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**REPORT OF PROCEEDINGS BEFORE**

# JOINT SELECT COMMITTEE ON THE NSW WORKERS COMPENSATION SCHEME

# INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

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**At Sydney on Monday 21 May 2012**

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**The Committee met at 9.00 a.m.**

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**PRESENT**

The Hon. R. Borsak (Chair)

**Legislative Council**
The Hon. N. Blair
The Hon. P. Green
The Hon. T. Khan

**Legislative Assembly**
Mr M. Speakman (Deputy Chair)
Mr R. Stokes

**CHAIR:** Welcome to the first public hearing of the Joint Select Committee of the NSW Workers Compensation Scheme. This Committee was established on 2 May 2012 to examine various aspects of the scheme, including its performance in meeting the key objectives of promoting better health outcomes and return to work outcomes for injured workers. The inquiry will also examine the scheme's financial sustainability and the functions and operations of the WorkCover Authority.

Today the Committee is hearing from the General Manager of the Workers Compensation Insurance within WorkCover Authority of New South Wales, Ms Geniere Aplin. Ms Aplin is appearing with Mr Michael Playford of PricewaterhouseCoopers and Mr Peter McCarthy of Ernst and Young. Mr Playford and Mr McCarthy have undertaken actuarial analysis of the outstanding claims and liabilities of the New South Wales workers compensation nominal insurer as at 31 December 2011. The Committee is also hearing from representatives of New South Wales Treasury, New South Wales Workers Compensation Self Insurers Association and from the New South Wales Auditor General. This afternoon it will hear evidence from representatives of the New South Wales Law Society, the Bar Association of New South Wales, Australian Lawyers Alliance, the Australian Federation of Employers and Industries and the New South Wales Business Chamber.

There are two further hearing days scheduled for Friday 25 May and Monday 28 May 2012 where the Committee will hear evidence from a range of organisations and individuals representing a variety of sectors, including unions, industry, insurance, medical and health disability and academia. The Committee will also hear from a number of individual witnesses who will share personal stories of their experience with the New South Wales Workers Compensation Scheme. As Chair of the Committee I would like to thank all the witnesses who are attending today. In relation to broadcasting guidelines, The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing broadcast of the proceedings are available from the table by the door. In accordance with the guidelines the media can film Committee members and witnesses but people in the audience should not—I emphasise "not"—be the primary focus of any filming or photographs.

In reporting the proceedings of this Committee the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee. Regarding questions on notice: Witnesses are advised that if there is a question they are not able to answer today, but would be able to answer if given more time or certain documents to hand, they are able to take that question on notice and provide the Committee with an answer at a later date. The Committee, witnesses, members and their staff are advised that delivery of messages and documents tendered to the Committee should be delivered through the attendants or the committee clerks. I also advise that under the standing orders of the Legislative Council any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such Committee or by any other person.

In relation to in-camera deliberations, witnesses are advised that if you should consider at any stage during your evidence that your response to particular questions should be heard in private by the Committee please state your reasons and the Committee will then consider your request. I remind all those present that witnesses who appear before the parliamentary committee are protected by parliamentary privilege for the things they say during the hearing. It means that what they say cannot be used against them later in court proceedings. I remind witnesses that the freedom afforded to witnesses by parliamentary privilege is not intended to provide an opportunity to make adverse reflections of specific individuals. Witnesses are asked to avoid making critical comments about specific individuals and instead speak about general issues of concern. Finally, all mobile phones are to be turned off for the duration of the hearing.

**MICHAEL PLAYFORD**, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, and

**GENIERE APLIN**, General Manager, Workers Compensation Insurance, WorkCover Authority of New South Wales, and

**PETER MCCARTHY**, Partner, Ernst and Young, sworn and examined:

**Ms APLIN:** The New South Wales WorkCover scheme provides insurance cover to almost 270,000 employers and more than three million workers. In all respects it is the largest Australian workers compensation scheme. It is almost 25 years old and it provides long-term services and support. Some active claims date from 1987. The scheme will collect about $2.6 billion in premiums and it has assets of around $14 billion. Every year

the scheme receives about 80,000 new claims and at any one time there are around 100,000 open claims. Right now the scheme involves about 100,000 injured workers receiving medical rehabilitation treatment, return to work and assistance from one of the seven scheme agents. Around 42,000 of these active claims receive weekly benefits because of an ongoing incapacity to work. We understand that the social cost of prolonged absence from work is severe. It affects injured workers, their families and the community. Delayed return to work can result in depression, breakdown, diminished social networks and poor health outcomes unrelated to the original injury. It is vital that this scheme does its job for the State and supports injured workers into the future as well as employers.

For the scheme to be sustainable, it must ensure that injured workers are returned to work in a timely fashion. Recent analysis by several parties, including WorkCover, the independent scheme actuary, the peer review actuary and the New South Wales Auditor-General, have all reached similar conclusions: The current New South Wales scheme is unsustainable. The scheme has spent all but two and a half years of the past 16 years in deficit. The premiums are 20 per cent to 26 per cent more expensive than those in Victoria and Queensland, and Victoria has just further lowered its rates, which will make this difference quite stark. As we know, the scheme deficit is currently $4.1 billion and the funding ratio is 78 per cent, which is amongst the worst funding ratios in Australia.

What makes this position worse is that it has not stabilised and the experience is deteriorating. Given the current claims experience in investment markets, there is no prospect for a return to improvement in the medium term. The target collection premium rate for 2011-12 is 1.68 per cent of wages and the estimated break-even premium rate is 1.85 per cent. In other words, the scheme is costing more than the target collection. In the current economic environment it is extremely unlikely that investment returns will help the scheme out of this situation. Much of the recent debate has been focused on the deficit, but the urgent and equally related problem is whether the scheme is structured appropriately to support injured workers and to return them to work efficiently and fairly.

WorkCover has initiated a variety of measures, including a scheme agent remuneration review under the contract, increased subsidies and incentives for employers to employ workers when they cannot return to their original work, claims initiatives focusing on the main areas of liability and a new operating model for the workers' compensation division. While these measures will help, more fundamental reform is needed to arrest the deteriorating claims experience. It is important that there is balance between premiums, benefits and management actions.

**Mr PLAYFORD:** As has been identified, I am the author of the valuation report of 31 December 2011. Pricewaterhouse Coopers have been the scheme actuaries for New South Wales WorkCover since June 2002 and I have been involved in the valuation reports that have been produced six monthly on the scheme's performance since that time. I took over as the principal actuary of our team in June 2005. Prior to 2002 I also had substantial involvement in the New South Wales WorkCover scheme. During the period 1997 to 2000, I provided advice to the New South Wales rating bureau when the Government of the day was considering privatising the scheme. I also provided technical support to the Sheahan inquiry in the lead-up to the 2001 reforms. I will not talk to my valuation report because I believe Committee members have seen it and presumably read it, but I am very happy to answer any questions.

**Mr McCARTHY:** I have been are providing advice to WorkCover since 2005 and been the peer review actuary since early 2007. The majority of the work I been undertaking has been to peer review PricewaterhouseCooper's [PwC] work, which includes the report that is the subject of this review. As part of our scope for the peer review we were asked to provide comments on valuation risks and issues of uncertainty in the valuations and recommendations from our review. As an actuary I am required to comply with the code of conduct of the Actuaries Institute and the professional standards. The relevant professional standards are referred to in our report. More broadly, I have been around the New South Wales WorkCover scheme since 1985 doing work from 1985 to 1990 as the scheme actuary, or as part of the team that was the scheme actuary at that time. I have also worked in insurance for about 10 years and managed various workers compensation and CTP portfolios, including claims management.

**Mr MICHAEL DALEY:** I presume you have seen the issues paper that was distributed. Was it distributed by WorkCover or the Minister's office? Who was the author?

**Ms APLIN:** The paper was distributed by the Government. Naturally we are continually providing advice to the Government. They then go through a process to determine whether it is Cabinet in confidence. It is not a WorkCover document.

**Mr MICHAEL DALEY:** Essentially the task that falls to this Committee is to look at the discussion paper and the 16 recommendations it contains. Of course, the Committee can come up with additional measures it might see fit to review to reform the scheme. Has WorkCover had the opportunity have an informed look at each of the 16 recommendations and do any costings? For example, recommendation 2 relates to the removal of coverage for journey claims. If journey claims were removed altogether, what would be the instant hit on the bottom line for the scheme?

**Ms APLIN:** I will take that question in a couple of parts and allow Mr Playford to add anything he would like. In relation to benefit costings, obviously WorkCover is continually looking at the major liabilities in the scheme and 80 per cent of the scheme's costs relate to claims. So, when we look at this deficit position we work through that. There are 4,000 existing journey claims and the value is about $197 million. I stand to be corrected on that.

**Mr PLAYFORD:** I will correct that. About 8 per cent to 10 per cent of claims reported every year are motor vehicle claims. The majority are coded as journey claims. One concern I have as the scheme actuary is that journey claims are excluded from the experience premium calculations. There is therefore an incentive to miss code motor vehicle claims as journey claims in order to reduce premiums. So it is actually quite difficult to get to the bottom of exactly how many journey claims are true journey claims. If you excluded all motor vehicle claims, it is roughly 8 per cent to 10 per cent of claims reported and roughly 8 per cent to 10 per cent of claim costs. However, I do not believe it is anywhere near the true number of journey claims that would be excluded. If you excluded journey claims, you would find that a proportion of the claims currently coded as journey claims would be reported as true motor vehicle claims.

**Mr MICHAEL DALEY:** I was using journey claims as an example. My point is that replete through several of these marquee documents is the claim that premiums will have to rise by 28 per cent to bring the scheme back into balance within five years. We have been asked to fixate on that. However, there is no information before this Committee about the cost of adopting any one of the 16 recommendations in the discussion paper. I would like you to take the following question on notice: Can you put before the Committee the consequence in dollar terms, based however you like, of the adoption of each one of these 16 recommendations?

**Ms APLIN:** We would be able to take that on notice and provide the Committee with some costings, if that would be of benefit to its deliberations.

**The Hon. ADAM SEARLE:** On the issue of journey claims: most are in fact claimed back from the motor accidents system, are they not? You mentioned the $197 million cost of journey claims to the scheme: was that before or after the claim-back from the motor accidents scheme?

**Mr PLAYFORD:** I presume that would be before the claim-back from the motor accidents scheme; that would be the gross cost.

**The Hon. ADAM SEARLE:** Would you be able to provide to the Committee the net cost of journey claims to the scheme, by year?

**Mr PLAYFORD:** I would have to take that question on notice.

**The Hon. ADAM SEARLE:** If you could take it on notice; and if you could give us the information for last five or six years, that would be instructive. If we could go the WorkCover paper: Ms Aplin, are you the author of this paper?

**Ms APLIN:** WorkCover is the author; I have reviewed it and put content into it, yes.

**The Hon. ADAM SEARLE:** On page 4 there is discussion about New South Wales spending more on compensation services and benefits—presumably, than other jurisdictions—without achieving superior health or return-to-work outcomes. I note on the following page there is discussion about current arrangements not sufficiently incentivising return to work. And I note further that one of the proposals in the discussion paper was

the idea of an incentivising step-down in benefits, presumably to incentivise workers to return to work. What does WorkCover propose in terms of improving return-to-work rates in terms of the obligations on employers to actually provide meaningful work?

**Ms APLIN:** Can I clarify whether that is the issues paper or the WorkCover submission to the Committee—because I cannot find the reference on page 4.

**The Hon. ADAM SEARLE:** I am looking at the WorkCover paper.

**The Hon. TREVOR KHAN:** Submission 144.

**The Hon. ADAM SEARLE:** Indeed. On page 4 there is the heading "2. Scheme performance overview", and the first paragraph talks about compensation services benefits; and on the following page there is discussion about incentivising of return to work.

**Ms APLIN:** Thank you.

**The Hon. ADAM SEARLE:** I highlight those as the proposition, presumably, of returning people to work and improving return-to-work rates as something of concern to WorkCover and indeed to many people with an interest in the scheme. Apart from cutting benefits, what other new approaches is WorkCover considering that would improve return-to-work rates—in particular, focussing on employer obligations?

**Ms APLIN:** The Committee will be aware that there are many different views on return to work and what are the best strategies in relation to that, and both historically from different interested parties and ultimately nationally and internationally in terms of this. Firstly, looking at what is best practice return to work: best practice return to work, or a scheme that is designed to support that, ultimately has appropriate support for severely injured workers, because there are severely injured workers and it is not appropriate to be looking at their returning to work; and ultimately, for others in terms of return to work, there has been a lot of evidence in relation to the fact that prolonged absence is particularly debilitating. So that earlier return to work, rather than waiting for full recovery, is particularly important. In relation to the actual scheme design, there is a view that benefits provide financial incentive and disincentive, and that can create an incentive for people to return to work at the appropriate times in the recovery process.

There has been a lot of press comment around the fact that WorkCover has lacked some capability in terms of managing the seven insurance agents. So, in relation to things apart from legislation and benefit reform, providing the appropriate interventions from a regulatory perspective in relation to contract management with the agents along the return-to-work process is particularly important; and WorkCover has recently looked at a quite extensive return-to-work program and attaching remuneration to that: ultimately, looking across the spend in return-to-work services—so, rehabilitation providers and ultimately the people that assist in that—analysing that spend and making sure that it is assisting workers appropriately in terms of vocational rehabilitation. In relation to employers, there is the same thing around incentivise and disincentives; and the premium system in terms of employers who have $7,500 in wages and have a premium, it has built into it the premium calculations in terms of the claims performance.

So, there is a financial disincentive for workers there. In relation to the specific question about what will WorkCover be doing in terms of employers, to encourage employers to take injured workers back into their existing roles, WorkCover has been working on a return-to-work inspectorate to work with the inspectorate that already exists around workplace health and safety, to look at the top 10 industries with the top 10 risks, and to be able to work with those employers very closely in terms of education and helping them look at different return-to-work options.

**The Hon. ADAM SEARLE:** Further to that: throughout the issues paper, and even the WorkCover paper, there is a presumption that return-to-work rates seem to be driven by workers' lack of willingness to return to work. I am just wondering what empirical data WorkCover has collected that might provide a full range of issues about the drivers in return-to-work rates. For example, what research has WorkCover done about the duties that employers are able to provide to workers who have been injured? Just for example, in a previous existence I had some passing acquaintance with the system, and it was often the case that employers, particularly smaller employers, found it difficult to reintegrate workers back into the workforce because of the nature of the workforce and the small nature of the enterprise; and it was not anyone's fault, for example, that in many cases they could not provide meaningful duties. This is not a new issue. In a policy sense, what

approaches is WorkCover considering to address that situation? Is it still, for example, contemplated that it is fair to cut benefits for workers in those situations, even though their employers are not able to provide return-to-work duties?

**Ms APLIN:** If I can take that question in a few parts. In relation to the pattern that we are seeing in the scheme, workers are staying off work longer; so their duration is extending.

**The Hon. ADAM SEARLE:** I am sorry to interrupt but, just on that, you might need to take this on notice. In relation to that cohort, what research or hard data is WorkCover able to provide us that actually drills into the reasons for the prolonged absence? Is it because the employer, for example, is not able to provide duties for them to return to?

**Ms APLIN:** I would have to take the data question on notice to see what we could provide back to the Committee. But, in relation to the reasons, there are myriad reasons. My reading of the issues papers is that the test that is proposed is a capacity test; so it is about capacity to return to work—to answer the last part of the first question. Also in relation to small employers, you are right. On average, they have one claim every 20 years and ultimately the option sometimes for return to work for injured workers can be limited, so WorkCover has had a historical focus on small employers and also looking at vocational rehabilitation programs in terms of being able to reskill injured workers and work with them about finding alternative employment.

**Mr PLAYFORD:** I do not have the hard evidence, but my understanding—and WorkCover may be able to elaborate on this—is that many injured workers do not actually return to work with the same employer, so in relation to return to work strategies you should not necessarily be specific about trying to return the worker to the same employer but consider a range of options in trying to find employment for the worker.

**The Hon. ADAM SEARLE:** On that point, one can understand a new employer being reluctant to engage someone they know to have been injured perhaps in the recent past. The focus in the issues paper and the implicit assumptions in the WorkCover paper seem to be surrounding the notion of reducing benefits to incentivise people, but if the existing employer is struggling to find meaningful work for them to return to and new employers, perhaps understandably, are reluctant to engage people they know to have been injured at work, it seems unfair to be looking at benefit cuts even though people might be willing to move back into work but are finding these obstacles, whether it is with a current or possible future employer. I am querying in a policy sense what WorkCover is formulating for the Government, or indeed for itself, to address that circumstance where workers may have a capacity for some work but are not able to return to their current or former employer and prospective employers are reluctant to engage them. What is the policy response, because I do not think it is fair that it should all rest on benefit cuts?

**Ms APLIN:** Very true, because it needs to be a balance. The scheme has a significant deficit and, if I come back to the fact that really the two and a half years that it was in surplus was driven by investment returns, not the underlying performance of the scheme, looking at benefits alone will not be sufficient, neither looking at premium or just management action. In relation to providing incentives to employers or programs or focus from WorkCover around people returning to work, ultimately WorkCover has the complexity from a policy position that there are varying sizes of employers and obviously different levels of interest and understanding about the scheme and what to do when there is an injury, let alone return someone to work. WorkCover has been working with the small business commissioner in particular in relation to small business and historically, in this scheme and others, the challenge is that it is a grudge purchase and the interaction with those employers does not typically happen until there is an injury.

From a policy perspective, investing significant amounts in trying to engage a small business owner at the time of an injury is necessary rather than trying to educate and make contact with all small business when it is not an immediate concern. Looking at programs like JobCover—I could take that on notice and provide the Committee with more information about that particular program and how much has been taken up—we have had the experience that small business actually has been taking on injured workers with some subsidy, so continually looking across education and intervention with small business because it is such a rare occurrence and the problems in terms of returning to work are often quite individual.

**The Hon. ADAM SEARLE:** No-one is doubting the health benefits of returning people to work, but looking at the issues paper and hearing what you said, it does not sound like there are any tangible new policy developments in this area of return to work policies being developed other than cutting benefits. Is that correct?

**Ms APLIN:** That is not correct.

**The Hon. ADAM SEARLE:** Can you please point out some tangible policy initiatives that are being considered presently, other than cutting benefits?

**Ms APLIN:** WorkCover is working within the existing legislation and ultimately the current premium order already provides financial incentive and disincentive for employers in terms of claims experience. WorkCover has a suite of initiatives in relation to long-term claims. Particularly when we look at long-term claims, we have been working with the seven insurance agents about those existing injured workers and looking at how we are able to return them to work. With return to work, the claims management model has particular intervention points and WorkCover significantly invests in managing providers and working with return to work providers to work with injured workers at critical points across the claim, and that always looks at a suite of strategies because there is no one-size-fits-all for return to work. In relation to working with employers, WorkCover is continually looking at both education and intervention from a policy perspective to provide employers with incentives to return people to work.

**Mr MARK SPEAKMAN:** I will ask some questions about the actuarial valuation. Can you turn to page 283 under the heading "Uncertainty of Estimates"? In this report, is PwC trying to value existing liabilities?

**Mr PLAYFORD:** That is correct: it is the liability in respect of claims that have occurred prior to the valuation date. Some of those will not necessarily yet be reported, but we include an allowance in our valuation results for the liability for incurred but not reported claims.

**Mr MARK SPEAKMAN:** You are not attempting to value mythical liabilities?

**Mr PLAYFORD:** No, we are attempting to value the liabilities in respect of claims that have already occurred prior to the valuation date.

**Mr MARK SPEAKMAN:** Although there is inherent uncertainty about the assumptions you adopt, what you are trying to do is give your best estimate of existing liabilities?

**Mr PLAYFORD:** That is correct. If I might add to that, in undertaking the valuation we are guided by the recent claim payment and claim reporting experience of the scheme in setting our assumptions. The valuation at December is not set in isolation, it is set as part of a series of valuations where I have applied consistent methodology and approach to analysing the data, reaching my conclusions over a long period of time. Between valuations we monitor the emerging payment and claim reporting experience and use that as one of the inputs into recalibrating the valuation result from one valuation to the next.

**Mr MARK SPEAKMAN:** Dealing with your assumptions at page 245, for investment return you have used a risk-free rate.

**Mr PLAYFORD:** That is correct.

**Mr MARK SPEAKMAN:** How long have you been using that risk-free rate?

**Mr PLAYFORD:** Since I started doing valuations of workers compensation liabilities back in 1997. In fact that is the standard approach for all actuarial valuations of general insurance liabilities.

**Mr MARK SPEAKMAN:** Does that include publicly underwritten workers compensation schemes?

**Mr PLAYFORD:** That is correct, and if you look at APRA requirements for the assessment of insurance liabilities, the accounting standard requirements, the actuarial standard requirements all require that what we term the discount rate be based on the risk-free rate of return which is available from Commonwealth Government securities as at the balance date.

**Mr MARK SPEAKMAN:** So what is the professional standard that requires that?

**Mr PLAYFORD:** If you go to Professional Standard 300, which is valuation of general insurance claims of the Institute of Actuaries.

**Mr MARK SPEAKMAN:** So every other publicly underwritten workers compensation scheme in Australia uses the risk-free rate of return?

**Mr PLAYFORD:** That is correct, with some exceptions. There are certain schemes that are not underwritten under Accounting Standard AASB 1023, which the WorkCover scheme is. So an example would be the Lifetime Care and Support Scheme, which is valued under a different accounting standard, AASB 137, in which they are allowed to use a long-term expected investment rate.

**Mr MARK SPEAKMAN:** You use as the inflation rate the labour price index?

**Mr PLAYFORD:** That is correct.

**Mr MARK SPEAKMAN:** Why do you use that rather than some other index like the consumer price index?

**Mr PLAYFORD:** The reason is that a large proportion of the liabilities is related to the weekly benefits and weekly benefits are indexed every six months in the legislation via the labour price index.

**Mr MARK SPEAKMAN:** For how long as a scheme actuary have you been using the labour price index as the measure of inflation?

**Mr PLAYFORD:** The labour price index, or its equivalent, going back throughout my involvement in the scheme back to 1997, the legislation did change the index that was used a number of years ago. I would have to take it on notice to get the exact date on which it was changed but it would have been the equivalent of the labour price index prior to that time.

**Mr MARK SPEAKMAN:** What do other publicly underwritten workers compensation schemes around Australia use as a measure of inflation?

**Mr PLAYFORD:** It will vary from jurisdiction to jurisdiction depending on is there an indexation rate defined in the legislation, but, typically, schemes where the benefits are related to wages it will be either average weekly earnings indexes or labour price indexes. Some schemes and some actuaries will also blend it a little bit so there is an element of consumer price index inflation to the extent that some of the services purchased by these schemes may be related to consumer price index inflation. Examples of that might be some elements of medical costs probably should be related to medical inflation indices. So in the sense the inflation rate we use is guided by the labour price index because the majority of the liabilities or a significant proportion of the liabilities are related to weekly benefits, but we also consider the likely indexation rates of other benefits that are payable under the scheme, like medical benefits.

**Mr MARK SPEAKMAN:** Could I ask Mr McCarthy whether he disagrees with anything that Mr Playford has said so far?

**Mr McCARTHY:** No, I have nothing to add to Michael's comments.

**Mr MARK SPEAKMAN:** Does that mean you agree with them?

**Mr McCARTHY:** Yes.

**Mr MARK SPEAKMAN:** Towards the bottom of page 245 of the actuarial report you point out that inflation forecasts do not extend beyond three or four years. So what you have done is, going to the top of page 246, you have used a fixed long-term gap between interest and inflation. You say that that is an approach used by other accident compensation schemes in Australia and New Zealand. Which other accident compensation schemes use that approach?

**Mr PLAYFORD:** The Victorian WorkSafe scheme, the New Zealand ACC scheme, a roughly similar approach is also used by the Dust Diseases Board. They are three schemes that spring to mind.

**Mr MARK SPEAKMAN:** You do not know offhand whether other schemes do or do not?

**Mr PLAYFORD:** Certainly those schemes do. I would have to take it on notice and go back to look at other publicly underwritten accident compensation schemes, but it is generally accepted across a range of these schemes that that is the approach adopted.

**Mr MARK SPEAKMAN:** The first bullet point on that page says that the methodology for determining the yield has not changed from that adopted at the previous valuation. Since this report was prepared the Reserve Bank has reduced the cash rate by 50 basis points. If you were doing this exercise as of today would that affect the numbers you would be using?

**Mr PLAYFORD:** The answer is yes. Because the valuation result is quite sensitive to changes in yield curves at the moment, I have been, at the request of the WorkCover board, producing a letter every month about the observable yields on Commonwealth securities in the market at the end of each month. Last week, at the request of WorkCover, I looked at what would the impact have been on my December valuation result if I had used the observable yields on the Commonwealth Government securities as at 15 May. I have a letter that I could table to the committee. The impact of using yields on Commonwealth securities that were observed in the market last week would have been to increase the December valuation result by a further $396 million. Sorry, that is the old one. That was an outdated number I just quoted. If I could have a copy of that letter I just tabled I will quote the number.

**CHAIR:** You are saying that the deficit would have increased by that amount?

**Mr PLAYFORD:** With the outstanding claims liability and the reported deficit at December, if we had used yields on Commonwealth Government securities that were available in the market as at 15 May, both the deficit and the outstanding claims liability would have been $335 million higher than what is contained in my valuation report.

**Mr MARK SPEAKMAN:** Was that just the discount rate?

**Mr PLAYFORD:** That is purely the change in the discount rate.

**Mr MARK SPEAKMAN:** Can we apply a proportion this way: If interest rates go down by 25 basis points next month, other things being equal, you would expect an increase in the December valuation of liabilities by almost $200 million?

**Mr PLAYFORD:** That is correct, something of that order—$200 million, $250 million.

**Mr MARK SPEAKMAN:** The inflation assumption, the budget papers for the Federal budget show for 2013-14 and 2012-13 a labour price index forecast of 3.75 per cent, which is 0.25 per cent lower than the 4 per cent figure you used. What effect would that have on the valuation?

**Mr PLAYFORD:** The effect would be to roughly reduce the outstanding claims liability by 2 per cent.

**Mr MARK SPEAKMAN:** We will work out the maths later on what that is in a dollar figure.

**Mr MICHAEL DALEY:** I thought you guys could do that in your head.

**Mr PLAYFORD:** Do you want me to?

**Mr MARK SPEAKMAN:** Can you do that?

**Mr PLAYFORD:** It would be a bit over $300 million.

**Mr MARK SPEAKMAN:** So, roughly speaking, that change in inflation broadly offsets the effect of the change in the discount rate?

**Mr PLAYFORD:** If you change those assumptions in the way you have suggested that is correct.

**Mr MARK SPEAKMAN:** Can I ask Mr McCarthy whether he has any disagreement with what has been said since I last asked that question?

**Mr McCARTHY:** I agree with what Michael said, although I have not done the calculation.

**Mr MARK SPEAKMAN:** If you go to page 283 there is a sensitivity analysis and you show the various assumptions on the left-hand side, dollar amounts and percentage amounts of change in liability and break-even premiums. Can we go away and assume that everything is proportional—in other words, where you have got, for example, a gap assumption increase by 0.5 per cent minus $177.1 million, that if it were increased by 1 per cent it would be double that and 2 per cent it would quadruple that, can the committee members assume that?

**Mr PLAYFORD:** I think that is a reasonable assumption, yes.

**Mr MARK SPEAKMAN:** And the percentage changes, are they percentage changes using outstanding liabilities as the denominator?

**Mr PLAYFORD:** That is correct in that at the top of that table you will see there the current central estimate of the liability. So the dollar changes in the table are the percentage change in that central estimate number.

**Mr MARK SPEAKMAN:** Going back to page 386, there is a risk margin of 12 per cent used. Do other workers compensation schemes use a risk margin?

**Mr PLAYFORD:** Yes.

**Mr MARK SPEAKMAN:** What is the rationale for the 12 per cent that has been adopted here? What does "75 per cent probability of adequacy" mean?

**Mr PLAYFORD:** I will step back and talk about, first of all, my central estimate liability. What I attempt to do is come up with a liability which is balanced in the sense that when the liabilities ultimately emerge and are paid out there is a 50 per cent chance that they will emerge higher than my central estimate result or 50 per cent lower. The accounting actuarial and regulatory standards of APRA have all concluded that putting the central estimate liability into an insurer's or a scheme's balance sheet does not provide sufficient protection for claimant entitlements or the security of claimants. As a result, all of those standards require that an explicit risk margin be added to the central estimate liability to create an insurance provision that goes into the liabilities or the insurer of the scheme. That is done so that a greater amount of assets are set aside in the balance sheet to meet and provide security to claimant entitlements.

The size of the risk margin is ultimately a decision for the board. So the accounting standard requires that a risk margin is required but makes it clear that it is a decision for management on the size of the risk margin and the WorkCover board—I think I mention this in the introduction to the report—made a decision at its board meeting several years ago that they would like to set a risk margin that provided a 75 per cent probability of adequacy. So that is increasing the likelihood that when the liabilities emerge there is only 25 per cent likelihood that they will emerge higher than the liability provision as opposed to just the central estimate liability that had been reserved in the balance sheet.

Based on the 75 per cent probability of adequacy that the board requires, I then go away and estimate the percentage risk margin that needs to be added to provide that level of increased security for claimant entitlements. We follow an approach that has been endorsed by the institutes of actuaries risk margin committee as best practice that takes both a backward look and a forward look at the risks faced by the WorkCover scheme. Backwards looking, I look at how volatile the scheme's experience has been over its history and the volatility of similar schemes with similar liabilities over their histories. I also look at the risks facing the scheme currently and into the future and how they may impact on the central estimate result. So I look at the potential volatility and the payment types weeklies, workplace injury damages and so forth.

**Mr MARK SPEAKMAN:** The 75 per cent probability of adequacy, is that a typical figure?

**Mr PLAYFORD:** It has become the commonly adopted standard across accident compensation schemes in Australia. Not all accident compensation schemes adopt that amount but a number of them do. The publicly underwritten accident compensation schemes are not regulated by APRA and so are not required to follow any APRA requirements in this regard, but schemes like the Victorian WorkSafe scheme, for example, also adopt the 75 per cent probability of adequacy.

**Mr MARK SPEAKMAN:** Mr McCarthy, do you disagree with anything that Mr Playford has said since I last asked you?

**Mr McCARTHY:** No. I just would like to clarify that the 75 per cent is in the insurance regulations that the Federal Government set out, which are regulated by APRA and that is a minimum.

**Mr MARK SPEAKMAN:** The Hon. Adam Searle asked some questions about alternatives or ways to supplement benefit cuts. What else is WorkCover doing? What else can be done? Can you quantify in any way savings that can be made by return to work measures that do not involve cutting benefits?

**Mr PLAYFORD:** It is challenging until you see the evidence come through in the claims experience. You do need the evidence to emerge that the initiative has been successful.

**Mr MARK SPEAKMAN:** Page 5 of the Ernst and Young peer review, top of the page, the second sentence, "We are aware that WorkCover are planning some major initiatives to address the scheme's adverse financial position and deteriorating claims experience". What are those initiatives, other than any that involve cutting benefits?

**Mr McCARTHY:** At the time that was written it was based on information from WorkCover but there was not that much detail around their plans at that stage. I think Ms Aplin outlined some of the things that we have been working on.

**Ms APLIN:** If I can add to that, in terms of the initiatives—and I think the question about how you are able to quantify the benefits that will flow from those initiatives—again I would come back to the fact that the scheme has a $4.1 billion deficit and if you look at the claims costs we have got 40 per cent of our claims that are over three years. Ultimately 80 per cent of the scheme's costs relate to claims. So the initiatives that have been established are very much focussed on the existing portfolio in the legislation and what positive interventions can be made in relation to the tail. The existing long-tail claims that are three years plus, that cohort of claims are managed with the seven agents and there are varying factors with them about returning people to some type of work or looking at providing them with the appropriate support.

A team has been set up within the agent operations area within WorkCover to work closely with the individuals within the scheme agents that manage the tail to focus on claims that might have a particular injury type or that the individuals come from a particular industry and working through then what the appropriate strategies might be in terms of either medical intervention or retraining. With that tail there cannot be a one-size-fits-all approach because obviously if individuals have been receiving benefits and out of work for three years plus it is highly unlikely at that point that there is any return to the existing employer. In addition though obviously to working closely with the agents there is financial incentive provided to the agents, which was established through the remuneration review about 2011-12.

It is a move away from WorkCover's historical remuneration in terms of the contract. The existing deed is a 2010 deed and we signed an amendment of that in relation to the remuneration with particular new establishment of, with those tail claims, looking at providing direct incentive per claim to the agents to work with them around moving those claims to an optimal result in terms of either getting the worker back to work or continuing to support them in terms of medical payments and benefits. PwC worked on developing the remuneration linked to that and ultimately looked at linking remuneration and then having a liability release if appropriate. We also had that work peer reviewed by Taylor Fry at the time. So that is on the tail.

Then with work injury damages, remuneration was attached to the entire scheme because we are looking for the scheme agents, as 7, to work together around work injury damages with one of the major issues being about liability and also not working appropriately through those claims. There is also a return to work measure which is looking at reducing the number of days of duration. Again to that question, there are certain claims within the system that can be managed through the appropriate interventions at particular times in the claim, so particularly before 26 weeks. I might get Mr Playford to comment further on the remuneration. We have been seeing claims finalised but it is too early to look at any liability valuation release.

**Mr PLAYFORD:** That is correct. With the new tail measure that was introduced last year, as Ms Aplin talked about, we are monitoring that closely. Some of the agents are saying that they are starting to see

movements in their portfolio of tail claims, but I have not yet seen that come through in the emerging claims experience. That may emerge prior to the June valuation but that is a wait and see at this point in time.

**The Hon. PAUL GREEN:** In your report at page 22 you say:

> New South Wales has the second highest costs on both bases. The size of the difference in costs is noteworthy, with the high-cost states, including New South Wales, having costs per employee over 50 per cent higher than the lowest costs.

Could you say why that is and what factors you think are contributing to that level of cost?

**Ms APLIN:** Can I just clarify that is from the WorkCover submission, on page?

**The Hon. PAUL GREEN:** Page 22. There is a graph there with the comparisons.

**Ms APLIN:** My understanding is that the Committee will be talking to Treasury and we took the data from Treasury. I would not profess to be an economic expert, so perhaps if Treasury could take that question.

**The Hon. PAUL GREEN:** Yes, I am quite happy with that. Secondly, on page 23 it is stated:

> Although New South Wales rehabilitation costs are relatively high, the rehabilitation participation rate for injured workers in New South Wales is only 31 per cent, compared with the national average of 43 per cent.

Could someone explain why that is so? Is that due to people not accessing the rehabilitation service, which is a positive, or is it due to an issue of people holding out for a lump sum?

**Ms APLIN:** Again that is in the Treasury section of the submissino, but I will take some of that question. I think ultimately we have seen in the New South Wales scheme that there is a significantly higher amount spent in terms of services to workers than the other States. The reference there is the report from the Heads of the Workers' Compensation Authorities, the monitor, and it is 2010-11 data. The causes of that can be varied. There needs to be improvement in terms of WorkCover and the agents' management of rehabilitation spend and making sure that ultimately the injured worker is getting the best services.

I think though that the largest indicator that the spend is too high for the result achieved is the duration results that we are seeing in the scheme. The experience in the scheme has been that injured workers are staying off work longer and more injured workers are receiving lump sum benefits than before. I could not comment on personal motivations of injured workers in relation to whether that is to receive a lump sum benefit, but ultimately the scheme is seeing that pattern in the data. Historically within this scheme and other schemes it is often discussed whether a lump sum culture is emerging, and the drivers of that are often quite varied.

**Mr PLAYFORD:** From my perspective where I see a lump sum culture establishing itself is purely through how it manifests itself in the claims experience. I have seen it manifest itself in the experience of other schemes around Australia at various times in the past as well. What we are seeing at the moment is an increase in the propensity to access workplace injury damages and, with that, an increase in the proportion of claims that are being assessed above the threshold levels to access both workplace injury damages but also section 67 pain and suffering benefits, where there is a 10 per cent threshold. If the proportion of claims that are being assessed greater than those levels is creeping up, that to me means there is some evidence there that there are changing behaviours in how those claims are being assessed. Why otherwise would a greater proportion of claims be assessed above those threshold levels than previously?

It manifests itself also in how it indirectly impacts other benefits. For example, when a claimant receives a workplace injury damages settlement, that should be a finalisation and it should exit the scheme. In theory then the number of claims continuing on weekly benefits should reduce. So if there have been 10 claims on weekly benefits and one claim return to work and one claim to receive workplace injury damages, at the end of the period I should only have eight claims left on weekly benefits. What I am finding is that I am ending up with nine claims on weekly benefits at the end of the period. So there is a change in behaviour occurring of more claims staying on weekly benefits to replace those claims that are exiting via workplace injury damages. I am not seeing the reduction in the weekly benefit liability that I would expect if more claims were exiting via workplace injury damages, and that is concerning to me at the scheme actuary.

**The Hon. PAUL GREEN:** Why do you think that is so? Do you have some sort of assumption?

**Mr PLAYFORD:** It is complex and these schemes are complex. I do not think you can point just to the behaviour of one participant; it is the changing behaviour of all the participants in the scheme. That is why we use this sort of term "lump sum culture" because ultimately the behaviours of all the participants in the scheme, whether it is legal providers, whether it is claimants, whether it is the medical professional, whether it is the way the agents work, subtly changes around the edges and at a micro level that is not necessarily obvious. My role is to add up the individual cases and look at what it translates to at a portfolio level. What I am seeing is changes in those patterns of benefit utilisation at an overall scheme level.

**The Hon. PAUL GREEN:** On page 6 you say.

> ... an increase in the proportion of claims which are electing to pursue a Work Injury Damages claim and enabled by the failure of legislated thresholds intended to limit access to Work Injury Damages.

I wonder if you could elucidate your thinking on that and what sort of legislative reform do you think could take place in the spirit of what you are suggesting there?

**Ms APLIN:** In relation to the comment about work injury damages, around about 12 months ago WorkCover undertook a file review to understand what the patterns were within the work injury damages cohort within the agents. Those claims demonstrated that there was a lack of timeliness about the lodging of those claims and that a lot of them were being accepted and paid out of time, and also that negligence was not being appropriately tested. The issues paper talks about the Civil Liability Act and the application of that. That would be something that I believe perhaps would help the issues that we are seeing in relation to the file review, but that would be a matter for the Committee's determination.

**CHAIR:** Ms Aplin, I note from your report that the deficit in the scheme deteriorated alarmingly by $1.72 billion in the six months to December 2011. Can you please give us an insight into the underlying drivers of this sudden large decline? It is on page four of your report.

**Ms APLIN:** In relation to their deterioration, obviously we are in a period of external influences in terms of investment income. Of the large deterioration, approximately 50 per cent of that was due to the investment returns that were achieved and the risk-free discount rate that Michael has spoken about this morning. The other 50 per cent was due to the deterioration in claims management experience since June 2008.

**Mr PLAYFORD:** Just to clarify what Geniere has said, the 50 per cent due to external factors and 50 per cent due to claims management refer to the deterioration in the scheme's funding ratio since June 2008. Over the last six months the drivers of the $1.72 billion deterioration in the deficit was over $1 billion due to changes in the discount rate assumed in the valuation, but an increase in the insurance liability assessments of $460 million due to the change in actuarial assumptions that I have assessed, based on how the claims management experience has been changing recently.

**CHAIR:** That leads me to the other part of my question: Were there any changes in major valuation assumptions in, say, December 2010, if you are going back to 2008, and 2011?

**Mr PLAYFORD:** If I might refer you to my valuation report, on page eight of the executive summary, there is a table that summarises by payment type the change in the liability assumptions that I have made reflecting changes in claim management experience over the various valuations between June 2008 up to and including the December 2011 valuation. The column at the right there looks at the cumulative change in the liabilities for each payment type over that period. Since June 2008 I have strengthened the liability for workplace injury damages by in excess of $1 billion due to changes in the emerging experience of that payment type, I have increased the liability for weekly benefits by $450 million reflected as changes in the emerging experience of weekly benefits, and I have increased the liability for medical benefits over that period by $432 million, although I would note that in the last three valuations I have begun to release liability from the medical payment type, as experience there has been improving more recently. Does that answer your question?

**CHAIR:** Yes, it does, I think, thank you. Just getting back to the overall valuation deficit, I know we talk a lot here about the risk-free yield and the reason for using it in the calculation of the gap. Referring to the letter that you have just tabled, where you are doing basically a monthly reassessment of that gap and seeing of course how volatile it is—for example, in February it seems to have been a positive adjustment of $207 million and in May it is a negative adjustment of $275million—in my experience over time, investment strategies start to stabilise according to the environment that they are in. Is it your expectation going into the future that

investment strategies would remain pretty much the same as they are now, given that 50 per cent of the loss or the projected loss is coming out of the investment side of the portfolio, or the income of the fund?

**Ms APLIN:** I might have to take that on notice, if the Committee requires further information on the investment strategy. We have an investment board. Naturally being a government agency, it is particularly conservative in terms of that investment. I think when you look at this scheme and other schemes and private insurers, the underlying performance of the scheme and the outstanding liabilities, that it is never a good strategy to rely upon investment income to fund outstanding claims costs. So even with improvement in investment income, which all reports that we have about the economy—and perhaps Treasury could comment on that—while there is volatility, we are unlikely in the short term to see a significant improvement in investment returns, based on our current investment portfolio.

**CHAIR:** I would be happy if you could take that on notice because, as we know, a large part of the deficit relates to a projected shortfall in investment income, for want of better terminology. There is a lot to do and a lot to be done in relation to investment strategies into the future. The majority of our discussion relates to increase in the premiums or reduction in benefits and maybe improving the claims management processes, and that is the way it should be.

**Ms APLIN:** Yes.

**CHAIR:** But what I would like to try to understand and better from your investment board is how and what they will be changing in terms of their strategies into the foreseeable future, rather than just irrational and excellent assumptions made by Mr Playford. Are things going to change in terms of what they are actually doing? As we can see from that letter of yours I have just mentioned a few minutes ago that you tabled, the actual investment returns can be quite volatile from month to month and probably from quarter to quarter as well. I understand the underlying assumption is that risk-free rate is falling because of the Reserve Bank reducing rates, but at some stage that will stabilise and you do need to understand then what is going to happen with the long-term return on the funds that the scheme holds. As I say, there is an awful lot of work to be done in the other areas, but there does not seem to be a lot of light shed into that part of the report. I am sure you got a lot of it in there, Mr Playford, but some of those figures and graphs are a little opaque to me.

**Mr PLAYFORD:** If I could comment a bit further, and if you go to page three of my executive summary, on page three I do some projections of the solvency position of the scheme over the next 10 years. In those projections I assume a long-term expected investment return of approximately 6.6 per cent, which has been provided or is based on advice from WorkCover's investment division and from their consultants about, given their asset mix, what they might expect as a long-term investment return over many years.

**Mr MICHAEL DALEY:** How many years, 20?

**Mr PLAYFORD:** You would have to get clarification of that, certainly over an economic cycle of 10 years perhaps. So in these projections of the balance sheet into the future, I have assumed that WorkCover will achieve an actual long-term expected investment return on its assets, not just the risk-free rate of return that is assumed in the liability calculation. What those projections show on page three is that, even if WorkCover achieved its long-term expected investment returns, that alone would not be sufficient to move the scheme back into a surplus position over the next 10 years.

**CHAIR:** No, and it would not be prudent to assume that anyway.

**Ms APLIN:** Perhaps, if it would assist the Committee, we can take on notice provision of some past performance of the investment board—there is a new investment board chair—and detail of their future investment plans.

**CHAIR:** If you could, please, that would be very good.

**Mr MICHAEL DALEY:** Mr Playford, on page two of your executive summary, you describe a return of the scheme to surplus within a reasonable time frame as being within five to 10 years. So five is reasonable or 10 is reasonable. On page three you then say that projections indicate that, and as you have just been talking about, given no other changes, aspiring to return to full funding by five years would require a premium rate increase in the order of 28 per cent and, by 10 years, would require a premium rate increase in the order of 8 per cent. Given that we are not going to contemplate premium rate increases, to bring it back to full funding you

either have to raise premiums or find savings and improvements to the equivalent of those two figures, 28 per cent or 8 per cent. Is there any pressing financial imperative that requires you to take the more brutal approach, that is the five-year approach rather than the 10-year approach?

**Mr PLAYFORD:** If you go to my first recommendation on page 28 I say that it is recommended that WorkCover make a decision as to the importance of returning the scheme to full funding and over whatever time frame. So, the scenario on page 3, where it refers to 5 or 10, is purely to give a frame work for WorkCover to make a choice. It is ultimately government policy: is it important to return to full funding and over what time frame does it believe it should be? So that is a government policy issue, ultimately.

**Mr MICHAEL DALEY:** That is a matter of policy but as a matter of finance is there any pressing financial imperative to take the short-term rather than the longer-term reasonable view?

**Mr PLAYFORD:** This scheme, as it refers to the WorkCover submission, has been in deficit not just for most of the past 16 years but for most of the past 20 years. That is one of the advantages of government compensation schemes, that they do not need to always be fully funded as a private insurer needs to be. So it is able to take a longer-term decision around investment strategies, around solvency strategies and so forth. One of the trade-offs of taking a longer-term decision around a strategy for returning to full funding is that ultimately there is a generational cross-subsidy from future employers having to fund today's deficit which was generated by the experience of the scheme in the past and the shorter the period that corrective action is taken over the more that solution has to be worn by future employers over that short period. So, there are trade-off choices as to which generation of future employers should bear that or other parts of the community.

**Mr McCARTHY:** Could I say something to that? The projections in Mr Playford's report—and he will correct me if I am incorrect—assume that there is no further deterioration in the scheme's claims experience. History over the past three or four years shows that there is continued deterioration in the scheme. So, if a scheme continued to deteriorate at the rate it has over the past few years, that deficit is going to increase not decrease.

**Mr MICHAEL DALEY:** That also makes the assumption that bond rates will not increase over a certain percentage and they might as well, which they have done in the recent past. Getting back to the lump-sum culture we spoke about a while ago, you said there were changes in behaviour, that the issue was complex and that you have been watching the scheme for a long time. Talking about changes in behaviour, there cannot be changes in the behaviour of injured people, they do not conspire to get stuck into the lump-sum culture together, and the nature of injuries on the scheme have not changed to the extent that it has contributed to this lump-sum culture. So, whose behaviour has changed to contribute so significantly to this lump-sum culture?

**Mr PLAYFORD:** I do not think it is as simple as blaming any particular participant. These sorts of schemes are complex and it is subtle changes around—

**Mr MICHAEL DALEY:** Can you give me the top three contributors to those changes in behaviour? Is it the top two or the top four? I just want to know what the main drivers in that change in behaviour are.

**Mr PLAYFORD:** Ultimately all I see is how it manifests itself in the claims data, where I can quote by payment type how it is impacting on the various payment types.

**Mr MICHAEL DALEY:** Could I direct the question to you then, Ms Aplin?

**Ms APLIN:** When we look at the system, ultimately you have injured workers who are staying off work for longer to receive a lump-sum benefit. Medical payments have significantly increased and it is difficult to ascertain legal payments because work injury damages costs are not regulated. So, ultimately, they are included when you look at the data in terms of an overall payment. As I indicated before, the system is complex and it is not our role as WorkCover to look at blaming particular groups.

**Mr MICHAEL DALEY:** I am not asking you to blame anyone but there must be an exhaustive list of contributory factors. Can you tell me what the most significant of those contributory factors are?

**Ms APLIN:** Injured workers are receiving section 66 and section 67 payments. We have more workers receiving those payments so in terms of assessments when there has not been a change, particularly in injury type, you need to look at that and think is there a percentage of assessment holding? Then ultimately with work

injury damages the fact there is an increase in the number of those when there has not been a change overall in the injury types, that process through to work injury damages needs to be closely looked at from an agent's perspective. But ultimately as to the top two or three contributors, the whole pattern is that weekly benefits are increasing for longer periods for injured workers and ultimately they are receiving the lump-sum payment.

**Mr MICHAEL DALEY:** You said medical payments have significantly increased. I know that the cost of diagnostic treatments such as MRIs and things like that are becoming more expensive and commonplace. Are there any other medical factors that would contribute to that increase as well?

**Ms APLIN:** The medical liabilities, if I look at the increase—and Mr Playford might like to add to this—from $1.8 billion since June 2008 to $3.3 billion in December 2011, so it is 24 per cent of the claims cost and ultimately 40 per cent of that is then weeklies. Care is included in there and rehabilitation, so medical is quite a broad category. We have had some increases in care but WorkCover's concern and focus on the medical strategy is about the areas of high spend. High spend is not necessarily a bad thing if it is driving the right outcomes.

**Mr PLAYFORD:** Ms Aplin is correct that the medical payment is quite broad and includes everything from hospital admissions to pharmaceuticals to surgery through to continuing care for the seriously injured, and so forth. We only value it at a higher level but we do monitoring, ourselves and WorkCover, of some of the medical categories. It is fair to say that pretty much every medical category has had escalation in spending in excess of inflation in recent years, particularly since 2006. It is not a particular area of medical. In my report I talk about making a recommendation for the need for a holistic strategy around medical because I do not see any strategy for coordinating the medical spend in a way to try to optimise the impact of that medical spend to try to improve health and return to work outcomes.

**Ms APLIN:** Inflation in medical has also been seen across other schemes, particularly nationally and other compensation schemes. As a result of the scheme actuary raising that there is no integrated medical strategy, a general manager was appointed in August of last year within WorkCover looking at the health-care strategy, and they are working across all the areas of data and intervening where there might be inappropriate treatment, but also looking at how you work with the health networks and systems more effectively because it has been an area where WorkCover has had many single strategies but not something that is overarching. So, the focus of WorkCover is to put a team of people with that individual.

**The Hon. ADAM SEARLE:** If I could ask you to look at page 49 of the external peer review. It says in the third paragraph:

> The Scheme Actuary has projected that the Scheme will slowly improve over time if it continues as projected—

And I understand that—

> however it will still remain in deficit … with a funding ratio of 89.1%, compared to 94.4% assumed at the last valuation.

So, the 31 per cent at the 2011 valuation that has a funding ratio of little over 94 per cent, is that correct? And the assessment is that if things remain as they are trending, after 10 years it would be 89 per cent funded as opposed to 94 per cent funded, is that correct?

**Mr McCARTHY:** Well it assumes that there is no—

**The Hon. ADAM SEARLE:** Further deterioration?

**Mr McCARTHY:** It assumes there is no further deterioration in the claims expenses.

**The Hon. ADAM SEARLE:** Returning to what Mr Playford said earlier about the difference between publicly underwritten schemes and private insurance, there is no immediate danger of the scheme becoming insolvent though, is there?

**Mr McCARTHY:** Depends on your definition of insolvent.

**The Hon. ADAM SEARLE:** There is $14 billion worth of assets under investment, is that correct?

**Mr McCARTHY:** In insurance the typical definition of a solvent organisation would be that assets are greater than liabilities. In this case the assets are actually $4 billion less than the scheme liabilities.

**The Hon. ADAM SEARLE:** But at the present time there is no practical impediment to the scheme's ability to actually pay its liabilities as and when they fall due, is there?

**Mr McCARTHY:** In the short term, no, but long term, yes.

**The Hon. ADAM SEARLE:** What do you mean by "long term"?

**Mr PLAYFORD:** I would like to make one contributing comment and that is by reference to the break even premium rate and how it compares to the current target collection rate. On page 2 of my executive summary under key results I note that my current assessment of break even premium rate is, yes, it is lower than the target collection rate. So 1.64 per cent of covered wages compared to 1.7 per cent of covered wages, but I make two comments. One is that the buffer between the two, yes, it is positive but it is relatively small compared to the size of the accumulated deficit. So it is about $95 million of extra premium being collected each year that can go towards reducing the deficit. But I also comment that the difference between the two is only about 3.6 per cent. So if claims experience deteriorated only by another 3.6 per cent, that buffer between the target collection rate and break even premium rate would disappear. So my conclusion was that that current buffer, given the uncertainties and the deteriorating trends we are seeing in claims experiences, is probably too fine and I do not think that is a reasonable basis therefore for setting the premium rates into the future.

**Mr MARK SPEAKMAN:** At the bottom of page 15 the WorkCover submission 144 states:

> Some commentators have suggested that New South Wales agent remuneration costs are unreasonably high. Scheme insurance costs in New South Wales are not high by Australian standards.

Then it refers to a report that shows that New South Wales's insurance operation costs, as a proportion of total scheme expenditure, are less than Victoria, Western Australia and Tasmania. However, that report shows New South Wales at 18.6 per cent, Queensland at 8.2 per cent and South Australia at 13 per cent. Is there any reason why New South Wales's insurance operation costs are higher as a percentage than Queensland and South Australia? What, if anything, could be done about bringing New South Wales's costs down towards that level?

**Ms APLIN:** I might have to take that on notice in terms of the particular page or what it is referring to because the costs are agent remuneration plus WorkCover's costs and the commission. Are you looking at insurance operations across?

**Mr MARK SPEAKMAN:** I am looking at the first sentence at the top of page 16 of your submission.

**Ms APLIN:** Yes.

**Mr MARK SPEAKMAN:** You point out that New South Wales's costs are proportionally lower than Victoria, Western Australia and Tasmania, but I am drawing to your attention that they are proportionally higher than Queensland and South Australia. My question is: Why is that so? If it is so, can anything be done to bring New South Wales down towards Queensland and South Australia's relative costs?

**Ms APLIN:** But the 8.2 per cent of Queensland is a different scheme with it being centrally managed by the agency. Ultimately, our costs also under insurance operations include the Workers Compensation Commission. I would note that the 18.6 per cent that is recorded in this but then the 17 per cent on a go-forward basis is lower than Victoria, Western Australia and Tasmania.

**Mr MARK SPEAKMAN:** Why is it higher than Queensland and South Australia?

**Mr McCARTHY:** The system in Queensland, Michael can correct me about this, if you are just looking at WorkCover, is not a lot by comparison to New South Wales. There is also a regulator in Queensland, which in New South Wales is part of WorkCover. And also the occupational and health system is separate. So you are not comparing apples with apples.

**Mr PLAYFORD:** I would also note that Queensland has a very different benefit structure to New South Wales in that it does not continue to have tail claimants where there is a lot of administrative expense around continuing the management of tail claims. That would also contribute to it. They have a centralised IT

system as well. So there are a number of differences between the two schemes. It means that it is not necessarily a like-with-like comparison.

**Mr MARK SPEAKMAN:** You do not need to have the document in front of you, but Slater and Gordon on page 21 of its submission points out a lot of things about cost increases—for example, the administrative costs of running WorkCover have increased from $70 million in 1999 to more than $600 million recently, payments to insurance companies between 2001 and 2009 increased from $134 million to $446 million, and there is a $209 million increase in claims handling expenses as at 31 December 2011. Could you be doing more in cutting claims handling expenses? If so, what?

**Ms APLIN:** I have not had the opportunity to review that particular submission. I would note though that the average total remuneration that has been paid since 2006 to agents is $366 million. There has been some recent analysis, which has been taken, I understand, from the annual reports, which looks at what amount is paid in that particular year but actually relates to payments made to insurers for past years, including when they were licensed insurers before they were scheme agents. If it would be helpful to the Committee, I could take that question on notice and provide the payments to insurers over the period of time referred to in the Slater and Gordon submission. Also from the WorkCover perspective, I have not had the opportunity to review that.

We could also provide that around the expenses, making sure that we provide the break-up between the occupational health and safety division and the workers compensation insurance division. I would say that the workers compensation insurance division is a smaller scale operation than Victoria and Queensland and ultimately the percentage of claims handling expenses is in line with other schemes and private insurers. But we are always looking at ways that we can be far more efficient. Also with scheme agent remuneration, remuneration has reduced by $48 million per year since the scheme was in surplus in 2008. But we will take that on notice and provide the Committee with a detailed breakdown.

**Mr McCARTHY:** Could I add something? I did notice that in the Slater and Gordon report. What was the first year with that cost comparison, was it 1989?

**Mr MARK SPEAKMAN:** 1999.

**Mr PLAYFORD:** I would like to make a couple of comments on this issue. I do not believe anybody would deny there is room for improved efficiencies in this scheme. Ultimately, only 25 per cent of the scheme is related to the operating costs and 75 per cent relates to the claim costs of the scheme. If you unduly slash the management costs there is a risk that the claim performance would deteriorate which would result in an overall increase in the cost of the scheme. When you look at the operating costs of the scheme you need to look at it and ensure that if you are reducing costs there that you are able to maintain and potentially still improve the claim management outcomes that you are able to achieve under the scheme.

**Mr MARK SPEAKMAN:** Are there any quantifiable savings in claims management expense that you can presently identify?

**Mr PLAYFORD:** One that springs to mind—and Geniere knows my views—is that WorkCover has been under-invested in ever since it was established in 1987. One of the key differences between the New South Wales and the Victorian WorkCover scheme is that the Victorian scheme was set up with a centralised information technology system. One of the key differences in WorkCover's ability to be agile and manage the scheme well is that it has to negotiate seven system changes with seven scheme agents every time it wants to change the way claims management occurs in this scheme. It is also inefficient in that it has to pay for maintenance of seven information technology systems, compared to the cost of maintaining a single information technology system. That is one area I suggest that operational efficiencies could be improved.

**Mr MARK SPEAKMAN:** Are the savings from those operational efficiencies presently capable of being quantified?

**Ms APLIN:** WorkCover has conducted a review over time about the particular issue that Michael raises in terms of centralised system. We would be able to quantify a range of management savings but they are not going to significantly contribute to a reduction of the deficit. Ultimately, working with the agents presently to align remuneration to outcome I could provide the Committee with detail on that and also of the costing that we have of a centralised information technology system, but they are somewhat outdated. It is expenditure of about $100 million. We have details of what we pay under the contract to agents for system upgrades or changes

that we make across the seven systems. The operational efficiencies in relation to that could be quantified but they are minimal in comparison to the deficit.

**Mr MARK SPEAKMAN:** Do you mean less than $10 million?

**Ms APLIN:** Yes.

**The Hon. TREVOR KHAN:** On a $600 million spend?

**Ms APLIN:** I would have to take the $600 million reference on notice because the WorkCover insurance division, in terms of its operational budget and then ultimately the payments to agents, are not up to $600 million that I am aware of.

**The Hon. NIALL BLAIR:** My question is in relation to some of the tangible things that WorkCover is doing. I did note that you made reference to the return to work inspectorate and that inspectorate being established and working with the other inspectors within WorkCover to identify the higher risk employer groups and working with them to look at meaningful and suitable duties for employees to return to those occupations. Could you expand on that area and where that is up to and how that is progressing? Could you then make comments on the impact of work capacity testing if that was to be implemented as a key change? How will that benefit that program if it is identifying suitable duties in that industry?

**Ms APLIN:** I will deal with the return to work inspectorate first. There has been a program of reform within the occupational health and safety area of the 10-5-5 program which has looked at the top 10 industries and recently has been working closely with them. It is important that you have an end-to-end life-cycle. Looking across workers compensation many employers will only have an interaction with you when they pay a premium. Even then sometimes that is through an accountant so there is not an interaction or opportunity with WorkCover. The other interaction they will have is either when there has been an incident or an inspector needs to visit or when they have a claim. There is also ad hoc contact. Looking across that life-cycle it was important that the two divisions work far more closely together from a WorkCover perspective looking across the entire system. We have had two of our senior injury management people working with that program to identify what would be the best use.

I should not use the term inspectorate because I think we want to make it more about education rather than prevention. That group has not been recruited as yet but they are looking at what the size of it needs to be and what industries they need to work through. Work capacity testing is about the capacity of the individual. The importance of that will be to collect the appropriate data to understand where intervention from a policy perspective needs to be taken for creating suitable duties and what industries we should be focusing on as WorkCover and working with to educate or prevent injury. WorkCover is continually focused on closing the loop. The general manager of the occupational health and safety division, John Watson, is leading the return to work program as part of 10-5-5 program. The insurance division and the occupational health and safety division are closely aligned.

**The Hon. PAUL GREEN:** Given your experience with WorkCover—quite a simple question—do you have any view of what direct reform or legislative reform is necessary to make this scheme far more sustainable?

**Ms APLIN:** Again I come back to the fact that this scheme, if we look back for 16 and a half years, has been in deficit. Generally good compensation schemes across the nation and internationally will look at major reform at least every five years. This scheme has not had major reform for 10 years. The scale of the underlying financial result, which we need to remember, has come about from claims experience as well as investment experience, and injured workers are not returning to work. We know the health benefits of people returning to work and the benefits to the community. Premium benefit reform and management action alone will not enough, it needs to be a balanced and combined response, in my view.

**Mr PLAYFORD:** I will make some comments about workplace injury damages. If you look at other schemes around Australia that have experienced deterioration; over the last 20 to 30 years most scheme deteriorations have occurred because of a deteriorating experience with adversarial lump sum benefits. That is a major driver of the deteriorating claims experience of this scheme and that is an area of benefits that is very difficult to design well to prevent deterioration into the future and should be looked at.

**Mr McCARTHY:** I do not have anything more to add.

**Ms APLIN:** If I can add one more thing; 42,000 claimants are in receipt of weekly benefits and weekly benefits make up a large component of the scheme's financials but if you look at scheme design around financial incentive and disincentive and compare New South Wales to other schemes in Australia, does it have an optimal benefit design to support people to return to work? I would question that. Ultimately, medical payments follow. For individuals that are in receipt of weekly benefits there is a systemisation and ultimately medical treatment follows which increases the spend. In addition to Michael's comment about work injury damages, weekly benefits and medical costs are concerns.

**Mr McCARTHY:** I do have a comment. If you go back and have a look at the history of this scheme you will see there have been a large number of changes at times, in particular in 2001. One area that stands out as not really being focussed on is medical expenses in the scheme. Since 1988—these are rough figures—medical expenses have increased well above inflation, for a long time. These figures are a few years out of date, but typically the increase in medical costs has been around 10 per cent per annum, which is way above inflation over that period. I think the medical costs in this scheme need a really close looking at. It is a very important part of the scheme. We are dealing with a personal injury scheme, so doctor and medical services are really a central part of what happens to a claim—whether the worker goes back to work, remains on benefits, gets surgery, gets allied health services, or not.

**The Hon. ADAM SEARLE:** On the issue of medical benefits, I note that under the Workers Compensation Act medical benefits are paid if they are necessary or reasonably necessary, but only if they are properly verified. I note that in Parliament the Minister has highlighted what he termed—

**The Hon. TREVOR KHAN:** Are you going to ask a question, or make a speech?

**The Hon. ADAM SEARLE:** It is a question.

**The Hon. TREVOR KHAN:** Well, get to it.

**The Hon. ADAM SEARLE:** The question relates to medical expenses. All these expenses are approved by the scheme agents. So, if there is a problem, is it not a problem with scheme agent management?

**Ms APLIN:** In terms of scheme agent management, as with any scheme, you can always improve the management of claims and the processes that you have. The definition of "reasonable and necessary" has been tested, and ultimately it is fairly broad. WorkCover experiences significant difficulty, as do the agents, in determining that treatment is not reasonable or necessary. On Peter McCarthy's point about the involvement of the general practitioner and the medical profession: there is limited, if any, regulatory power for WorkCover, or the scheme agents on behalf of WorkCover, to deem treatment as not reasonable and not necessary under the current legislation and guidelines.

**The Hon. ADAM SEARLE:** Getting back to the question that Mr Daley asked earlier: it is the case, is it not, that neither of the actuaries here today or WorkCover have been asked to cost the ideas in the Government issues paper?

**Ms APLIN:** WorkCover is always costing initiatives for the Government. Ultimately, in terms of the proposals under the issues paper, if the Committee would like it costed we can provide that on notice.

**The Hon. ADAM SEARLE:** My question was: You have not been asked by the Government to cost these proposals to date?

**Ms APLIN:** Ultimately, as I said, we always work through many costings, and then it is a matter for Government about the process it follows with the advice that we give them.

**The Hon. ADAM SEARLE:** The discussion paper, you said, was not a WorkCover paper. So it has been issued by the Minister, is that correct?

**Ms APLIN:** It has been issued by the Government.

**The Hon. ADAM SEARLE:** Well, not by the WorkCover agency?

**Ms APLIN:** Not by WorkCover. It is on the WorkCover website.

**The Hon. ADAM SEARLE:** What input did WorkCover have into the design of the issues paper?

**Ms APLIN:** WorkCover is always providing advice to the government.

**The Hon. ADAM SEARLE:** But the issues paper was prepared by the Minister's office, is that correct?

**Ms APLIN:** The issues paper was issued by the Minister's office, yes.

**The Hon. ADAM SEARLE:** In relation to work capacity testing, which is one of the ideas in the Government issues paper, is it not the case that section 40A already provides for work capacity testing? Is it the case that scheme agents are not properly utilising that?

**Ms APLIN:** Under section 40A, the work capacity test is not like the work capacity test that is applied in, particularly, Victoria. We are seeing increasing durations; and section 40 does assist in terms of returning people to part-time work, but it is not sufficiently effective, in my view.

**The Hon. ADAM SEARLE:** Could you explain that? As I read section 40A, injured workers are required to have work capacity testing, and if they do not cooperate they can have their payments suspended. How is that not an effective management tool?

**Ms APLIN:** I think section 40A is not applied consistently at specific points in the claim. Through research, if you look at Victoria at 78 weeks and then up to 130 it is applied; so it is applied earlier in the claim than it is in New South Wales. Ultimately, the ceasing of benefits, based on section 40, in New South Wales is heavily litigated with a result for the injured worker. I could not comment on whether that is appropriate or not.

**The Hon. ADAM SEARLE:** From what you have said, the issue is the inconsistent application by the scheme agents of the section, is that correct?

**Ms APLIN:** No. Ultimately, the scheme agents deal with application of that section, and under the legislation there are not specific points for that to be applied, like there are in other States.

**The Hon. ADAM SEARLE:** In terms of improving scheme agent management, I know that a number of stakeholders have suggested that management by the scheme agents could be improved. What steps is WorkCover taking to improve scheme management by the agents?

**Ms APLIN:** Most recently, I have announced a new operating model for WorkCover. I commenced at WorkCover in August last year, and my background is insurance and finance. WorkCover, in particular the insurance division, has lacked commercial capability; and the structure has not been particularly aligned to the key heads of liability under the valuations. So the agent operations group will be re-established in terms of a claims and an underwriting directorate reporting to me. We are going to open recruitment of that next week. That is to ensure we are focussed on the funding ratio, and also getting optimal health outcomes across the system: so, looking at it from a systemic perspective, rather than what I would say when I came into the role, discovering that there was strategy but not enough focus on the heads of liability.

So we will be working very closely with the scheme agents, as we already are through those specific projects I mentioned, about work injury damages, the tail project, return-to-work project. And we are doing a regulatory reform project—when I say project, that will become business as usual—working through and looking at what is the current legislation, what are the operating guidelines. I know that in some of the submissions it has been raised that they are quite burdensome. They are, and they are clothed in a lot of red tape: so, looking through those, and doing what we can from a non-regulatory perspective to align effort in the system with the key areas of health outcome and liability.

**Mr MARK SPEAKMAN:** The Bar Association's submission, No. 77, identifies its seven-point reform plan. The first of those is: allow commutations. They say that the Ernst & Young external peer review recommends consideration of a wider use of commutations. But then the Bar Association says, "There has been

a systematic and prolonged objection to commutations by WorkCover which has been a principal cause of the present tail." Would you like to comment on that?

**Mr PLAYFORD:** I think you need to look back at the main driver of claims deterioration prior to the 2001 reform, which was led by significant liberalisation and use of commutations in that era. I would not recommend that you have liberalised commutations, like there were back in the late 1990s, as a way of trying to improve outcomes under this scheme because I suspect you would get similar behavioural changes to those that we saw then, the same lump-sum culture that we saw then, and likely see a deterioration in the scheme's costs as a result of that type of strategy. That is not to say that limited targeted use of commutations might not be beneficial for some certain categories of claimants where there is a higher ratio of administrative cost to the liability of those claims, but I think it has to be very targeted and done very carefully and selectively to avoid the risk of a lump-sum culture spreading in the scheme like we saw pre the 2001 reforms.

**Mr MARK SPEAKMAN:** Are you going to take on notice a request to cost each of the seven proposals in the Bar Association's seven-point plan, which you will find in submission 77 and the Law Society's submission as well? Can you provide costings on those?

**Mr PLAYFORD:** I would have to look at what is in those in detail. I suspect that there is not enough detail in the Bar Association's submission, although I have not read it in detail to form a view on that at this point in time. But it is difficult, unless you actually have the detail of an actual package, to cost. The hardest part of any benefit reform to cost is how the behavioural changes will change the cost of the scheme rather than the direct impact of changing benefit levels per se, but I refer you back to what the cost of the scheme was pre the 2001 reforms where the cost of the scheme at that point was estimated to be in excess of 3 per cent of covered wages compared to the level that we currently have.

**Mr MARK SPEAKMAN:** You will have a go at providing those costings?

**Ms APLIN:** We will. We will take that on notice to review the content.

**Mr McCARTHY:** Can I just clarify the comment about our recommendation about commutation? It goes with a very clear warning that the past experience in using commutations in this scheme has not been successful, but we think there is a very strategic, targeted, implemented, effectively and tightly controlled role for commutations.

**Mr MARK SPEAKMAN:** Unions NSW, submission No. 135, at page 10, says that the workers compensation frequency rate for serious work injuries and diseases has been consistently higher in New South Wales than in Victoria. They say that in the five years to June 2009 the New South Wales annual rate was between 27 and 42 per cent higher than in Victoria. Is there any reason of structure of the economies or structure of legislation why one would expect the New South Wales frequency rate to be that much higher than Victoria? Can you give any explanation for it?

**Ms APLIN:** I might have to take that question on notice in terms of providing a full response to the committee.

**Mr MARK SPEAKMAN:** The Ernst and Young peer review at page 6, halfway down the page, just before heading 1.5.2, the last sentence says, "There are plausible alternative assumptions that could be adopted which are not particularly pessimistic and could increase scheme liabilities by more than $500 million". What are those plausible alternative assumptions?

**Mr McCARTHY:** I would have to refresh my memory but in respect to workplace injury damages, the trend over the past few years has been towards a greater number, and Michael has adopted reasonable assumptions, but you could easily choose higher numbers of claims going in than Michael has assumed, and similarly for sections 66 and 67.

**Mr PLAYFORD:** The challenge of doing a valuation of this sort is that if there is a risk of deterioration, the risk is you do not want to overreact to what might be just a short-term blip of experience. So I take a considered look at experience, particularly over a two-year period, to ensure that I take a balanced approach of not overreacting just to really short-term experience. But, as Peter has alluded to, because some of these trends have been deteriorating with some of the payment types recently, if you had considered much shorter periods of experience and assumed that that continues in the future at the more recent levels you could

have come up with a higher liability. But I believe it is prudent to wait for evidence of that continual deterioration to come through before I would respond even further in my valuation. So I believe I have taken a balanced approach of looking at the experience over a reasonable time and that this deterioration has been there for a reasonable time before I have included it in my valuation basis.

**CHAIR:** The time for questions is over. Thank you very much for attending the hearing today. There have been many, many questions on notice today, given the complexity of what we are dealing with, and the committee has resolved that answers to questions taken on notice be returned within three working days. The secretariat will contact you in relation to the questions that have been taken on notice and they will provide you with a marked transcript of those questions. The three days will commence from the time you receive the transcript. If you need a little bit of extra time we have leeway to give that to you.

**(The witnesses withdrew)**

**(Short adjournment)**

**ROBERT LLOYD**, Manager, Strategic Projects, New South Wales Self Insurance Corporation, sworn and examined:

**RICHARD COX**, Director of Economic Strategy, New South Wales Treasury, affirmed and examined:

**CHRISTA MARJORIBANKS**, Principal Actuary advising the New South Wales Self Insurance Corporation, PricewaterhouseCoopers, sworn and examined:

**CHAIR:** I welcome our witnesses to this session. I remind you that witnesses are advised that if there are any questions you are not able to answer today but that you would be able to answer if you had more time or certain documents at hand you are able to take a question on notice and provide us with an answer at a later date. Witnesses are advised that should you consider at any stage during your evidence that your responses to particular questions should be heard in private by the Committee could you please state your reasons and the Committee will then consider your request.

**The Hon. ADAM SEARLE:** Looking at the Self Insurance Corporation paper at page 2, what are the current premium rates or the allocations for workers compensation liabilities for the agencies covered by the Self Insurance Corporation?

**Mr LLOYD:** The total premium? For 2013 it is $669 million.

**The Hon. ADAM SEARLE:** But as a percentage of wages?

**Mr LLOYD:** As a percentage of wages, 2.5 per cent.

**The Hon. ADAM SEARLE:** And what is the break-even point for your agencies? That is presumably the total premium which includes claims management and other insurance functions; it is not just the claims themselves. Is that right?

**Ms MARJORIBANKS:** That is the premium rate that includes all costs to be incurred, including the claims management expenses as well.

**The Hon. ADAM SEARLE:** And what is the break-even point which is the cost of the claims themselves?

**Ms MARJORIBANKS:** I would have to take that one on notice. I do not have a breakdown of that with me.

**The Hon. ADAM SEARLE:** At point 3 of your paper you indicate that any proposed reforms should be actuarially costed before deciding on a package of reforms to be implemented. Do I take it that your understanding is that no such work has been done on the Government issues paper to date?

**Mr LLOYD:** No, not for the Government, not by us.

**The Hon. ADAM SEARLE:** You are not aware of any work being done by any actuary on that?

**Mr LLOYD:** No.

**The Hon. ADAM SEARLE:** You also say there are a number of differences between your fund and the WorkCover scheme. For example, at page 3 of your paper you say that sustainability is not an issue for the Treasury Managed Fund [TMF] as it is fully funded with no deficit. Can you explain how you got to that position?

**Mr LLOYD:** In the sense of each year PricewaterhouseCoopers forecasts what they anticipate the workers compensation costs will be and that number is given to—by the way, New South Wales Self Insurance Corporation is part of Treasury. It is a branch of Treasury. So we pass it over to our colleagues in Treasury who formulate the budgets and that amount is included in the budget for the State, so that is why it is fully funded. They know the number and they allocate that money in that year's budget.

**The Hon. ADAM SEARLE:** Your paper also indicates that TMF has experienced deterioration in weekly medical lump sum benefits but not to the same extent as the general scheme. Are you able to identify how and why that is the case?

**Ms MARJORIBANKS:** Because the nature of the public sector workforce is quite unique and there is a number of different characteristics of the claimants and the claims so the experience of the two schemes will naturally be quite different over time. The WorkCover scheme has a more diverse range of industries, whereas TMF has a much more unique workforce in the make-up of the public sector. So for various reasons different trends will occur in the two different schemes.

**Mr LLOYD:** One other reason is all the public sector agencies are a part of the Treasury Managed Fund. What they have is a very upfront management of the claims. We have three claims providers, which are insurance companies, and they happen to be the same as the WorkCover scheme agents. We have only got three of them. So the larger agencies as you would imagine have got the capacity and the personnel. They work closely with those scheme agents and they have people focused on reducing costs. I do not necessarily mean reducing costs, I mean managing the costs of claims and getting people back to work. At the end of the day these funds, as I was saying how the system works, the Government allocates the funds to those agencies but the agencies are held accountable. It is not like a bottomless pit. So they are committed to managing the costs in conjunction with our—we call them claims managers, not scheme agents, with our claims managers. That is another reason why there is potentially a difference, because they are very focused.

**The Hon. ADAM SEARLE:** Pardon my ignorance, but who are the three claims agents that you use?

**Mr LLOYD:** EML, QBE and Alliance.

**The Hon. ADAM SEARLE:** And you say you work closely with them on claims management?

**Mr LLOYD:** The agencies do—the agency people.

**The Hon. ADAM SEARLE:** What is the average notification period for an incident with your agencies to the insurers?

**Mr LLOYD:** The agencies find out about it pretty much straightaway and they start work and advise the claims manager. What that delay is, I am not sure.

**The Hon. ADAM SEARLE:** Maybe you could take that on notice. I think for the scheme generally it is seven to eight days from incident to notification to the insurer. I was just wondering whether it was longer or shorter in your situation.

**Mr LLOYD:** Okay. Yes.

**The Hon. ADAM SEARLE:** You may not know this, but I am wondering how, and in what ways, the agencies that you cover work more closely with claims agents in relation to their claims that, for example, may not have happened in the general scheme.

**Mr LLOYD:** Okay. One of the main differences, which I guess we have the capacity to do unlike private sector employers, is that when a person has a claim, their wage or their salary continues. At some stage when that claim is acknowledged as a worker's compensation claim, you might say, as I understand it, the designation in the payroll system would convert it from wages to workers compensation. From the worker's point of view, they do not, for that seven days notice, wait and wonder will I or will I not get paid. The way it works for the system is that the next pay day there will be money in their bank account in the early stages of connecting with the workers compensation system.

**The Hon. ADAM SEARLE:** What are the return-to-work rates like for the agencies in that situation? Generally, for example, in WorkCover's paper and the issues paper, poor return-to-work rates seem to be a problem for the scheme generally. I am wondering how it works in your cohort?

**Ms MARJORIBANKS:** I do not have any return-to-work rates in my head, but we do monitor the return-to-work rates for the scheme, so we can take that on notice.

**The Hon. ADAM SEARLE:** I am interested to see whether or not there has been an improvement or a deterioration, or maybe what it is that you do—your functions or those of your claims agents or what you carry out around return to work—that might contribute to whatever your results are.

**Ms MARJORIBANKS:** Yes. There has been a deterioration in return-to-work rates, but I think possibly the reasons for that are somewhat different in the New South Wales WorkCover scheme. One of the important things to note about the scheme is that it is effectively a self-insurance scheme whereas in the private sector people pay their premiums and it is not self-insurance; it is insurance. The concept of self-insurance, and we have large agencies, is that they are accountable and they know that their financial position will depend on how the outcome of the claim goes. It creates different incentives in terms of the question you asked about working with claims managers—a different dynamic, probably, in that regard.

**Mr MICHAEL DALEY:** Mr Lloyd, on page three of your submission in paragraph two, you state:

> Our main recommendation is that the Committee seek to have the impact of any proposed reforms scenario tested and actuarially costed to understand the implications on the TMF before deciding on the package of reforms to be implemented.

Mr Cox, do you agree with that contention?

**Mr COX:** Yes.

**Mr MICHAEL DALEY:** Okay. Given that the Committee will be limited to producing a report, or possibly two, and that we are therefore limited to making recommendations, can I take it then that your main recommendation is that this Committee recommend to the Government that it scenario test and cost with actuaries any proposals to change the scheme before they implement them?

**Mr LLOYD:** That is correct.

**Mr MICHAEL DALEY:** The Government has suggested that it needs to have any proposed changes to the scheme in place before 30 June because it needs to set the rates. My understanding was that the rates could be changed at any time during the year in any event, but you would say that your recommendation is more important than having this rushed before 30 June?

**Mr LLOYD:** Yes. This actuarial costing is on the Treasury Managed Fund [TMF]. You might say that the WorkCover scheme can look after itself, but it is the implications for the Treasury Managed Fund and also, by definition, the Government. They are the ones that have funded the State budget, so you might say they would like to know the implications of any package of reforms before they sign off because they are a direct stakeholder in all this. The package of reforms may look good for the WorkCover scheme, but it could not be so good for the Treasury Managed Fund. That is the comment.

**Mr MICHAEL DALEY:** The phrase "actuarially costed" is self-evident. How would a team go about scenario testing reforms?

**Mr LLOYD:** What we are referring to there, and it came up while we were sitting on WorkCover, you mentioned behavioural change. Whatever reform or package of reforms, it is not a financial assessment, it is saying we do this and how will that impact on this recommendation, how do they interact? Will it drive the right behaviours, what the proposed reforms are trying to achieve? From a Treasury managed fund point of view it is whether this reform and the other things that we interact with and which we mention in the paper about the death and disability schemes, part of the emergency services. So, if there is particularly a reform, how would that change behaviours so the desired result being looked for out of these reforms, will it be achieved in the Treasury managed fund?

That is scenario testing. It is non-financial. It is trying to work out the balance. You do one thing, does it cause this to go up or down. It is everything pretty much in balance. It is just to have a reality check on whatever package of reforms is proposed, apart from just the financials, saying this is a good thing or whatever the results are. It is the other side of it. The WorkCover people referred to some of those this morning which have taken place over time. I expect to do that before your deadlines for doing something is a bit hard.

**Mr MICHAEL DALEY:** In your third dot point on page 3 you say, "Sustainability is not an issue for the TMF as it is fully funded with no deficit." How do things like the police and emergency services death and

disability schemes, which by some descriptions were running at significant deficits, have an impact on that statement and on your own scheme?

**Mr LLOYD:** The nature of those schemes, the benefits that go to those officers, it is the flow-on effect to the workers compensation area. You might say less incentive to return to work. Because of the top-ups they get from those schemes there is no incentive to return to work, which means the workers compensation will just continue, and that is the impact. We have nothing to do with the death and disability scheme. It is at arm's length from us. It is something that exists and it is the flow-on effect to the workers compensation area.

**Mr MARK SPEAKMAN:** The WorkCover Authority submission No. 144 has a section 8 headed, "Impact of Workers Compensation Scheme on NSW economy." Under that it says, "Please note—section 8 is sourced from NSW Treasury." Have any of you been involved in preparing section 8 of the WorkCover submission?

**Mr COX:** Yes, I have.

**Mr MARK SPEAKMAN:** Page 24 of that submission states:

> The available evidence suggests that each 1 per cent fall in labour costs may … lead to a 0.8 per cent increase in labour demand in the long run (i.e. the long run price elasticity of labour demand is 0.08), and each 1 per cent increase in wages may ultimately lead to a 0.8 per cent increase in labour supply…

A 20 per cent reduction in premiums could equate to about 0.3 per cent of average wages. That could lead to 2,600 jobs. In a situation of high unemployment, which implies surplus labour, a 20 per cent fall would have a larger impact, 10,000 jobs. Can you explain why in one circumstance there is a 10,000 increase in employment with a 20 per cent fall in premiums but in other circumstances it is 2,600 with the same fall in premiums hypothetically?

**Mr COX:** Yes, certainly. The calculation is based on estimates of what we would call the long run elasticities. Therefore, the way to think about them is if we abstract from the economic cycle the idea that the performance of the economy varies through time. Sometimes we get periods of stronger growth and other times we get periods of less strong growth. So, if we abstract from those changes the underlying response on both demand side and supply side, those elasticities give the smaller number. The point there is if we do not have a significant unemployment problem we have to pay workers a little bit more to get them to supply more labour, and that is why we have that labour supply elasticity. If we have a period of surplus labour, the economy is in a period of weakness, and we can more reasonably assume we will get more workers coming forward prepared to work an existing wage rates, so we will not need to pay higher wages. So, the thing that drives the change in employment there is just the demand elasticity; the supply elasticity we are implicitly assuming is equal to one.

**Mr MARK SPEAKMAN:** In a situation of high unemployment you say a 20 per cent fall in premiums could increase employment by 10,000. Does it follow that in a situation of high unemployment a 20 per cent increase in premiums could decrease employment by up to 10,000?

**Mr COX:** Yes, correct.

**Mr MARK SPEAKMAN:** Likewise, outside that scenario a 20 per cent increase in premiums where we do not have high unemployment would decrease employment by 2,600?

**Mr COX:** Yes, that is correct.

**Mr MARK SPEAKMAN:** Where are we at the moment? Are we in the 10,000 ballpark or in the 2,600 ballpark, if there were hypothetically an increase in premiums by 20 per cent?

**The Hon. TREVOR KHAN:** Or 28 per cent.

**Mr COX:** I hesitate to answer that question because it assumes that this method of calculation has some scientific precision about it. Those elasticities are informed by a huge range of empirical studies that have been undertaken not only within Australia but overseas as well. I would hesitate to try to apply them in too mechanistic a way. I can assume away part of doing that by saying in the long run this is the sort of impact we would expect and if we had a different state of the economy we might expect more response. But I hesitate to calibrate the economy and say it is in this particular situation at the moment. I am aware that employment

growth in New South Wales has been moderate since the beginning of the year and there has been some weakening in the labour market since 2011.

**Mr MARK SPEAKMAN:** These are headline or across-the-board elasticities. Are there different price elasticities in different sectors of the economy?

**Mr COX:** You would expect that to be the case, yes.

**Mr MARK SPEAKMAN:** Those sectors of the economy that are a bit more depressed than others will be having greater job loss impacts on the premium increases?

**Mr COX:** Yes, that is correct.

**Mr MARK SPEAKMAN:** Going back to your submission, Mr Daley asked you a question about the second paragraph on page 3, "Our main recommendation is that the Committee seek to have the impact of any proposed reforms scenario tested and actuarially costed …" You go on at page 4 to list the issues and whether you support those options and if so to what extent. Can I take it with those items where you say, "We support this option" that you can be confident now those options will benefit the bottom line of the Treasury managed funds without the need to scenario test and actuarially cost them?

**Mr LLOYD:** The assumption is if you take something away there will be a saving. You might say with the weekly benefits arrangement, if that were to be changed, as the issues paper talks about other jurisdictions, that could have an impact that needs to be costed. Again, if the savings are there, it could also be that we are saving too much. We are more interested in the arrangement that the Treasury managed fund has a detrimental effect. The assumption is if it is removed it must make a saving.

**Ms MARJORIBANKS:** I think on those ones we can be reasonably confident; so, to answer your question, yes. I think the key point is, presuming you look at the financial impact on the WorkCover scheme of your reforms, you should also look at the impact on the Treasury managed fund because it could be quite different. That is another point.

**Mr ROB STOKES**: In relation to the projected performance of the workers compensation scheme, it was predicated on the assumption of a long-term investment return on its assets of 6.6 per cent. Does Treasury have a view in relation to that? Is that assumption optimistic or pessimistic?

**Mr LLOYD:** I do not know. Do you have an idea?

**Mr COX:** No. We can take the question on notice.

**Mr ROB STOKES:** Also, in relation to part of the WorkCover Authority's submission sourced from Treasury, at page 23 there was a statement in relation to compliance and claims costs for business:

> There is little available evidence on workers compensation compliance and claims-related costs borne by businesses in New South Wales compared with other states.

What little evidence is there and what evidence is there from other States that you are aware of?

**Mr COX:** Which page is that?

**Mr ROB STOKES:** Page 23, the sentence under the heading, two lines down from the top of the page, basically related to compliance costs. It is not quantified there. I am after some more information.

**Mr COX:** The only information we identified was some analysis that was undertaken for the Better Regulation Office when there was some reform to workers compensation arrangements which excluded employers with very low payrolls. I think they were payrolls below $7,000. The estimated savings that were identified there related to the non-payment of premiums by those businesses, so it was the avoided premiums. It did not really throw any light on those broader categories of compliance costs. We did not identify any evidence from any other jurisdiction.

**Mr ROB STOKES:** I would like to take you to your submission No. 131, page 4, the recommendations for options for change. Points 2 and 3 there in relation to journey claims and nervous shock

claims, Treasury stated that it supports the removal of these claims. Why these areas and not others, and what is the basis for your support there?

**Mr COX:** I defer to Mr Lloyd.

**Mr LLOYD:** Once again, it is simply if they are not there, there is a saving.

**Mr ROB STOKES:** Why those and not other areas of claims reform?

**Mr LLOYD:** Of the 16 options, I think we supported them all, or we had cautionary comments on the others but in general we support them.

**Ms MARJORIBANKS:** Early in Mr Lloyd's submission he is looking at the financial impact on the Treasury managed fund so I think the support is based on those not resulting in a cost but being a saving for the fund, and for the other options there is the possibility they could create a cost for the fund.

**Mr LLOYD:** Yes, this is about cost, not about scheme design.

**Ms MARJORIBANKS:** I do not see it is anything more than the financial impact on the fund. It is not about social benefits or anything like that.

**The Hon. TREVOR KHAN:** Can I take you to page 3 of your submission. At that point 4 you say the TMF has also experienced deterioration in weekly, medical and lump-sum benefits and then you compare it with the WorkCover scheme. Are you able to identify what the deterioration has been in the Treasury managed fund performance in those three categories?

**Ms MARJORIBANKS:** We have basically year-to-year comparisons in the trend monitoring reports that are done for the fund. I think the annual report and the financial statements show the movements in costs.

**The Hon. TREVOR KHAN:** Will you take it on notice and provide us with the deterioration in performance since, say, 2001? Is that possible?

**Mr LLOYD:** Yes.

**The Hon. PAUL GREEN:** The last session was with the WorkCover Authority and I asked them a question and they suggested I ask you. It regards comments from the Australian Bureau of Statistics data on the WorkCover compensation scheme. It says New South Wales has the second-highest costs on the basis of this graph, and the size of the difference in the cost is noteworthy. High cost States include New South Wales, having a cost per employee over 50 per cent higher than lowest cost. Can you explain why New South Wales has a cost that is such a large discrepancy and what may be driving those costs?

**Mr COX:** No, I am sorry, I do not have an answer to that question. We look for evidence which would help us to understand the extent to which there were different costs in different jurisdictions and how New South Wales compared with different jurisdictions. This is information we sourced from the Australian Bureau of Statistics but I do not know why those differences are there. That is raising issues about scheme design and all the issues that the Committee has raised.

**The Hon. PAUL GREEN:** In your view, if the scheme was left untouched, what would be the long-term ramifications for those injured and the State or the taxpayer?

**Mr COX:** I do not think I can answer that question because I do not have a detailed understanding. Can you ask me the question again so I can understand it properly please?

**The Hon. PAUL GREEN:** Let me ask it quite simply. Is the scheme unsustainable financially as it currently stands?

**Mr COX:** I am sorry, I cannot answer that question. I can take it on notice.

**The Hon. PAUL GREEN:** Okay. In your view are there any reforms that need to be addressed under the workers compensation scheme within the points of reference we are addressing here today?

**Mr COX:** Any changes that can reduce premiums and still achieve satisfactory outcomes in terms of the performance of this scheme are reforms that Treasury would support.

**The Hon. PAUL GREEN:** In another submission a gentleman suggests bringing back lump sum settlements for partially incapacitated workers so as to bring finality and closure. Do you see that as a viable option in managing part of the scheme?

**Mr COX:** Sorry, I do not understand that scenario well enough to answer your question.

**The Hon. PAUL GREEN:** Mr Lloyd, would you like to answer that question?

**Mr LLOYD:** Sorry, could you repeat the question?

**The Hon. PAUL GREEN:** The submission talks about bringing back lump sum settlements so you can actually close off the case.

**Mr LLOYD:** Oh, the commutations arrangements?

**The Hon. PAUL GREEN:** Yes. Do you see that as a viable option? What would be the process costs involved in such an option?

**Mr LLOYD:** I think like a lot of what WorkCover talked about this morning, what starts off on day one as a good piece of legislation or concept, over time is expanded. Commutation is a good case. I think WorkCover had commutations with tight controls, but over time the tight controls were loosened and I think Michael Playford mentioned how last time the costs blew out. The answer is that sometimes that is a good idea, but it is all subject to the controls, which leads to the deterioration, or how generous it becomes and how assessments become eased or loosened. Certainly, in some past systems commutations were a good way of keeping liabilities down. But the trouble is that there comes that commutation mentality. We talk about the change of behaviours and these are the things that take place in these schemes. Behaviours change—"I'm not going to go back to work because I'll get this golden pot of money. I'll just hang out for that." So you put another barrier in the way of going back to work. It is not there; it is a pension scheme and the fact is do I want to sit on this pension scheme forever or go back to work. There is always room for it. I think it would need to be tighter controlled.

**The Hon. PAUL GREEN:** Could you provide a scenario of what that would look like?

**Mr LLOYD:** The tighter control?

**The Hon. PAUL GREEN:** Yes?

**Mr LLOYD:** Sometimes with a worker on a pension with no prospects of returning to work because of the nature of their injury you might say their existence could be such where it starts to affect them psychologically, whereas to get them out of the system could be what it takes to get them to get back in charge of their life. But then again, once again everybody starts saying, "Hey, I'm in that bucket. I need to be given some money to get out of the system because it's annoying." By the way, some of the things I am talking about have gone before. You might say we have been there, it has happened and it got to the stage of no commutations because it becomes a bit of a difficult beast to manage—that is, who is one of those people in that particular category who should have a commutation compared to someone who is not?

It becomes very difficult in practice, which leads to appeals and court cases and goodness knows what. When I mentioned scenario testing, that is what I am talking about. Let us say, for example, one of the reforms was, "Hey, why don't we bring in commutations?" The legislation sort of says that, but then it is the application of it. That is scenario testing. What would be the outcome of that decision and what could happen with whoever those appropriate people are to ask those sorts of questions and get them to think about it? You get to that point, "Well, that was a good idea" and I realise in a sense you are all briefed, you have not got time to do all that work but, certainly, in the sense of making a scheme sustainable these sorts of things should happen to get the best out of it.

**CHAIR:** Thank you for attending and giving your evidence today. This session of questioning has concluded. I remind you that regarding questions on notice—you took a few—the Committee has resolved that answers be returned within three days. If you are unsure about the nature and content of the questions you took on notice, the clerks will provide you with a marked copy of the transcript and the three days in which to provide the answers commences then.

**(The witnesses withdrew)**

**DENISE FISHLOCK**, Chairperson, NSW Worker's Compensation Self Insurer's Association, sworn and examined; and

**PAUL MACKEN**, Legal Advisor, NSW Worker's Compensation Self Insurer's Association, affirmed and examined:

**CHAIR:** Before we proceed to questions I advise that any questions witnesses are unable to answer today but would like to answer if they had more information, time or documents to hand, can be taken on notice to provide the Committee with an answer at a later date. Witnesses are advised also that should they consider at any stage during their evidence that their response to a particular question should be heard in private by the Committee, please state your reasons and the Committee will then consider your request.

**Mr MICHAEL DALEY:** I refer to something that concerns me about mooted changes to the scheme, which you discuss on page 12 of your submission, that is, a cap on the duration of medical coverage. Your submission states, "... medical and treatment expenses should only be payable in New South Wales in the period during which weekly compensation is payable" which is 130 weeks at the moment. What would happen therefore to someone who has been injured and has, let us say, sciatic nerve pain and needs ongoing physiotherapy or someone, such as a police officer, who has a post-traumatic stress disorder that requires ongoing treatment for their quality of life to continue? Are you suggesting that we just cut them off and let them loose after 130 weeks?

**Mr MACKEN:** The interest of the Self Insurer's Association and its members is advanced by reducing the overall cost of the scheme. That represents simply a reduction in the overall costs of the scheme. The policy consideration as to whether that is an appropriate course is a different consideration. The members of the association are experiencing, as is the scheme, increasing costs in certain areas and they see a need to address those costs. That is one way in which that cost can be addressed. Is it fair that somebody in that circumstance ceases to be entitled to the payment of their medical expenses? Well, that is a question that we are not here to answer. That is a policy question for the Government.

**Mr MICHAEL DALEY:** So you support it nonetheless. Could you explain a recessed claim to me? On page 5 your submission states:

> The Association supports the removal of coverage of workers compensation for journey claims and says further that coverage for "recess" claim should also be removed.

I have not heard that expression.

**Mr MACKEN:** Journey claims are covered under section 10, recessed claims under section 11. If somebody takes an ordinary recess from work that they take away from work and they sustain an injury, they are still covered even though the employer has no particular responsibility or ability to oversee what happens in that situation. Visiting that on the employer we say philosophically is a bad decision.

**Mr MICHAEL DALEY:** On page 11 in section 11 of your submission you say that you do not support the suggestion of the introduction of one impairment assessment only unless this is specifically on the basis that the assessment to be obtained is obtained by or on behalf of the employer, and you say that they can vary substantially. Are you saying that these sorts of assessments obtained by employers are generally more favourable to the employer? Is that your contention?

**Mr MACKEN:** Probably the contrary view. That is, we know that claimants, when they ask for impairment assessments, are going to choose doctors, frankly, who provide them about the highest impairment assessment. If there is going to be one impairment assessment only and the doctor is at the choice of the worker that will increase, not decrease, the cost of the scheme. It is equally true that employers would be aware of the doctors who provide more reasonable assessments—they would say—but workers would say meaner assessments. However you view it, if you were going to have one impairment assessment only the association and its members want it to be chosen by the employer. Part of that comes from the fact that there is a great disparity in the assessment of impairment across the medical profession, despite attempts to suggest that it is not the case.

**Mr MICHAEL DALEY:** Why is that do you think?

**Mr MACKEN:** Because they are based on the Australian Medical Association [AMA], fifth edition, guides as modified by the WorkCover guidelines. There is a degree of flexibility in that guide concerning impairment assessment that enables doctors with the same training in the use of those guides to come up with widely variant assessments. We have seen it occur again and again and it keeps happening.

**Mr MICHAEL DALEY:** In section 1 on page 5 of your submission you say the association is also of the view that the determination of who constitutes a severely injured worker should be by reference to an injured worker who has an assessed level of whole person impairment more than 50 per cent. One of the things that concerned me about this scheme is its seemingly arbitrary determination of these sorts of impairments. For example, I spoke to a police officer who has post traumatic stress disorder and is almost dysfunctional. She was assessed at 24 per cent but it might as well have been 100 per cent. Could you elaborate on what you are trying to say in that regard in that section?

**Mr MACKEN:** I agree with you. The difficulty is setting the definition of "severely injured" by reference to impairment. There is no question about that. The concern is that there are certain types of conditions that do not result in high levels of incapacity but do result in high levels of impairment. The example we cite is the situation of a disfigurement caused by sun exposure—sun damage. There was an assessment of 50 per cent whole person impairment in that case but they retained virtually a full capacity to work. To say they are a severely injured worker for the purpose of determining whether they get long term weekly payments of compensation would be wrong under that guideline. Is that the perfect answer? That is a policy matter.

**The Hon. ADAM SEARLE:** The whole person impairment methodology is not related to any capacity to work. Do you not think it would be a better approach to assess whether a worker has capacity to work rather than the whole person impairment?

**Mr MACKEN:** Yes. That is the current situation and it is not working ideally either.

**The Hon. ADAM SEARLE:** The whole person impairment method is used presently, is it not?

**Mr MACKEN:** To determine the level of incapacity? No, not at all.

**The Hon. ADAM SEARLE:** In relation to the issues in the issues paper which you address in your submission, have you done any actuarial assessments or financial assessment or caused any actuarial or financial assessments to be conducted on what these changes would mean for the members or the workers employed by them?

**Ms FISHLOCK:** No, we have not done that at this point. We have been working with an actuary who is looking at the changes in the issues paper but we have not had anything finalised.

**The Hon. ADAM SEARLE:** Your approach in this paper is presently philosophical rather than driven by hard data?

**Ms FISHLOCK:** It is not driven by actuarial assessment, no.

**The Hon. ADAM SEARLE:** Do you have any knowledge as to what impact, even rough impact, the removal of the journey claims would have and the net effect upon your members and their employees?

**Ms FISHLOCK:** No, not at this point.

**The Hon. ADAM SEARLE:** That would also apply to the nervous shock claim proposal?

**Ms FISHLOCK:** Yes.

**The Hon. ADAM SEARLE:** In relation to work capacity testing what do you envisage would be a useful change?

**Ms FISHLOCK:** I think it would encourage more injured workers to gain suitable employment. At the moment it is being used in Victoria and there are varying views on how effective it is. At this point we are

looking at people staying home longer and incapacity testing would be something that would give an indication of their ability to work.

**The Hon. ADAM SEARLE:** Under section 40A cannot work capacity testing be required now?

**Ms FISHLOCK:** Yes, a form of that. A section 40 assessment can be done by a rehabilitation provider.

**The Hon. ADAM SEARLE:** If the workers do not cooperate with the assessment their payments can be suspended?

**Ms FISHLOCK:** Yes, but that is fairly hard to uphold for an employer.

**The Hon. ADAM SEARLE:** Have your members fully utilised section 40A?

**Mr MACKEN:** The experience of self insurers is that section 40A is not all that effective. It is used but not broadly used.

**The Hon. ADAM SEARLE:** Can you flesh that answer out?

**Mr MACKEN:** The reason section 40A is not all that effective is if you get a work capacity report it will set out the labour market available to someone, the capacity they have, the matches to jobs, and therefore what their ability to earn is, and therefore what their loss is. When it translates into a dispute about that and goes to the Workers Compensation Commission the outcome rarely reflects what is set out in the work capacity report. They are not all that effective. As a piece of evidence it is evidence but it is not binding, it is persuasive along with a whole lot of other evidence and does not have a great effect in that area.

**The Hon. ADAM SEARLE:** In relation to the idea that your organisation says it supports in principle, what changes do you envisage occurring or what would you prefer to see happen that is not currently being done?

**Mr MACKEN:** If an objective work capacity report was able to be obtained and was binding as to the loss to determine the entitlement under section 40 that may have some advantage. At the moment that goes to an arbitrator who, for one or other reason, may determine that the loss is not properly reflected in the work capacity report despite those carrying out the report sometimes having more expertise in that area than the arbitrator determining it.

**The Hon. ADAM SEARLE:** Who do you envisage getting or doing the report?

**Mr MACKEN:** The employer—they pay for it, they get it.

**The Hon. ADAM SEARLE:** The insurer pays for it surely?

**Mr MACKEN:** Not when they are self insured.

**Mr MARK SPEAKMAN:** Ms Fishlock, you mentioned there was some actuarial work being done, when do you expect that to be finished?

**Ms FISHLOCK:** I have no time frame.

**Mr MARK SPEAKMAN:** You have no estimate as to when it will be finished?

**Ms FISHLOCK:** No.

**Mr MARK SPEAKMAN:** In the case of those items in the Government issues paper that your association says in its submission it supports, can the Committee assume that you are confident it will result in cost savings for your members?

**Ms FISHLOCK:** Yes.

**Mr MARK SPEAKMAN:** You mentioned costs increasing for your members all the time, are you able to quantify those in any way or point to a bit of paper that sets figures out?

**Ms FISHLOCK:** What part are you referring to?

**Mr MACKEN:** You are referring to my answer?

**Mr MARK SPEAKMAN:** Yes.

**Mr MACKEN:** The WorkCover Authority has the data that supports the cost of self insurers. WorkCover receives so much data that presumably they can tell you anything in the known universe that you need to know. One of the concerns members of the association have is that they have to put forward so much data to WorkCover that it is drowning them. WorkCover can no doubt tell you about that. Anecdotally what is happening is an increase in claims for lump sum compensation and the level at which those claims are being made. Probably the most likely explanation for that is that over time claimants get better at working out how to maximise an entitlement—as they are entitled to do. The whole person impairment assessments were introduced in 2002 and we are now 10 years down the track. Claimants are better able to work out how to get the highest level of whole person impairment to maximise their entitlement to lump sum compensation in that area and that is what they do.

**Mr MARK SPEAKMAN:** Item 16 states exclusion of strokes and heart attack unless work accident is a substantial contributing factor. Your association suggests the test be amended to: "The substantial contributing factor" rather than "a substantial contributing factor." Is that an amendment that you are suggesting for strokes and heart attack or across the board?

**Mr MACKEN:** It should be across the board. It is an area of frustration for members of the self insurer's association. Section 9A was introduced after Zickar's case. A man had an embolism at work and was compensated in circumstances where Justice Kirby, then in the High Court, under the common law at the time, acknowledged he was overturning 50 years of legal precedent by compensating that man. The response of the Government was to bring in the amendment 9A, so that employment had to be a substantial contributing factor. That section, like many of those sections, has been watered down substantially. If you are interested in seeing how far it has been watered down, I would commend to you a reading of the case of *Vinidex Pty Ltd v Campbell*. Mr Campbell worked late night, at about 2 o'clock, with two co-workers on the factory floor, and they got bored.

They constructed a plastic wakeboard, tied it to the back of a forklift and went wakeboarding around the factory floor. Mr Campbell came a cropper, injured himself and sought workers compensation, and recovered. Every employer in New South Wales thought that, because there were no employment characteristics about that activity, section 9A would mean that he would not recover. He did; and it has happened again and again. Section 11A is the same; it was introduced to control certain types of psychological injuries. It has failed. Section 52A was introduced so that injured workers who were partially incapacitated could have their benefits stopped after two years if they were not genuinely seeking work. It has failed. What we would like to see is that some of these amendments actually have teeth, and work.

**Mr MARK SPEAKMAN:** Could you take on notice a request that you provide the citation for that case? And also, could you provide the Committee with citations for the series of decisions that you refer to on the top of page 14 of your submission?

**Mr MACKEN:** No problem.

**Mr ROB STOKES:** In relation to stroke and heart attack claims and the issue of significant contributing factor: you have a little bit of a nuance to your view there; whereas, in relation to journey to work claims and shock claims, you are quite strong in your opposition to those heads of claim. Could you detail, from a fairness or justice position, why your position is quite clear on that? I would point you to Queensland, where provisions relating to journey to work claims are different from those in other jurisdictions in that claims are entertained provided the injury occurs where the employee is on a direct path to work; and if someone goes off the path for a little while the claim is no longer sustained.

**Mr MACKEN:** Theoretically, that is the position in New South Wales as well. An injury sustained when they are on their journey, but where there is an interruption or deviation, should not be compensable

where the interruption or deviation materially increases the risk. The usual determination is that, no matter what the interruption or deviation is, it does not materially increase the risk, so that the person remains covered. Again, it is a philosophical question as well as a policy question as to whether or not employers should be responsible for their workers when they are not at work and when the employer has no control over them. That is the current situation with journey claims. Self-insurers, I think, represent the view of most employers: they think they should not really be responsible for the social cost of injury to somebody when they have no control over what happens. That applies in journey claims and recess claims.

**Mr ROB STOKES:** What about, for example, the situation, which is increasingly the case, where there is not a clear differentiation between someone who is at work and when they are journeying to work and take a telephone call in the car, or are reading something on the bus, or whatever the case might be? What about those more grey areas?

**Mr MACKEN:** That is a very difficult area. But we think a lot of that could be addressed by, for example, changing the requirement that employment be "a substantial contributing factor", to the requirement that it be "the substantial contributing factor". We had a recent case where a woman worked from home from 6.30 to 7 o'clock, and then went to work. She worked from home doing phone calls upstairs. She had concluded doing the phone calls upstairs, and while walking down the stairs of her own home fell down and fractured her ankle. Workers compensation was claimed, and the claim was successful. If section 9A had been drafted properly, that would not be compensable. I think most people would think that employers should not be paying for somebody who falls down the stairs in their own home.

**Mr ROB STOKES:** My next question relates to the increasing workload put upon self-insurers by WorkCover. Again, I point to page 3 of your submission, where you make a few statements, including that audits have "added immeasurable layers of bureaucratic costs to our businesses". It would be helpful if there could be some indication of what those costs are. Can you point to anything that would substantiate that?

**Ms FISHLOCK:** With occupational health and safety audits, we did ask our members some time ago, when we were looking at changes, to quantify that. But that was very hard; every business is very different, and they have different levels of resourcing. There is a cost for self-insurers. The amount of introduced audits and introduced regulatory oversight to self- and specialised-insurers has increased over the last 10 years, and that has put a burden on our businesses.

**Mr MACKEN:** The average cost for most self-insurers of each occupational health and safety audit each year was more than $100,000.

**Mr MARK SPEAKMAN:** Each one?

**Mr MACKEN:** Each one.

**The Hon. TREVOR KHAN:** Could I take you back to the 9A issue, and refer you to the decision of *PVYW v Comcare (No 2*,, that is, the—

**Mr MACKEN:** I know the case.

**The Hon. TREVOR KHAN:** It has got a lot of publicity recently. Would your amendment of 9A have an impact upon that circumstance?

**Mr MACKEN:** It would—properly read. I have to qualify that, because we thought the previous version might do it too. But, properly read, it would exclude compensation in that circumstance—because it would require that the injury is sustained in circumstances where there are some employment characteristics to what is going on; and in that case, I think most people would say there were not any employment characteristics, so they would not be covered.

**The Hon. TREVOR KHAN:** It would be difficult to identify any.

**Mr MACKEN:** It is hard to, unless they were instructed about how they should behave.

**The Hon. ADAM SEARLE:** Or not instructed.

**The Hon. TREVOR KHAN:** Or not instructed.

**The Hon. ADAM SEARLE:** Condonation and waiver.

**The Hon. TREVOR KHAN:** With regard to your injury and disease section, you refer to a section 323 adjustment. That is in the first paragraph on page 14. Can you explain what you mean in that regard?

**Mr MACKEN:** Under section 323 there is a requirement that when impairment is assessed that there is a deduction to take account of pre-existing abnormality. For example, for a person who sustains a back injury in the mid-1980s requiring a spinal fusion, but then in 2006 sustains a further back injury that aggravates that condition, the impairment is reduced to reflect the impact of the original injury, and there is a deduction. Section 323 provides a standardised out, if you like, where that deduction can be just 10 per cent if in the opinion of the assessor it is costly or difficult to determine. But it has become a default provision because, rather than look at the true merits of the deduction that needs to be made, a lot of medical assessors are simply saying, "Well, it's costly and difficult to determine, so I will just take off 10 per cent," and we are not getting a proper reflection of the deduction or pre-existing abnormality on impairment assessments, which takes into account lots of things: you will get over the work injury damages threshold easily if the deduction is reduced; or you will get over the pain and suffering threshold in the same way.

**The Hon. PAUL GREEN:** Further on your audits comments: I note that last year WorkCover NSW imposed new data management system requirements. You note here that that created duplicity of administration. Would you care to elaborate on that?

**Ms FISHLOCK:** Yes. With self- and specialised insurers the requirement to input invoicing changed, so therefore a standard invoice, even for a rehabilitation provider, had to contain further detail. So there was a lot more keying in by the self- and specialised insurer for every invoice they received. All that information was going in to WorkCover. WorkCover wanted to analyse costs to providers, on the basis that there was some overservicing or overcharging. Most self- and specialised insurers check their invoices fairly well; it is their money, and they are very careful about what they pay. We do not see the value to our members of the increase in costs that has been put on our businesses. A lot of the software had to be changed, and that cost thousands of dollars.

**The Hon. PAUL GREEN:** I am aware that the health system has accreditation situations where you can get a credit for three and five years, and so on. I understand you have licensing for WorkCover for a period of 12 months, or perhaps more. Could you explain to us the licensing process, and if there is a bit of room to move there, instead of having the red tape and being over-regulated? Is there a way forward, such as in the hospital accreditation system, where there can be a longer period between licensing audits?

**Ms FISHLOCK:** Yes, there is scope for improvement in that area. Normally, licences are either for one year or three years, and they are issued by WorkCover. It is based on performance; so that, if you are good performer, you are given a three-year licence. With that three-year licence there are a lot of annual requirements, self-auditing requirements that you have to provide to WorkCover to maintain that three-year licence. Victoria are currently looking at a six-year licence for their self insurers and, similar to what you were mentioning, the benefits are there for the business, that they do not need to go through that bureaucratic requirement every so many years.

**Mr MACKEN:** In terms of that bureaucratic requirement, the association is very strongly of the view that the only considerations for licensing should be prudentially based. At the moment they are based on occupational health and safety audits, case management audits, injury management audits—audits, audits, audits—which have nothing to do with prudential arrangements. It should be a prudential consideration and that should be the only consideration.

**The Hon. PAUL GREEN:** I note that in your submission at page 4.

**Mr MARK SPEAKMAN:** Could you just tell us what is happening in Victoria in relation to work capacity testing that is not happening in New South Wales?

**Ms FISHLOCK:** In my business—I work for a self insurer—we have many policies and even in Victoria. I suppose we are using work capacity testing in Victoria to get more medical evidence, not rehab evidence. When you have a section 40 assessment here in New South Wales the assessment is based on market

details, like Paul mentioned. A lot of the jobs that they source are very ordinary—we had one recently that came back where they identified a toll operator could sit in a toll booth—general jobs when the person had far more skills. So I think the section 40 assessment process in New South Wales is not very effective. With Victoria they seem to have a more comprehensive approach, a more medical approach.

**The Hon. ADAM SEARLE:** In relation to your submission that the oversight should be prudential oversight only, under the scheme insurers oversee a lot of other activities such as the engagement of rehabilitation and other ancillary services. Is it not fair enough that in determining whether or not people should be self insurers or agencies it is not just a prudential requirement but they should also be satisfied that they carry out all the other functions that are required of other insurance companies?

**Mr MACKEN:** It depends what you consider to be the other functions. You are right; the insurers do a lot of work in terms of rehabilitation. Frankly, a lot of it is wasted. Self insurers have the objectives of properly managing the cost of their claims and returning the injured to work as their primary objectives. WorkCover's input into the licensing process does not advance either of those things at all. If case management outcomes are poorly conducted by a self insurer they will spend their entire life running disputes in the Workers Compensation Commission—that avenue exists. Those who are silly enough to do it will quickly learn that they need to properly manage their cases. We do not need WorkCover to oversight those sorts of areas, and in fact WorkCover is the one with the deficit. Why are they carrying out occupational health and safety audits on the one part of the scheme that does not cost them money? They are not carrying out occupational health and safety audits on all the other employers that do cost them money; why is the money being spent on us? It makes no sense.

Could I make one final comment to the committee because it has not come up? The Self Insurer's Association is very strongly in support of unrestricted commutations. We do not support the suggestion that it creates a lump-sum culture. There may well be a benefit entitlement culture that exists but it exists whether it is a lump sum or whether it is in entitlements to weekly payments of compensation. It is an unreal view to suggest that lump sums drive the cost of the scheme. The self insurers save money and they give the opportunity of returning dignity and control to injured workers in a way which we want to have available in an unrestricted way. If the committee is of the view that they want to continue to burden the scheme agents and the fund with restricted commutations so be it, but self insurers would like to be set free from those restrictions so that they can achieve for both themselves and their injured workers the benefits that flow from commutation.

**Ms FISHLOCK:** Hear, hear!

**CHAIR:** thank you very much for appearing today. I note that you took some questions on notice. The committee has resolved that answers to questions taken on notice be returned within three working days. The secretariat will contact you in relation to the questions you have taken on notice and they will provide you with a marked copy of the transcript and the three days will commence from that time. If you need a little bit more time please feel free to request it and we will grant it.

**(The witnesses withdrew)**

**PETER CHARLES ACHTERSTRAAT**, New South Wales Auditor-General, sworn and examined:

**CHAIR:** Welcome Mr Achterstraat. You have appeared before a number of committees before so none of this is new but I will recite it anyway. Regarding questions on notice, witnesses are advised that if there are any questions they are not able to answer today but would be able to answer if they had more time or certain documents, they are able to take the question on notice and provide us with an answer at a later date. Witnesses are advised that if they consider at any stage during their evidence that their response to particular questions should be heard in private by the committee they can state their reasons and the committee will consider their request. Would you like to make a brief opening statement?

**Mr ACHTERSTRAAT:** I do not want to make a statement but if I could hand out the last three pages of our last report I might talk to some parts of that as I go. I will talk about assets and liabilities and also the cash flow situation. This is volume five from last year, which I am sure everybody has read, but I will just refresh your memory on it. If I can talk about cash flow and then assets versus liabilities. If you turn to page 92 and point three. The scheme last year had revenue of $3.4 billion and expenses of $4.2 billion, so there was a net loss last year of $780 million. In relation to the assets situation, total assets at point one are $13.327 billion and total liabilities $14.737 billion. That is in real terms so that is in discounted terms using the government bond rate as of 30 June. The nominal amount was about $26 million but when you discount that it brings it down to $14 million and as the discount rate reduces of course that figure increases.

I will come back to that in a second. Over the page you can see the quality of the assets where they have indexed securities, et cetera. So there is quite a weighting towards interest bearing assets. If we turn back to page 91 you can see that the return on the assets—so if we focus on the assets—has been 0.6 per cent above the benchmark since inception, and last year the return on assets was again above the benchmark. If we turn to the front page we can see the point I make there that if the gap between assets and liabilities continues then there may be an issue which needs to be addressed. If we look at the table there we can see that the assets are 85 per cent of the liabilities. If I can quickly just turn back to page 92 in relation to the discount rate, the outstanding claims, the figure of $14.7 billion there is based on the discount rate, as I said, of 30 June 2011.

Under the accounting standards, the standards require that a discount rate be used of a government bond rate. That is what accounting standard 10.23 says. The Treasury circular says that it is to be the Commonwealth government bond rate rather than the State one. The Commonwealth one of course is lower generally than the State one. The Commonwealth bond rate has dropped from roughly 4.5 per cent on 30 June 2010 to about 4 per cent on 30 June 2011 then to about 3.75 on 31 December and in fact it has fallen since then. As the discount rate falls, then the net present value of the liabilities increases. If I can just for one more minute talk about assets and liabilities. As the auditor I talk about what has happened and only talk about general principles in accounting.

If an organisation is in a situation where liabilities are greater than assets and the liabilities are increasing at a greater rate than the assets then eventually there will not be sufficient funds to meet everyday business. So one needs to either increase the assets or reduce the liabilities. The assets here, as I have pointed out, are returning an adequate return, above the benchmark; that is, the income from the assets. The premiums are another source of income to help supplement the assets. On the liabilities, there are three elements to the liabilities. The gross liabilities are determined by the entitlements that can be made and also determined by the expenses from WorkCover, et cetera, but they are also determined by the discount rate used. With that, I am happy to take any questions.

**The Hon. ADAM SEARLE:** Do you understand t the rationale of using the Commonwealth bond rate rather than the State Treasury rate?

**Mr ACHTERSTRAAT:** I think that is the case in all States. Internationally you can use high grade corporate bonds which are sometimes a higher rate than—well, clearly a higher rate than the government rates. If those rates were used it would be a higher bond rate and so the value of the liabilities would be even lower. But the Australian accounting standard says a high quality government bond rate is to be used. Treasury circular 2011/17 says the Commonwealth bond rate is to be used. So it is a policy decision from Treasury.

**Mr MARK SPEAKMAN:** What is the current difference between the Commonwealth bond rate and the New South Wales government bond rate?

**Mr ACHTERSTRAAT:** I am not an expert on that but I would imagine it would be at least 100 basis points. But you would have to check that with someone else.

**Mr MARK SPEAKMAN:** Each year you have audited the annual financial statements of WorkCover. Can we take it that over the past five years you have not objected to the methodology of valuing the central claims estimate?

**Mr ACHTERSTRAAT:** No. The actuaries' work we review and we are comfortable with that. When you say WorkCover, we are talking about the nominal insurer here.

**Mr MARK SPEAKMAN:** Yes, the nominal insurer

**Mr ACHTERSTRAAT:** Whereas WorkCover being the authority that administers the scheme, so we do two separate audits there.

**Mr MARK SPEAKMAN:** My question is about the nominal insurer.

**Mr ACHTERSTRAAT:** Yes.

**Mr MARK SPEAKMAN:** I do not know whether you have seen the WorkCover submission?

**Mr ACHTERSTRAAT:** No.

**Mr MARK SPEAKMAN:** Halfway down page 4 it says that recent analysis by several parties, including you, has concluded that the current scheme is not financially sustainable, is not priced favourably compared to its main competitors and spends more on compensation services and benefits without achieving superior health and return to work outcomes. Beyond what you have told us this morning, is there anything you can tell us about your analysis on those topics?

**Mr ACHTERSTRAAT:** No. The assets are lower than the liabilities and so if the scheme is to continue either the assets need to be increased or the liabilities need to be reduced.

**Mr MARK SPEAKMAN:** Page 9 of the WorkCover submission quotes you as saying in relation to the scheme:

> There appears to be emerging changes in workers compensation claimant behaviour indicating attempts to maximise claims resulting in increased Scheme liabilities. I am concerned that lump sum claims are re-emerging, significantly increasing workers compensation costs. This requires proactive management

Do you have any particular proactive management in mind?

**Mr ACHTERSTRAAT:** The proactive management on workers' claims of course is generally, and I will come to this particular one about the top-up—generally proactive management is stopping people getting injured, WorkCover inspections, et cetera, getting people back to work quicker and reducing the costs of running WorkCover and also monitoring medical and other expenses. In relation to the points I have made there, there appears to be a trend where a person will move to second level. For example, if they are off with one bad knee for a while then increasingly it seemed to be that they would then develop a second bad knee, et cetera. That was what that specific comment was in relation to.

**Mr ROB STOKES:** In relation to your comment about the investment returns from WorkCover of 5.2 per cent, I notice in the PricewaterhouseCoopers report they say that the projected performance of the scheme is predicated on an assumption of long-term investment returns on assets of 6.6 per cent. Do you have a view in relation to that?

**Mr ACHTERSTRAAT:** I do not predict the future, I am afraid. If I did I would not have this job. So in the past it has been 5.2. Other people can predict what it will be in the future.

**Mr ROB STOKES:** The next question is in relation to the point you made earlier about the risk of a lump sum culture in the comments attributed to you in the WorkCover submission. Would you have a concern in relation to the prospect of unrestricted commutations? Would you be concerned that that would add to that risk of developing a lump sum culture?

**Mr ACHTERSTRAAT:** Whether there is unrestricted commutation or not is a policy question that I would not comment on. Any policies that are implemented need to make sure that there are not perverse incentives one way or the other.

**The Hon. TREVOR KHAN:** In the WorkCover Authority submission, submission 144, there is reference to the PricewaterhouseCoopers actuarial report of 2007. In that it is indicated that the increasing cost of weekly benefits, work injury damages and medical benefits in the scheme was identified back in 2007. Did you have any concerns going back over the past five years with regards to the viability of the scheme?

**Mr ACHTERSTRAAT:** In 2007 the scheme made a yearly surplus. From 2007 onwards the scheme made yearly deficits. I understand 2007 was a particularly good year for the asset increases.

**The Hon. TREVOR KHAN:** Do I take that to mean good investment returns?

**Mr ACHTERSTRAAT:** Yes. For the last four years there has been a deficit each year and the deficit in the last financial year was $780 million.

**The Hon. TREVOR KHAN:** If I then go back to page 4 of submission 144, there is a diagram showing the scheme's surpluses and deficits going back to 2002. It only shows essentially a brief time over that 10-year period when the scheme has been in surplus. Do I take it that that surplus was purely due to, in a sense, a period of high return on investment as opposed to income from premiums?

**Mr ACHTERSTRAAT:** There could be a number of reasons. As you say, it could be that the assets were higher, it could be that the return on those assets was higher, but it could also be that the liability was lower. It may well be that the discount rate used was a higher percentage. Once you get a higher discount rate used, the liability figure drops. So it could be any of those. It could be more claims, or it could be better handled claims, or it could be a myriad of reasons, but one of the largest ones turns around the discount rate often.

**The Hon. TREVOR KHAN:** Are you comfortable in terms of the assumptions upon which the current estimates of deficits are based?

**Mr ACHTERSTRAAT:** I am comfortable with the assumptions that were used for the 30 June 2011 financial statements. I have read in the media, et cetera, reports that there have been new figures as at 31 December. I have not audited those. The figures again will no doubt be different by 30 June 2012, if the discount rate keeps dropping and if there are changes in claims made.

**The Hon. NIALL BLAIR:** One thing you referred to, which we also heard from other witnesses this morning, is the increased cost in medical expenses. Have you done any specific work in this area, that we could go back to, to track the increased expenditure?

**Mr ACHTERSTRAAT:** No, we have not, Mr Blair. I do financial audits of the 490 government entities. I do performance audits of about a dozen per year, and I have not done one in relation to the WorkCover issue. I only do about a dozen of those each year.

**Mr MARK SPEAKMAN:** On page 91 of the document you circulated, the table at the top indicates the benchmark return. Who sets the benchmark, and how is it derived?

**Mr ACHTERSTRAAT:** I am not sure about that, Mr Speakman, and I can get back to you. I think it is an industry benchmark. I think it is things like taking into account the risk profile and things like that, I would imagine. I would have to get back to you.

**Mr MARK SPEAKMAN:** It is not a target. It is an ex post facto comparison, is it?

**Mr ACHTERSTRAAT:** I think so. Yes, I mean, if it was a target, I would clearly have said "target" versus "benchmark" which indicates that it is a yardstick that can be compared from external factors. But I will get back to you to clarify this.

**Mr MARK SPEAKMAN:** Thank you.

**The Hon. PAUL GREEN:** Let me go back to the lump sum payments. We are hearing a lot about a culture change in regards to lump sum. Would you be adverse to self-insurers being able to be set free from commutations?

**Mr ACHTERSTRAAT:** That is a policy matter, Mr Green, for the Government to decide.

**The Hon. PAUL GREEN:** In terms of your experience, obviously you have written a comprehensive report. In your view, what are probably three of the most top things that you see that we should reform in this to keep a sustainable scheme?

**Mr ACHTERSTRAAT:** Again, they are policy issues. But from a financial point of view—

**The Hon. PAUL GREEN:** Financially?

**Mr ACHTERSTRAAT:** From a financial point of view, assets need to be maintained and the maximum return, taking into account one's risk appetite, needs to be derived. The running of the scheme needs to be minimised and needs to be efficient, and with liabilities there needs to be comprehensive claim management. Again, if we can, we should have systems in place to stop workers getting injured, to help them get to work quicker, and to make sure that the expenditure on that is controlled.

**CHAIR:** That concludes the Committee's pre-lunch session. Mr Achterstraat, I think you have one or two questions on notice. The Committee has resolved that answers to questions taken on notice be returned within three working days. The secretariat will contact you in relation to the questions that were placed on notice. Thank you very much for attending.

**Mr ACHTERSTRAAT:** Thank you very much, Chair.

**(The witness withdrew)**

**(Luncheon adjournment)**

**ROSHANA MAY**, Member, Injury Compensation Committee, Law Society of New South Wales,

**JUSTIN DOWD**, President, Law Society of New South Wales, and

**TIMOTHY JOHN CONCANNON**, Member, Injury Compensation Committee, Law Society of New South Wales, sworn and examined:

**CHAIR:** Before we proceed to questions I advise that any questions witnesses are unable to answer today but would be able to answer if they had more information, time or documents to hand can be taken on notice to provide the Committee with an answer at a later date. Witnesses are advised also that should they consider at any stage during their evidence that their response to a particular question should be heard in private by the Committee, please state your reasons and the Committee will then consider your request. Would you like to make an opening statement?

**Mr DOWD:** Thank you. First, I thank the joint committee for inviting the Law Society to give evidence at this hearing. Whilst I am pleased to be here, it is my two colleagues from the Law Society's Injury Compensation Committee who will be able to offer greater insights into the workers compensation scheme than I, being a family lawyer by profession. Both the Law Society Council and the Injury Compensation Committee have followed with great interest the recent parliamentary debate and other discussion on potential reforms to workers compensation. The Law Society has made submissions already by letter dated 18 May 2012 to the joint select committee and also in an earlier letter to the Minister for Finance and Services in a letter dated 22 March 2012. We would incorporate that correspondence into the submissions that we would make to this Committee.

The many working workers compensation lawyers practising in New South Wales, including those who are members of our Injury Compensation Committee, represent thousands of injured workers and insurers in New South Wales. Both Ms Roshana May and Mr Tim Concannon specialise in the area of workers compensation and have the day-to-day knowledge of the operation of the scheme and its claim management practises. The Law Society is pleased also to know that the Bar Association and the Australian Lawyers Alliance [ALA] are giving evidence before this Committee later this afternoon. We note at the outset that the submissions we have made are consistent with those we understand those organisations have made.

The committee has reviewed the WorkCover issues paper and the PricewaterhouseCoopers [PwC] report and agrees that the scheme as it presently stands is financially unsustainable. Significant consideration and analysis is needed to determine how to resolve this. Amongst other things, this will require a thorough and transparent analysis of the financial aspects of the scheme. We received today a response to our request for the release of the appendices to the PwC report. Some personal information has been withheld, but the committee will be examining the remainder as a matter of urgency and it is proposed that we will provide supplementary submissions based on that analysis as soon as possible. The analysis undertaken by our committee of the data which had previously been released suggests that it is not the payment of benefits that is increasing the deficit of the scheme. This critical question needs to be comprehensively addressed before any proposed resolution is adopted.

Those who suffer injury leading to disability are among the most disadvantaged of our community. The Law Society is genuinely concerned with the treatment of injured workers and strongly advocates for a workers compensation scheme that is financially viable and capable of appropriately providing for the people for whom it was created. The Law Society has already made a number of key recommendations for reform. Firstly, that the Government immediately re-implement the ability for claims to be resolved on a full and final basis by way of commutation. Secondly, that the claims estimate guidelines be amended to enable an appropriate discount to any estimate on any claim where such claim is capable of a commutation. Thirdly, that parties to a dispute be empowered with the authority to negotiate the outcome of the dispute.

In response to the terms of reference to this inquiry the Law Society has made two further recommendations. These are that scheme agents be permitted to efficiently operate as claims agents without overregulation, and that existing return to work initiatives be enhanced. It is part of the Law Society's mission to work in the interests of the most vulnerable as expressed in our motto "Defending the rights of all". We do not support further reforms of the workers compensation scheme that erode workers' rights and entitlements or place unnecessary burdens on employers. Instead, we call for a detailed and transparent examination of the problems in the scheme and propose sensible and achievable measures, which we believe will address some of these

problems. If it meets with your concurrence, I would like to invite Mr Concannon to make a very brief statement about lump sum culture.

**Mr CONCANNON:** Just very briefly, noting the time limit, the lump sum culture seems to me to be one of the central issues raised in the issues paper. The first point the Law Society would like to make about the alleged existence of a lump sum culture is, if it ever did exist or does exist now then one would have thought the 2001 amendments, which substantially remove the entitlements to lump sums, would have had an effect on eroding that culture. It appears 11 years down the track that it has proven not to be the case. The second point I would like to make about this alleged existence of a lump sum culture is that it is just inconsistent with my experience as a personal injury lawyer acting for workers now for getting on to 23 years.

**The Hon. TREVOR KHAN:** Good God, is it that long?

**Mr CONCANNON:** Yes, it has been Mr Khan. What I found is far from workers expressing excitement at the prospect of a lump sum dangling at the end of the rainbow. The experience is quite to the contrary. When I explain to them what rights are available to them under the workers compensation system, including the impairment lump sums that are available under sections 66 and 67 of the Workers Compensation Act, they express an abhorrence as to the fact, "How do I pay off my mortgage?" How do I survive on a day-to-day basis with those entitlements?

This alleged existence of a lump sum culture assumes there is some voluntary intent on the part of the worker to remain on the drip feed until this lump sum at the end of the rainbow becomes available. The lump sums that are now available are so paltry that they would not attract anyone to remain in this system for an extended period of time. The other experience that I have noticed over many years of experience in this industry is that 99 per cent of workers are actually very enthusiastic about returning to work and to the extent to which they are prevented from returning to work it is the systems in place or the injuries themselves that prevent them from returning to work, not some intent on their part to remain in the system and wait for the lump sum to materialise. That is all I wanted to raise as an introductory comment.

**The Hon. ADAM SEARLE:** I note you say you accept that the scheme, as it is presently constructed, has sustainability problems. I think you indicated that you had received some of the appendices to the PricewaterhouseCoopers report. Could I direct your attention to page 2 of the submission from the Law Society where you indicate that you do not accept the actuarial approach taken by the scheme actuary. To put it another way, you think some of the assumptions are not accurate and you have set out on page 3 some of your thoughts. Now that you have the appendices is my understanding correct that you are going to do further work around what you see as the more preferable assumptions that should be factored into a scheme valuation?

**Mr CONCANNON:** That would be one of the issues we will be looking to raise. We will need an actuarial analyst to look at some of these figures to check the assumptions with a like actuary. Unfortunately, actuaries live in one world and lawyers live in another. We would need some time within which to run those concepts by an actuary.

**The Hon. ADAM SEARLE:** I do not want to put you on the spot but apart from what is in your submission, based on the information you had to hand at the time when it was written, that is the limit of your capacity for probing the reasonableness of the assumptions that the actuary has factored in?

**Ms MAY:** Apart from our experience, which informs us every day, that is correct.

**The Hon. ADAM SEARLE:** Could you explain to the Committee what would be some more reasonable assumptions that your members have observed?

**Mr CONCANNON:** One of the assumptions the actuaries make is that over the last 18 months there has been an alleged explosion in the number of work injury damages claims. We find it impossible, based on our own experience of cases that have developed over the last 12 to 18 months, to believe that such an explosion has occurred. On my limited ability as a lawyer to understand how actuaries have come to their assessment it seems to me it may well be that these are based on projections of what may have happened before the last legislation in 2001—the explosion that was alleged to have happened back then—and to draw on that to extrapolate. What happened prior to 2001 does not accord with my experience of what has happened with work injury damages claims in the last 12 to 18 months.

**The Hon. ADAM SEARLE:** You have addressed the issue of what you see as the lump sum culture. In particular, items in the Government's issues paper in relation to work capacity testing. Your submission indicates that based on your understanding section 40A already provides for that. Can you explain how that works in the present system?

**Ms MAY:** Section 40A and section 38A provide for testing of a worker's capacity to return to work—commonly called functional capacity testing or vocational assessment. It is for the purpose of returning to work. How it works is; under section 40A an insurer can order a worker to comply with a direction to attend an assessment of their capacity to work. It is generally used for the purposes of evaluating their section 40 makeup pay entitlements or rather their ongoing partial incapacity entitlements. It is generally used as a function to discontinue payments or take people off payments. Under section 38A there is a capacity for employers to utilise vocational assessments for the purposes of determining what sort of work in the open labour market a worker might reasonably be able to return to, absent that work being provided by their employer. It is used for the purpose of delivering to them greater benefits than they would ordinarily get for the first 12 months of their partial incapacity after their first 26 weeks of benefits.

**The Hon. ADAM SEARLE:** Based on the experience of the members of the Law Society, have those provisions proved effective?

**Ms MAY:** No. They are generally used as disentitling provisions rather than enabling provisions. Section 38 provides for heightened benefits in circumstances where a worker is partially incapacitated for work but is not provided with suitable duties by their employer. Section 38A and the capacity to test work capacity, as its termed in the issues paper, should be used for the purposes of providing return to work programs, vocational assistance, rehabilitation, with the aim of getting a worker back to work quickly rather than taking them off benefits. It is not used often enough and it is used inappropriately, in our experience.

**Mr CONCANNON:** In my experience there is an air of unreality related to vocational capacity assessments. Invariably you find the vocational assessors considering a job to be appropriate where it does not exist in the real world. There are far more useful mechanisms to be applied in promoting rehabilitation such as rehabilitation training and assistance with applying for new jobs rather than vocational capacity assessments which, I agree with Roshana, are used in reality as nothing more than a tool by insurers to try and reduce benefits under section 40.

**The Hon. ADAM SEARLE:** Based on your experience of the use of that provision, are the insurers making much use of it and are they succeeding in achieving that objective?

**Mr CONCANNON:** Certain insurers apply it more rigorously than other insurers—I think it is fair to say. I have no doubt in a number of cases it works. A lot of workers think when they see the vocational capacity reports: "Why would I bother challenging this? It is all too much for me." I suspect that is the assumption on which insurers operate when they send these reports out, they assume that most workers will not challenge the findings of this vocational capacity assessment. If they are put in as a binding mechanism even more workers will not challenge these vocational capacity assessments.

**The Hon. ADAM SEARLE:** Is that the key difference between this provision in New South Wales and what happens in other States, the binding nature of that determination?

**Mr CONCANNON:** They are not binding. The way I interpreted the issues paper was that it was contemplated that in a new system they would be binding. They are not binding at the moment.

**Ms MAY:** That is the difference in other States, particularly in Victoria—they are binding.

**The Hon. ADAM SEARLE:** You mentioned the lump sums. What are the lump sums for section 66 and section 67?

**Mr CONCANNON:** The maximum lump sum for section 66 is $100,000 and it is $50,000 for section 67.

**The Hon. ADAM SEARLE:** How long have those been the lump sums?

**Mr CONCANNON:** They were amended once in 2006 but that was a consumer price index [CPI] increase at that time.

**Ms MAY:** The maximum value has not changed since 1987. There was an incremental increase that was incorporated up to a point in time and in about 1995 they reverted back to $100,000 and then $50,000. The maximum has not changed since then.

**The Hon. ADAM SEARLE:** The maximum of say $87,000 would have been eroded by inflation over the past couple of decades?

**Ms MAY:** Yes. There were CPI increases made to a point in time, and then they were brought back to a standard, unmodified figure in about 1995, taking claims made before 1995.

**Mr CONCANNON:** 2005.

**Ms MAY:** No, 1995. I am sorry, but I disagree with my colleague.

**Mr MICHAEL DALEY:** At page 22 of the issues paper it is said that a key plan of reforms should be to improve benefits for severely injured workers. It has been suggested that reforms should provide for an assessed level of whole person impairment of more than 30 per cent. What would happen if the 30 per cent impairment level suggested in the issues paper were imposed?

**Mr CONCANNON:** In my experiences of working under the scheme, I have had two or maybe three workers, amongst thousands of workers I have acted for over that period, who would satisfy that requirement. I think the general view is that something less than 5 per cent of all workers who receive impairment lump sums would qualify under that regime.

**Ms MAY:** When you consider that there are roughly 100 claimants in the scheme currently receiving ongoing care and medical benefits, they would be the type of claimants who would fall into the category of severely injured worked, as described by a 30 per cent whole person impairment.

**Mr MICHAEL DALEY:** A hundred only?

**Ms MAY:** Yes. I think it is more like 110; I am sorry, I do not have the figure.

**Mr MICHAEL DALEY:** Not thousands?

**Ms MAY:** There are not thousands; there are less than 200 claimants receiving ongoing care and they have received ongoing medical expenses for quite some time. There are claimants who have been in the scheme since they were injured. They would be of the order of 30 per cent or more. The best estimate of the Injury Compensation Committee is that it would reduce lump sum payments, if you are talking about that, to more than 95 per cent of the current injured population; if you are talking about access to common law damages, it would reduce the numbers down to very, very, very, very small numbers; and if you are talking about commutations, again, because of the threshold of 30 per cent, very few people would be able to exit the scheme—very few.

**Mr MARK SPEAKMAN:** Mr Concannon, you are a partner in Carroll and O'Dea?

**Ms MAY:** That is correct.

**Mr MARK SPEAKMAN:** And that is a leading plaintiff firm?

**Mr CONCANNON:** It is.

**Mr MARK SPEAKMAN:** Ms May, you are a partner in Slater and Gordon?

**Ms MAY:** I am not a partner; I am a practice group leader.

**Mr MARK SPEAKMAN:** And that is a leading plaintiff firm?

**Ms MAY:** Yes.

**Mr MARK SPEAKMAN:** I would ask you to look at the Law Society's submission, at the bottom of page 2 and going over to the top of page 3. Incidentally, who wrote this paper?

**Mr CONCANNON:** It was a joint effort of about three or four of us.

**Mr MARK SPEAKMAN:** Who are they?

**Mr CONCANNON:** Myself, Roshana May and Brian Moroney.

**Mr MARK SPEAKMAN:** Which of you three have any actuarial expertise?

**Ms MAY:** None of us do.

**Mr MARK SPEAKMAN:** Which of you three have any expertise that would qualify you to give an opinion about an appropriate discount rate to apply in valuing outstanding liabilities?

**Mr CONCANNON:** We have no experience other than our own; we are used to applying discount rates in terms of assessing damages. But in terms of the level of discount rates used in this actuarial report, I think we would have to concede that we are not experts in that area.

**Mr MARK SPEAKMAN:** At the top of page 2 the paper says, "The Committee rejects the need for any change to benefits or premiums." Is one of the underlying premises in that rejection that PricewaterhouseCoopers has overstated the outstanding liabilities of the fund?

**Ms MAY:** We are not able to say whether PricewaterhouseCoopers overstated the financial state of the fund. What we know from our experience is that some of the material within the report contrasts starkly with our experience. And we question the bases of assumptions and methodologies that have been employed in order to extrapolate that data to give the recommendations that PricewaterhouseCoopers has in its report.

**Mr MARK SPEAKMAN:** To the extent though that you say, at the bottom of page 10, the methodologies apply artificially high discount rates, you have strayed outside your area of expertise.

**Mr CONCANNON:** Yes.

**Mr MARK SPEAKMAN:** These criticisms you make about the methodologies, have you communicated those criticisms to WorkCover in previous years?

**Ms MAY:** We have not. We have not conducted an analysis and have not actually seen an actuarial valuation in recent years.

**Mr MARK SPEAKMAN:** At page 2, in the numbered paragraph 2, at about .8 on the page, you comment on the proposal "That existing return to work initiatives be enhanced". What other existing return to work initiatives are you referring to there?

**Mr CONCANNON:** One is the inbuilt mechanism in section 40 of the Workers Compensation Act whereby after the first 26 weeks of incapacity the worker's statutory rate is reduced to a level for an individual worker of about $432 a week. If the worker does return to work, he can then work for say 20 hours a week and his make-up pay for that remaining 18 hours lost per week can be made up, up to $432 a week. So there is an inbuilt incentive in that for him to (a) get back to work and (b) still be able to get that $432 a week. Very often that might be the difference between a person being able to service his mortgage or not being able to service his mortgage, for instance.

**Ms MAY:** May I add that we are also referring there to the fact that there is the capacity within the Act—and the section escapes me, but I think it is around section 38A and section 38—for WorkCover to provide to employers and insurers incentives to implement return to work plans, work trials and other such mechanisms already contained within the legislation that are not fully employed; and we allude to that in dot point 2 on page 2 of our submission.

**Mr MARK SPEAKMAN:** I take you to page 6 of your submission, at the first dash point commencing "Premiums in NSW". In the second sentence you say, "The operational risks and the like between employers in different States are entirely different." Would you identify what you say are the top three operational risks that are different as between New South Wales on the one hand and Victoria and/or Queensland on the other hand, that would result in higher risk and premiums in New South Wales?

**Ms MAY:** I think we will have to take that question on notice.

**Mr CONCANNON:** Yes.

**Mr MARK SPEAKMAN:** Could I ask the same question about the next sentence, commencing "The wage structures"? What are the three top differences in wage structures that would cause premiums in New South Wales to be higher? And I ask the same question about the commercial practices of companies.

**Mr CONCANNON:** Again, I think we would have to take the questions on notice.

**Mr MARK SPEAKMAN:** You must have had something in mind when you wrote this paragraph.

**Mr MICHAEL DALEY:** Mr Chairman, the witness has already indicated, as is his right, that he wants to take the question on notice.

**Mr CONCANNON:** I think I would prefer to do it that way. Roshana said she would take her part of it on notice.

**Mr MARK SPEAKMAN:** What I am putting to the witness, Mr Chairman, is that as he was one of the co-authors of this paragraph—

**The Hon. TREVOR KHAN:** We have got two of the three authors.

**Mr MARK SPEAKMAN:** We have got two of the three authors here. I am putting the proposition to them, which they can respond to, that they should be able to identify now what they had in mind when they wrote that paragraph. They are the authors of the paragraph.

**CHAIR:** Do you want to take that on notice?

**Mr CONCANNON:** I do want to take that question on notice.

**Mr MARK SPEAKMAN:** Can I go to the letter? We talk about commutation. I understand how commutation would reduce the trail of getting claims dealt with once and for all; what I do not understand at the moment is whether you would say that would reduce expense and, if so, how it would reduce expense if the parties, I assume, would come to a commutation with a commutation being some sort of estimate of the value of an ongoing stream of payment. How would it save money, if at all?

**Mr CONCANNON:** Invariably the way that commutations have worked in the past—I am talking about experience going back chiefly to the pre-2001 period—was that there was a significant discount worked into that calculation that would mean that, for instance, if there is a potential liability of 20 years then the lump sum would only be paid on the basis of perhaps five or six years worth of potential liability into the future. So there is an inbuilt saving into the scheme not only in terms of weekly benefits but also in terms of potential medical expenses down the track.

**Mr MARK SPEAKMAN:** Paragraph three on page three of Mr Dowd's letter to Mr Pearce on 22 March suggests amending the claims estimate guidelines to apply a 50 per cent discount. What is the rationale arriving at that figure of 50 per cent?

**Mr CONCANNON:** I think that is another question we would need to take on notice.

**The Hon. TREVOR KHAN:** But it is one of the proposals that are put forward in March that you rely upon—one of the four proposals that are put forward to apparently make the scheme viable. Surely you know what one of those major proposals that you put forward mean?

**Ms MAY:** It is a bit beyond Mr Concannon and I to answer because we both represent injured workers in the scheme; we do not represent insurers or scheme agents. We are not across the claims estimate guidelines. This letter was written by a greater number of us than the three people you have sitting before you. If we could take that on notice we will have an answer for you, and it is better answered by someone who has experience with the claims estimate guidelines.

**Mr MARK SPEAKMAN:** Mr Dowd's opening referred to the scheme as financially unsustainable. Are you able to quantify any of the savings you think could be made by the options that you suggested in your submission?

**Mr CONCANNON:** No, we could not do that; we would have to have an actuarial analyst have a look at it in the same way as WorkCover has.

**Mr ROB STOKES:** In relation to your concerns about assumptions in the actuarial report, have you got a concern that the assumption about the rate of return on investments is pessimistic or overly conservative?

**Mr CONCANNON:** Potentially yes. Again, I do not like to go beyond my area of specialty but it seems to me that it is somewhat pessimistic. I would need to get some expert actuarial analyst to have a look at that in a bit more detail to see whether it is sustainable or not, though.

**The Hon. PAUL GREEN:** On page 6—and I know you have spoken a little about this but I would like you to elaborate a little bit further—about the third paragraph you say that "our members are of the view that return to work initiatives are highly underutilised". Could you suggest once again how the system could be improved if it is underutilised? Can you elaborate on why you think that is so?

**Ms MAY:** I might start by saying that the return to work initiatives that are quite fully explored within the legislation could be implemented much earlier than they are. Our experience is that return to work options, which are available throughout the legislation, are not utilised by scheme agents or by employers until often quite late. There could be better education of employers and workers as to what their rights and obligations are under the Act in respect of return to work. There could be an enhancement of the penalties; specifically, section 38 and section 52A could be much better utilised by scheme agents and by workers in relation to return to work.

What also is available to scheme agents is to give employers premium benefits. It is contained within the legislation, and again memory escapes me, but there is provision for scheme agents to provide—

**The Hon. TREVOR KHAN:** Premium discounts?

**Ms MAY:** Premium discounts, and I am not aware that is actually utilised. I do know that it impacts on probably 10 per cent of large employers who have their premiums calculated by their claims handling, but the others—there is not necessarily an incentive for an employer to provide return to work. However, the legislation does provide for incentives to be given.

**Mr CONCANNON:** The other thing is section 52A of the Workers Compensation Act also enables an insurer, if the worker is not seeking suitable light duties, to terminate the worker as of a certain point in time if he or she is found not to be complying with that obligation. My experience is that that just does not work as a mechanism purely because of the wording of the legislation.

**Ms MAY:** Can I add one more in answer? The Workers Compensation Commission has limited power to enforce or return an injured worker to work or force or make an employer provide suitable duties. The power is almost unenforceable. They can make recommendations in relation to a whole raft of things in relation to return to work but they cannot really make enforceable orders. There is scope for improvement of the powers of the commission to address return to work in circumstances where return to work is explored by a worker and refused by an employer.

**The Hon. PAUL GREEN:** In terms of commutation, I guess we are hearing from self insurers as well that it would be ideal to work out a negotiation and cut the deal and move on with life and outcomes. I see you say that but there was also an impression left with that sort of situation that it is quite a complicated process. If you were to reinstall that situation how could it be simplified so it would not get so messy, because it seems to be too messy to bring back in, from what I understand, at this point in time?

**Ms MAY:** Several things: remove the threshold of 15 per cent whole-person impairment, which is precisely the same threshold as currently for work damages claims; take away the requirements under section 87EA of the Workers Compensation Act that require a worker to have been on benefits for two years and to have exhausted all of their rehabilitation requirements; and also take away from WorkCover the oversight approval mechanism. If scheme agents are properly managing claims they should be able to determine good value for a commutation that provides a saving to the scheme, that is attractive to a worker and with appropriate legal sign-off, I suppose. It should simply be the registration of an agreement in the Workers Compensation Commission so that it is properly recorded. At the present time WorkCover has oversight and approval and then the agreement has to be registered in the commission.

**The Hon. PAUL GREEN:** Given the fact that I do not have a legal mind, could you explain to me if there is any way that someone can come back on once that deal is made, that commutation?

**Mr CONCANNON:** Ordinarily not. I think there have been one or two cases that I am aware of where commutations have been overturned because the worker is simply unaware of the fundamental basis on which he or she came to their commutation. But I think one could safely say in 99.99 per cent of cases that is the end of the day.

**Mr MICHAEL DALEY:** We heard evidence this morning about the method of assessment of impairment and that currently the method of assessment goes to, if you like, impairment of bodily function overall. We heard evidence I think from the actuaries who cited an example in the PricewaterhouseCoopers report about a person with skin burns who was assessed at 50 per cent impairment but their capacity for work was almost undiminished. Is there a better way to do this?

**Mr CONCANNON:** Yes.

**Mr MICHAEL DALEY:** Any suggestions?

**Mr CONCANNON:** We say that it should be something akin to what existed before 2001 which left it in the discretion of either an arbitrator of the Commission or a judge. One can see under the Civil Liability Act for instance at the moment the test is left in the hands of the judge in coming to his assessment of pain and suffering and it is 15 per cent of a most extreme case. For whatever reason, the legislators have left the assessment of impairment within the parameters of these medical guides. We say that they just do not take into account subjective issues such as pain which, in our view, should be taken into account.

And I think it works arbitrarily, these impairment guidelines, you could safely say as well. I had one worker who I think got a 66 per cent whole person impairment. I think that is the only one I can remember off the top of my head who has actually exceeded the 30 per cent impairment guidelines, and that was a burn injury. Yet he is a person who is back at work and functioning reasonably well. Whereas if you have got a soft tissue injury of a back for instance, the very maximum he or she can get with a disc protrusion which impacts horribly on their work as a labourer would be somewhere between 5 and 8 per cent, which is less than $10,000.

**Mr MARK SPEAKMAN:** Have you got a copy of the PricewaterhouseCoopers valuation of outstanding claims at 31 December handy?

**Mr CONCANNON:** Yes.

**Mr MARK SPEAKMAN:** In an earlier answer you said that you did not agree with an assumption about an explosion in work injury damages claims.

**Mr CONCANNON:** Yes.

**Mr MARK SPEAKMAN:** Can you identify where in that report you say there is such an erroneous assumption?

**Ms MAY:** It is on page 174.

**Mr MARK SPEAKMAN:** What is the proposition on page 174 that you say is wrong?

**Ms MAY:** It is contained within the table under the heading "Results", fourth column along, "Modelled Ultimate Intimations". If you look from December 2008 to December 2010 there is a stark increase, six-fold, from December 2008 to December 2010 in the number of intimations that have been modelled into the actuarial valuation. If you look at the preceding six years, split into half year of accident, there seems to be consistency both in the intimated to date and modelled ultimate work injury damages that does not within it certainly nowhere within this explanation underneath the table is it explained how you get from 572 to 3,208 modelled intimations of work injury damages in December 2010.

**Mr MARK SPEAKMAN:** At paragraph 1 of page 2 of the letter which is annexed to your submission, looking at the first sentence, are you proposing that the regulations and claim guidelines be amended not only so that an independent medical examination can be obtained at any stage but also from time to time, and how is that different from the position at the moment?

**Ms MAY:** I think it is intended that the claims guidelines be loosened to allow scheme agents to obtain an independent medical examination report earlier than they could already have been, and the situation has only just been remedied by the reissue of the guidelines on independent medical examinations which was issued in March 2012. This recommendation has actually been employed now in the new guideline.

**Mr MARK SPEAKMAN:** Is it only one examination that is allowed?

**Ms MAY:** One examination is allowed unless there is a material change in circumstance or an issue arises in relation to the claim that needs to be questioned by the insurer. I am happy to make available a copy of the guideline that I think will answer your inquiry.

**Mr MARK SPEAKMAN:** Thank you.

**CHAIR:** Thank you for attending today. There are a number of questions on notice. The Committee has resolved that answers to questions taken on notice be returned within three working days. You will be supplied from the secretariat with a transcript marked up with those questions and those three days will apply from the date that you receive that transcript. If you need a little extra time, please ask for it.

**(The witnesses withdrew)**

**ELIZABETH EMILY WELSH**, Member, Common Law Committee, New South Wales Bar Association, and

**JEREMY PATRICK GORMLY SC**, Chair, Common Law Committee, New South Wales Bar Association, sworn and examined:

**CHAIR:** Welcome. Witnesses are advised that if there are any questions that you are not able to answer today but that you would be able to answer if you had more time or certain documents at hand, you are able to take a question on notice and provide us with an answer at a later date. In relation to in camera deliberations, witnesses are advised that if you should consider at any stage during your evidence that your response to particular questions should be heard in private by the Committee could you please state your reasons and the Committee will then consider your request.

Would you care to give perhaps a five-minute opening statement?

**Mr GORMLY:** Yes, thank you. So far as we can tell from our experience more or less at the coal front of claims the problem is more in the administration of the scheme than in the payments being made. Self-insurers who are largely free of WorkCover are healthy; the statutory scheme probably should be healthy as well. There is a definite need for a body like WorkCover. There are issues of public administration that such a body would always be able to fulfil. It is also legitimate to have disputes dealt with by a body like the Workers Compensation Commission. I have to say it was not a popular decision at the time to abolish what appeared to be an efficient court, but the Commission does seem to be doing a good job.

On the other hand, WorkCover—at least so far as one in the profession can tell—has become, or probably always was by reason of its design, impenetrable, ineffective and somewhat unresponsive. As the problems have worsened, it seems to have become reactive and perhaps more controlling in its behaviour because it seems to issue guidelines at a substantial rate to try to solve problems ad hoc as they arise. We think that there are a number of significant problems with WorkCover, but we do want to draw attention to one as an example. In doing that we are drawing in part on our history of seeing the way in which claims have been dealt with under the 1926 Act and its subsequent versions.

There seems to be what we would describe as a fairly undiscriminating bias against ordinary financial management tools that an insurer, acting on a market basis, would not really tolerate. It has the power, but seems very reluctant to exercise the power, to allow lump sum commutation. The buying out of a future liability for a discounted sum is really a fairly ordinary, sensible financial control, and it has been in place in the workers compensation system in New South Wales for a very long time. There is certainly room for discrimination about which claims should be commuted. Some claimants probably should not commute because their condition is not stable or because they will need medical treatment. So there may be a public interest in having an approval process of the type that existed prior to WorkCover as a protection, but we say that that is an activity that is at the claims level, which should not be done by WorkCover.

WorkCover really should not have a role in individual claims at all. It cannot be a public administrator and an insurer and a claims handler and a medical decision maker and a supervisor of insurers. It is just asking too much. By refusing to allow workers to exit the workers compensation system, though, by some form of commutation, we have to say—and this will sound like a fairly serious criticism of WorkCover—that it is in effect saying, "WorkCover knows best." It will not allow workers to commute, and that is a problem because, when it is doing that, it is refusing something that a worker might want; and that worker, as an adult person, usually is taking out mortgages, bringing up children, voting and bearing all the ordinary responsibilities of everyday life. They can make a decision like that, subject perhaps to the public interest to stand in and refuse some commutations through an independent body.

Injury causes shock and it is followed by fear. It makes people immediately vulnerable. I have a specific reason for putting this proposition to you. It may seem ordinary. An injured person becomes dependent on others, usually for basic functions, from the moment they are injured. And here is the point: Recovery from injury means gradually regaining control. This proposition I am putting now is one that goes to rehabilitation, commutation and virtually any aspect of workers compensation. With the regaining of control over your life from being in an injured state, there is increased self-determination. It is a normal part of the recovery process. It includes the normal desire to cease having contact with doctors and lawyers or insurers. It is a healthy sign when people want to get out of the system. It means that there is improvement in the worker.

The more that workers are able to make a decision to exit the workers compensation system freely and regain control of their lives, the better off they are. This is not a philosophical view that I am proposing. It is what workers say to us, and that is what health carers confirm. The need to be free and self-determining as part of a process of recovery is something that we believe, and I believe, that WorkCover has difficulty accepting. It has been given such a large task to be protective that it has perhaps become overprotective. It prefers to retain control over the workers decisions so it has the power to release the worker, but it seems not to be using it. Those people who are refused then become the growing group of people, it would seem, in the sick role. Those people seem to constitute a large part of the tail. They eke out an existence as partially disabled people in the hands of WorkCover, many not daring to take control of their own lives in case that prejudices the relatively meagre, but essential, payments upon which they are completely dependent. What do workers do with buyout figures?

My experience, from 1972 onwards in this field, and that of most people who work in the field, is that it is not wasted. Some workers do waste it, just as some workers go to the casino and gamble away their money. But so far as we can see, the majority put it into a mortgage or get a deposit on a house or do something sensible with it. Often in the approval process they were asked, "What are you going to do with that money?" That was under the old system. If they are able to buy their way out of it, then they will start their life again, as they so often do, even though they have a partial disability. That is because the very best person to find work for a disabled person or a partially disabled person is that person themselves, not an occupational therapist, not a rehabilitation expert, and not WorkCover—not that WorkCover does try to do that: it is one thing that is not in its huge array of tasks—but the worker, keen and free to find work.

These are our three points that are drawn from our experience in the field. Firstly, we suggest that WorkCover, in fairness to the body itself and the people who work in it if nothing else, needs to have its role redefined to make it more of a conventional public administration body instead of a complete overarching controlling body, the extent of which it itself has trouble managing. Secondly, it should do this: Return insurance issues to insurers to a greater extent than now so that insurers have a role, leave dispute issues to the commission, leave medical issues to the healthcare professionals, and give to WorkCover's role its proper administration capacity. Thirdly, may we say that this system has been dragging its feet in terms of payments. We appreciate that it is a very compelling argument to say that a way to control the problem that seems to be arising is to cut payments.

The fact is that payments under the New South Wales system could be cut; that is a way of doing it, but it is a really poor way of doing it because the payments at the moment seem to be insufficient for an ordinary family or an ordinary person. So we say that the third element is that there should be perhaps a greater respect shown for injured workers by keeping the payments up to date, if only by a consumer price index [CPI] type of approach. That gives people the incentive to get out of the system and the dignity to get themselves started again. So far as we can tell—and I heard the prior debate: we are not actuaries—if those things occur, then the system would in size generally shrink, WorkCover would have a proper role and injured workers would exit the scheme. Thank you for listening to that.

**CHAIR:** Thank you.

**The Hon. ADAM SEARLE:** In relation to page five of the Bar Association's submission about the shorter step-down periods in other States and how they have more generous common-law rights in other States—I think the usual comparison is Victoria and Queensland—can you explain to us a little more, if you know and if you do not, please take it on notice, what the differences are with those schemes, the pluses and minuses?

**Ms WELSH:** I think I will have to take it on notice in order to give you an accurate answer.

**The Hon. ADAM SEARLE:** That is fine.

**Ms WELSH:** I could give you a general answer now, which may be of some assistance.

**The Hon. ADAM SEARLE:** I would not mind hearing the general answer, and then if you need to flesh it out, that would be acceptable.

**Ms WELSH:** This is from my reading of the Victorian legislation, and I have not practised down there. It seems that there is a process whereby you have to have a finding after two years that you have a total

incapacity. Otherwise, after a particular period you can lose your entitlements and there is an arbitrary level at which that is fixed. I do not understand how they could operate without throwing some very badly injured people onto the social security system. It is unfortunate that we are not able to access that information for the benefit of this Committee, but it must have an enormous social cost.

**The Hon. ADAM SEARLE:** What about the access to common law in other States, such as Queensland and Victoria? Have you any knowledge of that?

**Mr GORMLY:** We do. It seems that New South Wales, which was something of a leader in tort reform, contracted the system for common-law damages and it knocked out, as this system does, smaller clients. Victoria and Queensland—Victoria in particular—seem to have retained small claims but also that does not seem to have restricted, for example, awards of general damages to a scale. I cannot say I am 100 per cent sure about that but from what I hear from Victorian barristers it is a free, more open system, more like the original common-law, non-statutory system. I think everybody is adopting Civil Liability Act restrictions, though, for liability, causation and so forth.

**Ms WELSH:** And I believe Queensland has an unregulated common-law system if you qualify to bring a common-law claim.

**The Hon. ADAM SEARLE:** Do you know what the qualification is in Queensland?

**Ms WELSH:** I will take that on notice and send it to you.

**The Hon. ADAM SEARLE:** On pages 5 and 6 you discuss the whole person impairment method. Can you explain from your knowledge how that assessment works and whether it has any relationship with someone's work capacity?

**Ms WELSH:** Certainly the motor accidents scheme, which is also a whole person impairment scheme, and I think it is probably the same in this system as well, says the finding of zero per cent whole person impairment does not mean there is no disability, because the guides are not directed to whether or not someone, for example, can perform a particular task, as you have to at work. The guides are based on what are meant to be objective assessments of the range of movement of a shoulder, for example, or according to whether or not you have had a particular operation. They do not look at the effect of that particular injury on you in your job, so they have absolutely no bearing at all.

**Mr GORMLY:** It is a real dilemma. Tables are always a dilemma. One way or another you try to standardise the amount of money that is to be paid to a worker, and there is nothing wrong with that. That seems to be generally a reasonable idea but inevitably you are going to get discrepancies. There seems to be some real problems in the whole person impairment approach because people with disabling injuries can end up with significantly less percentages than people who have appalling injuries that are not so disabling. The example that was given earlier of burns is quite a good example. All sorts of anomalies are produced. For my part—I am not sure what others would say—it does not matter what system you use, if you are going to tabulate injuries you will end up with anomalies. It possibly should or could be easier than it is at the moment.

**Ms WELSH:** My client last week had a double level spinal fusion. He had lost his job. His marriage had broken down and he is living with his parents. He had a terrible psychiatric problem as a consequence of all that. He was 23 per cent, and he was a young man. It is hard to encompass what would be over that 30 per cent threshold if that was the sort of threshold you imposed.

**The Hon. ADAM SEARLE:** Based on the experience of your members and what they have told you in relation to the obstacles to returning to work for injured workers, are you able to say what the key obstacles to returning to work are?

**Mr GORMLY:** There are differing views about this. I think you should go first.

**Ms WELSH:** I think the word is multifactorial—each case depends on its own facts.

**The Hon. ADAM SEARLE:** Are there any themes that emerge?

**Ms WELSH:** I notice with interest someone is making a submission about early intervention and perhaps psychological intervention. There can simply be some ill will between a worker and employer after an accident happens and that can be for a variety of reasons. That can create a barrier. There is the obvious genuine barrier of not being able to do that job and there not being another suitable job for that person to undertake. There are all sorts of things, all understandable depending on the facts of the situation.

**The Hon. ADAM SEARLE:** On page 6 of your submission you note there is no regulatory requirement on an employer to rehabilitate or return an injured worker to suitable employment. Do you see that absence from the regulatory regime as an obstacle? Do you think that is something that should be put in place?

**Mr GORMLY:** We have two conflicting propositions here. The first is there can be no doubt that getting a worker back to work one way or the other is the best form of rehabilitation. The sooner a worker can be got back to work in some capacity, the better it is for them—so long as it does work. On the other hand, it seems to me the idea that you require an employer to take an injured worker back is just completely unrealistic. If you have a large factory you can have someone who is missing an arm back at work and they can do something useful, but if there is a journey claim and an horrifically burned person in a wheelchair and the employer was a milk bar on the corner, it is just unrealistic to try to match them up. There is no room for force or pressure in a situation like that. It is a real dilemma.

If employers could take workers back, that would be a good thing. I have to add, though, that the general experience of the current provisions extending right back to the old section 11 (2) under the 1926 Act, which said an employer had to take a worker back and if they failed the worker was entitled to ongoing compensation, the fact is no employer likes taking back workers who cannot work at full capacity. When workers go back and work in a lesser capacity they still feel they are not back at work and back in their old role because they are constantly reminded of their disability. They are not doing their old job.

**The Hon. ADAM SEARLE:** What is the solution in that situation? If getting people back to work is the best form of rehabilitation, there does not seem to be too many alternatives.

**Mr GORMLY:** I think there are perhaps two. You give employers incentive to take workers back if you can. That is the first thing and presumably that can be done through premiums or some other form of benefit. I cannot see any others apart from premiums. The second is one referred to in the opening statement. That is, there seems to be a real benefit to workers and their capacity to make a decision for themselves if they can get out of the system. If they can get out of the system, usually they will find something.

**Ms WELSH:** One thing I have noticed over the years is if you act for someone who has a worker's compensation claim**,** something that no-one in the insurance industry is prepared to consider except maybe one self-insurer a while ago, and I do not know when the last time was, is some vocational retraining. It is something that appears to be completely off the agenda and we cannot understand why that is because that would be the obvious thing to do for someone who has been injured. There is a section under the Workplace Injury Management Act, section 53, which confers a discretion on WorkCover to provide funding for retraining, and it just does not seem to be used.

**Mr GORMLY:** I agree with that.

**Mr MARK SPEAKMAN:** If you go to page 8 of your submission, item 16. You say at the bottom of the page there are three recent decisions of the Court of Appeal that clarify how section 9A operates.

**Ms WELSH:** Yes.

**Mr MARK SPEAKMAN:** Can you identify what those decisions are and just briefly say how they clarify the operation of the section?

**Ms WELSH:** I do not have the names of those cases but we can provide them. I can take it on notice. Section 9A has been in the Act for a long time, since about 1996, I think. It has always been the case since then that employment must be a substantial contributing factor to an injury. That is nothing new. These new cases may be recent cases on the section but it has been in the Act for a long time now.

**Mr MARK SPEAKMAN:** Item 7 on page 6, you do not have any experience of how that testing operates in Victoria?

**Ms WELSH:** No.

**Mr MARK SPEAKMAN:** On page 8 there is reference to commutation. You heard my exchange with the Law Society representatives?

**Mr GORMLY:** I did.

**Mr MARK SPEAKMAN:** About how commutation saves money in substitution for a future stream, the value of which that commutation presumably represents in some rough and ready way.

**Mr GORMLY:** Yes.

**Mr MARK SPEAKMAN:** Would you like to respond to that?

**Mr GORMLY:** Yes. Under the old Act, by which I mean the 1926 Act—I refer to that because it went till 1987 and operated successfully—redemption as it was then called was a common tool. It got people out of the system quickly and it was sought by both parties. I was always impressed by the fact that insurance companies sought to do it. When I appeared for insurance companies the explanation given to me was that it is cheaper. In those days we used to negotiate with workers or if I was for a worker I would be negotiating with the insurer for a period of redemption—that is, we would buy two years' worth of payments or if it was a lesser injury it might only be one year or 18 months, something like that. The view taken by both parties then was that it was good for the worker because they got a lump sum and they got out of the system, but the insurers were very keen to have it because the way it was at least explained to me by very senior solicitors and claims managers was that it cost as much to keep paying regular payments to a worker and keep checking on them over a long period of time as it did to actually make the payment.

You have to bear in mind that those days up to 1987 did involve physical payments, that is, there were cheques and letters sent out and all that sort of thing. It would be a lot cheaper now, I imagine. But the fact is that over all those years redemption or commutation was seen to be a much cheaper option than keeping people on the books. That has informed my experience for a long time and it does seem logical. In every other field of dealing with streams of payments compared with chunks of capital there does seem to be a general view that to buy out at a discounted level a stream of payments achieves benefits for both sides. It is cheaper for the person who has to make the stream of payments and it gives capital to the person who receives. That is the basis on which I have supported commutation at a financial level. But really it is the psychological level and that rehabilitative effect of people being able to get away from the insurer and get away from the whole scheme that seems to be so effective.

**Mr MARK SPEAKMAN:** Why do you think WorkCover appears to be stubbornly opposed to commutation?

**Mr GORMLY:** I have to say I slightly disagree with the Law Society about this. When workers compensation was reformed on the last occasion it was because there was a community dislike of the way the lump sum scheme in personal injury was operating generally. There was a feeling that there were a lot of bad claims around and people were getting lump sums that they did not deserve, and there was quite a strong feeling developed against lump sums as a reflection of people creaming the system. It was not actually like that, especially in the workers compensation field, but it did cause a large number of people, and I am told WorkCover is strongly of this view, to develop a lump sum mentality that you will have people crawling like ants after a honey pot to try to get their cut. I agree with Mr Concannon that that just does not exist; it just does not work. In the old days there used to be a lot more dud claims than there are now, but Elizabeth Welsh and I were discussing this morning that it is a long time since either of us has had a personal injury claim where we have doubted the integrity of our client. That, I think, is partly because a lot of the smaller claims have been cut away by the prior system. You are really only dealing with more significant injury now.

**Mr MARK SPEAKMAN:** Have you read the Law Society submission?

**Mr GORMLY:** Yes I have.

**Mr MARK SPEAKMAN:** I asked the Law Society witnesses about their recommendation of amending the regulations and claims guidelines to allow scheme agents to obtain independent medical examination reports at any stage of the life of the claim. Would you like to comment on that proposal?

**Mr GORMLY:** Is this about deterioration of injury?

**Mr MARK SPEAKMAN:** About getting an early medical determination?

**Mr GORMLY:** Essentially I agree with them. The less medical examinations the better, really. They cost a lot of money and they certainly seem to harass people who are trying to recover. But generally speaking, I look at it differently. I do not think insurers and employers are particularly well treated under this scheme, but that is perhaps more in the common law side. I think maybe Ms Welsh could say more than I about that that would of use.

**Mr MARK SPEAKMAN:** Do you wish to add anything?

**Ms WELSH:** Yes I would, thanks. A lot of what happens with workers compensation is the function of the money that is available. It is an event-based scheme and the scheme agents have to work in accordance with guidelines. The guidelines I am told up until recently provided for a system whereby if a scheme agent was served with a medical report that said someone was over the threshold for a work injury damages claim, the scheme agent had to accept it. I think the point the Law Society was making was that scheme agents should be free to make their own decision as to whether or not they should do something about getting some evidence a bit earlier. We would not want a system where it went the other way and insurers were allowed to harass injured workers by getting multiple medical opinions, but it should be fair for both sides. That is the thrust of our submission in this area. At the moment one thing that is probably causing a lot of expense and perhaps unnecessary payments is the fact that scheme agents and insurers are not really getting a fair go from WorkCover.

**Mr MARK SPEAKMAN:** Mr Gormly, is there anything else you wanted to add about how you thought employers and insurers were being mistreated?

**Mr GORMLY:** Yes. In the common law matters, there is the common law damages claims system as it exists at the moment. A worker can more or less prepare a case and put it into a claimable form not at their leisure exactly, but they have time to do it. When they serve the claim the employer, or the insurer really, gets 42 days to respond. That is absurd. You cannot get a proper testing of a claim if the employer only gets 42 days to respond. It is just not enough time. To get a decent medical examination or to get an expert on side—that is a litigator's use of language—but just to get an expert report takes six to eight weeks; to get a decent doctor can take longer than that. It is not a fair amount of time for an insurer to be able to respond to a claim.

**Ms WELSH:** And if they do not respond within 42 days they cannot defend the issue of liability. That is it. It is a technical provision and there is no discretion.

**Mr ROB STOKES:** In relation to your proposals for law reform for death benefits and journey to work claims, what proportion of claims do you think that might affect? I am trying to get a sense of the numbers involved.

**Mr GORMLY:** I will leave the journey claims for Liz to answer. On the death claims, our objection to that is not so much that it affects a lot of people. I do not think it does. But the objection is that it is just absurd to have a workers compensation system where a chunk of money goes into someone's estate when they have no dependants. If they have left their entire estate to the cat home, then the money, the nearly half million dollars, is going to be buying cat food. Where is the logic in that? It is completely inconsistent with the compensation scheme. It is just absurd. Liz will answer on the journey claims.

**Ms WELSH:** There are probably a significant number of journey claims. I do not know the figures.

**Mr ROB STOKES:** Have you any sense of how many claims regarding the at-fault argument?

**Ms WELSH:** The rationale behind that is if someone is at fault they do not recover benefits under the Act. If they are not at fault they recover benefits, but also WorkCover can recover its money from the at-fault

driver because these are almost always motor accidents. It enables workers to have benefits in circumstances where there is really no downside to the fund. I cannot give you the actual figures in relation to that.

**Mr GORMLY:** It is a submission we made with reluctance. If you have two workers driving one another to work and there is an accident and one of them is at fault, the driver is at fault, one recovers compensation and common law damages because they are the passenger and the other one gets neither common law damages nor the ordinary prop up of workers compensation that keeps a family going when there is injury. It is not something we were warmly enthusiastic about, but the scheme seems to be in difficulty so one looks for ways to assist the scheme.

**Ms WELSH:** That was the previous provision. There was a "fault" provision for many years.

**The Hon. PAUL GREEN:** I noted about 4,000 journey claims totalling $197 million in New South Wales. Is there any room through car insurances, comprehensive and other insurance, to cover the situation where two people are going to work and one is covered and one is not, as Mr Gormly has said? Do vehicle insurances and other insurances cover those issues?

**Ms WELSH:** It would be harsh for the driver who was at fault because they would not be covered under comprehensive third party scheme unless they qualified for some of those very limited at-fault benefits that you get with your compulsory third party [CTP] policy. That would potentially eliminate those people having anything to fall back on.

**The Hon. PAUL GREEN:** On page 2 of your submission you note a 7-point reform plan. Would you expand on item 4, the revocation of section 151 Z (2), and address item 6?

**Mr GORMLY:** This provision has caused more grief and anxious study than any other in the Workers Compensation Act. It has caused the New South Wales Court of Appeal a lot of trouble. It has finally been worked out. It is an odd provision. It means the workers compensation system cannot clawback money it pays out, even when the injury is caused or contributed to by the negligence of a stranger. A "stranger" means a non-employer. There does not seem to be too much logic behind that provision. I think the general view in the profession would be that it has not helped: it has hindered. It has deprived the scheme of a right of recovery and caused a tremendous amount of litigation and trouble because you have to do so much and work out so much to see who pays what. It needs to be repealed. It is not a helpful provision.

**Ms WELSH:** Section 151 Z (2) affects a lot of small cases. It was enacted before the Civil Liability Act. My memory, and my view, is that the reason why it is there is to stop workers from seeking other remedies when their remedies under the original 1987 Act were limited. Now everyone has to deal with the Civil Liability Act which also restricts people's access to other avenues. The section is still there. If you have someone injured by a third party who has received $70,000 worth of workers compensation payments and they want to sue the other party they have to pay back the workers compensation payments from the verdict. The verdict is also reduced by the proportion of their employer's liability. If it is half their employer's fault they lose half their damages. If you have a small case you cannot advise your client to bring that case because there is not enough in it for them because they lose half of their damages under this provision. That is a case where WorkCover does not get the $70,000 back. If the provision was not there, it would. That is another way in which ordinary risk management principles and insurance principles should apply to this fund which has to be administered properly.

**The Hon. PAUL GREEN:** Could you comment on item 6?

**Mr GORMLY:** There is a proposal in the issues paper that you can only get a lump sum disability payment for one of the tabled disabilities once. The fact is that injuries that are disabling change over time and they can get better but they can also get worse. Allowing people to claim only once means they are seeking a percentage assessment on a single occasion at a moment in time. It may be they do very well out of that assessment and their arm gets better after that. It may also be that the injury significantly deteriorates and because they can only get a result once they cannot come back again. It is an unfair proposal. It is one of those proposals that was grasped to try and help the scheme and maybe it is not really a good idea. It is unfair. If the scheme is meant to give people a percentage amount of a lump sum it should be able to accommodate deterioration.

**The Hon. TREVOR KHAN:** Is that not the equivalent of a commutation? You only get one hit.

**Mr GORMLY:** That is a good parallel. With the lump sum you are only talking about one aspect of compensation. There is a problem with commutation. I think they should be approved because people are buying-out of the system and it is once and once only, as someone said, in extreme situations. The psychological effect of getting people out of the system is so great and so valuable that I think commutation is worth it.

**The Hon. PAUL GREEN:** It seems the more mature a person is, the more they waste that opportunity. They fall back on social security, Medicare or some other system down the line. What do we do to work that in if we were going to restore commutations? What would your opinion be as to how to avoid that endless situation?

**Mr GORMLY:** If you had a commutation system that did involve an approval you would do what used to happen before the judges. The approval would occur through an arbitrator or someone in the Worker's Compensation Commission, not in WorkCover, and the worker would have to go in the witness box and explain themselves in a mild way. The worker would be asked, "What do you propose to do about this money?" They would say, "Well, I want to pay off such-and-such a debt" or "I want to put a deposit on a house." It sounds patronising but it was a way of protecting the more vulnerable. When I saw that system in active operation commutations were frequently refused to young injured workers because it was thought better, if they were young, to have them stay on the scheme for a while and see how things shaped-up.

**The Hon. NIALL BLAIR:** Is there capacity for vocational planning to go hand-in-hand with a commutation as part of a condition?

**Mr GORMLY:** If there is a plan like that in place you would not be commuting and you would not permit commutation. You would wait until it settled down, there was a stable condition, all of those issues were in place, you could feel confident that there was not going be deterioration and only then would you have a commutation. That is what used to happen.

**The Hon. ADAM SEARLE:** In relation to the interface between the motor accident system and the workers compensation system; what are the key benefit differentials under the two different regimes for someone injured in a journey?

**Ms WELSH:** Under the Motor Accidents Compensation Act if you are over the 10 per cent whole person impairment threshold you get general damages which are assessed at large up to an indexed maximum of, I think, $450,000. It is all lump sum damages for past and future economic loss. There is a provision for the insurer to pay some loss of wages on the way through, but it is rarely used. It is generally a capitalised lump sum for heads of damage, domestic assistance and medical expenses as opposed to, under the workers compensation system, if it is a journey claim it is unlikely to be a work injury damages claim. You would be on your statutory benefits for weekly payments and medical expenses and you get a lump sum if you have impairment.

**The Hon. ADAM SEARLE:** If it is over 15 per cent?

**Ms WELSH:** No, you can get a lump sum at any level of impairment if it is just a claim under section 66 of the Act.

**CHAIR:** I note there were some questions on notice. The Committee has resolved that answers to questions taken on notice be returnable within three working days. The secretariat will contact you in relation to the questions and give you a marked-up copy of the *Hansard* so you can determine exactly what those questions are. You will have three days from then to respond.

**(The witnesses withdrew)**

**(Short adjournment)**

**CHAIR:** I welcome Mr Bruce McManamey, New South Wales committee member of the Australian Lawyers Alliance, and Mr Andrew Stone, New South Wales Director of the Australian Lawyers Alliance. I thank you very much for coming. Regarding questions on notice, I wish to advise that if there are any questions you are not able to answer today, but would be able to answer if you had more time or certain documents at hand, you are able to take those questions on notice and provide the Committee with an answer at a later date. Regarding in camera deliberations, if you should consider at any stage during your evidence that your response to particular questions should be heard in private by the Committee, would you please state your reasons and the Committee will consider your request.

**ANDREW STONE,** Barrister, New South Wales Director of the Australian Lawyers Alliance, affirmed and examined, and

**BRUCE GORDON MCMANAMEY,** Barrister, New South Wales committee member of the Australian Lawyers Alliance, sworn and examined:

**CHAIR:** Would you like to make a short opening statement?

**Mr McMANAMEY:** Yes, thank you.

**CHAIR:** Would you please limit it to about five minutes.

**Mr McMANAMEY:** I will do my best. Workers compensation, as we know it in New South Wales, really commenced in 1926 with the passing of the Workers Compensation Act 1926. That piece of socially beneficial legislation had one basic tenet: that was that industry should pay for its casualties. The idea was that employers who got the advantage of the labour of those who come to work and spend their time and energy working, and from whom they take profits, should meet the price of casualties that occur by that activity. The original scheme was far more generous than the one we have at the moment. It provided for better weekly benefits, much harsher penalties on employers that failed to provide light duties, and unrestricted common law rights. That scheme ran without hiccup from 1926 to 1987—61 years. Through that time people made claims, people were paid compensation, and people were regularly commuted.

We had a change in the system in 1987. In 1987 there were two fundamental changes to the scheme as we see it: one was the elimination of commutations, or an effective exit strategy from the scheme; the other was the advent of WorkCover. Up until that particular point in time, the scheme had been managed by four judges of the former Workers Compensation Commission, which was required to run a profitable and successful scheme. Since then we have had this ever-growing bureaucracy interfering with the scheme. What we have seen since that time is this: in 1995, a reduction in workers' benefits; in 1996, a reduction in workers' benefits; in 1998, a reduction in workers' benefits; and in 2001, a reduction in workers' benefits.

And here we are in 2012, and what is happening again?—proposals to reduce workers' benefits. It has been a continuous slide since WorkCover came into being. There is a contrast with that. One part of industry has been exempt from WorkCover and the 1987 amendments, and that is the coalmining industry. Coalmining is one of the most dangerous industries in this country; it has a high level of injury and a high level of incapacity. The coalmines insurance system still runs quite happily, at a profit; it has never come running to WorkCover or anywhere else saying, "We need assistance." You might ask why. We say the difference is they had an exit strategy, and they do not have WorkCover.

We members of the Australian Lawyers Alliance have been representing injured workers for a very long time. What we have found overwhelmingly is that workers are genuine people. We are after all talking about workers—people who get up to go to a job of work. We are not talking about dole bludgers and that crowd, if I can be excused for using that kind of language. We are talking about genuine, working people. When they are on benefits, they want to get back to work. As Mr Gormley said earlier in his submission, it gives them dignity; it gives them a purpose in life; and it also allows them to meet their financial obligations, and their aspirations. We hear about the aspirational Australians; that is them. We say that that is part of the culture; they want to get back to work. The question is: Why doesn't that happen?

What we have found is that the way in which WorkCover, through its scheme agents, manages its claims is often an impediment to return to work. One often finds workers complaining that they get a whole lot

of conflicting directives on what they can do and cannot do or must not do—all of which creates a culture of fear, a culture of adversary, that is, the insurer and the employer have now become my enemy because they want to run me round with things, and that inhibits a return to work. We at the Australian Lawyers Alliance say that the problems lie not with the level of benefits—which are not great; we are talking about subsistence level or dole level payments after the first 26 weeks; we are talking about lump sums which, for the vast majority of people, are less than $10,000, and that is if you are permanently incapacitated.

What we have seen in the material that has come before us in recent times, we say, is some real evidence of some problems. Firstly, we do question the actuarial advice coming from WorkCover. Now, I do not claim to be an actuary, but I do claim to have 30 years' knowledge and experience of the workers compensation scheme and how it operates. And I can look at that report and I can tell you, just from the outside, that some of the assumptions that PricewaterhouseCoopers have been given are wrong. For example, at page 7 of their report they identify as a separate liability a sum of $290,000 for commutations. A commutation is not a separate liability under the scheme. Commutations are reducing an already existing liability for weekly payments and medical expenses and lump sums to a single amount. To define it as an additional amount is simply wrong. Someone is not giving them the correct information on how this scheme operates.

But that error compounds itself, because we know from the questions asked in the upper House between 1999 and 2001 that the average commutation during that period, when we had unrestricted commutations, was less than one-third of the outstanding liability estimate on the file. The last time the answers were tabled, in December 2001, the average commutation was $45,000, and the average outstanding liability commuted was $140,000. Put that logic into the PricewaterhouseCoopers report, and they have over-counted $290,000; if they had properly taken into account the fact that they had been relieved of weekly payments and medical expenses, they should also have taken $570,000 or $580,000 off that figure. So, just sitting on the sideline, I can identify an $870 million error in the calculations. There is also potentially an error in respect of work injury damages. They estimate $1,771,000 in work injury damages. Again, what work injury damages do is buy out future liabilities for weekly payments, future liabilities for medical expenses, and any potential liabilities for increased lump sums.

Once you have got work injury damages, you have finalised it. Where in the report do we see an allowance for that? This report should be saying: yes, we have added in the last year $148 million for work injury damages. But why has it not taken away something from the others? Anecdotally, from our members, we know that work injury damages by and large settle for less than the outstanding liability on the file. There should be a figure coming off that. There are real questions about that report, and they need to be looked at. Someone has to check that the actuaries have been given the correct information about the scheme and how it works. The other thing that we notice, as I have said before, is how WorkCover manages the scheme. WorkCover, interestingly, seems to want to tell us how it mismanaged the scheme. Last week WorkCover issued a press release and in it included what it said were the worst cases. I take the Committee to one of those, the second one:

> A woman who suffered "minor whiplash" 10 years ago has received $751,000 worth of WorkCover-funded treatment, including "botox injections, skin treatments and massages". WorkCover claims the woman has refused to return to work, undertake rehabilitation or undergo an insurance assessment.

<33>

I have only one question: Why are they paying her? Under the Act, if she has refused to return to work and she is fit, she has no entitlement to payments. If you refuse to undertake rehabilitation, your entitlement to payments is suspended. If you refuse to undergo an insurance assessment, your entitlement to payments is suspended. What we have there is a classic case—if WorkCover is to be believed about those facts—of someone who, if they had been properly managing the scheme, would have been off benefits a very, very long time ago. Our position is that the problem is not with the level of benefits, which are small—they are meagre payouts for the injured. The problem is with the management of the scheme.

**The Hon. ADAM SEARLE:** In relation to the experience of your members regarding return to work rates, what do you see as the key impediments to getting injured workers back to work?

**Mr McMANAMEY:** Apart from the matters that have already been raised, which are the difficulties of the relationship, one of the things that does happen is that employers generally have a resistance to employing anybody with a workers compensation history—I noticed it this morning on the ABC when people were ringing in—and it is particularly so when someone is trying to get a job with somebody other than their initial employer because one of the first questions that is asked is, "Have you had a workers compensation claim?" Employers try to justify it on the basis that, "We have to know whether you have an injury as there is a duty of care." It does

not require that question. The question should be, "Do you have an existing disability", not, "Have you had a workers compensation claim?" In my view, one thing that could be done—and it is not in our submission paper—is putting a ban on the asking of that question. It is not relevant to employing people. The other question, "Do you have a disability", is, but whether you have a workers compensation history is not a question that is appropriate to ask and it seems to offend disability legislation anyway. Anyone competing for a job who says, "I have workers compensation history", is behind the eight-ball. People tell us they apply for a job, they are asked the question and the moment that question is answered it is, "Next, please".

**Mr STONE:** The other issue to add to that is that there is undoubted discrimination in the workplace and, to be frank, money talks. If you look at the disability sector where they are trying to get people into employment, the best way to do it is to offer a subsidy back into their initial job. You could cut a fortune in what you currently pay for workplace rehabilitation advisers within the WorkCover scheme and channel some of that money back into getting employers to give people a go, because it is the first job back that is the hardest to get, the first return to work. Once you are back in employment, that becomes the leverage to further employment and further options. It is the first job that is the hardest. I note that you have some employer representatives coming here after us and I encourage you to ask them what we have to do to get them to offer more opportunities to people coming back from an injury, and I think they will quite like the answer I have just suggested.

**The Hon. ADAM SEARLE:** On page 15 of your submission you talk about how the step-down proposal in the Government's issues paper does not represent harmonising New South Wales with other states. Can you elaborate on that and explain what occurs in those other states?

**Mr McMANAMEY:** The starting point with other States is that they have a different definition for the rate of pay. Under the New South Wales scheme, what you get is called a current weekly wage rate, which is essentially the award rate. It takes no account of overtime or shift penalties; it takes no account of people being paid over award. That has become an increasing problem in the state scheme as awards become more and more ancient and increasingly industry is working on individual agreements and deals. In most of the other jurisdictions they work off a definition of what they call normal weekly earnings. It varies a little bit from state to state, but it is normally a matter of looking at what a person earns on average, taking all those matters into account.

The consequence is that, almost inevitably for that first period, in other states you get a much bigger payment than you do in New South Wales. They have different step-downs at different points and some of the legislation has it a little bit earlier. It might be said here that in terms of what they step down to, this issues paper highlights Victoria and Queensland. I might invite the Committee to look at the Northern Territory, which has a much more generous system. Their step-down is to a figure of 75 per cent of loss of earning capacity and you keep that regardless of what happens intervening until retirement age. That is a scheme that is firmly in the black, although it might be noted that it is run by private insurance. The step-down is different, but we come off a lower base and the others do not.

**Mr MARK SPEAKMAN:** If you turn to page 9 of your submission under the heading, "Privatisation of the Scheme", I can understand how you might talk about privatisation if there were not a deficit, but if there were to be some sort of privatisation of the scheme, how would you see the existing deficit in the scheme being dealt with?

**Mr McMANAMEY:** I might say one thing at the outset about this. We actually have great concerns about this talk of a deficit. It goes back to what WorkCover tells the actuaries to do. The deficit only exists on the assumption that if you had to pay all the liabilities today there would not be sufficient money to cover it. That can never happen under the scheme because of the way it flows out as weekly payments. What is interesting about this scheme is that they have been pleading deficit in various forms since about 1995, yet every year the size of the fund gets bigger, so back in 2001, the last time they were pleading deficit, they had about $9 billion. They have now got $14.6 billion. I am not quite sure how a fund that actually collects more money than it spends every year is somehow going into the red.

**The Hon. TREVOR KHAN:** Because its liabilities are increasing at a rapid rate.

**Mr McMANAMEY:** Yes, because of the assumption that they make that the liabilities must be met today. They do not. Properly accounted, this actually would be accounted as a pay as you go scheme because that is what it is, and it has never been accounted in that way. That is why we keep hearing this talk about deficit. The realities are that at no point are we going to have to find the $18 billion now. In terms of answering

the question, what brings it over to private insurance, to give them the vehicle and the capping to control the moneys to be able to limit their liability, the answer to that, as it was from 1926 to 1987, is commutations. You give them the mechanism to cap their liability to finalise claims and they can run their own discretion as to whether it is commercially worth their while to do so or not.

**Mr STONE:** If I can add to that, you cannot privatise a long-tail scheme. You have to turn it into a short-tail scheme. You turn it into a short-tail scheme one of two ways. You do it by creating the buyout mechanisms or you do it just by creating dumping mechanisms. I know which of those two is fairer.

**Mr MARK SPEAKMAN:** But sooner or later someone is going to have to pick up the tab between the assets and the liabilities, even if those liabilities are not immediately payable. How, in privatisation, are you going to get private insurers to pick up that tab?

**Mr STONE:** I do not know that you would. You would have to rule a line in the book and then privatise moving forward.

**Mr MARK SPEAKMAN:** So someone like the taxpayer will have to pick up the outstanding liabilities?

**Mr STONE:** You get actuaries to design a way that gives you an attractive product. You have to get your scheme back to shorter tail to make it more attractive. As it becomes shorter tail, it then becomes better suited to privatisation and, in part, give it three years of healthy financial returns on the stock market and stop working off just the last five years assumptions, and all of a sudden half your deficit disappears. A substantial amount of the deficit is based purely on projected forecasts about financial returns and that has changed remarkably in the past couple of years.

**Mr MARK SPEAKMAN:** And it is not something about which you can offer any expert advice, is it?

**Mr STONE:** Financial returns, no.

**Mr MARK SPEAKMAN:** The assumptions used for financial returns, discount rates, inflation rates—they are beyond your expertise, are they not?

**Mr STONE:** I have been dealing with the Motor Accidents Scheme for 15 years, and the profits being made there. I do not pretend to be an actuary, but we have a pretty fair working experience and we simply make this point to you: If you wanted to produce a report that had this scheme $10 billion in surplus on its projections versus $10 billion in deficit, the way you go about setting assumptions either way, you can achieve that outcome. To pretend that actuarial assumption is writ in stone is just false. It depends upon what assumptions you put into it about future investment returns and so on, and simply by picking how many years you go back makes the difference. There is a reason, when they talk about the financial return you can make investing in wine by buying 1972 Grange, they always go back to 1972 Grange. That was the year that the price of Grange suddenly spiked. You can manipulate these figures depending on where you start and what you include—not that I have owned a '72 Grange, or any other Grange for that matter—I simply look at the way in which they manipulate the market there, and you see that across a variety of markets where that manipulation occurs, depending on where you draw the starting point.

**Mr MARK SPEAKMAN:** So the assumptions I have mentioned are things on which professional opinions can repeatedly differ but you cannot suggest that the figures that PwC have used for those things I identified can be manipulated, can you?

**Mr STONE:** "Manipulated" is not the word that I used; I said they are capable of manipulation.

**The Hon. TREVOR KHAN:** Actually I do not think that was what you said.

**Mr MARK SPEAKMAN:** At point 4.1 of your submission you say that half the deficit has been identified as due to poor investment strategies. Where in the PwC report do they say there have been poor investment strategies?

**Mr STONE:** I think we give you a footnote there to page 288.

**Mr MARK SPEAKMAN:** Could you show me where on page 288 it says that?

**Mr STONE:** I am afraid, in the interests of what we could bring up, I brought the 28-page executive summary; I did not bring the full report. We are happy to take the question on notice.

**Mr MARK SPEAKMAN:** I will hand you a copy of page 288 and you can tell me where on that page it says that it is due to poor investment strategies.

**Mr STONE:** If you look at the second paragraph under the heading "Key Recommendations", it notes that, "Half of the deficit is due to deterioration in claims management experience. Further deterioration in claims management experience would add to the deficit remaining half due to external influences impacting investment returns achieved and particularly the risk-free discount rate". It is where you choose to place your money and the rate of return you achieve upon it. I think we elsewhere in our submission make the point that WorkCover has, in fact, traditionally done relatively well with its investment returns but not in the more recent period, and it is the failures by way of comparison with earlier periods that are in large part driving the deficit cries now: "Is the extent of the change in our investment return performance?"

**Mr MARK SPEAKMAN:** That passage you just read refers to external factors and investment rates of return. It says nothing about poor investment strategies, does it?

**Mr STONE:** In those words no.

**Mr MARK SPEAKMAN:** Indeed, there is nothing in the PwC report that suggests that WorkCover has engaged in poor investment strategies?

**Mr STONE:** I would not want to answer for the balance of a report in excess of 288 pages without taking it on notice.

**Mr MARK SPEAKMAN:** I will invite you to take that on notice, and if you want to contradict that proposition on notice I invite you to do so.

**Mr STONE:** Thank you. I will return your page 288 to you.

**The Hon. PAUL GREEN:** Just an observation before I ask you a question: I note that you were talking about the initiatives that one can undertake in terms of getting re-employment. Some of the comments have been in terms of the impairment level. If the person went to the table and got a certain impairment percentage not knowing if they have got the lump sum, but some time later an injury could take a turn for the worse and of course they would be out of pocket. Taking that sort of approach on board, how do you propose that a new employer, even with the financial initiatives, would be able to present to a person that is getting employment? I think your comment was do not ask them whether they have had a workers compensation claim but ask them do they have a disability from workers compensation, that they are two different questions that employers should ask. Given that, how do you process that a new employer might take on someone and how can they be protected from a heritage claim, so to speak? How do you propose to work through that, because that is a big issue out there?

**Mr McMANAMEY:** The easiest way to deal with it is in the circumstances you have described you are essentially saying the deterioration, the further injury, results from the initial injury: "Because of the initial injury I am now weaker, I am more easily injured" and the like, and in those circumstances one could always relate that back to the original claim. So if someone has employed someone who has a workers compensation history and they re-injure themselves, it can always be referred back as being a consequence of the original claim to be handled by the original scheme agent as a liability for the original employer who set the train in motion in the past. That would relieve the subsequent employer of the liability, the obligations and hassles that go with it and also then avoids the impact upon premium. Part of the premium calculation is claims experience. In circumstances where you are re-injuring someone who has been injured elsewhere, if that did not impact on claims experience that would represent a significant saving—maybe not a saving, but avoids a cost to a subsequent employer who takes on board someone with a workers compensation history.

**The Hon. PAUL GREEN:** So if they have been bought out, so to speak, or the exit strategy or the lump sum payment and that has all been invested into the house or whatever it may be, I guess they are out of that ability to pay for those expenses and suddenly it gets loaded on to the next employer.

**Mr STONE:** But also bear in mind that if you do a commutation that then gives you the flexibility to take into account future circumstances. So somebody who has had a fractured ankle and a knee, if an ankle is rendered arthritic and it becomes worse and more painful overtime, you go on for as long as you can and then finally you will end up having it fused, you might eventually end up in surgery, the hip might eventually end up in replacement. If you are going to do a commutation it has got to take into account, and you get a medical opinion to cover, those future contingencies, and there is allowance made for it. Otherwise, there are people who will remain on your books for whom you have to keep a file open, for whom you have to pay for that surgery five or 10 years down the track, for whom you then pay for the economic losses five or 10 years down the track. The reason commutations work is workers so hate being left in the clutches of a workers compensation insurer that they will take enormous discounts off their future entitlements just to get the hell out of Dodge.

**The Hon. PAUL GREEN:** I guess my point was that it should not become the burden of the new employer.

**Mr STONE:** But I think there are ways to meet that.

**Mr ROB STOKES:** Is it the position of the Australian Lawyers Alliance then that there is no deficit or that there is, in fact, just a dispute about the level of the deficit?

**Mr McMANAMEY:** I think our position is this: We are not persuaded by the report; it has obvious errors as we see it and until one actually goes and has actuaries produce a report you cannot sit there and say they have got the scheme wrong. We do not know. All I can say is that if there are obvious errors in the PwC report you cannot say that is a firm basis.

**The Hon. TREVOR KHAN:** And the peer review? Because it is not only the PwC report, is it; you are criticising the peer review as well?

**Mr McMANAMEY:** No, I am not criticising the peer review, because the peer review is very careful to say that it says nothing about the assumptions; it just says on the processes they have adopted from the outside, without questioning the assumptions, that is okay. They also acknowledge that there are other ways of doing it. Other actuaries might repeat other answers. So the peer review does not touch upon what we are talking about, because it is understanding the assumptions, understanding the benefit structure they are trying to give an actuarial report about.

**Mr STONE:** We are here to talk about a set of proposals to yet again cut the benefits to workers, and part of our broader point is before you go recommending that put your hands on your hearts and say, "We have exhausted everything else. We have tried everything else; we have looked at everything else. We cannot make WorkCover run any leaner. We cannot find any other savings within the system; it has got to come out of the workers". To be frank, I do not think you are even starting from that position. What we have got on the table at the moment is just cutting benefits. The reason we raise the issues about the report from WorkCover is we want to know why are you trusting the people who have got the system into this condition to then brief the actuaries to give you the answers?

**Mr MARK SPEAKMAN:** When the peer review report says on page 3, "We have reviewed the assumptions for consistency with the available experience and trends and conclude that they are consistent or if not there are valid reasons or valid materiality considerations surrounding the assumptions used and conclude that they are suitable for differences in material", you have overlooked that, have you not, in your answer?

**Mr STONE:** They are simply saying they are within the available range.

**Mr McMANAMEY:** All they are saying is that PwC have adopted the same assumptions year in, year out and they are consistent; they are making the same mistake every year.

**Mr MARK SPEAKMAN:** They are consistent with available experience and trends, not consistent with what they have done before.

**Mr STONE:** But experience and trends is what they have done before.

**Mr MARK SPEAKMAN:** You keep misreading these reports, do you not?

**Mr McMANAMEY:** No.

**Mr STONE:** No.

**The Hon. TREVOR KHAN:** And you assert, I take it, that the Auditor-General misreads them as well.

**Mr McMANAMEY:** I do not know how much the Auditor-General knows about workers compensation. One of the big difficulties through workers compensation has always been that they have never actually allowed people to actually know the scheme, know its benefit structure, to actually get in and advise on these matters. WorkCover, oddly enough, has very little expertise about its actual benefit structure. You see it in the kind of directions they give about various cases. The hard part is just going to the actuary and saying, for example, "commutations aren't an additional liability".

**The Hon. TREVOR KHAN:** What we are now talking about is an auditor, a peer reviewer and the Auditor-General and you are essentially positing that there is a red under the bed and that all of them are to be ignored.

**Mr McMANAMEY:** No, it is not a red under the bed. What we are saying is that all of those work off a set of assumptions, and the Auditor-General says yes on those assumptions, that is fine, been in that path before. No-one has ever gone in saying, "Have a look at the assumptions". Within that report there are at least two assumptions that are undeniably wrong. While you have a report that has those kind of glaring errors in it, you have to go back and say, "What were the assumptions?" Ernst and Young do not examine the accuracy of the assumptions. The Auditor-General does not examine the accuracy of the assumptions.

**Mr MARK SPEAKMAN:** They do not examine them; they just say they review them and they are consistent.

**The Hon. ADAM SEARLE:** In terms of difficulties for the scheme from the claims management, from the scheme's insurers—or the licensed insurance scheme agents they are now called—do you have any proposals or any ideas about how they could be made to work more effectively or that arrangement could work more effectively?

**Mr McMANAMEY:** The scheme agents operate in accordance with operative directions given by WorkCover. There does need to be a significant review of those operative directions. I do understand what is happening at the moment. From where our members sit, we see certain operative directions that do not make sense. There is the classic "thou shalt not negotiate lump sums". Never made any sense at all; all it did was put an awful lot of money into the pockets of the doctors who get to write the reports. Also in the early days they touched upon the operative directive about getting independent medical examinations. The guideline basically says the independent medical opinion is the absolute last resort before one can examine it. Clearly the scheme agents should be able to use their expertise and knowledge and look at things and might turn around and say, "No, we think we need one".

There are collections of guidelines about when rehabilitation will be provided. There are guidelines that generally mean that if anyone comes along with a proposal for retraining that involves more than six weeks of paid retraining it gets no because it is contrary to a guidelines. We have certainly seen a number of cases where people say, "I have an alternative. I can go into this business. I've got it all set up but I need to do this three-month course", and the answer comes back, "No, because it is outside the guidelines." It is the extent to which WorkCover micro manages everything. They do not allow the people actually doing the claims handling to use their experience and expertise to try to get better outcomes. Those guidelines need to be revised en masse.

**CHAIR:** Thank you for your evidence today. There are a number of questions without notice. The Committee has resolved that answers to questions taken on notice be returned within three working days. The secretariat will contact you in relation to those questions, with a copy of the transcript. If you need more time, please ask for it.

**(The witnesses withdrew)**

**GARRY BRACK**, Chief Executive, Australian Federation of Employers and Industries, sworn and examined, and

**JILL ALLEN**, Manager, Research and Policy, Australian Federation of Employers and Industries, affirmed and examined:

**CHAIR:** In relation to questions without notice, witnesses are advised that if there are any questions you are unable to answer today or would like to answer if you had more time or have certain documents to hand, you are able to take questions on notice and provide an answer at a later date. Regarding in camera deliberations, witnesses are advised that if you should consider at any stage during your evidence that your response to particular questions should be heard in private by the Committee, please state your reasons and the Committee will then consider your request. Would you like to make a short opening statement?

**Mr BRACK:** No. You have the submission.

**CHAIR:** Do you want to go straight to the submission questioning?

**Mr BRACK:** Yes.

**Mr MICHAEL DALEY:** I take you to page five of your submission, in paragraph 7 at the bottom it talks about a survey of your members in February 2007 and then again in May of this year. You say, "The results of these surveys provide evidence to the inquiry that the concerns expressed by employers have been exacerbated." When you say "evidence" have you attached the results of those surveys to your submission?

**Mr BRACK:** No, we have not.

**Mr MICHAEL DALEY:** So more accurately it is your summary of the results that provide the evidence to the inquiry.

**Mr BRACK:** That is right.

**Mr MICHAEL DALEY:** Which are contained in this submission.

**Mr BRACK:** It is a descriptive term rather than evidence that you might have in a court of law.

**Mr MICHAEL DALEY:** At paragraph 10 you say "at both points in time"—that is 2007 and 2012. Most of the main areas of concern for your members are costs to their organisations, which I understand, but also the performance of their agents. Do you have any evidence about how many or what percentage of your members have raised with WorkCover the question of the performance of their agents?

**Mr BRACK:** We get about 80 calls a month, so just shy of a thousand calls a year, from members who raise problems with us about claims. They normally start off as problems about claims, where they may have gone to the agent and said, "This is an issue. It's a problem. What's happening?" The agent may say, "We've approved it". They might say, "But you didn't talk to us". So they then move from there. Typically, we will start to investigate the detail. Depending on how far it goes we may raise the issue with WorkCover on their behalf or we may send out to them somebody who will then investigate the detail, compile some information and then we will work out how far we should go. No, we do not have specific numbers. I cannot quote specific numbers, but depending on the nature of the issue we will go to WorkCover if we think there is a purpose in going to WorkCover about the particular matter.

**Mr MICHAEL DALEY:** The next bullet point mentions the role of the nominated treating doctor. Can you expand on that? When you say the role of the treating doctor, the role in what sense is a concern to your members?

**Mr BRACK:** As they are generally described, they are the gatekeepers to the system. If somebody goes to the treating doctor they get a certificate and the certificate frequently will be lacking in relevant detail. Then there is an argument about whether or not that detail is confidential to the patient. You cannot get the information; therefore as an employer you cannot make a judgement, or the doctor will not talk to the employer about the issue. The employer is trying to deal with the doctor on the question of whether there are suitable

duties that can be performed. The doctor may have put on the certificate "no suitable duties" or words to that effect. That will have come from the employee. The employee will have been asked by the doctor, "Are there things that you could do apart from your normal job?" If the employee says no, that goes on to the certificate despite the fact there has been no conversation with the employer and no clear knowledge on the doctor's part about whether or not there are suitable duties which might have been elicited had there been that discussion. So those sorts of issues arise

**Mr MICHAEL DALEY:** Where does the fault, if you like, in that arrangement lie? Is it that the scheme is designed as such, or someone is not doing their job at WorkCover, or the scheme agents are not intervening? Whose shortcoming results in this poor relationship between the doctor and your members?

**Mr BRACK:** I do not know whether you would just call it a "poor relationship".

**Mr MICHAEL DALEY:** I was just paraphrasing.

**Mr BRACK:** I understand that, but it is important to understand the distinction—at least in our minds anyway. Doctors may have the view, "I will not talk to a layperson about the issue." If they have that view then they will not talk so that becomes an issue of principle rather than bad relationship. They just will not talk. Others will talk. In other circumstances employers try to arrange a doctor who knows their workplace to see the injured person. Generally they might get a better outcome because the doctor knows the workplace, they understand what duties might or might not be available for a person performing that previous function and where they might go. So that is an advantage. I would not call it a bad relationship, but I would call it a defect of the scheme because you are trying to get to these people as quickly as possible, get suitable duties instituted as quickly as possible and speedy return to work, which generally demonstrates a faster overall recovery time. So they are the things we are after, but they do not work particularly well in quite a lot of cases.

**The Hon. ADAM SEARLE:** Throughout your organisation's submission you highlight one of the frustrations reported by your members about an inability to challenge decisions of claims agents or WorkCover or even the Workers Compensation Commission. That is at paragraph 10, but I think it is a continuing theme.

**Mr BRACK:** Yes.

**The Hon. ADAM SEARLE:** Whether it is appeals from assessment as to premium levels or decisions made by the insurer about the claims handling, it sounds like your members feel frustrated and want to have more input into what happens with injured workers at least insofar as it affects their workplaces. Have you given thought to what that increased role for your members might actually look like? I can see the frustration but I am just thinking what your organisation might be proposing in terms of solutions?

**Mr BRACK:** Despite our young years, you and I have been dealing with these sorts of issues perhaps as far back as the mid 1980s. At least I have. You are probably too young. But Barry Unsworth then raised a lot of these issues and dealt with some difficult questions. When we talk about the frustration of employers, it is over a long period of time where we have had experience of what they want to do. They want to be in a position where if somebody is injured they want to be able to send them to the doctor or take them to the doctor, get immediate access where they talk about suitable duties, get a certificate that does not close out that proposition. They want an insurer who actually vets the claim adequately and is not subject to directions from WorkCover, which they are now, that prevent them from dealing adequately with the claim.

Where they are on remuneration based on a formula, which in our view must be, and I say must be because we have tried to get hold of them for a long time and we keep on getting told by WorkCover they are on the website—I am not talking about the current regime, by the way, in WorkCover but in a previous guise. So we cannot get hold of the remuneration formula but we know from talking to them that they are remunerated for certain actions. If the actions are not consistent with good claims management it does not matter—they are the actions that they are remunerated for, that is part of WorkCover's design.

WorkCover has been unyielding, in our view, in the way they deal with agents when it comes to the question of how they treat claims. Do you approve straightaway? Do you get the 12 weeks provisional liability? All of those sorts of issues arise from the design that WorkCover imposes on the system. Then you go to the agents and you say are they the only problems that arise with the agent because of WorkCover? I think the answer is no because some agents perform better than others. That is what the data show. Therefore you have

got to look at the things the agents are assessed on, how they are remunerated, et cetera. A whole host of those things need to be changed.

But we know going back to 1985 that even when the design is changed it only takes a few years before the scheme starts to get "undermined" again by what happens in the assessment process, what happens in the court process, what happens in WorkCover, what happens when we try to deal with WorkCover or an agent on behalf of the member looking at a particular claim. In the end the rot starts to set in and the scheme starts to go down the tube. This time I think perhaps more than most WorkCover has been responsible for a lot of the design features of the operational factors. Those operational factors being poorly designed have led to a significant part of the deterioration and have left employers in a position where they cannot deal effectively with a claim.

**The Hon. ADAM SEARLE:** You also indicate the frustration as reported by your members that claims are being accepted but not adequately investigated by a claims agent. How significant amongst your members is that problem?

**Mrs ALLEN:** It is very significant. There are a large proportion of our members who call saying that the claim has been accepted and then there is no investigation at all attached to that acceptance, or it is investigated inadequately. So whatever investigation that has taken place has not, in their eyes, had a full look at the circumstances, all the circumstances, surrounding the injury.

**Mr MARK SPEAKMAN:** At paragraph 87 of your submission you agree with capacity testing but say there must be changes in the scheme to ensure that the capacity testing must be independently and properly done. What are the changes in the scheme that you say are necessary?

**Mr BRACK:** In principle if you do not have somebody who is independent—and I mean independent of the agent on one side or the employee on the other or the lawyer on the other—then the likelihood is, not universally but the likelihood is, you will get a poor outcome because the assessment is going to be slanted. We have the same problem dealing with medical issues as we do in dealing with this sort of stuff. But the capacity of the individual should be assessed medically, in our view, and there needs to be that objective factor. So it comes down to who you get to do the job and how you qualify them, accredit them, and whom you accredit in order to get the job done. I think if you look at the existing system there are various levels of medical intervention but because of the way WorkCover has accredited in one sense or in one case just about everybody under the sun irrespective of whether you might get a good outcome or a bad outcome, that was their way, in my view, of undermining the system and the outcome has not been good.

**Mr MARK SPEAKMAN:** At paragraph 52 you speak of worker obligations. You say in paragraph 53 that key provisions should be adhered to, their importance has been considerably diminished in the approach to claims adopted by WorkCover in recent years. Can you elaborate on what you mean by that last sentence of paragraph 53?

**Mrs ALLEN:** This is the return to work. Well, in practice the worker obligations are pretty much overlooked. In many cases we find that workers act as if they have no workplace obligations at all: that they are not in fact employed, that they are off on some sort of special leave, that they do not even have to maintain any contact with the workplace. So in terms of making reasonable efforts to return to work, in many instances we just do not see it happening and we do not see the agent attempting to drive that. A lot of this will often depend on how effective the rehabilitation provider is but unfortunately we have seen that there are a lot of rehabilitation providers that are not doing what we think they should be doing within the scheme as well. As you are aware, there are very detailed return-to-work guidelines that are published by WorkCover. They set out the worker obligations very, very clearly, but whether they are brought to the attention of the worker as clearly and directly as we think that they should be in some instances, that is not apparent to us. It also points to the fact that section 38 really has not been working. That goes to the nub of the capacity-testing question and to our response to this question as well.

**Mr ROB STOKES:** I have just a couple of questions relating to pages 14 and 15 of your submission and the issue of the role of the general practitioner [GP]. You raise some issues relating to the role of general practitioners in assessing workplace injuries. Do you consider the general practitioners might be conflicted in this role? Is that what you are getting at?

**Mr BRACK:** I do not think there is much doubt that some general practitioners are conflicted. If somebody walks in the door, they are their patient, they are the family member who is part of the whole history

of patients that come there, and when those people come there and they say, "I've got this condition", the general practitioner says, "He's got this condition." When they ask, "Are there suitable duties?"; "No, there are no suitable duties", and they write, "No suitable duties." I think sometimes that general practitioners think, "This is covered by insurance. Therefore, there are no consequential problems." Perhaps if you have a shunt with your car and you say, "I'm insured, so therefore everything is covered", well, I think there is perhaps a view that, "If I say this on behalf of my patient, there will be no problems for the employer because it is covered by insurance", whereas we know that the multipliers built into the insurance premium formula are so great that there are very significant problems associated with the declaration that there is an issue, and the failure to get them back to work quickly.

**Mr ROB STOKES:** That point is an interesting one. I know it is a difficult thing to see, but if there could be any sort of evidence in relation to that, it would be useful. I understand what you are saying and I realise it is a difficult thing for which to adduce evidence, but perhaps you could take it on notice.

**Mr BRACK:** I would hate to claim it as evidence, but if you looked at various programs like *A Current Affair*, and others—I know that people would perhaps rail against that.

**The Hon. ADAM SEARLE:** Oh, that is a big stretch, even within the limits of a more flexible approach.

**Mr BRACK:** But, no, let me make the point: They have gone around and they have sent people out there—they are stooges, people paid for by the station, and so how much do you believe them, but nevertheless there is an issue—and they ask for a doctor's certificate. On camera, they say, "Oh no, I'm not sick. I just want a certificate." And they give them the certificate. So there is an indication, but can we actually provide the evidence—I mean, real evidence, not that mickey mouse stuff? The answer is we cannot. We can tell you what our members have told us, and over a period of years we have been told that so consistently, we believe it.

**Mr ROB STOKES:** The next point is in relation to your suggestion of an independent audit of occupational physicians. What is an occupational physician?

**Mr BRACK:** Well, this would be somebody who is properly qualified and accredited—not just a general practitioner, but somebody who understands the workplace and what happens in the workplace; what physical movements and motions are capable of being carried out in the workplace for somebody with that particular kind of injury, or that particular circumstance. With the best will in the world, general practitioners are trained as general practitioners. You cannot blame them for that, but they will not necessarily have the skills to deal with what arises in the workplace and whether suitable duties will or will not be available, even though that is a fundamental issue in this whole system.

**Mr ROB STOKES:** Just one final question on that: How would you see that independent body operating? Could you just speak to that little part of your submission?

**Mr BRACK:** Well, it certainly would not be by WorkCover saying, "You shall have this person." More likely, it would be the agents saying, "We will have that person." There would be a need then to guard against the proposition that they pick a hanging judge, for example. I think the employee's side legitimately would be able to say, "Well, these people have that kind of batting average, and that's a worry." So I think you have to make sure there is objectivity in the kind of assessments they make. Even though this is not the general practitioner, we are talking about a specialist kind of function where all of the problems could nevertheless arise. Who do you get your work from? I get it from the agent so, because I get it from the agent, I give the agent what they want. You would obviously have to guard against that, but we are moving one step away from the person who is tied to the customer.

**The Hon. TREVOR KHAN:** I take you to page 106 of your submission, the final bit, and put this to you. This is the part where you agree with the proposition that strokes/heart attacks should be excluded. If you go to paragraph 22 of your submission on page 10, you deal with the work-relatedness issue. Is what you are calling for not necessarily the exclusion of a particular class of disease or injury but, rather, the adoption of or a tightening up of section 9 and 9A so there is a greater correlation between the employment and the injury or disease that is sustained/incurred?

**Mr BRACK:** That is the broad proposition, but I guess it has currency in relation to heart attacks and strokes, et cetera, which might physically occur at work; but, if they happened to be at home at that moment, then they would have occurred at home.

**The Hon. TREVOR KHAN:** Indeed, but you raise issues of stress-related claims. We had such cases as *PVYW v Comcare (No 2)*, which was the famous light falling off the wall and onto the bed, or in fact onto the participant.

**Mr BRACK:** Onto what was on the bed, yes.

**The Hon. TREVOR KHAN:** Indeed, with that style of thing, the question is: Is the relationship between the activity and the employment, or the lack of connectivity?

**Mr BRACK:** I hesitate to say so concretely that it is only about tightening up of that issue. If that tightening up got the outcome that we seek for it, I would agree with it. But if, in the end, it was only tightening up in name and we had the sort of deterioration of that issue through decisions of the courts, and it did not end up in a tightening-up at all, then I would say, "Give us something else."

**The Hon. PAUL GREEN:** We discussed a previous submission and the ability for an employer to respond to medical investigations with a pre-filing statement within 42 days, which means that a plaintiff's expert evidence is almost never challenged because employers' representatives do not have time to obtain proper expert reports. What would be an appropriate amount of time? Do you have an opinion of your members as to what is an adequate time?

**Mr BRACK:** Well, I think adequate time. As soon as you put a number on it in this system—for example, agents have to respond within 21 days to the first report of the claim, so what do they do? They respond on day 20 and a half because that is the way they get remunerated—the whole system dictates the time frame. If you are looking for a concrete number, I do not have one: I just say "adequate time".

**The Hon. PAUL GREEN:** I am a bit concerned because, obviously, in rural and regional Australia, given the accessibility to specialists or some reports—

**Mr BRACK:** Not available.

**The Hon. PAUL GREEN:** —you will be lucky to get in within 42 days just to your general practitioner these days. I am just wondering whether there is a selected number.

**Mr BRACK:** Therefore "adequate time" in those circumstances would be greater.

**The Hon. PAUL GREEN:** Fair enough. I draw your attention to point nine of your submission. I wonder if you could elucidate on this a little, particularly the last sentence?

**Mr BRACK:** Well, that was a response by members, so they were asked the question, "Have you reduced your employee numbers as a result of ...?" Now we have a higher number. Can we claim that there is no rubber in the answer? We would not seek to claim that this is statistically unchallengeable, but it is an indication of a greater incidence among our membership. Over a period of time we can make a judgement about how frequently the claims come in.

**The Hon. PAUL GREEN:** My point relates to the last sentence, "The number of employers who have actually reduced their employee numbers as a consequence of workers compensation costs has increased from 9 per cent to 15 per cent." Have they not taken employees on, or do they have employees who are off crook, and therefore have not taken on any further persons?

**Mr BRACK:** Put them off?

**Mrs ALLEN:** This is actual reduction.

**The Hon. PAUL GREEN:** They have put them off.

**Mrs ALLEN:** This is interesting because, in our experience, employers put people off as an absolute last resort. They will reduce hours and they will do whatever they can before they reach that point. We think that is a very telling indicator. We did that survey in 2007 on our own initiative and instigation because we were getting so many calls from members ringing alarm bells about the operation of the scheme and the way that claims were handled. We did the survey to try to get an aggregate picture of what was happening. At that point they were saying they had reduced numbers specifically because of workers compensation costs, so presumably they had been impacted by them. They were experience rated and had been impacted by the cost of claims. That seems to have gone up. There may be other factors at work but we asked the question specifically because of workers compensation costs in the broad.

**The Hon. ADAM SEARLE:** On page 21 of your submission you discuss the issues paper referring to a drop in average premium rates of 33 per cent since 2005 and yet 85 per cent of your members do not report any decrease in their premiums; they actually report increases. Is there something particular about the composition of your membership in terms of industry?

**Mr BRACK:** No, I think this is spin. When you say there has been a drop in premium rates that is different from a drop in the actual premium charged because the way you calculate the premium is to take a rate and multiply it by your wages and you get a base premium. Then you add various other things associated with your claims experience costs and you get an outcome.

**The Hon. ADAM SEARLE:** Is it only something like 12 per cent of employers who have individual claims experience built into their premiums?

**Mrs ALLEN:** Yes, that is right—12 to 14 per cent.

**The Hon. ADAM SEARLE:** Does that mean that 88 per cent of your members do not have experience rating?

**Mr BRACK:** No, we are like the distribution of the economy, if you like. There are a lot of small employers, a lot of medium size employers and a few large employers. That is true, but the ones responding to this survey—it is not necessarily about the distribution, it is about who answered the survey—talk about the premium rate reduction but that does not necessarily dictate the final premium that is payable. I understand the point you are making.

**The Hon. NIALL BLAIR:** On page 18 of your submission, in relation to deemed workers, there is the comment that WorkCover has devoted substantial resources to attain 100 per cent coverage, including basically everyone that is an employee being brought under the workers compensation system. Can you expand on that and offer an alternative?

**Mr BRACK:** That means that they sent out auditors, who are "hanging judges" in our experience. They say, "You say this fellow is a contractor. Show us where the contractor has advertised that they have other business and they are conducting an arm's length business." They are unrelenting in their determination to find people who in the ordinary course of business you might think were contractors but who they say are employees. That does not mean that they are all contractors. Quite clearly they will not all be contractors but the line taken by the people engaged by WorkCover, or the agents who go out and vet, is a fairly unrelenting view. That is about a WorkCover view and certainly a union view that there is no such thing as a contractor. They do not want any such thing as a contractor.

**Mr MICHAEL DALEY:** On page 45 you talk about seriously injured workers. What is a definition of a seriously injured worker that your members would accept?

**Mrs ALLEN:** That is paragraph 76 on page 37.

**Mr BRACK:** Can you repeat the question?

**Mr MICHAEL DALEY:** In paragraph 1.02 you say that you agree there should be a cap on medical benefits but the cap must be structured so that those seriously injured workers who require ongoing medical treatment receive this for as long as there is a genuine need. There has been some discussion in evidence put to the Committee today about what is a seriously injured worker. What is a reasonable definition of a seriously injured worker by reference to percentages of injury or some other definition?

**Mr BRACK:** It is a question of how injury is assessed. One of the underlying questions here is about the 15 per cent or 30 per cent or whatever the number will be. We have been concerned for some time about what we call the deterioration in those assessments; that is, it has become easier and easier to be assessed as more than 15 per cent whole-of-body injured and if you went to 30 per cent our fear is—

**Mr MICHAEL DALEY:** You would be dead.

**Mr BRACK:** That was the precise proposition about 15 per cent. However, the 15 per cent has been weakened and watered down by the aggregation of various things—ankle, knee, elbow, arm et cetera—

**Mr MICHAEL DALEY:** Do you have any evidence you could put before the Committee on that? I would love to see it. You can take it on notice. I would like to see your evidence about the 15 per cent being watered down to the extent you say it is.

**Mr BRACK:** Okay, we will take that on notice.

**CHAIR:** Thank you for attending today. There are some questions on notice. The Committee has resolved that answers to questions taken on notice be returned within three working days. The secretariat will contact you in relation to the questions on notice. Those questions will be marked in the *Hansard* transcript and if you need more time feel free to ask us.

**(The witnesses withdrew)**

**GREG PATTISON**, General Manager, Workplace Solutions, NSW Business Chamber, and

**PAUL ORTON**, Director, Policy, NSW Business Chamber, sworn and examined:

**CHAIR:** Welcome and thank you for attending. Witnesses are advised that if there are any questions that you are not able to answer today but that you would be able to answer if you had more time or certain documents at hand you are able to take the questions on notice and provide us with an answer at a later date. If you consider at any stage during your evidence that your response to a particular question should be heard in private by the Committee, please state your reasons and the Committee will consider your request. Would you like to make a brief opening statement?

**Mr PATTISON:** Yes. There is a certain sense of déjà vu about where we are today. In 1995, the scheme faced a crisis which is hard not to compare with the situation that faces us today. There was a rapidly deteriorating funding position and a surplus of $900 million disappeared in a fairly short time. The first response was to increase premiums by 40 per cent, and then by 12.5 per cent. Despite those increases the scheme's situation continued to deteriorate. Clearly, just increasing premiums was not the solution. In fact, the cost of the scheme continued to deteriorate; but for the fact that the Government put a cap on premiums they would have been well over 3 per cent. There have been a number of early initiatives to try to fix the problem. Some went to the design of the premium system—not so much the system itself but the number of premium rates that were in the system—and other changes including the reversal of earlier increases to lump-sum benefits.

There were changes following the Grellman inquiry as well, which sought to increase the focus on injury management and it included a commutation program. Those interventions had some positive effect but only in the short term. They were quickly overwhelmed by the underlying drivers of scheme performance. It was not until some fundamental changes were made that we started to see the premium system and premium rates turn the corner and track down. They were then reinforced by further changes following Mackenzie, which created licensed insurers, some other initiatives on injury management support for injured workers and employers, so we got the changes coming down. That took several years from the time the scheme first was in trouble until we started to see a change in premium rates and there were about 10 years before there was any relief on premiums.

In our view we have similar sorts of cost drivers driving the scheme now. So, we have an increase in the duration of claims and, what has been mentioned more than once today, the lump-sum culture. Looking at the situation we face, there are some lessons we need to take from the last time we were here. Certainly the scheme was in the position it is now. Increasing premiums might balance the books but they do not fix the problem. As you have seen from our submission, increasing premiums will have an impact on jobs and job opportunities in New South Wales. That is what our members are telling us. Tinkering at the edges might give some short-term effect but only for a limited time and you need to go to the scheme cost drivers if you are going to get sustained change. The other thing you need to do is make sure all the players in the system, as best you can, know there is a new paradigm. The rules have changed and they have to adjust to those changes.

Then, perhaps most importantly of all, you have to monitor, review and refine those changes. The problems we had in 1995 did not appear overnight. The problems we have now did not appear overnight. So, there needs to be a constant monitoring and adjustment to the scheme—if you will, the price of an effective and affordable workers compensation scheme is eternal vigilance, if I can pinch that from the RSL. We have raised a few other things in our submission. They go to such things as the role of claims agents and the relationships with WorkCover. We are sure how much of a problem rests with the agents, how much rests with WorkCover or the interaction of the two. That is a problem that needs to be sorted out. This morning the scheme actuary talked about a centralised IT system. To my knowledge there have been one of two attempts to look at it over the past 15 years.

It has been rejected on the basis of cost. It seems to us, given the size of the scheme and the sorts of improvements you need to make to get a positive cost benefit out of the centralised IT system, the benefits are probably quite modest. Finally, if you are an experience-rated employer in New South Wales, if you are one of the 32,000 or 12 per cent to have your premium calculated using the experience formula, the odds are you are not likely to see that formula as being fair or balanced. That is compounded by having premium notices and other communications that you cannot understand. One of the purposes of the premium system, the experience-rating system, is to send signals to employers to let them know they are being rewarded for good performance

and that their premiums are going up for bad performance. At the moment, we are sending out smoke signals that nobody can read.

**The Hon. ADAM SEARLE:** Just to take your last point first about experience rating for certain employers, at the moment about 12 per cent of employers are experience rated. Is your organisation advocating for more employers in the system to be experience rated as a component of their premium?

**Mr PATTISON:** I think there is a reasonable question, and I do not know the answer to it, but a few years ago the experience rating was removed for those employers between $3,000 and $10,000. We supported the move because experience rating at that level is entirely punitive. If you have a premium of about $10,000 and you do not have a claim you get a discount of about 3½ per cent. If you have a claim your premium could go to $15,000 or thereabouts. It was of questionable value and certainly a disincentive. It would be reasonable to have an investigation of what other alternatives there might be. We are not advocating extending the experience-rating system as it stands but perhaps we need other things in there.

**The Hon. ADAM SEARLE:** Not to put words in your mouth, for employers to fall into that range, if you are not going to expand experience rating, you are suggesting there needs to be other signals sent to those employers by the system in some way, industry and design, to reward them for good behaviour and discourage them from other behaviours that are contributing to the scheme costs?

**Mr PATTISON:** I think some form of motivation, both positive and negative, is warranted and needs to be looked at. One of the things we do need to understand, though, is how you best design it given, even at that level, the odds are that claims are likely to be infrequent. There is design work to be done. I do not know what the answer is but I think it is worth looking at.

**The Hon. ADAM SEARLE:** At that level, although any individual employer may not have that many claims, if any, across the whole system there are a number?

**Mr PATTISON:** Yes.

**The Hon. ADAM SEARLE**: It is about managing risk, you would accept that?

**Mr PATTISON:** Yes.

**The Hon. ADAM SEARLE:** Therefore, anything that can be done to assist employers in terms of workplace safety would be a good thing?

**Mr PATTISON:** Absolutely yes.

**The Hon. ADAM SEARLE:** Has your organisation given any thought to what some of those ideas might be that might send those positive signals or what those proposals might look like?

**Mr PATTISON:** Not in any detail. We have thrown things around internally but we have not formed any views on it yet.

**The Hon. ADAM SEARLE:** When you do you will be sure to let us know?

**Mr PATTISON:** Right.

**The Hon. ADAM SEARLE:** You indicated your members are not sure as to between the scheme's agent and WorkCover where difficulties might lie, but it is the experience of your members from your paper that there are frustrations at the way in which claims are handled, processed and managed?

**Mr PATTISON:** Yes.

**The Hon. ADAM SEARLE:** What are the key drivers of that frustration?

**Mr PATTISON:** The manifestations are claims where the employer believes there is some reason to believe the validity of the claim. They raised that with the agent and, to the member's best knowledge, there is no investigation, no feedback and they do not know what is happening. The other thing we need to remember

about the scheme is that for the vast majority of employers—and employees, which is fortunate—workers compensation claims are unusual events. So, they make contact with their agent and they have an expectation that their agent will walk them through the process.

**The Hon. ADAM SEARLE:** And that does not happen?

**Mr PATTISON:** I do not believe it does. It is some years now since I was directly involved with workers compensation within the workplace, but my experience and my observations are that every employer who does well—whatever the workers compensation system is—when it comes to workers compensation is an employer who has decided this is something I have to manage, not anybody else, everybody else is a service provider. That is not a realistic expectation for a small business that really has a claim. It was the hope, and I was involved with Grellman and all that stuff since 1995, as a number of us have been.

**The Hon. ADAM SEARLE:** Yes.

**Mr PATTISON:** It was the hope that those changes would start to lift the level of support that employers get. We are not yet where we need to be, in my view.

**The Hon. ADAM SEARLE:** What needs to be done to assist in achieving those objectives?

**Mr PATTISON:** In terms of how it might be seen, certainly I think employers need to get more proactive engagement by the agents. Where the dilemma and uncertainty comes is that I have no doubt that they are also constrained by their operating instructions. My impression, and it is no more than an impression, is that to some extent WorkCover has sought to manage them by controlling the inputs hoping that the outputs will flow, and I do not think that works.

**The Hon. ADAM SEARLE:** Do your members have any use to challenge scheme agent decisions around acceptance of liability and things like that?

**Mr PATTISON:** I think first of all they want confidence that somebody has actually looked at it. I think they would expect some ability to question, in the event they thought the finding or determination of the agent is worthy of challenge. But I think their biggest complaint is that the claim goes in and they actually do not know what happens: "We told the agent that we thought this was actually an accident from the weekend and nobody's come back to us. The claim's been accepted" and away we go.

**The Hon. ADAM SEARLE:** Even though it is red-flagged by them, the agents are not even investigating whether there is a reported incident from the workplace?

**Mr PATTISON:** We get that feedback from our members. I am not suggesting that is always the case, but it is certainly feedback we get from our members.

**The Hon. ADAM SEARLE:** With issues like return to work, which many people and stakeholders have identified as a key area where the scheme certainly could do better, are your members generally able to provide return-to-work duties and meaningful work for injured people they have in their employ?

**Mr PATTISON:** Our membership profile mirrors the economy. So we have big businesses and lots of small business. There are varying capacities I guess to respond, depending on the extent to which the work needs to be adjusted to facilitate return to work. One of the consistent themes that come through from our members though is that where they have somebody who may be ready to return to work and has been approved for return to work, if you like, by their treating doctor, it then becomes very difficult to give effect to that. The injured worker then goes and gets an alternative medical opinion or finds some other way to avoid the return to work.

**The Hon. ADAM SEARLE:** What is the strike rate of that occurrence? Is this an impressionistic feedback from your members or is there data from a survey of your membership on which you gauge that? What is the level of information?

**Mr PATTISON:** It is impressionistic, but when we ask our members what would you like to do to improve the scheme, it is not an uncommon theme that comes through. I cannot quantify it for you, but it is not an uncommon theme.

**The Hon. ADAM SEARLE:** Again, if you do not know the answer to this question, you can take it on notice. With most work place injuries that lead to interaction with the workers compensation system, by and large do the injured workers remain in employment with your members or is the employment brought to an end by reason of the injury?

**Mr PATTISON:** I do not know that answer. I am not sure we can get that information, but we will see what we can do.

**The Hon. ADAM SEARLE:** Leaving aside the feedback you have indicated from your members about reluctance to return to work, what could be done in the system to encourage employers to actively take back into their work places injured workers?

**Mr PATTISON:** I think part of it revolves around how treating doctors might express their positions on medical certificates. So start talking about what people can do and what they cannot do. At the next level, the issues that have been raised earlier this afternoon about removing concerns from employers as to the flow-on effects that might happen from second injuries and the like is another issue that is worth considering, particularly where you are talking about people resuming work but with a different employer.

**The Hon. ADAM SEARLE:** In relation to your organisation's response to some of the ideas in the Government's issues paper, has your organisation done any costings about what those proposals might mean for your membership?

**Mr PATTISON:** No, we have not.

**The Hon. ADAM SEARLE:** Do you propose doing so?

**Mr PATTISON:** I think first of all we would like to see, as I think the Committee would, some costings from WorkCover as well and then go from there.

**The Hon. ADAM SEARLE:** I do not know if you were present earlier, but WorkCover indicated that it is not responsible for the issues paper. However, its actuaries have taken on board getting some costings on that and getting back to us.

**Mr PATTISON:** It needs to be an informed debate.

**The Hon. ADAM SEARLE:** Yes, I take that point. What do you understand to be the idea about capping medical coverage?

**Mr PATTISON:** We have section 52A in New South Wales now, which in fact was derived from the Victorian arrangement some time ago, except when it came into New South Wales the process was reversed. From what I can see by looking at the commission website, it appears to have been unsuccessful in its application. To my mind, the idea of capping is to precipitate another checkpoint, another point at which the progress of the claim is examined and a point at which there may in fact be a decision to discontinue benefits or proceed. But if there is any proceeding or continuation, it is following some rigorous investigation.

**Mr MARK SPEAKMAN:** At page 2 of your submission in the second paragraph of the executive summary you refer to a survey of chamber members?

**Mr PATTISON:** Yes.

**Mr MARK SPEAKMAN:** You refer again to that towards the bottom of page 5 and over to page 6?

**Mr PATTISON:** Yes.

**Mr MARK SPEAKMAN:** Did you send this survey to all of your members?

**Mr PATTISON:** We sent that out to about 11,000 addressees. There may have been a little bit of duplication because we sent it to everybody who receives industrial services plus the principals. Our membership is just under 9,000.

**Mr MARK SPEAKMAN:** I refer to page 13 of your submission under "Strengthen Regulatory Framework for Health Providers" and your recommendation. Can you give the Committee the specifics of the strengthening of the regulatory framework that you envisage and, in particular, any legislative change you have in mind?

**Mr PATTISON:** There have been a couple of attempts in recent times—when I say recent times, I mean in the last two years or so—for WorkCover to try to put some controls on health providers. Its approach, which has not proceeded, was to create another hierarchy of rules and WorkCover acting as a gatekeeper. We and I think a number of other organisations said that was not the way to go and that did not proceed. The substance of our recommendation really is to recognise that, in our view, you cannot effectively manage the health providers, whoever they may be, remotely. You need to engage them. There has been work with the College of General Practitioners over a few years in various places to try to help them and I think that more work can and should be done in that regard but with the various, if you like, colleges and areas of specialisation, not simply by the imposition of a new set of rules.

**Mr MARK SPEAKMAN:** I refer to page 13 on which you talk about targeted commutations. I get the impression that some commutations are okay and others are not. Where do you draw the line?

**Mr PATTISON:** I think earlier this afternoon the observation was made that the commutation program in the late 1990s resulted in a number of claims being resolved and there was a positive difference between the average amount that was commuted and the amounts in the scheme estimates. That deteriorated and it pretty obviously became a means by which agents or then insurers could clean up the tail, and at a cost to the scheme. Without being precise about what we think it might be, the program needs to be designed and controlled so that it does not become a convenient and easy way to clean up tail at a cost to the scheme. Ultimately all you are doing is transferring costs back to other employers. The targeting then would be what claims are susceptible and make sense. Perhaps the current rules are too restrictive. It is an area in which we need professional help to come up with a design. We are not actuaries.

**The Hon. TREVOR KHAN:** You have not dealt with this, but I draw your attention to complaints from your members about a failure to investigate. Part of that relates to the provisional liability issue; that is, the obligation to accept a claim provisionally within seven days. What your members are seeing is almost an automatic payment of claims, except in the most extraordinary of cases, and then the claims wander on. Is that the experience?

**Mr PATTISON:** My recollection of the advice from the actuaries when provisional liability came in, and we were all sitting waiting for a blow-out, is that it had a positive effect on the scheme generally. I am not saying that there might not have been incidents of some learned behaviour in some companies et cetera. I am not particularly perturbed about provisional liability, but I am perturbed about what appears to be an unwillingness or inability on the part of agents to respond when members say they think they have an issue with a claim.

**The Hon. TREVOR KHAN:** Is that an unwillingness on the part of the agents simply because of some bureaucratic lethargy or is it because of WorkCover guidelines?

**Mr PATTISON:** I do not know the answer to that question. It could be a combination of all those things and it could also be an issue of the agents' skill sets. At the time of the McKinsey review it was well recognised that there was a shortage of people who could work in the industry and who had the right skill sets and expertise. There is work going on now to build that through the Personal Injury Education Foundation, Deakin University et cetera. But when we talk to our members we still get similar complaints about the capability and skill sets of some claims managers, and that could be contributing as well.

**The Hon. TREVOR KHAN:** On page 15 you deal with structure and resources. The proposal appears to be that a separate workers compensation authority be created.

**Mr PATTISON:** I understand that WorkCover is about the third largest insurer in Australia. It is a large and complex operation. Given that, it should be separate with its own board or whatever structure is put in place so that it can apply the focus that is needed to manage the operation and not be buried in the general WorkCover structure. While we have had problems emerging in the WorkCover scheme, we have also had harmonisation going on. I do not know, I am not privy to it, but it seems reasonable to question to what extent attention in WorkCover has been directed towards harmonisation and all the work involved in that while

problems have been emerging in the workers compensation scheme. I think it is time for us to take a very serious look at whether we need two organisations. In doing so, we would not be dissimilar to other jurisdictions around the country either.

**The Hon. NIALL BLAIR:** Can you identify schemes that the Committee could examine?

**Mr PATTISON:** Victoria is one. The South Australian structure is separate, but it has its own problems. I think its funding ratio is about 62 per cent. Queensland and Western Australia have separate structures. The Committee could look at a couple.

**The Hon. TREVOR KHAN:** I refer to page 14 and the exclusion of strokes and heart attacks. You heard me ask questions of Mr Bracks about that and the approach to be taken; that is, whether there should be exclusion of particular diseases and the like or whether it is more appropriate to proceed by strengthening the tests under sections 9 and 9A.

**Mr PATTISON:** As our commentary probably suggests, we are not sure why section 9A is not working now in relation to strokes and heart attacks. So, generally, if that test works then that should be sufficient.

**The Hon. TREVOR KHAN:** I understand what you are saying. Let us suppose that one way to proceed is to strengthen the section 9A tests and, for instance, to make it the major contributing factor or something of that nature. The other approach would be specifically to exclude certain illnesses such as stroke or heart attack under the legislation.

**Mr PATTISON:** There is a moral hazard in that.

**The Hon. TREVOR KHAN:** There is.

**Mr PATTISON:** There may be strokes or heart attacks that are caused by the work. So, again, I do not know how many cases of this have arisen; we do not have any numbers. I presume it is not common, but it is common enough to be an issue for the scheme. I think we would be comfortable if the work-relatedness tests were strong enough.

**The Hon. TREVOR KHAN:** If strengthened, they may address some of the concerns expressed with regard to stress claims.

**Mr PATTISON:** That could be a possibility.

**The Hon. PAUL GREEN:** On page 6 you have provided some statistics about the potential increase to 28 per cent and then you talk about 400 members, 4.5 per cent, 280,000 workers and compensation. Can you run through that?

**Mr PATTISON:** How we worked that out?

**The Hon. PAUL GREEN:** Yes.

**Mr PATTISON:** We had just over 400 members who responded to the survey say there would be an impact on employment in their business if premiums went up. When we asked them how that would occur—depending on the size of the premium increase—one third said there would be terminations, a few more said they would use natural attrition and the balance said they would not fill vacancies. We get different outcomes depending on the 10 per cent. A number of respondents indicated the number of jobs that would be affected and a number did not. A number were uncertain because they had to see how their markets would respond.

What we did was take each one of those businesses that said they would have an employment impact and attribute one position to that company and then we extended it. We also did it that way because the response that we got in terms of the mix of premium size, or the mix of premiums, was different to the scheme premiums. We had a bias to those with premiums above $10,000. When you added up the numbers it was above the allocated one per company. We have discounted that again to allow for the fact that there is a tail of small businesses that may, in fact, not be in a position to drop a job. Again, we are not saying these are perfect statistics. We put it forward as an indication of the potential impact of the changes.

**The Hon. PAUL GREEN:** On top of the carbon tax?

**Mr PATTISON:** We are not saying that 12,500 people will be terminated. We are saying there will be some terminations. Most likely businesses will adjust by foregoing employment opportunities.

**The Hon. ADAM SEARLE:** You talked earlier about having an affordable workers compensation system. What level of premium do you say is affordable?

**Mr PATTISON:** That has probably shifted over time and that shift is in relation to what is happening in other places so it is affordable and competitive. If you asked me that in 1995—

**The Hon. ADAM SEARLE:** I think we did.

**Mr PATTISON:** —I would have said something around about 2 per cent. The environment has changed; workplaces are getting safer. It has to be, I think, within a sensible distance of our colleagues in Victoria and perhaps Queensland. You then need to take a look at it objectively. I do not want to overplay this point, but Victoria's rates are below ours, there are other differences in the design which you need to take into account for a comparison. For example, in Victoria they pay higher excess and medical expenses. Those things need to be taken into account to adjust a comparison.

**The Hon. ADAM SEARLE:** The structure of the economy in Victoria and Queensland is different to New South Wales in terms of distribution of businesses, isn't it?

**Mr ORTON:** Not vastly different. I think New South Wales might have more in financial services and information technology [IT], but manufacturing and agriculture would be similar to Victoria. I think that is probably the closest comparison.

**Mr PATTISON:** If we have more in financial services and information technology the implication is that rates in New South Wales should be lower because they are lower risk industries.

**The Hon. ADAM SEARLE:** It depends on how the other more dangerous occupations are performing compared to interstate comparators.

**Mr PATTISON:** And what the balance is.

**The Hon. ADAM SEARLE:** You are not aware of any work having been done on comparisons?

**Mr PATTISON:** No. There are clearly differences between industries. One of the other things that needs addressing in New South Wales is somehow we now have some embedded cross-subsidies, because of the way premium reductions have occurred, that will need to be addressed over time. There is some distortion between industry sectors.

**CHAIR:** There are some questions on notice. The secretariat will contact you in relation to the questions on notice. I ask that answers to questions on notice be returned within three days of a marked-up copy of *Hansard* being supplied to you.

**(The witnesses withdrew)**

**(The Committee adjourned at 5.43 p.m.)**