REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE No. 1

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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At Sydney on Monday 6 June 2005

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The Committee met at 9.30 a.m.

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PRESENT

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

The Hon. A. Catanzariti
The Hon. R. H. Colless
The Hon. G. J. Donnelly
The Hon. K. F. Griffin
The Hon. R. M. Parker
Ms L. Rhiannon
The Hon. I. W. West

CHAIR: Welcome to this third public hearing of General Purpose Standing Committee No. 1 as part of the inquiry into personal injury compensation legislation in New South Wales. The Committee previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of this broadcasting guideline are available at the table near the door. In reporting the Committee proceedings, the media must take responsibility for what they publish, including any interpretation placed on evidence before 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 this Committee that have not been 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, members and their staff are advised that any messages should be delivered through the Committee clerks. Please turn off your mobile phones during the hearing.

BENJAMIN ROBERT WILLIAM COCHRANE, Legal and Policy Officer, Australian Lawyers Alliance, Level 7, 189 Kent Street, Sydney, affirmed and examined, and

ANDREW STEWART MORRISON, New South Wales Branch Committee, Australian Lawyers Alliance, 16th floor, Wardell Chambers, 39 Martin Place, Sydney,

ANTHONY SCARCELLA, Secretary, New South Wales Branch Committee, Australian Lawyers Alliance, Level 24, Martin Place, Sydney, and

THOMAS JULIUS GOUDKAMP, National President, Australian Lawyers Alliance, 6/1 Castlereagh Street, Sydney, sworn and examined:

CHAIR: In what capacity are you appearing before the Committee? On behalf of the alliance?

Mr COCHRANE: Yes.

Dr MORRISON: I am a senior counsel at the New South Wales bar. I am a committee member of the New South Wales branch of the Australian Lawyers Alliance, and I appear as a representative of the alliance.

Mr SCARCELLA: I am appearing as secretary of the New South Wales branch of the Australian Lawyers Alliance.

Mr GOUDKAMP: I am the National President of the Australian Lawyers Alliance, formerly known as the Australian Plaintiffs Lawyers Association.

CHAIR: We have before us your submission. Who will lead in this matter?

Mr COCHRANE: We all have some brief remarks to make by way of opening.

CHAIR: Would you like to go through, starting with you, Mr Goudkamp?

Mr GOUDKAMP: We will start with Mr Cochrane. He will have an opening introduction. Then I will speak about whole person impairment. I will be followed by Dr Morrison and then by Mr Scarcella. Then I would like to call on Susan Harris to give some evidence before the Committee.

Mr COCHRANE: First, if I can express, for the witnesses who are here today, as well as for the rest of the members of our association across New South Wales, our gratitude at the opportunity to be here and to give this evidence. As those of you who are familiar with our organisation and its history would realise, we have had a very close association with this area for a long time. So we are very interested in this issue, and also believe that we have a certain expertise that we can lend to the Committee's deliberations. Just expanding on that, I also express our gratitude for the patience and flexibility that the Committee has shown in allowing us to bring witnesses to Wagga Wagga and also the possibility of having an additional witness attend the hearings that are planned for the Hunter.

If I can go back a step to the history of our organisation, we have been engaged in this issue for a long time and in principle have objected to some of the changes that the Government has made in this area. In our view it was not through excesses litigation that insurance premiums reached crisis point and as such it was not through addressing changes to the law that that crisis would be resolved. We have made those points repeatedly and we do not intend to dwell on those today.

CHAIR: That was a point picked up in the media as a very simple answer to a very complex issue.

Mr COCHRANE: Which is the simple answer?

CHAIR: The fact that it was mainly lawyers who created this problem with excessive cases and excessive payouts. Ambulance chasing lawyers and Father Christmas judges, I think, was the term used.

Mr COCHRANE: Those are the terms that have been adopted in the press. As you say, for complex problems there are often simple solutions which are wrong, and we would say that is one of them. Today we do not intend to dwell on those issues. We accept that government policy has moved on and that there is now an approach adopted which is to attempt to limit the number of claims that are made at the less serious end of the injury spectrum and by doing so to influence insurance premiums. The main comments that we would like to make today are about the mechanisms that have been used to achieve that end, to limit those less serious injuries, and some of the ramifications of the systems that have been adopted, which we say are problematic and unfair.

As our submission sets out, we see this area of law dividing quite neatly into four different areas. Workers compensation and motor accidents have their own independent statutory regimes which are more or less exclusive and independent. We believe that the Hon. Rick Colless asked a question during evidence on 2 May about whether or not injured workers might not have an entitlement to sue at common law where it seems that the regime is not doing them sufficiently well. The answer is no. The system simply does not allow that. Each of the different regimes is independent and it is very difficult to move between them. So we have divided our submissions into the respective areas of law and bring with us, we believe, some of the senior experts in each of those areas. As I said before, we will not be addressing workers compensation today. The leading expert in our organisation in that area is based in Newcastle and we would seek to have him provide evidence when you visit the Hunter.

Today that leaves the remaining three areas which are motor vehicle accidents, civil liability and medical negligence. If you can see the books in front of Mr Morrison, they are probably the chief hard copy reference work in this area for the State of New South Wales. That is the book on this area of law, and these two gentlemen at the end both wrote it. Mr Goudkamp is an expert in motor vehicle accidents. He has run some of the largest cases in that area in this State and is chiefly responsible for authoring the section in that work on those cases. Mr Morrison has a range of work across different areas, including public liability and motor accidents. He will be today mainly limiting his comments to the Civil Liability Act, but given Andrew's expertise across the field he is also in a position to offer some observations about the differences between the schemes and some of the apparent contradictions.

Finishing up today, Mr Scarcella will speak about legal costs. Strictly speaking in the terms of reference the Legal Profession Act has not been referred to, but in our submission you may have read that the costs provisions in the Legal Profession Act impact on the Civil Liability Act in quite a drastic way and we suggest that it is important that the Committee understand how they interact. Coming from those different statements made by these gentlemen will be three essential recommendations from the Australian Lawyers Alliance. The first is that the American Medical Association *Guides to the Evaluation of Permanent Impairment*—this book—which is used in the motor accidents scheme and the workers compensation scheme to assess the degree of injury that a claimant has is an inappropriate tool.

It is this document that prevented that young fellow whom you met in Wagga Wagga, Matt Davis, from making a sufficient level of injury to qualify for general damages. We say it is too tough and that there are a range of other problems with it. In our recommendation it should either be abolished or its use should be severely modified, and largely Tom will speak to that issue. The second recommendation we have is that the Committee give some consideration to the discount rate. I will not go into great detail about that. It is a technical area. I will leave it to Andrew to discuss. Suffice it to say that the use of a discount rate that is currently legislated in New South Wales harms the most seriously injured people within our compensation regime. It is accepted that government policy is to attempt to limit compensation at the lower end. Andrew will explain to you how this particular profession hurts people at the very seriously injured end of the spectrum. We say that is manifestly contrary to government policy.

The final submission we will make, which will largely come from Anthony's comments, is that there needs to be some modification of the costs regime. I will leave that to Anthony to explain. If

I could touch on one other point before I finish. In evidence before this Committee previously, particularly in the case of the Bar, there were observations from some members of the Committee that certain self-interest was at work in the kinds of representations we might choose to make—particularly Mr Slattery of the Bar Association, who received some comments and I think responded to them quite clearly. In our view, the most important response is simply that no union represents people who have been injured in motor vehicle accidents, people who suffer injury through medical error or people who suffer unfortunate accidents in public. Our members see these people on a daily basis, they cannot help but feel affected by their experiences and they feel some kind of obligation to speak on their behalf.

That said, it is still open to the Committee to infer that they earn an income from doing so and to suggest that a certain self-interest brings us here. I put it to you that personal injury is not the most lucrative area of the law in which to work. If any of these gentlemen here wished to be making a motza they would perhaps practise in taxation law or in intellectual property. They tend not to do so, in part out of a vocation to assist people have been injured. I ask you to consider that when you are also considering that perhaps we speak only out of self-interest.

There is one point that is strongest of all on this front that I would like to finish with. It is to ask you to judge us not by those preconceptions but by the submissions we are making. In particular, remarks that Andrew is going to make about the discount rate makes little or no difference to the amount of money our members are able to earn. If somebody comes along who needs to make a claim for millions and millions of dollars for a terrible injury, our members are able to charge not a cent more if we are able to convince you today to change that discount rate. The impact of such a change would be felt only by the injured people, not by us.

I will hand over now to Tom, if I may. The only other thing is perhaps to put a question to the Committee. We have invited Susan and Tim Harris to join us today. Their case arises out of the motor accident compensation system. As such, it may be the Committee's preference to hear from them immediately following Tom's remarks—they may fit more neatly together. Alternatively, we can complete our entire opening statement and then invite them to give their evidence?

CHAIR: I suggest we go through the opening statements and then ask Mr and Mrs Harris.

Mr COCHRANE: Certainly. One final point: these gentlemen are some of the most senior practitioners in this area. I understand this area of law is the key to your deliberations. I encourage you to ask them questions as they move through. They may assume some knowledge or use acronyms. If there is anything you do not understand, I think we can be of more benefit to you in explaining the system if you interrupt and ask for clarification at any time.

CHAIR: Thank you. Mr Goudkamp?

Mr GOUDKAMP: I will be speaking about whole person impairment and the medical assessment service. The Australian Lawyers Alliance has two major objections to the use of the whole person impairment assessment criteria as the gateway to entitlement for compensation for pain and suffering for victims who have been negligently injured in motor vehicle accidents. We can call pain and suffering non-economic loss or general damages, but for ease of understanding I think I will just refer to it as pain and suffering. That covers loss of enjoyment of life and impaired faculties, and so on. Our main objections are that it precludes many seriously injured accident victims from receiving any compensation for pain and suffering and it also causes unacceptable delay in the resolution of claims. I will explain all that in a moment.

I thought I would take you back a little through the history. Prior to October 1999, compensation for pain and suffering was assessed according to how the injuries impacted on the individual, taking into account pain, distress, disabilities and destruction to our lifestyle. The quantum of those damages was calculated by reference to a percentage of the most extreme case, similar to what exists in the Civil Liability Act, subject to a maximum, which is increased on 1 October annually. That maximum is usually reserved for people who have suffered most extreme injuries—probably paraplegia, quadriplegia and gross brain damage. A sliding scale applied for injuries assessed at less than 30 per cent of the most extreme case down to 15 per cent, under which there is no compensation at all for pain and suffering. That has effectively excluded minor injuries such as

whiplash, fractured ribs, fractured sternum and other soft tissue injuries. We have no argument that those cases ought to be excluded from the system, not only in this area but in the civil liability area as well.

The assessment of a percentage of the most extreme case was not a medical assessment. Doctors had very little part to play in the assessment; rather, it was a judicial assessment, by judges or by arbitrators. I assume Committee members are familiar with what a CARS assessor is? CARS stands for claims assessment resolution service. CARS was adopted in October 1999 to allow cases to be assessed by CARS assessors who are appointed from the ranks of solicitors and barristers. I am one of 40 CARS assessors. The vast majority of motor vehicle cases now are assessed by CARS assessors rather than by judges. The result of a CARS assessment is binding on insurers but not binding on claimants, but there are severe cost penalties if a claimant rejects a CARS assessment and the matter goes to court.

If we had a system today of assessing a percentage of the most extreme case as the entitlement to damages for pain and suffering, in most cases it would be decided by a CARS assessment on medical evidence and on the ways in which the injuries have effected particular individual. Under the previous system there was no requirement for injuries to stabilise before a case could be resolved. In my practice, at least 80 per cent or 90 per cent of cases were settled without going anywhere near a court. Pain and suffering and destruction to injured persons lifestyle were important considerations, as were likely future pain, deterioration and complications.

I believe the system worked well. The green slip premiums were stable. Nevertheless, the Government introduced the Motor Accident Compensation Act [MACA] in October 1999, which dramatically changed the way compensation for pain and suffering was calculated and assessed. The whole person impairment [WPI] threshold or gateway to entitlement to compensation for pain and suffering was introduced, and MACA provides there will be no award of damages for pain and suffering unless the insurance company concedes, or the injury is formally assessed by a trained medical assessment service [MAS] assessor, that the injuries constitute a greater than 10 per cent whole person impairment according to a combination of the AMA guides fourth edition, the American guides, and the Motor Accident Authority [MAA] guides.

Any consideration of pain, distress, disabilities, dislocation of lifestyle, individual circumstances, future medical deterioration, even if that deterioration is inevitable, is irrelevant until and unless the insurer concedes, or a MAS assessor determines, that the injuries are greater than the 10 per cent whole person impairment threshold. Once that threshold has been beaten whole person impairment becomes irrelevant and damages are assessed according to common-law principles, subject to the maximum, which currently I believe is $349,000. The most extreme case scale has been abolished. Because the assessment of whole person impairment for physical injuries cannot be combined with psychological injuries, most claims involving depression and anxiety—so often the sad aftermath of major trauma—are excluded.

The main purpose of this new regime was supposedly to exclude minor injuries—and it has certainly done that—whilst maintaining proper and appropriate compensation for those who have suffered serious injuries. This is where we have a big problem. The system was also supposed to expedite the processing of claims and the delivery of compensation. That is also a major problem. More than 200 doctors have been trained to be MAS assessors, and their function, amongst other things, is to conduct whole person impairment assessments. The annual cost of running MAS apparently exceeds $6 million. The question is whether the MAS whole person impairment system, now almost six years old, has been a success. It is our submission it has been an abject failure.

Why is this? The system was designed to deny at least 90 per cent of people injured in motor vehicle accidents the right to receive damages for pain and suffering. Thus, many injured road users who have suffered serious injuries miss out. You have heard from Matt Davis, and he is just one of hundreds. Many injuries are incapable of being assessed—for example, the loss of a foetus—and you will be hearing from Susan Harris in a moment. Mild traumatic brain injury is another injury that is difficult to assess according to the very complicated guidelines. We all know the impact of mild traumatic brain injury can be quite catastrophic.

The system is cumbersome, it is bureaucratic and it has caused massive delays in the resolution of third-party claims. Cases that normally should be finished in 1½ to two years are now taking four to five years—perhaps even longer—from the date of the accident. As a CARS assessor I am hearing a lot of these cases. I am yet to hear a case now closer than 2002. In most of the cases I am hearing, and other CARS assessors are hearing, the accidents occurred in 1999, 2000 and 2001, and we are now halfway through 2005. These are not complicated cases. The reason they are being so delayed is that cases are simply incapable of being resolved until the whole MAS process, including the initial assessment, applications for reviews and reassessment, has been finalised. It is an extremely slow process.

Insurers seem to be unwilling in most cases to concede that injuries exceed the per cent whole person impairment, even in the most obvious cases. In those circumstances there is no option but for the claimant to go through the MAS process. Future deterioration cannot be included in the assessment of whole person impairment no matter how inevitable that may be. So, those claimants whose injuries are assessed at less than 11 per cent whole person impairment but whose condition is likely to deteriorate—the medical evidence may be there is a likelihood of epilepsy or head injury or osteoarthritic changes—are disinclined to finish their claims until this deterioration has taken place, in the hope that the whole person assessment will take them over the 10 per cent threshold.

CHAIR: Is there a time limit on that?

Mr GOUDKAMP: Not really, because there is no time limit on taking cases to CARS.

CHAIR: I suppose the longer it goes the less likelihood there is of a successful outcome?

Mr GOUDKAMP: If you have serious injuries but you know you will be assessed at less than 11 per cent but you know you are going to have future complications perhaps one or two years down the track, it would be sensible to wait until those complications kick in. At 10 per cent you get nothing. At 11 per cent I think the starting price would probably be about $90,000 or $100,000.

CHAIR: I am not trying to argue that, I just want the information. In your experience does the longer delay improve that?

Mr GOUDKAMP: I think the resolution of cases is very important to the rehabilitation of injured people—there is no doubt about that. While there is uncertainty, there is tension in the muscles. It is not a criticism of injured people but there is no doubt people do improve once cases are resolved and they have some financial security. Most injury victims who have suffered depression, anxiety, nightmares, and so on, do not qualify, because they cannot get over the psychological threshold. There is a perception that many of the MAS doctors are biased against injured people. In my experience many MAS doctors have only ever performed medico-legal assessments for insurance companies, and they continue to do so.

CHAIR: We have heard evidence on this issue. In your opinion, is there a nexus between the doctors doing those assessments and insurance companies, that is, it is good business if they get good results?

Mr GOUDKAMP: I do not know how to answer that, really. Just being involved in this area for the past 25 years, the names I have seen on the MAS list are the doctors I have seen on the insurance company list for years.

CHAIR: We used to know from your profession there were judges referred to as hanging judges. Reputation goes before a person. In your opinion, are there doctors who have a reputation for being very harsh?

Mr GOUDKAMP: Absolutely. Quite frankly, Christopher Reeves would not get over the threshold with some of these doctors. Some of them are terrible.

Ms LEE RHIANNON: Has that been quantified in anyway? You said many of them had worked for insurance companies and now they are MAS doctors. Do you have a list of how many were best known for working for insurers?

Mr GOUDKAMP: I can only go on experience, and I see the names very familiar to me. These doctors are not only involved in MAS assessments but they are still doing medico-legal work for insurers. So, one day they are MAS assessors and the next day they are doing medico-legal work for insurers.

Ms LEE RHIANNON: You are talking about more than 50 per cent, the majority?

Mr GOUDKAMP: Yes, I think so. There are some doctors you see mainly on the plaintiff's side of assessment, but not many.

The Hon. IAN WEST: You mentioned 11 per cent in the WPI assessment. There is a 10 per cent threshold. Can you explain why you keep mentioning 11 per cent?

Mr GOUDKAMP: Because 11 per cent is more than 10 per cent. Under 11 per cent you get not one razoo for pain and suffering but over 10 per cent—say, 11 per cent and beyond—you are in the area of common law damages for pain and suffering.

The Hon. IAN WEST: To clarify, 10 per cent means nil? Although the threshold is 10 per cent—

Mr GOUDKAMP: No, it is greater than 10 per cent. They should call it 11 per cent, that would be easier to understand.

CHAIR: In the most extreme cases there is a 15 per cent threshold?

Mr GOUDKAMP: No. That was under the previous scheme where it was a judicial assessment of a percentage of a most extreme case. But it had nothing to do with whole person impairment. Impairment does not include disabilities. There is a big distinction. Impairment is a pretty rigid and cold-blooded way of assessing.

CHAIR: I think you clarified that at a previous hearing.

The Hon. IAN WEST: The 15 per cent whole body impairment applies to the workers compensation jurisdiction.

Mr GOUDKAMP: Only as a gateway to the right to claim damages, which I do not think any seriously injured worker would take on at the moment because there is no claim for pain and suffering.

The Hon. IAN WEST: You are not talking about the workers compensation jurisdiction; you are talking about motor vehicle accidents.

Mr GOUDKAMP: That is correct.

Dr MORRISON: Tom made a point that is worth commenting on. It is in excess of 10 per cent permanent impairment but psychological injury cannot be added to physical injury. So that you could, in fact, have a 20 per cent permanent impairment, 10 per cent physical and 10 per cent psychological, and be entitled to absolutely nothing.

The Hon. IAN WEST: Will you be explaining the intricacies of the differences between impairment and disability?

Mr GOUDKAMP: Yes, I can do that. It is fairly straightforward. Impairment is what is in these books. It is all about the assessment of damage to a particular body part. It does not take into account pain, chronic pain or distress. It does not take into account changes to lifestyle. A person who suffers say an injured hand is assessed in exactly the same way. If a lawyer who may not need his left hand to effectively carry out a practice and a young person who is a budding professional tennis player and a left-handed player have a damaged left hand, they get assessed exactly the same way for pain and suffering.

The Hon. ROBYN PARKER: Who appoints the MAS doctors?

Mr GOUDKAMP: There is a committee who appoints the MAS doctors.

The Hon. ROBYN PARKER: The committee is made up of whom?

Mr GOUDKAMP: I think of people from the Motor Accidents Authority. I am not entirely sure. There is a committee and I think representatives of the Law Society are on that committee.

The Hon. ROBYN PARKER: Are MAS doctors paid per case that they assess?

Mr GOUDKAMP: Yes. Each MAS assessor gets paid for each assessment.

The Hon. ROBYN PARKER: Do they have other strands of employment?

Mr GOUDKAMP: I expect some of them are doing it almost all the time. I do not know that a lot of them are conducting medical practices. They would be professional MAS assessors.

CHAIR: Go ahead with your introduction. We have accepted Mr Cochrane's invitation to interrupt you. It is his fault.

Mr GOUDKAMP: The general consensus in the legal profession is that there are wide fluctuations and outcomes according to which doctor carries out the assessment. Another problem is that seriously injured claimants are forced to undergo additional and quite unnecessary medical assessments, which adds to their anxiety and stress—particularly those people who it is inevitable will be assessed at greater than 10 per cent but they still have to go through the MAS assessment if an insurer does not concede that those injuries qualify. Many seriously injured claimants have to travel significant distances to Sydney, where most of the MAS assessors are, to be assessed.

I recently acted for a gentleman who was injured in Sydney but was repatriated to his home country of Austria. He had suffered mild traumatic brain injury but also a very seriously fractured leg. The insurer in that case, the NRMA, would not concede that his injuries constituted greater than 10 per cent whole person impairment. Mr Goshling, in the company of a companion, had to be brought back from Austria to Sydney for a MAS assessment which had the inevitable outcome that he was assessed something like 15 per cent or 20 per cent whole person impaired. Then he went back to Austria. But he came all this way for that assessment, which I think was totally unnecessary and unreasonable. The insurance company had to pay for it, but that is not the point.

As far as I know there are no MAS assessors available in Europe, Asia, the US, the Middle East or Africa. There are occasional MAS assessors available in the UK. But it is a sad fact that there are many visitors to New South Wales who are involved in road accidents and they go back to where they live, whether that is interstate or overseas. I have acted for many people over the years who have been injured in New South Wales whilst visiting from overseas. Those cases have become extraordinarily difficult because you simply cannot finish them until the MAS assessment procedure has been completed. You either bring these people back to Australia for MAS assessments or it is done on the paperwork, which can be tricky. There are other criticisms: misuse of the AMA guides. The AMA guides themselves state:

> It must be emphasised and clearly understood that impairment percentages derived according to the guides criteria should not be used to make financial awards or direct estimates of disabilities.

Nevertheless they have been adopted. There is another problem with combining and subtracting the values. You have the injuries to different body parts so you add up the percentages to see if the percentages are over 10 per cent. But it is not a straight addition. So 10 per cent and 10 percent may not necessarily mean 20 per cent because of the combined tables that the assessors need to use. Assessors must subtract percentages for pre-existing conditions. That subtraction is a straight subtraction. So if there are pre-existing injuries, take off 10 leaves 10. Well, 10 is useless. That is a straight subtraction, whereas when you add it is a combined value.

With mental injuries, mental health is a major area of concern in this country yet the whole person impairment system segregates mental and behavioural impairment from all other body symptoms because they cannot be combined. We say that is grossly unfair and highly discriminatory towards claimants who have suffered mental and behavioural injuries. Furthermore, the diagnosis of recognised medical psychiatric disorders—such as schizophrenia, depression, anxiety disorders—appear to have no bearing on the whole person impairment value. Also, the assessment criteria for psychological impairment is biased against claimants who are not working prior to the accident—housewives, retirees, students, children and so on—because the section in the guidelines on adaptation, that is, one of the main six areas of function, is solely assessed on the basis of change in employment status since the accident. That particular area of function is excluded for people who were not working before the accident.

The Hon. IAN WEST: That is the Pat Skinner case you refer to?

Mr GOUDKAMP: Yes. As to pain, I find it extraordinary that the threshold or gateway to damages for pain and suffering excludes pain. Severe pain, especially chronic pain, as we all know is debilitating and causes significant disability. People who suffer from severe pain I do not need to tell the honourable members of this Committee find it very difficult to function, to concentrate, to stay focused. In the AMA guides, that is, the American guides, impairment due primarily to intractable pain may greatly influence an individual's ability to function. But the MAA guidelines specifically state that assessors should make no separate allowance for permanent impairment due to pain.

In conclusion, it is the Alliance's submission that the MAS WPI system is cumbersome, complex, bureaucratic and painfully slow. The entitlement to a quantum of damages for pain and suffering ought to be determined as a judicial assessment as a percentage of a most extreme case. The MAS and the whole person impairment system ought to be abolished. The pre-October 1999 method of assessing damages for pain and suffering should be reintroduced. This would speed up the resolution of CTP claims, avoid unnecessary duplicated medical assessments, give insurers less influence and incentive to obstruct the finalisation of claims, provide seriously injured road accident victims with proper compensation for pain and suffering, and remove the sense of injustice currently caused by unreasonable and unfair MAS outcomes.

It would also save $6 million a year, which is currently spent on MAS. As far as I can tell, no-one is too keen on MAS except the MAS doctors and perhaps the people who work in the MAS bureaucracy. In the alternative if MAS is to stay and the whole person impairment guidelines are to stay, the assessment of whole person impairment ought to be amended to make it fairer, more accessible, efficient and speedier. Specifically the assessment guidelines should be amended to allow pain, particularly chronic pain, depression and likely future deterioration to be included in the assessments.

CHAIR: Mr Morrison, you are next.

Dr MORRISON: I want to address primarily the Civil Liability Act, but in doing so I need to mention the inter-relationship with the other statutory schemes in New South Wales. I simply say in commencement that the combination of those schemes has left the rights of those injured in a parlous state in New South Wales, parlous by comparison with other parts of Australia. Tom has referred to the Motor Accidents Authority. One thing about the MAA is that it at least set out a target for insurers and requires insurers to report on the amount of profits that they make. The aim of the MAA was to recover 8 per cent profit for insurers. We know from the MAA statistics that they are recovering between 20 and 30 per cent currently.

In respect of other areas of insurance—public liability, medical—they do not publish. APRA regrettably does not require them to give useful statistics and there are major holes in APRA's requirements. This State, unlike some other States, does not require insurers that work here to publish statistics as to their level of profits. So the only very good statistics that we have relate to the motor accidents area. There has been a paper, which I saw on Friday—which I am sure we will make arrangements to come to you—from a Mr Richard Cumpston, a very well respected actuary from Melbourne, indicating that in his view the current level of profits of insurers in the non-motor vehicle area is of the order of 19 per cent. That is well above a reasonable return on any basis.

CHAIR: Is that on a premiums claims basis or does that count also their investment returns on profit, shares and so on?

Dr MORRISON: That is a return on premiums, as I read his paper. He deals with it on both bases. He says that there are major discrepancies in the way in which they report to APRA. Regrettably, APRA is not very good at forcing them to report and no longer, for example, requires them to categorise different areas of insurance. But I am sure you will hear the insurers say, "There are very long tails. We cannot predict what will happen in the future. We have to make allowances."

CHAIR: Certainly if his actuarial statements are true, that is quite a turnaround for the industry on premiums losses. Mr Cochrane, would you be able to get that paper for us?

Mr COCHRANE: I have a copy of it here, which I can table.

CHAIR: Thank you, that will be most interesting. Please continue, Mr Morrison.

Dr MORRISON: May I say that Mr Cumpston is highly reputable in this area and is involved, for example, in doing work for the Motor Accidents Authority and, as you will hear shortly, does work with the Protective Commission in this State. So he is highly respected.

The Hon. IAN WEST: Has that report been peer reviewed?

Dr MORRISON: It has been peer reviewed. I spoke to Mr Cumpston on Friday. He has had it actuarially peer reviewed.

The Hon. IAN WEST: Do you know by whom?

Dr MORRISON: I think it probably says it in the paper but, if not, we can find out very quickly. It is most interesting because the one thing you will hear the insurers say, "There are very long tails. It is all very well to look at profits now." What is most interesting is that their level of profitability cut in long before the changes from the 2002 legislation could possibly have had effect. Bear in mind that from the time the Parliament changed the law to reduce compensation in 2002 until cases came to court there would be a significant lead-time. Yet profitability had returned before those changes could conceivably have had any effect. So they were making substantial sums of money before the 2002 legislation bit. If the insurers come to this Committee and say, "Well, we have to have huge reserves for possible future liabilities", ask them to produce their figures. They do not do it for APRA. They are not required in this State to produce them. If they are critical of Mr Cumpston's calculations, they are critical without revealing the basis upon which they say he is wrong.

CHAIR: Thank you for leading us into that question.

Dr MORRISON: Could I just pass on to the interaction between the different areas of liability. I mentioned, very briefly, workers compensation. For all practical purposes since 2001 the right to sue at common law for workers compensation has been abolished. There is a theoretical right to sue but in practice no-one in their right minds would sue because they give up their rights to medical expenses in the future. Why would you do it purely for economic loss when there is no right to pain and suffering? You would be crazy to sue, so common law is effectively abolished. You have to picture the problem that we have when someone comes to us and says, "I have been injured in a factory by a bale, which fell from a shelf because it was bumped by an unregistered forklift." There is a variety of possible schemes, and possible sets of rights or lack of rights, which then apply.

In respect of workers compensation, if he wishes to sue his employer he has no rights; he is left on the miserable workers compensation rights for the rest of his life, a pension, no lump sum compensation other than very small sums, and he is on that drip feed indefinitely. If, however, he is working on that factory hired by a labour hire company, then his employer is not in the factory and he can sue under the Civil Liability Act. But, if the accident arises out of the driving of motor vehicle, it does not come under the Civil Liability Act; it comes under the Motor Accidents Act. Those produced ultimately very fine distinctions we spend a lot of time in courts, a lot of wasted time, debating those distinctions. They are important only because your rights under the different schemes are so different. For the life of me, I cannot understand why, when the case is about to come to court involving an

unregistered forklift or a vehicle down a mine, that has been pursued under old workers compensation rights, at the last moment the insurer, having put a defence on under the Workers Compensation Act, says, "Ah, but this is actually a motor accident."

The worker has to have his statement of claim struck out and to start all over again, and several years are wasted. The irony is that the insurer will be the same insurer, because if it is an unregistered motor vehicle it is the workers compensation insurer that picks up the bill. That insurer can require a worker to run the whole case again from scratch several years down the track, and waste a whole lot of legal costs. The judges become extremely frustrated and will order them to pay costs, but that is no compensation for the worker. It is those fine distinctions that are the result of us having this multiplicity of schemes in this State. There is just no logical reason for it. For example, the maximum that you can recover under the Motor Accident Compensation Act is $341,000, whereas under the Civil Liability Act it is $400,000. Justify that in logic to a quadriplegic as the maximum he or she can recover for pain and suffering. There is just no rational reason for that distinction; it makes no sense whatever. When people had rights under the Workers Compensation Act there was a different scale again. It makes no sense.

The Hon. IAN WEST: Is it true that one is fault and one is non-fault?

Dr MORRISON: No, they all involve fault—except for present workers compensation benefits. But that was not a common law action under the Workers Compensation Act; that involved fault. The Workers Compensation Act did provide for a common law claim. That right is largely removed since 2001. For all practical purposes it has been removed.

The Hon. RICK COLLESS: Just on to point: Do you think there is a need for all those different schemes to exist at all, or should all the different schemes simply have the same provisions contained in them?

Dr MORRISON: Speaking for myself, I would much prefer a single scheme. I can see no justification in logic and we waste a great deal of time and money, which would be better spent on compensating victims than on debating under which scheme a claim falls.

The Hon. ROBYN PARKER: Would you use the Civil Liability Act as a basis for that?

Dr MORRISON: Yes. The Civil Liability Act is actually very close to the old Motor Accidents Act scheme, which scheme, although the insurers have a temporary glitch in it, was in fact, on the evidence in fact profitable and was operating effectively—Mr Cumpston's is perhaps a very good paper to look at in that regard. Were we to use that across-the-board, it seems to me that we would function in this State far more fairly and far more efficiently. That was the 15 per cent of the most extreme case, and get rid of those wretched AMA scales that state that even though a person cannot walk because of unremitting pain he or she is assessed at nil impairment. How do you tell that to a person who was brought in to you in a wheelchair?

Can I turn from those problems to the Civil Liability Act because that Act has a number of significant problems, which are only evident on fairly close observation. Why should a blind person or an illiterate person or a child or a visitor who cannot read English, someone from another country, be bound by a warning sign in the English language—which does not comply with the Australian standard, because the Australian standard requires a visual symbol, and yet our Act says they are bound by that warning sign?

Why should a child who is accompanying an adult, even though that adult is not a parent or responsible for the child, be bound by a warning sign that the adult sees? Why should a four-year-old child who is affected by alcohol have their damages reduced by 25 per cent for contributory negligence? That child is not at fault; someone has given the child the alcohol, and yet our scheme says if that child suffers injury and there is any significant contribution to it from the alcohol, that child has his or her damages reduced.

It gets worse. Public authorities are largely exempt from liability. I wonder if this Committee is aware that, by regulation, private schools were declared public authorities? That was slipped through about 18 months ago. Government schools were public authorities from the outset; private

schools were added to that as well, no doubt because the spectre was there that you could have a situation where there was no liability for failure to supervise pupils in a government school but there was liability in a private school. Why do I say there may be no liability for failure to supervise pupils? Section 44 of the Civil Liability Act says, that unless a person has a right to force action by civil litigation, the public authority has no obligation and no liability for failure to take action.

Supposing in a government school or in a private school, during the lunch hour, there is a teacher on duty, as there are invariably is, and that teacher is watching children play a dangerous game—for example, a game that is prohibited in all government and private schools without proper supervision, tackle football. Suppose it is being played on a hard surface and a child is rendered quadriplegic. Section 44 says no liability. Although it happened right in front of the teacher, and the teacher saw what was happening and could have prevented it, there is no liability. Even if a parent had known about it, had foreseen that this was likely to happen and had tried to bring an action to require the school, government or private, to take action to prevent it, there would be no enforceable rights. You could not get an injunction to require a government school or the Department of Education and Training to properly supervise bus queues, lunchtime activities, excursions, or things of that nature.

There is a very large area of the duties of public authorities that are now wholly exempt from liability. I suspect, speaking as parent myself, that most parents would be scandalised to know that schools are not liable for failure to supervise pupils. When I say that—failure to supervise in relation to injury by other people. It is the failure to regulate the activities of others that public authorities are exempt from. The same applies when a surf club allows a surfboat to go crashing through between the flags and mow down a few people. No liability. That is the problem. e exempt public authorities and people would be horrified to know the potential that that leaves.

Road authorities are given a partial exemption from liability. A Road authority that knows of the problem on its roads and takes no action is liable for the consequences. But, think of this: Road authorities, a council or the Roads and Traffic Authority, know that after heavy rain certain areas of road will develop potholes and become dangerous—there are structural problems throughout the State and it is well-known. If the road authority chooses not to check those roads, it is not liable; if it does check them, finds the deficiency and does not remedy it, it is not.

CHAIR: To clarify that: If they know about it but do not check they are liable, is that right?

Dr MORRISON: No. If know that hypothetically and area of road is subject to those risks but they do not go and check it, they are not liable.

CHAIR: Yes, but if they do check it, they are liable. I think you said they are not liable.

Dr MORRISON: I am sorry. Thank you Dr Moyes. The fact is that, as a consequence, they have a major incentive not to have a program of going around checking the road signage is there, that's traffic lights are working—

CHAIR: And that the bridge is in place!

Dr MORRISON: And that the bridge is in place, yes. If they do not have a regular program, for example, of checking that bridges are safe, that is to their financial advantage. Is that really what we want to encourage? What do is say the and about the rights of those who are engaged in illegal activities? If a bouncer at a nightclub uses grossly excessive force on a patron, leaving that patron quadriplegic or brain-damaged, because the bouncer was entitled to remove the person from the premises—supposing the person were drunk—there are no damages for pain and suffering for that permanent disability. Nil. Even though the force was grossly excessive, it was unlawful and it was a criminal act, there are no rights for pain and suffering. If a landowner sets an illegal man trap and catches a trespassing child and that child loses a limb, there are no rights to damages for pain and suffering for that child. We seem to have gone back 200 years!

CHAIR: Shooting a burglar!

Dr MORRISON: Shooting a burglar. Members of the Committee might recall the campaign by the *Daily Telegraph* two or three years ago about a 16-year-old who tried to get into a nightclub by

the back entrance. He was not offering any violence. The owner of the premises hit him with a metal bar while he was cowering in the corner and protecting himself and left him with permanent brain damage. Under our legislation he has no rights whatever. He was offering no violence; he was doing what, regrettably, 16-year-olds and 17-year-olds do. It was wrong, but surely to goodness that is not the sort of behaviour that we reward by making that behaviour immune from compensation—behaviour that was grossly excessive—it simply cannot be justified, and yet that is what we do.

We treat those who travel on ferries and on trains as motor accident victims. We define "motor accident" as including ferry and train injuries, yet those who operate ferries and trains, government and private, do not contribute to the third-party scheme. Where is the justification for limiting their liability under the third-party scheme? We know that the Government does not think it is fair because when the Waterfall accident occurred the first thing the Government said was, "These people will get common-law rights." Well, that is not much consolation to a person who was injured through the negligence of the railways or on a private ferry, but who is in a much less publicised accident. They do not get them; their rights are restricted to in excess of 10 per cent permanent impairment. That embarrassment by the Government is very revealing in relation to the true state of affairs in this State. If a little light is cast upon what the Motor Accidents Scheme does, it is highly indicative that if the Government has to, in a well-publicised scheme, extend liability to those who would have missed out, perhaps those rights should be extended to all those involved in transport accidents.

May I turn to the discount rate. I am sorry to have to deal with some complexities, but it is very important and it is very misunderstood. When the original 1942 third party scheme was introduced, it operated as a pure common law scheme until the 1984 amendments. In 1984 the Government had left that scheme unfunded for several years in order to keep third party premiums down. I am sure the Committee understands what is meant by "unfunded": that is, it had the ability to pay out the amounts on an annual basis but it was not putting adequate reserves aside for the future and there was a significant deficit, estimated at between $5 billion and $7 billion, though I think in fact it probably turned out to be significantly less with the GIO, which was then the 99 per cent insurer.

In 1984 the Government changed the discount rate on the awarding of lump-sum damages from 5 per cent to 3 per cent for motor accident victims. What is the discount rate? It is assumed that when you receive a lump sum by way of damages you are able to invest the money and get a return on it, and therefore you should get less by way of a lump sum than simply saying, "Your needs for the next 50 years are $1,000 a year, therefore you get $50,000." You will in fact get much less than that because it is assumed you can invest the money. You discount the damages according to sets of tables. I wonder whether it would be helpful for me to tender to the Committee sets of discount tables at the 3 per cent and 5 per cent rates.

Documents tabled.

In 1984 inflation had reached between 12 per cent and 13 per cent, interest rates were running at 17 per cent, and there was then an argument for the bringing in of a 5 per cent discount rate. The Minister in his second reading speech said, "We have brought it in, but it will be reviewed from time to time as the economy changes." It has never been reviewed. It was extended subsequently to workers compensation, whilst there were still rights there, and in 2002 it was extended to the Civil Liability Act.

The consequence of that is that if you have a 5 per cent discount rate you are saying that a person can, by safe investment—because we already discount the sums for the possibility that you might have suffered a loss in other ways through a non-compensable injury—secure a 5 per cent return, after tax and after inflation, every year, guaranteed, for the duration of the period. If you are talking about a quadriplegic child, you might be talking about 70 years. The fact of the matter is that it cannot be done. I have seen a recent report from the Office of the Protective Commissioner's actuary, who says that a more realistic rate would be 2 per cent. In 1981 the High Court said that 3 per cent was the figure. The Ipp committee report, about which I am sure you have heard a great deal, recommended 3 per cent. Without any explanation, in 2002 we imposed a 5 per cent discount rate across the board.

The Hon. ROBYN PARKER: This refers only to lump sums. Are those lump sums able to be taken as structured settlement payments? If so, does the same discount apply?

Dr MORRISON: It depends upon the way in which the settlement is structured. Generally speaking, the way in which insurers prefer to do business is by way of lump sum, to get rid of their liability. For example, I have had the situation, in dealing with the NRMA, of trying to negotiate a lump sum settlement for someone whose life expectancy was very uncertain and was in a nursing home. The NRMA would not have a bar of it. It takes two to tango in these matters.

In any event, the primary way in which insurers prefer to structure is by the purchase of annuities, and they do that first of all by using the discount rate, reducing it to a lump sum, and then using the lump sum to purchase annuities. They then get it both ways. They get it reduced by the discount rate, and then they get rid of their potential future liability through that purchase. Unless the insurer is prepared to meet whatever the reasonable needs are on a permanent basis—and it is very rare that insurers will do that, although on some occasions, to their credit, they have done so—except in those very rare instances, generally speaking the discount rate is applied, even to annuities, as a means of providing a structured settlement.

CHAIR: Dr Morrison, I think you have made that point well. Could I suggest we move on.

Dr MORRISON: Certainly. Could I ask Mr Cochrane to provide a supplementary paper, which sets this out in much greater detail. Would it be convenient for the Committee to see that paper?

CHAIR: Is the document included in the supplementary tabled documents, Mr Cochrane?

Mr COCHRANE: It is.

Document tabled.

Dr MORRISON: May I take you to two elements of that which demonstrate the point very well. If we assume a quadriplegic has a need for nursing care for the next 50 years at $4,000 a week—which is not an unrealistic figure, in my experience, in terms of providing around-the-clock nursing care. The difference between the damages he gets on a 3 per cent discount rate and a 5 per cent discount rate appears on page 3. If you assumed that he could earn 5 per cent after tax and inflation, his money lasts for 50 years. If, however, his real rate of return is 3 per cent, not 5 per cent—may I say that you are doing pretty well with 3 per cent after tax and inflation—the money runs out after just 28 years; in other words, two decades too early.

The people who are affected by this are quadriplegics, paraplegics, severely brain-damaged people, and infants with major disabilities—not people with whiplash injuries, and not people with even moderate injuries. It is the most catastrophically injured who are grossly affected. In 2001 in England, after inquiry the rate was reduced by the Lord Chancellor to 2½ per cent, if that is any indication to the Committee. I believe it has been reduced even further since then.

I wish to refer to a couple of further matters under the Civil Liability Act. There was a case, I think in Queanbeyan, under the Motor Accident Act, but it has now been extended to the Civil Liability Act, of a teacher who, upon hearing the sound of a car accident outside, rushed out to assist in the rescue of the injured and suffered very serious injuries as a consequence of her nervous shock. Those injuries would have been sufficient to get her over even the miserable 10 per cent-plus permanent impairment threshold. But she could not recover because she had not actually witnessed the accident.

But it gets worse than that. Suppose you have a person who actually witnesses the accident and then goes to the rescue. That person's damages would be reduced for the contributory negligence of the person they are trying to rescue. If that person was drunk, if that person was partially at fault in the accident, their rescuer loses damages for that fact. What we have done in this legislation simply beggars description—it is just totally irrational. I note from the transcript of previous evidence to the Committee that it has been suggested that volunteers are still at a major disadvantage in New South Wales in terms of obtaining insurance cover. I do not know why they need insurance cover; they are exempt from liability unless they are drunk. Why would they insure? Why would they pay huge

premiums to the insurers who operate in Australia when there are much cheaper premiums available on the London market?

CHAIR: And most volunteers work with organisations who have very substantial public liability insurance.

Dr MORRISON: Meals On Wheels went overseas and got premiums at a tiny percentage of those which were offered in New South Wales and Australia. The fact of the matter is that the Australian insurers have a captive market and take full advantage of it. But the reality is that they do not need insurance; they are exempt. That is really what I wanted to cover. I am sorry it has taken so long, but I thought it important to draw attention to those problems and the serious discrepancies which I see in catastrophic injury cases, where I mainly practise. It is a pretty awful thing when someone comes in with a gross injury, to tell them that they have either no rights or rights which are so arbitrary and so ill-treated that all you can say is, "Speak to your member of Parliament. I am sorry, I cannot justify it in logic as a lawyer or as a human being."

Mr SCARCELLA: Due to the time constraints I will keep my comments brief. But I do not want to mislead the Committee in any way that the points I have to make are critical. I will keep them brief because I am very concerned that Susan Harris has an opportunity to give evidence to the Committee. My focus is in relation to the impact of legal costs to the amendments to the Legal Profession Act as they relate to the Civil Liability Act. That might seem a boring task, but it is a task that is very important. I think this is something that has slipped through the cracks. It was unintended, and it has resulted in great disadvantage to a great number of injured people under the Civil Liability Act.

The normal cost regime as we have it in New South Wales, and in most court cases, is that the winner is awarded costs—not every red cent of costs, but they usually recover about 80 per cent of their actual costs. The reason behind this is to give the parties an incentive to negotiate an early resolution of the dispute. So everybody has got something to lose. The gung-ho party is hosed down by the fact that, "If you run your case, you will not get all your legal costs; you have got something to lose."

That was the position before the Civil Liability Act. It is still the position under the Civil Liability Act in the scenario where a claimant exceeds an award or settlement of $100,000. But the anomaly and the disadvantage comes for those who have claims under $100,000. That does not mean they are small claims. We accept that we have these percentage impairment is in relation to most extreme case. You can see that those percentages have watered down the rights of those who bring small claims, and they are just not happening any more. But you still have someone who is assessed at 15 per cent of a most extreme case, and it is still significant. An example of a most extreme case may be a brain-damaged quadriplegic. Someone who is assessed at 15 per cent is still a fairly significantly impaired person, yet they get $4,000 for pain and suffering.

Where I am coming from is in relation to legal costs. Under the Legal Profession Act, the amendments have flowed through to those types of claims. The rule of thumb does not apply. You have a limit on your costs. I can quote sections, but I will not do that because of time constraints. Basically those who obtain an award or a settlement under $100,000 are limited to 20 per cent of the result or $10,000, whichever is the greater. That amount covers solicitors' and barristers' fees, and of course in relation to disbursements like expert witnesses, medical reports, you do not recover all of those either but you recover a reasonable part of those. It has an adverse effect and you have this anomaly now because where once upon a time I and my colleagues would write a letter of demand or a notice of claim setting out particulars of a claim pre-litigation saying, basically, "This is not a huge case but here is our evidence. Liability is straightforward. We are prepared to arbitrate, mediate or negotiate", we are finding now that the standard answer is, "Well, we'll see you in court", because of the cost pressures.

I will not go through the key provisions because I have just briefly summarised them, but you have got the outcomes. The outcomes for claims less than $100, 000—they are not having the effect originally intended. The original intention was, I think the Premier's words were to the effect, "to make laws more efficient". That is not what has happened. The lawyers are being forced to run cases or take cases to certain points in investigation and obtain expert witnesses and run up costs. The

reason for this is you have got these cost restrictions, and practical experience is that the insurers are refusing to look at claims early; they are denying liability in straightforward cases; and they are denying liability until the bitter end—the doorstep of the court—if you have got a plaintiff who is brave enough to get there, and this is a plaintiff who is still somewhere between 15 per cent and 25 per cent of a most extreme case.

I, as a District Court arbitrator, have had experience where the insurer will run a case dead. In other words, they get a free kick—they have a trial run. The insurer goes through the arbitration process—mind you, the arbitration process is included in that lump sum of $10,000 or 20 per cent—runs the arbitration dead, has a free kick, has a look at the plaintiff's case and then applies for a rehearing automatically. Then you go back before a judge—and even your simple cases are two day cases—and we have got this dragging out, this stalling by insurers to wear down plaintiffs, plaintiffs who are seriously injured. They are already being penalised because of sections 16 of the Civil Liability Act. The insurers are not affected similarly by these costs; they have not got these impositions on them. Technically there is an argument that they may have, but they do not for all practical purposes.

It increases hearing time in front of the judges, runs up the costs, burdens the plaintiff with worry on top of whatever they have got already, and it takes no account of the complexity of a matter. You can have a simple, straightforward matter but for various reasons because of the case scenario you may have a defendant insurer cross-claiming against one or more cross-defendants. That is no fault of the plaintiff. The case then becomes bigger than the proverbial Ben Hur, and that is outside the control of the injured plaintiff. You get a scenario where the worst position in all of this situation is that there is a certain class of injured people that is most severely prejudiced, and that is the class that involves children, retirees and stay-at-home parents. They have got no huge claim, if any, for economic loss; they have probably got no claim for care or substantial out-of-pocket expenses, but they have still got a significant impairment. So you are left with their pain and suffering and under the lump sums—which are not generous, we have accepted that—but then they are penalised from the point of view of the costs, and they are paying the costs. It is the plaintiff, the injured person, who is paying the costs.

Depending on the facts, a plaintiff may be left in a situation where he gets his lump sum for pain and suffering but it is not economically viable to run the case. There are lawyers saying, "You have a good case in liability and negligence is as straightforward as it can get. You have got a small claim for economic loss; you were off work for three months—that is $5,000. You are assessed at 20 per cent of the most extreme case; that comes to $11,000 or $12,000. We can't run this case. You are in the right; you have got a significant impairment, but we cannot run this case. You are out of the system."

So, effectively, it raises the threshold for this kind of plaintiff; it lifts the bar. They are not talking about 15 per cent; they have got to start talking about more than 30 per cent before they can consider running a case like that. There you have the anomaly, and I do not think it was intended. It has not been thought through and the consequences come from experience. So it is not a matter of being critical, it is a matter of realising and accepting from practical experience, from practitioners who are at the coalface everyday that this is what is happening. I am turning people away from my practice and I know that colleagues are too. And these are the unintended victims. I am told that that is it so I will close there. I can make a paper available to add, but we will see what Ben says in relation to that. I thank you for the opportunity.

CHAIR: I do want to hear Mr and Mrs Harris. Perhaps this is the time. We welcome Mr and Mrs Harris.

SUSAN JANE HARRIS, 18 Cressy Street, Goulburn, sworn and examined:

CHAIR: What is your occupation?

Mrs HARRIS: My background is, I did a Bachelor of Arts, Welfare Studies, and, Mr Chairman, I have actually worked for the Wesley Mission. I have worked in the disability field. I have also worked as a youth worker and I have also worked for DOCS in their child protection.

TIM HARRIS, 18 Cressy Street, Goulburn, affirmed and examined:

CHAIR: Mrs Harris, we have read the account presented but what is it that you would like to say?

Mrs HARRIS: On 20 January 2005 our lives were completely shattered. I have secondary infertility and last year in January my husband and I underwent the IVF program and July last year we fell pregnant. This was a very much sought-after baby and we were very much longing for his arrival. On 20 January we were travelling from a family picnic in our motor vehicle; we were on our way home about 10 minutes away from Goulburn and we were hit head-on by a car that was trying to overtake two trucks and another car. I was seven months pregnant at the time. I was sitting in the rear passenger seat with my four-year-old son.

I knew that I had lost my baby in the car because I was in so much pain and I knew that being in so much pain how could my baby survive this? I was taken to Goulburn hospital by ambulance and was then flown to Canberra hospital by helicopter. I woke up about three days after the accident with a ventilator machine in my mouth. I think my first question was—they came up to me and they told me that I had lost my baby, but my other big question was, "Please, take this ventilator out of my mouth so that I can ask you how is my four-year-old child who was also in the car. And what day is it?" Because I had been unconscious for about three days.

I sustained massive multiple trauma because I was so vulnerable because I was seven months pregnant. I suffered fractures to the base of my skull and was in a neck brace for six weeks. I just about lacerated everything internally: a lacerated spleen, a lacerated bowel; I had lacerated my uterus quite badly from the seatbelt—bowels, kidneys, liver; I had a lung collapse and hence was on the ventilator machine; I also suffered a haematoma from my right breast and have quite severe scarring from my abdominal injuries and also from the breast injury. But the worst injury of all was to lose my seven-month-old baby.

Under the current legislation we are not eligible for any kind of compensation and, Mr Chairman and honourable committee members, I will tell you that as a mother I would gladly give my leg or my arm to have my baby back. Because of my severe multiple injuries I did not get to see my baby until about 2½ weeks after the accident. When I was in hospital I had had visions of being able to take him home or trying to get through the grieving process. Because of health regulations I was able to hold my baby for an hour and a half, and we had waited for him for so long. No amount of money will ever replace our baby and our precious son but it is jarring to think that under the current legislation pain and suffering is worth nothing. We would like, as part of our evidence, to show you a photo of our precious little boy because I think that people might not know that a foetus at seven months is a fully formed little baby. Just because he has not breathed a breath outside the womb does not take away his rights as a human being.

Mr HARRIS: May I approach the Chair with a photo album?

CHAIR: I might say, Mrs Harris, this matter is heavy on our minds in the light of other legislation, and within the House just recently we have examined very closely the impact of the unborn child.

Mrs HARRIS: We also realise that in the criminal proceedings once again our child has not been recognised, but when it comes to compensation when we talk about 10 per cent or the 11 per cent whole body impairment, either Lars was part of me or seen as a separate identity. We feel like under the current legislation that the Government has taken its cake and has eaten it as well.

Mr HARRIS: So for the criminal court case Lars is not a human being, yet for the compensation case, if there is one, he is not part of Susan. What does he become?

CHAIR: They have been questions I have raised in the House. Are there questions members would like to ask Mr and Mrs Harris, or any comments? Let me just say, our hearts go out to you. We understand the human tragedy but also the financial tragedy. We also understand the costs of IVF treatment and so on, all of which was of no avail to you. We also know the difficulty of having further treatment in the light of what happened and also the additional cost that you may have to face. So we hear your comments very sympathetically. We wish you well.

Mr Goudkamp, is there anything that you and your team would like to say further?

Mr GOUDKAMP: One thing about the Susan Harris case is that when the regulations first came in, in 1999, the loss of a foetus after 17 weeks was an assessable injury automatically over the threshold and, for some reason which I do not really understand, in February 2000 it was removed from the regulations. In terms of Susan's internal injuries, they will not register at all on the whole person impairment scale.

CHAIR: No, I understand that.

The Hon. IAN WEST: I would ask some advice as to the definition of "serious" and "non-serious". I ask the President and Mr Morrison, in your expertise how would you define "serious", because the word "serious" keeps coming up?

Dr MORRISON: I think a serious injury could be defined as an injury that involves hospitalisation; it requires surgery; it is under the whole-person-impairment assessment guidelines. Fractures, multiple fractures to lower extremities quite often do not get over the threshold even though the sufferer of those injuries may have been in a wheelchair for several months, on crutches and have ongoing disabilities as opposed to impairments. Lower extremities are very difficult to get over that 10 per cent threshold.

I think that serious internal injuries such as what Susan has suffered ought to be properly assessed and be productive of compensation for pain and suffering. I think any brain injury should be regarded as serious injury, whether it be mild traumatic brain injury, which can affect personality, stamina and so on and can have a catastrophic affect on the sufferer and the people around that person. Those sorts of injuries should not be excluded. The sort of injuries that should be excluded are minor whiplash type injuries, fractured ribs, fractured sternums—fractures that make full recovery within a relatively short period of time.

The Hon. IAN WEST: Excluded for the purposes of damages?

Mr GOUDKAMP: Yes.

The Hon. IAN WEST: But not for the purposes of rehabilitation or for the purposes of restoring someone to their pre-injury position as much as it is possible to do so?

Mr GOUDKAMP: The ideal would be for the compensation to put the injured person back in the position that person was in had the accident not occurred.

The Hon. IAN WEST: If one were to look at the whole-of-body-impairment provisions of the Civil Liability Act, would you see that that would cover adequately the issue of serious injury?

Mr GOUDKAMP: Mr West, under the Civil Liability Act it is a percentage of a most extreme case. It has got nothing to do with whole person impairment. It is disability; it is how it affects the individual and it is a judicial assessment, not a medical assessment. That was working under the Motor Accidents Act. It had been tightened up in 1995. Between 1995 and 1999 it had excluded minor injuries and even moderately severe injuries but it certainly included people who had suffered serious injuries.

Dr MORRISON: It might be of assistance to the Committee that the wording of the old provision, which Tom has just been referring to, was that "no damages are to be awarded for the non-economic loss of an injured person as a consequence of a motor accident unless the injured person's ability to lead a normal life has been, or in the near future is likely to be, significantly impaired for a continuous period of not less than 12 months by the injuries suffered in the accident". I do not have a problem with that as a means of assessing, provided that the assessment is done by a judge, who can distinguish between my losing a finger and a concert pianist's loss of a finger. In my case I should not get over the threshold but I do not see why a concert pianist, who loses their career and all that goes with it, should not be treated very differently and yet we treat them the same under these wretched AMA scales.

The Hon. IAN WEST: In terms of that socially desirable position of restoring someone to their pre-injury position as much as is possible to do so, as opposed to the cost effectiveness of it, would we not have a situation, if you were to reintroduce an across-the-board Act such as the Civil Liability Act, where it would be untenable financially to do so?

Mr GOUDKAMP: No, I do not think there is any evidence of that at all. Under the Motor Accidents Act before 1999 there was no suggestion or evidence that that system had become unstable. In fact, the premiums had become very stable.

Dr MORRISON: Can I add to that: The NRMA has no such thresholds for compensation in the Australian Capital Territory and makes very good money out of the scheme there. They do not publish the details and that is perhaps why, but they are very happy with their levels of profits in the Australian Capital Territory. In Queensland there are no permanent impairment thresholds for their motor accidents scheme and yet the insurers are perfectly successful and profitable in Queensland. It does not follow that insurers cannot make a profit under the sort of threshold that is under the Civil Liability Act or was under the Motor Accidents Act prior to the 1999 changes.

The Hon. RICK COLLESS: Mr Morrison, can I just take you back to the comments you made about the case where the 16-year-old boy was attacked with an iron bar when trying to gain entrance to a premises. That case obviously got a lot of publicity throughout New South Wales and probably throughout Australia at the time. It raises a very interesting scenario about what action a homeowner or the proprietor of a business can take if confronted by somebody illegally on his premises. What comments have you got to make in regard to that?

Dr MORRISON: The first comment is that that is a matter of criminal law not of civil liability, and there is a good deal of protection offered for the use of force. It is perfectly lawful to use reasonable force to protect your perception in relation to your family, your home, your business, and the courts and juries usually will err, if anything, in favour of the homeowner because they relate to it and they understand that that person may use force which, in the cold hard light of day seems excessive but which, at the time, appeared to them to be reasonable to a perceived, though not in fact accurate threat. But hitting with an iron bar someone who is cowering, I cannot believe that a jury would accept that that was a reasonable use of force; because a teenager tries to sneak into a nightclub or a pub by the backdoor cannot justify that use of force. I just think the public perception, if the true facts emerge, would be very different in relation to that.

Yes, criminality is one thing, and there is considerable protection for the homeowner in regard to criminality, but civil liability, bearing in mind, of course, that person is insured and they are insured by their homeowners' or their business occupiers liability policy. It is the insurer which gets the benefit of these defences. It does not protect the person from the criminal aspects if they have misbehaved, but they are two very different things. But I do not perceive it to be a great problem in the criminal area, although it is not my particular field of practice.

The Hon. ROBYN PARKER: This question is slightly beyond the terms of reference of this inquiry, and I thank Mr and Mrs Harris for coming here; our heart goes out to you. In terms of the legislation we recently amended with grievous bodily harm, Mrs Harris would be in the situation where there could be criminal charges laid. Would there be victims compensation applied in that case?

Dr MORRISON: First of all, there are two issues. The mere fact that a driver is negligent does not give rise to victims compensation, but if there is criminality involved, the maximum amount

allowable for criminal injury compensation is $50,000. That is the maximum and that limit has been there for more than 10 years, so there has been no change in that for a very long time. They would not be entitled to the maximum, or anything like the maximum, even if there is a criminal conviction arising out of this, and there may well not be.

CHAIR: May I thank the members of the Australian Lawyers Alliance for your presentations; they have been most illuminating. I thank you for what you have done, Mr and Mrs Harris. I have already expressed our concern and appreciation to you and thank you for travelling to this inquiry today.

(The witnesses withdrew)

(Short adjournment)

BRUCE EDWARD McCANN, Solicitor, 18 Pitt Street, Parramatta, sworn and examined:

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

Mr McCANN: As a private individual.

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

Mr McCANN: Yes, I am.

CHAIR: We have before us your statement. Would you like to make a comment about your statement?

Mr McCANN: Would you care me to read it onto the record?

CHAIR: No, you do not need to read it all but if you would just like to make reference to it or pull out salient points and then we will come back to questions.

Mr McCANN: Thank you. I just want to reiterate my gratitude in being able to make a submission and appear before the Committee today. I have in the statement produced a very condensed summary of events as detailed in my primary submission. The only difference in the summary relates to two offers of compromise that I made in accordance with the District Court Rules and I logged in each of those in strict time order in the chronology, just to alert the Committee to the fact that there were two genuine and quite reasonable offers on the table before the insurer as defended in my matter well before things got to the very expensive stage in terms of legal costs, and both of those offers were rejected.

In fact, the highest of those two offers was less than the award I eventually received from the Court of Appeal. I make some record on page two, points 3(a) and (b), of various things said by the barrister for the insurer at both the arbitration and the hearing in the lower court. I want to emphasise that the barrister did absolutely nothing wrong. He simply followed his instructions. I did not want any adverse reference made to him. The only other thing I would add in addition to this statement is that I think the decision in my matter, just talking with my colleagues, reverberated through the profession, as I think other matters that have resulted like mine have done, clearly sending a message: Be very careful if you are going to mitigate. You ought to do everything you can to settle. It was that fear that my legal team and I had in those early stages that prompted those quite low offers of compromise.

The Hon. IAN WEST: Those low offers of compromise and the decision of whether you would go or would not go to court were not being prejudiced by your legal representatives and the amount of money that they would receive?

Mr McCANN: No. Certainly I was not pressured by my representatives to accept something greatly less than we perhaps thought at that stage the matter was worth. The offers were put in at that level for fear of what eventuated, that the cost provisions and the capping provisions of the legislation would work against me.

The Hon. IAN WEST: And your legal representatives would not have received more or less money. There is a perception that cases are not being taken because the lawyers are not getting enough money in their pocket. In your particular case did that or did that not have a bearing?

Mr McCANN: No, it did not have a bearing. I knew my legal representatives. I had known them for many years, trusted their judgement and of course had the advantage of knowing myself the state of play.

The Hon. IAN WEST: Previously there was this perception that people were settling on the court steps because for some reason there was some advantage to the applicant to do so. There was this perception that people were not settling but were proceeding too far down the track and going to court when they should have settled before they went to court. Your particular case does not represent that sort of philosophy.

Mr McCANN: Not at all. I put an offer, the initial offer of compromise at $52,000, most reasonable. That would have afforded the insurer the ability to settle on the steps of the court and not to proceed further but that opportunity was not taken. Having made that offer in a formal way by way of an offer of compromise, runs for a set period; it is 28 days from the time of making. During that time I am not permitted to withdraw it so there was ample opportunity to take that prior to the hearing as with the one that followed.

The Hon. IAN WEST: There appears to be a perception coming through now that the insurers' representatives are using the court process and the court steps as a bargaining chip in the process.

CHAIR: Pressure.

Mr McCANN: Absolutely. My case is reported, having gone to the Court of Appeal, and it is there to be seen what happens. Cases commence. There are negotiations. You get these days, thankfully, two formal negotiations by way of these offers of compromise and for them to be rejected when they are reasonable and a process of the decision, and appeal, a decision, and appeal, as there was in my case, is fairly evident or was evident to me that there was a procedure to be followed regardless of the merits of the case.

CHAIR: At the appeal process did the judge give reasons why on one hand he awarded you damages of $95,000 but awarded costs against you? It seems rather odd.

Mr McCANN: It does. If I may give a full explanation of that, taking initially the arbitration process in the District Court, the parties opt for the arbitration process because it is cost effective and quite swift. My understanding is that you cannot get a hearing before a District Court judge unless you first attempt the arbitration process. At that arbitration I was awarded the amount of money I have stated and with that goes, just by way of operation of the law, a costs order. The winner has his costs paid, and I might just digress for a moment and explain the costing process. There are two kinds of costs that operate within litigation, one is solicitor-client and one is party-party. It operates much like Medicare in the sense that the solicitor-client to bill will always be higher by about one-third than the amount you will cover party-party.

So at that early stage in arbitration my legal bill would have been about $30,000 and I would have expected, having won the arbitration, if the matter had finished then I would have recovered about $20,000 from the defendant. That happened again before the District Court judge. The District Court judge never knows what the arbitrator's award was; it is completely independent, as it must be. On appeal to the Court of Appeal, in reducing the amount of money that I was awarded by His Honour Judge Andrew, effectively the appellant won. If I had maintained that judgement at that level or gained more on appeal—which I did not ask for; I simply asked that it be left in place—the fact that the judgement was reduced by even $1 means that the appellant wins and with that win goes the costs order. Those costs in the Court of Appeal are not capped. That is why we see a disparity in the figures. My overall bill from my solicitor, on a high solicitor-client ratio, through the arbitration, the hearing before Judge Andrew and the Court of Appeal totalled $78,000. Whereas, the appellant costs, the insurer's costs, for the appeal only on a party-party basis were $40,000.

The Hon. IAN WEST: That is all medico-legals as well? That $78,600 would cover not just legals but also medico-legals?

Mr McCANN: That is correct.

The Hon. IAN WEST: So that is not $78,000 to your solicitor or barrister?

Mr McCANN: The medico-legals in that I paid for as I went. So, that does not include them. That is simply professional costs and counsel fees.

CHAIR: In your experience since this happened to you, is this a fairly frequent occurrence? I ask that in the light of a telephone call I had this morning from a woman who has just lost an appeal in

a medical negligence case and suddenly discovered she has a $127,000 costs award against her. She is a pensioner, and that consumes her house and everything else. This is a fairly frequent thing?

Mr McCANN: I would not say frequent. It happens, and it happens with this legislation because of the fear of the adverse cost effect. One of the salient points lawyers make to their clients in deciding whether to make an offer or to accept an offer that is made is the consequence of not reaching that $100,000 threshold. In my case it represented, in pure mathematical terms, recovering in relation to the costs in the District Court only about half of what I could have got if that capping provision had not applied. But it does happen. It can happen certainly in situations as you have said, where the legal fees exceed the verdict. But that is a risk that has always been. The risk is now much greater because of this lottery system or game of chance with one aspect of all of the costs arrangements being capped.

The Hon. GREG DONNELLY: In summary, what would you put forward as the position to really deal with this issue?

Mr McCANN: I see it as black and white. I see that we either remove the capping altogether or cap all costs in the sense of cap the solicitor-client costs as between the injured person and his solicitor, cap the solicitor-client costs between the insurer and its solicitors, and cap the party-party costs. That was the problem in my matter, if the $40,000 costs that flowed against me in the Court of Appeal had been similarly capped, the consequences would not have been so bad, as I would have been left with some money over instead of being in the negative.

The Hon. ROBYN PARKER: I have one question about people being in the position such as the Chairman mentioned, and perhaps your own situation, where you just do not have the funds to pay. Is there any course of action you can take at all other than going bankrupt or something like that?

Mr McCANN: No. That is it. You are effectively trapped within the legal costing system. I will either settle with the insurer's solicitors an agreed amount—at the moment it is $40,000. I accept that or not. If I do not accept it, they will go through the costing process, which will add thousands to the bill, and at the end of the day it could conceivably come out to be well in excess of $40,000. It could be reduced but I would think more likely, just knowing the way it works, it will cost about $5,000 to go through that process and it will probably increase by about another $20,000.

The Hon. ROBYN PARKER: If you had this case all over again, the chance to go back—say it was groundhog day—what would you do differently?

Mr McCANN: I would have made that initial offer of $52,000 and that would have been accepted and it would have been all over and done with. The two years of additional litigation beyond that time not only cost me a great deal of money and all the angst of going through it, with family and what have you, it also cost the insurer an absolute fortune, because they have to pay their solicitors for the work done in the District Court and there is still a gap that the insurer will have to pay solicitors in relation to the Court of Appeal. The $40,000 I have to pay represents, again, about two-thirds of the overall bill.

CHAIR: Do you get this sense however that the insurer's company is happy to pay that and to go down this line perhaps as a warning to other people?

Mr McCANN: I gleaned that with the benefit of hindsight and sensed all along the way, because there was no reason to reject the $52,000 sensibly. In the light of things it was a win, I would say, for the insurer. But it was the fact that mine was one of the first matters to go through the court and one of the first matters to go to the Court of Appeal where you had this cost operation. It was interesting that the Court of Appeal brought in the verdict just under the threshold, and the consequences have flowed. I think it sent a message.

The Hon. IAN WEST: I imagine also that, just like the insurers would be pricing their products to cover actuaries and the like and all the other service providers, part of their premium would be to cover legal costs? So, the issue of the method of operation of the insurance industry to operators in the industry would be different to a normal applicant who would not have a lot of

knowledge of the area and would be employing probably legal advice at a much increased price to that that the insurer's company would be employing it for?

Mr McCANN: In response, with respect, I say that I was concerned with the legislation when I kicked the matter off. My lawyers were also concerned. So, if they were concerned with me, they would be more concerned with someone who did not appreciate the way things operated. But to have accepted that offer of compromise in the very early days before the first arbitration, I estimate it would have been hundreds of thousands of dollars saved by the insurer. I would have received $52,000 and on top of that the insurer would have paid perhaps $20,000 in costs on a party-party basis, because the offer of compromise is made on the costs plus basis, and out of my $52,000 I would have paid $10,000 to my solicitors and walked away with $42,000. We would not have had the District Court's time consumed with an arbitration and hearing, and then off to the Court of Appeal.

CHAIR: It is rough justice when you have to bear the injury, the pain and suffering and then pay the costs?

Mr McCANN: That is true. In answer to the honourable member's question, the only other alternative is access to the suitors fund. The Court of Appeal, in finding against me and reducing the verdict, gave me a certificate to go to the suitors fund. I think it is about $10,000 or $12,000 you can get from the suitors fund. But the mode of operation of getting that money means going through the costs assessment process, which my solicitors estimated would cost about $8,000 and would have taken months. So, with respect, that system needs to be looked at as well. They said, in the scheme of things $4,000 is a drop in the bucket, do not waste your time, and I took that advice.

The Hon. GREG DONNELLY: It is interesting that the weight of the box that injured you was 25 kilograms. Do you have a view that if there were some enforceable weightlifting limits for packaging that that would create a situation where there is less likelihood of these types of injuries occurring—soft tissue injuries, or neck or back injuries—from lifting?

Mr McCANN: I did not lift it, the thing simply fell on me. It was not the fact that it was heavy and high, it was the way it was placed that was a problem. It was the placing of it. From memory, the shelf was narrower than the box.

CHAIR: I was in a hardware shop on Saturday, and on the other side of the aisle someone was using a forklift to load heavy things on that side, and pushed things through that then fell in front of me. I could see that happening with you. I missed this by eight yards.

Mr McCANN: I do not know why the box fell, but it certainly did.

CHAIR: It was not your fault in any way?

Mr McCANN: No, liability was admitted. I could understand the insurer's position if it had been a contentious matter, like the ones we see in the press of people getting injured in the surf, and that sort of thing, where there is a question about liability, but not in circumstances where the insurer admitted liability prior to the arbitration.

(The witness withdrew)

CATHERINE ROE CLEARY, Farmer and Secretary of the Study and Investigation Committee of the Country Women's Association of New South Wales, Kaloola, Cowra Road, Forbes, sworn and examined:

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

Ms CLEARY: Yes. I did do a submission quite some time ago and I have been reading it on the train on the way up here.

CHAIR: Would you like to speak to that?

Ms CLEARY: Yes. The first page of the submission was left out when it was sent to you but it is mainly just general remarks and I wonder whether I could cover them now?

CHAIR: Please?

Ms CLEARY: While we acknowledge the good intentions of the changes to personal injury compensation, we are concerned about some no doubt unintended consequences. Some of these are the capping of insurance payouts have led to surging profits for insurance companies—IAG's insurance profits jumped 50 per cent to $518 million in the first half of 2004-05 with very little if any reduction in premiums. There has been a shift in the costs of catastrophic injuries from insurance companies to the Federal Government by way of social security and to the State Government by way of health costs, and to the families of the people catastrophically injured.

In recent times there seems to be a need for a no fault insurance scheme to insure those catastrophically injured in public liability incidents who are not covered by current schemes. Premier Bob Carr was quoted as proposing that this scheme would be funded by a levy on third party insurance and workers compensation premiums, as said in the *Herald* of 11/2/2005. We feel this is a bonus for the insurance industry and an unfair targeting of two groups in the community, employers and motor vehicle owners, rather than being funded by the whole of the community and insurance companies. We have a real concern that the cost of insurance cover is becoming out of reach for community groups, wage owners and those on social security. We all pay in terms of increased insurance premiums for frivolous litigation. We believe there has been a decrease in this since the reforms of the system, but there is still room for improvement.

As to the impact on community events, I would just like to say I am on the Study and Investigation Committee of the CWA. It is composed of members of the CWA from all areas of the State—Cessnock, Macksville, Forbes, whatever. To do these submissions we all gather our experience, we all put it together and then one of us is lucky enough to do the submission. The things we talk about are things our groups are involved in. So they are drawn from everywhere. I talk about the Hunter.

CHAIR: The impact on community events and activities is very interesting reading. You are quite correct in saying that page one is missing from your submission. Would you table page one?

Ms CLEARY: I do have copies of page one.

CHAIR: Thank you, it is important for us to have a copy of that. Would you go on with the impact on community events and activities because your members' views are important.

Ms CLEARY: The cost of liability insurance has become prohibitive. Even with the CWA we have had to put up our subscriptions. That is okay; it is not very much for each group. But the CWA I am involved in is in Eugowra, which is very small town with 370 people. In that town the people who are in the CWA are also in the Show Society, the Red Cross, every group going. So this goes to all the groups. One small premium increase mounts up and it makes things very difficult. People are not prepared to take the risk of putting on an event because of the risk. Carols by Candlelight is still running but often without candles, of course. A good example is the small model aeroplane club in the Hunter. The insurance cover has more than doubled since 2001 but membership has dropped. That was a very profitable little activity. The pensioners would be there flying aeroplanes. Now they can afford to pay their membership to the club but not the public liability. They

cannot do what the club was intended for. Juniors cannot afford to join. What do they do? The same has happened to many sporting clubs, especially where we are. We are in our fourth year of drought. We have very little spare money and every bit makes a difference.

The other area is in council-run playgrounds. That is a big issue again with distance. Councils are tending not to take the risk of having a small playground in Eugowra and one in Cudal and one in all the different areas because it is too risky. So they have a regional one. But a regional playground in Orange is of no use to the children of Eugowra or the children of Gooloogong or whatever. So the children again have nothing to do. We worry about obesity, which is probably a far greater risk to their health in the long term than the odd chance of breaking their arm when they fall off a monkey bar. Again, this really makes a big difference to community life in small communities especially. If you are living in Sydney and you had to go to a big playground a couple of miles down the road I guess that is fair enough. But in our little communities it does make a big difference.

CHAIR: When we took evidence at Wagga Wagga about country-based events, they were not able to say definitely that certain events had been cancelled or were no longer held in rural areas because of insurance premiums. In the experience of your members have events actually been cancelled or not been organised or perhaps country shows have been going for X number of years and are unable to continue?

Ms CLEARY: Country shows are one thing we are debating at the moment. We are involved with the Eugowra Show Society. We want to run a demolition derby, which sounds a fairly risky thing but we used to live at Robertson and we ran one very successfully for a few years. They are only allowed to go in reverse, and that does slow people down. It is very carefully monitored. They are caged in and the fuel tank is in the back and you do not have any problems.

CHAIR: It is a little more risky than flying a model aircraft.

Ms CLEARY: Certainly, but it is the sort of thing that young people in country areas love to do, and they are doing it in a supervised environment with safety issues, rather than burning down main roads and running into trees. It is a safe, well-supervised event. We are now debating whether to hold this event or not. I am not saying we are not going to do it, but we are debating it because of the cost of insurance premiums. I cannot tell you the exact amount.

CHAIR: Have you heard of other organisations that definitely have cancelled events?

Ms CLEARY: I am sorry, I have not. The only one we used in our submission was the Hunter Valley model aircraft club. I am sure I will think about some afterwards and if I do I will write to you.

CHAIR: Please do. We have anecdotal stories, but we would like to hear of actual cases.

Ms CLEARY: Yes.

The Hon. KAYEE GRIFFIN: You refer to council not wanting to take responsibility for any incidents that may happen on play equipment. What has happened to playgrounds in the smaller townships? If the councils are not taking any responsibility because they do not want to be caught up in any liability issues, what has happened to the play equipment or the playgrounds?

Ms CLEARY: They usually dismantle them because they cannot afford to have them there. If they do not maintain they you are still liable. They are council playgrounds. So they take away the equipment because it is not safe. So we are left with a vacant piece of ground that is nice and mown. I wonder if they are going to take the trees down next because the children might climb them. That is what happens. I know in the Wingecarribee shire, which I was closely involved with before I moved, the play equipment suddenly disappeared. It was there and all of a sudden it was gone.

The Hon. KAYEE GRIFFIN: Council still has responsibility for the space without the equipment?

Ms CLEARY: Yes, which is not satisfactory.

CHAIR: We are aware that the traditional play equipment, like monkey bars, swings, slides, maypoles, have all gone. When I visited a new housing estate at Nelson Ridge on Thursday to open a couple of new homes I noticed there were new forms of children's play equipment that is completely safe, including climbing rigs, but it is all fairly low level.

Ms CLEARY: They are fine. To replace them at all the little townships, again it is the tyranny of distance. Cabonne council has all these little villages. It is different for a city council, which can put a nice state-of-the-art playground in the middle of town. Probably the closest playground around is McDonald's at Forbes, so you have obesity and play equipment put together.

The Hon. KAYEE GRIFFIN: A couple of years ago there were issues because play equipment had to meet certain standards, which probably negated much of the very old play equipment. Has there been any discussion with council about installing the soft-fall surfaces and at least renewing some of the play equipment?

Ms CLEARY: I am not aware of it if there has been. When I was doing the submission I had some cuttings from the newspaper, which I have not brought with me, with information about council taking it out. But I am not aware of them replacing it. I can probably talk to the council about it, but there certainly has not been any at the moment. Again because of the drought, and I hate to keep bringing it up, it does mean that even the councils are more cash-strapped than they normally would be. I am just guessing, I do not know.

The Hon. KAYEE GRIFFIN: Nevertheless, they still have to take responsibility for the space that is left, regardless of what is in it.

Ms CLEARY: Yes.

The Hon. KAYEE GRIFFIN: So if anything happens within that space it is still a liability of council.

Ms CLEARY: That is true.

CHAIR: Beware of the trees and drop bears.

The Hon. RICK COLLESS: Mrs Cleary, what cumulative impact does all this have on small communities like Eugowra and Gooloogong knowing they cannot have their playground, the local show, billycart derbies?

Ms CLEARY: I think it is very depressing. It is also very expensive with the insurance premiums. I had a letter from the president of my branch to bring to the next meeting saying we have these rooms at Eugowra, we spend all that time working to maintain these rooms and trying to get people to join. They cannot afford to join because of the premiums. Then we pay the premiums on the rooms because of the risk. It is very wearing and we say why are we still going, why are we doing this? Why are we doing this to pay the insurance? It is $516 and we have eight members and we are working the whole time to pay this money. These rooms are used by community health who pay $30 a week and will not pay any more. That is all we get. The insurance is just another nail in the coffin of all these little organisations. And those organisations are the lifeblood of these towns. If the CWA, the Red Cross and whatever cannot afford to do it the government will have to step in. It is just crazy because these volunteers are the lifeblood of our little towns. There is nowhere for youths to go and so on. It is very sad. It really makes a difference to the maintenance of the buildings. If you have to pay all these insurances as well as painting and maintenance, it is just too hard for little groups.

CHAIR: We had evidence in Wagga Wagga that many groups in the community do not need this kind of insurance but they are frightened into getting it.

Ms CLEARY: I think that is very true. I think they are frightened. The lady bowlers at Eugowra rang me up the other day to say they wanted to use our rooms for a meeting. We said yes, that is fine, but they have to sign the hall hire agreement and all this has to be done before Monday

morning. People are very frightened because you hear and read all these cases where people are held liable.

The Hon. RICK COLLESS: Who has given you that information? Has it been legal advice or is it coming from your local insurance person who is selling the policy?

Ms CLEARY: Our insurance all comes centrally through the CWA. We are told how much we have to pay. They centralised all that insurance. That is who tells us what we have to pay. It goes through head office at CWA.

The Hon. RICK COLLESS: The reason I ask is that the evidence the Chairman refers to that we heard in Wagga Wagga was that very often these sorts of ideas at put in the organisations' minds by the insurance industry rather than by someone who has properly assessed the relevant legislation. In the case of the CWA, perhaps you may be well advised to take legal advice on whether or not you need that insurance because from what we were told in Wagga Wagga the case may be that you do not need it.

Ms CLEARY: That is interesting because I know with auditing we had to meet all these provisions, all these little branches had the cost of auditing, and we found out now that we do not need to spend as much as we did. So that is an interesting point.

The Hon. IAN WEST: With your eight members paying $516 a year, how many claims have you made in the last 20 years?

Ms CLEARY: None. They should have a no claim bonus.

The Hon. IAN WEST: Has your group undergone any risk assessments? Has the insurance company come to you to conduct a risk analysis that may alleviate or discount your insurance premium?

Ms CLEARY: No, it has not. Because community health uses the rooms they have come and said we should have this, this and this. We have complied with the regulations, you know, where the exit signs should be and all that sort of thing, but we have not had any other. But that is interesting. I will write that down, too.

The Hon. IAN WEST: I would be interested to know whether, in determining the price of cover, the insurer has conducted any risk assessment. The industry is extremely efficient at pricing its product to ensure that there is maximum responsibility on the part of the person paying the premium, but I have yet to find too much happening in the reverse, for example assessment by the insurer. Has the $516 increased or reduced over the past five years?

Ms CLEARY: It has increased.

The Hon. IAN WEST: So it has gone up incrementally over the past half decade, is that so?

Ms CLEARY: Yes. I have only been at Eugowra for three years and it has increased during that time. I am trying to think what it started at.

CHAIR: Yet you have made no claims and the Country Women's Association [CWA] is not known for running riotous evening events.

Ms CLEARY: No—if only!

The Hon. KAYEE GRIFFIN: There are a number of organisations, as I understand it, in respect of which head office has an overall policy. But in your case is an individual policy for each branch, is that so?

Ms CLEARY: Yes, we each get an invoice setting out how much we have to pay.

CHAIR: Just to clarify the point made by the Hon. Kayee Griffin, I think it would be a statewide cover and that head office would charge each local auxiliary a proportion of the fee. Is that so?

Ms CLEARY: I am not sure, because some branches have their own buildings; some are in rented premises or use the local bowling club. Would it not vary because of that? I am not sure.

The Hon. KAYEE GRIFFIN: I suppose my question really is: Does your branch of the association hold the policy in its own name, as opposed to head office holding the policy?

Ms CLEARY: Yes, we do have in our own name. Our CWA branch has a Certificate of Currency that we have to produce.

The Hon. KAYEE GRIFFIN: The renewal of the policy is sent to your branch of the association, as opposed to your head office, is that so?

Ms CLEARY: Yes. Well, it is sent from head office to us, but is our individual policy and we have our own Certificate of Currency.

CHAIR: It could prove worthwhile to follow that up with your State general manager, on the basis that an individual policy charged against you may be $400, which may be the company's overhead administrative charge for writing out a separate policy. That could help you to get a better deal.

Ms CLEARY: Yes.

The Hon. IAN WEST: In respect of the insurance company you are using at the moment, are you familiar with whether or not they provide other forms of insurance to the CWA?

Ms CLEARY: I am sorry, I do not know.

CHAIR: I would ask you to move on to your third point, particularly the aspect of disallowing the earning capacity of someone over the age of 65 years?

Ms CLEARY: Yes, it just struck me as quite odd. If someone aged 60 is injured, fairly severely injured, they say they only have loss of earning capacity for five working years. Really, people are leading very useful lives until well beyond that. Why should they say they can only get compensation until our 65? It seems crazy when our population is living longer and leading useful working lives for longer.

CHAIR: Indeed.

The Hon. IAN WEST: But the insurance companies would say, if they were to agree to that, that $516 is not enough.

Ms CLEARY: They may be saying that, but considering the age of our members it could well be the only way we could ever get any money out of the insurers. I do not know. I do not think it would make a huge difference, but I am saying that because I do not know. I just think it is illogical to ensure people and then say that, suddenly, their lives are irrelevant at 60 and they cannot earn money any more, and they will only be paid for the next five years.

The Hon. IAN WEST: Are you suggesting there is a social responsibility that should be taken on board, that should have a higher objective and just bland cost-efficiency?

Ms CLEARY: Yes.

The Hon. IAN WEST: I agree. During he last five years during your insurance premium has increased. Are you familiar with what you are covered for?

Ms CLEARY: No. I know we are covered for public liability and hall hire liability.

The Hon. IAN WEST: However, are you aware whether, in the fine print, your overall coverage has been reduced in a corresponding arc with your increased premium?

Ms CLEARY: No. I will check that, too.

CHAIR: I know it is not his area and responsibility, but I will remind the Prime Minister when I am talking with him tomorrow night that his sixty-fifth birthday is coming up.

Ms CLEARY: That is right. He has got a few years of earning capacity left, surely.

The Hon. GREG DONNELLY: In an attempt to understand what is a relatively complex issue, have you been able, through any relevant State government department, to discover whether any information is readily available to explain these types of issues? Coming to terms with the complexity of insurance is obviously difficult. The point was raised earlier that perhaps obtaining legal advice to assist in understanding it. Are you aware of information available, in plain English, through any government department that would help to explain it to community organisations such as your own?

Ms CLEARY: I am not aware of it. e When we were talking earlier about legal advice I was thinking that we would have had to pay for legal advice, which, once again, is one more expense that our small CWA branch cannot afford. I have been involved in workers compensation issues, because of our business and I have always found it very difficult to understand. As farmers it costs us more than average. It is more like an advance payment than the insurance premium. It would be interesting to check whether there is some user-friendly promotion available from State government departments. I do not know.

CHAIR: On the fourth point, there are some aspects there that we probably could follow through on. For example, I believe the costs of some forms of insurance under compulsory third party and so on has actually decreased. It might not the common knowledge, but I think that is so. The Committee is not asking you to do that; we can determine that.

Ms CLEARY: It would be interesting to know.

CHAIR: I have been informed that the Committee has some evidence about that. On the issue of coverage for injury caused by uninsured drivers, I cannot imagine pro bono coverage.

Ms CLEARY: We felt it could be a pro bono coverage by insurance companies, out of the increased profits. As we said in our submission IGA's insurance profits jumped 50 per cent in the first half of 2004-05. We felt that out of those increased profits there could be some sort of pro bono coverage. I think the insurance companies have benefited from these changes—probably an unintended benefit, but I think they have benefited. The evidence seems to be that they have benefited; I am not the only one who thinks that. With the changes from the insurance industry paying money to the Federal Government with social services, security and so on, I cannot see why the Government could not have some sort of enforcement on insurance companies and say it is social responsibility. Those people were injured by an uninsured driver. It is a terrible thing. You were there, you had done nothing wrong but were a hit by someone who is uninsured. It is not your fault.

There are a lot of profits and I think the socially responsible thing would be to ask them to cover that, rather than the taxpayer. I do not see why that should result in an increase in premiums, with the profit levels increasing as they have been. We also would like to see a no-claim bonus on third-party insurance. When you get your green slip they ask if you had an accident that was your fault in the last year. If so—I guess, it has not happened to me—they increase the cost of your insurance. I guess that is saying that the green slip as at a no-claim bonus level, but I am not sure about that. I know that last year when I went to get my green slip I was asked whether I had had an accident in the past 12 months that was my fault. Really, they have no-claim bonuses for other insurance and I cannot see why they cannot have it for that.

(**The witness withdrew**)

(**Luncheon adjournment**)

ALAN JOHN MASON, Executive Director, Insurance Council of Australia, Level 3, 56 Pitt Street, Sydney, sworn and examined, and

ALLAN JOHN HANSELL, Manager for New South Wales and the Australian Capital Territory, Insurance Council of Australia, Level 3, 56 Pitt Street, Sydney, affirmed and examined:

CHAIR: Are you conversant with the Committee's terms of reference?

Mr MASON: I am.

Mr HANSELL: I am.

CHAIR: We have received your submission. Would either of you like to make an opening statement?

Mr MASON: Yes, I would like to make an opening statement. Today I am representing the Insurance Council of Australia. Our members are involved in public liability, compulsory third party insurance and workers compensation insurance, both as underwriters—where they carry the financial risks—and/or as managers of the business on behalf of others. Our members constitute over 90 per cent of the general insurance industry in Australia, when measured by gross premium income.

I propose to speak from an industry perspective. I note that representatives of individual member companies are appearing separately before the Committee, and I am sure they will indicate their own company-specific initiatives. We have provided a detailed submission to the Committee. This submission builds on material we have previously prepared and presented to the ministerial forum on insurance issues and the Standing Committee of Attorneys General. We continue to report to those ministerial forums, being accountable to them and monitored by the Australian Competition and Consumer Commission, as well as being directly regulated by Federal and State government regulatory agencies.

In our view, tort law reform is all about balancing the needs of seriously injured people to ensure they receive appropriate treatment and compensation, with the wider needs of society to have available and affordable insurance cover. When insurance is compulsory, it is particularly necessary for governments to take this role, as the community cannot avoid the cost. While public liability insurance is not compulsory, it is nevertheless essential for people running public events, community activities and businesses. That is why we believe it is necessary for government to get the balance right between the interests of the different stakeholders, and it is our view that the New South Wales Government has achieved this balance.

Initially I would like to address public liability insurance, with particular reference to the reforms enacted by the Civil Liability Act 2002. This legislation covers the inquiry's terms of reference relating to people injured "at public events, in public places and in commercial premises". I would first like to put the issue in context by outlining the difficulties insurers and the community faced as problems started to develop in the late 1990s. The experience of public liability insurance in Australia in recent years has been very well documented by the Australian Prudential Regulation Authority [APRA] and by the Australian Competition and Consumer Commission [ACCC]. I would like to circulate a chart headed "APRA Public Liability Data".

Document tabled.

The chart, which is annexure A to our submission, shows the financial position for public liability insurance for all APRA-regulated insurers between 1998 and 2002. Information relating to industry experience since 2002 has not been published by APRA. The chart shows that in 1999 and 2000 insurers were suffering losses in public liability insurance totalling many hundreds of millions of dollars—in fact, I think about $500 million to $600 million a year in the worst two years. The total cost of claims was well in excess of the level of premiums being collected by the industry.

There is a dip in the chart for 2001. This is because HIH Insurance collapsed in March 2001, and therefore HIH data was not collected by APRA that year. Even without the HIH data, the remaining insurers still experienced a significant loss on public liability business. HIH business was distributed across the market, and overseas as well, so some of that business is now reflected in the 2002 figures. However, you can see that even with a much higher level of premium in 2002, claims costs still outstripped premiums.

The primary cause of these losses can be ascertained from the next chart I would like to circulate, which is also in our submission. The chart is headed "ACCC Fourth Monitoring Report", and deals with public liability insurance. For the past three years the ACCC has been monitoring claims costs and premiums for public liability and professional indemnity insurance in Australia. The chart shows, on the ACCC's figures, the average size of personal injury claims from 1997 to June 2004. The values have been adjusted for inflation, so the effects of normal inflation have been removed.

The ACCC has found that between 1997 and 2003 the average size of personal injury claims in Australia more than doubled, from $16,000 to $35,000. There has been a steady and consistent increasing trend in the average size of claims over that period. As was noted earlier, there was a reduction in 2001, but by 2003 new record levels had been reached. The reduction in the average size of claims in 2004 shows the initial reflection of the impact of the civil liability legislation.

The public liability crisis of 2001 and 2002 was not a short-term phenomenon. Rather, it was a reflection of seriously increasing claims costs over a number of years, dating back to the 1990s, combined with serious underpricing of the product. Insurers therefore acted to protect their position by significantly increasing prices, thereby giving rise to major community concern about the affordability of public liability insurance, or by withdrawing from the market altogether, thereby giving rise to community concern about the availability of cover in the first place.

It is true that the collapse of HIH contributed to that instability, because HIH anecdotally accounted for about 40 per cent of business in Australia. The World Trade Centre attack in September 2001 also had an impact on the availability of capital for the global industry. But the core drivers were the core liability business and claims in Australia. Having examined the issue very carefully during the course of 2002, nine Australian governments, operating through the specially convened ministerial meeting on insurance issues, agreed that something needed to be done. The result was the civil liability law reform program, the key piece in New South Wales being the Civil Liability Act.

From our point of view, it is pleasing to be able to say that since the Act was passed, claims costs have stabilised and started to reduce, as have premiums. The ACCC has been conducting a very thorough monitoring of public liability insurance across Australia. Its most recent report states that in the six months to June 2004 the average size of settled claims decreased by 11 per cent, and average premiums charged by the industry were reduced by 15 per cent.

Public liability cover is now widely available for commercial, small business and not-for-profit organisations. Prices have started to reduce, and some insurers have publicly announced further reductions or indicated to the ACCC planned further reductions. We understand that the market is currently quite competitive. It is our view that this would not have occurred if the Civil Liability Act had not been passed. It is a vitally important piece of legislation. It gives insurers the basis on which to offer public liability cover to the community at reasonable rates. It is our view that the insurance industry has responded to the calls from government to respond to the reforms they have put in place.

We note that the New South Wales Bar Association has called for "institutional accountability" of the insurance industry, so that the impact and operation of the civil liability legislation can be monitored. I am pleased to advise the Committee that institutional accountability for public liability and professional indemnity insurance has been put in place, under the Federal Government's Financial Sector (Collection of Data) Act 2001. Using the statutory powers available to it under this legislation, APRA has established the National Claims and Policies Database, and insurers provided the first round of data to this statistical collection in February this year. APRA has been loading the data and preparing the first reports from the database. We understand that those reports should be available in the very near future.

This database will provide a comprehensive mechanism for the analysis of premiums, claims and trends in public liability insurance across Australia, for both the private and public sectors. It is our understanding that governments have agreed to contribute their own data to this mechanism. So we will be in a position in the future to monitor trends in public liability in a way that we have not in the past, and we have been very strongly supportive of that initiative. I would also ask the Committee to note that the Federal Assistant Treasurer and Minister for Revenue has asked the ACCC to continue to monitor public liability premiums for a further three years. The insurance industry is more than happy to co-operate in that process.

If I could now turn my comments to compulsory third-party. Private-sector insurers have been insuring compulsory third-party insurance since 1989, some 15 years now. Following the March 1999 election, the Government announced a desire to make CTP green slips more affordable. A reform package was introduced which was designed to preserve and improve medical and rehabilitation services for people injured in motor accidents and to make the product more affordable by limiting damages for pain and suffering for relatively minor injuries. Since those reforms were introduced, premiums have reduced by more than $100 per vehicle on what we believe is a sustainable basis. Premiums have continued to reduce in recent times, while the timing and delivery of medical and rehabilitation services to injured people have improved.

CTP insurers are subject to very close oversight by the Motor Accidents Authority. That authority is subject to annual review by the Legislative Council Standing Committee on Law and Justice. So that area of insurance in New South Wales is subject to close accountability to the Parliament and I believe the community is benefiting both from the legislation and the manner of its implementation by insurers. For example, I think the average cost of a green slip for motor car insurance was 55 per cent of average weekly earnings in 1999 and is now 35 per cent of average weekly earnings.

The last area to touch on is workers compensation. Our members are also heavily involved in the New South Wales workers compensation scheme, but not as insurers. They do not carry the financial risk of claims costs or the underwriting, and they operate in accordance with strict controls and directions from the WorkCover Authority. Premiums are determined by the authority, not by insurers. I also note that medical indemnity insurance falls within the scope of the inquiry's terms of reference, but we do not represent the medical indemnity insurance sector, so we propose not to comment on that area.

If I may conclude by referring to the detailed terms of reference of the inquiry. The first issue is the impact on employment in rural and regional communities. While it is difficult to show a direct correlation between the cost of insurance and the level of employment in the rural sector, there is no doubt that workers compensation, motor third-party and public liability insurance are a significant cost to business and primary industry in towns and regional centres. If premium costs get too high you could conclude it would have a negative impact on employment. Similarly, for community events and activities and community groups, cost is clearly an issue, as is availability. One of the major industry initiatives in 2002 was the establishment of the Community Care Underwriting Agency, which was a joint-venture between Allianz Australia, Insurance Australia Group and QBE Australia.

A large number of community groups, which previously had difficulty, now have access to affordable public liability insurance through that underwriting agency. That agency has indicated there will be no increase in premiums in 2005, and they are working very closely with the not-for-profit sector to promote better risk management for community functions. I think you have already heard evidence from Mr Turner.

CHAIR: We have heard evidence to that effect.

Mr MASON: Suncorp/GIO are also very active in the not-for-profit sector, and I believe you are hearing evidence from them later. The next issue in the terms of reference was the availability of cost-effective insurance. I think I have covered the impact on premium levels for both public liability and CTP insurance, and the regulatory authorities have confirmed lower pricing. I am also pleased to say that on the availability front, during 2002, 2003 and onwards ICA itself and the Insurance Ombudsmen Service, which was then known as IEC Limited, was getting dozens and dozens of calls a week from community groups who could not get insurance at all. We set up a facility to help them and

I am pleased to say that since the end of last year I doubt that we would have received more than two or three inquiries from community groups that cannot get access to cover. So from that point of view government reforms have clearly worked to get insurance back in the community where is needed.

On the question of insurers' profits, there is no doubt that the insurance industry has returned to profitability and has made reasonable profits in the last few years after many years of poor results. It is absolutely essential that the industry is profitable so that we can give the community the security that it needs. I think we all saw the evidence of what happens when companies are not profitable in the HIH case. But the claims that are repeated in the media occasionally that these profits have come out of tort law reform are simply wrong. Public liability insurance accounts for 7.7 per cent of insurers total business. So whilst the reforms have helped restore profitability to the public liability sector as well as everything else, the majority of insurers' profits come out of the other 92, 93 per cent of their business, not out of this sector.

CHAIR: That would include investments and property and things like that?

Mr MASON: Yes. The industry has had a coincidence of the regulatory reform from APRA with much tighter prudential standards, governance rules and capital requirements. The drought is probably the only sector that has enjoyed any benefit from the drought in terms of lower property claims, lower motor accidents, and that has had a contributory factor; the investment markets have performed well; the public liability changes have definitely been beneficial and the losses of the past are not there. So all these things have coincided at the same time to produce industry returns where, I am happy to say, the industry is making the sorts of profits that you would hope to make in any sustainable business over the long term, and it is vital that the insurance industry is profitable and secure for the community.

We noted the report from Mr Richard Cumpston that was circulated at the end of last week. We think it draws a very long bow based on mainly speculative assumptions and speculative interpretation that recent profits on public liability and CTP would allow benefits to be increased without any impact on insurers' business. We asked an independent firm of actuaries to review that report this week and we have had a draft report this morning from Ms Estelle Pearson of Finity Consulting, which has done an analysis on this, and we can make that report available to the Committee later if you wish.

CHAIR: I think that would be helpful.

Mr MASON: I do not have it with me at the moment.

Ms LEE RHIANNON: When will we get it?

Mr MASON: I can probably arrange for it to be passed up here this afternoon or tomorrow, if that suits.

Ms LEE RHIANNON: It would be good to have a look at it while we are questioning you.

Mr MASON: Certainly. Ms Pearson's conclusions are interesting. She says, "The level of profits in current prices is not known given that few post-tort reform claims have been settled". Commenting on the Cumpston report, Ms Pearson says, "We do not believe that it is possible, purely from the results of the analysis undertaken, to conclude that current premiums are too high and that a wind back of some of the tort reforms could be absorbed within current prices". She noted in relation to the CTP scheme that even for the first year of the reformed scheme in 1999, it is still too early to estimate profits because only 88 per cent of claims are finalised and the remaining 12 per cent are the higher cost claims. She further advised that the 12 per cent of claims that are not settled represent over 50 per cent of the total claims costs for that year.

CHAIR: How long is it anticipated that this tail shall be there?

Mr MASON: Liability business—unfortunately, the tails can be exceedingly long. It takes probably, on average, five to six years for most claims to be reported and for the true development of those claims to be known to insurers so that they can actually price with confidence. It takes many

years, especially in the case of infant claims, for all claims to be settled; it could be 10, 20 years. So total finality is a very long issue in this area.

The Hon. IAN WEST: So therefore are you saying that these graphs that you have given us are an average size of personal injury claims? They are projected estimates, not results?

Mr MASON: These are not final results, no.

The Hon. IAN WEST: These are projected estimates?

Mr MASON: Yes.

The Hon. IAN WEST: There is a big difference between that and results.

Mr MASON: Yes.

CHAIR: Particularly as the ones that are outstanding happen to be the larger percentage of the claims.

Mr MASON: The key thing for insurers is to try and estimate the future cost of these claims with the closest possible accuracy to what the eventual outcome is, and it is things like superimposed inflation that cause the real problems to insurers when the final costs outstrip their original estimates.

The Hon. IAN WEST: Are you saying then that the claims estimates projected in APRA's public liability data here for 1998 to 2002 are tracked?

Mr MASON: No. The APRA figures in 2000-02 are financial results for those years. The ACCC report is the average cost of claims.

The Hon. IAN WEST: Estimates?

Mr MASON: That would be settled claims and estimates in those years, yes.

The Hon. IAN WEST: And you are saying that those claims estimates for 1997, 1998 and 1999 are tracked so that they can be assessed against estimates? The outcomes can be assessed against estimates for each individual claim?

Mr MASON: Within individual companies it would be for sure, yes.

The Hon. IAN WEST: It would be interesting to see.

Mr MASON: The other term of reference asks what would happen if the reforms had not been enacted. We find it very difficult to answer that question because it is quite hypothetical because claims costs, just to pursue the point of Mr West, are driven by a wide range of factors including the number of injuries, the awards by the courts, superimposed inflation. But looking backwards now, it is clear that prior to the reforms, costs were increasing; they were increasing far and ahead of the rates of inflation; increasing far and ahead of what insurers had assumed in their pricing models, which is why we got into the situation that we were in. If the Government had not acted I think we would just be in a worse situation today than we are now.

The Hon. ROBYN PARKER: Could you compare that comment you have just made with a comment you made earlier when you said the reforms of insurance indeed were not born out of the changes to tort reform. Did you not say that before?

Mr MASON: I am not sure. What was it that I said specifically?

The Hon. ROBYN PARKER: Earlier I thought you said that the changes and reforms and improvements within the insurance sector were not due to the tort reform changes?

Mr MASON: Not solely. The changes to tort law reform have certainly assisted in making these classes of insurance better priced, more affordable, and the costs have come down and the premiums are coming down in correspondence. The total profit of the industry, however, is not built on the basis of public liability solely. That accounts for less than 8 per cent of the industry's total business. So it is contributing to the profit for sure, but most of our profit is coming from the other product lines like car insurance, house insurance, investment income and so forth.

The Hon. ROBYN PARKER: So therefore if there were to be, hypothetically, a wind back of tort reform, then the insurance industry could cope with that, if that is only a small percentage of your profit?

Mr MASON: If I understand your question correctly, no, because insurers price each product line on a standalone basis. They do not cross-subsidise from one product to another. In fact, you have got a few insurers that specialise in this liability area that might not necessarily be the same insurers that do house insurance or car insurance. Insurers operate in different segments of the market and they have to make sure that each product range is priced appropriately to try and earn a profit on that business because they have to apply capital to that business as well.

The Hon. IAN WEST: Although that does not appear to apply to Suncorp, which seems to have a fairly diversified portfolio, and that is 7.7 per cent that you are talking about?

Mr MASON: That is the total industry. I do not know what it is for individual companies.

The Hon. IAN WEST: And does that 7.7 per cent relate to CTP and personal injury, not workers compensation because that is—

Mr MASON: An agency.

The Hon. IAN WEST: Claims management only?

Mr MASON: Yes.

The Hon. IAN WEST: That 7.7 is—

Mr MASON: Public liability.

The Hon. IAN WEST: Public liability and CTP only?

Mr MASON: No, CTP is separate to that. I do not know what percentage CTP represents. I could look that up and let the Committee know, if I may?

The Hon. ROBYN PARKER: Insurance companies are doing pretty nicely, though, are they not? Your submission says that insurers in Australia collect $25.9 billion in premiums a year and pay claims at a rate of $55 million a day, which would be something like $13.75 billion a year. I am not really strong on maths but that looks like a gross profit of about $12 billion a year, does it not?

Mr MASON: I would really have to get the industry results in front of me to give you a proper answer.

The Hon. ROBYN PARKER: That was in your submission?

Mr MASON: I am happy to do that. Do we have the industry total figures there?

Mr HANSELL: Yes.

CHAIR: The problem here is that it is very hard to compare apples with pears and that is exactly what we have got here.

Ms LEE RHIANNON: Or it is hard for him to say, "yes" to a straightforward question, but it is in your submission.

The Hon. ROBYN PARKER: That looks like the profit and it is in your submission, yes or no?

Mr MASON: The industry is making a profit but the profit it is making is not the difference between those two numbers you have quoted. I am happy to give you a proper considered answer.

The Hon. ROBYN PARKER: Another set of figures that make it look better for the insurance industry?

Mr MASON: No, I am happy to give you the APRA official government figures, which show you exactly what the industry's income, costs and profit are. There is no doubt that the industry is making profits but you have premiums, you have the cost of running the business, you have got the costs of buying reinsurance, you have got the cost of claims, you have got the cost of distribution or remuneration to intermediaries. There are a lot of other costs between premium and profit. It is not just the claims.

The Hon. ROBYN PARKER: Is it not, though, about 20 per cent? If you combine all of those strands of insurance, are you not making a profit of around about 20 per cent across all insurance lines?

Mr MASON: I would like to take that question on notice rather than guess and give you an answer that will not be quite correct.

CHAIR: We will come to specific questions in a moment. Would you like to finish your opening statement?

Mr MASON: Thank you, Chairman. Our conclusion is that the evidence from a very wide range of sources said that there clearly was a problem with personal injury compensation in New South Wales and in other parts of the country. Governments have acted to restore the balance between the level of compensation and the level of premiums needed to fund it, and insurers are now providing the benefits of those reforms to policyholders and the community. But the full impact and the effectiveness of the reforms to both CTP and, more importantly, public liability are yet to become fully clear because, as we said earlier, it takes on average five years for a public liability claim to be made and finalised.

Despite the early progress that we have seen, very few cases have reached the appellate courts to test the new laws and so it is vital that the legislation and the impact of this are monitored very closely to ensure that the original intent is achieved. Parliament plays a very important role in that respect because it is possible for judicial interpretation to lead to outcomes that were not intended by the law, nor assumed by insurers in their pricing or underwriting. Insurers are backing the reforms to work and are providing lower premiums on their interpretation of the reforms. We think it would be exceedingly premature and dangerous at this stage to seek to undo the reforms until they are fully tested because the last thing we would like to see, as an industry and for the community, is to find ourselves back in the situation we were two or three years ago. Mr Chairman, that concludes my opening statement.

CHAIR: Mr Hansell, do you wish to make a brief opening statement?

Mr HANSELL: No, I do not.

Ms LEE RHIANNON: Do members of your council support New South Wales' present legally complex situation where there is a range of different thresholds for recovery of common law damages depending on who injured you or where you were the injured? From reading the submissions and listening to witnesses I picked up on a range of those, and I am sure you are aware of what I am referring to. For workers injured by an employer it is 15 per cent whole person impairment under the WorkCover guidelines; injured in a motor accident it is 10 per cent whole person impairment under the Motor Accidents Authority; injured by someone other than your employer it is 15 per cent for the most extreme case under the Civil Liability Act, with a maximum of $400,000; injured prisoners have a different set up, as do coalminers and police. Do you think that this range of complexity works?

Mr MASON: Our best answer to that is that that level of complexity you have articulated for insurers is multiplied by the number of jurisdictions we have in Australia as well. It is certainly a policy position of the insurance industry to have, as far as possible, national uniformity around regulation and benefits design. Clearly given our system of government that is very, very difficult to achieve. It is governments, at the end of the day, that determine the level of benefits and the structure of these schemes and really, provided that insurers can, with confidence, assess the reforms and how they are supposed to work and how to deliver them, insurers will respond, but the more consistency you get, clearly the easier it is for insurers to assess the environment and to underwrite it.

Ms LEE RHIANNON: The mission statements of many of your members state that they are looking to find a practical method of paying compensation that relieves the suffering that people have. The complexity for people who are injured often puts them in a much more stressful situation. I will ask the question in a different way. Do you see that the range of systems that we have is to the advantage of your members?

Mr MASON: No.

Ms LEE RHIANNON: So you would like to change it?

Mr MASON: If you look at the many businesses that our members insure, they operate, for example, on a national basis and the fact that you have got inconsistencies just in the workers compensation arena—I mean, you can have employees all over Australia covered by multiple different definitions of who is the worker and multiple benefit regimes—makes it very hard to underwrite that, price it and deliver it to the employer, especially where some of those issues are publicly underwritten and some are underwritten in the private sector. Yes, I fully agree with you that the more consistency we have got, the more efficient the product we can deliver to the marketplace.

CHAIR: Would it help the Insurance Council if many of these diverse acts all came under, say, the Civil Liability Act?

Mr MASON: I would have to say that is probably a very complex question and we would have to look at that quite carefully, but we would not say we would not look at it. We would, definitely.

Ms LEE RHIANNON: Is your hesitation there because it is at 15 per cent or is your hesitation having one system?

Mr MASON: Our hesitation would be in the complexity of what that would imply in terms of a massive change—it does not matter which of the systems you pick as the benchmark—to the others and whether or not you could understand that change with confidence, price it and everything else. At the end of the day it is the community needs that governments in their policy setting are trying to balance.

Ms LEE RHIANNON: I thought you just said that a simpler system would work for you?

Mr MASON: It would be more efficient for insurers, yes, but I cannot tell you, without looking at the detail, what that would do to the actual product that you deliver in the marketplace. We know what the cost is of a green slip today, for today's legislation and today's benefits. If you were proposing a fundamental change—

The Hon. IAN WEST: Today's workers compensation?

Mr MASON: Yes.

The Hon. IAN WEST: I do not think there is much benefit in getting injured.

Mr MASON: Sorry?

The Hon. IAN WEST: I do not see the word "benefit" as applying to compensation.

Mr MASON: However you define it, but the terms of the legislation are what insurers are assessing, pricing and delivering. Any change to that is risky because it is fraught with all the unknowns. It takes years and years for these things to be worked through and assessed, so we would think that any proposed changes to harmonise would have to be very, very carefully considered.

The Hon. RICK COLLESS: But surely the unknowns in the industry at the moment, where we have, particularly in relation to personal injury, some people assessed at 10 per cent and getting nothing when they are obviously very seriously injured. They are the inconsistencies that have been brought to the attention of the Committee over last few days of hearings. We heard evidence this morning to suggest that motor vehicle and medical negligence would be much better off if they were administered under the Civil Liability Act to provide that consistent approach so that people, when they are injured, know exactly what they would or would not get, rather than lawyers being tied up for weeks debating whether it will be heard under motor vehicle, medical negligence or civil liability. That seems to be the case at the moment. Would it not make a lot more sense if governments around Australia were to bite the bullet and try to put some consistency into the whole thing?

Mr MASON: It is not a question we have actually considered, nor have we had the opportunity to discuss that with our members. At a headline level, consistency clearly is something that would be easier to assess because we would have a greater volume of statistics doing the same things the same way, but the reason that all the schemes are different probably have very good reasons grounded in public policy and parliamentary process, so I cannot give you a categorical answer, sitting here, without looking at the full ambit of any consequence of those changes.

The Hon. IAN WEST: However, you have indicated that the legislators have got the balance right. In your submission you said that somehow, magically, we have struck on the correct balance at this point in time. You seem fairly certain about that. I am just having some difficulty in coming to grips with that certainty, which you say that we, as legislators, have come to grips with. In looking at what you call the balance between the social responsibility and the obligations of insurers to provide a restoration of a person's pre-injury position as far as possible as opposed to the cost effectiveness—whatever that might mean because there is some great debate about what cost effectiveness means—you say in your submission that we have magically got that balance right, even though we have a multitude of supposed compensation levels. Can you explain to me how it is that we have magically got the balance exactly right?

Mr MASON: I do not want you to overemphasise my comments. I do not know that I ever said that we have got the balance exactly right because in this area it is always the case that there are things you do not know about that you might need to deal with. The Government, for example, has publicly announced that it is looking at alternative mechanisms for providing long-term care to catastrophically injured people and we are quite willing and supportive of that initiative to look at that and see how the insurance industry can deliver and help with that, so nothing is ever fixed.

The Hon. IAN WEST: So we are in that state of flux—

Mr MASON: My comments about getting the balance right directly refer to the fact that two or three years ago in the public liability arena clearly the balance was totally out of kilter where people could not get access to the market at all or could not afford it. So in terms of the balance, the Government has changed the compensation regime to a point where insurers feel that they can price it and deliver it. So that is what I mean about getting the balance right. The community can afford it and we are compensating seriously injured people.

The Hon. ROBYN PARKER: I was not in Parliament when these tort reforms were brought about and the legislation changed but part of the media and political spin on those changes was that premiums would go down, and the public was certainly keen on that. I thought you said before that premiums had gone down. Was that correct?

Mr MASON: Yes.

The Hon. ROBYN PARKER: Other than CTP?

Mr MASON: Yes.

The Hon. ROBYN PARKER: Can you demonstrate and elucidate on that a little because I would like to know about that. I do not know anecdotally of anyone who is in fact paying less. Perhaps you could give us a little more information on that.

Mr MASON: Yes, for sure. The Australian Competition and Consumer Commission [ACCC] has been monitoring insurance company pricing. I think it has produced six reports now every six months. Its most recent report found that premiums on average dropped 15 per cent in the first six months of 2004 and in that report they reported that at least two insurers had forecast further reductions of 10 per cent in the second half of 2004. So presumably those will work through now. In our experience, the market continues to be quite competitive. I think Suncorp announced last month a further 10 per cent reduction for the not-for-profit sector so there is some evidence of the change in market pricing subsequent to the reforms.

The Hon. ROBYN PARKER: It does not relate though to the profit that the insurance companies are making in comparison, does it? Those drops are only small percentage drops compared to the profit insurance companies are registering. They are registering something like 17 per cent and 18 per cent, are they not?

Mr MASON: Return on capital, yes, companies are making that sort of return on capital but as I said earlier they are making that on the totality of their business, not just out of personal injury compensation.

The Hon. ROBYN PARKER: It seems as though since the tort reforms claims have reduced. Would that be correct?

Mr MASON: Yes.

The Hon. ROBYN PARKER: CTP claims have reduced, something like about 24 per cent, is that right, or 45 per cent?

Mr MASON: I do not know the number. I do know they have reduced, yes.

The Hon. ROBYN PARKER: About half of what it was before, would that be right?

Mr MASON: You have to be careful looking at claims in terms of numbers and/or costs because insurers' experience is that it is the small claims where the large volumes are that the main reduction has taken place. So it is the small claims with minor injuries, people without permanent impairment, where the claims have reduced, whereas the actual costs of settling the more seriously injured claims have still continued to increase. So the money in our view is going to the more seriously injured people, which is part of the policy intent.

The Hon. ROBYN PARKER: The average person out there would expect that if claims have dropped by 50 per cent surely insurance premiums would drop by 50 per cent.

Mr MASON: The ACCC found that claims had dropped 11 per cent and premiums came down 15 per cent, so the 50 per cent is not a number I recollect.

The Hon. ROBYN PARKER: I think that might have been in Suncorp's submission. They said that there is about half the claims under CTP.

Mr MASON: I am sorry, I am not familiar with the Suncorp submission.

The Hon. RICK COLLESS: I refer to your comments about public liability insurance and community organisations. Your submission contains quite a comprehensive list of the types of problems that communities have been experiencing, from things like caravan parks, sporting fields, Anzac Day ceremonies, surf lifesavers, the rural shows and so on. We have taken evidence that suggests that community organisations utilising voluntary labour may be paying excessive insurance premiums. What is your response to that?

Mr MASON: I do not know how to determine that. All I can suggest is that if people believe that is the case they are more than welcome to either contact us or contact the insurance ombudsman's service and we will see if we can provide them with some assistance. We have helped a lot of organisations in the past two to three years.

The Hon. RICK COLLESS: It has even been suggested that organisations utilising voluntary labour perhaps do not even need public liability insurance. I gather that that is not something you would support.

Mr MASON: No, and I would not support that as a private individual either, I do not think, or a member of a volunteer organisation myself. The risks are there. Notwithstanding that the Government reforms gave volunteers and people a lot more comfort in operating in a good samaritan environment or conducting rescues and that sort of thing, your exposures for a whole range of other liability issues still remain.

The Hon. RICK COLLESS: I will give you an example. This morning we had the chairman of the Country Women's Association here and she told us that her branch, which is a little branch called him Eugowra in central western New South Wales—they have eight members and they are paying $516 a year for their public liability insurance. What sort of risk assessment do you think their insurance company may have been out to have a look at? She also told us that they have not had a claim.

Mr MASON: I cannot answer that question obviously about the CWA in Eugowra because I do not have the information.

The Hon. RICK COLLESS: It seems excessive, does it not?

Mr MASON: You raised a very important point about the fact that people have not had a claim, which is a difficult issue we find trying to communicate, particularly to the not-for-profit sector. I think there was a report released in Victoria earlier that said that they had assessed all their members in the not-for-profit sector and only 5 per cent of them had ever had a claim. The whole problem with this area of insurance is that it is the premiums of the many that have to go towards paying for the claim that happens to even just 1 per cent. A $1 million claim takes an awful lot of people's $500 to pay for, and the fact is that probably 95 per cent of organisations may never have a claim and we hope that is the case.

The Hon. RICK COLLESS: But in terms of risk assessment, I pay about the same amount of money for my car insurance every year. Driving 60,000 or 70,000 kilometres a year, I would expect that my risk of having a claim would be a lot greater driving 60,000 or 70,000 kilometres a year on Australian roads than would eight ladies meeting in the CWA hall in Eugowra loading once every two months.

Mr MASON: The insurers I know, and I know community care underwriting agency in particular, have developed products and they are giving community organisations a lot of help and assistance in risk management and trying to identify their risks and how to reduce their exposures. Most of the concern around what the community organisations do is unfortunately they usually run events where people get together, whether they are young kids, elderly people, the general community, and they come to single events or events that are run by volunteers. They do not have the infrastructure, the risk management, the other systems in place. Accidents do happen unfortunately and often they result in claims. So the best I think the industry can do is provide its best knowledge in terms of risk management to these people.

The Hon. KAYEE GRIFFIN: You just mentioned in terms of voluntary organisations that it was a range of concerns you would have about not being insured for public liability. Can you make mention of some of those specific issues?

Mr MASON: I think everybody, any organisation, if it took advice from its own advisers or anyone else, would realise that you have a range of exposures. If you operate a club or a volunteer organisation you might have immunity under the legislation for obvious risk, it might have immunity

for responding, say, to a good samaritan situation and where you go to assist someone who has been injured on the road you might still operate out of a clubhouse or something, you still have the possibility of injuries around the premises, slips and falls, a whole range of things that every other organisation or business might do to incur liability every day of the week. So the legislation certainly helps specific sectors with specific risks they have but they still have the general liability exposure that everyone else has.

The Hon. KAYEE GRIFFIN: You also mentioned previously in your opening statement, I thought it was a question that the Chair asked about the issue of the tails being very expensive and obviously that percentage being somewhat of an unknown quantity and you mentioned, I think, that some claims possibly would take, particularly in relation to children, 10 to 20 years. Can you expand on why that occurs?

Mr MASON: If a minor is injured, my understanding—forgive me because I am not a solicitor—is that you cannot settle a claim with a minor until they reach the age of 18. So they have until they reach the majority to bring their claim forward. You might notify the claim when they are a child but I think the person has the right to pursue the claim once they become an adult. So some of these claims remain open for many years.

The Hon. KAYEE GRIFFIN: So basically once a claim—

Mr MASON: There are a lot of latent issues. I know this inquiry is not dealing with that but you only have to look at the question of asbestos where people were exposed 20 or 30 years ago and their injuries are only now becoming manifest. So policies insurance companies sold in the 1950s are being called upon today to respond to those claims, those injuries and those diseases. Liability insurance is very longtailed in nature.

The Hon. KAYEE GRIFFIN: So once a claim, for instance, for a minor is notified and goes into whichever company it might be, then that is part of an actuary's work in relation to how much you think that claim might be as the years go by and what it might be from a—

Mr MASON: Actuaries try to assess the future cost of all claims.

The Hon. KAYEE GRIFFIN: What it might be at the time a person becomes legally an adult.

Mr MASON: I would probably need to give you a proper response to that question because I think I am not doing it full justice in my reply.

The Hon. IAN WEST: Correct me when I am going astray. I am trying again to come to grips with the issue of cost effectiveness. On one side of the equation you have the restoration issue, the social wish and obligation to collectively as a community attempt to restore a person to their pre-injury position, and then the position that you are in as the representative of insurers, the Insurance Council of Australia, the union representing insurers, attempting to maximise the return on your investment and therefore I would have assumed had a vested interest in minimising the amount of compensation you pay out. So in looking at your definition of "cost effectiveness" I am trying to factor in your dilemma. Can you help me with how you come to grips with what you define as cost-effective and serious injury versus a minor injury?

Mr MASON: The insurance industry's basic position is that we are there to provide insurance to the community and to provide the benefits or the proceeds of those policies to people if what they ensure against happens and it goes wrong. Things go wrong for people So we give them their money. The number one thing that stops us selling our product to the community is cost. If the cost gets beyond the ability of people to afford it then not only are we not selling insurance to whoever wants it. You then have a whole raft of people in the community who do not have insurance and therefore they have no means of compensation or protecting themselves against their losses.

The Hon. RICK COLLESS: Is that not a circular reference? If you have 10 people paying $100, you can have 100 people paying $10 and you have the same amount of money. The more people

you have contributing to the system the better off is the insurance industry, surely, even though you will have more claims?

Mr MASON: The numbers do not work. Think about it in terms of car insurance. The more cars you have insured the more the probability is you will have the same percentage-increased volume in claims, so your costs are going to go up. So, it is the cost of the claims that drives the amount of premium you need to charge each person. So, having double the amount of people insuring their cars still means you have to collect double the amount of money because you will have double the amount of claims if they all have the same average size of claim. The ultimate affordability issue for us is not our affordability, it is affordability in the eyes of the customer.

The Hon. TONY CATANZARITI: I often wonder how people get out of this dilemma. You are damned if you do and you are damned if you do not. You might say this is a service we offer, take it or leave it, but the customer is in a situation where he cannot afford to be without it, particularly with public liability. I just cannot comprehend the situation.

Mr MASON: That is exactly right. This is why governments do and have to take the role of being the arbiter at the end of the day and say what does the community need and what can it afford, because everybody would like to have the maximum amount of cover possible for no price at all. That would be Utopia. Somewhere in the middle is the balance that governments have to strike in the legislation, and insurers have to price it.

The Hon. TONY CATANZARITI: The point I am trying to make is that a small person cannot afford not to be covered, because they can go out just like that. On the other hand, you are saying this is our price and this is what you are covered for if you want to take it. If not, just leave it.

Mr MASON: Which is why governments have a role in defining the benefits in this area.

The Hon. IAN WEST: And you are provided a very favourable environment with the Civil Liability Act and, can I say, that 7.7 per cent of your overall market that you are talking about here in public liability, one may be cynical and say a hard line was taken by the industry in its availability of public liability insurance to the community. There appeared to be a rather uniform position on pricing in that 2002 year which looked rather collusive. Across the board, all of a sudden there appeared to be unavailability of that type of insurance. Keeping in mind that something like 7 per cent of the whole industry market was involved here, one found it a bit difficult to comprehend why that hard line on prices took place as it did.

Mr MASON: I can assure you from my perspective there was no collusion. We are absolutely, totally, on top of the fact that those sorts of collusive practices are a no-no at ICA. However, do not forget the liability market is not just Australia, it is international. The crisis was going on in the 1990s. Costs were starting to rise. It was when HIH fell over and tipped a huge volume of business onto the market that no-one else wanted because they were already losing money on the business they had.

The Hon. IAN WEST: Some may think that that crisis was rather illusory, but leaving that aside we still appeared to be in a marketplace—am I right in saying—where the environment, in terms of the tort legislation, is extremely favourable?

Mr MASON: Look, the legislation has restored insurers' confidence. They are back in the market and prices are coming down. Hopefully we will know in the next month, when the Australian Prudential Regulatory Authority releases the first output from the statistical collection, in some detail what is working and what is not working. We do not have that in front of us at the moment. The industry is not hiding away from scrutiny. We are more than happy to have that scrutiny and have that discussion.

Ms LEE RHIANNON: Over recent years when we saw the changes to the legislation, were you or any other members of the council involved in lobbying government for changes to the legislation?

Mr MASON: I have been talking to all the governments since the ministerial forum process started. We had to appear in front every one of the ministerial forums on insurance issues to respond to questions about what insurers were doing.

Ms LEE RHIANNON: But were you proactive in seeking changes?

Mr MASON: We certainly were proactive in putting proposals to government as to what might be done. I do not think we were proactive in saying that things needed to be done, because that was a consequence of what was happening in the marketplace. Community pressure is what caused governments to act, not us.

Ms LEE RHIANNON: In your preparation for today, did you read any of the transcripts from previous hearings?

Mr MASON: No.

Ms LEE RHIANNON: I was just asking because what came through in two previous hearings—one in Wagga Wagga and one here—was considerable hardship for people who had been injured in different ways. A term that was used quite often was "drip feed". I imagine you are acquainted with that term?

Mr MASON: No, I am sorry, I am not.

Ms LEE RHIANNON: It was used in the context of people who were injured, who cannot get a final payment and are dependent on periodic payments from the insurance company. We received many complaints because those payments would not come through on a regular basis and people felt they were put in a quite demeaning position of having continually to go back to the insurance company. A couple of points arise from that. Many insurance companies refuse to make electronic payments to people who are injured and injured workers. Do you have any understanding why that is the case?

Mr MASON: No, but I can certainly follow these questions up.

Ms LEE RHIANNON: Would you appreciate how important that would be for people who are injured, to receive regular payments?

Mr MASON: I am afraid without the detail I am at a bit of a disadvantage.

Ms LEE RHIANNON: With all due respect, that is a fairly straightforward question. We are talking about people, say building workers, who at some stage might have been on $800 a week and then, because of some injury, they might be on a few hundred dollars a week.

Mr MASON: Sorry, these are workers compensation payments?

Ms LEE RHIANNON: Not just workers compensation. At Wagga Wagga we heard from people who are just having problems getting regular payments. If there were regular electronic payments, at least there would be some certainty when they were going to receive the payments, without them having to ring back to the head office of the insurance company. For people in the country this was an extraordinary dilemma, being stuck on STD phone calls for a long time.

Mr MASON: I will certainly look into it for you. I suspect the issue is one in relation to payments for workers compensation benefits. Public liability claims payments do not tend to be paid periodically, they tend to be lump sums, as do motor third-party bodily injury. They are lump sum awards. So, I assume these are workers compensation payments. The way workers compensation claims are paid, generally speaking, is laid down by the WorkCover authority. More than that I cannot really say without making inquiry. I will certainly look at it for you.

Ms LEE RHIANNON: The other issue that related to this was case managers. Evidence was presented to the inquiry that there was a theme coming through that case managers would frequently change and this would mean that people would have to update them on their situation and supply

additional information, and again payments would be held up. This term "drip feed" was regular used and we heard serious cases of considerable hardship.

Mr MASON: We will certainly refer these back to the insurer members for comment. We do not take an interest in the operational side of insurers' businesses. They are questions we will put back to the members and see if we can get some responses for you.

Ms LEE RHIANNON: I will leave it at the point that I imagine you are concerned about the image of the industry, and the image of your industry is often tarnished. Hearing these reports would add to that problem, so I imagine it is something relevant to your work as a council?

Mr MASON: Yes. As I say, I will certainly go back to the members and asked for some comments on this. The people who have given evidence are presumably in the transcripts?

Ms LEE RHIANNON: Yes.

Mr MASON: So we will be able to follow them up as well.

The Hon. ROBYN PARKER: I have some questions that relate to some evidence we heard this morning. In your submission when you were talking about settlement of claims you said that caps on legal costs are seeing a trend towards settlement. Is it not true that those caps on legal costs are forcing injured plaintiffs to settle because the insurers are using the cost caps to exhaust their ability to take action, have re-hearings and appeals, and that sort of thing? Is it not forcing them to settle because their costs would not be able to be recovered from the insurance companies themselves?

Mr MASON: Here again, it is a matter of detail where I do not have any information available to me. I think it a question probably better posed directly to the insurers who manage the claims. We do not manage claims as such. My understanding is many claims are being settled much faster because legal advisers are negotiating settlements quicker rather than allowing claims to drag on and on as has been the case in the past.

The Hon. ROBYN PARKER: So, in your view, it has no relation to the caps on legal costs?

Mr MASON: I would have to go back and take that question on notice, if I may.

The Hon. ROBYN PARKER: You also suggest that lawyers are opting to settle matters because they will not certify that a claim has reasonable prospects of success. You are not suggesting, are you, that insurance companies settle when there is no reasonable prospects of success?

Mr MASON: Sorry, I am not suggesting that insurers are behaving inappropriately, if that is your interpretation, no.

CHAIR: In the interests of transparency, we had evidence indicating that injured individuals, for example, are not treated fairly. We had some fairly graphic illustrations of that. Do you think it would be an advantage to have some external mechanism whereby transaction between companies and, say, injured people are reviewed?

Mr MASON: The workers compensation and motor third-party schemes are closely regulated by the Government and government agencies. Whatever mechanisms are in place are there regulated. On the public liability side the industry is close to launching a new industry code of practice, which deals principally with claims management, and this will apply for the first-time probably anywhere in the world, but we have a code of practice that currently applies to residential consumers, motorists, householders. The new code of practice the industry is about to launch will deal with the full spectrum of business, including small business and the commercial sector, and cover claims for things like public liability, and will have a clearly enunciated set of standards around claims handling.

CHAIR: That is a self-regulatory issue, is it not?

Mr MASON: Yes.

The Hon. ROBYN PARKER: In your submission you say liability reforms have not been a reason for insurers' recent return to profit. If that is the case, why did we need liability reforms in the first place?

Mr MASON: The liability reforms I do not think were intended by governments to actually restore industry profitability. Liability reforms by governments were intended to restore availability of insurance and affordability to the community. The industry, as I think I said earlier, has achieved profitability because of better pricing, increased prices, better risk management, better prudential standards, better investment income, lower claims. A multiple set of factors has seen the insurance industry return to profitability. Tort law reform has been part of that. If the industry was losing $500 million a year out of public liability, clearly, to the extent that the reforms and price increases in particular have actually eliminated those losses, then the tort law reform has contributed to the industry's return to profitability. But it is not the sole cause.

The Hon. ROBYN PARKER: Has not the cost shifting occurred in any case? Has not the cost shifting been from the insurers to the government and the injured parties?

Mr MASON: The cost shifting to government?

The Hon. ROBYN PARKER: You were talking about cost shifting. Has that not occurred and has it not been from the insurers' books to the government and injured members of the public? Are they not bearing the costs? Is that not where the cost shifting has occurred?

Mr MASON: The insurers have increased prices over the two to three years leading up to the reforms. The price increases were quite dramatic. To the extent that people are paying more for their cover, yes, that is absolutely true. People have paid more to access the insurance market, yes. The reforms that governments have put in place, and this Government in particular has put in place, tried to reduce the costs and succeeded in doing that by eliminating, if you like, the most inefficient cost system which was, generally speaking, awards of pain and suffering to people who had minor or insignificant levels of injury. I do not have the number in front of me but the greatest proportion of legal expenses was being incurred in the small claims for people who were not permanently injured.

The Hon. IAN WEST: That is an interpretation which is far from universal in its approach. I do not take a person with no hands as someone with a minor injury. The definitions of "minor" and "serious" in this whole sorry affair need a much closer look. I do not think it is a simple issue you are putting.

The Hon. RICK COLLESS: Following on from the Hon. Ian West's comment, does the council support the American Medical Association guidelines that are currently being used in determining these sorts of injuries?

Mr MASON: Our view has been that having the degrees of injury impairment and medical issues determined by medical professionals is far superior to having them determined by the legal profession. That is, I suppose, our view, yes.

The Hon. IAN WEST: I think it is far superior that it be adjudicated by an independent judicial system, not necessarily the advocates but by an independent judicial system. It is a bit different. My understanding from APRA statistics is that not only are there premium revenues in the whole of the private industry market of $26 billion, there are assets increasing yearly that now stand that is $81 billion. They have increased exponentially over the last half decade when this crisis was occurring. In the 7 to 10 per cent of the insurance market while this crisis was occurring in that area the profitability and assets of the insurance industry were rising every year over the last half decade to now stand at $81 billion. Are those APRA statistics right or wrong?

Mr MASON: I am certain you are reading from an APRA source. The industry assets are of that order. The industry liabilities you have not quoted. I need to have the figures in front of me.

The Hon. IAN WEST: I am talking about the assets. The assets have increased every year.

Mr MASON: Yes.

The Hon. IAN WEST: They now stand at $81 billion.

Mr MASON: And the liabilities have also increased.

The Hon. IAN WEST: The projected estimates are available into the year 2050 but the actual annual liabilities are less than the $26 billion that are collected. The assets continue to increase. So I am having difficulty comprehending the crisis.

Mr MASON: I think we are mixing and matching discussions here. I take your number as being correct. The industry has probably got $80 billion worth of assets. Most of those assets are held against liabilities and most of those liabilities are companies' future obligations to pay claims or premiums that have not yet been used up.

The Hon. IAN WEST: I am not talking about investment returns or prudential holdings against projected estimated claims. I am talking about assets that have increased yearly to now $81 billion. The crisis that occurred from 1998 to 2002, that four-year period, has not been reflected in the continuing increase in the assets of the industry.

Mr HANSELL: I think Alan mentioned previously that the way insurance works is that each line of business has to be profitable in its own right. There is no cross-subsidisation.

The Hon. IAN WEST: Insurance by its very nature is cross-subsidisation. It is a collectivist approach.

Mr HANSELL: Insurers get support from reinsurers. Our public liability market in Australia is probably less than 1 per cent of the total world market. The question is if a reinsurer has a choice of sending a dollar to Australia or a dollar elsewhere, and they know if they send it to Australia they will lose that dollar and more, where are they going to send the money? They are not going to send it to Australia.

The Hon. IAN WEST: I am merely talking about the factual results.

CHAIR: The net asset worth has continued to increase.

The Hon. IAN WEST: Every year for the last three to five years.

Mr MASON: The Committee seems to be interested broadly in the performance of the industry. Can I take it on notice and go back and get APRA's latest results and provide you with a note about that? The assets Mr West is talking about are the total assets, not the net assets or shareholders funds in the industry. The total assets are there partially to match the future liabilities.

CHAIR: Mr Mason, if you would take that on notice and forward it to us. Thank you, Mr Mason and Mr Hansell, for attending.

(The witnesses withdrew)

MARK ROLAND COSS, National Liability Manager, Suncorp Metway Insurance Limited, Level 10, 117 Clarence Street, Sydney, and

JOHN PHILLIP ROGERS, General Manager, Commercial Insurance, Suncorp Group, Level 10, 117 Clarence Street, Sydney, affirmed and examined:

CHAIR: Mr Coss, in what capacity are you appearing before the Committee: as a private citizen or representing your company?

Mr COSS: As a representative of Suncorp Metway in relation to the submission.

CHAIR: Mr Rogers, in what capacity are you appearing before the Committee?

Mr ROGERS: As General Manager of Commercial Insurance for the Suncorp Group.

CHAIR: Mr Rogers or Mr Coss, do you wish to make an opening statement?

Mr ROGERS: Very briefly, we just wanted to update the Committee on a development since we made our submission. Some three weeks ago—Mr Coss may be able to tell the actual date—we reduced across the board our liability premiums for not-for-profit organisations by 10 per cent. That was made known to the standing committee in Darwin, I think it was, at the time. No, it was the meeting of the Ministers in Darwin.

CHAIR: We read about that in the press.

Mr ROGERS: I think it was fairly widely reported. That is a small update on the submission. Other than that, we are here to answer any questions the Committee may have regarding the submission.

The Hon. ROBYN PARKER: I am interested in your insurance cover to not-for-profit organisations. We have had quite a bit of evidence from groups, as you would probably be aware. Have you read any of the submissions that have been made to the inquiry?

Mr ROGERS: I have not had the opportunity.

Mr COSS: No, I have not either.

The Hon. ROBYN PARKER: Your submission, if memory serves me correctly, mentions that you cover volunteer organisations. Is that correct?

Mr COSS: We cover not-for-profit organisations in 46 different ANZIC classifications within the not-for-profit organisations and community groups for which we provide public liability insurance. They are, of course, as you would appreciate, fairly heavily dependent upon volunteer workers to ensure the activities of those organisations are carried out and performed.

The Hon. ROBYN PARKER: The Committee has also heard that volunteers do not need that sort of cover. Would that be correct?

Mr COSS: Probably that is not a true statement. When we are dealing with volunteers we have to look at two aspects: The first is with a public and products liability insurance. That particular policy responds to provide an indemnity in respect of a legal liability. As you could well appreciate, accidents do happen and there is not necessarily a legal liability or anyone to blame, other than the persons themselves. Accidents will happen. For those situations there is another insurance policy that is available and it can be purchased by the community groups. It is called personal accident insurance. That pays for accidents that to occur without negligence on the part of other persons.

The Hon. ROBYN PARKER: Will you be explaining those circumstances to not-for-profit organisations?

Mr COSS: We had a conference in Brisbane about one month ago and this question came up in the public forum and opening address. We certainly addressed this inquiry in a lot of detail. As to the distribution method of our not-for-profit public and products liability insurance, the majority of the product is sold by insurance brokers and it is certainly the advice of the insurance brokers they give not-for-profit organisations as to the appropriateness of coverage they arrange on behalf of those organisations.

The Hon. ROBYN PARKER: Are you covering any part of the insurance market now that you were not covering before?

Mr COSS: Prior to tort reforms we were not a market for not-for-profit and community organisations. With the advent of tort reforms, as I mentioned to you before, we now cover 46 different ANZIC classifications, which encompass not-for-profit organisations and community groups.

CHAIR: I am interested in the date of view entering into that market. You mentioned it was the tort reforms process. I wonder whether it might have been taking up the vacuum created by the collapse of HIH Insurance?

Mr COSS: I do not know that generally that was the reason for stepping in to take up a market that HIH withdrew from, but to my knowledge—and I do not have an extensive knowledge of what was in the HIH portfolio, because, frankly, I have not seen it—HIH's main focus in the public and professional indemnity markets was at the high-end of the market, or the corporate accounts, rather than the small-medium enterprise businesses and not-for-profit areas. It is unlikely they had a very large book involving community groups and not-for-profit organisations. Again, I have not seen that factually, but it is certainly my understanding from my experience in the marketplace.

Mr ROGERS: I can probably add to that, since I was there when we did enter the not-for-profit market. It primarily arose out of the Queensland Government approaching me in the end because of Suncorp being the largest insurer in Queensland. They had been in discussions with another insurer it to provide them with a scheme for not-for-profit organisations, but unfortunately they fell through. They then came to Suncorp and said, "Is there anything you can do?" After some months of discussions we came up with a scheme for the Queensland Government for not-for-profit organisations. Through discussions with other governments we expanded, not the scheme but the availability of cover for not for profit organisations throughout Australia over the course of the next six months.

CHAIR: This was over a period of a few years of your fairly rapid expansion from a State government insurance office to a national player.

Mr ROGERS: Suncorp, of course, is a creature of three previous insurers. It is part of the old GIO—

CHAIR: Yes, SGIO.

Mr ROGERS: Well, it is part of GIO in New South Wales, the old is GIO in Queensland and AMP General Insurance, which was a mutual insurer in New South Wales primarily as well.

CHAIR: That is what I mean by your rapid expansion, growth and moving into a national market, not just in Queensland.

Mr ROGERS: The national market occurred because of the mergers of those companies, yes.

The Hon. ROBYN PARKER: You mentioned the reduction in insurance premiums for not-for-profit groups. Apart from CTP Insurance, have any of your other premiums on down?

Mr COSS: In real terms, liability premiums have been reducing. At the last rate review there was no increases that were passed on to consumers. Effectively, that really means that the real

premiums are reducing to the extent that by are at affected by inflation, AWE&C-composed inflation, which varies from State to State between 7 per cent and 9 per cent per annum.

The Hon. ROBYN PARKER: You would say that it has gone down by about 7 per cent?

Mr COSS: Yes. It depends on which State as to the extent to which it has reduced. That is just in a general broad-brush area. There are some parts of our portfolio which we have segmented, which may have had some benefits such as not-for-profit organisations.

The Hon. ROBYN PARKER: That does not correlate, though, with the profits you are making. I think that other until December 2004, if I am correct, your insurance profits rose by 58.6 per cent?

Mr ROGERS: The insurance profits are made up of a number of factors. Certainly, only a very small part of that would be public liability. For public liability, you are not just looking at the year in question; you are looking at your whole book of public liability, and your reserves and releases, or strengthening of reserves. Then of course the profit is also impacted on by the investment markets. So they have been increasing as well, so the profit has been increasing. The real reality is: Are we achieving an adequate profit to want to stay in the market? I am sure no-one begrudges a commercial insurance company making a profit; it has to do that to satisfy its shareholders' requirements.

The Hon. ROBYN PARKER: There is a huge disparity, though, between the profit you are making and what you are passing on to consumers.

Mr ROGERS: What disparity?

The Hon. ROBYN PARKER: You are passing on something like a reduction in premiums of how much per cent in real terms?

Mr COSS: From 7 per cent to 9 per cent.

The Hon. ROBYN PARKER: As opposed to 58 per cent in profits.

Mr ROGERS: As I said, the increase in profit is made up of a number of factors. It has not just to do with public liability; it has to do with many factors. You cannot look at the profit that comes from all of our insurance lines and reflect that back against just the decrease in public liability costs. The two are mutually exclusive. You would want to look at every insurance line we do, including CTP where we have been reducing prices because a lot of our profit for instance comes from CTP, where there have been major decreases in prices in both Queensland and New South Wales.

The Hon. ROBYN PARKER: What is the profit from premiums other than CTP?

Mr ROGERS: I would have two go back and break it down. It is a matter of public record.

The Hon. ROBYN PARKER: Surely you would have to do that for your shareholders anyway?

Mr ROGERS: We do. We report on it in our annual reports. It is broken down in those, but I do not have that information that my fingertips. I only know what my profits are for commercial lines.

The Hon. ROBYN PARKER: You are passing on the profits from the CTP by reduced premiums. You are passing on the profits from public liability by reduced premiums.

Mr ROGERS: No, we do not go from profits backwards in looking at pricing. When we are pricing, that is made up of a number of factors. Primarily it is driven by the cost of claims and claims are the benefits we pay all the claim payments we pay, plus any legal costs or other associated costs. Then we have our administrative costs, that is, the running of the company. Then we add on our profit margins that our shareholders expect us to gain. Offsetting that to some degree is our investment

return. That is how we price, according to those factors. It is not according to the fact that we made this much profit in this year and therefore our prices next year will be X.

The Hon. RICK COLLESS: Could I go back to the comments you made about personal liability insurance under the banner of the not-for-profit groups that you have been talking about. You might have been in the room when I mentioned the issue of the Eugowra Branch of the Country Women's Association [CWA], which has eight members and is paying a public liability insurance premium of the order of $516 a year. When the members of the Eugowra Branch of the CWA be covered by their own personal liability insurance, if they happen to fall over and breaking an ankle while attending a meeting? What proportion of the community at large actually has personal liability insurance?

Mr ROGERS: There are a number of questions in that. I will let Mr Coss answer the questions on the legal aspects.

Mr COSS: Unfortunately, I was not in the room when you outlined the particular case that you have cited. I do not know of the background material but I am happy for you to tell me.

CHAIR: It is simple—eight members, elderly ladies, and a premium of $515.

The Hon. RICK COLLESS: Perhaps not elderly. Ms Cleary did not say that. The Eugowra Branch of the CWA pays $516 per year for public liability insurance. They have eight members and meet probably once a month of the most. It just seems extraordinary to many that the premium is so high. The other side of the question is: What proportion of the community at large has personal injury insurance? If one of the members happened to break her leg at a CWA meeting would she be covered by that personal injury insurance?

Mr COSS: I think there are a number of questions in that. The first, I believe, was how many people have personal liability insurance. To the extent that persons are covered under the domestic liability householder insurance, which normally comes when you take out contents of householder's policies, they would have personal liability insurance. But that is a domestic personal insurance line, as opposed to a commercial public liability line. To that extent, because I am not in personal lines, I am unable to specifically give you a number.

I believe the second question was: Would someone who suffered a broken leg be compensated by a public liability policy? It would really come down to the facts of the particular case, as to whether there was a legal liability on behalf of the not-for-profit organisation. If a legal liability attached to the not for-profit organisation through whatever circumstances, to the extent that the public liability policy would respond, clearly if there was no negligence on behalf of the not-for-profit organisation, or negligence of a fellow member, then I would suspect that the policy would not respond.

Mr ROGERS: May I clarify that. Personal accident and illness policies are policies brought by individuals if they suffer an accident or illness without any liability attaching. Is that the sort of policy you are referring to?

The Hon. RICK COLLESS: Yes. I have a similar policy for personal accident and injury. I am wondering what proportion of the population at large hold those sorts of policies.

Mr ROGERS: We do not sell that type of policy; we are looking to do it now. We do sell some in the wealth management side of the bank. But we could take the question on notice and find those figures for you. In fact, the Insurance Council of Australia is probably the best body to give that information.

Ms LEE RHIANNON: Of the not-for-profit organisations that take out insurance with you, have any of them made any claims in the last five years?

Mr COSS: We only started writing not-for-profit organisations which were a dedicated ANZSIC classification, as we mentioned with the advent of tort reform. Prior to that time, basically what was occurring in the general insurance industry, which I think has been publicised, a well-known

fact, is that not-for-profit organisations were included in the general data for the entire industry and it was not possible to adequately segregate the data for not-for-profit organisations. Your question is, have we had claims. The answer it is, yes we have.

Ms LEE RHIANNON: How many have you had and approximately how large have some of the bigger claims been?

Mr COSS: If we look at some of the claims pre tort reform, we have had claims stretching from $340,000 to $1.4 million, as a single claim. The claims in more recent years, obviously we do not know what they will be, allowing for the development of these claims when they do come to us, so we are basically seeing typical, everyday, frequency-type claims, which are the smaller claims. But they are averaging somewhere around the $30,000 mark.

Ms LEE RHIANNON: Since the tort changes came into effect, can you quantify how many not-for-profit organisations have put in claims and how much they have ended up receiving?

Mr COSS: Yes, we can.

Ms LEE RHIANNON: Would you take that on notice?

Mr COSS: Yes.

Mr ROGERS: May I point out that we have received some claims now, and they will have an estimate attached to them, but that is not a liability that we will ultimately have. What you have to look at is what is the total number of claims we estimate we will have over the next 10, 15 or 20 years, and then attach an estimated amount of claims development to those. Looking at what claims we have had from policies that we wrote in the last two years already will give you a very limited view of how many claims we will ultimately have and what those claims will ultimately cost us. We do actuarial projections as to how many claims we will ultimately have and what they will ultimately cost us, and that is what drives the pricing of the policies.

Ms LEE RHIANNON: I appreciate that. But the fact that this document reported that there have been very few claims from the community sector prompts someone like me to ask why the costs are going up so considerably when there have been so few claims.

Mr ROGERS: As I said earlier, the costs are actually going down in that sector as far as Suncorp is concerned. Generally in public liability you get very few claims. The personal injury liability—what we call the claims frequency, or the percentage of claims we get—is just over 2 per cent. One in 250 policies give rise to a claim in any given period. So the claims are very infrequent. It is not like motor vehicle insurance, where 12 out of every 100 policies give rise to a claim in a yearly period. However, the claim size generally for public liability is significant, at somewhere between $50,000 and $70,000, as against a motor vehicle claim, which might be $4,000.

Public liability is not really about the frequency of claims. It is about frequency and severity. The fact is, they are usually of great severity but not as frequent. What causes great uncertainty when you are pricing public liability is when you start to get frequency of claims. Prior to tort reform, that is what we were seeing: the claims frequency was much higher.

Ms LEE RHIANNON: As you would obviously be aware, being at the coalface with this, we now have a legally complex system, with a whole range of legislation that offers different systems depending on how people are injured. For example, workers injured by an employer receive 15 per cent whole person impairment under the WorkCover guidelines. There are a number of different regimes, for example, for people who are injured in a motor accident, people who are injured by someone other than their employer, and so on. As key personnel of Suncorp, do you believe that having a complexity of legislation works for you in terms of maximising the returns for your shareholders?

Mr ROGERS: Any complexity of legislation makes it more difficult to deal with claims. Of course, we deal with the different types of claims in a different manner. For example, workers compensation claims are dealt with in accordance with the workers compensation legislation and

regulations, as is CTP, whereas with public liability there is no regulation regarding claims handling as there is regarding the type of claims. In fact, there is more complexity than you have pointed out, because we deal with different Acts in different States of Australia and we are a national insurer, so that does cause us difficulty. We have to have different systems for different types of claims in different States. Any complexities such as that will add to the cost of handling claims.

Ms LEE RHIANNON: Considering the difficulties with which you are faced, would you support a single, straightforward, common threshold, perhaps set at the Civil Liability Act level of 15 per cent?

Mr ROGERS: I cannot really answer that, because we are dealing with different legal structures under workers compensation and CTP, which are government-regulated schemes collected on a different basis, handled with reference to rehabilitation and those sorts of things, as against public liability, which does not have rehabilitation considerations around it. There are some considerations regarding how claims are lodged. They are very different beasts. It is not as easy as saying let us put in a common threshold; you have to look at the totality of the system. More so, you have to look at the totality of whether things should be different State to State, because that is almost as complex as looking at the different motor vehicles, versus workers compensation, versus public liability.

Ms LEE RHIANNON: Does that not contradict your previous answer, in which you said that there are complexities there and the variations make your job more difficult?

Mr ROGERS: I said it adds to the cost of handling claims. Any complexities like that will add to the cost of handling claims. It is just that we run different claims systems.

The Hon. KAYEE GRIFFIN: I think you said earlier that you had 40-odd categories in terms of public liability insurance for not-for-profit organisations and so on. How do you define the differences in those categories?

Mr COSS: We work from the Australian and New Zealand industry classification, which are known as the ANZSIC codes. We have 46 different ANZSIC codes to which we now correlate not-for-profit organisations within those classifications.

The Hon. KAYEE GRIFFIN: Presumably, that includes community-based organisations where there is a mix of volunteers and paid staff. I am thinking of organisations such as community-based child care centres, or perhaps organisations such as Meals On Wheels that are not attached to a local government institution but are strictly set up within the community, they are not for profit but they are providing the service by paid employees as well as volunteers. Would such organisations be included?

Mr COSS: One of the difficulties with underwriting and insuring not-for-profit organisations, as you correctly pointed out, is that whilst we have a classification which is determined by ANZSIC, within a classification an organisation may have very diverse activities. As you have rightly pointed out, they could have several different activities which may be other than what the classification suggests they do, and it certainly can include respite care and looking after children, which can include entertainment venues. It can include a number of different activities for both the elderly and youth, and that is all within one risk. So when we come to classify, we try to use the most appropriate classification to cover all those diverse ranges within the particular ANZSIC code for data collection purposes.

The Hon. IAN WEST: I am trying to come to grips with the terminologies used in premium levels and cost effectiveness on pages 10 and 11 of your report. You indicate that there have been some positive impacts as a result of tort reform in the claim portfolio mix and the insurers loss ratios. You mention the concepts of small and low value claims and what you describe as serious claims. Can you give us an indication as to the physical disability of someone you describe as being on the cusp of a small value claim and a serious claim?

Mr ROGERS: When we are using those terms, we are talking in dollar terms rather than the type of injury. For the purposes of pricing, which those points address, we do not analyse the type of

injury; we look at small claims being of a certain dollar value and seriousness, and larger claims, where we assume the person is more seriously injured, being of a larger dollar value.

The Hon. IAN WEST: Can you give us the dollar values?

Mr COSS: Yes, certainly. Small low-value claims are those below $20,000 in value, and the serious claims are those above $0.5 million in value.

The Hon. IAN WEST: Then there is a grey area between $20,000 and $0.5 million. What do you call them?

Mr COSS: We normally call them normal working losses. They are fairly typical; they happen regularly. Our average low-value injury claims cost us around $100,000 to $160,000.

The Hon. IAN WEST: So there are three levels?

Mr COSS: No, there are probably four. In addition to working frequency losses, we also have what we call catastrophic injuries, which is obviously more than serious.

The Hon. IAN WEST: Could you take the question on notice and provide us with more detailed information on how you categorise the claims? That is fairly important to us in understanding the terminology. I am thinking of these claims in terms of injuries such as the loss of an arm or a leg.

CHAIR: We have heard evidence from people who have been substantially impaired and then substantially disabled because of catastrophic events to them.

The Hon. IAN WEST: You have indicated that the price of CTP insurance has been coming down. I confess that I am obviously not a very good shopper in the marketplace, because my CTP insurance goes up $100 every year and what I am covered for goes down by $1,000.

Mr ROGERS: There is a very good web site run by the Motor Accidents Authority, I think, which gives a full range of CTP insurance prices.

CHAIR: It gives seven companies and you can choose.

The Hon. IAN WEST: I have been through them in some detail and I am yet to find a lower price.

The Hon. ROBYN PARKER: Your general insurance products and premium revenue is made up from CTP workers compensation public liability as part of high-end commercial products, is that correct?

Mr ROGERS: Yes, motor insurance for consumers, home insurance for consumers, commercial insurance, which includes public liability, for mainly small businesses, and workers compensation and CTP.

The Hon. ROBYN PARKER: Your general insurance profit in December 2001 was recorded at $47 million; a year later it was $81 million; then $224 million in December 2003; and in December 2004 it was recorded as $353 million. Looking at that profit, do you still claim that you have passed on benefits of the tort reform to the community and to the consumers?

Mr ROGERS: As I said earlier, looking at the profit will give you no idea as to what is happening with tort reform for the purposes of pricing. Pricing is done on a different basis altogether. Pricing is done set against a required profit level to give shareholders returns. The ultimate profit it gets in an insurance company will come out of many factors totally unrelated to that. It will come out of investment markets, releases or strengthenings for prior year reserves, which is an actuarial calculation; it will come out of a beneficial claims environment for property claims, as we have had for the last three years in Australia; and we have not had the level of storms or rain we usually have, and that means that in motor vehicle insurance and some commercial insurance we have been unusually profitable. But they have got nothing to do with tort reform.

The Hon. ROBYN PARKER: Why do you say then in your company's 2004 results presentation that tort reform has worked and the benefits are clearly going to both insurers and consumers?

Mr ROGERS: Because in our pricing of public liability insurance—

The Hon. ROBYN PARKER: But you just said it had nothing to do with tort reform.

Mr ROGERS: I did not say tort reform had nothing to do with our pricing, I said tort reform had nothing to do with those profits you were quoting. Tort reform has a lot to do with our pricing and availability, and it is all about affordability and availability. In looking at what we expect tort reform to deliver in terms of lower cost of claims, we take that into account in our pricing, and that is indeed why we do not have to pass on the cost of superimposed inflation, as Mark spoke about earlier, because we factor in some benefit from tort reform. Again, we have done that in going into classes of insurance, the Anzac codes that Mark talked about, that we did not feel comfortable with before, primarily because they were the more frequent claiming-type of classes, but we have gone back into them because we believe that under tort reform we will not get that frequency of claim that we had before.

Ultimately, we will know the full results in probably five years' time because that is when we will know what the ultimate number of claims, or near the ultimate number of claims and cost of those claims will be. So we do not see clearly now the full benefits of what we hope will be tort reform, but we are trying to take it into account already in making public liability insurance more available and more affordable.

The Hon. ROBYN PARKER: But are not the greatest beneficiaries of tort reform insurance companies?

Mr ROGERS: No. The greatest beneficiaries of tort reform should be those who have public liability insurance made more available to them at more affordable premiums.

CHAIR: Thank you, Mr Rogers. Thank you, Mr Coss. We appreciate your contribution.

(The witnesses withdrew)

DOUGLAS ROY ANTHONY PEARCE, Group Executive, Insurance Strategy, Insurance Australia Group Limited, 388 George Street, Sydney,

JACQUELINE SUZANNE JOHNSON, Head of Risk Management Services, Insurance Australia Group Limited, 65 Pirrama Road, Pyrmont,

THOMAS BRENNAN, Head of Product and Underwriting CGU Insurance, Insurance Australia Group Limited, 485 Latrobe Street, Melbourne, and

PETER SWAN, Head of Compulsory Third Party Insurance, Insurance Australia Group Limited, 65 Pirrama Road, Pyrmont, sworn and examined:

CHAIR: Do any one of you wish to make a statement?

Mr PEARCE: I do. Insurance Australia Group regards this inquiry as a beneficial opportunity for the Parliament and the broader community of New South Wales to be informed of the many issues associated with insurance premiums and availability, particularly in assessing the benefits of recent reforms to personal injury compensation legislation. We welcome the opportunity to elaborate on our written submission today. Insurance Australia Group has been operating in a number of personal injury schemes in New South Wales under the leading brands such as NRMA Insurance and CGU Insurance for some time. Along with a number of other participants, IAG provides workers compensation, compulsory third-party and public liability insurance to the residents in New South Wales.

Recent reforms. There are a multitude of factors that contribute to insurance premium levels and determining the attendant issue of availability. Insurers have a difficult task in pricing products before the cost is known. Factors such as weather patterns, investment returns, changing regulation and shifting community attitudes towards risk can take some time to manifest, yet judgements need to be made before such outcomes are known. The pricing challenge becomes more complex in personal injury insurance due to its long tail nature. Long tail refers to the fact that personal injury insurance claims can be made and paid many years after the premium is paid.

There are, in fact, two aspects to long tail: in many instances it will take some years for a claim to be made and then some years for it to be finally settled. I suppose the most extreme example of that is in infants claims in the compulsory third-party scheme or, for that matter, in any, in that in the extreme it can be the statute of limitations which determines when the claim is made—that is up to six years later. But for an infants claim where there are catastrophic injuries, typically a court will not consider the settling of the claim until the child has at least reached a mature level and then the needs of that child can be properly projected for the rest of their life. That is why it is long tail. So for motor vehicle insurance we think of it in terms of the average duration of a claim—that is, how long it takes to settle—to be three months; for these classes it can be four years and upwards. That is the long tail.

Insurers, in effect, must sell their product some years before they know how much the product will eventually cost. Future and sometimes unknowable costs of personal injury insurance include litigation expenses and indeterminate damages assessment for non-economic loss by the judiciary. In short, a policy written today is not priced on the basis of current cost of claims but on an estimate of future costs.

Public liability. The ACCC currently has a standing brief to report on a six-monthly basis for two-year adjustments to insurance premiums in light of costs savings. The final ACCC report from their initial brief was released in February 2005. The reports found the average public liability premium for the period of 31 December 2003 to 30 June 2004 had "decreased by 15 per cent, reversing the trend of substantial increases experienced since 2000". This report does not consider premium levels for the period after June 2004 since that period the IAG subsidiary, CGU Insurance, has announced it will reduce commercial public liability rates by 10 per cent in New South Wales, Queensland, South Australia, ACT and the Northern Territory. This followed a similar decision in July 2004 in the other States, Victoria, Tasmania and Western Australia. These decisions were taken in anticipation of the benefits of recent tort law reform.

Compulsory third party. Likewise, the compulsory third-party insurance scheme has seen some positive changes over recent years. A fair assessment of the current CTP scheme is better informed by having regard to the scheme's history and its subsequent developments. Attached to our written submission is a graph of the affordability index that measures the CTP premiums charged by NRMA Insurance against average weekly earnings from 1992 to 1999. The New South Wales CTP scheme has been subject to a number of reforms since 1992. The graph shows that there was a sharp increase in premiums in 1995. The major driver behind this increase was a substantial rise in the number and quantum of awards for non-economic loss for compensation for minor injuries.

Over time the initial threshold introduced to prevent small claims from receiving compensation for non-economic loss had been eroded by changes in the legislation and judicial decisions that allowed minor claims to receive significant non-economic loss damages by effectively reducing this threshold. Action was taken to address this issue in 1995 and amendments were made to the legislation that introduced a tougher verbal threshold and a sliding scale for damages linked to an assessment of severity of loss as a percentage of the most extreme case. These measures resulted in a decrease in the number of small claims receiving non-economic loss compensation, resulting in CTP premiums reducing slightly and stabilising.

Despite these signs of stabilisation, the Government considered that premiums were too high and that a longer-lasting solution was needed to provide a stable lower cost scheme. In 1999, following a review headed by Ms Shelley Miller, and made up of all stakeholders in the scheme, the scheme was further amended; in this instance, by the Motor Accident Compensation Act 1999. The task of this review was to recommend changes to the scheme design that would deliver a $100 reduction in an average CTP premium, which in June 1990 was approximately $430, and go back to the aim of the scheme of delivering the bulk of the compensation to those seriously injured.

Critically, the legislation introduced a threshold for non-economic loss, which was to be assessed according to an objective measurement of whole person impairment according to the guides, based on the American Medical Association guides of permanent impairment, the AMA guides. These kinds of objective assessments help to ensure damages are the purview of appropriately qualified independent medical assessors and are applied fairly across like levels of injury. Other changes introduced by the 1999 Act included a focus on early notification and early treatment and establishing dispute resolution facilities designed to reduce litigation in the courts.

The combination of these features has allowed reduced claims costs and scheme stability, which has been reflected in a further downward trend in premiums. Without the 1999 amendments it is highly unlikely that affordability would have improved as markedly from the 51.5 per cent of AWE in September 1999 to the 34.4 per cent of AWE enjoyed by the community as at December 2004. Whilst it is not necessarily possible to attribute all of the improvement in affordability since 1999 to the 1999 amendments, we believe it is the most significant factor. As Committee members would be aware, the New South Wales Government licensed IAG, trading as CGU Insurance, to issue workers compensation policies and manage claims on behalf of WorkCover. However, CGU does not set premiums, nor does it own the liabilities of its clients under the scheme. CGU, therefore, has not made any professional assessment of the impact of premiums, nor the likely impact of the WorkCover scheme had the 2001 changes not been made.

However, from a general insurance perspective, CGU believes that the amendments made in 2001 which, to a large extent, mirror some of the amendments made to the CTP scheme, have been very beneficial to the scheme. In particular, CGU believes that the introduction of an objective threshold based on an assessment of whole person impairment according to the AMA guides is more effective than a table of maims or a percentage of the most extreme cost in assessing permanent impairment and determining the appropriate compensation for it.

Furthermore, the amendments to the dispute resolution procedures have resulted in a less adversarial scheme that has reduced associated legal costs and the proportion of scheme funds going to legal service providers without any reduction in the benefits payable to workers. While CGU is not able to comment directly upon the level that workers compensation premiums would have been without both the amending 2001 legislation and the continuing efforts of all parties to keep claim costs under control, it is certain that this costs and therefore premiums would have been significantly higher

in the absence of legislative reforms. Ultimately, CGU believes that the current regime strikes a fair and appropriate balance between the rights of injured workers and the needs of industry.

CHAIR: Thank you.

Mr PEARCE: I do have a conclusion.

CHAIR: We have read the conclusion and we appreciate your thoughtfulness on that matter. We will now have questions.

Mr PEARCE: If you could direct the questions to me and then I will pass them to each of the experts, as appropriate.

CHAIR: We will see how we go.

Ms LEE RHIANNON: You spoke about your work with workers compensation. How many case managers do you have to manage workers who are on compensation?

Mr PEARCE: I will ask Jackie Johnson to answer that.

Ms JOHNSON: I will get back to the Committee on exact number but we have people who are actually injury management professionals as well as case managers who would be handling the claim itself but with an organisation that size you would have around 300 people.

Ms LEE RHIANNON: We have had two previous hearings where this matter has come up and a number of people who were receiving compensation raised concerns about how they are handled by their case managers; how they often change and they do not get back to them. To what degree do you monitor the work of your case managers and what training do you give them?

Ms JOHNSON: One of the things that we acknowledge within the industry is the high turnover, particularly in the workers compensation class of business and so we have a particular recruitment strategy of being able to look at what the job really is—and it is not as simple as processing a claim that you might in a short-tail business—and actually having a look at assessing the right person to come in, in the first place, and then making sure that they do have the right training. There is no denying that the turnover is still high, so part of it is about making sure that we become an industry of choice. What that means in terms of ongoing development—and you can imagine that for a junior claims person this area can be a particularly stressful place to work when you are dealing with very serious injuries.

One of the things we do is that we have performance management to review how well people are managing and, in fact, in New South Wales relicensing, we just put in that that we would like to be measured on injured worker satisfaction as well as employer satisfaction because we believe that will drive the right behaviour within our staff.

Ms LEE RHIANNON: So when there is a change from one case manager to another do you ensure that the new case manager is really up to speed on where that case is at so that the injured person does not have to go through the history?

Ms JOHNSON: That is a difficult one, but in terms of the handover, you can do as much handover at the time of the handover of the person leaving, but if an issue comes up, unfortunately sometimes you do need to hear it from the injured person again, which would be very frustrating for injured employees.

Ms LEE RHIANNON: Another frustration was how people were paid. They gave examples of insurance companies refusing to make regular electronic payments. Are you willing to give electronic payments to injured people that you are making payments to?

Ms JOHNSON: I would have to check that. I do not think we are paying electronically consistently.

Ms LEE RHIANNON: Why would that be?

Ms JOHNSON: Mainly on systems integration. We have just moved from four systems down to one so we would be moving to be able to be consistent with EFT transfers.

Ms LEE RHIANNON: So you are planning to do that?

Ms JOHNSON: Yes.

The Hon. ROBYN PARKER: Your company is a member of the Insurance Council of Australia, is it not?

Mr PEARCE: Yes.

The Hon. ROBYN PARKER: Are you familiar with the submission of the Insurance Council of Australia?

Mr PEARCE: Yes.

The Hon. ROBYN PARKER: They claim that insurers in Australia collect $25.9 billion in premiums per annum and pay claims at the rate of $55 million per working day, which would be claims on an annual basis of about $13.75 billion. That would leave a gross profit of $12.15 billion, is that correct?

Mr PEARCE: That does not sound right to me.

The Hon. ROBYN PARKER: So that is not correct?

Mr PEARCE: At an aggregate level, I think the loss ratio for the industry, which is the loss of claims as measured as a percentage of premium, is in the order of 70 or 75 per cent.

Mr BRENNAN: Yes.

Mr PEARCE: But that is off the top. That is before all the administrative expenses, commission to brokers and the like but, no, that sort of number does not make sense to me. We could check it for you and from the APLA statistics, I think it is stated on one of the pages the numbers that they produce.

The Hon. ROBYN PARKER: One of the benefits sold to the public in terms of tort reform was that premiums would go down and that insurance company profits would be passed on to consumers. What you think should happen with those profits, if they are at that level?

Mr PEARCE: Well, they are not at that level.

The Hon. ROBYN PARKER: Do you think that tort reform has passed on the benefits to consumers or to the insurance companies?

Mr PEARCE: According to the ACCC in the period from 31 December 2003 to 30 June 2004 overall a decrease of about 15 per cent. Subsequent to that we have announced 10 per cent increases further. Prima facie they are significant benefits to the community. I know of very few other products or services available to the community that have had price reductions of the order of 10 or 15 per cent or, for that matter, dare I say any of the services provided by any level of government.

The Hon. ROBYN PARKER: Your half yearly profits show a profit of about 18.1 per cent. Your presentation said at that time that the strong insurance margin was dominated by the performance of the motoring classes, property and liability. Motoring liability is CTP, is that right?

Mr PEARCE: Yes.

The Hon. ROBYN PARKER: How can you explain a profit of 18.1 per cent when the New South Wales Motor Accidents Authority figures for 30 June 2004 estimate profit margins of around 8.7 per cent for its CTP insurers in New South Wales?

Mr PEARCE: The MAA figures, as I understand, estimate 8.7 prospectively on premium filings as a percentage of premium. The 18.1 per cent that you are referring to is a return on capital.

The Hon. ROBYN PARKER: So it is not the case then that the 18.1 per cent is profit margin from your CTP insurance?

Mr BRENNAN: No, those numbers are not under compulsory third party insurance. That is, I think, the insurance margin for the Insurance Australia Group across all its lines of business. It sounds about the right number to me, if you are taking it from the half-year results. CTP would be automatically 10 per cent of that total number, if that. The MAA has published recent statistics on the profitability of CTP insurance since 1999. We obviously contributed to that.

Mr PEARCE: And our profits are in line with this scheme.

Mr BRENNAN: Yes, our levels of profitability over that time, bearing in mind that even making the statement, that level of profitability is based on a whole bunch of assessments or guesses or estimates, whatever you like to call it, so it is our best estimate of what is played out over time. But our performance has been consistent with what the Motor Accidents Authority published and if you look at that, amongst other things, you would see declining profitability since 1999, each year becoming less and less. We do not claim to be dissatisfied with the return on capital we are giving our shareholders because it is a very capital-intensive business.

The Hon. ROBYN PARKER: Would you say that the improved position for insurance companies is due to tort reform?

Mr PEARCE: Which tort reform? Are you referring to the Civil Liability Act, CTP?

The Hon. ROBYN PARKER: All of the above. That is what this Committee is inquiring into.

Mr PEARCE: Yes, I would have to agree, that we are a supporter of tort reform but it is not as simple and it is not right to say that is because tort reform delivers greater profitability. What tort reform does is to deliver greater stability and, most importantly for insurers, predictability. When the schemes and the judicial systems are in balance and we can have a reasonably good go at estimating how many claims there will be and how many claims will arise out of the total number of motor accidents that happen, and then how much those claims will cost, then we can price our premiums such that we can estimate the true cost into the future. So the great advantage of the reforms that have taken place are to bring back that stability. I will emphasise that the absolute key in this is the independent assessment of impairment by properly qualified doctors. I know the plaintiff lawyers scream about this. They say, "No, give it back to the judges." In the conclusion that I did not read I said that is an absurdity.

Ms LEE RHIANNON: How can you say that they are independent when the majority of those doctors are doctors that the insurance companies—

CHAIR: Are paid for by the company.

Ms LEE RHIANNON: They are doctors who have been on your insurance company's list for years.

Mr PEARCE: We pay the plaintiff lawyers as well. What does independence mean in this? These are doctors who have been assembled on a list that have been submitted to the insurers for their agreement but, importantly, they have been submitted to the plaintiff lawyers to say whether or not they agree with these doctors. They are independent in that the doctors, as I understand it, are there primarily to be concerned about their patients. They are not our servants; they are the servants of their patients.

Ms LEE RHIANNON: I think it is widely accepted that there are doctors on different sides like there are lawyers on different sides, with all due respect.

Mr PEARCE: No, I am sorry, with all due respect you are talking about medico-legal professionals. We are talking about treating doctors. They are not in our pay as such. We pay them when we pay for the proper medical expenses incurred by the claimants and we pay on their behalf. That is the relationship. It is not one of those doctors working for us. The claimants choose their doctors. They are treating doctors and it is these people who become the assessors. They lawyers hate that because it is no longer judges who are determining what are medical outcomes. As I say in this, it is an absurdity to have judges determining how people are impaired. It is doctors' business. It would be just as silly to have doctors making judicial decisions.

The Hon. ROBYN PARKER: Is it not the case, though, that the AMA guidelines—the American Medical guidelines—are what those doctors are bound by, and that they are inappropriate?

Mr PEARCE: Well, they are not inappropriate. They were chosen as the best guides available in the world to make assessments of permanent impairment. I will agree that no such guides are absolutely perfect and you would be able to find a small number of exceptions. But the reason why the 10 per cent was chosen, that the intent of the scheme was to deliver the bulk of the money—that is, 90 per cent—to those who are most seriously injured. When a whole bunch of claims—I was part of the Shelley Miller process and this is what went through; we had an expert, Dr Dwight Downer, do this. We took a sample of about 500 or 600 different types of claims, put them through that, and it was the 10 per cent level that got only about 10 per cent of claimants over and these were the seriously injured and permanently seriously injured.

The Hon. IAN WEST: So you say 10 per cent is a fair level.

Mr PEARCE: That is right.

The Hon. IAN WEST: What do you say about the 15 per cent in workers compensation?

Mr PEARCE: It is a different scheme.

The Hon. IAN WEST: It is a different scheme.

Mr PEARCE: That is the Government scheme.

The Hon. IAN WEST: That is fair too, is it?

Mr PEARCE: We do not underwrite that.

Ms LEE RHIANNON: Why do some injured people deserve to be paid more than other injured people? The injured person is not really concerned about whether they have been hurt at work or walking down the street.

Mr PEARCE: First, there is a bit of confusion. All claimants, as I understand it, both in workers compensation and CTP, receive full and fair compensation for all medical expenses, all care, whether that be short-term or long-term care—and I will say that it is long-term care that is the most significant cost in the CTP schemes—economic loss, both past and future, and all out-of-pocket expenses. What we are talking about is pain and suffering—the pain and suffering or non-economic loss award. That is the thing that the threshold applies to. It does not apply to anything else, and it is very important. The lawyers would have us believe that these people do not receive compensation. That is not true.

The Hon. IAN WEST: But you are fundamentally wrong.

Mr PEARCE: I am sorry. I believe under oath that I am fundamentally right.

The Hon. IAN WEST: In workers compensation there is no such thing as non-economic loss.

Mr PEARCE: Wage replacement.

The Hon. IAN WEST: It is not pain and suffering, non-economic loss, is it? It is economic loss. You are not entitled to non-economic loss if you get over the 15 per cent threshold.

Mr PEARCE: Are they not entitled to common law damages?

The Hon. IAN WEST: Specifically, non-economic loss is excluded.

Mr PEARCE: I think if they get into a common law regime and are able to—

The Hon. IAN WEST: If you get over the 15 per cent whole-of-body threshold, if you are lucky enough to do that, you get economic loss, past and future. You do not get non-economic loss, but that is a minor issue in the scheme of things that we are addressing here. On the second to last page of your submission you indicate that the AMA guidelines are more effective than the table of maims as a percentage—in workers compensation you are talking about here, I do not know whether it is the most extreme case, it is a whole-of-body impairment. Do you have some actual examples of what you describe as a fair and appropriate balance between the rights of the injured worker and the needs of the industry?

Mr PEARCE: We are referring to how much is spent on claims as to how much is paid in premium. That is the ultimate balance in all of these schemes.

The Hon. IAN WEST: I suggest to you that there would be a number of people outside the insurance industry who obviously, without making any moral judgement, have a vested interest in maximising return on your capital and minimising payouts and compensation. I suggest to you that perhaps your definition of a "fair and appropriate balance" may not necessarily be that of others in the equation.

Ms JOHNSON: In workers compensation, one of the key differentiators is also, with an employer being involved, trying to maximise the return to work outcome and in terms of the balance of the scheme having a look at the balance where you can actually maximise the return to work so the person has long-term income viability.

The Hon. IAN WEST: I realise we are talking in rather nebulous terminology. I am trying to equate those with some reality in terms of whether we are talking about a person with one leg or no hands. We appear to be saying that we have struck a fair and appropriate balance between the rights of injured workers but I am not finding all that many injured workers having a similar view to yourselves. Can you explain why that discrepancy may be out there?

Mr PEARCE: I think primarily would it not be in the interests of an injured worker to maximise their monetary claim? That is the fundamental difference. Whereas for the schemes—and I should say in workers compensation we act as an agent for the government instrumentality being WorkCover in this—it is the balance between not maximising all payouts but rather optimising and achieving the highest return to work. There is a natural tension.

The Hon. IAN WEST: Are you suggesting that the injured workers are asking for more than they should get?

Mr PEARCE: I am not making any such assertion about any individual worker.

The Hon. IAN WEST: I was trying to come to grips with the clear difference between your definition of injured workers being fairly and appropriately compensated and a number of other people that we have heard from, especially injured workers, who are saying that they are having real difficulty comprehending the fairness and equity of the system. I am hearing that you are saying that perhaps they are asking too much.

Mr PEARCE: I did not say that. I said there is a natural tension in these schemes, and particularly when we are talking about common law damages, which is a lump-sum payment, between the maximisation of claims costs and how that then represents itself as the premium that industry and in the end the community must bear. That is the balance, and the whole I suppose aim of any of the reforms around this is trying to achieve a fair balance that overall seems about the right thing.

The Hon. RICK COLLESS: If I could just ask the group if they are aware of a young man called Matt Davis, who was injured in a bus accident near Albury. Seven weeks in hospital, nine operations, steel plates in his shoulders and legs, wheelchair for three months, cannot play sport, cannot climb, bush walk, suffers pain from his injuries every day still. This happened in May 2002. He rated 8 per cent under the AMA guidelines, and when they heard the figure his parents could not believe it. Neither could his treating orthopaedic surgeon. Because he did not rate more than 10 per cent he is not entitled to damages for pain and suffering.

I do not expect you to know all the details of this particular case, if you are aware of it, but that is the sort of evidence that the Committee has heard about unfair treatment under these AMA guidelines. That young kid's life has been substantially changed for the rest of his life. He suffered very serious injuries in a bus smash, in which four other people were killed. He also had substantial psychological trauma that does not add onto the 8 per cent that he was deemed to have and he gets nothing for that. That to me does not spell fairness in the system.

Mr PEARCE: We cannot comment on the details of the case and I do not think we are aware fully of what they are. As I understand it, they are with another insurer. But I suppose a general comment about this is that the way this company sees the general tort law reform that has occurred in both CTP and workers compensation and now starting in public liability is that it is a medicalisation rather than the legalisation of the scheme. It is trying to transform these schemes from being one of basically an adversarial legal approach to one of a medical approach. The whole aim of them is to get such things as early intervention and rehabilitation really working.

There is no doubt that the workplace and motor vehicles are the greatest source of traumatic injury in this country and that is why we have these dedicated schemes. I suppose out philosophical objective is to make these schemes the best at fixing people, and I suppose philosophically we did not think giving someone or putting them through the legal process, which is a horrible process of being assessed by different lawyers and different medico legals and then saying, "We'll make you right at the end of it by giving you $50,000 or $70,000" actually works terribly well.

The Hon. RICK COLLESS: I am not suggesting that at all. The concern I had was your comments before that you were talking about the medical professionals making those assessments. Yet here we have a very clear case where the medical professional using the AMA guidelines said that he had 8 per cent, yet this boy's treating orthopaedic surgeon clearly thought otherwise. So the conflict there is between two doctors?

Mr PEARCE: The orthopaedic surgeon obviously understands the injuries very well but has he been trained in making those assessments? Further, if there is a dispute about that assessment, then there is a process for having it reviewed and reassessed. I will also say that they do not work perfectly in every instance, but to my mind they are still a lot better than having lawyers make that decision.

Ms LEE RHIANNON: You spoke quite passionately about how you see that the new scheme is fair and balanced and you set out a strong case for that. Considering that your job is to look after your company and make sure it delivers for its shareholders, are you arguing along those lines because the new system compared with the previous system delivers a system that gives you more surety, you get more confident of your profit margins at the end of the day the colours the payouts to injured people, to injured workers, are less? We know that the bar has been lowered and that is why you are very happy with the new system.

Mr PEARCE: We are happy because the system is more sustainable. We very much take the view in these compensation schemes that if the community is not happy with the level of premium or is not happy with the level of payment but in particular at how well these systems are at fixing people, then they will change them. So our long-term objective is to have sustainable schemes. It is only in sustainable schemes that we can have long-term sustainable benefits.

Ms LEE RHIANNON: How do you define sustainable? When I hear you say "sustainable" that means good profits for your company rather than the workers and the injured people being looked after.

Mr PEARCE: Good profits only flow when the scheme is delivering the right outcomes to injured workers and injured CTP people. It is no different than motor vehicle insurance. If our customers are not happy with the way we fix up their cars they go to another insurer so we do our damnedest to fix them up as best we can for the cheapest price and then sell our motor vehicle insurance as cheaply as possible. It is the same for CTP, but CTP is more complex because it sits in the scheme. So we work and we try to understand what are the best schemes in the world and advocate those.

(The witnesses withdrew)

(The Committee adjourned at 4.40 p.m.)