWOOD: Yes I am.

The Hon. ANTHONY D'ADAM: Is it the position of NSW Business that it supports the adoption of that framework in New South Wales? I understand there has been some reluctance from the New South Wales Government to support its implementation in the New South Wales system?

Ms GREENWOOD: We would support the adoption of it. A lot of work has been done in this area, especially with Safe Work Australia and my counterpart, Jennifer Low, has been quite involved in it.

The Hon. TREVOR KHAN: I understand the concept of arming what we could call the regulator or SIRA with more powers, but I put this to you. It seems that at least in the area of PIAWE the conflict between SIRA and icare has indeed slowed down the resolution of disputes. Do you agree with that proposition? It slowed down the resolution of the issue because they each had their own view.

Ms GREENWOOD: I was only involved in the latter part of that PIAWE consultation. I would say a lot of the delay at least when I was involved was to do with—in fact, it was a very large room with a lot of stakeholders and a lot of differing views that really needed to be resolved in bite-size pieces. The overarching idea behind the change was the fact it was the common source of contention in so far as dispute resolution was concerned and that was mainly because it was a very complicated formula. The reason for the regulation was to make it a simpler calculation but with most of these things the devil is in the detail and I think a lot of the delay can be attributable to that.

The Hon. TREVOR KHAN: What I am getting to is this: if we have icare with a lot of executives, many of whom are paid large amounts of money, why is it not simply the responsibility of icare to get its act into gear and sort out the deficiencies that seem to have developed in the scheme? Why do you need somebody else intruding in that decision making process?

Ms GREENWOOD: I am going to rely on history. Ever since icare has been in existence we have seen a decline in return-to-work outcomes. It seems as though, given that the regulator cannot place a condition on their licences to do simple things such as complying with the claims administration manual, which is probably the largest area of significance, it seems to me that there needs to be some sort of oversight—strengthen governance. The easy fix is to have the regulator able to place conditions on their licence. I think you will also find that Janet Dore's report found that that needs to be improved governance within icare.

The Hon. TREVOR KHAN: Indeed.

Ms GREENWOOD: How it actually operates, I have no involvement in that so I am not really in a place to pass comment about whether what they have in place is good, bad or indifferent.

Mr DAVID SHOEBRIDGE: Ms Greenwood, you quite rightly point to very real concerns about icare's performance and they are not new. You say you have concerns that go back some time, is that right?

Ms GREENWOOD: Yes. Correct. I said it probably came to our attention early 2016 when the five scheme agents went down to three.

Mr DAVID SHOEBRIDGE: Are you aware that icare has its own statutory body whose actual job is to oversight how icare operates; to hold the chief executive teams to account and to check to see how the system is operating? There is a separate statutory board for icare. Are you aware of that?

Ms GREENWOOD: Yes, I am.

Mr DAVID SHOEBRIDGE: What are your comments on a board that has allowed what we have seen with icare to roll out over the past four years that has allowed that to happen? What are your thoughts about that board?

Ms GREENWOOD: I do not have any thoughts about that board because, as I said, I am not privy to the business of that board and the instructions that have been handed to icare.

Mr DAVID SHOEBRIDGE: Surely a much more direct oversight of icare happens through icare's own board which is meant to be independent of the executive team. It is unusual that we hear a business group say that you want additional legislative regulation making power with a government agency when you have got an existing board that surely should be doing its job?

Ms GREENWOOD: Perhaps what needs to be amended is perhaps the level of Ministerial oversight with the board.

Mr DAVID SHOEBRIDGE: I think the Treasurer is responsible.

Ms GREENWOOD: Yes.

Mr DAVID SHOEBRIDGE: Are you suggesting that he has not oversighted the board?

Ms GREENWOOD: He does but the legislation is very peculiar in that if the Treasurer feels that there is a need to issue a direction in the public interest the Treasurer must first seek the board's advice as to whether such a direction is required.

Mr DAVID SHOEBRIDGE: Do you know if that has happened? Do you think that is a useful course to explore?

Ms GREENWOOD: I do not know whether that has happened, no.

Mr FROST: Sorry to interrupt. I think ultimately our position is that the overarching system could be strengthened if there are more subtle tools available to the regulator enabling them to more effectively engage with icare on the practical things that it sees could improve the outcomes in accordance with its regulatory objectives. I think this was spelt out in the Dore report. There are certain practical examples that were drawn out around measuring return to work and the like, but there is very little there to resolve some of those conflicts and disagreements. To an extent the overarching governance system could be improved to give some more nuance to how the two parties connect with one another on their respective interests and that would improve the overarching system.

The Hon. TREVOR KHAN: Mr Frost, I am interested in your comment about nuance and I am not being critical of either of you. If what is said is that there needs to be a condition put on the licence, that is a fairly unsubtle form of regulatory light touch, I would have thought. If I am right in that regard, what sort of appropriate regulatory nuance would do?

Mr FROST: As I said earlier, our recommendation is not prescriptive. We do not claim to have all the answers. I guess finding 12 of the Dore report is that legislative powers available for SIRA should be reviewed and strengthened to enable proper oversight of the nominal insurer. I think our position is consistent with that finding and the observations made in the Dore report.

Mr DAVID SHOEBRIDGE: Mr Frost and Ms Greenwood, I do not understand why you are resistant to the idea of looking to the board and critiquing the board for allowing all of this to happen on their watch. I do not understand why you are resistant to the fairly obvious conclusion, I would have thought, that a board that allows this to happen on their watch should be held to account by stakeholders, by Parliament, by the Treasurer. I do not understand why you are resistant to that proposition.

Ms GREENWOOD: I do not think resistance is the right word.

Mr DAVID SHOEBRIDGE: I do not understand your position then.

Ms GREENWOOD: We are simply saying there needs to be a strengthening of oversight. As you can probably see, in recommendation five, the last dot-point was a new governance model for the nominal insurer with better representation of key stakeholders. That is part and parcel of what we are calling for, but at the end of the day, it is not just about the board of the nominal insurer. There are a lot of changes in the framework as it

currently stands that need addressing. For example, this is a statutory trust, but I cannot seem to find who a statutory trustee is. When it comes to the behaviour of the nominal insurer and any agents, all accountability and liability gets fed up the chain to the nominal insurer, all liability gets paid out of the insurance fund. It is the employers who are responsible for making up any shortfall. The system is obviously not working and the employers should not be holding the can for the inefficiency. Yes, something needs to be done. Yes, it has been a less than ideal performance over the last couple of years, so let us just sit down and work out what has worked well in the past, what has not, what needs strengthening, what needs fixing, and then get it fixed so we can move on and have a scheme that operates as it was designed to originally, back in the early 1900s.

The CHAIR: Thank you very much for your attendance today, Ms Greenwood and Mr Frost. We have reached the end of the morning session of the hearing.

(The witnesses withdrew.)

(Luncheon adjournment)

DERICK BOREAN, NSW President, Australian Rehabilitation Providers Association, affirmed and examined

SHAUN LANE, NSW Secretary, Australian Rehabilitation Providers Association, affirmed and examined

The CHAIR: Would either of you like to start by making a short opening statement? If so, please keep it to no more than a couple of minutes.

Mr BOREAN: Thank you. Every day workplace rehabilitation providers apply their allied health expertise and experience to support workers with injuries or illnesses recover at work or return to work, whether this be a return to their same job or to a new job. Our expertise enables workers not only to return to work but also support to return to health and engagement in the community, minimising the social and financial impact on them, their families and other stakeholders in the New South Wales workers compensation scheme. Workplace rehabilitation providers are the sole independent, audited and regulated experts in return to work. We understand that early referral to at-risk workers for our support following an injury minimises the possibility for barriers to return to work to become entrenched and lessens the impact on workers with injuries, their employers and the scheme more broadly.

Sound, high-quality, evidence-based early intervention and referral to services to achieve safe and sustainable recovery at work is what the scheme sorely lacks at present. Australian Rehabilitation Providers Association [ARPA] and our members are incredibly proud of the role that we play in supporting workers in their recovery, enabling and educating employers to support recovery at work, engaging doctors and treatment providers to achieve meaningful goals, empowering workers to identify vocational goals and a new pathway where a return to the same employer is not attainable and ensuring the objectives of the workers compensation legislation that include early, safe and sustainable return-to-work outcomes remain the cornerstones of our service. Workplace rehab providers have a much larger role to play in the New South Wales workers compensation scheme as a solution to better health and return to work outcomes for workers with injuries and the scheme that supports them. We will continue to advocate for the science of return to work to be applied. We thank the Committee for the opportunity to participate in the review.

The Hon. GREG DONNELLY: Thank you for coming along this afternoon and providing us the opportunity to ask you some questions following the contribution you made in your submission. If I could go to your submission, on page 4 going on to page 5 at point 5 you talk about the collapse in the return to work [RTW] rates in New South Wales under the current icare model. You give figures and what have you. Please elucidate on the point you are making and provide any insights that you might have in regard to your thoughts about what is behind the issue of the collapse in the RTWs. We have had witnesses come to the inquiry thus far and we have taken submissions. We have a further day of hearings and so I am sure we will hear other views. From our point of view, your thoughts and insights would be valuable. What do you think is behind this?

Mr BOREAN: Thank you. As we alluded to in the submission, the scheme seems to lack at the moment an effective and high-quality early intervention approach that identifies workers at risk of not returning to work or employers at risk of not accommodating those workers in returning to work and then prescribing or referring for the appropriate services to support those workers. That appears to be a fundamental flaw in the claims model, which flows through into things like prolonged absences from work, deteriorating return to work rates, elevation of medical costs and an expansion of pressure on premiums.

The Hon. ANTHONY D'ADAM: Is that common across all elements of the scheme? Obviously that applies to the nominal provider, but what about the other elements of the scheme, the Treasury Managed Fund and the self-insurers?

Mr BOREAN: I think many other insurers in the scheme, so self-insurers, specialised insurers and other funds within the scheme, certainly take a lead from what is the prevalent approach at any particular point in time in relation to early intervention and the use of rehabilitation. What we have seen is a declining use of rehabilitation, declining quality of the screening of workers at the initial stages of their post injury recovery, and subsequently a decline in return to work rates. It is more prevalent in the Nominal Insurer, certainly. But I think there is probably evidence also of the decline in the use and the application of good early intervention across other schemes and insurers as well.

The Hon. ANTHONY D'ADAM: It seems from the data—I do not know whether you have looked at the other submissions, there is a graph in the SIRA submission that is replicated in the Business NSW submission— the decline in return to work rates from the historical rates, there seems to be something occurring around January 2018 that has triggered this decline. Do you have any theories about what occurred around that period that might have driven the decline?

Mr LANE: What Mr Borean was saying is primarily referring to the service model that is delivered by the Nominal Insurer. It relied on the worker having the ability to navigate through a scheme themselves, the employer having the ability to provide assistance, and a claims agent to support that. Then you have got treating providers, possibly, to help that. It is a very strong lead in that regard and there has been a lot of discussion about therefore the need for both the service model, whether it is the Nominal Insurer or otherwise, to bring more of that in-house for the insurance case manager to lead that return to work process. That in itself has reduced the reliance on workplace rehabilitation and we have seen across each one of those schemes a bit of a detraction, or a retraction, in the investment in workplace rehabilitation, where it is being seen more as a spend rather than investment in that recovery. Across each one of those schemes we have seen more of that assistance come back in-house.

The Hon. TREVOR KHAN: Or not at all.

Mr LANE: Or not at all.

Mr DAVID SHOEBRIDGE: Thank you both for your quite detailed submission, which I found very interesting reading. You set out a number of very real concerns you have with the sole agent, EML. Did you want to summarise those concerns?

Mr BOREAN: I think our concerns are not per se with EML. Our concerns are in relation to having a sole agent, and what we have therefore is one model of application of the legislation, which is not competitive. We think one of the key issues here is not so much the legislation itself but how the legislation is brought to life in practice, and that is through a model. That model is obviously one that is applied by a sole agent at this point.

Mr DAVID SHOEBRIDGE: You have a number of concerns in your submission. One is the excessive power of the Nominal Insurer, which I assume is partly what you are talking about. Where the Nominal Insurer's claims are managed by just one insurer, that makes that excessive market power more problematic?

Mr BOREAN: Yes.

Mr DAVID SHOEBRIDGE: But you then on page 13 of your submission enumerate a number of quite distinct issues with EML, about EML's practice, that you address.

Mr BOREAN: Yes.

Mr LANE: What Mr Borean was getting to there is that EML deliver the service model. Regardless, I guess, of the agents delivering that service model they have quite a challenge ahead of them. The things that we have seen quite apparently—you can see them listed there—are the lack of understanding, the insurance literacy of the case managers who have been charged with the responsibility to manage that return to work process, but also the claim in itself. There is high turnover existing within those claims agents.

The Hon. TREVOR KHAN: Very high turnover in fact occurs.

Mr DAVID SHOEBRIDGE: There is almost no retention, would be a better description of it than a high turnover.

Mr LANE: But the real understanding of the person leading that return to work in the insurer agent, the case manager, to be able to manage that return to work process effectively. You are asking somebody who may not necessarily be trained or have a great understanding in insurance, or worker's insurance, but really the people aspect of it as well, how you assist a person with their recovery, and that sits with a health professional. You are asking that person to manage a return to work process, which is a very high level process, and they simply do not have the ability to do so. A lot of that is sitting with EML but in all honesty it does reflect on a number of the other insurance agents as well. It is a fundamental issue to do with the design of the delivery model per se, not just the agent.

The Hon. TREVOR KHAN: These hearings start to blur together after a while, I have to say, including on this particular issue. I know you have given evidence before—I do not know what that is about. Certainly, we heard evidence once before, I think, that one of the problems in terms of any of the agents was that the propensity was to employ as claims officers people who had experience in general insurance, as opposed to, we will call it workers compensation, or even CTP experience. They might have been good at turning over paper, but they were not familiar with the issues that arise in the complex field of workers compensation and/or CTP.

Mr BOREAN: Yes.

The Hon. TREVOR KHAN: Is that a legitimate concern that arises with EML now?

Mr BOREAN: Yes, absolutely. Personal injury schemes are complex schemes because they deal with individuals in vulnerable situations who have different levels of complexity to their presentation, and clearly the reasons that they are within the scheme themselves are an issue in and of themselves. But they bring with them

their own social circumstances, their own beliefs, their own psychosocial factors that need to be managed effectively from the outset. If they are not managed effectively from the outset they become increasing barriers to enabling return to work to happen efficiently. Early intervention is important but the quality of that intervention is equally important. If the quality of that intervention is not there, then it can tend to hamstring the process down the track.

The Hon. TREVOR KHAN: If what we have got is quite inexperienced claims officers who are turning over, say every eight months, the prospect is their management of the files is likely to be somewhat ineffective. Is that a reasonable conclusion?

Mr BOREAN: Yes, sure. There is also an issue though whereby an effective screening process at the early stage of an injury or at the time of claim lodgement can overcome many of those issues of lack of knowledge and experience. We would advocate for the right sort of screening process, a simple screening process, like asking the worker if they think they will be back at work tomorrow or next week and asking the employer the same question. Unfortunately those questions are not asked in the early stages of a claim. If the answer is no, getting experts involved to support those particular workers or employers.

The Hon. TREVOR KHAN: But it would be a problem, would it not, asking those questions if, for instance, there is a trend towards not lodging claims quickly so that the agent does not have anything to work off, and then the agent themselves not processing the claim in a timely manner. You are essentially building almost a disaster before your very eyes. Would that be right?

Mr LANE: It does cause an issue, no doubt. Delay, any delay, compounds the issues.

Mr DAVID SHOEBRIDGE: Was that aggravated in your experience by the changes that icare and EML made by putting in place an algorithm, if you like, and a computer-generated response, which they did 18 months ago?

Mr LANE: Yes.

Mr BOREAN: Yes.

Mr DAVID SHOEBRIDGE: What was your personal experience, if any, with that change?

Mr BOREAN: Certainly all our members expressed the same sentiments, that it absolutely contributed to further delays and an increase in barriers.

The Hon. ANTHONY D'ADAM: Can I follow up on that? The decision to engage a rehabilitation provider, does that solely rest with the claims agent, or is there some kind of overarching framework that informs the decision about when and in what circumstances a rehabilitation provider is engaged to deal with a case?

Mr BOREAN: Yes. Both employers and workers themselves who have sustained an injury can also refer to rehabilitation providers, as can treating doctors. At any stage any number of stakeholders can initiate that referral process. Ultimately the referral typically comes from the claims agent.

Mr LANE: That requires the claims agent to understand what should trigger that referral. What we know—and it does go back to your questions around what is general insurance versus workers insurance—is understanding the difference. When you set fire to a building, you know what its value is, you rebuild it and put it back together. What we do know with a worker is that the psychosocial factors have a far greater influence on their likely recovery and return to work than the actual injury itself. To understand and determine that, you have to understand a complex factor in an individual to make that decision.

Everybody, I guess, steps back. What Mr Borean is saying is we know the evidence supports it, if you simply ask the worker or the employer, "Do you think you will get back to work?" or, "Do you think your worker will get back to work?" or even ask the worker, "Do you think your employer will help you get back to work?", that is a far greater indicator of the likelihood of that person coming back and recovering. What we have suggested in our submission and previously is to ask simple questions like that and that will help you determine who needs help and who does not. Our members are not looking to see everybody; we just want to see those that we think will need the assistance. We want to see them as early as possible, so we can actually get a better outcome for that scheme. That has been lacking across—

Mr DAVID SHOEBRIDGE: You also say that when you actually get a referral—so, those hoops have been gone through, someone has finally realised a rehab provider is needed, you get a referral—you find your funding request is just arbitrarily reduced without any reason, without any rationale. Is that right?

Mr LANE: It has been, and it has been reported from our members widely that decisions have been made and there has been a bias with an insurer case manager to pull back on costs. They say, "Is this necessary? Is it something that you necessarily need to do?"

Mr DAVID SHOEBRIDGE: Some of that is necessary. You cannot just allow rehab providers to write their own cheques. Is there a set of guidelines in place that would make that a principled decision, or is it just arbitrary?

Mr LANE: It is generally—we believe it is arbitrary. We would like to see the evidence of how that is done, but we have been working with the nominal insurer on that and that has declined. They are making efforts.

The Hon. TREVOR KHAN: What has declined? Working with the nominal insurer?

Mr LANE: The incidence of declinature of our services has declined. Where we have put in plans to support workers, those plans have generally been approved more consistently than in the past.

The Hon. ROD ROBERTS: Why do you think that is? Where has there been this change?

Mr LANE: It was identified as an issue and the nominal insurer took that on board and made an effort to try to have it changed.

Mr DAVID SHOEBRIDGE: That is good.

The Hon. SCOTT FARLOW: In terms of where it was identified as an issue, was there a steering group that looked at that or was it just you personally raising it with the nominal insurer?

Mr LANE: We had raised it but so did employers who were desperately seeking assistance at the workplace to try to get things done. But also workers raised it because they said they were trying to get things approved. I think as a general group they identified the need to not have a focus or a bias on cost-cutting but a bias towards what actually might assist that return to work.

Mr DAVID SHOEBRIDGE: One of the issues you identified in your submission is the way in which the insurer, EML, and the scheme agents are remunerated, but particularly EML, I think. You critique the cost-plus model. Do you want to explain that in some more detail?

Mr LANE: The agreements with the agents, we understand, are confidential, so we only have a small amount of information around that.

Mr DAVID SHOEBRIDGE: Much of the EML deed is now public. That was not easy, but in the end we got there.

Mr LANE: Okay, but our understanding is that it is a cost-based model—so the cost of administering those services or the service model, the return on that was a figure of 10 per cent, or whatever it was, but a percentage on top of those claim costs. That has a perverse result in the sense that it encourages you to inflate your base service costs so that you effectively increase the amount of cost on top of that.

The Hon. TREVOR KHAN: To be fair, it does not necessarily encourage you to inflate it, but it does certainly does not discourage you in any way from that.

The CHAIR: Discourage.

Mr LANE: No, but what it does do is it certainly makes you look across the scheme and say, "What could we bring more in-house? What could we do more ourselves?", which is part of the mechanism of delivery of the services to the worker. That by itself would broaden the base of your own costs.

Mr DAVID SHOEBRIDGE: When you are talking about "we" and the person in this, in this case it is not actually a service provider. It is not a doctor or a rehab provider or a physiotherapist; what you are talking about is the scheme agent and, in this case, the insurer, EML, and the service they are providing is just running the scheme.

Mr BOREAN: I think it is important also to make a distinction on medical and treatment costs versus rehab costs. We are unsure as to whether or not the lines have been blurred somewhat in relation to those costs and how they are accepted in the community of stakeholders. Rehabilitation costs have decreased in the scheme. Medical costs and treatment costs have increased.

The Hon. TREVOR KHAN: Substantially.

Mr BOREAN: Substantially, and I think that is an important distinction to make, because some people—

Mr DAVID SHOEBRIDGE: Do you have any hard data on that, Mr Borean?

Mr BOREAN: Unfortunately, we do not have hard data on the scheme spend on rehabilitation. We have conflicting data and we have feedback from our members, who report a 35 to 50 per cent reduction in referral numbers since the introduction of the new claims model.

Mr DAVID SHOEBRIDGE: Alright, it is something we could usefully get some data from icare or SIRA on, do you think?

Mr LANE: You could certainly obtain it from SIRA too, but there will obviously be that lag. Regardless of exactly the number on that data, the trend is quite substantial and the reduction of investment in rehabilitation is significant.

The Hon. TREVOR KHAN: Do you notice any difference in the approach taken under the worker comp scheme compared to CTP?

Mr BOREAN: CTP legislation reforms do include benefits for those injured in motor vehicle accidents by way of income support benefits, and that is a relatively new amendment to the scheme. The financial returns for engaging rehab now exist in that scheme. There is an emergence of some insurers understanding the benefit of rehabilitation in the CTP scheme and starting to engage rehabilitation services more consistently in the scheme. The trend actually there is for a steadily increasing use of rehabilitation, because of the way that scheme has been amended to include income support benefits for those injured in motor vehicle accidents and the like.

The Hon. GREG DONNELLY: On page 11 going on to page 12 of your submission, point 10 about practices inconsistent with scheme principles, you provide four examples. I think for each of the four without exception the first sentence is, "There is evidence of…" I am wondering, in terms of the evidence for each one of those, what are we talking about? Is this anecdotal evidence from members of the organisation simply reciting to you experiences or is this something you collect information on specifically? Could you elaborate on the amount of evidence behind each one of those or more generally on the points you are making?

Mr LANE: ARPA is quite a well-established organisation with a strong membership across the country. The mechanisms to feed all that information back in are quite reasonable. We do run surveys and we do collect information, so we are able to obtain a lot of that information from our members on a regular basis. It was not just one off; it is very consistent for a lot of those behaviours or practices that you have seen. But it does not just come from our members. A lot of employers were contacting us, because in many ways our members are the face of a workers compensation scheme, because the most disadvantaged workers are the ones getting assistance, so we are the ones there. Those employers were crying out for help and saying, "We need you and why can't we get you engaged in this return to work?" or, "We want you to do more." On the flip side there was a bias towards reduction of workplace rehab engagement. That is what we have put there; they are the—

The Hon. GREG DONNELLY: Sorry to interrupt, but just to be precise, with respect to the context of employers crying out and the information coming forward about these inconsistencies, what time are we talking about? How far back are we going in history when you say that this is starting to emerge?

Mr LANE: It has certainly emerged a lot since the introduction of the new claims model and that was not something that necessarily was there.

The Hon. GREG DONNELLY: Prior to that is it fair to say that these were not significant issues and that in fact that was a marker in the ground that is clear?

Mr BOREAN: Absolutely. And just to be clear, the feedback comes from all our members within the rehab provider association. We represent over 85 per cent of the scheme in New South Wales.

Mr LANE: The other people to add are doctors who were saying the same thing and workers were saying the same thing—they would request assistance and it may go four weeks or more before anybody heard something. There were times when we would follow-up a lot with the agent to try to get that engagement and it might take a month before the referral would come through. But they are only the ones that we know about and our greater concern is those that we do not—those ones that should have been referred for assistance that never were.

The Hon. TREVOR KHAN: What concerns me about this—and I make this as an observation because I sat through the inquiry that was involved in the introduction of the 2012 bill—is that one of the fundamental rationales of that 2012 bill was an improvement in return-to-work rates, and it seems that of recent times that whatever I can be accused of in terms of supporting the legislation enthusiastically—

Mr DAVID SHOEBRIDGE: Which we do not need to reopen now, I assume, shameful as it was.

The Hon. TREVOR KHAN: It seems to me that it has been lost in the scheme—that rationale of high return-to-work rates because of the benefits to both the worker and the employer of getting a worker back to work.

Mr BOREAN: Yes, we agree and we look to the drivers of the reasons why. In looking to that, return to work has not been a focus, unfortunately, of the new claims model. There is science that backs how you get good return to work, consistently—there is Australian evidence and there is international evidence. There is no debate about what good early intervention and good return to work looks like and how it is done but, for whatever reason, it has not been happening under that model.

The Hon. TREVOR KHAN: And early intervention is, in a sense, about proactive involvement and care of the worker through the process, is that right?

Mr BOREAN: Correct, and it starts with the employer immediately after an injury is sustained and how they approach the worker who has been injured. It starts right there but then it obviously becomes a gateway for how the worker interacts with the scheme and their experiences of that.

Mr DAVID SHOEBRIDGE: Given that is such a basic fundamental—early intervention, getting a worker back to work—do you have any understanding of how it is that icare, with the support of its board, moved to a model where that was all put under a computer algorithm and most workers did not get contact, other than very cursory contact, for up to six weeks? Do you have any idea what the rationale was at the time? Was it explained you?

Mr BOREAN: It certainly was not explained.

Mr LANE: No.

Mr BOREAN: We could surmise that the assumptions made around the efficacy of that model were incorrect.

The Hon. TREVOR KHAN: Indeed, we have heard evidence—I do not know if it was from you, before—that talked about the fact that once you got past three months, if a worker had not returned within three months, then the prospects of getting the worker back were increasingly remote. I think that was the general drift of the evidence that we received before.

Mr BOREAN: Correct.

The Hon. TREVOR KHAN: On the basis of what you describe, both in your submission and here, a lot of workers are just falling through the net without the sort of support that is necessary to support them back early and therefore not falling into that post-three-month group.

Mr BOREAN: Correct. We have been capturing the average delay to referral through our membership. Delayed referral to rehab has extended by months since the introduction of the new claims model—not by days or weeks, by months.

The Hon. TREVOR KHAN: So that means that by the time you are getting involved with clients, it is almost—it is getting very hard to work your magic.

Mr BOREAN: It is far more difficult.

Mr LANE: Very much so. Those first few weeks are vital and in the previous papers or submissions we provided, we advocated for a model that identifies those most likely to need assistance and get onto that early, because the cost of even our intervention, let alone the total claims cost, skyrockets dramatically at that latter end. So it is a very sensible investment in rehabilitation to do it early; you are far more likely to get a far better outcome. We are in an unusual position, too, being a health provider but also a cost mitigator. I think that should be seen as a real plus but it is also, in some sense, a negative.

I think rehabilitation—when I say, "I think", our members see that we are arbitrarily used: Why is it that some workers and some employers gain the assistance of workplace rehabilitation, yet others do not? It does not make any sense. That is a very broad scheme issue and I think it comes down to that belief that this is a tool, a service, a cost within a scheme. We might be able to reduce that cost and therefore get some benefit but what you have seen is not a reduction in cost but a loss of investment. The response, unfortunately, has been a blowout in not only claims cost but also medical costs—when there is no rehab engaged, you see medical costs climb—and you have seen the total scheme return-to-work rates fall dramatically.

The Hon. GREG DONNELLY: Just with point number nine about the emergence of the non-accredited providers operating in the New South Wales scheme, can I invite you to elucidate on your knowledge about the numbers entered in—are they plateauing, are they growing? What is the score at the moment, as you understand it?

Mr LANE: It is certainly plateauing in some areas but in others it is emerging. Our members see that it came from almost an overcooking of the desire to improve a return-to-work result or to do something different—to look at a different service, a different something, to maybe introduce to this to get a different result—when the evidence said, "If you do it well and do it properly, then you will still achieve great return to work results." That has allowed for the emergence of some of these different services to pop-up—they are not accredited, they are not necessarily governed; we cannot guarantee what services people provide and what they deliver and there is certainly no connection to return-to-work outcomes. But it has been allowed to continue under the auspices of, "Let's be open to innovation and see what is there."

You will notice in our submission, too, we also requested a little bit of an expansion under SIRA guidelines of the definition of what workplace rehab is to allow a little bit more breadth in that, instead of running down the road of something that is completely different. I do need to add one point to that, and that is the concerns about whether those services are in themselves a conflict of interest. We are aware of services that are operating that we think are at risk of breaching that conflict of interest. It is mostly in the new employment placement area, where there is a joint venture between EML and PwC, called My Futures, that we are aware of. I do not know anything else about it—it might be up to the Committee to look at that—but that does not make sense to us that something like that would operate and provide services within the scheme.

Mr DAVID SHOEBRIDGE: Sorry, so EML is referring injured workers off to a rehabilitation provider that it is a co-owner of with PwC?

Mr LANE: I cannot give you a lot of information because we just do not know.

Mr DAVID SHOEBRIDGE: What is it called?

Mr LANE: My Futures.

Mr BOREAN: It is not a rehab provider.

The Hon. TREVOR KHAN: It is an employment service, is it not?

Mr DAVID SHOEBRIDGE: Well, what is it? An employment service?

The Hon. GREG DONNELLY: That provides work-ready assistance.

Mr BOREAN: It is an employment provider.

Mr LANE: Again, we cannot really say a lot about it because we just simply do not know. But they are the things that emerge in situations like this. We have asked SIRA to look at that and to stick to the evidence we have. The legislation works—providing it is applied correctly and applied well. We do not need to keep stretching; we are not getting the basics right at the moment. Let's get the basics right.

Mr DAVID SHOEBRIDGE: Now is not the time for stretch goals, you think?

Mr LANE: We do not think so, no.

Mr DAVID SHOEBRIDGE: I think you touched upon this earlier, but you talk about four practices that are inconsistent with scheme principles when it comes to rehabilitation. One is not getting a rehabilitation referral where a worker is certified as unfit for work; the other is about the nominal insurer and scheme agents discouraging the employer from referring a worker to a rehab provider they have a relationship with and works for them; another is about discouraging employers from going and sitting with doctors to try to talk through some of those issues; and the last one is a general concern about avoiding keeping the pre-injury employer informed about what is happening in a different return to work thing. Are any of those things you want to expand upon at all?

Mr BOREAN: They are just indicative of an approach that appears to discourage a fundamental driver of good return to work. The fundamental drivers of good injury management return to work are good lines of communication, early intervention, bringing all the stakeholders together towards a common goal, common timeframes and the right evidence-based treatment approach and into a rehabilitation plan that everyone agrees upon. Those practices are inconsistent with what is the science behind good return to work. It has always been a frustration of our membership to have these consistent experiences and to have them applied, quite often by case managers who have very little, if any, experience of workplace rehabilitation and possibly have never ever met a worker with an injury face-to–face or their employer and do not understand the psycho-social factors that go into enabling a good return to work to occur.

Mr DAVID SHOEBRIDGE: Will you explain for my benefit clearly where you see the utility of having a rehabilitation provider referred where a worker has been certified as not fit for work? What is the job of a rehabilitation provider in those circumstances?

Mr BOREAN: In many of those circumstances the doctor has no understanding of what the workplace is about. In many of those circumstances it is the worker's first experience of workers compensation and the employer's first experience of workers compensation. When someone is unfit for work it often is the case that they have capacity of some sort to perform some sort of duties safely. We know that early return to work is an absolute imperative in terms of good recovery. So work in many ways is a treatment modality rather than something to be avoided. Our role is to make sure that the treatment providers, including the doctor, understand the workplace and the functional demands or the psychological demands of the work that that person can do; understand the capacity of that worker to do those particular roles and then match them up in the workplace. And if the workplace does not have those duties available for whatever reason, to look at alternate pathways for that worker immediately. So someone who is unfit for work or has zero work capacity as certified by a doctor needs help. They need help.

The Hon. TREVOR KHAN: They do not need to be ignored?

Mr BOREAN: They do not need to be ignored and we certainly should not wait for assistance until that person is fit for work or deemed to have capacity for work because part of our role is to educate the doctor, worker, employer and treatment providers on what is available and what that person can safely do. That is where our allied health and clinical expertise comes into it. It is not something that can be negotiated over the phone. It needs to be done in person with a look at the duties that are available at the workplace and assessment of those duties in detail and then a matching of the worker's capacity to perform those duties safely. That is where the value of rehab comes in. It is where doctors, treatment providers and workers themselves agree to the duties that are available and the capacity to do them. They are often tested and are able to trial those duties to a graded recovery plan, and return-to-work plan. All those things are lost when you do not have an expert involved. It is not all cases that will require rehab. It is a very select few, in fact, that will require rehab, but those select few are not getting that opportunity either.

Mr DAVID SHOEBRIDGE: When you say there is evidence of the nominal insurer directing and training scheme agencies not to refer to a rehab provider if a worker with an injury is certified unfit for work with no work capacity what is that evidence?

Mr BOREAN: The evidence is feedback directly from our members that they have had referrals refused because the worker is unfit for work. The feedback is in reviewing manuals about vocational rehabilitation where there is instructions not to engage rehabilitation if someone is unfit for work.

The Hon. GREG DONNELLY: Will you repeat that please? A manual that says not to—

Mr BOREAN: Correct.

The Hon. GREG DONNELLY: Explicitly says not to.

Mr BOREAN: Correct. It is a manual we were asked to provide input on about a year after it was implemented into practice and that was the first thing we identified as an association as being problematic.

The Hon. SCOTT FARLOW: Who produced that manual?

Mr BOREAN: It was produced, my understanding is, by the nominal insurer together with a claims agent, or to instruct the claims agent.

The Hon. GREG DONNELLY: I will be cheeky enough to say, or ask: Are you in a position to provide a copy of that to the Committee? You can take the question on notice.

Mr LANE: We cannot provide a copy of that. Keep in mind too, we would like to express that the nominal insurer has tried to work with us on that. When we looked at that they were seeking our assistance and our help. We offered to provide them more assistance and provide more manual, more instruction, more documentation on how to better educate their own claims agents.

The Hon. GREG DONNELLY: It beggars the question how that got in the document in the first place. Being cheeky about it, who was genius who thought that that was a wise incorporation into the manual?

Mr LANE: That was our feedback. It was that the insurer case managers were saying "We can't refer that because the worker is unfit". We were hearing that over and over again. So we were educating them to say, "No, we can create a return-to-work pathway whether or not they are unfit." That is the stage one. We can get them there. So we had to find a source of where that was and so when we raised that with the nominal insurer that did advise him to give us the opportunity to look at some of that education piece. So there are people in there trying to work to improve those things.

The Hon. GREG DONNELLY: Someone drafted it in the first instance.

Mr LANE: Correct.

The Hon. TREVOR KHAN: I find that, apart from profoundly inhumane, I might say, remarkably short-sighted to think that you would start to get a rehabilitation provider involved in getting somebody back to work only after they are deemed at least partially fit for work. It is a bit late in the process at that point in time.

Mr LANE: Yes.

The Hon. TREVOR KHAN: One would have thought you would be trying to build the confidence of the person at a stage where they may not be capable of work but at least they need somebody to talk to them about where they go to with that injury. Obviously we accept that may involve their doctor but it really is placing responsibility into the hands of only one or perhaps two people to assist that worker and we know how some specialists and GPs work: it is probably a short consultation with the doctor.

Mr DAVID SHOEBRIDGE: You only get a bandaid when you are cured.

The Hon. TREVOR KHAN: I am with Greg. It profoundly concerns me that even that would form part of a draft document.

Mr BOREAN: It was of grave concern to us and that sort of connected for us some of the reasons we were getting all this feedback from our membership about referrals for people unfit not being accepted. It puzzled us and it still puzzles us today how that came into practise. We understand there was a different focus of that document and perhaps it was not developed in the right way. We are obviously keen to be part of the solution there as well.

Mr DAVID SHOEBRIDGE: It looks like it was developed by somebody with minimal understanding of workers compensation which is one of the critiques about icare—

The Hon. TREVOR KHAN: Perhaps General Insurance experiences.

Mr DAVID SHOEBRIDGE: Yes, it has come from somebody who does not understand the place of rehabilitation and the need to have ongoing relationships with both the employer and the injured worker.

Mr LANE: My understanding is the context of it was more around longer term claims from a vocational perspective. So if a person has limited capacity at that point the ability for workplace rehabilitation to effect a result is less. The thing is the interpretation around that did not help in the absence of any other instruction about how to help somebody on the day they are injured, or in the weeks that follow, that is the issue. If that is the only instruction document then that is what you will follow.

The Hon. TREVOR KHAN: I used the term "inhumane" before. If you actually had a person who has a long-term injury that may deem them unsuitable to return to that work, to say you are not going to connect them up with a rehabilitation provider beggars belief. They are precisely a cohort of people who actually need a rehabilitation provider to give them some sort of direction in their life, I would have thought. Have I got your job entirely wrong?

Mr BOREAN: No, you have got it spot-on.

Mr LANE: Yes. I think it speaks volumes that in the responses even to this inquiry, and some of the documentation we have seen written from the nominal insure, does not mention rehabilitation.

The CHAIR: The time has expired. Are there any more burning questions from Committee members. I do not believe you took any questions on notice.

(The witnesses withdrew)

The Committee adjourned at 13:45.