REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE No. 1

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

———

At Sydney on Monday 20 June 2005

———

The Committee met at 9.30 a.m.

———

PRESENT

Reverend the Hon. G. K. M. Moyes (Chair)

The Hon. A. Catanzariti
The Hon. R. H. Colless
The Hon. R. M. Parker
Ms L. Rhiannon
The Hon. E. M. Roozendaal
The Hon. I. W. West

CHAIR: Welcome to the fourth public hearing of an inquiry by General Purpose Standing Committee No. 1 into personal injury compensation legislation in New South Wales. The first witnesses to provide evidence today represent the Law Society of New south Wales. They will be followed by representatives of the Local Government Association of New South Wales and Shires Association of New South Wales. This afternoon we will hear from representatives from Statewide Mutual, QBE Insurance and Unions New South Wales.

The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the broadcasting guidelines are available on the table by the door. In reporting Committee proceedings the media must take responsibility for what they publish, including any interpretation placed on evidence by the Committee. In accordance with these guidelines, while a member of the Committee and witnesses may be filmed or recorded, people in the public gallery should not be the primary focus of footage or photographs. Under the standing orders of the Legislative Council, evidence and documents presented to the Committee that are not being tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by a Committee member or by any other person. Witnesses and members and their staff are advised that any messages should be delivered through the Committee clerks.

MARK RICHARDSON, Chief Executive Officer, Law Society of New South Wales, 170 Phillip Street, Sydney,

JOHN ERIC McINTYRE, Solicitor and President, Law Society of New South Wales, 170 Phillip Street, Sydney,

ROBERT STANLEY BRYDEN, Solicitor, 203 Northumberland Street, Liverpool, and

BRIAN GEORGE MORONEY, Solicitor, Level 9, 15 Castlereagh Street, Sydney, sworn and examined:

CHAIR: In what capacity are you appearing before the Committee?

Mr RICHARDSON: I am here on behalf of the Council for the Law Society of New South Wales.

Mr McINTYRE: I am appearing as a councillor of the Law Society of New South Wales.

Mr BRYDEN: As councillor of the Law Society of New South Wales.

Mr MORONEY: I am a member of the Law Society's Injury Compensation Committee.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr RICHARDSON: I am, sir.

Mr McINTYRE: I am indeed.

CHAIR: If at any time the evidence you give or any documents you tender you wish to be heard or seen only by members of the Committee, please indicate that fact and we will consider your request. Would any of you like to make a short statement before we proceed to questions?

Mr McINTYRE: I will make a statement, if that is appropriate. Today my colleagues and I are here not only to represent the Law Society, which I should indicate to the Committee is the professional association of solicitors in New South Wales with membership of more than 18,300 practising solicitors, we also represent in our submission the community. We do this because we believe that we are uniquely placed to do so and to provide some information to this inquiry. Firstly, I must confirm that in the Law Society's view this current inquiry is both timely and entirely warranted given the impact on the lives of thousands of New South Wales residents of the changes that have been made to personal injury compensation laws over the last six years. I will refer in my remarks to the Law Society's written submission, which deals in great detail with the inquiry's terms of reference and which, I am sure, members of the inquiry Committee will have read closely.

CHAIR: That is submission No. 41.

Mr McINTYRE: My remarks are going to focus on principally three areas. Firstly, I will outline the case for making other changes to tort law in this State to ensure that greater compensation benefits are returned to injured persons. Secondly, I will identify a model by which such change could be achieved. Lastly, I want to set out some other sources of information that the Committee, I think, would find most useful to pursue as part of its inquiry. Turning to the first point, we would submit that the current position in New South Wales in relation to personal injury compensation is best described as follows. The legislative amendments that were enacted from 1999 onwards have significantly reduced claim numbers and overall claims costs. There is little doubt about that, but they have done so by largely reducing in some cases and in many cases totally eliminating compensation payments to injured persons.

The second essential thing that needs to be recognised is that the insurers that are underwriting the injury compensation schemes in this State have taken the resulting savings, that is, the difference between premiums and payouts, into record profits. Lastly, the draconian changes have,

in the main, failed to deliver lower premiums, particularly in the area of public liability. The Law Society believes that this situation is both unsatisfactory and in the long-term untenable for those people in this State who are paying insurance premiums and for whose benefit and protection these laws were designed. I turn to each of the elements.

Firstly, claims numbers and benefits, it is common ground that the changes that were enacted have had a significant impact on the level of compensation available to injured persons. There is now more than enough evidence available to demonstrate that the amendments that have been made since 1999 have created clear inequalities and inconsistencies that must be addressed if we are going to restore any sense of fairness to the system. In particular, many people injured through the carelessness of others have been left with little or no right to compensation. In fact, our own Chief Justice is quoted as saying:

> … some people who are quite seriously injured are not able to sue at all. More than any other factor I envisage this restriction will be seen as much too restrictive.

One way to judge the scale of these restrictions is to look at compensation levels. As the Committee will be aware, the changes introduced thresholds and damages caps to restrict damages in all areas of tort law. For example, as the insurers themselves commented in their testimony before this Committee on 6 June, the thresholds in the motor accidents scheme have had the effect of denying meaningful compensation to approximately 90 per cent of the motor accident victims. Another way to judge the scale of these restrictions is to look at claims numbers. For example, between 2001 and 2003 civil listings in the District Court in this State fell by 62 per cent. If you look at major country venues it was even greater—70 per cent.

Insurers tell you that you should disregard the court filings as an indicator. They say that most cases are unlitigated and therefore those numbers are only the tip of the iceberg. With respect, that is nonsense. QBE's own submission to this inquiry contains a graph in relation to CTP, graph No. 2, which shows that the claims frequency reduction is down from 0.55 per cent in September 1995 to 0.45 percent in December 1999 and now 0.24 per cent in 2004. That is claims frequency measured over all claims, not just litigated claims. At the same time the average claim payment for CTP in this State has reduced from $19,600 in 1999 to $17,400 in 2004. You do not need to be much of a mathematician to work out that the amount that is actually being paid to victims of motor vehicle accidents has significantly reduced.

If we direct our attention to insurers' profits, perhaps the threshold issue is: Why are profits a matter of public concern? Our submission would be that it is obviously a matter of public concern. The detailed legislative framework within which insurers offer personal injury cover are generally established by Parliament for the community's benefit. In a very real sense the insurers only operate within the frameworks that Parliament agrees to, and Parliament obviously would only do so as long as they believe the insurers' actions are beneficial to the community at large. When an insurer takes advantage of that framework to generate an excessive profit, we would say that it is frustrating Parliament's will by inappropriately retaining benefits that Parliament intended should be passed on to injured victims. The information that is currently available indicates that insurers are making profits far in excess of what would be regarded as a reasonable margin in motor accidents and public liability.

The committee has already tendered to it the report of Mr Richard Cumpston to which I will refer. Mr Cumpston who is an actuary suggested that compulsory third party insurers had returns on capital which it got as high as 19 per cent in 2003-04. In gross terms for CTP in New South Wales, Queensland and the Australian Capital Territory the difference between net premiums and claims has grown from about $350 million in June 2000 to $750 million in June 2004. The turn around in public liability is even more dramatic. If you look at Cumpston's report it shows that by June 2004 net premiums exceeded claims by $850 million in the public liability area.

The Hon. ERIC ROOZENDAAL: Where is that shown?

Mr McINTYRE: It is graph 5.2,I believe. If you look at the MAA's 2003-04 annual report, total premium collected during that financial year was $1.45 billion. According to answers given by Mr Bowen of the MAA to questions on notice from the Legislative Council's Standing Committee on Law and Justice, total claims payments under the Motor Accidents Scheme as at 1 June 2004 were $861 million. I would suggest those estimates contrast starkly with statements that were made before

this committee that profits under the Motor Accidents Scheme are declining. We would suggest again that that is entirely inaccurate.

The true position, however, may be dramatically better for insurers. The Law Society remains concerned that major insurers are hiding profits as claims reserves in order to escape public criticism over high profits. For example, Suncorp's half yearly results to 31 December 2004 show that on top of a 59 per cent increase in overall profit from insurance to $241 million in the same period, it transferred a further $70 million to reserves by way of an increase to its prudential margin. The company has lifted its prudential margin by $163 million over 18 months, that includes the $70 million to which I referred. It now has a probability of adequacy in its long-tail insurance reserves of approximately 94 per cent. QBE's results for the year ended 31 December 2004 also showed that it increased its probability of adequacy from 86 per cent in 2000 to 94 per cent in 2004. It is our submission that the combination of that increase in reserves, together with their declared profit, would suggest that in fact their profits are considerably higher.

I should try to translate that insurance jargon, however, into some plain English. A prudential margin is what actuaries like insurers to hold in their reserves as a buffer for claims. Since the demise of HIH that prudential margin has been regulated by APRA. A probability of adequacy approaching 95 per cent is way above the 75 per cent that APRA now requires. That translates into a prudential margin of about 30 per cent. In simple dollar terms, if the actuarial assessment of a claims reserve by an insurance company tells us that the claims have cost $10 million one would put another $3 million on top of that as a prudential margin as a buffer. When the claims are paid out—if they are paid out in accordance with the appropriate actuarial assessment—then the $3 million is released from claims reserve back to the bottom line as profit. We would suggest that that is where a lot of the profit from these tort law reforms are in fact currently residing. I have only referred to two companies because those are the only two companies whose annual reports provide sufficient information for this analysis to be presented.

Insurers have argued before you that it is too soon after the reforms to determine whether the profits are excessive. In his testimony before this inquiry, Alan Mason, the executive director of the Insurance Council stated that after six years of operation it was still too early to say what insurers were making by way of profit from the Motor Accidents Scheme. He further stated that the full impact and effectiveness of both the reforms to CTP and, more importantly, public liability, are yet to be fully clear. On that basis he argued that it was premature to undo the reforms. I would say that what the Insurance Council and insurers have failed to do before this inquiry is to come clean. The only financial information they presented to you is that which is publicly available from the MAA, APRA or the ACCC. The real sources of the information needed to substantiate that claim on their part is held by insurers themselves. I think it is entirely significant that they have totally failed to take the opportunity to make a full and frank disclosure of their level of profit across their various lines of business to this inquiry.

So what are we left with? We are left with some hints by people who I think are placed well to offer them. For example, in response to the Cumpston report the insurers commissioned a brief report in response from Finity, and the actuary involved in preparing that was Estelle Pearson. As I understand it, the Insurance Council said that it would make that available to this committee and I assume that by now it has done so. We have seen a copy of Ms Pearson's report and, again, I would suggest she is well placed to make these comments. She said that tort reform has had a significant impact on the cost and availability of public liability insurance. It is now seen by insurers, both locally and overseas, as a profitable class, and this has attracted competition to the market.

That entirely coincides and dovetails with a statement made by Mr David Bowen, the General Manager of the Motor Accidents Authority who says that in relation to CTP in New South Wales, profits are likely to be up under the new Motor Accidents Scheme because claims payments are down, partly as a result of scheme changes and partly, in fact, quite significantly, as a result of a change in claiming rates. Even Mr Mason in his evidence concedes that the insurance industry has returned to profitability and has made reasonable profits in the past few years. Furthermore, he says, that profits have helped restore profitability in the public liability sector. All they have said to you, however, is that we are not making unreasonable profits. They have not proffered to you the information which would be readily available to each and every one of their insurer members to provide detailed statistical data to you in that regard.

I regret I also need to correct some inaccurate statements that have been made to this inquiry. For example, Mr Mason's statement that in 1999 and 2000 insurers were suffering losses in public liability insurance totalling many hundreds of millions of dollars, in fact, $500 million to $600 million a year in the worse two years, is incorrect. Richard Cumpston's analysis of publicly available data suggests that in terms of underwriting losses the insurers made combined losses of only about $150 million per annum during the period that he was speaking about. There were also unfortunately mis-statements to you about the significance of where profit was being derived. Where the insurers have placed reliance on APRA data in giving evidence to you they have, with respect, treated it very carelessly. For example, it was argued that public liability premiums are not a significant contributor to higher profits that insurers made during the past financial year.

Alan Mason stated that public liability accounts for only 7.7 per cent of insurers' total business. That 7.7 per cent of total business includes about 30 per cent of total business which comes from investment and reinsurance. So it is, in fact, 7.7 per cent out of 70 per cent but that also is misleading. It ignores the fact that much public liability is embedded in policies sold by insurers, such as household, fire and special risk. As a result, public liability insurance is, in fact, a much larger component of premiums collected. Even as a standalone product, public liability has become an increasingly important area within insurers' businesses.

With public liability premiums almost doubling as a percentage of their net premium revenue over the past four years, 4.4 per cent in mid-2000 to 7.7 per cent in mid-2004, public liability is a much more significant component of profit than has been suggested to you by the insurers. Likewise it is apparent that profits that insurers are generating on the Motor Accidents Scheme are a significant component of their overall profit. Mr Rogers, the general manager of commercial insurance of Suncorp stated to you, a lot of our profit, for instance, comes from CTP. APRA figures indicate that approximately two-thirds of national CTP business in this country comes from the New South Wales market.

If I turn to the question of the impact of the tort law reform program on the injured, the Law Society submits that the community has yet to see significant reductions in premiums or improved availability of insurance, both of which were hallmarks promised as part of the tort law reform process. In relation to premium levels, the insurers relied on ACCC figures. The Law Society believes that it is totally misleading to quote the premium decrease that the ACCC has referred to in isolation without looking at some of the factors that surround it. For example, referring to recent reductions in premium for public liability that does not take into account the changes that have been made in the nature of the policies that have been made by insurers since the introduction of tort law reform. By making those changes the insurers have effectively passed more risk and cost onto the insured.

As stated in the section of the ACCC report from which Mr Mason's 15 per cent figure has been derived, the report says, both the average cover limit and average level of excess has increased significantly in 2003. Further, the report says, "Across six insurers the majority of insurers increased the average levels of premiums significantly between the years ending 31 December 2002 and 31 December 2003." This indicates that in the six months to 30 June 2004, on average insureds have been receiving lower level of coverage than in 2002 due to higher levels of excess. For business, for example, higher levels of excess mean that, to an extent, businesses are becoming self-insurers because the level of cover above the excess only kicks in quite often for very high levels of claims, sometimes even catastrophe level. As stated in the Law Society's submission—it is worth repeating—even with the fall in public liability premiums recorded in the latest ACCC report, premiums remain close to double the 1999 levels. This view of rising insurance premiums is backed up by a recent survey of public liability insurance for not-for-profit organisations, which was conducted by the Council of Social Service of New South Wales.

The survey found an average increase in the cost of public liability insurance of 18.78 per cent of their survey respondents during the 2003-04 financial year and an average increase of 9.16 during the 2004-05 financial year. Some organisations actually recorded increases of above 70 per cent. For example, the sector also reported an average increase in workers compensation premiums during the 2003-04 financial year of 31.69 per cent and 28.45 per cent during the 2004-05 financial year, with one respondent reporting an increase of more than 90 per cent during that year. However, probably the most graphic example of a significant increase in public liability insurance premiums

between 2000 and the current State is the submission of the Society of Vincent de Paul, which is submission No. 15 before this Committee, which dates, "The society's insurance premium has increased from $200,000 to $600,000 since the collapse of HIH. At this point in time tort law reform has had no effect on premiums."

I would like to turn now to what the Law Society would suggest to you is a model for change. Premier Carr recently stated that the big insurers have had a bonanza with our help, and they should give some of it back. On a separate occasion he stated that he was worried about talk of insurers' profit margins being double or triple what the industry said was necessary to maintain viability, and that he would like to see further downward pressure on premiums. If there exists a premium dividend, he said, it has to be shared fairly between victims, insurers and motorists. The Cabinet Office submission to this inquiry went further, stating, "The Government has consistently made it clear that it expects insurers to pass on the benefits of tort law reforms to the community in the form of more affordable and available insurance." We would echo these sentiments.

They are entirely consistent with Mr Cumpston's analysis that, "The profits and capital of insureds appear high enough to allow better benefits to insured persons, particularly those most harshly affected by recent budget changes. Yet in the light of the reduced benefits available to the insureds under the current reforms and the apparent unwillingness of the insurers industry to disclose their proper levels or to reduce premiums in line with reductions in compensation benefits it seems unlikely that the dividend is going to be delivered to the community in the form of significantly reduced premiums." Other than waiting for insurers to reduce premiums, what options are available to this Parliament to fulfil what the Premier calls legitimate expectations accident and injury victims have of their payouts and fair treatment?

The society suggests that any effort to improve the fairness of the current system will have to focus on increasing the level of compensation to the insured, while improving their consistency with which the tort laws are applied to them. Mr Mason, in answer to questions from this Committee, agreed that there were advantages to the insurance industry that would flow from improving consistency. In its detailed submission the Law Society has set out in some detail a possible way through which such fairness can be restored to the tort system. We say that existing premium levels can find existing levels of compensation and still deliver reasonable profits to insurers. The Law Society submission sets out in detail a number of possible amendments to the current system of thresholds and to the dispute resolution mechanisms that currently operate.

I further note that in his address to the Personal Injury and Compensation Forum in June Michael Slattery, QC, the senior Vice-President of the Bar Association of this State referred to a possible increase in the role of juries in personal injury law. His thinking behind that recommendation, as I understand it, was to increase public confidence and to get away from the criticism that popular media has been addressing to "Santa Claus judges". However, the choice of model and measures for delivering this rests with Parliament. The last area I want to touch on is further information that would assist this inquiry. These are mostly set out in Richard Cumpston's actuarial report, and he points out those sources of information that are not publicly available, which may well provide the inquiry with additional information relevant to its terms of reference.

Unfortunately, it does not appear that the National Claims and Policies Data Base established by APRA will deliver the necessary information to provide greater clarity on profits, particularly on a line-by-line of insurance business basis. The Committee may need to refer to these additional sources. I might just make a quick summary of those things that Mr Cumpston suggests would assist. There have been statistics formerly published by APRA, which are not now available. For example, APRA used to publish premiums and claims for each class of insurance in each State every six months, but it has not done so since June 2002. That data would be particularly valuable, and is no doubt held by the insurers. We understand it will be published from June 2005, but there is a large gap in between. APRA also used to publish annual analysis by accident year and by State of claim numbers and costs for CTP and workers compensation, and for Australia for public liability.

Other statistics or material that could valuably be published by APRA are the recommendations of the HIH Royal commission, which recommended that all statistical returns supplied by insurers to APRA should be publicly available. Unfortunately, APRA rejected this recommendation and, instead, publishes summaries. But Mr Cumpston's view is that those summaries

are slow and not informative. He also touches on the question of prudential margin. Since July 2002 insurers have been required to add risk margin or prudential margin to their provisions for claims to give a probability of about 75 per cent. Regular publication of the risk margins that the insurers are, in fact, loading for each class of insurance would help show whether increases in claims are due to increases in claims payouts or merely increases in risk margins. As I have already indicated, that has a significant impact on the level of potential profitability.

Finally, APRA's quarterly inside statistics, with its new quarterly general insurance performance statistics, would be of increased value if they showed revenues, expenditures, assets and liabilities for each class of insurance separate. The Law Society remains concerned that the insurance industry is failing to provide this Parliament with sufficient profit information to enable Parliament to effectively monitor the industry's operation. For example, in the CTP area earlier statements made to this inquiry say that the motor accident insurers are subject to very close oversight by the Motor Accidents Authority. In reality, the industry's profits, even in that area, have not been disclosed in a way that allows them to be effectively monitored. For example, in the most recent annual review in this area the Legislative Council Standing Committee on Law and Justice disclosed that the Motor Accidents Authority does not monitor profit announcements of motor accident insurance. Nor, according to the Committee's report, could APRA provide sufficient profit information relating to motor accident insurance in New South Wales.

The same objections apply to other areas of personal injury insurance, where neither the Insurance Council nor the individual insurers themselves appear to provide profit figures on a breakdown for different business lines. Contrary to what Mr Rogers stated to this inquiry, those profits are not matters of the public record and they are not reported in their annual reports. I have taken the opportunity of getting out the Suncorp annual report and closely scrutinising it, and I can confirm to you that they are not matters of public record in their annual reports. Frankly, the situation is wholly unsatisfactory. It would significantly improve Parliament's ability to monitor insurance operations in this area were this Committee to recommend that such information be specifically provided for New South Wales motor accident insurance and also for public liability insurance. That concludes my opening statement.

CHAIR: Thank you for a very detailed rebuttal of some of the earlier evidence that we have been given.

Ms LEE RHIANNON: I am interested in some of the comments you made about Suncorp and about hiding profits. I understood it to a certain degree, but do you believe that is happening with other companies and, if so, the degree to which is happening?

Mr McINTYRE: I cannot be positive in relation to other companies because their annual reports did not make comments in relation to the level of prudential margin. For example, I chose to scrutinised IAG's to see what their position was, and it is not reported in their annual report at all.

CHAIR: Would they not be required on their balance sheet to have their prudential requirements set to one side?

Mr McINTYRE: No, they are not.

CHAIR: That would seem not to be a true and fair record of their financial performance if they do not present that in an annual report.

Mr McINTYRE: I think they merely need to state in their annual report that their reserves satisfy the APRA standard. They then, no doubt, provide other information to APRA, but it is not publicly available.

Ms LEE RHIANNON: Do you think there needs to be consistency between workplace and motor accidents, and people getting injured in the street? Do you think that is one of the key changes that needs to occur?

Mr McINTYRE: Yes. We would suggest that it is. It seems a pretty illogical system that you get a different level of benefit depending on whether you are injured in a motor vehicle accident or

you fall over in the workplace, or you are injured elsewhere. My colleagues Mr Bryden and Mr Moroney are both experts in those areas of law, and if you want to direct more detailed questions in relation to those levels of inconsistency, they are well placed to answer them. We would certainly suggest that the inconsistency in the current system is causing all sorts of inefficiencies. Mr Moroney, I think you had one example of such an inconsistency you wanted to mention to the Committee.

Mr MORONEY: Yes. I think there are a number of areas where you can identify problems as a result of the various schemes. An obvious example would be the rights, for example, that an injured employed worker has as a result of the negligence of their employer, as opposed to the rights that an independent contractor, not employed, has against the occupier of the site on which they are working—two completely different sets of rights, often with very different amounts of money involved in the outcome, yet arising from an identical accident on the same site. It seems to me that that is not easily justified, but that is what the legislation enables at this time.

Ms LEE RHIANNON: That causes problems for those people, particularly the person who is at the lower end. Can you give examples of inconsistencies that are causing problems in how the law plays out?

Mr MORONEY: Inconsistencies in what sense?

Ms LEE RHIANNON: You have given the example of a person on a worksite, one being a contractor and the other an employee. Can you give us an example of other inconsistencies that are causing confusion for people who are injured, and outline any problems in making the law more efficient in terms of meeting the needs of those people?

Mr MORONEY: I think the starting point to answer your question is that the more hurdles that are put up for claimants or victims, the more difficult it becomes for them to understand what it is they are to do to address the situation. In terms of workplace accidents, we have in place a clear threshold and clear caps in relation to the benefits they can have. A person is not entitled to what we would call common law benefits, as a general term, unless they have 15 per cent whole-person impairment. I think considerable evidence has been put before this inquiry on that.

When you go across to the Motor Accidents Scheme, the threshold is entirely different. Someone could have an accident in the course of their work that falls under both pieces of legislation. A forklift driver in a registered vehicle may well have rights under both pieces of legislation. The obvious worker versus public liability example is what I raised before. Again, motor vehicle versus public liability is an area that does arise from time to time. If a claim is characterised as a CTP claim, the assessment of damages is entirely different as compared with if it is characterised as a public liability claim.

Ms LEE RHIANNON: In terms of the impact that it is having on injured people—who, obviously, often lose out financially—do they give up because it is just too confusing and they do not think it is worth their while because it just adds more stress to their current situation?

Mr MORONEY: Most of my clients are corporate insurers. Mr Bryden is probably better placed to answer the question.

Mr BRYDEN: Certainly there seems to be some confusion between the various systems, and certainly some distress for injured workers, for instance, who will have quite a serious injury. They have financial responsibilities, to their family and their mortgage, and they are not entitled to a lump sum of any significance. The 15 per cent threshold, if they are injured through the negligence of their employer, effectively prevents most injured workers commencing a common law claim. If they do happen to be over the threshold, the other restriction is that they cannot claim future medical expenses. So there is a double jeopardy for those workers. As Mr Moroney said, there may be a contractor on, say, a building site who has a separate set of rights and is more fairly compensated. That is very confusing for injured workers. The fellow next-door might be a contractor, he is injured, and he can get reasonable compensation, whereas the employee cannot.

The Hon. ROBYN PARKER: I would like to ask about non-government organisations [NGOs] and their insurance availability and affordability. One of the promoted benefits of tort reform

was to alleviate the problem of NGOs having difficulty getting insurance. However, that does not seem to be the case. Many examples have been presented to us, for example, relating to community events being cancelled and so on. Do any of you have comments to make on why that is still the case, and on whether the claims and litigation from NGOs decreased since tort reform has come about?

Mr McINTYRE: Two things happened around the time of the HIH collapse, and I think the factors that have led to this tort law reform process are reasonably well speculated on. One of the big driving factors was a lack of capital on the part of insurers and therefore cherry picking of business. Community groups, particularly, are regarded as very low on the pecking order for insurers, and that is the reason that I think the insurers were prevailed upon to set up an organisation directed to providing some cover to community organisations.

Anecdotally, I think we would suggest that that has not been an overwhelming success. There are a number of community groups who the insurers have great difficulty in putting into a particular box or category so they can determine whether they cover them or not. I think a significant number of community groups are still not getting insurance, but I think the reason is that the insurers do not understand the risk of the organisation and therefore they simply steer away from it.

The Hon. ROBYN PARKER: Do you have a view on the way forward for those NGOs?

Mr McINTYRE: I think the initiative of setting up a body that is more directed to meeting their needs is a good one, but they need to do more work in that area and make more analysis of what a lot of these small organisations do. There used to be a minimum level of premium, $250 or something, and virtually anybody could get $5 million in cover for $250. That concept also seems to have gone out the window.

The Hon. ROBYN PARKER: A lot of concern has been expressed to us throughout the inquiry about the AMA guidelines. Do you think there is a fairer or better system of assessment than the AMA guidelines?

Mr BRYDEN: Most certainly. As you have heard from previous submissions, the system is a real failure. It is supposed to be consistent and objective, but in practice it just is not. I have seen submission No. 56 from Mr John Ellard, the psychiatrist, in which he says, "My argument is that psychiatric assessments in this area should not be done by rigid categorisation adding numbers and that judgments should be made by judicial officers, not committees and computers." I think that is the real key to it—not just for psychiatric assessment but to bring fairness back to the system. If the medical guidelines were removed from the system and a system similar to the Law Society's suggestion were brought back in, which reintroduced judicial determination as to an entitlement to general damages, that would be a lot fairer.

The Hon. ROBYN PARKER: Do you think that the judiciary is more qualified than the medical profession to make assessments of people's psychological or physical damage?

Mr BRYDEN: Yes. Referring back to the submission by Mr Ellard, I think he explains it very, very well. The judiciary does have a lot of experience. That is what the common law system is about. I think the Bar Association's suggestion of retaining juries should also be considered, because that then reflects what the community believes a compensation claim should be worth.

Mr McINTYRE: May I also make this observation. The judiciary is not going to be carrying out a medical assessment; they will have the benefit of reports by medicos. Part of the current assessment system operates on the basis that you go along to somebody who has been, for example, chosen by the Motor Accidents Authority as a medical assessor. They may be assessing you in an area that is not even their speciality. So the current system is certainly not operating fairly. There have even been suggestions that the Motor Accidents Authority has been writing inappropriately to the medical assessors and suggesting that they make amendments to their reports. There is currently some litigation in the Supreme Court to deal with that particular issue, so I cannot say any more about it. But I think you should not be immediately rushing to the conclusion that even the current method of assessment is in any way fair to people.

The Hon. IAN WEST: I thank the Law Society for its comprehensive submission. May I clarify that with regard to the 18,300 people you represent here today, you are representing all stratas; you are not just representing plaintiff lawyers.

Mr McINTYRE: Plaintiff lawyers only make up about 6 or 7 per cent of those 18,000 solicitors, so we are certainly not here on behalf of plaintiff lawyers. I might say to you that, to the extent that my evidence might be a little faltering, I am not a plaintiff's lawyer. But I have great belief in this cause, because I think that where we are at the present time is grossly unfair.

The Hon. IAN WEST: May I refer to the conclusions in your report and the paragraph commencing, "Earlier I spoke about insurance being a wonderful concept …" You refer to the issue of restoration. I want to ask a couple of questions about the vexed issue of the social concept of restoration to pre-injury condition versus cost effectiveness. In doing so, I want to refer to the second and third pages of the Finity report by Ms Estelle Pearson, submitted to this Committee by Alan Mason on 7 June. In her report Ms Pearson says that industry profitability is very problematic and cyclical. She refers to a number of issues. At the bottom of page 2 she sets out three dot points. The first refers to the history of Australia's largest insurer, the NRMA, the Mutual, which is now IAG, which returned no return on capital, and the fact that this led to artificially low premium rates. I would like you to make some comment about the word "artificial".

The second dot point refers to Suncorp, which was formerly the Government Insurance Office. Ms Estelle Pearson makes the comment that with regard to the privatisation of the Government Insurance Office, the return on capital policies, which referred to no profit, caused premium rates to remain low. The third dot point refers to the fact that HIH, together with FIA, market leaders in commercial classes of insurance, had this cost-risk philosophy which led to the collapse of HIH. Ms Estelle Pearson said that the profitability in the industry is very cyclical. In assessing cost effectiveness against the social concept of restoration, is it feasible for the two to have equal balance?

Mr McINTYRE: I think it is, notwithstanding the fact that the NRMA was a not for profit organisation. They were only one of the players in the market and they were still operating as an insurer, so they were still needing to charge premiums which were sufficient to cover all outstanding claims and an appropriate prudential margin and meeting all their costs of administration and so on and so forth. What you do notice, however, from the Estelle Pearson report is that the insurers are now considerably ratcheting up what they see as appropriate in terms of a return on capital. You will see comments that they are now aiming at the range of 12 to 15 per cent whereas previously their expectation was something in the more modest 8 to 10 or 8 to 12 per cent range. So I think that is one point.

The other thing that should be borne in mind in relation to the cyclical nature of the insurance industry is that all of these changes were driven when the insurance industry was on the bottom of the cycle. If you go back—and her report, I think, has got data going back a number of decades—you will see that the insurance industry often drops into a trough for a year or so and then considerably increases for some seven or eight years. So it is to their advantage to be driving change when the market is in a trough because that is when the market looks absolutely worse for them. What they now do not want to tell you is how well they are doing.

The Hon. IAN WEST: My question goes to, again, the issues of the six dot points on page three in assessing insurance industry profitability. Again, maybe I should ask the question another way. If the insurance industry is so cyclical and reliant on so many variables, is it responsible socially for us to say that the cost effectiveness of insurance is the only measure of whether or not we can have a certain level of restoration of people back to pre-injury condition?

Mr McINTYRE: I need to answer probably from a fairly basic, philosophical point of view, that the essence of tort law is that so far as possible a person who is in the wrong should be able to, so far as they are financially able, restore the person they have injured to their pre-injury situation, so far as it is capable of being done in monetary terms. The reason that we have insurance is that the majority of us do not have the resources, unfortunately, to do that. Insurance, of its very nature, is a mutual sort of concept. We all take out insurance; we all contribute to the vast pool so that there is a sufficient pool of money to meet those who are unfortunately injured.

Many of us have paid insurance for many, many years and have never either made a claim ourselves or actually been the recipient of a claim, but we still contribute because it is socially sensible to do so. I think what we have to be alive to is that the insurers themselves have to fit within this social concept and they have to play their part. Their part is obviously to be viable. You do not want the insurance industry going down the gurgler, but you also do not want them to be the sole beneficiaries of the system, and at the present time we would say to you that they are the sole beneficiaries.

The Hon. IAN WEST: In looking at cases that were taken before the courts, there were issues in the community about Santa Claus judges, ambulance chasers, the perception of excessive costs by lawyers, and this advertising that was causing all these problems in the cost effectiveness of insurance. Have you got any comments on that?

Mr McINTYRE: If I can deal with those probably one at a time. A lot of that, we would suggest, was media hype. It is very, very easy to highlight every three or four weeks a case where an injured person has received a large amount of compensation, but, by and large, if you analyse those cases they often involve extremely serious injuries where persons are either rendered into wheelchairs or they suffer brain injuries such that they cannot continue to function in the sense that all of us do. The criticism of Santa Claus judges I think was unfair because they were focusing on very large payouts, which, by and large, were covered by insurers in any event.

The suggestion of the reintroduction of juries I think is one attempt to focus the idea on let us not look at how much this person has received but let us look more closely at the question of whether the community believes that that person was entitled to compensation. If you reintroduce more broadly for large claims the concept of a jury, in our view, or in my view particularly, you restore the concept of public acceptability to those verdicts, because if you have got a jury of four or six people who are determining liability it is very hard to criticise the Santa Claus judge because he holds for the plaintiff.

Your other point was in relation to ambulance chasers and advertising. The changes that were made to advertising regulation for solicitors was not something that the Law Society sought nor is it something that the Law Society favours. The position in this State prior to 1993 was that solicitor advertising was considerably limited; it was essentially limited to things like business card-style advertising, if I can call it that. You could advertise the whereabouts of your premises, your telephone number; you could advertise that you accepted instructions in certain fields of endeavour, but that was pretty much it.

The changes that were made were driven by competition policy and the Law Society strenuously opposed them, and it is still Law Society policy that we oppose the sort of advertising that occurred in that period of time. But to suggest that that advertising was in fact a driver of any sort of litigation explosion has never been borne out. It was again, I think, a great piece of hyperbole, but something which has not been borne out by any statistical material.

CHAIR: I want to move to the second round of questions.

The Hon. IAN WEST: In measuring profitability of the insurance industry, Estelle Pearson on page three says that there is the issue of the premium cycle hitting its peak, good economic conditions, favourable weather conditions, favourable claim environments like tort reform, and strong equity returns. Within the parameters of those vagaries should we determine compensation levels?

Mr McINTYRE: We would say you would because where they are measured at the moment, they have been measured from the bottom end of the cycle and if you are going to set benefits based on the bottom end of the insurance cycle where they are having negative returns on investments because they have got a lot of money in the share market and the share market has gone into negative territory, if you are going to determine benefits by that part of the insurance cycle you are never going to get a proper level of benefits, you are always going to get higher premiums and you are always going to get higher levels of profitability. If you want to deliver higher profits to the insurance industry that is the way you would do it.

Ms LEE RHIANNON: Do you think there is any role for the Government to re-enter the insurance market in any aspects of workers compensation or public liability?

Mr McINTYRE: I think that is a matter for government policy but I must say to you, I suppose by means of disclosure, that the Law Society has currently incorporated and is operating a professional indemnity insurance company, which is wholly owned by the Law Society and is APRA licensed, which replaces a mutual fund that we previously had. The reason we are doing it is that we are trying to deliver not-for-profit insurance to our members. Whether the government wants to get back into things which are generally recognised as private enterprise is a matter for government policy, but if you are not required to deliver massive profits to your shareholders you certainly are, I think, able to deliver insurance at a better price. Whether an organisation that is run by the government is theoretically as efficient is some economic argument that I would not like to delve into, I am afraid.

Mr MORONEY: Can I also say, in terms of workers compensation, the concept of private insurance is not the same as it is over in public liability insurance.

Ms LEE RHIANNON: Do you want to elaborate?

Mr MORONEY: WorkCover are the central fund and, as I understand the legislation as of July this year, I think they will be the sole insurer, with the private insurers solely as appointed agents under the scheme.

The Hon. ROBYN PARKER: Just following on from what we were saying before about going back to a system where there were juries introduced, do you think that that is going to increase litigation and increased costs?

Mr McINTYRE: I do not believe so. Juries, I think, are not an inherently expensive adjunct to proceedings. They can be funded by a jury fee, if the parties seek to have them. It is not going to add significantly to the length of the case because the judge has to sit and listen to all of the evidence in any event. I think the advantages of having juries, in terms of public perception, would outweigh any small disadvantage there may be, for example, in either jury fees or slightly longer trials.

The Hon. ROBYN PARKER: In terms of fault-based compensation for negligence, I wonder if you have some comments to make about taking away a lot of the responsibility in terms of duty of care and what message, in terms of the reduced penalty or no penalty at all, that careless behaviour might present to the public?

Mr McINTYRE: If you go all the way down the track to no fault, the inquiries that have been made in relation to the New Zealand no fault system would suggest that there has been a significant increase, for example, in workplace accidents and other areas of accident. So I think fault as a concept delivers a number of benefits to the system overall: it makes people more conscious of their responsibility to care for others and I do not believe it is just sufficient, for example, to say, "I will introduce a more stringent occupational health and safety situation", because occupational health and safety, for example, is aimed at the top of the tree; it is aimed at the managers and the bosses. A lot of accidents occur elsewhere and the persons who are causing those accidents I think need to be aware that they have a responsibility to their fellow workers, their fellow road users and just people in the community generally.

The Hon. ROBYN PARKER: Would you like to comment then on proposed changes that have gone through the lower House in this Parliament in terms of employers' responsibilities? How is that going to affect the compensation for negligence?

Mr McINTYRE: You are talking about workplace accidents?

The Hon. ROBYN PARKER: Yes.

Mr McINTYRE: In my view it probably will not make much difference at all.

Mr BRYDEN: Could I make a comment generally dealing with that area? One of the things I am seeing in practice is significantly injured workers not being able to bring common law claims for lump-sum compensation, yet, on the other hand, WorkCover would fine the employer. We are getting a situation where significantly injured workers are denied adequate lump-sum compensation, but the employer is still making a substantial payment by way of fine to WorkCover.

The Hon. ROBYN PARKER: And, presumably, increased premiums the next year round. What are your thoughts on the ability or inability, consistency or inconsistency, and efficiency of the CARS assessors? The Committee has heard some evidence in relation to that aspect.

Mr BRYDEN: The CARS system, of course, deals with the economic loss components and the care components, and we are finding that the system is reasonably satisfactory. There have been some delays that they have not addressed, but we are finding that is a good system. The real problem we are having is with the MAS system, with the medical assessments of the whole person impairment. I think that is the area that really needs looking at.

The Hon. ROBYN PARKER: In what way?

Mr BRYDEN: Inconsistency. As I mentioned earlier, it is supposed to be an objective system. The level of the doctors doing a lot of the assessments is inappropriate and you will get widely varying assessments on a system that is supposed to be objective.

The Hon. ROBYN PARKER: I think last week the Premier announced changes to the compensation system for catastrophically injured people. I do not have the details about what that means. I wonder if you have additional information or comments? If the system is working why would we need to introduce another level of compensation? Surely these people would fit under that threshold?

Mr McINTYRE: This relates to the level of compensation directed to those persons involved in motor vehicle accidents who are themselves at fault. Under the common law system, because they are responsible for their own injuries, they receive no compensation. This is a system of providing them with some benefits. As I understand it, the benefits will not the lump sum financial; they will be long-term care, ongoing medical expenses and things of that nature, and they will be for those people catastrophically injured. I think the suggestion is that it will involve about 120 people year.

The Hon. ROBYN PARKER: Are they not currently covered by the legislation?

Mr McINTYRE: They are not currently covered under CTP because, under the CTP system, you have to establish that someone else's negligence contributed to your injuries. These are people who, for example, run off the road whilst intoxicated and unfortunately seriously injure themselves.

CHAIR: Single driver accidents.

Mr McINTYRE: Yes.

Mr BRYDEN: One of the things that will need looking at in relation to that system will be ongoing growth in administration costs. That could become significant in the years ahead if it is not a system based on a lump sum, where the administration costs are ended. It is an ongoing payment system and we could find in the years ahead an enormously growing bureaucracy administering such a system. That is one of the real dangers we have to be careful of.

The Hon. ROBYN PARKER: In your submission you made some suggestions for improvements to our system. How do we compare with other States? Is there, in some of the other States, a way forward that is working well?

Mr MORONEY: You will see, on page 33 of the Law Society submission, a comparative table. It commences with the civil liability scheme and then discusses the motor accidents scheme, and it looks at the various thresholds and caps in each State as a starting point of any comparison. In terms of the how the states are working compared with New South Wales, in one sense you are comparing

apples with oranges. New South Wales accounts for 50 per cent of Australia's insurance market, so that to compare it to South Australia is not a very good comparison to draw. I think in reality the best comparison for New South Wales is New South Wales.

Mr McINTYRE: I think it is fair to say, though, that the insurers would not be subsidising the other States out of premiums they are receiving in New South Wales, so they must be doing very nicely here, thank you very much, if they can afford to be paying a wider range of compensation benefits in the other States.

Mr MORONEY: Interestingly, for instance, in the area of public liability, Queensland has a particular system that requires a pre-claim procedure quite different to New South Wales. It has no caps and no thresholds. On my understanding of the way the system is working up there, it is, on all reports, considered to be working reasonably well. Whether that is attributable to the pre-claim procedure that is in place or to better insurer practices and better industry practices generally, I do not know.

The Hon. ERIC ROOZENDAAL: I have been listening very intently. I sort of gather that the main thrust of your submission and what you have said you today is basically that insurance companies, for want of a better description, misrepresented the position earlier in terms of losses. I think you put forward a figure of between $100 million and $150 million in losses as opposed to the $600 million that they are claiming. Would that be right?

Mr McINTYRE: That is correct.

The Hon. ERIC ROOZENDAAL: Following on from that position you are of the view now that insurance companies are pretty much the problem in terms of the lack of lowering of premiums. Would that be right?

Mr McINTYRE: What we say is that, considering the significant drop in claims numbers and claims payouts, and increased amounts they are putting into their reserve margins, and what they have disclosed as profit, the balance of benefits and profit is just way out of kilter.

The Hon. ERIC ROOZENDAAL: You are advocating some changes, including juries and a few other things. I you aware that with the changes in the workers compensation scheme expenditure on legal fees has significantly declined as a percentage of costs? Will some of the suggestions you are recommending now see those legal costs increase again?

Mr MORONEY: No, is the answer. Primarily because in large measure there are no common law claims—a small number, but not a large number.

The Hon. ERIC ROOZENDAAL: And, in terms of public liability?

Mr MORONEY: In terms of public liability there is no data to suggest that a claim heard by a jury costs more. There is no data to suggest that. There is no data to suggest that if you introduce a jury system that there will be more claims. Indeed, the statistics would suggest there have been more claims since juries were not used in civil cases in New South Wales than before they were. In terms of legal spending on workers compensation—you made that point—the Cabinet Office submission before this Committee suggested a figure for legal payments in workers compensation having risen from $200 million per annum in 1996 to $350 million per annum in 2000-01. If that figure is right, and I am not sure where it is derived from, it is significantly less than the public statements made by the Special Minister of State on that issue during the course of the reform program.

On my recollection of that figure the saving was estimated to be of the order of $800 million. I could be wrong, but I stand corrected. There is no evidence to suggest that legal fees have significantly dropped under the new system, in terms of lawyers' costs. There are other legal costs within the system that may well have been affected by the changes—medico-legal expenses, investigation expenses, court costs and administration costs. We cannot talk to that because those figures have not been released to us by WorkCover.

Mr McINTYRE: You also need to factor in the cost of administering the current system. The Compensation Court at the time it was abolished was the most efficient court in the British Commonwealth in terms of getting through claims, and case management. I am not sure the same can be said about the current Commission. We also do not know how much extra WorkCover is gobbling up in this whole process as well.

The Hon. ERIC ROOZENDAAL: There would have had to have been a substantial reduction in income for some of your members from the reforms, would there not?

Mr MORONEY: Yes. I think that is fair to say. But, whether that there is a large number, I am not aware. The details survey has not been performed on that as far as I am aware. I can say from my own experience in practice that certainly these reforms have had a significant effect on the viability of the business.

Mr BRYDEN: The have certainly had a major effect on the compensation levels received by injured people, which is something I always focus on as a plaintiff's lawyer.

The Hon. ERIC ROOZENDAAL: It seems to me that on your presentation lawyers are sort of angels protecting the interests of the injured—which, frankly, I do not think is the public perception—and that the same time the evil insurance companies are busy making record profits. That you are the angels in this process. I find that a bit hard to believe. There were a number of lawyers who made very good livings almost entirely out of workers compensation or public liability. I want to raise one particular point following on that. You made some comments about to the problems of the approved medical specialists making assessments. Is it not true that under the old system it was pretty much the case that doctors divided up into insurance doctors and victims' or plaintiffs' doctors; that both sides would wheel out their own doctors and it would have to be battled out in a court? Is that not how the system previously worked?

Mr McINTYRE: It was, but you have an independent umpire. If you only have one medical assessor and that medical assessor is not, for example, qualified in the area of medicine that he is completing an assessment in, I mean how fair is that to in injured person? To comment on your honour two points in terms of the legal profession, the first point is that although the changes that have been made have altered income levels within certain firms—there is no doubt about that—the reality is, however, that they have simply moved on to other fields of work.

The Hon. ERIC ROOZENDAAL: I understand that.

Mr McINTYRE: We are not here trying to return the situation to where it was five or six years ago so that they can all give up those areas and go back to doing personal injury. A lot of them probably would not do that. The bottom line is if you are going to have a detailed inquiry into, for example, the public hospital system in New South Wales would you not ask the doctors to come along and give some evidence about it? Are they not the best placed persons to make some comments? That is why New South Wales solicitors are here.

The Hon. ERIC ROOZENDAAL: I never quite think of lawyers in the same healing capacity as I think of doctors sometimes. One question, what was the average portion of a workers common law settlement that lawyers received? When a settlement was eventually reached, what was the average portion?

Mr McINTYRE: I can perhaps best do that because one of the things I do in relation to litigation is that, because I am a cost assessor, I see a substantial number of party-party bills. I have seen a substantial number of party-party bills over the years and the amount would vary significantly, depending on whether the verdict is a very large one or very small. On very large claims the percentage of legal costs was extremely low On a smaller claim there is no doubt that the percentage of legal cost is higher, particularly if the insurer takes the matter from an arbitration hearing to a hearing before a single charge and then goes to the court of appeal.

In those circumstances the percentage of legal fees is quite high, but if the worker or injured person is successful, the majority of those costs would be paid by the insurance company. The recovery of costs on the costs assessment system is about 80 per cent. So to suggest that, for example,

the legal adviser was getting 50 per cent of the verdict is just a nonsense. It is another one of these pieces of hype that you hear a lot about but you see very little of in reality.

The Hon. ERIC ROOZENDAAL: That was a very long answer but you did not quite answer the question. Can you give me the band? What would be the highest percentage and what would be lowest percentage? You sort of answered a question, set up your own 50 per cent figure and then kicked it away. I am really interested in hearing your answer, since you are an expert in the area.

Mr McINTYRE: On a very small claim, legal costs, which include medico-legal expenses, court filing fees, investigation costs and a whole range of other things, could probably be as high as 40 per cent of a small verdict.

The Hon. ERIC ROOZENDAAL: And what would you call a small verdict?

Mr McINTYRE: Under $50,000.

The Hon. ERIC ROOZENDAAL: Okay.

Mr McINTYRE: And on a multimillion-dollar verdict, the legal fees might be as high as 15 per cent. But again you are going to probably recover a good proportion of that.

Mr MORONEY: Can I come back to your question on the approved medical specialists [AMSs] which was not specifically answered?

The Hon. ERIC ROOZENDAAL: Yes.

Mr MORONEY: The problem of duelling experts or duelling doctors is an old one. It still exists. Specifically in relation AMSs, the problems arising from appeals from approved medical specialists in the commission is a real one. They have appointed six deputy presidents to deal with a backlog of 365 days on appeal after only two years of operation. It would suggest that the AMS system is not working as efficiently as it was designed to work. I think the concept of an AMS, an independent arbitrator, whether that is a judicial or a medical one, is a good one. However where you have an applicant's doctor and a respondent's doctor theoretically assessing on the same guidelines and then an approved medical specialist theoretically assessing on the same guidelines and three people come up with three different results that then result in an appeal that sits in a drawer for 365 days, I do not think the system can be seen to be working very fairly for the injured worker in those circumstances.

The Hon. IAN WEST: Can I clarify a previous answer on legal costs so that we are very clear as to the position? My understanding is that when one takes away the medico-legal costs and the various disbursements, whatever, the annual reports of WorkCover say that the legal fees, that is, the fees that go to the plaintiff and respondent lawyers, are about 15 per cent?

Mr RICHARDSON: That would be about right.

The Hon. IAN WEST: About right?

Mr RICHARDSON: Yes.

The Hon. IAN WEST: Thank you. I just want to canvass some of the words used in your conclusion—words like "fair and just", which are obviously fairly nebulous terms that mean all things to all people. But in trying to come to grips with those words "fair and just" and in the light of your appearing to think that there is some equation between cost effectiveness and social responsibility of recompense, should the insurance industry be the sole measure of cost effectiveness, or should there be some other methodology for assessing cost effectiveness?

Mr McINTYRE: I think that when the Government brought about these changes, one of the things they did was decide to monitor the insurance companies because they realised that they were delivering something to private enterprise that private enterprise said that they needed to have for the purposes of maintaining the availability and the affordability of insurance. What has failed to occur is

that they have not set up anywhere near the appropriate mechanisms to be able to monitor effectively whether the level of profit the insurers are making is reasonable or more than reasonable. I think we do not need to reinvent the system in terms of a new model of insurance. We simply need—I think if you have full and frank disclosure by the insurers of how much profit they are making, I think that in itself would be sufficient for the insurers themselves to have a second think about whether they are charging too much, for example, or not making insurance widely enough available.

The Hon. IAN WEST: However, in doing that assessment, when one looks at the Estelle Pearson report on pages two and three, there are numerous variables, not just tort reform. Tort reform is one of about 10 variables.

Mr MORONEY: Yes.

The Hon. IAN WEST: And when one looks at the prudential requirements and the measures that are put in place by the Australian Prudential Regulation Authority [APRA], the Australian Competition and Consumer Commission [ACCC], the Motor Accidents Authority, et cetera, and when one looks at the methodology for assessing fully funded liabilities, which are extremely variable with many vagaries as to what fully funded means, when one looks at a balance sheet it is virtually impossible, is it not, to determine the profitability from the balance sheet?

Mr McINTYRE: In the fullness of time, if you monitored insurers and you had all the information that was available to them at the board level, it would be a fairly simple process to determine whether they are adequately provisioning, whether they are overprovisioning or underprovisioning. Let us recall that the collapse of HIH was brought about by chronic underpricing and chronic underprovisioning. That is the reason that, as an insurer, they failed.

The Hon. IAN WEST: I am sorry, but one may also say that it was not necessarily chronic underpricing in the areas that we are looking at.

Mr McINTYRE: Well, they were writing insurance right across the board so they were probably underpricing on a number of fields. The problem was of course that all their competitors were underpricing to meet their price—either underpricing or not getting the business.

The Hon. IAN WEST: I do not know: Some may say that in that period of time pricing by NRMA and the GIO was not underpriced at all. They just did not have a profit margin that now applies with Suncorp and IAG. However, that is just one variable within the framework of determining cost effectiveness. I ask this: When you try to determine the balance of whether or not it is time to tweak and whether or not the tort changes are at their maximum effect—and I assume that one would determine that there is a need for constant change in the balance—how do you suggest that we determine the profitability of the insurance industry?

Mr McINTYRE: I think, as Mr Cumpston suggests, we need much more information from them. I am frankly appalled that they have come along to this inquiry and they have not provided you with any detailed information at all about it. Frankly that is what this inquiry is all about and I just think it is a dereliction of their responsibility to this Parliament.

Mr RICHARDSON: May I make this observation: The materials on page three of the Finity report to which you refer are a group of factors that you would take into account to determine how the insurance industry is operating. Many of those factors are no different from the factors that we all face in business, as is the nature of commerce, but I would say that, if this is what you are getting at, those factors are very different from the factors that the Parliament of New South Wales should be using to determine the effectiveness of a compensation scheme because you have an interest in the public. They are your shareholders.

In my view, one of the factors not mentioned here is the extent to which the failure of the insurers to meet compensation payments is resulting in a cost transfer to the Federal Government or indeed to the State Government in terms of increased payments from the public purse that have to be made to people who are unable to get sufficient compensation from the insurers because of tort law reform. If that is what you are getting at, we would entirely agree with you. There are other factors

that the Parliament of New South Wales, as a representative of the community, must take into account beyond mere commercial factors.

The Hon. IAN WEST: Thank you.

The Hon. ROBYN PARKER: Presumably at the time the tort reform agenda was being rolled out, the Law Society would have made submissions, comments and predictions about what it might mean. I wonder if you could briefly outline what your views were at the time, and how much those have transpired to be correct or incorrect?

Mr McINTYRE: I think that Mr Moroney was reflecting on that to me this morning. I might ask him to answer that.

Mr MORONEY: I think most of the predictions that certainly were raised in the injury compensation committee and raised with the council from there have proved to be true—that is, there has been a drop in benefits, when such a drop, we were told, would not occur. There has been a severe winding back of common law rights across the board. There have been enormous problems in the assessment process in the various schemes from the medico-legal angle through to AMSs, medical assessments services [MASs], or whichever system you look at. There has been considerable confusion brought about in the community as a result of it.

What we are left with is a system has, in effect, put up barriers to people receiving compensation and there is no evidence that injury numbers are dropping, people are taking more responsibility, employers are being more careful, or that occupiers are doing the right thing. There is just no evidence of that. People are still being injured at work, they are still falling over in shopping centres and they are still getting hurt on sporting grounds, and there are still medical negligence claims out there. But a lot of people who suffer as a result of that are not getting compensated fully, compared to what they were before.

Mr RICHARDSON: Can I also make this observation: There are two matters that you are looking at, the civil liability debate and the public liability changes. They were two matters that the Law Society was very concerned about at the time. There were other matters on which the Law Society agreed with the Government, but there were two matters that were fundamental. The first one is that these laws were retrospective in their nature, and the Law Society used the term "a windfall profit to insurers" to describe the outcome that would occur from the retrospective nature of that legislation.

The second thing that we were violently opposed to at the time, and remain opposed to, is the level of threshold that exists for the civil liabilities scheme. In relation to that, it may be of interest to this Committee to know that the Law Society has been monitoring cases where people under the civil liability provisions are not getting compensation today in circumstances where they would have before these reforms came about. Some eight months ago we provided our report to the New South Wales Government on this point at the request of the Attorney General. If you are interested, we would be happy to disclose that information to you. But as I point out, it is now eight months old.

The Hon. ROBYN PARKER: That would be really useful, if you could table it.

Mr RICHARDSON: The process would be to table the document, would it?

CHAIR: Yes.

Mr RICHARDSON: I have copies and I am able to do that.

Document tabled.

The Hon. ROBYN PARKER: What was it that you agreed with the Government on, just out of interest?

Mr RICHARDSON: We agreed with the Government that in connection with the civil liability reforms—and I am only talking about civil liability reforms—there was some need for

changes to be made. We agreed with some of the concepts in the civil liability legislation about responsibility and things of that kind, but we did not agree on the thresholds, we did not agree on the retrospective nature of the changes, and there were other matters that we objected to. But to say that the Law Society was opposed entirely to reform in the civil liability area in 2001-02 is just not correct.

The Hon. ROBYN PARKER: The insurance industry generally tells us that it is too soon to be reviewing the tort reforms and to be recommending any changes. Is it your view that it is too soon to start looking at this?

Mr McINTYRE: No. The problem with the insurers' view about this is that because they say that this is a long tail business and these claims may take 20 or 30 years before they are paid out in the fullness of time, you should not to any tinkering with it, it ignores totally the way in which insurers go about their business. Insurers employ actuaries to make very detailed statistical analyses of past claim trends, current claim trends and even projected claim trends based on changes to a whole range of things, including the numbers of people in the workplace—very detailed statistical analysis.

Although actuarial analysis is not an exact science, the insurers have coped extremely well with actuarial assistance over many, many years. Actuaries are able to predict levels of claims, claims frequency and claims payouts with some degree of certainty. The areas where they are uncertain, the things which really impact on their numbers are things like inflation rates, things over which they do not have a great deal of control. The other thing is interest rates. Inflation and interest rates are the two great variables. In terms of claims frequency and claims costs, the actuaries can make a very, very concentrated and fairly precise guess based on the statistical material that they have available to them. For example, in CTP we are now six years down the track. They know with a great degree of certainty what the claims frequency is going to be and what the claims payouts are going to be. What they do not know are things like the inflation rate and they do not know what the discount factor is going to be because of current interest rates.

The Hon. IAN WEST: However, in 2002 they seemed fairly certain about the discount and inflation rates and that there was a desperate need for change.

Mr McINTYRE: They know what they are at the time. But you cannot, unfortunately, say what they are going to be for the next 20 years. If they are, therefore, bad at the time, for example, if they project that forward to the future you are always going to be doom and gloom.

Ms LEE RHIANNON: It is widely accepted that compensation schemes should have a deterrent function. Do you think the changes that have occurred over the last five or so years have impacted on the way deterrents operate within workplaces and elsewhere?

Mr McINTYRE: We are not seeing any massive increase in accidents, but we are certainly not seeing a decrease either. The only real analysis I can give you is to go to a true no-fault system. New Zealand is probably the most striking example. An inquiry they had into that system did indicate that accident numbers across the board were up and the driver of that was said to be the fact that people were no longer personally responsible for what occurred.

Ms LEE RHIANNON: Under our circumstances you are not seeing it go down. Do you think, therefore, that side of things is working okay or could it have been improved with the changes to the law in recent years?

Mr McINTYRE: The issue of deterrents is a matter of balance. I think the community has to keep that in mind, and I think they do.

CHAIR: Thank you for tabling the examples of persons disadvantage. Thank you very much for attending, gentlemen, and all of your submissions.

Mr McINTYRE: On behalf of the Law Society I would like to thank the Committee your time.

(The witnesses withdrew)

RYAN FLETCHER, Director, Policy and Research, Local Government Association of New South Wales and Shires Association of New South Wales, Level 8, 28 Margaret Street, Sydney, sworn and examined:

GENIA McCAFFERY, President, Local Government Association of New South Wales, 28 Margaret Street, Sydney, and

FRANCIS MICHAEL LOVERIDGE, Legal Officer, Local Government Association of New south Wales and Shires Association of New South Wales, Level 8, 28 Margaret Street, Sydney, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee?

Mr FLETCHER: On behalf of the Local Government Association and Shires Association.

Ms McCAFFERY: As President of the Local Government Association.

Mr LOVERIDGE: For the Local Government Association and Shires Association.

CHAIR: Would one of you care to make an brief opening statement?

Ms McCAFFERY: I would first like to thank you for giving the associations the opportunity to talk a bit about our position. I want to talk first about the associations, the climate of the reforms, the impact of reforms on the affordability of insurance and also the impact of reforms on the availability of insurance. I appear on behalf of the Local Government Association and also on behalf of my colleague Councillor Col Sullivan, President of the Shires Association, who is, unfortunately, unable to be with us today. Together the two associations represent 152 councils in New South Wales. We also represent special-purpose councils dealing with water supply and noxious plant control. We also represent regional Aboriginal councils. The associations' role is to present council views to central governments, obviously both State and Federal governments. We provide industrial relations and specialist services to councils. One of our strongest roles is to promote local government to our own communities and to other stakeholders.

We are not appearing here as legal experts, insurance experts or actuaries. We are appearing to offer the perspective of local government and the communities we represent. If you like, we are here to offer local government sentiments, often based on how our community is feeling about these issues and whether the Civil Liability Act 2002 and the Civil Liability Amendment (Personal Responsibility) Act 2002 seemed to have helped to relieve what we believe was becoming a real problem in our communities. I am sure you will know, because it is on public record, that the associations have been a strong supporter of these reforms. The associations, in fact, were delighted and relieved with the inclusion of new provisions for special nonfeasance protection for roads authorities. That is particularly important for our rural and regional members.

I do not want to dwell on the history too much. The associations took up this issue well before it became a strong public issue. We have been expressing local concern about the state of personal injury compensation law and the practice from the late 1990s. After that we have been active in providing a focus local government view on public liability issues from 2001. We felt that we worked with the State Government in seeking to find a legislative solution to the problems that our communities were facing. I do not want to cover the whole background of the reforms. I will briefly touch on it. In 2001-02 a series of international and domestic events caused the cost of public liability insurance to significantly increase. Some of the key events were the collapse of HIH, which had a huge impact on councils across New South Wales. We had a big increase in claim numbers and claim costs. There was a judicial expansion of what constitutes negligence. There are a couple of cases which I am sure you are well aware of. There were also fewer insurers and a subsequent reduction in competition. Of course, there was the huge impact of September 11 attacks.

In response to significant underwriting losses, insurers made commercial decisions to significantly increase premiums or withdraw completely from the public liability insurance market. This had serious implications for councils and community groups who either were unable to get

insurance or if they could they could not afford it. Many of our communities were losing significant community events, which were the gel that held our communities together. Many councils were facing the loss of those kinds of significant community events and community centres were having to close because they simply could not find insurance.

In the simplest terms, in our submission in 2002 concerning the reforms that we wanted to see, firstly, we said many councils and local non-government groups could not pay the increases or could not get insurance. Many councils and local non-government groups were cancelling a wide variety of events. That obviously had a huge impact on the social capital of our communities. Councils and non-government groups that could get public liability and coverage and could pay the increase premiums, of course the cost meant sacrificing or compromising some of the important community functions that before they were able to afford.

In the course of the inquiry the associations have been conducting further research into the impact of reforms on premiums. This research includes an ACCC monitoring report. The recent Australian Competition and Consumer Commission Public Liability and Professional Indemnity Insurance Fourth Monitoring Report dated 15 February 2005 has shown that public liability insurance premiums have been reduced by 15 per cent in the six months to June 2004. Those figures speak for themselves. The ACCC also reported expectations of further premium reductions in 2005. We are obviously extremely pleased by those figures. We think that proves that the legislative reforms have had the desired results.

Statewide Mutual, which is a not-for-profit self-insurance scheme that covers over 150 councils in New South Wales, has advised us that the reforms have reduced the total cost of claims and turned a 2002-03 $47 million deficit into a now small surplus of $4,000. Given this result we think there is a real potential for further premiums to be reduced. I know Statewide is giving you evidence this afternoon. I am sure they will give you more details. As far as the impacts of reforms on the availability of insurance I think the associations consider that the reforms have really had the positive impact on the availability of insurance to community groups which conduct community events and activities because they now have improved access to insurance. In my own council in North Sydney a number of our markets were facing closures before these reforms took place and all of those markets have now been able to get insurance. That is again anecdotal evidence but the reforms certainly are having the desired impact.

Insurers now seem to be more willing to provide the type of cover that they provided before, but they seem to be actually providing even more extensive cover. A Community Care Underwriting Agency has been established specifically to provide public liability insurance to not-for-profit organisations, and we think that is fantastic. The associations are also aware that Suncorp has now increased the availability of its public liability and products liability insurance to eligible not-for-profit organisations.

I guess we are great proponents and advocates for these reforms and I think in the really relatively short period of time that the reforms have been introduced, we think there is clear evidence that the reforms are having the desired result. I guess we would urge that you do not go back on the reforms because I think they are producing the right results for our communities.

CHAIR: Have you received examples of individuals who have been injured through the fault of others not being able to get adequate compensation for what they have suffered? We have heard from a number of people who have given personal testimony to their own loss.

Mr LOVERIDGE: No.

CHAIR: Nothing at all?

Mr LOVERIDGE: No.

The Hon. TONY CATANZARITI: What percentage of councils are now covered under the public liability system?

Mr FLETCHER: Statewide Mutual which is the not-for-profit self insurance arrangements covering local councils covers more than 150 councils in New South Wales so I think it would be up in the 95 percentile but I do not have the precise number. Perhaps I can take that on notice and come back to you but it is certainly within that range.

The Hon. ROBYN PARKER: I am very surprised that none of your members have commented on lack of cover and their difficulties with getting insurance cover. A number of witnesses who have appeared before this inquiry say that community events have been cancelled, they are not able to get affordable insurance, the numbers of claims were not high in the first instance and there has not really been much change, some groups who have had to seek insurance cover have not been able to find it or get affordable insurance cover and some councils are no longer providing some facilities such as public playgrounds because of the risks. Yet you say you have not heard anything like that from any of your members.

Ms McCAFFERY: I thought we were talking relative to the reforms? There is obviously an issue with affordability of insurance. But what we are saying is that since the changes the situation is better than it was before.

The Hon. ROBYN PARKER: Were the changes promoting the fact that there was going to be more availability and affordability for NGOs and community groups in general?

Ms McCAFFERY: I can only give you an example of our community centres at North Sydney and two community centres who, prior to the reforms, could not get insurance and prior to the reforms were faced with closing both their markets and they, since the reforms, have been able to get insurance and the markets are still operating.

CHAIR: The committee heard from some rural councils that community activities have closed and that the equipment from playgrounds has been removed?

Ms McCAFFERY: If you are talking about shires in particularly I think that is linked more to resourcing of the councils and that is a whole other discussion we probably need to have.

CHAIR: I think the markets and other activities of some councils have closed and they claim it is because of insurance costs, but you are unaware of that?

Ms McCAFFERY: I will take that question.

The Hon. ROBYN PARKER: How is it some members of your association have put their issues to this inquiry by way of submission but not to you? Are you unaware of the issues? Have you asked any of your members how their groups are going in their local government areas?

Ms McCAFFERY: Yes, we certainly have.

The Hon. ROBYN PARKER: Have you told your members, because that is in sharp contrast to what is happening in other places. I know a Victorian group called Our Community has done a survey recently that showed the community groups that it polled have had huge increases in premiums, a lack of availability of premiums and no change in terms of claims.

Ms McCAFFERY: But that is in Victoria.

The Hon. ROBYN PARKER: That is a well-known Victorian group that is right across Australia—*ourcommunity.com.au*. It is based in Victoria but it not just polling Victorians.

Ms McCAFFERY: I can certainly take that up with Col Sullivan who is the president of the Shires Association but certainly in my experience with our local government members which are large regional councils and metropolitan Sydney councils, we were certainly faced with those problems prior to the reforms but since the reforms have been undertaken, the exact opposite has happened.

Ms LEE RHIANNON: It would be useful for the committee to explore with the Shires Association whether it is a regional difference. I was only surprised to hear how well it was going,

which is obviously very welcome. Do you know if they have problems paying? It sounds like everything is okay.

CHAIR: It sounds like a paid political advertisement.

Ms McCAFFERY: We are concerned that the inquiry intends to reverse the reforms. My presentation this morning was concerned that you intend to reverse the reforms and if the reforms are reversed you are going to place councils in an even worse position than they are now.

CHAIR: From where did you get that view?

Ms McCAFFERY: From our members.

CHAIR: That this inquiry intended to reverse the reforms?

Ms McCAFFERY: I think there was concern that there might be the potential in the inquiry that the reforms might be reversed. My presentation was telling you that for local government the reforms have produced a more positive result than was the case prior to the reforms being implemented.

Ms LEE RHIANNON: It is a more positive result and, within that, are there still problems?

Ms McCAFFERY: I think there are still problems, particularly in rural areas because of rate pegging, with resourcing. Councils are struggling to provide the services to the communities that they provided before because everything is going up and with rate pegging the income to councils is declining.

The Hon. IAN WEST: The committee has discussed the concept of reversal of the so-called reforms but do you see the tort changes that took place as immutable in the sense that those changes seem to have struck a balance that is perfect?

Ms McCAFFERY: No, I do not think any change is perfect. We believe that the reforms have placed our communities in a stronger position than they were before. I have been told of many communities that cannot get insurance but I am telling you that my members, Sydney metropolitan councils and large regional councils, are now able to get insurance that they were not able to get before.

The Hon. IAN WEST: Mainly through Statewide Mutual?

Ms McCAFFERY: Yes.

The Hon. IAN WEST: A mutual insurance concept?

Ms McCAFFERY: Yes.

The Hon. IAN WEST: Do you think it is proper for the committee or somebody to constantly look at the balance between so-called cost effectiveness and the social concept of restoring people to their pre-injury condition?

Ms McCAFFERY: Yes, you need to balance that.

The Hon. IAN WEST: In balancing that, is there a need to constantly revisit the concept?

Ms McCAFFERY: Yes.

The Hon. IAN WEST: In doing that should there be a mechanism for measuring cost effectiveness?

Ms McCAFFERY: Yes.

The Hon. IAN WEST: Having the mechanism to measure cost effectiveness, you would not believe that it should be solely left to the insurer to determine what cost effectiveness means?

Ms McCAFFERY: No, but I think you have to balance. I was trying to emphasise the situation that we were in before the reforms took place when it was extremely difficult for councils and community organisations to get insurance. As far as members of the LGA are concerned, that position has been dramatically improved. I guess you have to balance both of those.

The Hon. IAN WEST: In the main you are looking at one side of the equation?

Ms McCAFFERY: I am President of the Local Government Association.

The Hon. IAN WEST: I am not making a moral judgment, I am just asking a question.

Ms McCAFFERY: Clearly, I am President of the Local Government Association. My job is to represent local government in New South Wales and the communities that we represent, in the same way I am sure you as a MLC are representing people who elected you.

The Hon. IAN WEST: Yes, I am not making a moral judgment or suggesting that your answer is in any way wrong. I am merely asking for a statement from yourself so do not be concerned about stating what your position is.

Ms McCAFFERY: No, clearly that is my job and that is what I am doing.

The Hon. ROBYN PARKER: How many of your councils would have organisations that are members also of NCOSS?

Mr FLETCHER: I would suggest all local councils would.

The Hon. ROBYN PARKER: The sorts of things would be vacation care and children's programs.

Mr FLETCHER: Yes. One could perhaps take the question on notice in relation to the precise numbers.

The Hon. ROBYN PARKER: I would be interested in that because NCOSS recently surveyed their members to find out about the reforms to tort reforms and the impact on the member groups. They are saying that 22 per cent of the respondents to the 2005 insurance survey cited examples of organisations cutting services and closing down because of insurance premiums and because of fears that their insurance premiums would increase through litigation. They changed their services somewhat. They are examples such as closed vacation care services and cancelled youth music performance weekends. Some associations have cancelled market days and fun runs.

Ms McCAFFERY: You said that is 22 per cent?

The Hon. ROBYN PARKER: Yes, you are saying none of your members and I am saying 22 per cent—

Ms McCAFFERY: Sorry, I explained at the beginning that I represent the Local Government Association and the Shires Association represents rural councils fundamentally. Certainly among my members, and I am Mayor of North Sydney, so I am the mayor of a significant council—

The Hon. ROBYN PARKER: I know what you said. I asked you to take on notice how many of your organisations are also members of NCOSS, because NCOSS got a different result. They were also saying that in some children's service programs, for example, staff are not co-operating to administer Ventolin because of the risks they are perceiving. I am astounded, therefore, that everything is hunky-dory in terms of the Local Government Association for your members in the light of contrasting information from NCOSS. Are you telling me that that is really only happening in rural and regional areas?

Ms McCAFFERY: I have a lot to do with metropolitan councils and I can only tell you the feedback I am getting from metropolitan councils and that is a dramatic change from previously, and it certainly was the case in my council because I had two of our community centres—

The Hon. ROBYN PARKER: You are saying that is really a problem that is occurring in rural and regional councils?

Ms McCAFFERY: I think councils that are poorly resourced, and that is an issue. If you want to talk about rate pegging, we can talk about rate pegging.

The Hon. ROBYN PARKER: But you are saying it is a rural and regional issue?

Ms McCAFFERY: I am saying that I will take it on notice.

The Hon. ROBYN PARKER: Which is a change from what you said before, is it not?

Mr FLETCHER: Perhaps if I could just add that those community organisations are facing a whole lot of pressures, not just insurance premium pressures. There are a whole lot of back office costs associated with running these essential services. Perhaps at a broader level it is those other issues that are also having an impact upon the capacity of those organisations.

The Hon. ROBYN PARKER: That survey was only about insurance and responses were only about insurance.

CHAIR: Your presentation has been very clear.

(The witnesses withdrew.)

(Luncheon adjournment)

JOHN ATTENBOROUGH, Executive Officer, Board of Management, Statewide Mutual, 66 Clarence Street, Sydney, affirmed and examined, and

STEPHEN ARTHUR PENFOLD, Board Member, Statewide Mutual, 66 Clarence Street, Sydney, sworn and examined:

CHAIR: We have your submission, which is submission No. 43. Do either of you wish to make an opening statement?

Mr ATTENBOROUGH: With regard to the Committee's terms of reference, we are only concerned with terms of reference 2 and 3. Term 2 relates to the availability of insurance for community groups and council-operated section 355 committees. Term 3 is a general reference to the availability of public liability insurance and the problems we have in arranging such insurance. With regard to reference 2, there has been a lot of discussion in many places about the availability of insurance for community groups. There are three types of community groups: those connected with council, as appointed by section 355 committees under the terms of the Local Government Act, not-for-profit organisations, and profit-making organisations, all of whom, in different areas and different ways, hold community activities.

Statewide Mutual, as the insurer of the majority of councils throughout New South Wales, has little problem in providing cover to councils for their committees in organising activities, such New Year celebrations, Australia Day celebrations, Anzac Day marches, and many other activities that are put on throughout the year specifically for community groups. We have established schemes, which are available through the Web, for not-for-profit organisations to gain insurance. It is done through our Victorian office. We have also established a scheme for stallholders that participate in fetes and fairs. There are a number of organisations providing that sort of cover, and we are aware of the existence of the community group Underwriting Agency and we are working with them in coming to agreement on insurance clauses for the protection of councils in whose areas the community groups conduct their activities, and with the community groups themselves.

CHAIR: Are there not-for-profit organisations you do not accept?

Mr ATTENBOROUGH: Statewide Mutual is a mutual liability scheme—it is not insurance—set up to overcome the problems that local government had in 1992 when there were no underwriters available. We only provide cover for local government—for councils throughout New South Wales, their committees and their volunteers. We cannot, and will not, provide cover for other organisations to cover liability they incur in their activities.

CHAIR: A preschool activity would not be eligible for cover?

Mr ATTENBOROUGH: A preschool is not connected with council, and therefore we cannot provide cover.

CHAIR: Do you cover all volunteers involved in council-run functions?

Mr ATTENBOROUGH: We do.

The Hon. TONY CATANZARITI: Mr Penfold, this morning we heard evidence from Local Government Association representatives that a large proportion of councils are covered by your company with regard to public liability.

Mr PENFOLD: That is correct.

The Hon. TONY CATANZARITI: They said that quite a large percentage, if not 100 per cent, have such cover. Do you agree with that, and if not what percentage do you think are covered?

Mr PENFOLD: All bar 19 councils, in New South Wales. We run similar Mutual schemes in the other States as well. We are here on behalf of the New South Wales-run Mutual scheme called Statewide, but there are Mutual schemes in the other States as well.

Mr ATTENBOROUGH: I think in Queensland there is one council that does not participate in our scheme, and I think in Victoria there is one. But every council in Western Australia, South Australia and Tasmania participates. New South Wales has 19 councils that do not.

The Hon. TONY CATANZARITI: Does that cover the Local Government Association as well as the Shires Association?

Mr ATTENBOROUGH: Yes, it does. Every rural council in New South Wales is a member of Statewide Mutual.

The Hon. TONY CATANZARITI: How long ago did that commence?

Mr ATTENBOROUGH: In New South Wales, on 31 December 1993.

The Hon. IAN WEST: What do you cover councils for?

Mr ATTENBOROUGH: We cover councils for public liability for their activities, and for their duty owed in a professional capacity in terms of approving development applications. We cover the councils, councillors, their employees, their committees, their bona fide volunteers, residents mowing nature strips, and family day care providers who are appointed by council. Basically, anyone who has a direct connection with council is covered under the scheme.

The Hon. IAN WEST: I do not think the terms of coverage are included in the submission. Would you be able to provide that?

Mr ATTENBOROUGH: Certainly. We could provide a copy of the Mutual Liability wording, which includes a definition of "member".

The Hon. IAN WEST: This is covered by Lloyds of London, it is not covered domestically, and you are a broker for Lloyds?

Mr ATTENBOROUGH: It is Lloyds and London Underwriters. QBE and AIG in London are our main providers; they provide the primary $1 million cover. Beyond that, there are about five or six insurance companies involved. I might mention that our existing market as at June 2003 withdrew cover; they would not provide cover in the future. So Stephen and our managing director went to London and met with approximately 43 insurance companies in London. In Australia, no insurance company is available for local government. All 43 underwriters in London said that had the Civil Liability Amendment Act not been enacted, they would not have come to the meeting. So without the legislation, local government is back to being a self-insurer.

Mr PENFOLD: They are still careful of the fact that the legislation will stay in its current form, because the claims that were being made prior to the enactment of the legislation were making councils uninsurable in certain forms.

The Hon. IAN WEST: Are you able to give us details of those claims prior to December 2002 and since that time, in terms of not only the IBNRs but the claims and their estimates and the trailing actuals?

Mr ATTENBOROUGH: Since we started the scheme in December 1993, we have recorded 33,380 claims at a total cost of $262,817,382.

The Hon. IAN WEST: You are able to give us your annual report?

Mr ATTENBOROUGH: The annual report is available, yes. Those figures are not in the annual report, and nor is the actuarial study. It gives the results that we have achieved in the last year and the current year, if you like. But certainly, the claims that have been incurred since January 1994

increased. When we started I think we had 96 councils in the scheme. We grew and as we grew so did our claims base, the number of claims that we incurred. In 1994-95 we had 2,400 claims, in 1998-99 we had 4,000 claims, in 1999-2000 we had 3,900, in 2000-01 we had 4,000 and then we started the reduction: in 2002 we had 3,500. Since then, bearing in mind that there is a statute of limitations of three years applicable to liability claims, we can get claims anywhere in the future, so the last three years we call them undeveloped, and they show 2,000, 1,700 and 1,300 claims respectively. So there has been a reduction in the number of claims. The cost of claims has reduced from a high of $37 million down to at the moment, the current year, we estimate $10.8 million.

The Hon. IAN WEST: You say they are not in your annual report?

Mr ATTENBOROUGH: They are not in the annual report, no.

The Hon. IAN WEST: I am sorry, I do not understand that.

Mr ATTENBOROUGH: Our annual report is basically financials.

The Hon. IAN WEST: And the figures you are quoting are actual claims or IBNRs?

Mr ATTENBOROUGH: The actual claims with IBNRs outstanding.

The Hon. IAN WEST: Have you got the differences?

Mr ATTENBOROUGH: Not with me, no. But I can get them.

The Hon. IAN WEST: So you are quoting us the estimates, are you?

Mr ATTENBOROUGH: I am quoting paid to date is $197 million, outstanding is $65 million: a total of $262 billion. They are the figures that I have.

The Hon. IAN WEST: Those figures are estimates?

Mr ATTENBOROUGH: The paid are paid; they are not estimates. That is money actually paid out: $196,988,630. That has actually left our accounts.

The Hon. IAN WEST: So you are talking about this financial year?

Mr ATTENBOROUGH: That is the total.

The Hon. IAN WEST: The total since—

Mr ATTENBOROUGH: Since inception.

CHAIR: Just before we go on to other questions, can I just clarify that in your annual report you have mainly these financials. Mr West was asking you do you put into those financials provisional payments for the long tail of some of your claims?

Mr ATTENBOROUGH: We do, but it is an accumulated total put in, not individual year by year.

Ms LEE RHIANNON: You would be aware of the New South Wales Council of Social Services [NCOSS], I am sure. It has recently done a survey of insurance earlier this year and one of the things it found was that most insurances have increased steadily over the past two years with some respondents still experiencing very high increases. I was just interested in your comments on this because when we have been taking evidence there is a contradiction that is coming through about to what degree the situation is now okay for community groups and to what degree they are still struggling. This survey by NCOSS suggests that there is still a considerable degree of hardship and I was wondering from your position as an insurance company what your take on the situation is with regard to how community groups are faring with having to pay insurance?

Mr ATTENBOROUGH: We are not an insurance company, we are a mutual liability scheme.

CHAIR: Covering only the councils?

Mr PENFOLD: We can only cover the council or any community group associated with the council. We are not out there insuring community groups per se in the general marketplace.

Ms LEE RHIANNON: So I have asked the wrong question.

CHAIR: Just keep your question until QBE is answering it.

Mr PENFOLD: That might be a good place to start, yes.

The Hon. RICK COLLESS: Gentlemen, in your submission you say that Statewide has just returned a modest surplus of $4,016, is that correct?

Mr ATTENBOROUGH: That is correct.

The Hon. RICK COLLESS: And you also say that it is difficult to see where insurers involved in public liability are attracting huge profits. What do you mean by that statement? Are you referring there to the commercial insurance companies?

Mr ATTENBOROUGH: Statewide Mutual, I think to a degree, reflects what happens in the insurance market and insurance companies have been losing quite substantial dollars for a long term. Statewide Mutual—when we first started we had actuarial studies that indicated we would make a profit within three or four years of $3.669 million. In fact, in our first four and a half years of operation we incurred a deficit of $51 million. So claims per se have been at a higher level.

The Hon. RICK COLLESS: So for a mutual organisation such as yourselves, when you say you incurred losses of $51 million in a given year, where did that money actually come from, given that you are a mutual company and that you must have substantial reserves put aside in order to meet those sorts of losses?

Mr ATTENBOROUGH: No. We started from ground zero. The councils pay the premium—or we call it contribution because it is not insurance—into the fund. In 19981 we had such substantial losses we were carrying a $2 million self-insured retention, that is, we covered the first $2 million of any claim; we then sought to place insurance in London from the ground up. But, having done that, we did not reduce our contributions required from each council, so we made surpluses. Those surpluses that we generated went to fund the deficit. Last year we reached the situation on paper where we had a $4,000 surplus. Our premium in London in 2003 increased—and it is in our financial statements—from $13 million to $30 million, and that is as a result of the claims experience, but that is with a new underwriter who is starting again from ground zero. We still made surpluses that we have been able to use to offset the deficits that we made, so we have not needed at this stage to call on the members to provide more funds.

The Hon. RICK COLLESS: You say later on that same page of your submission, "Now that a surplus has been achieved the board of management has determined that member councils will receive a distribution of surplus of some $4 million". How does that fit into what you have just been telling us?

Mr ATTENBOROUGH: The surplus that we generated each year is roughly three to four million. We kept that to fund the deficit. We believe we now have sufficient funds to finance the deficit or the outstanding claims from our first four and a half years of operation. So rather than reduce premiums we prefer to give backend discounts, so that we know the situation when we are giving money back. I think I said in the submission $4 million, but 10 per cent was the maximum that a council could achieve. We expect the average to be about 7.5 to 8 per cent.

The Hon. RICK COLLESS: So that modest surplus of $4,016 is after those funds have been distributed, is that correct?

Mr ATTENBOROUGH: Yes, it is.

Mr PENFOLD: Can I just add there that, as John mentioned before, we talked to a number of underwriters, mostly overseas because the local underwriters will not insure us; we have got to be fairly careful because it will only take one or two years down the track where underwriters walk away from insuring, as local underwriters did, and we would again be struggling to find insurers. There is only a very small number of underwriters that will insure local government and we just hope their support continues. That is hand-in-hand with the legislation at the moment because they have got confidence that legislation can keep those claims to a minimum.

CHAIR: Just looking at those rough round figures that you have given us, it would seem to me that Statewide is not really big enough to be viable into the long-term future?

Mr ATTENBOROUGH: We have an income of $41 million and with the reinsurance arranged at the moment, whatever it is there, then we can manage. If the reinsurer decides to pull the plug then we believe that, based on the legislation as it stands and actuarial assessments, that the premium that we do not pay to London and we keep for ourselves will meet the claims cost going into the future.

CHAIR: I note the air of confidence there but from a business perspective I would be thinking you would need to grow larger in order to survive into the future. There is not much future for small mutuals. Most of the small mutuals have gone out of business. I look back in history at mutual companies in Australia and there were 190 of them in Sydney at the beginning of the 20th century and today there might be a handful. Would you consider broadening your base?

Mr PENFOLD: Our charter at the moment is just purely to write local government. That was the need for local government. I think the mutuals you are referring to that is quite right, there have been a lot go by the wayside, but certainly your funds are one benefit when you are talking with local government. But yes, we grow across Australia by funds similar to Statewide Mutual growing in each State. So therefore all your purchase insurance—we purchase insurance on a national basis which is—

CHAIR: It is much easier to knock on the door of Munich Re or somewhere?

Mr PENFOLD: That is right.

CHAIR: Mr West, I think you had a question you were thinking of asking Mr Attenborough concerning the excess profitability of insurance companies.

The Hon. IAN WEST: I was not for one moment thinking of insurance companies doing anything other than acting with the best of intentions on behalf of their shareholders.

Mr PENFOLD: Can I comment on the growth issue you mentioned? John mentioned before that we do public liability and professional indemnity cover. Statewide also provides property insurance and fidelity guarantee insurance. So it is areas we are growing within.

CHAIR: A good, steady market.

Mr PENFOLD: That is right, within the local government sector. But as far as the issue on insurance companies, that is why we look to a mutual and, therefore, if we can earn some surplus funds it goes to our members rather than going to the profits of insurance companies.

The Hon. IAN WEST: There is nothing wrong with the insurance companies making a surplus on their investments but I was interested in the comments about how you started up as a mutual. I think the NRMA was a very profitable mutual—if I can use the word "profitable"—prior to being sold to IAG; they were doing very, very well. I am sure you will end up quite viable yourselves and one day you will no doubt be in the market to be bought.

CHAIR: There tends to be more cars than councils.

The Hon. IAN WEST: However, prior to 1992 what was the situation?

Mr PENFOLD: Dare I say the word, HIH was an insurer of councils prior to that date; FIA—dare I also say those three letters—were as well, and GIO; they were the majority of the underwriters. At one stage GIO wrote virtually all councils in New South Wales and because of a change in a view within GIO they decided not to insure councils any longer.

The Hon. IAN WEST: What was the change in GIO?

Mr PENFOLD: A change in management, they had a change of view and said they did not believe they could make any money out of local government.

Mr ATTENBOROUGH: In 1992-93 that was.

The Hon. IAN WEST: In 1993 what happened to GIO?

Mr PENFOLD: They walked away from local government; then they sort of went south from there.

The Hon. IAN WEST: Were they not sold?

Mr PENFOLD: Yes, to AMP.

The Hon. IAN WEST: They are now Suncorp?

Mr PENFOLD: Yes. I know this because I was employed by GIO at the time: they believed the claims were, to use their term, out of control and they could not control the claims experience, and there was no certainty of what premium they charged. So the long tail hurt GIO, which is what happened with some of the insurers on Statewide early in the piece.

Mr ATTENBOROUGH: There is a roll of honour of underwriters who have been involved in local government over the years and they are all three letters: MMI, QBE, SBU, NZI, UAP, FIA, HIH, GIO, the Royal—there have been heaps of underwriters involved in local government and steadily they have fallen by the wayside when they have seen the claims. A lot of those companies withdrew prior to 1982-83. So it is not a new thing with prices in insurance for local government, it has been there for a long time. In fact, we did a submission to the Attorney General in 1997 and we made mention in that submission of a survey that was done by the then Attorney General in 1990, John Dowd, and he said—and it is quoted in the 1997 report—that there was a crisis then for local government and councils were closing facilities and not opening new facilities.

There was a council that was going to be sold a block of land for 10¢, and they said, "No, we can't afford it". The problem has been there for a lot of years. Different people would have different perspectives on what the problem is, where it is and how it arose. Our feeling is that it lies with the legal fraternity. I signed a cheque this morning for legal costs on a claim for a young girl who injured her elbow in an accident at Leichhardt Oval. She received $10,000. The total cost of that claim was about $45,000—she received $10,000.

The Hon. IAN WEST: What were the medical costs?

Mr ATTENBOROUGH: That was it full stop! She received $10,000.

The Hon. IAN WEST: You just signed the cheque for a number of medicals?

Mr ATTENBOROUGH: No, I signed a cheque for the solicitors.

The Hon. IAN WEST: Were the solicitors' costs included, medico-legal and other costs?

Mr ATTENBOROUGH: No. No.

The Hon. IAN WEST: Are you saying they got $45,000 legal costs in their pocket?

Mr ATTENBOROUGH: No, $36,000 and she got $10,000. That, to me, is the problem.

(**The witnesses withdrew**)

Ms ROBYN NORMAN, General Manager CTP Insurance, QBE Insurance Australia Ltd, 82 Pitt Street, Sydney, and

Mr GEORGE KATSOGIANNIS, Regional Manager, New South Wales and Australian Capital Territory Workers Compensation, QBE Insurance Australia Ltd, 82 Pitt Street, Sydney, sworn and examined:

CHAIR: Ms Norman, are you appearing in behalf of QBE Insurance?

Ms NORMAN: Yes, I am.

CHAIR: Are you appearing in behalf of the company?

Mr KATSOGIANNIS: That is correct.

CHAIR: Would either of you care to make a brief opening statement?

Ms NORMAN: We have forwarded our submission to the Committee. We do not intend to reiterate any excerpts from the submission. However, we will be more than happy to take questions from the Committee.

The Hon. RICK COLLESS: By way of introduction I refer you to the graph relating to quarterly average premiums set out on page three of your submission. Is that in real dollars for the base year, or is it in actual dollars? What is the basis for it?

Ms NORMAN: That is the average premium for a metropolitan class 1 sedan, and then all classes of vehicle at the various intervals on the graph at the time.

The Hon. RICK COLLESS: In actual dollars, is it?

Ms NORMAN: In actual dollars, yes.

The Hon. RICK COLLESS: What has happened to that in some base-year dollars, say, $2005? What would that graph be showing? Can you give the Committee an idea whether those premiums have come down substantially in real terms? Obviously they would have in the last five years because it is pretty much a straight-line graph since then.

Ms NORMAN: They have in real terms when you consider the inflation that would have occurred over those five years. The latest statistics from the Motor Accidents Authority indicated that the premium in March 2005 for a sedan in Sydney metropolitan area is now around $327. That is the latest information we have. So those premiums certainly have come down since September 1999. whilst in some years they had dropped very slowly, in real terms, when you add in the inflation, they have been coming down each year.

The Hon. RICK COLLESS: How do you think they would compare to the March 1993-June 1993 figures when they were at the lowest point on that graph? Would what we are paying for CTP now be less than it would have been in those years, do you think?

Ms NORMAN: If I compare the March 2005 figure, which is $327, I think it is the cheapest premium in 10 years. The premiums in the early part of the scheme, in 1992-93, I can see were a little cheaper.

The Hon. RICK COLLESS: Yes, in dollar terms, but what about in real terms? I am interested in what the trend has been in real terms rather than in actual dollar terms. Do you understand where I am coming from?

Ms NORMAN: Yes, I do. Maybe that is something I would have to go back and calculate.

The Hon. ROBYN PARKER: I wonder if you have seen a recent report by Richard Cumpston into profitability in insurance?

Ms NORMAN: Is that insurance all classes or CTP?

The Hon. ROBYN PARKER: it is entitled, "High Insurance Profits Allow Better Benefits to the Injured?" It was to June 2005.

Ms NORMAN: No, I have not.

The Hon. ROBYN PARKER: I will outline a couple of his findings it is summary and ask you to comment on them from your perspective. He makes a couple of comments that there is limited data to go on but that on the data he has been presented with Australian insurers had a return on capital of about 23 per cent in the six months to December 2004; third-party insurers had a return on capital of about 19 per cent in 2003-04; public liability insurers had a return of 19 per cent in 2003-04; and medical indemnity insurance a return a capital of 166 per cent of the minimal capital requirement and were predicting and increase to 206 per cent by 30 June 2005. On the basis of those assessments, would it be fair to say that insurers are reaping substantial profits as a result of the changes to tort law?

Ms NORMAN: I can really only comment on the reference to CTP, because I represent CTP insurance. You said it was 19 per cent for the year 2003-04. I would have to query that level of profit, given that the amounts of claims that have been paid out from that year are fairly low and I do not how that early calculation of profit can be made when there is still a vast number of claims to be paid out from that year. I think on the latest count there is still 93 per cent of payments to be made. I do not know how Mr Cumpston calculated that there could be a 19 per cent profit. I think that would be premature calculation.

The Hon. ROBYN PARKER: What is your estimate, based on your company's projections?

Ms NORMAN: We have filed to make an average profit and we anticipate that that there is about the profit we will be returned. That is the profit loading included in our premium filing to the Motor Accidents Authority.

The Hon. ROBYN PARKER: What would that be?

Ms NORMAN: The average profit loading is around 8 per cent of gross premium. We are not talking about the same sort of measure and I cannot tell you what the measure is compared to Mr Cumpston's measure was. The average profit would be around 8 per cent on our filings for that year.

The Hon. ROBYN PARKER: For 2002-03, what was your profit percentage?

Ms NORMAN: Once again, I think that is a very difficult estimate, because in the year ending September 2002, there are still 83 per cent of payments to be made. I think it is very difficult to calculate at this point in time with any confidence what the actual profit is in the scheme.

The Hon. ROBYN PARKER: How far back do you have to go before you can come up with an accurate assessment?

Ms NORMAN: Technically, until every claim is paid out. That is the only time you could really do an accurate assessment. We anticipate that when we do our filing to the Motor Accidents Authority that we will derive a certain amount of profit.

The Hon. ROBYN PARKER: Based on his figures some other insurance companies must be making a huge profit in comparison to yours, if the average comes up to 19 per cent and you estimate only 8 per cent.

Ms NORMAN: I would find it very difficult to comment on that, given that I have not seen his report.

The Hon. ROBYN PARKER: Do you think that a profit of 8 per cent is due to tort reform?

Ms NORMAN: I think that the tort reform certainly is taken into consideration when we do our premium filings. I think that the tort reform is more inclined to have some beneficial outcome on the premium that we charge our customers.

The Hon. ROBYN PARKER: So that you have passed on to your customers the tort reform benefits, rather than making a huge profit?

Ms NORMAN: I think in CTP every year there has been a decrease in premiums and I therefore think, yes, that the benefits of tort reform have been passed on.

Ms LEE RHIANNON: The Committee heard evidence this morning from Law Society witnesses, who talked about insurance companies hiding their profits. Would you care to comment on that?

Mr KATSOGIANNIS: In what way?

Ms LEE RHIANNON: Are you aware that insurance companies hiding their profits?

Mr KATSOGIANNIS: No, I am not.

Ms LEE RHIANNON: You would reject that statement?

Mr KATSOGIANNIS: I would reject that statement on behalf of QBE. At the end of the day when you talk about particularly long tail business, and if you look at workers compensation, we are still getting asbestosis claims coming in from 30, 40 and 50 years ago. You never know what the final price is going to be. When you insure someone you do not know in totality whether the final price is right or wrong. I am not sure where that statement comes from. Obviously it comes from the Law Society.

Ms LEE RHIANNON: You reject that on behalf of your own company. What about for other companies? Do you think there is a problem?

Mr KATSOGIANNIS: I cannot comment on other companies. I would not know.

CHAIR: I think you can comment on what is known generally in the industry. Is it known generally in the industry that some companies would hide their profits rather than have full and open disclosure?

Mr KATSOGIANNIS: I really cannot comment. I would not know.

Ms LEE RHIANNON: the New South Wales Council of Social Services, an umbrella organisation for a number of welfare groups, has recently surveyed its members about how they are handling clear insurance commitments and they have found that many community groups are still struggling considerably. One of their findings is that most insurances have increased steadily over the past two years with some respondents still experiencing very high increases. Today we heard from the New South Wales Local Government Association that community groups are actually quite happy with the situation. The association has not received complaints. I just wondered from your own experience if you could comment on how you think community groups are handling their insurance commitments in the light of changes over recent years?

Ms NORMAN: Can I just make a comment there? I am here today to represent compulsory third party insurance [CTP] and my colleague Mr Katsogiannis is representing workers compensation. I believe that at a hearing in early May you heard from our colleague from the Community Care Underwriting Agency [CCUA], Mr Turner, and he would have dealt—or he should be a person who deals with a question like that.

Ms LEE RHIANNON: Fair enough.

The Hon. IAN WEST: Understanding that insurance is a game of estimates in the future and that you are indicating to us that at this point in time claims that have been made since the tort changes in 2000 have not fully flowed through the system and therefore assessments of the impact are somewhat difficult, I am thinking about the situation in 2002 when the changes were made. At that particular time there seemed to be fairly universal agreement that things were in crisis and there was a need for changes to be made. In the light of the certainty in 2002 of the need for the change, can you comment for me on how it is that we can be certain that the changes that were made are perfectly on the mark and that there is no need for any adjustment of those changes that needs to be made in the future, or whether or not you concur with other comments that have been made by people that constant review of the changes that were made in 2002 are proper to ensure that the balance continues to be held correctly?

Mr KATSOGIANNIS: The tort reform changes?

The Hon. IAN WEST: The tort changes, yes.

Ms NORMAN: These changes were made to the liability classes. Is that correct?

The Hon. IAN WEST: Various changes that were made, the tort changes that were made in terms of civil liability, in terms of workers compensation, and in terms of CTP.

Ms NORMAN: CTP changes were made in 1999.

The Hon. IAN WEST: Then from 1999 through to 2002, the various changes that were made in those three categories.

Ms NORMAN: The changes that were made in CTP in 1999 have been successful in relation to some of the key indicators of success so far. One is certainly that the assumptions that were made prior to the introduction of the 1999 changes included that only 10 per cent of claimants would receive non-economic loss or general damages, and that is tracking in line with those assumptions so far. The other key performance indicator I believe would be the way claims are assessed through the claims assessment and resolution process [CARS], and that is yet to be really tested because it has taken a little while for claims to get to that stage. I think in some respects, yes, the assumptions made and changes that were introduced are working in line with the expectation, but there is some checking that has to be done for other changes that came in at the same time.

The Hon. IAN WEST: Expectations of whom?

Ms NORMAN: Expectations of the insurers in relation to how far or how much premium reductions would be flowed through. And I think that is—

The Hon. IAN WEST: Are you saying to me that those changes in 2002 or 1999 in terms of CTP and—

Mr KATSOGIANNIS: In 2001and—

The Hon. IAN WEST: And in 2001, 2002 and 2003 for workers compensation—are you saying that they are perfect and there is no need to change?

Ms NORMAN: No, I am not saying they are perfect. I am saying that they have tracked fairly much broadly in line with what was expected and I still think there is still some testing to be done on all those changes.

The Hon. IAN WEST: What mechanism do you think we should use to have those tests done?

Ms NORMAN: In relation to what, specifically?

The Hon. IAN WEST: In terms of testing the changes, do you think that there should be some involvement of other than the insurance industry? Should there be some transparent system of

testing whether or not the changes are currently tracking fairly and justly, as per the community at large, including the insurance industry?

Ms NORMAN: I think that the purpose of this Committee is also to have a look at whether those changes have been fair in relation to claims outcomes and in relation to the premium-paying public as well.

Mr KATSOGIANNIS: If you look at the 2001 New South Wales changes and you look at it purely from a financial point of view, I think in December 2002 the deficit was $3.2 billion. In December 2004 it was $1.6 billion. Purely from a financial point of view, it seems to be heading in the right direction.

The Hon. IAN WEST: When you are assessing the equation in terms of cost effectiveness as opposed to the social responsibility of attempting to restore an injured person to their pre-injury position, do you not see in balancing the equation that more is involved than just that balance sheet?

Mr KATSOGIANNIS: That is correct, but having a look at some of QBE's numbers, on an average basis per worker, they are now getting more than they were in 2001, based on QBE numbers—weekly compensation payments and permanent disability and pain and suffering. You would have to exclude common law because clearly common law has reduced significantly.

The Hon. IAN WEST: I do not think I will go into that.

CHAIR: That includes pain and suffering, too, which is interesting.

Mr KATSOGIANNIS: That is on our portfolio.

The Hon. IAN WEST: I think that opens up a whole new subject that we probably do not have the time to take up now.

Mr KATSOGIANNIS: To answer your question, yes, there is a huge responsibility on everyone's behalf to ensure that the workers get looked after and get, I guess, what they are entitled to in terms of benefits.

The Hon. IAN WEST: And in doing that, there clearly would be some responsibility of society at large to have a look at the equation, the issue of cost effectiveness versus compensation, and reviewing it as well as using some mechanism to review it other than just the insurance company's balance sheets.

Ms NORMAN: Yes. I do not think that we said it was just the insurance company's balance sheet that was important in this process. I mean, the legislative change and change to tort reform is a matter of what the community wants and what the Government wants to give the community.

The Hon. IAN WEST: I am having difficulty reconciling that with the definitive answer that if we tinker at all with the tort changes that have been made between 1999 and 2002, the sky will cave in and civilisation as we know it will collapse.

Ms NORMAN: All we can do as insurers is price those changes and price any tinkering that may take place. I think that is our role in any tort reform or changes.

The Hon. RICK COLLESS: I wish to follow on from that and also follow on from my previous question about reduction in real terms of the premiums. It would be fair to say, would it not, that the reduction in real terms since 1999-2000 has been the result of the medical assessment process, CARS and so on, and the introduction of the American Medical Association guidelines for assessing injuries. Is that a fair comment to make?

Ms NORMAN: Yes, that has had an impact on the number of claims coming into the system and it has influenced or certainly has had an influence on eliminating the smaller claims from the system in relation to—

CHAIR: And capping the larger ones?

Ms NORMAN: In relation to non-economic loss, there is a cap, but I do not think it has worked to cap the larger claims; but in relation to eliminating the smaller claims, eliminating that head of damage.

The Hon. RICK COLLESS: You point that out in your submission where you talk about the 1999 amendments underpinning the principles of early and appropriate treatment and the early resolution of claims in a non-adversarial environment. At point three of that you talk about keeping premiums affordable by eliminating the amount of compensation payable for non-economic loss in the case of relatively minor injuries while preserving the principles of full compensation for those with severe injuries. I have to say that we have taken quite substantial evidence during this inquiry that suggests that the principle of full compensation for those with severe injuries has not in fact been preserved. What are your comments in that regard?

Ms NORMAN: We are talking about—I guess I still have to come back to the point that we are talking about one head of damage, which is non-economic loss, and that anyone who does not reach the threshold that was introduced in 1999 is certainly not stopped from accessing the other heads of damage. My experience, and in looking at the evidence heard by the Committee, is that there are some people who are not meeting the 10 per cent whole person impairment threshold, but my experience is that it is a small number of people. I do not know that you can ever introduce a perfect threshold that captures just 100 per cent of the right people.

The Hon. RICK COLLESS: Should there not be some flexibility in the system, though, that allows for those who do not meet the strict guidelines? Personal injury is not black or white, is it? There are varying degrees, particularly when you start to look at psychological trauma and those sorts of things. We actually interviewed some people recently who had quite substantial psychological trauma despite the fact that they had very little physical injury to their body or themselves. Yet they were in a situation where they were unable to get a job or keep a job and were suffering quite severely as a result of that. Should there not be some flexibility in the system to allow for those who do not meet the strict guidelines, as the American model sets out?

Ms NORMAN: I think you are right: It is not black or white because you are dealing with people who suffer at different levels. But the problem that the scheme prior to 1999 had was that the threshold was very subjective. It was very difficult if you had a claim from three different people when each assessment would be quite different to the last. So the American Medical Association guidelines were introduced as an objective way of assessing just that one head of damage, non-economic loss. As I said before, it is not 100 per cent perfect.

The Hon. RICK COLLESS: Tell me, does QBE have a sense of responsibility to ensure that those people who may not fit strictly within the guidelines have a right to compensation if they have suffered those sorts of injuries?

Ms NORMAN: Have a right to?

The Hon. RICK COLLESS: Have a right to compensation when they do not fit the strict guidelines as laid down?

Ms NORMAN: Not all claimants that we deal with would be sent off to be assessed, and we certainly would in a lot of cases negotiate with the claimant's solicitor or directly with the claimant that, yes, they were entitled to compensation for non-economic loss. So we do not send everybody through that process. There are some that are more border line, I guess, and it is very difficult for us to determine whether that person does fit within or is over the 10 per cent whole person impairment. They certainly do go through the MAS process of assessment. Yes, we consider everyone, every case, on its own individual merits and we take all of the information that we have into consideration.

The Hon. ROBYN PARKER: We have concerns about the MAS in terms of inconsistencies, delays, absence of appeal rights. The Bar Association said that the users of CARS are increasingly dissatisfied with its operation. Would you like to comment on those statements?

Ms NORMAN: I suppose this is a brand new way of assessing non-economic loss in New South Wales. We have never had this process before. I guess there are administrative hurdles to overcome which may have caused some delays. There may be from time to time some inconsistencies between doctors. But if their assessment is by way of the American Medical Association guides, which should introduce a very objective approach, then that inconsistency should be fairly limited, I would think. I also think that the Bar Association and the Law Society have access to making comment about the doctors on the MAS panel because they have representatives sitting on a selection panel with insurers and other stakeholders.

The Hon. ROBYN PARKER: The Law Society has suggested a fairer and better way forward might be to establish a jury system, on the basis it would be more efficient and representative of the community's views, rather than have the current system. What do you think about that idea?

Ms NORMAN: My observation of the CTP scheme in New South Wales, and I have been involved with it for the last 32 years, is that it is the first time that I can actually recall where the right person, in my mind, is making the decision. That has been with the appointment of the MAS doctors, who are medical professionals making decisions about medical issues. I think that is correct.

The Hon. ROBYN PARKER: If the system is working as well as you say it is, why did Premier Carr at the Labor conference last weekend make an announcement about extra compensation for people who are catastrophically injured?

Ms NORMAN: I think the MAS does not necessarily deal with catastrophic injuries. It is quite clear where you have someone with a significant brain or spinal cord injury that they are over the 10 per cent whole-person impairment. In those cases it is usually readily agreed between the claimant's solicitor and the insurer that that person exceeds that threshold. I think Premier Carr is looking at establishing a long-term care scheme so that people who have catastrophic injuries, whether they are at fault or not at fault, have access to care for as long as they need it for the rest of their lives. I think it is something different to what MAS is doing.

The Hon. ROBYN PARKER: True, but if the system is working efficiently and those people are over that threshold, then the system should provide for them without the need for extra compensation. We do not have the details of Premier Carr's announcement, only what we read in the media. I would have thought they would be catered for.

Ms NORMAN: They are catered for, certainly those people who have catastrophic injuries and who are not at fault. But anyone that is involved in an accident who has a catastrophic injury and is at fault has no access to compensation. For the first time they would be included, and that can only be a good thing. The other thing I think the Government is trying to overcome is it is probably more efficient to pay for a person's care needs as they are required as opposed to giving someone a lump sum where they have to make those decisions for the rest of their lives. In many cases it has been shown that the money given in the lump sum is not spent for what it was intended to be spent for. Maybe this is a more efficient way of looking after those people.

The Hon. IAN WEST: You indicated the AMA guidelines were objective and the best way of assessing. As I understand the situation, there seem to be some issues. First of all, MAS is 10 per cent whole-of-body impairment under AMA guidelines edition four, and the workers compensation system is a 15 per cent whole-of-body impairment under AMA guidelines edition five and they assess a medical incapacity, not a work disability. Although the service providers do not have a problem with it, amongst the stakeholders, one in particular, there seems to be an issue that a medical assessment of impairment is not an objective assessment of a person's disability for work. Do you have any comment on that? I am sure you would be aware of those concerns and the varying thresholds. I put two questions: Do you see any inconsistency between the CTP thresholds and the workers compensation thresholds? Do you see any inconsistency with the use of different AMA guidelines and medical incapacity versus disability for work?

Ms NORMAN: There is certainly inconsistency, even in that we are all using different measures and different guidelines. That goes across various schemes across Australia. It would probably be simpler if we all used the same guidelines, but that is a matter for government. The AMA guidelines for CTP users measures impairment, not disability, but the issues flowing from disability

should be picked up and compensated for in the other heads of damage. For instance, if I have a fracture and that interferes with my work, that would certainly be picked up in heads of damage that deal with economic loss or heads of damage that deal with care. It is a strict measure of impairment. But, as I said before, the issues flowing from disability should be picked up elsewhere.

The Hon. IAN WEST: You would see those sorts of issues coming into the area of a mechanism for continually reviewing the balance?

Ms NORMAN: I am sorry, I do not understand the question.

The Hon. IAN WEST: On the understanding we have not reached nirvana and perfection, there should be some sort of ongoing mechanism for reviewing compensation versus cost effectiveness. These would be the sorts of issues that you would tinker with in trying to achieve the ongoing and continually changing balance.

Ms NORMAN: Yes. If there are changes that can be made to improve the system then, of course, that has to be looked at.

CHAIR: Thank you, Ms Norman and Mr Katsogiannis.

(The witnesses withdrew)

MARK ROY ROBERT LENNON, Assistant Secretary, Unions NSW, level 10, 377-383 Sussex Street, Sydney, and

MARYLOUISE YAAGER, Workers Compensation and Occupational Health and Safety Officer, Unions NSW, level 10, 377-383 Sussex Street, Sydney, and

IAN WILLIAM INCOLL, Medical Practitioner, Australian Society of Orthopaedic Surgeons, P.O. Box 12, Arncliffe, and

STEPHEN ALWYN MILGATE, National Co-ordinator, Australian Society of Orthopaedic Surgeons, P.O. Box 12, Arncliffe,

PETER JOSEPH MOONEY, Barrister-at-law, adviser to Unions NSW, level 55, MLC Building, Martin Place, Sydney,

Ms SONIA FADLALLAH, 74 Gladstone Street, North Parramatta, and

Mr JAMES LEO O'BRIEN, Industrial Officer, New South Wales Nurses Association, 43 Australia Street, Camperdown, sworn and examined:

CHAIR: In what capacity does each of you appear before the committee?

Mr LENNON: On behalf of Unions NSW.

Ms YAAGER: On behalf of Unions NSW.

Dr INCOLL: On behalf of the society.

Mr MILGATE: On behalf of the society.

Mr MOONEY: As adviser to Unions NSW.

Ms FADLALLAH: As a private individual.

Mr O'BRIEN: On behalf of the Nurses Association and on behalf of the Labour Council in support of Ms Fadlallah.

CHAIR: Mr Lennon, would you care to make a brief opening statement?

Mr LENNON: Yes, I thank the committee for providing Unions NSW with the opportunity to present our oral submissions to this inquiry. I understand that members of the committee have been provided with our submission and appendices and, hopefully, have had the opportunity to consider the views and recommendations of Unions NSW. Whilst we have a number of concerns regarding the present operation of the workers compensation system, today we would like to focus the attention of the committee on a number of major concerns and recommendations. I should point out that during my opening statement, I will call on a few experts in the medical and legal field who are here with us to supplement our submission.

We have also advised representatives of the Minister's office about our concerns. The first major concern to which I refer is in relation to the application of WorkCover guidelines for assessing permanent impairment. Under the previous system workers were assessed by doctors and those doctors were allowed to use their clinical skills and experience to determine the injured worker's disability. The doctors were able to take into account the impact the injury had on this person, their pain and suffering and the loss of their occupation. An injured worker, as we know, subsequently received a lump sum under the previous workers compensation legislation. Whilst the industry did not consider the lump sum they received to be adequate under the old system to compensate them for injury or loss of earning and for pain and suffering, that system of lump sum certainly appeared more generous than we have in the current system.

The Government changed the system and introduced a set of guidelines that were based on the Australian Medical Association's guidelines. At the time, and I remember this quite vividly, the industry was advised that the guidelines would take disputation out of the system, and it would be a much fairer and consistent way to assess an injured worker's permanent impairment. The unions do not believe this to be the case as they are starting to receive evidence that some workers who are seriously injured are not receiving adequate compensation and the guidelines can be applied in a manner that gives a harsh outcome. This is on the basis that those guidelines have a number of flaws. One of the major flaws is that there appears to be a great variance between doctors' findings. The guidelines do not appear to compensate workers in respect to many serious injuries such as rotator cuff and burns. The doctors that we have here today will elaborate further on that.

Later on you will also hear from a member of the NSW Nurses Association, Sonia Fadlallah, who has experienced first-hand the unfairness of the new system. In her case the insurance company doctor found that she had a 24 per cent permanent impairment. Her own treating specialist found that her impairment was approximately 30 per cent but the specialist appointed by the Workers Compensation Commission, whose outcome had a binding effect, found that she had no impairment whatsoever. The interesting outcome of her particular case is that the insurance company doctor is also an approved medical specialist, so if the roles had been reversed and he had been the commission's doctor, she would have had a 24 per cent impairment.

The matter is being appealed. However, the advice is that the appeal will take some nine months to finalise. This is hardly the simpler, faster and fairer system that the Government promised when the changes to the workers compensation system came into effect in 2001. In fact, in 2001 the criticism by the Government was that the workers compensation court was taking in the order of nine to 12 months to have matters heard. Well, we have found that here we are with a new system and exactly the same sort of delays are occurring. Briefly, whilst on the topic of the Workers Compensation Commission, I advise that the unions are not satisfied with the operation of the current compensation commission and do not believe it is delivering a fair outcome for workers in New South Wales.

I have just highlighted an example where a binding decision has been made, not only in relation to Mrs Fadlallah's lump sum, but also any chance of pursuing a claim under common law is non-existent. We believe that under the previous system in the workers compensation court, Mrs Fadlallah, who is a major breadwinner in her family, would have received a more just outcome of adequate lump sum compensation to allow her to adjust to life with a disability, and to provide some certainty for her family. It is not only unions that have those concerns with the operation of the commission, it is also all of the medical profession. As part of a delegation today we have Stephen Milgate who is the national co-ordinator of the Australian Society of Orthopaedic Surgeons and Dr Ian Incoll who is an orthopaedic specialist who want to elaborate on some matters I have raised with regard to the guidelines and also the question of the unfairness in relation to the operation of the Workers Compensation Commission. They want to make a statement.

Mr MILGATE: Orthopaedic surgeons treat the majority of WorkCover injuries requiring medical and hospital attention. To give the committee an indication, according to the latest statistics from WorkCover, 63 per cent of injuries regard sprains and strains and 28.9 per cent are back injuries, so it is a substantial amount of transaction between injured workers and orthopaedic surgeons. We will not go through the process of the current arrangement of assessment that is well known to you: you know it is about the determination of whole body impairment. I just want to make one correction to what you have been told, it is actually not the Australian Medical Association, but the American Medical Association guidelines that are used as the sole determiner of permanent impairment.

You also know that they are done by two types of approved medical specialists: some who do permanent impairment and some who do general medical disputes. Importantly, in the appointment of those specialists, according to the application put out in May 2003, the Workers Compensation Commission is not committed contractually in any way to those persons who are accepted as approved medical specialists. So they are maintaining that there is no contractual relationship. AMS was appointed, as you know, for a period of three years under an instrument of appointment, and make a final determination, albeit with some appeal mechanism to the worker's permanent impairment.

The medical assessment in relation to the following is conclusively assumed to be correct, subject to appeal, which raises the whole issue of the relationship between the approved medical specialist and the injured worker. The reality is that the approved medical specialists are required to comply with times and schedules of the commission to submit their work according to a very tight format, as you know. They have to accept payment. They do not bill by invoice. They are paid electronically according to the dictates of the commission. Their superannuation is deducted by the commission. They must attend training as dictated by the commission. They have to use the guides, as we pointed out, and the approved medical specialists [AMS] are virtually put in the situation of judicial officers determining impairment.

The Australian Society of Orthopaedic Surgeons [ASOS] has long held that orthopaedic surgeons should not be the final determiners of a percentage of whole body impairment. We prefer that this particular final determination be made by a judicial officer. There will be differences in expert medical opinions. It is also important to note that with WorkCover and also with motor vehicle accidents the previous system whereby doctors wrote an opinion and that was determined for determination in another place has now become very tightly controlled, and if it is not done properly it is sent back to be redone. If that is the definition of an independent assessment then that is the way it is currently in practice. ASOS believes that the AMS function should be reviewed with a view to ensuring that there is more independence and less control over the appointment and management of approved medical specialists.

We also believe that decisions concerning permanent impairment should be more transparent. We have advocated in previous inquiries that there be an independent dispute and anomalies committee, independent of WorkCover—Anomalies Exceptions and Disputes Committee we call it—to receive information from doctors that come up against these differences in the use of the AMA guides. We regret the fact that that has not been implemented. There is a committee, but it is under the control of WorkCover. Essentially, we believe that the final verdict should be done by a judicial officer and not rest with an orthopaedic surgeon. Obviously, we are subject to the laws of the land and the system that the Government determines will be implemented. Dr Incoll will explain a little bit about the guides and how to use them.

Dr INCOLL: It is a very thick book. I do not know whether you have seen it. The guides are used to score permanent impairment, disability, pain and suffering. All these things are taken into account. It is a bit like comparing science to arts. If you take a purely scientific approach then the guidelines are quite useful. What orthopaedic surgeons and most medical specialists in general develop over the years of practice is an art in their chosen field and that is where the medical opinion becomes more important. Although the American Medical Association guidelines are an important guide I do not think they should be taken as the overall be-all and end-all of the scoring system. Certainly, within those guides it is easy to come up with a number of different scores depending on your point of view of the patient, and that is where personal opinion and the oversight of a judicial officer is probably most important.

CHAIR: Do you find yourself in conflict with other areas of medical legal opinion over scoring?

Dr INCOLL: Not so much conflict, but difference. Mostly the score is based on your own interpretation of your findings. Patients can be very well from day to day. Your opinion of their position might be different from day to day. Certainly it would be very unusual for a number of doctors to get all the same score using the strict guidelines anyway.

CHAIR: Do you take into account the end use? For example, if the person has a rotator cuff injury that might be assessed at a certain percentage of disability or impairment. If it happens to be the first violinist of the Sydney Symphony Orchestra it might be something quite different.

Dr INCOLL: I believe there is a section in the American Medical Association guidelines regarding prior function, but that sort of thing is where a worded opinion rather than the score is much more important. I agree that someone's injury to the left toe is much more important if they are a professional soccer player than if they are a computer worker.

The Hon. ROBYN PARKER: Some of my original question about the American Medical Association guides have been answered. Do you feel that psychological impairment would be best dealt with by an independent medical assessment rather than currently is the situation?

Dr INCOLL: It is really not my field. I do not think I should comment on areas outside orthopaedic surgery.

CHAIR: Would you think it relevant to call in someone from the Australian and New Zealand College of Psychiatry, for example?

Dr INCOLL: That would seem appropriate, or a psychologist rather than a psychiatrist. There are certainly a number of different facets of disability, only one of which is musculoskeletal.

The Hon. ROBYN PARKER: Do you think it is fair to be able to combine a number of different resultant injuries, for example some psychological damage and perhaps damage to one limb or whatever to meet the threshold rather than as it is currently assessed independently?

Dr INCOLL: That is where an overseeing judicial officer is most important because they can take input from a number of different specialties in a number of different areas.

The Hon. ROBYN PARKER: The New South Wales Law Society suggested to us today that introducing juries into the system to assess damages would be a good way forward to prevent the Santa Claus judge idea and be a bit more responsive to community attitudes. Would any of you like to comment on that?

Mr MILGATE: Certainly the Australian Society of Orthopaedic Surgeons will not make a statement on that role. It is not our role to determine that situation.

The Hon. ROBYN PARKER: What about Unions New South Wales?

Mr MILGATE: That is something you would have to look at, but our position at the moment is that the review should be by a judicial officer. That is what we have said in our submission.

Ms LEE RHIANNON: What about the variation between doctors' findings? Earlier we heard evidence from some people involved in the industry who were very pleased with having three medical opinions. I would appreciate hearing from you about any particular cases you have and why you value having a judicial officer who, at the end of the day, makes the decision, reflecting back on the system that we lost. We have been hearing evidence about insurers who very much value having those three medical opinions and they argue that we are talking about injuries so they know what they saw and they know what the situation is.

Dr INCOLL: Sorry, I am not sure I follow the question.

Ms LEE RHIANNON: The comparison between having three medical people make the decision. We are hearing evidence from people involved in the industry who see that is the best way to go because they are dealing with injuries, medical people know what the situation is, they are the ones able to give the right decision. They have argued that is an objective way to make a decision, whereas you are doctors but you value the judicial input we previously had, if I understood correctly. I would ask you to reflect on those differences and why you value the judicial input.

Mr MILGATE: One of the things that seems to be imposed on medical practitioners now is to weigh evidence affecting situations. The question is whether or not it is the role of the doctor to start weighing evidence in a judicial sense as to what is more relevant than whatever as opposed to a medical sense. Also, the final determination is the finding of the final doctor. I have a photograph of the reports here and sometimes you get several folders of reports. One person issues the final verdict. That particular person has to come down on a particular side of the argument, depending on their opinion.

Ms LEE RHIANNON: You are saying that one particular doctor ends up being the decider?

Mr MILGATE: Yes. It goes to the final AMS and his determination or her determination is binding, and that is it.

Ms LEE RHIANNON: You would argue they should not rest in the hands of the medical person?

Mr MILGATE: Yes.

Ms LEE RHIANNON: That medical people should just give the opinions, they should not weigh it up?

Mr MILGATE: What we are saying is that a lot of our doctors are not comfortable with being the final judicial officer in a verdict for a worker. They are not comfortable with that. Obviously, some may be but a lot are not. It is a new role for our doctors.

Ms LEE RHIANNON: You are saying a lot are. Are you referring to your own day-to-day experience or have you done surveys?

Mr MILGATE: Yes, from our own day-to-day experience talking to people who do these assessments the whole new system is at total variance with what they are used to. They are used to giving independent advice to someone else. They now bring down the verdict, in a sense, on someone's permanent impairment. That is not the traditional role of an experienced independent medical witness writing an independent opinion.

Ms LEE RHIANNON: What is your comment on the old system, when there were insurers doctors and doctors backing the victim? Was it as delineated as that?

Mr MILGATE: The idea of expert medical witnesses is a very controversial topic, and obviously some people were labelled hired guns for either side. It certainly was a particular process that we went through. We really do not have an opinion. Good doctors give very good independent medical opinions, and if you approach the right people you get a fair and reasonable assessment. But they are not comfortable with giving the final verdict.

The Hon. IAN WEST: I want to ask you a question about journey claims and, when you are interviewing or talking to someone about their impairment, if a decision has not been made as to whether there is going to be a CTP claim or workers compensation claim do you assess both the American Medical Association edition 4 for the CTP and then AMA 5 for the workers compensation?

Dr INCOLL: I cannot speak for anyone other than myself. In general the most recent guidelines are the ones I tend to use.

The Hon. IAN WEST: Which are 5?

Dr INCOLL: The most recent approved guidelines.

The Hon. IAN WEST: My understanding is that they are for workers compensation?

Dr INCOLL: Yes.

The Hon. IAN WEST: What do you use for CTP?

Dr INCOLL: Again, I cannot speak for anyone else, but for myself I have enough trouble learning one set of guidelines.

The Hon. IAN WEST: Fair enough. In terms of impairment versus disability you are saying, as I understand it, that you do not feel qualified to make assessment as to a person's work-related disability as opposed to medical impairment, and that is where the judicial part comes in?

Dr INCOLL: No, I think most orthopaedic surgeons will say that they feel able to make assessments of impairment, assessments of disability, but they realise they are one opinion and,

therefore, in some instances in medicine you can be blind to one aspect of the care of the patient or the treatment of the patient, which is where a number of opinions come in. That is where the judicial oversight comes in—it is weighing up all the opinions and forming a balanced view.

The Hon. IAN WEST: Perhaps these questions might be best directed towards the Labor Council. I think we will hear from a representative of NSW Nurses of an assessment of 30 per cent from their doctor, 24 per cent from the insurance doctor, and zero per cent from the AMS. Can you explain how that could possibly happen?

Dr INCOLL: I do not know anything about the individual case, so it is very difficult for me to comment.

The Hon. IAN WEST: Have you been in a situation where—?

Dr INCOLL: Certainly I have heard of situations in which there has been a 10 or 15 percentage points difference, and that goes to the application of the guidelines. I think people also use the guidelines, together with their own opinion, as a basis.

The Hon. IAN WEST: You are engaged by WorkCover? Does WorkCover pay your account?

Dr INCOLL: It depends whether you are talking about the accredited medical specialists or individual specialist orthopaedic surgeons.

The Hon. IAN WEST: Do you act as an approved medical specialist?

Dr INCOLL: No, I do not.

Mr MILGATE: The AMS is appointed by the commission, under an instrument of appointment by the court, and can be removed by the same process. It is also paid by the commission.

The Hon. IAN WEST: By the registrar of the commission?

Mr MILGATE: That is right. It is paid electronically, and it can be removed by the same process. As you know, the insurance companies look up a web site with the various AMSs beside it, and they decide from that list who they are going to send the work to.

Ms LEE RHIANNON: You spoke about the variation. From your experience, how often do you find that there is a variation of between 10 and 15 per cent?

Dr INCOLL: That would be unusual. In general, for simple, straightforward injuries with simple, straightforward outcomes, most scores will be very close.

CHAIR: We have heard evidence of quite disparate scoring.

Dr INCOLL: That is right. I think that is the exception rather than the rule, though.

Ms LEE RHIANNON: The exceptions would be with regard to the more serious injuries?

Dr INCOLL: Usually multiple injuries—certainly the more serious ones and those that involve greater loss.

Ms LEE RHIANNON: People who have been injured have said to us that, as we know, their psychological injuries cannot be included. How do you make that separation? As a lay person, it seems to me that the separation is not very clear, that a psychological injury can impact upon one's physical wellbeing. In your experience, is it something that is difficult to delineate, that you have difficulty with, because you have to separate them?

Dr INCOLL: That is where purely using the guidelines does cause problems.

Ms LEE RHIANNON: In what way?

Dr INCOLL: Because they have strict scorings for pain and suffering, and I do not think that really allows an independent opinion. However, the guidelines are fantastic for the bulk of the assessment. As I said before, it is a combination of using science and using the art of medical care.

Ms LEE RHIANNON: You say the guidelines are good for the bulk of the assessment, and that the problem arises when you get into the grey area of what has caused a person's injury, whether it is the physical damage or the psychological impairment. Is that the grey area?

Dr INCOLL: I guess the grey area is the amount of disability that has come about with the psychological impairment.

Mr MILGATE: Our members do talk about the patient with a pre-existing condition. Some of these files are quite high, and include patients with multiple injuries and pre-existing conditions. It is very complex material to go through and make judgments on each conflicting doctors' reports and so forth. So they do cause concern, and the payment for them is not substantially high; it is set by the commission.

The Hon. RICK COLLESS: Dr Incoll, do you feel that the AMA guidelines are suitable for this type of work, or do they need to be massaged to suit our situation here a little better?

Dr INCOLL: I think they are suitable but they are not perfect. These guidelines have come about after many years of work by thousands of doctors. They are certainly great groundwork for the assessment of impairment and disability, but, as with any individual case, there are always nuances that will not be picked up. I think they are the best that we have, but they can certainly be improved, as with most things.

The Hon. RICK COLLESS: Is there any flexibility in the way they are applied?

Dr INCOLL: Before you use the guidelines, you examine the patient, and you go through their history and examination. From that you form an opinion. Though they are fairly hard and fast scoring systems, your opinion will colour the disability score. I think you could train someone in a few weeks to assess and put down a score. But it is the evaluation of the opinion that is important.

The Hon. RICK COLLESS: Mr Milgate, I think you said that some doctors at least are not keen on making the final decision, that it should be a judicial decision.

Mr MILGATE: Many are not. Yes.

The Hon. RICK COLLESS: If that is the case, does that re-introduce into the decision-making process what I might call non-medical subjectivity?

Mr MILGATE: It is not really for me to say. There are a number of solutions to overcoming that. But, given a set of conflicting circumstances, most of our assessors would be comfortable with a judicial officer going over the work again, weighing it up and making sure not only that justice was done by that justice was seen to be done. That is important. I think doctors genuinely care about injured workers, and they genuinely want to see those who are genuinely injured get a fair and reasonable go. They are forced to use a particular system. As Ian said, they find some validity in that system in certain circumstances, but there are other circumstances where they are troubled and concerned. Having micromanaged into producing a particular format and a particular result from the system, they have to stick within the rigid structure of that system; they cannot move outside it. That is why we wanted to set up a disputes and anomalies committee. We wanted to be able to say: Where we start to find some of these problems, let us have a look at them independently. But that has not been forthcoming.

The Hon. RICK COLLESS: Mr Lennon, do you believe that it is better to meet a person's medical needs as they arise, rather than giving them a lump sum, which really can only estimate what happens with regard to their future medical requirements?

Mr LENNON: Our view generally is that we want to make sure that people's medical needs are met. With regard to how you do that, I think you have to look at particular circumstances. Many would say that as they arise is probably the best way to go. If you talk to our unions, I think you will find there are conflicting views about how you would approach that. But our preference is to make sure that they are met as the need arises.

The Hon. ROBYN PARKER: The tort law reform agenda was a response to public opinion, rightly or wrongly, relating to a number of factors, one of which was that people were receiving unreasonable and ridiculous payouts, people were claiming for things that most people thought were excessive and should have been their own responsibility, and there were fraudulent claims going on. Since the reforms, has there been a reduction in the number of workers compensation claims?

Mr MILGATE: We can only go by the statistics we are given. We understand that there is a reduction in the number of claims, particularly at the bottom end. Whether that is due to the fact that those claims were not real claims beforehand, it is not for us to say. We understand there is a reduction at the bottom end. It may be that people consider that it is too hard. But our AMSs certainly have plenty of work. The AMS system is fairly heavily used. People are not ringing me and saying there is no AMS work in the system. Although, it is interesting that some AMSs are used more heavily than others. The allocation of where this goes to is made by those in the office of allocated work. So doctor A might get five, and doctor B might not see something for two or three months. It is totally up to WorkCover as to who they send a report to, and there is no way the doctor is involved in that process.

The Hon. ROBYN PARKER: You cannot tell me whether there is a reduction in the number of frivolous claims?

Mr MILGATE: We are not given those statistics. We are like members of the general public in relation to what is happening; we are not briefed in that matter.

The Hon. TONY CATANZARITI: Mr Incoll, you made reference to the fact that the system of assessment is as good as it can be at the moment, although it is not perfect and there is room for improvement. Do you have any ideas as to what short-term improvements can be made?

Dr INCOLL: I guess the short answer is no. It is a very complex situation. It has taken many people many years to work on it and modify it. I am amazed that someone could come up with those sorts of guidelines in the first place. So, no, I do not really have any way of improving it. But I think it would be wrong to take them as the only guide in relation to disability.

(**Messrs Incoll and Milgate withdrew**)

Mr LENNON: I would like to touch on the issue of the Workers Compensation Commission. As I said, we have some concerns about the Workers Compensation Commission. We believe that it should be incorporated into the New South Wales Industrial Relations Commission, which has qualified and experienced judges and commissioners who would be in a position to determine workers compensation rights. We believe this is an appropriate step because it would be complementary to the work that they presently perform in regard to common law, industrial law, and occupational health and safety law. Further, we believe that the commission is highly regarded, in the main, by employers, unions and regulators in New South Wales.

On the issue of common law, this is an area that needs serious amendment. It is our understanding that there have been no common law applications for workers whose injuries occurred after November 2001. This is due to the question of the high threshold, in combination with the question of guidelines. Also, those who do get over the threshold do not bring a claim for damages because they will not be provided with ongoing medical and domestic care. For a quadriplegic, for instance, this could be up to $2,000 or more per week. With your indulgence, Mr Chair, we have with us Mr Peter Mooney, who is a barrister at law and an expert of practice in this area. I ask him to come forward to make a few remarks.

Mr MOONEY: From what I understand, you have heard exhaustive evidence about the impact of the reforms of 2001 when the storm of tort reform was at its highest and the consequences

of the effects on the Workers Compensation Act, the CTP insurance and the Public Liability Act, and I would not want to labour the position by giving you examples. I have been in practice for probably about 20 years. I see only injured workers, principally those who are injured in the workplace, victims of industrial accidents and the like. I would see 10 to 20 per week and I have seen them under the old 1926 Act, which was in place until 1987; from 1987 up until 2001 and from 2001 until now.

From my experience, and it has probably been brought home with this Committee, I have seen people regularly who have had profound injuries, people who are perhaps injured in the workplace or in some other circumstance where they come to you and say, "I was earning $1,000 gross". The average weekly earnings for a male in New South Wales now is $1,166 per week. That is from the Australian Bureau of Statistics, which was published about a month ago. If I see a young man who is 25 and he has had a serious injury perhaps to his back, he is a labourer and he will never work again; I say to him, "What is the situation now?" and he says, "The injury happened a year or so ago"; I ask him, "What are you receiving on workers compensation payments?" and he says, "About $380 per week gross". He is better off on sickness benefits.

I tell them sometimes the system of workers compensation in this State is so bad for injured people that they are better off on sickness benefits because they will get a disability card. Then they say to me, "What about my common law rights? Can I sue anybody?" It is my experience, and I have no doubt it is an unanswerable fact, that the 2001 amendments wiped out the rights of injured workers to claim compensation, and I understand the Committee has heard many examples of this. So this injured worker, who will never return to his chosen occupation, goes along to an accredited medical specialist, and we have heard some evidence now about whether or not there is a divergence of opinion. From the 50 or so cases I see every week you will get the treating orthopaedic or neurosurgeon, who was the person closest to the injured individual, give an assessment of 15 per cent or greater and the AMS, without exception, will come back with a figure probably less than 5 per cent for a profound injury.

Then you say to the worker, "Well, your lump sum entitlements are you will probably get about $30,000 for pain and suffering", and he says, "I have had two back operations and I am in unrelenting pain and I will never get back to work", and that is the benefit he now has under this scheme. And it is case after case after case. That worker ultimately will go along to the commission. I have not appeared before the Workers Compensation Commission but I understand that cases there are compromised greatly by injured people only because they are exhausted by the system and they just cannot take it anymore.

That is the machinery which we now have and have had now for four years, and we can really see the full impact of what it has. I speak here on behalf of the unions or the workforce; I am not here to put actuarial evidence before the Committee or to tell them what system is the most affordable and the like. When the present Labor Government in Victoria was returned to power some years ago, in the first twelve months the Attorney General stood up and said, "We are here to restore common law rights for injured people. It was a right that should never have been taken off injured workers". Perhaps I could reiterate that that is exactly the echo which I would like to send through this Committee.

It is probably even more embarrassing when one has regard to comments made even by the lady representative from QBE not half an hour ago. A worker who insures himself in the workplace in the advance of his employer's interest in doing a day's work, has nowhere near the rights of an injured worker in a motor vehicle case, as appalling and unjust that system is. The lady from QBE said, "The percentage impairment of disability or impairment does not really give us a figure for disability, but it is good to know that those rights are protected under other heads of damage". Well, they are not protected in relation to the workers compensation amendments because if you do not get over the 15 per cent you have no rights to bring your claim for loss of damages, economic loss, nursing care or future medical expenses.

What is being trumpeted by people, and I would also advocate this, is the Civil Liability Act. There are many problems with the Civil Liability Act but the Government, in its submissions, and I quote from page 10, says, "The civil liability reforms accordingly strike a balance between fair and reasonable compensation for injured people and the community's ability to pay for that compensation". That is the architects of the Civil Liability Act—who are the same architects of the

workers compensation and motor vehicle legislation—advocating that that scheme is a fair and reasonable scheme. The question must be asked by this Committee: if it is fair for the public at large to be compensated as they are here, why is it not fair for injured workers? And there is just no answer to that.

The Government would say, of course, that in a statutory scheme there is really no place for common law, and that seems to be the principal argument which is mounted by the Government in their submissions as to why common law should not be reintroduced or amendments made to the present scheme. That would have a lot of force. If an injured worker were paid their full pre-injury wage during any period of incapacity, the case for common law damages would fall away. But that will never happen; it will never be affordable and it would take an enormous leap of faith to say that the scheme, which at the moment after six months or even 30 weeks reduces a person to $380 per week, will increase that person's payments to what was their wage prior to the accident—it will just never happen.

The Government then says, "People whose injuries are assessed at 15 per cent are still entitled to seek damages for economic loss"—this is under the Civil Liability Act—"In similar terms, injured people who are less serious, nevertheless can still seek full recovery of their reasonable hospital, medical and rehabilitation expenses, past and future care and out of pocket expenses. Nothing in the Government's reforms limits the liability of persons to recover these things". Again, I am not here for any particular interest in the community other than the general workforce, and no doubt the Committee has been told that if you are in that very rare situation where an injured worker gets to 15 per cent impairment—and I had one not long ago where a prison warden, whom I will not identify by name, was the victim of an horrific assault in gaol. He was assaulted by inmates who stomped on his head. He was in a coma for six months. His wife brought him in to me and the wife said to me, "Look at him, but I will speak on his behalf because he lost his power to articulate"

But I have to give advice like, "You need a speech therapist. You are severely disabled. You need assistance and you will obviously have very substantial ongoing medical treatment. For those reasons, even though you are over 15 per cent, you would be out of your mind to bring a common law claim to recoup your economic loss". Then the client will say to you, "Well, what should we do? Do we bring the claim and lose our medical expenses or do we not bring the claim and lose the home that we live in?" I do not want to be anymore graphic than what I have just respectfully submitted, but that is the present regime of treatment of injured people in this State.

CHAIR: We have heard accounts of similar stories like that.

Mr MOONEY: What I am here to say is that whilst you may have heard some stories, that is the majority of injured people who could tell that story to this inquiry. I just wonder whether or not paraded before this Committee have been any examples of people who say, "I have been injured since 2001. What a fair system we have", and I doubt that we have.

The Hon. IAN WEST: We have had some people who have said that but they have not been injured workers.

Mr MOONEY: The principle behind all these schemes was that if you are injured as a result of the fault of somebody else you should be put back in the position you were if the accident had not occurred. I know that might sound repetitious but that is where it is.

CHAIR: It has been the phrase that some members have used.

Mr MOONEY: One of the concerns which I have heard from the Committee is Santa Claus judges. That is a very troubling perception which probably was based as the foundation for the tort reform, that the system is out of control.

CHAIR: It was a public perception.

Mr MOONEY: It was a public perception. It still persists. The Government in their submissions have referred to three well-known cases as to saying, "This is why we fixed the system". The first case was, I do not know if you have been told of this by previous submissions, but three of

the four cases which they identify in their submissions, and I do not know if you have had this brought to your attention, but each of those three cases which they refer to were overturned on appeal. Those judgments never persisted; and they do not exist today.

The Hon. ROBYN PARKER: Who do you think created that public perception and why?

Mr MOONEY: That would be an embarrassing question to answer and I would not want to.

CHAIR: Can I put it in a different way? Was that litigation explosion due to lawyers' greed, society becoming more litigious, the claims becoming more frivolous, the payments becoming more excessive by judges and the fear that the public was going to have to pay higher premiums?

Mr MOONEY: Can I answer that in a number of ways? The first way I would answer it is, the more the injured people whom I have acted for—and I am talking in the thousands now—I have never met one injured plaintiff who at the conclusion of his or her case would say, "I'll keep the money and keep the injury". I have never had an example of that. In the District Court, which is the principal court that deals with civil matters in this State, there might have been 10,000 personal injury claims filed per year, and what the public is told of is the one in 200 which goes off the rails. The idea of Santa Claus judges—the perception, which I can understand—the judicial system in relation to injured people is a very different system and climate to what it may have been 10 or 20 years ago.

If a person comes in the door and wants to bring a claim you are worried about bringing a claim for them. The complexion of the judges in all courts, District and Supreme courts, is certainly not under any circumstances a Santa Claus system. The perception as to who it may have been created by, I do not know. In 2001, at the height of the reforms, I was lucky enough to go and visit a number of members upstairs and I introduced injured people to them and I said to them, "If these reforms go in, people like this are not going to be compensated". But I think the tsunami of public opinion at that stage was just unbearable and the catchcry was, "Let's get the lawyers". Let us be honest about it: that is what the catchcry was. When a worker comes in now the first thing they say to you is, "I understood the reforms just cut the lawyers out of the system", and when they realise that in order to get to the lawyer they cut their way through a dozen injured people to get every lawyer, that is what has happened.

The Hon. ROBYN PARKER: If our Committee were to take on board your suggestions and other people's suggestions in terms of a way forward in trying to reverse the situation for some of these injured workers, will there not be a similar tsunami of public outcry and a fear campaign of premiums increasing and a return to previous times?

Mr MOONEY: The Civil Liability Act as it is at the moment is a very stringent system of giving injured people access to rights. The Civil Liability Act has a number of governors on it, which would make the public quite happy. The first governor is that it protects the public purse against excessive legal fees. That would immediately ameliorate substantial concern. If the claim is worth less than $100,000 in ultimate verdict, the maximum amount that can be recovered by way of legal fees is $10,000, unless there are special exceptional circumstances in which the client has agreed to enter into a private arrangement with the legal advisers. But the maximum amount that can be recovered against a defendant is $10,000 for professional costs. That will do a lot—and has done a lot—to eradicate small claims; it has done a lot to eradicate erosion of verdicts to pay legal fees; but what is more important it has protected defendants and insurance companies from paying significant legal costs for matters that are relatively modest, that is, cases worth less than $100,000. That would immediately be attractive, and indeed that was one of the attractive things about introducing the Civil Liability Act.

The other question is: What about the explosion of small claims? In order to obtain money for pain and suffering and loss, you need to be assessed under a judicial test. In Victoria if you are an injured worker there are two gateways to accessing rights. One, you get a medical certificate that says that you are a percentage whole person impairment. Like our system no-one gets that certificate. No-one could ever prove that they were so injured that they would qualify for the threshold. The other is what we have been calling the narrative test, a judge's appreciation of the effect of an injury on an individual, that is, is that person a seriously injured worker? Under the Civil Liability Act if you are under 15 per cent of a most serious case—and a most serious case is brain damage or quadriplegia and the majority of injured people are under it—you get nothing for pain and suffering. The idea of the

small cases clogging up the system is gone. They are certainly gone under the Civil Liability Act. Does that answer the question?

The Hon. ROBYN PARKER: Do you think the removal of fault-based compensation for negligence underlines personal responsibility and reduces the duty of care?

Mr MOONEY: The idea of duty of care has been in existence for centuries. The removal of a fault-based system is going to have two consequences. As I say, I am not an actuary, but if you were to introduce a no-fault system into this State the cost on the public purse would be horrific. As I understand it, it is in existence in New Zealand and it is trumpeted as a great system. New Zealand has a population of something like 3 million people, less than the population of New South Wales. As I understand it, the underfunded liabilities there are in the "dillions". They dwarf our system in relation to the alleged deficits in workers compensation. It would just be unaffordable. The other thing is, where do you draw the line? Who is going to get no-fault protection? Is it the public, the worker, the motor vehicle or the injured individual? It is very hard to say. As to whether or not it would affect people's obligation to take care, I will be honest and say I do not know the answer to that question.

(**Mr Mooney withdrew**)

Mr LENNON: I would call on Ms Fadlallah and Mr Jim O'Brien, who is an official for the Nurses Association to outline her case, in particular the circumstances surrounding her determination under section 40 of her ability to earn on the open labour market, which is also a particular problem with the legislation as we see it at the present time.

CHAIR: Ms Fadlallah, what is your occupation?

Ms FADLALLAH: I am a registered nurse.

CHAIR: But you are appearing before the Committee as a private individual?

Ms FADLALLAH: Yes.

CHAIR: Mr O'Brien, you are you appearing today on behalf of the Nurses Association and on behalf of the Labour Council in support of Ms Fadlallah.

Mr O'BRIEN: Yes.

CHAIR: Would either you care to make a brief opening statement?

Ms FADLALLAH: Yes. I am 44 years of age. I was employed at a public hospital since 1988 as a fault-time registered nurse. I was the main income earner in my family. I worked in different wards in that hospital, and seven years later I moved to the cardiology diagnostic department where I was doing some nursing duties plus testing on the hearts. My job was mainly doing ultrasounds. Nursing is a physically demanding job, but much more demanding was doing ultrasounds. That involves reaching the patient's chest to take pictures and using the left hand to operate the machine. In lots of cases we had to do more stretching to reach the patient and the machine. That would involve macro rotation to the left and back twisting to the right. It was a difficult, awkward position to do that job. I did that job for eight hours a day for many years, but this sort of job put too much strain usually—and on me—on the bones, muscles and tendons. These days musculoskeletal injuries related to this specific type of work is very well documented.

Until September 2001 I was very fit and energetic, managing any workload without any problems. In September 2001, following five weeks of increased workload, I started to complain about pain in the neck, shoulders and arms. Diagnosed as muscular strain in the beginning, I had one week off and I returned to work doing a bit of ultrasound and light duties that I could manage with the level of pain. On 22 October in the middle of the day I had to stop while doing an ultrasound because of too much pain and numbness in the left hand—and the face as well. I had investigations done and my doctor said that this is a serious injury, so I had to take three months of work. I returned to work in January 2002, on light duties and reduced hours.

I moved to the Admissions Office first. Was placed in the main Admissions Office at the hospital, then in the medical casualty ward, and then in infection control. During this time the hospital asked me to go and job-seek for three months, using an employment agency. So, while I was employed, I had to go for three months to seek employment outside the hospital. In November 2003, because my condition did not improve and I was not able to increase my hours to full time, they asked me to go and job-seek again. They withdrew the duties in infection control, and they asked me to job-seek outside the hospital again.

My employment was officially terminated in May 2004. With the job search activities, in early 2004 I had some help from the insurance company—that was for about one and a half months—and after that they closed my rehabilitation and patient file. They said they cannot do anything much to help me. So I had to job seek by myself and I am still doing this, but I was not successful. In the last four years I had three functional assessments, three vocational assessments and a driving assessment; I was seen 10 times by the insurance doctors. All these doctors knew that I have a serious injury, but they had one main aim, to get me to work straight away, full time. I know this.

On the other side, my doctors tried everything to get me improved and to get back to some quality of life. With my workers compensation case, my doctors gave their opinions, they had similar opinions, and the percentage that they had was well above 15 per cent or well above 20 per cent or 25. The insurance doctor himself gave me 24 per cent—that was in December 2003—but, for some reason, I had to go and see an AMS from the Workers Compensation Commission. So I was referred to one of the doctors and I saw him in October 2004.

In January 2005 I had the results that it is zero per cent of impairment. He gave me zero for impairment while the insurance doctor gave me 24 per cent. At the same time a knew that another insurance doctor who assessed me just a few months earlier or at the same time as the Commissioned doctor, based on his opinion and the vocational and functional assessments, based on these three assessments, they said I can do full-time nursing duties. Because of this, they reduced my payments from the specialty rate, which is about $300 because I have two dependants, to $48, and the $48 is just the difference between working in the public system and working in a nursing home. They said I can work full duties in a nursing home or full duties as a liaison nurse. This is what happened. My solicitor lodged an appeal.

The Hon. IAN WEST: Who made that assessment?

Ms FADLALLAH: From the insurance company they sent me for a functional assessment and a vocational assessment.

The Hon. IAN WEST: A doctor assessed your ability to work in a nursing home?

Ms FADLALLAH: No, rehab provider, plus the pensioner's doctor. So, insurance doctor—another insurance doctor than the one who gave me 24 per cent. It was just about one year later. I was given 24 per cent by an insurance doctor in December 2003. In October 2004 I was assessed by another insurance doctor. He is the rehab doctor. Based on that assessment and a functional and vocational assessment, I was told I can do full-time nursing duties. And based on that my payments were reduced.

CHAIR: Despite the fact that working in a nursing home you might be lifting patients and the nature of your injury, because of the stretching and so on, did the rehabilitation doctor say that that had not impaired your strength or your lifting ability?

Ms FADLALLAH: He said I can lift 10 kilos, in his assessment.

CHAIR: Ten kilos! I have never had a patient that light.

Ms FADLALLAH: My solicitor lodged an appeal against the zero per cent and I am not going to be able to get an answer until another nine months. Just lately I got in touch with Ms Yaager and she asked me to go and be assessed by an independent rehab provider at the Australian Institute of Management. We are going to take it from there.

The Hon. IAN WEST: The rehab provider who conducted the assessment was employed by whom?

Ms FADLALLAH: The insurance company chose. Actually, my doctor chose a rehab provider right from the beginning for rehab assessment, physio, hydrotherapy and everything. The rehab provider that my doctor chose was not accepted. Even my specialist referred me to a rehab provider. I went for the first assessment and it was not approved; they sent me to their rehab provider.

The Hon. RICK COLLESS: What is the prognosis for your future recovery? Are you expected to recover from this injury eventually?

Ms FADLALLAH: No. Maybe a bit of improvement, but not full recovery.

The Hon. RICK COLLESS: Certainly not back to where you were before?

Ms FADLALLAH: No.

The Hon. ROBYN PARKER: Do you have daily pain?

Ms FADLALLAH: Yes, day and night. I am still having physio and medication.

CHAIR: To enable me to understand and also to place things into context, part of the legislation has to do with your own responsibility in respect of such an injury. My understanding of the ultrasound is that the machinery was over here to the left and that meant quite a lot of stretching while you were doing things here. You said that was well known in the industry as a problem.

Ms FADLALLAH: Yes.

CHAIR: Just help me to understand. Is this because the placement is a foolish placement? Could the machinery not be closer to the patient, for example? I do not know.

Ms FADLALLAH: For example, we have to do the tests on the heart. In the department itself, it is not that bad at all because the machine is just next to the bed.

CHAIR: Okay. So you would lean over to the patient's heart?

Ms FADLALLAH: That is right, and operate the machine. Now, if the patient cannot come to the edge of the bed because he is orthopaedic or because of any other reason, I have to lean over to the right side, so that could be some twisting and make the patient—

CHAIR: And for some patients who are very large, there would be quite a bit of leaning.

Ms FADLALLAH: That is right, too much of arm abduction and arm limitation.

CHAIR: So this is not in any sense a responsibility of yours and not thinking out where the machinery was. It is not a responsibility of yours. It is just one of those things: you have a variety of patients sizes and conditions that are involved in this kind of stretching.

Ms FADLALLAH: Yes. It is more problem, for example, in the intensive care areas or in the coronary care areas where there is equipment on the right side of the patient, like a respirator or an intravenous machine, and I cannot put the machine straight next to the bed. The machine has to be put at an angle, and this is where more problems can happen.

Mr LENNON: Ms Yaager would just like to supplement this section. She has been involved in the case.

Ms YAAGER: When I met Sonia, the first reason that I met Sonia was because of her permanent impairment and what happened to her. I found that subsequently she had a section 40 assessment. What I did that was I organised for Sonia to go to a rehabilitation provider immediately and I selected a provider who had a background in nursing so that when they were assessing her, they

were looking at what she could and could not do; they knew the duties of a nurse. We have not got the report yet but I spoke to the provider before this hearing and they said that there is no way that Sonia can return to nursing duties. She was assessed by a nurse and the nurse has a double degree: she is also an occupational therapist. They could not understand how this insurance company came to that conclusion.

The Hon. IAN WEST: Section 40 being the weekly payment of the $48.

Ms YAAGER: Yes, the amount that she is now paid by the insurer.

Ms LEE RHIANNON: Mr O'Brien, as an industrial officer of the Nurses Association, is Sonia's case something that you see quite often? How frequent is it that you come across nurses in this predicament?

Mr O'BRIEN: Thank you for the question. I see this almost on a daily basis.

Ms LEE RHIANNON: Really?

Mr O'BRIEN: And the injuries that nurses sustain are many and varied, ranging from psychological through to serious medical and musculoskeletal problems. My role, if I may, is to ensure that the employers follow their obligations to do everything that is physically and humanly possible to ensure that the injured worker returns to work. Sadly there are cases, and I think Sonia is one of those matters, where she will not be able to return to nursing, and that is a tragedy. So, yes, it is something I see quite regularly and for that reason I suppose I have taken on the role of pursuing in the Industrial Relations Commission proceedings from time to time to endeavour to have nurses, who are injured and who have had their employment terminated because they are no longer able to perform their pre-injury duties, return to work either in a re-employment role or reinstated.

The consequences for a nurse who is injured is that she has nothing to look forward to, other than a very poor weekly payment, and that quite often continues until they are eligible for the old age pension. It is a tragedy which they feel immensely aggrieved by and we do everything on our behalf to try to ameliorate that situation.

The Hon. IAN WEST: Sonia, during the period of time when you first went off work, there would have been a rehabilitation co-ordinator and provider that you would have been asked to see from the hospital.

Ms FADLALLAH: Yes.

The Hon. IAN WEST: Did they offer you any return to work program?

Ms FADLALLAH: From the beginning, yes, in 2001, when I first had my injury. I had three months off and the rehabilitation provider from the insurance company, she came to my place actually and she did an assessment and she spoke with the occupational health and safety officer at the hospital and then they decided that I would start in the admissions office. This is what has happened. Does that answer the question?

The Hon. IAN WEST: Yes.

CHAIR: I think you have made the point very well, very clearly. We do not have any conflict with you at all. You have illustrated what we have heard before in a number of situations.

Mr O'BRIEN: Mr Chairman and members of the Committee, if I might add one further thing, and I put this no higher than its being anecdotal evidence, for want of a better word. Often times, apprehension and fear of being injured or having been injured, reporting it, and then coming into the system and the way that unfolds, people have told me that they are encouraged not to report their injury because if they do, they are in for the ride of their life. It is a very unhappy situation that results. That is difficult. In the reasons for parting company with nurses by their employers, it is often said that nurses—I often call it—are risk managed out of their position because they cannot guarantee that they will not ever be injured again. They are at risk of further injury, so therefore, out they go.

CHAIR: They are not wanted.

Mr O'BRIEN: It is an important resource which we are endeavouring to do everything we can to retain in employment in what at times can be a very dangerous occupation—not my words, the words of the Industrial Commission.

The Hon. IAN WEST: Can we get an explanation as to where the appeal ends up in terms of where it goes to—another approved medical specialist?

Ms YAAGER: Yes. It will go out to the approved medical specialist.

The Hon. IAN WEST: Appointed by the workers compensation—

Ms YAAGER: Yes, appointed by the Workers Compensation Commission.

The Hon. RICK COLLESS: Sonia, have there been any attempts to find you an alternative role within the nursing profession? I understand the general duties of a nurse, having been in hospital at one time, but has there been any attempt to find you an alternative role in the hospital system or in the nursing fraternity somewhere that does not involve the things that aggravate your injury?

CHAIR: For example, medical records?

Ms FADLALLAH: In the main admission office at the hospital, that type of paperwork, the repetitive type of work, was actually increasing my pain.

The Hon. RICK COLLESS: So that obviously was not suitable?

Ms FADLALLAH: It was not suitable because it was very repetitive and it was in a static area. So I had to move to the medical casualty ward and doing light nursing duties until I had to bend a lot and I had to reach, and this was a problem for me. The third thing that was after I went off sick at that time for three months and came back to the hospital, they find me something in the infection control department where I have to help the consultant in the infection control department. This involved lots of walking around the hospital. That means that I strained my back and there was pain in my leg to and doing surveys on the patients and coming to the table to put the surveys all together. That was increasing my pain as well, so they could not find me any.

The Hon. RICK COLLESS: Do you believe that there is any role that you can play in the nursing industry that is not going to aggravate your injury?

Ms FADLALLAH: I was always thinking in a small place where I move around, but not in the whole hospital. I did say that. In a small area where I do not have to go around the wards or I do not have to sit just with that paperwork. This is what was aggravating my injury.

Ms YAAGER: Sonia has a very serious injury. She has a prolapsed disc in her neck that makes it very difficult for her to do things where you have a static position, so it is the severity of the neck injury that precludes her.

CHAIR: Thank you for coming in. Is there anything further?

Mr LENNON: We were just like to finalise and Ms Yaager would like to make a few comments, if she may, on some of the questions that were asked.

Ms YAAGER: I will keep them brief because I know that the Committee has been sitting all day listening to evidence. Just in relation to the guidelines on back and neck, I know that some of the doctors gave evidence, but there are other doctors. I refer in particular to Professor Burnside who sat on a WorkCover committee with me when we were reviewing the guidelines. He said that they are very poor in terms of assessing neck and back injuries. There are a number of flaws. People often with serious injuries—and he actually named nurses—are missing out completely under the guidelines.

No. 2, in relation to fraudulent claims, I do not think that there are fraudulent claims. Even if you asked WorkCover to put evidence before the Committee about fraudulent claims, I think the figure of 3 per cent comes up all the time. Claims are not fraudulent; it is the mismanagement of claims; it is employers not taking people back to work, or insurance companies not doing the proper thing in the process, like allowing people to choose their own doctors or treatment provider. The doctors said to us before we came to give evidence today that they are actually delaying treatment. They are waiting two months to get approval of treatment. All of that is still occurring in the system. They were just further points I wanted to make.

Mr LENNON: To clarify for the Hon. Rick Colless the issue about lump sum payments versus periodic payments, as I say, it is a question that really depends on the individual to a large degree and what suits their particular circumstances.

The Hon. IAN WEST: Is there not also a mix? You do not necessarily have to choose one or the other—there is an appropriate mix between the two.

Ms YAAGER: Well, you are getting $300 a week—that is all that you are entitled to—yet some people earn over $1,000 a week with penalty rates. Often they have to get a lump sum to pay off their mortgage and that is why it helps them in those situations.

The Hon. RICK COLLESS: Just in relation to your comments about the nursing industry and in relation to the American Medical Association [AMA] guidelines, is there anything that you think needs to happen in order to make those guidelines more flexible in relation to nurses? Do they need to be amended? What can be done?

Ms YAAGER: Two things: they need to be reviewed and that they need to be reviewed by an independent committee outside of WorkCover because that committee is manipulated by WorkCover all the time, and the doctors on the committee are critical of WorkCover. No. 2, at the end of the day, it should be a judicial officer that takes into account the different medical evidence, whether it is a psychiatrist or somebody who has a psychological injury, or it is an orthopaedic specialist because they have a back injury. But it should not be a doctor at the end of the day determining which opinion to accept. It should be a judicial officer of the court.

The Hon. IAN WEST: Can I just clarify, if there is someone who can clarify it for me, my understanding that the difference between compulsory third party [CTP] and workers compensation is that he AMA guidelines for CTP are in edition five.

Ms YAAGER: Edition four.

The Hon. IAN WEST: And for workers compensation, they are edition five.

Ms YAAGER: Yes.

Mr O'BRIEN: That is correct.

The Hon. IAN WEST: And they are two different assessments.

Ms YAAGER: Yes, they are.

The Hon. IAN WEST: I got the impression previously from the orthopaedic doctors that they were not.

Ms YAAGER: My understanding is that four is not as generous—edition four is not as generous as is edition five, but they are up to nearly edition seven now in America, and that is how outdated we are in terms of guidelines.

The Hon. RICK COLLESS: Do you know what changes have been made in terms of these later editions? Have they addressed any of the issues that you are faced with?

Ms YAAGER: I think as part of this panel the doctors have actually recommended to WorkCover that we get some expert out from America to talk to us about this so that we actually look at a proper review of the whole process. But at the end of the day, a doctor should not determine what a person ends up earning, and the doctors have made that point themselves.

CHAIR: I think I must draw this to a close. Our time has gone and we still have to have a deliberate meeting.

Ms LEE RHIANNON: Let us have the last remark from Mark.

Mr LENNON: I was going to make the point that it is clear from what we have heard today that I am sure it comes as no surprise to any of us in this room that medicine is not an exact science. You are going to have conflicting views, whichever source of evidence you have got.

CHAIR: It is also an art.

Mr LENNON: Ultimately someone else has to make the determination, and we say that that should be a judicial officer.

CHAIR: Thank you very much for your contributions this afternoon.

(The witnesses withdrew)

(The Committee adjourned at 4.14 p.m.)