

REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE NO. 1

**INQUIRY INTO SERIOUS INJURY AND DEATH IN THE
WORKPLACE**

At Sydney on Monday 15 March 2004

The Committee met at 10.00 a.m.

PRESENT

Reverend the Hon. Fred Nile (Chair)

The Hon. D. Clarke

The Hon. C. E. Cusack

The Hon. K. F. Griffin

The Hon. P. T. Primrose

Ms L. Rhiannon

CHAIR: I would like to welcome you all to this fifth public hearing of the inquiry of General Purpose Standing Committee No. 1 into serious injury and death in the workplace. This morning we will commence by hearing evidence from Mrs Karen Boland, whose husband died as a result of a workplace accident. I welcome Mrs Boland's children Hope, Tara and Jordan, who are in the audience today. Thank you very much for coming and supporting your mother. Later in the day we will be hearing from Mr Alan Welsh, as well as representatives of the Road Transport Association and of WorkCover's prosecutions branch.

Before we commence I would like to repeat some comments that I have made at the beginning of previous hearings. The Committee is conscious of the sensitive nature of this inquiry and respects the personal pain that witnesses may face giving evidence about the death of close relatives or injuries they have suffered themselves. I ask that the media and any other persons in the audience show sensitivity in any approach made to witnesses during the inquiry, but particularly immediately after the giving of evidence.

In regard to parliamentary privilege, the evidence in this inquiry already has included material that could be seen to adversely reflect on third persons, such as employers, WorkCover employees and others. The Committee believes it is important that the evidence of this inquiry is heard in public as far as possible, as the inquiry will not be able to serve its purpose by hearing in camera evidence which cannot be used in the Committee's final report.

As with previous hearings, I ask witnesses, where possible, to try to minimise their mention of individuals, except if it is essential to address the terms of reference. Parliamentary privilege, which applies to parliamentary proceedings including committee hearings, is not intended to provide a forum for people to make adverse reflections about others. If it becomes necessary, I may stop witnesses at times if their evidence about another person is not necessary to address the issues in the terms of reference for this Committee. At all times the Committee will try to be sensitive to balancing the needs of witnesses and the need for procedural fairness.

I need also remind witnesses that, although what they say during evidence is protected by parliamentary privilege, what they say outside after the hearing is not protected by parliamentary privilege, even if it is said within this building.

I move to some administrative matters. I ask everyone to please turn off mobile phones during the hearing. In regard to broadcasting guidelines, the Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing broadcast of the proceedings are available from the table by the door. I point out that, in accordance with Legislative Council guidelines for the broadcast of proceedings, a member of the Committee and witnesses may be filmed or recorded. People in the public gallery should not be the primary focus of any filming or photographs. In reporting the proceedings of this Committee, the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee.

Witnesses, members and their staff are advised that any messages should be delivered through the attendant on duty or through the Committee clerks.

I advise that, under the standing orders of the Legislative Council, evidence given before the Committee and any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such Committee or by any other person.

KAREN LEE SCULLY BOLAND, Sales Manager, sworn and examined:

CHAIR: Are you appearing as an individual or as the representative of an organisation?

Ms BOLAND: As a private individual.

CHAIR: Do you wish to make an opening statement to the Committee?

Ms BOLAND: No.

CHAIR: Mrs Boland, we thank you for providing the Committee with some background material. In your submission you give details about the accident in which your husband was killed. Would you like to give a summary of that?

Ms BOLAND: He was working at Heathcote as a dogman on the railway. I am not 100 per cent sure, I still do not know what happened, but apparently the crane hit power lines and he was electrocuted. I am sorry, but I am really nervous.

CHAIR: One of the issues we are investigating is what backup is provided to people like you and your family who have lost a loved one or had a loved one injured on a work site. What happened in your case?

Ms BOLAND: I had absolutely nothing; anything I did I had to do on my own. When we arrived at the hospital there were people from the Rail Infrastructure Authority, Whyco Cranes Services and two police officers. One of the police officers was absolutely brilliant, but there was nothing else. When it all happened, I was going through the motions. But I look back now and realise that so much more should have been done. When I got to the hospital I sat outside for about two hours. I was told that Michael had passed away, but I was given no other information. Terry White told me that the electricity had arced. I had a cup of tea and I was asked whether I wanted to go and see Mick. I was not ready at the time. I then decided that before the children came down I would go in to see him. I was taken to a room and one of the police officers came with me. I was told that the police officer would have stay in the room and the door was open. I was shown that it was Michael. I am sorry I am so upset.

CHAIR: It is important that we know the circumstances so we can ensure that if it happens again to other people they will not be left to their own resources as you were.

Ms BOLAND: Then I was told that I was not allowed to touch him and that the police officer would have to stay with me. I stayed there for about 10 or 20 minutes. I was trying to work out what everything was for; he had a tube in his mouth. I asked the police officer and she said I would have to speak to one of the nurses. I did not see a nurse the whole time I was there. I did not get to ask any questions. I then came out of the room. I had asked someone to pick up the children and I needed to tell them. The children came down with Michael's sister. When they got to the hospital there were two police officers there. Michael's boss left then. I told the police officers that I did not want them around when the children came. I did not want them to see that anything was wrong and I wanted to tell them myself. The children came into a room one of the police officers found for us. I was sitting in there waiting for the children to come and they came in. When they came into the room there was just me and I told them. Michael's mum and sister were outside. I have been told that the police officers were outside the room at the time. They let Michael's mum into the room and we sat there for a while.

I asked the children if they wanted to see Mick and they said they did. So I took them to the room, and once again the police officer had to wait outside. I told the children that they could not touch Mick. I could not tell them anything else because I did not know anything else. We stayed there for about four hours until they were ready to go. During that time I asked for a priest to give Michael the last rights. That was okay but after that he was trying to coax the children out of the room, but they were not ready to leave. I am sorry I am crying.

CHAIR: Take your time.

Ms BOLAND: I wanted the time to be right for the children to go; I did not want them to be hurried out. If they wanted to stay for 24 hours that was okay, but we were told by the police officers that we had to hurry up because the crime team was coming in. I tried to coax the children out and we finally got them out. One of the police officers went in and chopped off some of Mick's beard for the kids to take home. They were told they were not allowed to touch him. She took that step, which was great. We then left. I asked the police officer what would happen after that and she said the crime people would come in to take photographs. That was it.

The following day, about lunchtime, I got a phone call from forensic science. I had not spoken to anybody else. They didn't even ask me, they actually told me that it was normal protocol that they take some of his brain after something like that. I said to them that they couldn't, and she said to me, "It's normal protocol. We just have to notify you." All I remember is yelling and screaming down the phone line at this woman, saying, "You cannot do that." If he was a donor it would've been fine. I tried phoning the police. I tried to ring them back. I tried to ring WorkCover. I just didn't know what to do, and I still don't know whether she has done it; whether they have kept some.

CHAIR: You said you tried to contact WorkCover. When did you finally have any contact with WorkCover?

Ms BOLAND: Eddie, my brother-in-law, has a card. He gave me that card and he said to me, "This is the person that is looking after the investigation." So I rang him. That would have been about two or three days afterwards. But I rang the police to try to speak to Nicole Bridge, to find out what was happening from there, but she had taken a few days leave. I was told that it was handed over to another detective. I tried to contact that detective to find out what was happening because after something like that you just want answers. You're just always looking for information. Anyway, I spoke to the police and they told me that he wasn't in at that time, and I waited for them to ring me back. A couple of days later I rang. I always had to ring them before I got any response.

CHAIR: When did WorkCover contact you?

Ms BOLAND: I contacted WorkCover. I know that the investigator gave Ed the card, and with that card I rang him.

CHAIR: What happened as a result of that? Did they come to see you, or did you hear from them?

Ms BOLAND: No, never. I had all this information from the stuff that was happening in the first two days. Somebody was giving me pieces of information. People in the industry and friends were just piecing things together. I had all these questions. I tried ringing them. I didn't get through to the guy, so I left a message there. He contacted me and he told me that he was working on the investigation, but he couldn't really give me any information at that time.

CHAIR: Is that WorkCover?

Ms BOLAND: Yes, then he rang me back. I had some information that I wanted to give him that I thought was relevant to the investigation. I gave him the information on the phone, then I sent him a few faxes of little statements of what was happening. Anytime I spoke to WorkCover, I had to initiate the call. The investigator rang me, probably, two times of his own accord. But every time I had to initiate that call. Then I would ring and I was told he was on holidays. I asked him at one time why he had not rung me back and he said it was because he had family problems. There should have been somebody else there to contact me, to give me that information. He had time off, which I understand, but there should have been somebody to give me the information and there wasn't.

CHAIR: Did WorkCover offer any counselling to you or organise any counselling to help you?

Ms BOLAND: No, no-one did. The CFMEU has, but I had someone from Whyco come out to see me. I think that was the second day. On that day she came out to check how I was, but at that time the crane driver was there as well, so I think maybe that might have been the reason she was over. But she told me that she could not see me and she would have to recommend me to the victims

of crime because it would be a conflict of interest. At that time I had no information about what had happened to Mick. I was told that it was a freak accident: the electricity had arced. When she said to me that she would recommend me to the victims of crime I thought: it's no crime, it was a freak accident.

Then after that we saw one of the solicitors at the CFMEU and she took us to this man at another company, and we spoke to someone there and they sent out a gentleman for the children and myself. But he just didn't relate well with the kids. I guess they found it hard with him, too. They have never spoken to a counsellor before. After that I went through the phone book and I got the kids helpline number. I think Hope actually rang the kids helpline. I even rang them and asked if there was someone they could send out to speak to the kids because I could see just how hard it was for them. It didn't matter whether I was okay, just as long as the kids were okay. After ringing the kids helpline she gave me some other telephone numbers to follow through with. And I started to go through the phone book, just to find somebody from there.

A few years ago I saw a lady myself, and I thought she would be great for the kids, to come out and see the kids. I rang her and asked her if she could come out. I told her that I wasn't sure how she would get paid, that maybe it would go through the insurance company. She came out and she started to see the kids. I think she came out for two or three visits. She had just started to get their confidence and then one Saturday morning when I was in the shower and Jordan answered the phone. It was the receptionist trying to make an appointment. Jordo said, "Mummy's in the shower." The receptionist said to Jordo, "Can I speak to daddy?" And he was just a mess. Since then my children have not had any counselling. They won't speak to anybody. I can see every day how hard it is for them. There are days when they are okay, but then there are days when they are just not okay. Jordan sees the school counsellor every second Thursday. She cannot fit him in any more than that. I did ask her if it was possible to come out to see him at home, but she can't do that. The girl is just—

CHAIR: Did WorkCover give you any compensation or are they giving you any compensation? Are you getting any financial compensation?

Ms BOLAND: No, absolutely nothing. What do you mean?

CHAIR: I am just asking whether they have given anything to you.

Ms BOLAND: WorkCover doesn't do anything. Honestly, I don't even know what they are meant to do. What are they meant to do? Is there a procedure or something in there that they are meant to follow? What happens after something like this happens? There is no guidance, and you feel so alone. Everything that I have had to do, I have had to do on my own. It has been hard, but I have just had to do it.

CHAIR: You have been coping very well. It is a terrible situation for you to be in.

The Hon. DAVID CLARKE: You said that you do not know what rights you have with WorkCover, whether you are entitled to compensation. Has the union advised you on what your rights are under WorkCover?

Ms BOLAND: I have spoken to one of the solicitors there. I cannot answer that. In the first couple of days I spoke to someone there. I do not know, I cannot answer it.

The Hon. DAVID CLARKE: You cannot recall whether the union ever advised you?

Ms BOLAND: I know that we have had conversations about WorkCover.

The Hon. DAVID CLARKE: But you cannot remember whether they advised you as to whether you had entitlements to compensation?

Ms BOLAND: I know that I have entitlements to workers compensation. I see a solicitor through the union. They have done all my paperwork and everything for me. If it wasn't for the union—and I am not pulling anyone's strings—I would not have made it this far. Mick handled all our money. I went to work, but he did all that stuff.

The Hon. DAVID CLARKE: You said you have seen the union's solicitor. Has the union's solicitor advised you what entitlements you can receive?

Ms BOLAND: Yes.

The Hon. DAVID CLARKE: Do you understand what those entitlements are?

Ms BOLAND: Not fully. I have not wanted to know. I do not want to know about money. I think this is what killed my husband. I hate talking about money; I have not asked. I see an injury management solicitor, and I cannot even talk about money with him. I want him to make somebody accountable. I want him to find the answers.

The Hon. DAVID CLARKE: You said that you would like to see Michael's employer stand in a court of law and justify why they should not be sent to gaol. Are you aware whether any criminal proceedings have been instituted against anybody in the company?

Ms BOLAND: I know that they received a notice. WorkCover has suddenly started to contact me. I got a phone call from Stephen Cooper about three weeks ago asking me how I was going. He has never done that before. Then I got a phone call from—

CHAIR: That was a year or so later?

Ms BOLAND: Yes. During our conversations—and I have initiated the call; either by me leaving a message or ringing him—he does ask me how I am going. But is it his job to ring me to ask how I am going? Whose job is it?

The Hon. DAVID CLARKE: You are not aware of whether any manslaughter charges have been brought against any person in the company?

Ms BOLAND: No. But I spoke to somebody by the name of Tony from WorkCover, and during that conversation I think he actually started to go through the process of what would happen from here, that it was going back to the police—

The Hon. DAVID CLARKE: Has the union advised you as to the progress, if any, of criminal proceedings?

Ms BOLAND: What would happen?

The Hon. DAVID CLARKE: Yes. Have you received any advice from the union as to criminal proceedings with regard to the employer?

Ms BOLAND: I have been told what the process is, through the union, but I do not know whether anything has happened to date.

The Hon. DAVID CLARKE: Have you asked the union whether anything has happened?

Ms BOLAND: No, because I was told that it had not gone over to court yet.

CHAIR: One of the matters the Committee is hoping to do from hearing from people like you is to make sure that the situation does not arise in the future whereby a wife and/or children, or a close relative, are literally left high and dry. We gather that WorkCover is now aware of that, but it is long overdue. We thank you for sharing with us, because it helps us to have concrete information upon which we can then make recommendations to the Parliament, to ensure that a wife such as you and her children are taken care of when there is a workplace accident or death. Is there anything else you would like to tell the Committee that we should put into place to help people such as yourself?

Ms BOLAND: I just do not want to see anybody go through this, and I do not want people to feel so alone. There needs to be something put in place to help these people through. It is not just about counselling; they need to know what goes on and how far it has to go—even if it is financial

advice. Someone like me obviously needs financial advice, and I never thought I would need it. There are lots of things. It is not just about having a counsellor or a psychologist.

CHAIR: There are two categories: one is counselling and the other is to give you practical information and progress reports, and answer your questions.

Ms BOLAND: We definitely need more information. And it is not from a year after somebody passes away; it needs to be from the very beginning. It needs to start at the hospital.

Ms LEE RHIANNON: Would you have appreciated assistance from day one, for example, with practical things like shopping, taking the kids to school, and so on? Are they the sorts of things you mean?

Ms BOLAND: I do not mean shopping, because I can do that.

Ms LEE RHIANNON: What sort of things do you have in mind?

Ms BOLAND: They just need somebody to guide them, somebody who understands—not somebody who has a piece of paper saying they have this degree and that degree. It needs to be somebody who understands what they are going through and has compassion.

The Hon. JAN BURNSWOODS: I think you said earlier that the company secretary spoke to you and mentioned that it is difficult because of the conflict of interest. Have you had any contact from the company since then?

Ms BOLAND: It was the company's counsellor. At the time she said that to me, she actually had the crane driver at my home the following day. I have had nothing to do with the company whatsoever. The only thing they have done is that they have given my brother-in-law a letter from Assirt to sign so that they could claim \$5,000 back from Assirt for the funeral expenses. That is the only contact I have had.

The Hon. JAN BURNSWOODS: There has been no personal contact, such as to ask you how you are going, and no correspondence?

Ms BOLAND: No.

The Hon. JAN BURNSWOODS: In that respect, you have been left alone?

Ms BOLAND: Mick gave so much to that company. There has not even been a phone call to say, "How are you going?" It is like he is not a person any more.

The Hon. JAN BURNSWOODS: For how long did he work for the company?

Ms BOLAND: I think it was about 16 months. It was not that long. He was friends with a lot of them before he started working there.

CHAIR: Your husband was employed by Waco Crane Services but the principal contractor was the Rail Infrastructure Corporation. Did you ever hear from the Rail Infrastructure Corporation? Did anyone from that organisation contact you, given that the accident occurred at the eastern overpass siding?

Ms BOLAND: No. I have never heard from anyone. The CFMEU is probably the only one. I have never heard from anyone, unless I have initiated it from WorkCover. For me personally to see a psychologist—one day I knew I needed help, so I just sat there and went through the phone book. I rang quite a few, to say that I wanted to speak to that person because I was having a really tough time at that time. I wanted to speak to the psychologist at that time but I could not. So I just kept going through the phone book, and I found one, and I have been with him for the past six or seven months.

It took the a few months to get to the point where I thought I have got to do something. I just sat there and went through the phone book. I spoke to Stephen Cooper about counselling, especially

for the kids. I told him that it was really hard for the kids, that they had gone through counsellors, and that I had spoken to friends. A friend of mine is a teacher, and she had tried to organise counselling for the kids from the Kids Helpline. But I needed somebody to come to the home, not to take the kids out, but no-one was prepared to come.

CHAIR: How are coping financially?

Ms BOLAND: I have had to downgrade my hours of work. I promised Mick that I would not stop doing the things that the kids used to do, to make sure that their life was still full. So I had to downgrade my hours at work and just get by on the money that I got from the insurance. When that runs out, I guess I am going to have to—it is just hard to do fit everything into a day. My kids do sports every afternoon, and this is the stuff they were doing when Mick was here. They do sports. They are forever going away on football trips or touch football trips. There is just so much that they do, it is really hard to fit it all in. Sometimes you just get so exhausted from doing it all.

CHAIR: Thank you for coming in today. We appreciate your coming in. We know it is distressing for you to relive that experience, but it does help us greatly in writing the report and making sure that there will be a lot of improvements in the future so that people are not left, as you have been, about counselling, without being given advice, without having somebody come to your home, especially when there are children involved as well. Thank you for making the effort to come. We really appreciate it.

Ms BOLAND: No worries.

CHAIR: Thank you.

(The witness withdrew)

ALAN JAMES FAIRFAX WELCH, 4836 The Parkway, Sanctuary Cove, Qld, 4212, Retired, sworn and examined:

CHAIR: We thank you very much, Mr Welch, for agreeing to come as a witness to this inquiry. We appreciate your co-operation. I apologise for two of our Committee members. The Hon. Peter Primrose is unwell and has had to leave the Committee and the Hon. Kayee Griffin has a medical problem that has occurred just this morning. I note that for your information. We certainly want your evidence. In what capacity are you appearing before the Committee—as a private individual?

Mr WELCH: As a private individual.

CHAIR: Do you wish to make a brief opening statement in a moment?

Mr WELCH: I certainly want to make a statement. It might not be brief.

CHAIR: Do you want to make any comment before we ask questions?

Mr WELCH: I welcome the opportunity to address this Committee. It is only by chance that I am here. The *North Shore Times* has been the only media outlet that has shown any interest and has been very helpful. About two or three weeks ago they followed up with an article and they have had a member of articles in the local paper. A couple of friends sent the article up to me. Out of that I rang me Mr Andrew Ferguson, the union secretary. He said to me, "I have been trying to find you for some time now. I have contacted WorkCover who would not give me your phone number." I am critical of the fact that WorkCover made no attempt to contact me, particularly as this inquiry is to be held.

CHAIR: He said that they would not give him your phone number?

Mr WELCH: WorkCover would not give Andrew Ferguson my phone number. I respect that they were probably respecting my privacy, but in view of what has happened, they should have contacted me. I think it is very important that I be here today to address this Committee so that this Committee realises exactly what does not happen. Hearing that lady speaking, I sympathise wholeheartedly with everything that she has said: You are left on your own. Without my efforts, the charges that have been laid by WorkCover would not have been laid. It has been a conglomeration of incompetence, negligence and/or lies by every authority involved and the people involved in this site. I have tried to get a Coroner's inquest three times and I have been refused. I am dumbfounded that the Coroner will not have an inquest, as are friends.

Mr Barry O'Farrell has tried to get an inquest held and I have come to the conclusion, rightly or wrongly, that there is a deliberate attempt to cover up the circumstances involved in the death of my wife. In that I include the New South Wales Government, the police and the Judicial Commission of New South Wales. That is a pretty big statement, but I have got the facts. This is not going to be a five-minute inquiry, if you are prepared to listen.

CHAIR: Could you outline for our record what happen to your wife—just the basic facts?

Mr WELCH: Firstly, on 30 June, a Saturday, we had only just moved into a new unit two months before she was killed. On that day I was going up to golf. I kissed my wife and said, "Have a good day"; we both said the same thing. I went to golf. She was to go and meet a friend. She walked for the first time from the unit to meet the friend. We had lived in St Ives for over 30 years and we were conversant with the area. I never saw my wife again. She walked down Mona Vale Road and from all the evidence that I have read—and this is evidence from the driver of the truck. I might add his license had been suspended for nine months. He was breaking the law by driving. That seems irrelevant. The only other witness was the driver of another truck who was up the driveway. This driveway is a residential driveway, about 50 metres long. I want to show you some photographs and a plan of the area. I will pass that around so that you can appreciate just how bizarre this approval was. It was approved by the Land and Environment Court.

CHAIR: We will make copies of that, thank you.

Mr WELCH: I would also like to pass around a photo of my wife taken about three years beforehand because the driver of the truck said that she stopped alongside him, they had eyeball contact and nothing else. She was just apparently two or three metres from the side of him. His comment was that she reminded him of his little old grandmother. My wife was an attractive woman. She was 71 years old and she dressed very well. She was sprightly and played golf. She was anything but a little old lady, but what had happened as far as the police were concerned was they found in her handbag that we had lived temporarily at the Fernbank Retirement Village simply because we needed a unit to live in or somewhere to lease. I believe that probably the words might have been put into the chap's mouth because that day his evidence was that he was told not to worry, the lady is at fault

My wife walked along the footpath and a truck came out in front of her. I do not know how far she was from the truck when it first came out of the driveway. It stopped at the kerb line. My wife stopped alongside the cabin and he claimed he waited for a break in the traffic and there had been numerous traffic accidents because of the trucks going in and out of this site, parked on the side of the road. He drove off and my wife walked forward as the truck, which was about eight metres long—and bear in mind this was a 19-metre long 30-tonne vehicle coming out of a residential driveway. There was no flagman, no warning signs and no barricades, which are required by legislation. They are Australian standards. They are good building practice. The only time that they were in existence at that site—and I passed it for 14 months—was when I saw premixed or ready-mix concrete trucks doing a U-turn and then driving into the driveway. There was nobody controlling them, so I immediately rang the Hornsby police station and complained bitterly. For the next few weeks while the concrete pour was being done there was somebody there. That is the only time that I have ever seen anybody controlling the traffic. There were never any safety measures in place even after my wife was killed. Unbelievable.

I have also got photographs of the trucks on the site because it is so relevant that this Committee realises and so that you can pass on to the Government how flawed this legislation is that allows these State environmental planning policy [SEPP] 5 developments to be approved in inappropriate locations. I am not against every SEPP5 development—obviously developments are needed for the increasing population—but there are appropriate locations for them and there are certainly inappropriate locations, and this strip along Mona Vale Road would be one of the most inappropriate. The decision to approve this development by the Chief Justice of the Land and Environment Court in not only my opinion but those of many sane, logical professional people, and even another Judge who, as it turned out, happen to live next door to me—I had never met him before—but he also said the development in question appears to be the result of a bizarre planning decision.

Mona Vale Road is a six-lane highway with residential blocks to the south and with a cut-off at a sharp angle. To get into this driveway, as you will see on the plan, necessitates for ever and a day a driver intending to turn into it—and I am talking about in the future with people over 55 or the disabled whose reflexes may have, or inevitably will have, slowed down—has to turn 128 degrees, often in front of three lanes of traffic, and the speed limit when the Judge passed it was 70 kilometres an hour, without being able to see any person, who could be disabled, or any vehicle coming out. As the Judge said, it will result in end-to-end accidents. Anybody could see that. Why this Judge did not see it is beyond any sane person's—

Reverend the Hon. FRED NILE: One of the matters our Committee is inquiring into is WorkCover's follow-up of next of kin and so on. I know there were some problems with locating you, was that because of a change of address?

Mr WELCH: Yes. After 14 months I sold the house. We had only bought the house two months before my wife was killed. I could not stay living there. I do not have any family. I lived in the homes of nine different friends from one night to eight months. My friends have been marvellous. Without my friends heaven knows what would have happened. I know the anger that I had within me and I am determined that I will bring all this out in the open. There should be a full judicial inquiry and the Minister for Planning, or the former Minister for Planning, I believe should resign. The Judge, who was the Chief Judge of the Land and Environment Court, who overturned the council's decision to reject the development, which was the only sensible decision to make, I cannot understand for the

life of me how any sensible person, who had before them letters from local residents warning of the dangers, could pass this development.

Reverend the Hon. FRED NILE: That is really another issue for perhaps another inquiry.

Mr WELCH: Unless I get it out to you people how do I get a judicial inquiry? There is a cover-up. There is a cover-up because of the horrific circumstances of my wife's death.

Reverend the Hon. FRED NILE: Because you were obviously upset and staying with friends when did WorkCover finally locate you?

Mr WELCH: WorkCover never approached me. Nobody approached me, except the police initially. The day that it happened the police came to my home, went next door, found I was probably at golf, they came down to the golf club and I got called in off the golf course to be told my wife had been killed. The next night two police came to my home, went over what had happened and at that stage I immediately told them my wife had lost some of her peripheral vision. And I accepted it then that it was an accident.

My wife could not be identified for six days. A policeman who happens to live only about five doors from where this accident occurred had to come to my home to take fingerprints to try to identify her. That six days was unbelievable: the telephone never stopped ringing, I had people coming and going, I never ate, I never slept, I lost about five or six kilos. Some friends, a husband and wife, arranged the whole of the funeral service; I could not have done it. Firstly I did not know whether I could have a cremation because they could not to identify her and it looked like there might have to be DNA tests done which would have gone on for weeks. Eventually, when the Coroner said an identification had been made by dental records I was able to proceed then with the service and the cremation. When a friend picked me up to go to the church we stopped at the site to look at it and as I stood there I thought, "This is crazy. This shouldn't have been passed". I happen to have been involved in development myself all my life. I started off doing architecture and I was involved in planning and construction. Had it been somebody that did not have my knowledge, perhaps nothing would have had ever happened, my wife would have just been history—a statistic.

I accepted the police version that night that it was an accident. I no longer believe that it was an accident; it was criminal negligence and I have said so from the outset in letters to the Premier, for whom my estimation has gone down a lot. He sent me a letter expressing his sympathy. He went on about an assurance that the legislation would be brought in. You imagine if instead of my wife being injured or killed at that site it had been one of our most famous and elite athletes. This Government would have been thrown out of office at the last election if the whole truth had come out. In fact the Premier would have been back-peddalling so fast. These things have got to be said.

Reverend the Hon. FRED NILE: We know there was some confusion at the beginning over whether it was a matter that was solely a police matter or a WorkCover issue, and that created some of the delays.

Mr WELCH: The police decided on the spot that it was an elderly lady—this is my version—she had walked behind a truck, it was her fault. They told me it was her fault, it is in the statements. But the police statements to the Coroner do not say that the driver of the truck was unlicensed; that they were working after the hours they were supposed to have stopped on a Saturday, and accord with the judgement; that my wife, as it has turned out and it is clear in the statements, was standing behind a large real estate sign and she would not have seen what was up the driveway. Mr Quentin Dempster from Stateline did a program with me—I have got the video here—where we stood alongside that sign. My wife would not have seen what was up the driveway; she would not have seen the trailer. As the trailer moved forward she walked, it knocked her over and went over her head. I have got to live with that for the rest of my life. Every authority has run for cover, each one blames the other. It is an absolute disgrace.

Reverend the Hon. FRED NILE: We certainly express our sympathy to you. It is a terrible thing to happen, as you say, to come suddenly out of the blue in such a way. We understand it has had a tremendous effect on you.

Mr WELCH: The ongoing effect on me is incredible. As the lady said, "You do not want to speak about money", and I do not want to make money or a profit out of my wife's death. But to date it has cost me in excess of \$150,000 and I have not got one cent of compensation from anywhere. Think of that. I have even had to pay GST on my wife's death. Why should I have to pay GST? There is a case up in Queensland—and there are others of course—where three children have been murdered. Why should their parents have to pay GST? This inquiry, as I read it, is mainly about WorkCover's inaction, but it should not only be about that; it should get to the whole basis of how these accidents occur and what goes on and does not go on after; the lack of support to the parents or the spouse of the victims.

Reverend the Hon. FRED NILE: Just for our record, can you remember how long after the accident WorkCover finally contacted you?

Mr WELCH: I will speak about WorkCover now. I was going to say that WorkCover never contacted me but that is not quite right. A Mr Andrew Symonds is a cartage contractor who lived a couple of streets away. He had gone past this site and seen what was going on: these trucks, which, as I said, are 19 metres long and 30 tonnes in weight, were driving down the median strip of a six-lane arterial road, and they had to swing right across the road to get into the driveway.

Think of that! A vehicle of 30-tonnes, 19-metres long, going up and down a residential driveway, with no-one in attendance. The actual excavation was 50 metres up the driveway, which was 7.2 metres wide and initially was the access for two battleaxe blocks. Andrew Symonds was going to ring the council, and will forever regret that he did not do so. When he heard that there had been an accident involving a fatality, on the following Monday he rang WorkCover. WorkCover sent an inspector to the wrong site and did not tell its inspector that a fatality had occurred. The inspector reported back to WorkCover that there was nothing wrong at the site. I eventually contacted WorkCover, after I was sent a document from the Coroner, which told me the role of the Coroner and said that I could obtain counselling, which I did not get; my friends with the best counselling I could have. Without their support I do not know what would have happened.

What is the point of a stranger trying to tell me something? My wife had been killed in horrific circumstances, nothing was going to change that. It was not until about August 2002 that I got the letter from the Coroner, in response to my letter asking for a coronial inquest. Attached to that were several other letters, police reports, which as I said were flawed, and a letter from the general manager of WorkCover—when I read that, it was not true, it was a false statement.

Ms LEE RHIANNON: Whose name was on the letter?

Mr WELCH: Kate McKenzie. One thing I did, about 20 August I rang WorkCover and spoke to Kathy Maltby.

The Hon. JAN BURNSWOODS: Was that August 2001?

Mr WELCH: Yes. She was the person who answered the phone.

The Hon. JAN BURNSWOODS: Whereas the letter from the Coroner was a year later?

Mr WELCH: Yes, August the following year. I said that my wife had been killed, she was unaware of that, and she said that she would have had to get back to me. I was looking for answers, of course. She rang back about 10 days later and left a message on the answering machine to say that as my wife was well away from the site it had nothing to do with WorkCover. She may have said "off the site". When I got the letter from the general manager of WorkCover that had been sent to the Coroner, in which they said that they would not be taking any further action, I rang WorkCover and spoke to someone who put me through to a gentleman who was very good, Les Blake. When I told him the circumstances I think he almost dropped the phone. My wife was about one metre off the site when the trailer hit her. Most of the trailer would still have been on the site. WorkCover could not say that it had nothing to do with that construction site, because the trailer was still on the site.

Otherwise, apparently, it would have become a council problem. When I wrote to the RTA—and they were hopeless, because people do not pay their fines and continue to drive. This driver's

licence had been suspended, and there had been no follow up. The RTA said this matter virtually had nothing to do with the RTA, its responsibility stopped at the kerb and anything on the footpath was the responsibility of council or police. The council, of course, said it was nothing to do with it, because it had rejected the development; the development was passed by the Chief Justice of the Land and Environment Court, and as she was the consent authority therefore it was her responsibility. Unbelievable! Duckshoving! That is what Barry O'Farrell said in when he addressed Parliament, and is recorded in *Hansard*.

Ms LEE RHIANNON: Can you continue with WorkCover.

Mr WELCH: I get the impression that this whole meeting is about the inefficiency of WorkCover.

Ms LEE RHIANNON: No, we are talking to WorkCover this afternoon.

Mr WELCH: I made an appointment and spoke with Les Blake and Rick Bultitude. From that moment on I believe WorkCover has performed as it should. I had to come back from interstate to have an appointment with the investigator. Finally, I got a letter from the general manager; the general manager had to retract the statement made to the Coroner and open the case. This case would never have been heard, and I would not be here today—and I want the person, the building company, the contractor, charged with criminal negligence. I have said that from the outset and I believe that what the unions are pushing for, in introducing industrial manslaughter, is mandatory.

CHAIR: We need to be careful about what is said, because the case is before the Industrial Commission. We do not want anything to hinder a successful outcome of that case, which is what you want.

Mr WELCH: Absolutely, but you can appreciate my feelings.

CHAIR: I know you feel strongly about it.

Mr WELCH: Well, wouldn't you! Everybody would. I am so angry that this could happen and I am so angry that there has been, what I believe to be, a cover-up.

CHAIR: Do you know what charges have been laid against the principal contractor?

Mr WELCH: I could not give you the exact details. It was along the lines that he was a person who should have prevented this, he obviously had a duty of care to ensure that it could not happen. I cannot give you the precise details, I do not have them in writing.

The Hon. JAN BURNSWOODS: Has the truck driver had any charges laid against him?

Mr WELCH: No, no charges laid against the truck driver or the company he worked for.

CHAIR: No charges to your knowledge, because no-one is telling you anything.

Mr WELCH: Not unless it has happened since, and I certainly have not been told otherwise. Mr John Watson has kept me informed since he first contacted me. He has rung me after dinner at night to keep me abreast of when hearings were to be held. Twice they have been adjourned.

CHAIR: Are you happy with the way that he has kept you informed?

Mr WELCH: Yes, as far as letting me know that the investigation had resulted in charges being laid, or would be laid, against the building company and the contractor involved, the principal. WorkCover was still considering whether it would lay more charges. Obviously the ones I would have thought of were the truck driver, who was breaking the law by driving. If he had not broken the law and driven that day my wife would not have been killed. The truck company should not have used a truck with a trailer that had to drive along the median strip to get into that driveway. It was reckless. That practice got out a double load, and made more profit. Everything is for profit.

CHAIR: Was that part of the demolition, removing the old buildings?

Mr WELCH: The spoil. Incredibly Ku-ring-gai Council had a traffic management plan as a standard requirement for demolition. It did not have that requirement for construction. Once this happened and Quentin Dempster got onto the former Mayor, Laura Bennett—and I have her statements here for the Committee to see—she did not say there and then that changes would be made, but that council had changed its requirements and flagmen were required. Around St Ives two flagmen are required outside properties where construction is going on. The council's requirements were pathetic. Even though the council rejected the development, the people they called in to represent them at the appeal against the developer—one of whom was a disbarred lawyer, I might add—were pathetic. I could find out all the things that they did not bother to find out.

CHAIR: Do members of the Committee have further questions?

Ms LEE RHIANNON: You described how you received a letter in August from WorkCover and then some time later WorkCover picked up the case. Can you explain why you think WorkCover changed its position and started to pursue the case?

Mr WELCH: Because of me, because I went to them and said that what your general manager has said to the Coroner obviously is a contributing factor in the fact that the Coroner would not hold an inquest, along with the police flawed evidence and the evidence of others, WorkCover then investigated. They put a man on that job. I think he was probably on it somewhere from about August 2002 up until, I was told, round about April of last year that charges would be laid, and I think the actual charges were laid one or two days before the statute of limitations. It is interesting in that period—and I know I keep getting back to other issues—when I was told of the charges being laid, the Chief Justice then retired and the Director-General of Planning NSW was removed. You figure that out for yourselves.

I want the Minister for Planning to resign. Do not have any doubt about that. My wife lost her head. The chief executive and the chairman of the National Bank have just resigned because of the debacle all over the National Bank's losses. Why should a Minister not resign when somebody's loses their life because of flawed legislation? This SEPP 5 policy is flawed. It is being abused by developers. The Government knows it; the Government is allowing it to continue because of the revenue they collect from it. They are in the pockets of the developers.

CHAIR: I am sorry but that is really not part of our terms of reference.

Mr WELCH: I know but I have got to get it out because where else am I going to get it out, Mr Nile?

CHAIR: I appreciate that.

Mr WELCH: I cannot get anybody to listen to me. After charges were laid the Coroner sent me a wad that thick of the investigation and when I read it, everything that I had assumed was spot on, incredibly. When I wrote to the Attorney General to, amongst other things, demand compensation for what I have lost, I have said that any damages that I get above what it has cost me, and something for the last 2½ years, will be donated to the Children's Hospital for research into cancer. That has been in the letter to the Coroner, the Attorney General and the Premier. I do not want to profit out of my wife's death. I do not want to lose because of it. Why should I have to spend my money because the Coroner in his letter to me said that the Coroner has to weigh up—I cannot think of the exact words—the personal versus the cost of running a coronial inquest. This Government is going to make \$500,000 in stamp duty out of that and WorkCover have told me that the builder could be fined up to \$500,000 and that goes to the Government. The Government could get the best part of \$1 million out of a flawed policy that has cost my wife her life.

CHAIR: We understand there is a lot of debate on what you are speaking about.

Mr WELCH: Mr Chairman, how do I get this out to a judicial inquiry? You are all members of Parliament, tell me?

CHAIR: There are avenues such as the Ombudsman's Office and others.

Mr WELCH: I have been to the ICAC and I got knocked back. I went to the Ombudsman, if I remember rightly. I will try again. I have been everywhere. I went to the unions. Unfortunately, and sadly, Andrew Ferguson's father had died at that time, so I could not get to him otherwise they might have been involved more. This is a disgrace. It is a disgrace and it is a blight on this Government.

CHAIR: You have highlighted a serious problem in those residential areas with contractors using these very large vehicles that were never intended to be used in those areas, when permission was given to have extra trailers attached to vehicles.

Mr WELCH: I am sure if any one of you had seen these trailers being driven along, you would have taken some action. The incredible thing is that people see things, and a lot of it happens when people are going to work.

CHAIR: Thank you for appearing as a witness and giving us your submission. Some things are not within our terms of reference but we can refer them on to other bodies for examination by them.

Mr WELCH: I hope you do. I am going to get in touch with the barrister, Mr Rosen. He might be the right person to help me take action. It is my present intention to sue the New South Wales Government and the NSW Police. I cannot sue the judge. The Judicial Commission of New South Wales has sent me a letter that is not true, and this involves nine judges, the top judges in the State—or they are amongst the top.

CHAIR: We will have to draw it to a close there. My only advice to you is to do all you can to maintain your own health.

Mr WELCH: My health has suffered. I got carted off to hospital twice.

CHAIR: This is obviously creating a great deal of pressure on you.

Mr WELCH: Of course it has.

CHAIR: You may need to work with some other people to give you advice and to assist you. Some other community organisations may be able to take on your case for you and make further inquiries.

Mr WELCH: Could you tell me who?

CHAIR: There are a lot of community organisations that act as advocates on community issues.

Mr WELCH: I do not want somebody that I do not know to come and tell me how to cope with the death of my wife. That is not going to do anything for me.

CHAIR: No, but to assist in examining some of your legal rights and so on. Thank you for appearing as a witness today. I know it is very difficult when you are dealing with such a personal matter.

Mr WELCH: I am coping, believe me, because of the anger I have got and because I am so determined that the people who are responsible will be brought out. It has been spoken about in here, because I have read the transcripts, how difficult it is to take action against corporations, and I understand that. I understand it is a different playing field between a small company and, for instance, this guy, who is responsible. And in America you have chief executives who are being paid megabucks now looking to face gaol terms. I have now learnt of the tort of misfeasance. I am pursuing it. I will pursue it vigorously and I hope that you people get that through to this Government.

CHAIR: Thank you again for appearing as a witness.

(The witness withdrew)

(Short adjournment)

HUGH McMASTER, Government and Commercial Services Manager, Road Transport Association, sworn and examined:

CHAIR: Mr McMaster, in what capacity are you appearing before the Committee—as a private individual or as a representative of the association?

Mr McMASTER: As a representative of the association.

CHAIR: Do you wish to make a brief opening statement to the inquiry?

Mr McMASTER: Yes, I do.

CHAIR: Would you proceed with your opening statement?

Mr McMASTER: Yes.

CHAIR: We were hoping that Mr Rod Grace would appear with you, but he is unable to attend.

Mr McMASTER: I apologise for that. He is in court at the moment. He was called at short notice.

CHAIR: We understand that.

Mr McMASTER: The New South Wales Road Transport Association, an industrial association of employers, which was founded in 1890, represents the interests of road transport operators in New South Wales. Our members are employers, principal contractors or subcontractors and they may be involved in all those roles. Most of our members are in what are called hire and reward categories, so they specialise in road transport. We also have a number of members who are known as ancillary operators, so their principal business is something other than road transport, and they engage in road transport as a subsidiary operation of their core business.

The industry is very large. The hire and reward sector in Australia is worth about \$10 billion in gross domestic product terms. The industry as a whole across the hire and reward ancillary sector employs 210,000 workers, has 400-odd thousand trucks, carries 1.5 billion tonnes of freight each year, travels 132 billion kilometres a year and is growing at around 1.3 times the rate of growth in the economy. So it is a very large industry. The nature of the industry, its size and the operational environment in which people work mean that it is inherently risky in the occupational health and safety sense. Most deaths and injuries in the industry occur on the road, which creates unique challenges for employers. They have no real control over the working environment while drivers are actually on the road.

There are many other variables that create the risk environment that drivers find themselves in. But, having said that, the level of road fatalities has fallen substantially in the last 20 years. It is important to understand why fatal accidents occur. The Australian Transport Safety Bureau said that in one in six accidents the driver of one vehicle did not see the other vehicle involved. In 11 per cent of accidents, sleep or tiredness was a major factor. Alcohol was responsible in over 10 per cent of accidents and drugs were responsible in almost 10 per cent of accidents. Speed was responsible for, or was the primary cause of, fatal accidents on only 6 per cent of occasions.

So far as the other main points in our submission are concerned, we see as one major weakness in the institutional structure the absence of a national occupational health and safety system. We would like to see the system cater for those large organisations that operate across State borders. We certainly encourage the Committee to recommend that that be pursued as a matter of urgency by Commonwealth, State and Territory governments. We strongly support the risk-based approach that underlines the current Act and regulations, and we urge that that framework be kept in place. We do not support industrial manslaughter legislation as recently introduced in the Australian Capital Territory. We think there are current provisions in the Act and regulations that can be pursued more vigorously if there are concerns in that area.

We support the retention of the primary role of the Roads and Traffic Authority and the police as far as on-road fatalities and injuries are concerned. Since we lost our submission, as you may know, the Minister for Industrial Relations, John Della Bosca, has issued a media release and an interagency agreement which reinforces that. I have a supplementary submission that I would like to table which makes reference to that. It is also important to note that there is a lot of very good work in areas related to workplace safety that has been carried out by the National Transport Commission, which is a Commonwealth agency that considers national policy as far as road transport is concerned. It is very difficult in an industry like ours in terms of policy development and strategies to avoid the critically important role played by transport agencies at the Commonwealth and State levels.

We certainly think that the summit convened by the Government in Bathurst last year in relation to occupational health and safety across all industries and the summit convened last year in Windsor in relation to transport provide a very sound basis for moving forward. I should also say that we are very proactive in bringing concerns in relation to road safety to the ear of government. We are also very proactive on the ground. We do a lot of training of drivers, managers and others in the industry. We are the successful recipients of WorkCover assist contracts. We had just been awarded one for 2004, and we see that as being critically important in trying to encourage an occupational health and safety culture in the industry that is better than what is in place at the moment.

Finally, we support the idea of the creation of a school-to-work career path for young people who want to enter the road transport industry. That is something sorely lacking at the moment. Another measure I want to raise in our submission that I have tabled this morning is to clarify certain facts regarding the level of truck driver deaths in the industry. At an appearance at the Labor Council three or so weeks ago I got the impression that the spokesman for the Transport Workers Union said that 958 truck drivers had been killed in accidents in the past five years in Australia. The Australian Transport Safety Bureau said that for the four years to 1999, which is the last statistics they have available, the number of deaths was actually 108. It is important to place that on the record. I have nothing further to say at this time.

CHAIR: In your latest submission dated 15 March you have responded to some of the matters raised by the union representatives. One of the propositions from Mr McClucken from the TWU was that, in regard to investigating accidents involving trucks, WorkCover should be involved on the basis that a truck cabin is a place of work and that the safety regulator of this State is there to look after workplace accidents. How do you respond to that proposition?

Mr McMASTER: We certainly agree that WorkCover has a role. We said so in our original submission. We said that the police and the Roads and Traffic Authority should be the primary agencies because of their role in terms of the development and application of road transport law. We believe that the media release issued by the Minister and, more importantly, the interagency agreement that was released at the same time reinforce their primary responsibility, but they do recognise that there are circumstances when WorkCover justifiably has the right and duty to investigate where there are concerns that say the driver has been driving excessive hours or there are other factors that in the minds of those responsible may have compromised that driver's ability to do his or her job in a safe and responsible manner.

As far as the cabin being the workplace, it is certainly our view that it is a place where work is carried out. The difficulty we find is that, as I said in my opening remarks, it is not possible for an employer to have any control over what goes on in the cabin of a truck while the driver is doing his or her job on the road or over the working environment surrounding the truck at a particular point in time. So a great deal of care must be taken in considering the implications of calling a road or the cabin of a truck a workplace. We broadly support the agreement that was released last week. We would like to know how it will work in practice. We have already written to the Road Freight Advisory Council chairman seeking further consultation about that.

CHAIR: On page 4 of your original submission you note in relation to industrial manslaughter legislation that part 2 of division 3 of the Occupational Health and Safety Act contains provisions that provide for a range of offences for failing to provide a safe workplace that you claim have not been used. Therefore, there is no need for industrial manslaughter legislation. Why do you think those offences have not been used and what can be done in that regard?

Mr McMASTER: I do not know the answer to that question. Perhaps the Committee may want to speak to WorkCover about that issue. Ultimately WorkCover is responsible for the administration of the legislation. It may be that there are drafting problems with resources. I do not know. I think it is a question best put to WorkCover. Should there be problems of that nature we would certainly be happy to engage constructively in any development of alternative regulations or legislation.

CHAIR: We will question WorkCover; I simply wondered whether you had any ideas about that matter.

Mr McMASTER: No.

The Hon. DAVID CLARKE: You have provided figures that show that between 1997 and 1999 some 33 per cent to 43 per cent of truck drivers were fully or partially responsible for fatalities involving a truck. Is that correct?

Mr McMASTER: They are the figures from the Australian Transport Safety Bureau. Yes, that is correct. By inference, the other party or no party is responsible for the balance of those accidents.

The Hon. DAVID CLARKE: Do you have any figures for how many of these fatalities involved another vehicle?

Mr McMASTER: No, I do not and I do not believe the Australian Transport Safety Bureau has done an analysis that links responsibility to the number of deaths.

The Hon. DAVID CLARKE: So conceivably we could have a situation where drivers other than truck drivers—between 60 per cent to two-thirds of all drivers—were theoretically responsible for the accidents.

Mr McMASTER: Yes, that is correct.

The Hon. DAVID CLARKE: Of the truck drivers who are fully or partly at fault, what percentage of them were owner-drivers and what percentage were employees? Do you have those figures?

Mr McMASTER: No, I do not and I do not know whether those figures are available. I will take that question on notice and ask the Australian Transport Safety Bureau whether it has those statistics.

The Hon. DAVID CLARKE: What percentage of all truck drivers are owner-drivers?

Mr McMASTER: I understand that it is about 40 per cent. I am basing that figure on my understanding of the proportion of Transport Workers Union members that I understand are owner-drivers as opposed to employees. I can try to get further information about that. It may be that the Transport Workers Union can also assist in that regard.

The Hon. DAVID CLARKE: In situations where fatalities have been caused fully or partially by truck drivers what major factors appear to be responsible for those accidents?

Mr McMASTER: I would suggest the major factors are those that are outlined on page 14 of the submission that we sent to the Committee on 25 February. I will read them out to reinforce what we said. Alcohol accounted for 10.8 per cent of all heavy truck accidents involving vehicles of more than 4.5 tonnes gross vehicle mass in 1999, which is the last year for which the Australian Transport Safety Bureau has done an analysis. Sleep and tiredness accounted for 11.2 per cent; did not see the other road user, 16.5 per cent; a misjudgement other than a misjudgement caused by speed, 6.8 per cent; excessive speed, 6 per cent; and drugs 9.6 per cent. They are the most common major factors in any accidents. It is important to point out that invariably there is more than one factor at play in an accident—for example, it could be speed and alcohol or a blackout and wind. We are dealing only

with the primary factor. It is also important to emphasise that this analysis was conducted following the completion of Coroner's investigations.

The Hon. DAVID CLARKE: Those contributing factors in accidents when the truck driver is fully or partially responsible amount to about 60 per cent of the total.

Mr McMASTER: Yes, that would be right. Of course, the partial responsibility may be very minor or quite significant.

CHAIR: Drugs and alcohol account for more than 25 per cent of all contributing factors. If a truck cabin was a place of work would that not help you to insist upon breath-testing drivers before they leave depots? Do you conduct drug and alcohol testing now?

Mr McMASTER: It is not the association that does the testing per se.

CHAIR: It would be the companies.

Mr McMASTER: We would encourage our members to ensure that the drivers they employ are fit for work every day. Our concern would be to ensure that those drivers are not impaired by alcohol, drugs, lack of sleep or by any other physical or medical condition that may compromise the driver's ability to do his or her job properly.

CHAIR: How many companies that belong to your association conduct breath testing or other inspections of drivers before they start a trip?

Mr McMASTER: I could not tell you. I would say that specifically in relation to breath testing there are very few. As far as general wellbeing, again I would say very few. The routine practice in the industry would be for the employer or the principal contractor, as the case may be, to provide written instructions to the driver as to their obligations as far as health and wellbeing are concerned. I will obtain further information for you, if you like, to clarify that statement.

CHAIR: That would be helpful, thank you.

Mr McMASTER: Certainly we do train a lot of senior management in a range of companies in this area so they appreciate their obligations and responsibilities as far as ensuring that they protect themselves and encourage drivers to protect themselves from the obvious risks associated with being under the influence or in poor health.

Ms LEE RHIANNON: If your members did accept that a truck cabin was a place of work, do you think it would change their attitude to the drivers and their wellbeing and safety on the road?

Mr McMASTER: I think the attitude of the employers and principal contractors is driven by a number of factors. The most important obviously is to ensure that the transport task is completed as safely and efficiently as possible. The last thing any employer wants to see is one of his or her drivers involved in a serious accident at all or killed or injured. They are also driven, obviously, by the need to ensure that the consignment they are carrying reaches the destination in accordance with the expectations of their client, so that it arrives in good shape and on time. So, the scheduling of the transport task takes place in those circumstances. One common problem in the industry is a lot of pressure can be placed on consignors, consignees and others in the transport chain to get this load from A to B in this time. There are numerous occasions when the expectations of clients are unrealistic. That puts the owner of the trucks on the spot. They can often face the threat of a loss of business unless they are prepared to accept a breach of the law in order to complete their transport task in accordance with the expectations of the client.

Ms LEE RHIANNON: Do you think that is why there is that argument that the cabin is not a place of work? Could that be a reason?

Mr McMASTER: No, I do not think so.

Ms LEE RHIANNON: I can imagine how some owners can think it and then shift their responsibility.

Mr McMASTER: The industry's caution is based on the ability of the employer in particular to exercise control over the work of the employee.. When a driver is driving, the best the employer can do is provide written instructions as to how it is up to the driver to comply with the relevant road transport laws that apply at all times, but he cannot actually sit in the cab and ensure he does it. The level of supervision, the level of control, is a lot different in the road transport industry than in most industries. I do not believe that the issue of whether a cab is a place of work or not a place of work has a lot to do with the level and extent of safety risk in the industry. I really do not. So, the responsibility of the owner of that truck really has to be to provide the appropriate instructions to the employee and to accept consignments on terms and conditions that should ensure that the driver completes the transport task in accordance with the relevant transport, road safety and occupational health and safety laws.

The Hon. CATHERINE CUSACK: Can I submit my questions in relation to the trucking industry and how we deal with bad drivers in the industry on notice?

Mr McMASTER: Certainly I would be happy to take those questions on notice from the members of the Committee.

(The witness withdrew)

JON BLACKWELL, Chief Executive Officer, WorkCover New South Wales; and

BERNADETTE GRANT, Director, Legal Group, WorkCover New South Wales, on former oath:

HAMINA ANNE CAMERON, Solicitor with WorkCover, and

KAREN LOUISE WILDERMOTH, Solicitor with the Commonwealth Director of Public Prosecutions, sworn and examined: and

RAMYA KUMARI PANAGODA, Solicitor with WorkCover, affirmed and examined:

CHAIR: Do you wish to make an opening statement in due course?

Ms CAMERON: No.

Ms WILDERMOTH: Yes.

Ms PANAGODA: Yes.

CHAIR: Mr Blackwell, do you want to make a statement?

Mr BLACKWELL: I want to make a statement of clarification. I am aware that the Crown Solicitor wrote to the committee in relation to giving information about who was dealing with what, and also about whether there were ongoing legal proceedings in relation to the various cases. Part of his letter says that the McGoldrick and Selinger matters are clearly not the subject of pending proceedings. I want to amend that: the Selinger matter is in fact the subject of proceedings by the parents. Perhaps, Ms Grant could elucidate on that matter.

Ms GRANT: Currently there are common law proceedings in the Supreme Court brought by the father against Sydney Fringe Festival, Fox Studios and one other party.

CHAIR: Is WorkCover directly involved?

Mr BLACKWELL: No.

CHAIR: Does anyone want to make an opening statement before questions? The committee appreciate your attendance. We understand the sensitive nature of some of these matters and are concerned with sub judice. We do not want to undermine or hinder the successful prosecution of matters. We know that you are solicitors and understand legal privilege is involved.

Ms WILDERMOTH: I started working as a solicitor with the WorkCover Authority in March 1994, but I am currently on two years leave without pay. I am employed as a senior legal officer with the Commonwealth Department of Public Prosecutions. I was last in the legal branch of WorkCover on 30 April 2003. Until October 2002 I was known as Karen Parsons for the information of the inquiry to avoid any confusion. I did not have carriage of the McGoldrick matter but I was doing the court list on 25 May 2001 when it came for a plea of guilty. I did that plea on that day. I was directed to attend that day by the principal legal officer because I already had another matter in court on that day and in accordance with standard procedures at the time. Obviously I will answer all questions that I am able to, and I hope that I can be of assistance to the inquiry, given my limited knowledge of the matter.

CHAIR: Do you know who had carriage of the McGoldrick matter?

Ms GRANT: Yes, it was Ms. Rosanna Parmigiani to whom I spoke the night before when she gave me the papers for it.

CHAIR: Is Ms Parmigiani present today?

Ms GRANT: Ms Parmigiani is no longer employed in the public sector.

Ms PANAGODA: I want to introduce myself. I was first admitted as a solicitor in Sri Lanka in 1976. Since then I was admitted in England in 1980 and New South Wales in 1984. During the past 15 years I have been involved in law enforcement and investigations. I have served as a solicitor with the Director of Public Prosecutions, the Royal Commission into the New South Wales Police Service, the Police Integrity Commission and the WorkCover Authority. I first joined WorkCover in May 2001 as a solicitor in the criminal law practice group. I have appeared as an advocate in Local Courts, the District Court, the Industrial Relations Commission and the Coroner's Court. In relation to the present inquiry, I have the carriage of the following three matters: the death of David Selinger, the death of Lola Welch and the death of Chun Lin at the University of New South Wales.

Ms LEE RHIANNON: Ms Panagoda, in relation to the death of Ms Welch an article appeared in the *North Shore Times* that referred to, I take it, the former general manager of WorkCover?

Mr BLACKWELL: Yes.

Ms LEE RHIANNON: The letter that was dated 29 July said that WorkCover could not pursue that case, citing issues to do with jurisdiction and occupational health and safety. However, in September 2002 WorkCover commenced investigations. What happened in that period to bring about that change?

Ms PANAGODA: I have seen that letter on the file but at that stage this matter had not reached the legal section of WorkCover. So any questions that I answer have to be from the time the file reached the legal section of WorkCover. I would not be able to assist the committee for the policy change in the decision by the inspectorate to appoint a person to investigate the matter.

Ms LEE RHIANNON: When were you given carriage of the Welch case? Where is the matter up to at the present time?

Ms PANAGODA: I was given carriage of the matter when it reached the legal group, the prosecution unit and that was approximately September 2002. It came by way of a case conference situation. A case conference is when we assist the investigating inspector to compile the legal part of a file. Since then it has come through and currently the matter is in court listed for hearing in June 2004.

Ms LEE RHIANNON: Why was it thought not to be under the jurisdiction of WorkCover but now is?

Ms PANAGODA: I would not be able to answer that because I did not take part in that decision-making process.

Ms LEE RHIANNON: Mr Blackwell, can you assist the committee on that matter?

Mr BLACKWELL: Clearly there was some debate at the beginning of the process as to whether this was a police matter or a WorkCover matter, about which we have already given evidence. Subsequent to that, Mr Welch, as you have heard this morning, became involved and raised the issue with us and subsequent to that there was an investigation conducted. The investigation was conducted and completed and then handed over to the legal group.

Ms LEE RHIANNON: Could you explain how the change occurred?

Mr BLACKWELL: May I suggest that this afternoon John Watson will be giving evidence and it might be more appropriate for him to deal with it?

The Hon. CATHERINE CUSACK: Does WorkCover refer the decision of jurisdiction to someone other than its solicitors?

Ms GRANT: As part of the recommendation of the investigation file to the legal group there could be a recommendation as to jurisdiction.

The Hon. CATHERINE CUSACK: We heard this morning that a clear decision had been made prior to the file being sent to the legal group.

Ms GRANT: What we are saying in the Welch matter is that a decision was taken initially that we were not involved in, that it was a police matter. Subsequent to that, there was a change in that decision, which resulted in the investigation being completed and then referred to the legal group.

The Hon. CATHERINE CUSACK: I understand that. I want to be clear that the initial decision about jurisdiction was made without reference to the legal group.

Ms GRANT: I would have to look at the file. I can only rely on what Ms Panagoda is saying, since she had the conduct of the matter. Perhaps we can answer that more fully this afternoon.

The Hon. DAVID CLARKE: Did Mr Welch come forward with any information that you did not have that necessitated your reassessing the matter?

Mr BLACKWELL: Again, this issue was dealt with in the Occupational Health and Safety Division prior to transfer to the legal group. I think it would be better for us to answer that question this afternoon when John Watson, who was involved in the whole case, could give you more information.

Ms GRANT: We also need to be careful that we are not touching on issues that may be protected by legal professional privilege.

Ms LEE RHIANNON: I will move on to the David Selinger case. Did the Coroner make any comment on the recommendations of WorkCover not to prosecute this case?

Ms PANAGODA: Yes, she did, on the first day.

Ms LEE RHIANNON: What was the comment?

Ms PANAGODA: I am going on memory at this stage, without looking at a transcript. She said that she did not agree with the WorkCover inspector's recommendation.

Ms GRANT: Could I clarify one point before we go on, because I think it is important? It was not a recommendation to prosecute. The Coroner was commenting on the recommendations made by the inspector in her brief to the Coroner. There is a difference. It was not a recommendation to prosecute. It was a recommendation arising out of the investigation and the brief to be provided to the Coroner.

Ms LEE RHIANNON: Was not the recommendation not to prosecute?

Ms GRANT: No.

Ms LEE RHIANNON: Would you explain what the recommendation was?

Ms GRANT: I have not got it in front of me at the moment. I think the inspector's recommendation dealt with the investigation. It was intended to assist the Coroner for the purposes of any coronial proceedings. I think you addressed this on the last occasion that I was here. The Coroner did make certain comments at the conclusion of the first day of the inquest about the investigation.

Ms LEE RHIANNON: Ms Panagoda, as you had carriage of this case, did you make the decision not to prosecute?

Ms PANAGODA: No, I did not make that decision. Advice from a barrister was obtained. The barrister was briefed on the matter and the general manager's briefing note was prepared—

Ms GRANT: We are touching on issues that will be the subject of legal professional privilege. This is advice from counsel to WorkCover.

Ms LEE RHIANNON: I thought the Committee was able to pursue process issues.

Ms GRANT: The government guidelines for public servants appearing before committees require us when we are in doubt to take a question on notice and seek the advice of the Crown Solicitor. This question may well fall within that category.

CHAIR: Why do you think that is the case in this matter?

Ms GRANT: I think Ms Panagoda was referring to advice from counsel. Counsel represented WorkCover during the course of the inquest. He provided certain advice to WorkCover, which is covered by legal-client privilege.

Mr BLACKWELL: It is not our privilege to waive.

CHAIR: The counsel was someone engaged by you, not an employee of WorkCover?

Ms GRANT: No, it is a barrister.

The Hon. CATHERINE CUSACK: Who is the client?

Ms GRANT: WorkCover.

The Hon. CATHERINE CUSACK: Do you say you cannot waive the privilege?

Ms GRANT: I am not able to waive that privilege.

Mr BLACKWELL: It is only the person who provides the advice who can waive the privilege. It is not ours to waive.

CHAIR: The Crown Solicitor's advice is that the waiver of any such privilege that might exist is a matter for the client, not for the legal practitioner.

Ms GRANT: That is correct.

CHAIR: You do not believe that you can waive it?

Ms GRANT: I am certainly not in a position to waive it.

CHAIR: You do not wish to?

Ms GRANT: I am not in a position to; it is not my privilege to waive.

The Hon. DAVID CLARKE: Who is in a position to waive it?

Ms GRANT: I think that that the ultimate decision would reside with John Blackwell as the Chief Executive Officer who, pursuant to the Act, has the day-to-day responsibilities of running WorkCover, and he would take advice in relation to that matter.

The Hon. DAVID CLARKE: Mr Blackwell, do you have a view on whether you wish to waive that privilege or not?

Mr BLACKWELL: My view would be that I would not waive it without consulting with the person who gave the advice.

The Hon. DAVID CLARKE: That is the barrister. Who is the barrister?

Ms GRANT: Paul Lakatos.

The Hon. PETER PRIMROSE: You said that, according to the Premier's guidelines, if the Committee wished to pursue the matter you would take the matter on notice.

Ms GRANT: Yes, and seek the Crown Solicitor's advice.

The Hon. PETER PRIMROSE: I would assume that if the Committee wished to press the matter that is the course you would follow.

Ms GRANT: I think that is the preferred course.

CHAIR: Would you take that matter on notice?

Ms GRANT: Yes.

Mr BLACKWELL: What is the actual question?

CHAIR: Ms Lee Rhiannon, would you clarify your question?

Ms LEE RHIANNON: It is about the decision not to prosecute in the case of the death of David Selinger. I would like to continue with the line of questioning.

CHAIR: Ms Grant, do you understand the point that Ms Lee Rhiannon is making?

Ms GRANT: I can appreciate that the question relates to the reasons for deciding not to prosecute.

CHAIR: It was based on the legal advice you received?

Ms GRANT: Yes.

CHAIR: That is the answer to the question.

The Hon. DAVID CLARKE: Was your decision not to take any further action based on that advice?

Ms GRANT: It was not my decision. There was consultation between myself and John Watson as director of service delivery in the Occupational Health and Safety Division. The decision was taken not to proceed.

The Hon. DAVID CLARKE: Based on the advice by counsel?

Ms GRANT: Taking that matter into account.

The Hon. DAVID CLARKE: Based on the advice or taking it into account?

Ms GRANT: I think it would be fair to say taking it into account.

Ms LEE RHIANNON: Ms Panagoda, are you aware if any part of the Occupational Health and Safety Act was breached when David Selinger died at Fox Studios?

Ms GRANT: Again, it is getting very close to a claim of privilege. You are asking a solicitor in the employ of WorkCover to express a legal opinion as to certain facts.

The Hon. DAVID CLARKE: Are you claiming privilege?

Ms GRANT: I would like to take that question on notice and seek the advice of the Crown Solicitor.

Ms LEE RHIANNON: When WorkCover decides not to prosecute any person or company over the death of a person, are you obliged to inform some other authority? If you decide not to proceed, does it stop there or does a process kick in and another authority picks it up?

Ms PANAGODA: I think it is a policy decision of the organisation.

Ms GRANT: Can I assist? In the case of David Selinger, and also involving another case of the big day out where the child Jessica Milicic was killed, an intergovernmental agency working party was established to look at these issues of public safety and how best to deal with tragedies that occur which have a tenuous link to employment but do require the government to have a position on it. That working party is still under way and yet to come to a final view on the relevant matters. So, as a direct result of the Jessica matter, this governmental working party was established and, obviously, after the David Selinger matter occurred, that matter is on the agenda for discussion.

Ms LEE RHIANNON: What is the statute of limitations for the prosecution of this case?

Ms PANAGODA: The normal statute of limitations is two years from the date of the accident, but because it has gone to the Coroner's Court, if occupational health and safety breaches arise from there then we get an extension of another two years from the date of the coroner's findings.

Ms LEE RHIANNON: If I could conclude on that matter. Maybe you could take the question subject to privilege, but if we could get the response to the coroner's comments on this case.

Mr BLACKWELL: I think that is a question we have already got on notice, and we will be providing that later today.

CHAIR: In regard to the case you mentioned, Ms Wildermoth, you stated you were briefed over the telephone the evening before the sentence hearing in relation to the Dean McGoldrick matter. Do you believe you were adequately briefed?

Ms WILDERMOTH: I was briefed in person the night before, after the diary meeting, and the principal legal officer had decided that I would be attending that matter as well as my own. I spoke to Ms Parmigiani in person. I went to her office. She provided me with the file and her instructions, and also the documents that I would need to tender to the court—the statement of facts and photographs or any other documents that I needed. I took those and read the documents that I would be tendering in court, and made sure the dates and everything were correct on all the documents. I do not recall having any further questions of her. She was certainly available if I needed her. But I did not have any more questions. The following day I took both my matter and her matter down to the court and proceeded with them on that day, 25 May.

CHAIR: Could you restate the original reason she was not there? Was she in another case in another court?

Ms WILDERMOTH: I understand that is the case. I am not sure what was in her diary, and I cannot recall, because my diary just notes that she was unavailable. I had one already, and the principal legal officer would decide then the best use of resources, and it was in that case that I would do both of them on the day. That was in accordance with the procedure we had at the time, which was based on best resources in the court, so that other officers could attend to other matters in other courts.

CHAIR: I suppose it is more of an opinion, but do you think the sudden appearance of another solicitor upset the McGoldrick family? Did they understand what was happening when you suddenly appeared as a new person?

Ms WILDERMOTH: As far as I remember, I did not feel that that was an issue, from my perspective. And I certainly cannot speak for anybody else. I have been trying to recall that day, and I do remember things of that day. I do remember the family were there and various other parties, which was unusual, but not always in the case of a fatality, which was why I made special note of that before I went down there. I have attended many coronials over quite a number of years, and I do take special care to be as sympathetic and as understanding as I can and to explain the process if there are any questions. I just don't recall that there were any difficulties arising on the day.

CHAIR: I suppose it is difficult to ascertain what the sentence could have been or might have been if the original solicitor had been present. Would that have had any bearing on the outcome of the sentence? Might it have been a heavier sentence?

Ms WILDERMOTH: My personal view is that it did not make any difference. It was common for it to happen that other solicitors would appear, and everything was arranged well advance of that: the statement of facts had been settled, there was a plea of guilty. I do not recall there being any issues arising. Sometimes there are. I looked at my notes, and there were not any there. Sometimes there are issues, for instance defendants might challenge something, or say they don't want to agree to what the prosecutor wants to put before the magistrate. In that case, it is my duty and my responsibility as a capable and efficient solicitor: I had the file there and then I deal with any matters arising, and I can answer any questions, for instance, saying that, "No this has been agreed; this matter is going before the magistrate and you haven't made submissions to the contrary," and to deal with it. If ever a matter arose that I could not deal with, I could certainly stand the matter down the list, inform the magistrate that there was something that needed to be resolved. Ms Parmigiani was contactable, and I could have spoken to her and got any further information that I needed. But I do not feel that it made any difference. If that was the belief, then certainly it would have been our standard procedure to do that. I think over the years we would have realised that, if there is a difference, we certainly would not have done it that way. We would have made sure there was a different way of doing it.

Ms GRANT: Can I just say that since August 2002 fatality matters are no longer brought in the CIM, so this problem would not have occurred again.

CHAIR: Are there any further questions?

Ms LEE RHIANNON: I would like to ask a few more questions of Ms Wildermoth. What is the process for deciding whether or not to prosecute a matter? Does that rest with you, or at what point do you come into the process, or is it part of a team decision?

Ms WILDERMOTH: I can only speak for the time I was there, and I was last there in April 2003. Prior to that time, I understood the procedure to be that, in matters of a fatality, or any matters brought before the Industrial Relations Commission, where that was the recommendation of the inspector, all matters would go through the principal legal officer, who would make that final decision. And all matters in which there was a fatality or an IRC matter, or a matter where the defendant was an individual or a one-man company, that we had received directions internally that there had been decisions made in the IRC which required penalties which were quite low. So, if there was a recommendation from the inspector that said they want to take it to, for instance, the Chief Industrial Magistrate's Court, and we did not agree with that, or conversely the Industrial Relations Commission and we did not agree with that, all those controversial matters, or matters on which there was not agreement, would go through the principal legal officer. And matters where the inspector recommended the Chief Industrial Magistrate's Court, what we considered were routine matters, where there was an injury but no fatality, those matters would be commenced by the individual legal officers.

Ms LEE RHIANNON: Are there any written guidelines to help you with that work?

Ms WILDERMOTH: At that time, as far as I am concerned, there was a general policy for prosecutors in place—I had also a folder that I had used over many years—that a principal legal officer would issue a memorandum or an update that in future these particular matters, for instance any fatality matters, would not be filed until they had been approved by the principal legal officer.

Ms LEE RHIANNON: Was the chief legal officer's decision subject to review when there were differences?

Ms WILDERMOTH: From what I recall, if there was a difference of opinion it might have involved meetings with the manager of the occupational health and safety division and the inspector involved just to discuss the issues—their views and our views from a legal point of view. That was also a decision made by the principal legal officer.

The Hon. DAVID CLARKE: I refer to the Welch case. You indicated that Mr Lakatos' advice was a matter taken into account in deciding not to prosecute.

Ms GRANT: Yes.

The Hon. DAVID CLARKE: So you took other matters into account.

Ms GRANT: Yes.

The Hon. DAVID CLARKE: Can you say what they were?

Ms GRANT: No, I would like to take that question on notice.

The Hon. DAVID CLARKE: Can you do that?

Ms GRANT: Yes.

The Hon. CATHERINE CUSACK: Was that the Welch case or the Selinger case.

Ms GRANT: We were talking about the Welch case.

Mr BLACKWELL: Selinger is the barrister.

The Hon. DAVID CLARKE: What was the matter involving Mr Lakatos?

Ms GRANT: Selinger.

The Hon. CATHERINE CUSACK: Are you aware of documentation of those decision-making procedures?

Ms GRANT: Yes. The compliance policy and prosecution guidelines have just been updated on our web site. It sets out all the considerations that WorkCover takes into account in deciding to prosecute a matter. Those guidelines are in line with the Director of Public Prosecutions' guidelines and the Environmental Protection Authority guidelines.

The Hon. CATHERINE CUSACK: Do those guidelines cover the responsibilities of the different officers when there is an internal disagreement?

Ms GRANT: Not as such. The guidelines set out the particular matters taken into account, such as public interest and so on. There is an internal process. Ms Wildermoth would not know about it because she has been out of the organisation since April last year. When I arrived in August 2002 she was in the legislative advisory area and came back towards the end of 2002. She was back in the branch for a relatively short time after my arrival. The decision to prosecute is taken in consultation between me and the director of service delivery. If we disagree on any points, the matter is then escalated to the respective general managers of corporate governance and occupational health and safety. If there is still no meeting of minds, the matter goes to the chief executive officer for decision.

The Hon. CATHERINE CUSACK: Does that happen often?

Ms GRANT: No, generally we reach agreement. In the main we accept the inspectors' recommendations. We have a careful look at the papers to see whether there is sufficient evidence for a prima facie case and whether it matches up with the alleged offences, and then come to a view. In the majority of matters we agree with the recommendation to prosecute. However, there have been occasions when we have disagreed or recommended additional charges.

The Hon. CATHERINE CUSACK: Would you call that case conferencing?

Ms GRANT: In fatality matters a process has been in place since the establishment of the fatalities unit on 30 September 2002 that we get involved in within 24 hours of a death. A form comes through to me and I assign the matter to a solicitor. That solicitor makes contact with an inspector and the case conferencing process gets underway. In fatality matters we have solicitor in there right from the beginning providing assistance in case management.

The Hon. CATHERINE CUSACK: But not in this case.

Ms GRANT: That was prior to September 2002.

The Hon. CATHERINE CUSACK: Are those procedures documented?

Ms GRANT: No, they are not. However, we responded that in our questions on notice.

CHAIR: Are there any cases in which you have decided to prosecute and been overruled by the next management level?

Ms GRANT: No, I cannot recall any matter.

Mr BLACKWELL: All the fatality matters come to the CEO regardless of the recommendation.

CHAIR: Have you or any of your predecessors overruled any recommendation?

Ms GRANT: No.

The Hon. CATHERINE CUSACK: That is post September 2002.

Ms GRANT: Yes. The fatalities unit was established on 30 September 2002.

The Hon. CATHERINE CUSACK: That was obviously with a view to improving procedures.

Ms GRANT: Yes. It was in recognition that all facilities matters must be commenced in the Industrial Relations Commission and the serious nature of the matters.

The Hon. CATHERINE CUSACK: What was the date of the Jessica matter to which you referred?

Ms GRANT: I think it occurred at the Big Day Out in 2001.

The Hon. CATHERINE CUSACK: I am trying to get a feel for the issue of public deaths or recreational incidents, or any references to these incidents in other than occupational health and safety language. It is contentious. Is the intergovernmental committee making progress or has it bogged down?

Ms GRANT: I am not in a position to answer that at the moment. Perhaps we can come back to that.

The Hon. CATHERINE CUSACK: It is in its third year of hearings.

Mr BLACKWELL: It has been meeting for only a year. We can provide more detail this afternoon.

CHAIR: You were saying that you usually follow the advice of inspectors.

Ms GRANT: It is escalated to a more senior level; that is, to the team manager. All the inspectors' files that come to us are not simply left with the inspector; they go to the team coordinator, team manager and then to us.

CHAIR: Is there any case in which the solicitor investigating or handling the case has made a recommendation to prosecute and it has been overruled?

Ms GRANT: That could happen in theory, but I do not recall it happening in practice.

CHAIR: Victim impact statements are used in courts before the sentencing hearing. Is that procedure followed?

Ms GRANT: We are implementing a process now. We have some matters coming up in April and throughout 2004. We will make contact with families and offer them an information pack. I will have a discussion with them to explain the process, and if they want assistance in preparing a statement we will make counselling available.

CHAIR: I commend you for that.

Ms LEE RHIANNON: Did you have carriage of the Chun Lin case?

Ms PANAGODA: Yes, I did.

Ms LEE RHIANNON: What is the current status of those investigations?

Ms PANAGODA: It is an archive matter in the legal section. I cannot comment about that.

Ms LEE RHIANNON: So it is a closed case.

Ms GRANT: We received counsel's advice last week and we are considering it.

Ms LEE RHIANNON: Whose advice did you get?

Ms GRANT: We sought advice from Peter Skinner, a barrister.

Ms LEE RHIANNON: What advice was that?

Ms GRANT: The inquest was discontinued and the papers were referred to the Director of Public Prosecutions. The DPP's office advised in February that it would not be laying any charges under the Crimes Act. Therefore, the file came back to WorkCover for consideration. At that time we sought further advice from Peter Skinner and we received it last week. We are considering the matters he has raised.

Ms PANAGODA: May I correct my previous reply? I am aware that we referred it to Peter Skinner for advice.

Ms LEE RHIANNON: Going back to the case itself, which is when you had carriage of it, what did the police recommend?

Ms PANAGODA: I would not be able to tell you exactly what the police recommended because I do not have the police brief provided to me. The only thing I can say is that it went to the Coroners Court and then there was no WorkCover brief. WorkCover did not do a brief in this matter.

Ms LEE RHIANNON: Why was that?

Ms PANAGODA: I was provided with a brief.

Ms GRANT: Perhaps we could take that question on notice and come up with a response.

Ms LEE RHIANNON: Were any statements taken from witnesses?

Ms PANAGODA: No, there were no statements taken by WorkCover from witnesses as such. There was just a report, not a report, just a status report from the inspector?

Ms LEE RHIANNON: Is it usual not to take statements from witnesses?

Ms PANAGODA: If we were providing a report to the Coroner, it is not usual because we have to have the complete file sent to the Coroner. In this instance I think WorkCover did not take up the matter. I cannot answer why WorkCover did not take up the matter that has been answered by the occupational health director.

Ms GRANT: I might be able to assist. I think there was a decision taken that this, because of the particular facts, was not an occupational health and safety issue. It was a dangerous driving matter, and viewed by the police as such. The fact that the coronial inquest was run along those lines, and the Coroner terminated it and referred the papers, would endorse that approach. The fact that it has now come back to us and we have sought and obtained council's advice, and we are considering what we need to do from this point onwards.

CHAIR: We understand, from previous evidence, that this was a grey area as to who was responsible, the RTA, police or WorkCover.

Ms GRANT: The actions of the Coroner would support the WorkCover approach.

Mr BLACKWELL: There was a referral to the Director of Public Prosecutions.

The Hon. CATHERINE CUSACK: Using the Selinger case as an example, what is your interaction with the Coroners Court? Can you explain to us how WorkCover might or might not make a submission and then what happens with the recommendations?

Ms PANAGODA: When that happens at a workplace the inspector assigned to the matter will prepare, first of all, a Coroner's brief and send it to the legal section and at that stage I will look at the brief and forward it to the Coroners Court. That is a WorkCover Coroner's brief. Then, if the inspector thinks there are occupational health and safety breaches he will prepare another brief and recommend prosecution and send it to the legal section, and I will handle that as well. But that is going to be to another court in a different area. When providing the brief I write to the Coroner to inform us whether there will be an inquest or any details about the matter, whether it is going to be dispensed with or anything. In due course the Coroner will contact us and let us know whether there will be an inquest and, if so, the date that it is scheduled. Then we brief a barrister to appear for us and I will instruct and appear for the Coroner's hearing. That is what has happened with the Coroner's part of it.

The Hon. CATHERINE CUSACK: In the case of David Selinger, WorkCover was represented throughout the coronial inquiry?

Ms PANAGODA: Yes, it was represented.

The Hon. CATHERINE CUSACK: Then the Coroner makes recommendations and you take those recommendations, you read them?

Ms PANAGODA: Yes.

The Hon. CATHERINE CUSACK: Was it your responsibility in that case to analyse those recommendations and provide advice back to WorkCover?

Ms PANAGODA: Yes, I would provide it to the executive via a briefing note.

The Hon. CATHERINE CUSACK: Did you feel any of those recommendations related to WorkCover?

Ms PANAGODA: In Selinger's case the final recommendations did not highlight WorkCover, but it was true of the hearing that issues came out.

Ms GRANT: We are touching on issues that are truly the subject of legal professional privilege. You are asking Ms Panagoda to express legal opinion as to the basis of the recommendations. We are certainly happy to talk about the facts contained in the Coroner's finding, but to take the next step and to ask her to express a view as to where that leads is delving into the area of legal professional privilege. We might be able to answer the question if it is phrased differently.

The Hon. CATHERINE CUSACK: My question was whether any of those recommendations related to WorkCover.

Ms GRANT: The answer to that is no, and as part of our answer to questions on notice we will provide a copy of the Coroner's findings.

The Hon. CATHERINE CUSACK: Other action in other courts can go on simultaneously with the coronial inquiry, is that right?

Ms PANAGODA: Yes.

The Hon. CATHERINE CUSACK: Does everything stop, or does it wait?

Ms PANAGODA: No, it depends on the matter. There are instances when both go together, especially when the limitation period is approaching. I have had instances like that. But if the Coroner's Court is happening next month and the limitation does not expire until next year I would not rush to file the pleadings now, I might as well wait until next month and finish the Coroners Court, then file the pleadings for the other proceedings.

Mr BLACKWELL: There is a convention, if you like, that we would normally wait for the coronial process to be completed. It is not legally necessary, but we would normally do that.

The Hon. CATHERINE CUSACK: In terms of the role of the coronial inquiry, that is not necessarily getting the 10 Commandments on how to manage a case, is it?

Ms GRANT: It is an investigation in other words. From my discussions with Mr Abernathy, the State Coroner, he sees great value in the coronial process being completed before any prosecution action is taken because it has the opportunity to advance the evidence and have additional evidence produced and considered. Certainly, his approach is that we should wait, where possible, under the outcome of the coronial investigation, although the Coroner reserves the right, when they get the police brief as well as the WorkCover brief, to refer directly to the Director of Public Prosecutions for consideration, that has happened with one of our matters during the past week.

The Hon. CATHERINE CUSACK: I have been reading the report of the coronial inquiry on another matter, which took the opportunity to clarify the role of the Coroner. My understanding is that is very much about establishing facts and gleaning evidence. But the recommendations themselves should not limit any organisation on how they follow them up.

Ms GRANT: They have an education function, apart from establishing manner and cause of death. The Coroner has no power to make recommendations in relation to prosecution.

CHAIR: In regard to cases that you have been proceeding with, the Coroner has made recommendations that he should have the power to force witnesses to answer questions without the answer being used in any criminal proceeding. Would that assist the work of the inquiry if those changes were made to the Coroner's powers?

Ms GRANT: It is the power that is vested in our inspectors when questioning witnesses. They have the power to compel people to answer questions, but the answers cannot be used in any subsequent criminal proceedings. The benefit of that line of questioning is that it throws up issues that can be further investigated. Are you asking me for a policy position?

CHAIR: Yes, whether it would assist WorkCover in cases when the Coroner—

Ms GRANT: I am sure the Attorney General would have a position on this, it is probably inappropriate for me to express a view. I can just say that in terms of the process in terms of our inspectors and their investigations, it provides an opportunity to open up inquiry.

CHAIR: I was asking you whether it would assist WorkCover in its work interests in prosecuting cases if the Coroner could provide you with that information, if he had the power. Would that assist you?

Ms GRANT: The answer is yes, because in terms of our inspectors that process is very useful.

CHAIR: As we have three solicitors with us, is there anything you want to suggest we should do or recommend any thoughts you have that would assist us as a Committee?

Ms GRANT: It is a very hard for us to answer.

Ms LEE RHIANNON: This morning we heard from a number of relatives of victims. I assume that in your work you would come into contact with the victims' families. In the WorkCover cases that you have been involved with, who informs relatives that their case is before the court and any other progress to do with that? The Committee would be interested in hearing from the three of you how that process works and how it can be improved.

Ms GRANT: I suggest that Ms Cameron might answer that question, because she has the conduct of the Exner matter, the Jardine matter and the Hampson matter. She has all the main matters in her practice at the present time, so she can probably speak about her contact with the families.

Ms CAMERON: In relation to the Jardine matter, I spoke to Mrs Jardine this morning and advised her in relation to the fact that the Industrial Relations Commission had issued orders for three defendants to appear before the court arising from the accident involving her husband. I advised Mrs Jardine that I would be in contact with her again following the next court date to advise her of the outcome. So there is regular contact with the family to advise the status of the matter in court and what will happen next.

Ms LEE RHIANNON: For the three of you, was that just something that you took on, or is it stipulated in the guidelines as part of your work?

Ms CAMERON: It is part of the guidelines.

Ms WILDERMOTH: I can only speak for earlier times. The general prosecution policy referred to contact with regard to coronial matters. I always understood that it was each individual officer who had contact with the family. I know that for myself, attending coronial inquiries I would meet the family and sometimes I would get to know them to some degree. In one case I had telephone calls up to three years after the matter was finished. He had questions for me, and I answered them as best I could. It helped him understand a few things about the process.

As far as WorkCover is concerned, I have always understood that officers individually dealt with families. Originally there was a booklet that was given out, and then there were new directions being agreed upon regarding victim impact statements. In the past that was the procedure, and that is the way I have always worked since the mid-1990s. But I cannot speak about the present system.

CHAIR: Ms Panagoda, with regard to your handling of cases have you had similar contact with relatives?

Ms PANAGODA: Yes. I personally meet the families at the Coroners Court. On some occasions the solicitor for the family is also present in court, so it is always through the solicitor for the family. I introduce myself, give them my business card, and they ring me and ask for information. I always tell them that they can ring me and ask anything they want to know about the case. That happens almost every time I attend the Coroners Court.

(The witnesses withdrew)

(Luncheon adjournment)

NICHOLAS RICHARD COWDREY, QC, Director, Office of the Director of Public Prosecutions New South Wales, 265 Castlereagh Street, Sydney, affirmed and examined:

CHAIR: Thank you for agreeing to appear before the Committee. In what capacity are you appearing before the Committee—as a private individual, or as a representative of an organisation or business?

Mr COWDERY: As the Director of Public Prosecutions.

CHAIR: Do you wish to make a brief opening statement prior to questioning?

Mr COWDERY: Not an opening statement, as such. I received a letter of invitation to appear before the Committee and that has identified at least two areas where I can give some information.

CHAIR: One of the issues that the Committee has been examining of those that were raised in correspondence with you was the adequacy of the current manslaughter laws in prosecuting employers following an industrial fatality. Can you comment on that issue?

Mr COWDERY: Yes. The law of manslaughter in itself I think is not in need of amendment to be appropriate to workplace fatalities. The offence of manslaughter comes from the common law. We have recently had a review of the offence of manslaughter conducted by the Hon. Mervyn Findlay, QC, who addressed a number of aspects of the offence. I do not see a need for any amendments to the offence itself. It seems to me in the context of workplace deaths that the issue is rather the question of who can be made liable under that law. While it is clear enough that individual persons can be, and have been, prosecuted for manslaughter for deaths occurring in the workplace, there are many more uncertainties about the liability of a body corporate for the offence of manslaughter. Indeed in this State, my researches have been unable to uncover any case of a prosecution of a body corporate for manslaughter for deaths arising in the workplace, or any successful prosecution of an individual for manslaughter. But I do not think that that highlights a fault with the law of manslaughter in itself; rather, it shows that some consideration perhaps should be given to making corporations responsible for gross negligence occasioned to a worker. That is a very vexed question.

It is something that has been the subject of consideration in dispute for many years in this country, in the United Kingdom, in Canada, in the United States, in the common law world and indeed, in some continental systems including Italy. As yet, nobody has a very good outcome to pursue from all of those discussions. I see in evidence before the Committee from Mr Rozen a very good analysis of the issues that are raised. The problem is that the corporation can act only by its agents, its officers, its employees, and its contractors. The difficulty is in sheeting home the gross negligence, if it be gross negligence, of an actor in the corporation to the body corporate itself, and that is where the law has been at a considerable difficulty for a very long time; in fact, I venture to suggest ever since corporations, certainly in the commercial world, were brought into existence. It is an area that I think would benefit from examination by a body such as the Law Reform Commission. As you probably know, the Law Reform Commission recently published a report on the sentencing of corporate offenders, report No. 102. But the criminal liability of corporate offenders for serious criminal offences as opposed to regulatory offences would perhaps benefit from such a study.

CHAIR: The other matter I would like to ask your advice about is that the evidence the Committee has had from WorkCover reveals that it has referred four matters to the Director of Public Prosecutions [DPP] for possible prosecution, one of which went to trial at which the judge found there was insufficient evidence to go to the jury and the charge was dismissed. In the other three cases the DPP decided not to proceed to trial. As you would know from the work of this Committee, there is widespread concern in the community that when there are serious injuries and fatalities, someone should be prosecuted. Can you indicate in your response why you were unable to proceed, or what improvements are needed in the law to assist you, or improvements in the evidence that may be needed? After all, you obviously can only act on what you are given. You are not the investigating officer.

Mr COWDERY: That is right.

CHAIR: Is there some deficiency in what people are handing to you in those matters?

Mr COWDERY: Can I preface my answer to you in this way: my office receives, on present figures, about 17,000 matters a year. Most of them come from the police but we do get referrals from other investigating agencies and other bodies. Indeed, there is no reason why a private citizen cannot refer a matter, subject to formal requirements. I am not inviting people to do that.

CHAIR: There would be a jump from 17,000 to 50,000.

Mr COWDERY: Indeed. We already get a lot of representations from members of the public which we deal with anyway. In the area of workplace deaths and serious injuries, referrals come from the police, from the Coroner, and on occasions they have come from WorkCover. You are aware, I know, that in January of this year I signed a protocol with WorkCover and the police about the conduct of investigations and the referral of matters to my office. But the matters that I am going to talk about predate the protocol. The cases that I am going to mention do not highlight to me any need for a change in the law in any respect. In my view, the law is clear enough. The prosecution guidelines which we follow in the office are clear enough and available on our web site and the tests in guideline 4 are the tests that would apply whenever a matter is submitted to us for consideration for prosecution. Those tests have been tried and tested over a long period of time and are quite satisfactory, in my view.

The invitation to appear before the Committee was received in my office last Thursday, 11 March, so we have had a rather short time to make investigations in the office to see what information we can provide in answer to the questions that you have asked. In that time we have been able to identify seven matters which would fall into the category of workplace deaths that have been referred to the office. Bear in mind that the office commenced operations on 13 July 1987 so it is a comparatively small number of referrals over that period of time.

The first one was in 1990 where a worker had fallen through a hole that had been cut on the roof of a building on which there was work going on. The Coroner referred the matter to the office. The then Director Of Public Prosecutions, the current Chief Judge of the District Court, directed that there be an ex officio indictment of manslaughter against the person with whom the deceased was working on the roof for not adequately protecting the hole that had been cut in the roof. As the matter proceeded the accused's solicitors requested that there be no further proceedings. The matter was examined afresh by a very senior Crown Prosecutor and by other lawyers in the office and the then director, on consideration of additional aspects of the matter, was of the view that the negligence was not at the level of negligence required for manslaughter. That is, it was not gross manslaughter of the kind where there could be a conviction. Therefore, he directed no further proceedings. That was one case.

You will appreciate that I am referring to these anonymously because, of course, these are matters in which private individuals were involved. The second matter, in date order, was in 1992. This was a case where the crane operator was driving some piles. On his machine there was a control lever for the pile driver, there was another control lever for a hook that was attached to the machine and, regrettably in this case, at the crucial moment the operator seized the wrong lever and the hook came down on top of a worker and killed him. The Coroner held an inquest, referred the matter to my office—this was then in the time of the former director—he directed an ex officio indictment, which is the procedure that would follow a coronial referral, and the matter went to trial. At the end of the Crown case the trial judge held that he was not satisfied that there was evidence of criminal negligence—again negligence is the high degree required for the offence of manslaughter—and he directed the jury to acquit the accused. Of course there is no appeal from a directed acquittal.

The other matter occurred in my time in office since 1994. In 1996 police referred a matter having charged the person with manslaughter already. So the police put on the charge before seeking advice from my office. In this case it was a fall from a roof. The deceased had been told by his supervisor to wear a harness. He had said that he did not propose to wear it and went about his work, fell off the roof and he died. In those circumstances I directed in 1996 that the police charge be

discontinued because again the high level of negligence required on the part of the individual co-worker could not be satisfied on the evidence that was available.

The fourth case was in 1998. Again, a referral by the Coroner. It was concerning the operation of a crane and the load that was put on the crane. The expert evidence was that there was a design flaw in the crane mast and that the flaw was not in any way attributable to the supervisor employed by the crane company, so I declined to direct an ex officio indictment in that case.

The fifth case was in 2003. It was a case of a student at the University of New South Wales being struck by a truck which had been parked on a road in the campus. Again, the Coroner referred the matter to my office following an inquest. The evidence was examined very closely, including expert evidence obtained by the police, and I declined to direct an ex officio indictment for manslaughter in that case on the basis that the truck driver could not be shown, on the evidence available, to have been negligent, and certainly not negligent to the extent required by the offence of manslaughter.

The sixth case referred last year by WorkCover—so that was before the protocol came into effect—is still under consideration in my Chambers, so I do not want to say too much about it. Suffice to say that it was the case of an unsupported brick wall collapsing and killing a worker underneath it. I may be in a position to determine what is to happen to that matter later this week or early next week.

The final matter—I do not know what year this came but I have a recollection of it—was a carnival ride where the pod containing a young girl, I think it was, broke away and it could have been one or two children who were riding in this pod, I am just not sure about the details of it, were injured or killed. It was one of those things that spins people out, from recollection.

The equipment was faulty, there was an ex officio indictment directed against the operator of the ride. The negligence was the lack of proper servicing and maintenance of the equipment. The operator had always relied on the certificate of an engineer in certifying that the ride was in workable order. By the time of the matter came to trial the engineer had died. So, he was not available as a witness in the matter and when the matter went to trial the jury acquitted the operator of the ride. Those are the seven matters that in the time available we have been able to identify. If there were more I do not believe there would be many. We have pretty well covered it by drawing on the corporate memory of people involved in that sort of matter.

CHAIR: The sixth case you referred to went through WorkCover to you. Do you think you should set up the new protocol so that cases would not come through WorkCover in future but through the police. Was that part of your thinking? If so, why?

Mr COWDERY: Yes, it would have been part of the motivation behind formulating the protocol. The situation needed to be put on a regular footing, anyway. Negotiations were conducted by a senior solicitor in my office, assisted by a professional assistant from our side and senior officers from WorkCover and the police. We now have a protocol which, in large measure, simply codifies the practice that had been developed in any event. We have something now in black and white that emphasises the need for police to be involved in investigation and assessment of the matter before it comes to me. That is a very favourable safeguard.

Ms LEE RHIANNON: With regard to the protocol that you have been talking about, to what degree is the Coroner involved? This matter did not come before the inquiry, but I have heard that the Coroner at times was not satisfied with the negotiations around the protocol and left one of the meetings. His concern was that he would not be party to arrangements that undercut the Coroner's Act. Is the protocol fully working with all parties?

Mr COWDERY: It is and that includes the Coroner. There was a not a formal ceremony as such, but the document has been signed by all parties and put into effect. I am not aware of any concern that the Coroner may have had, because as I said before a senior solicitor from my office was involved in the negotiations and nothing has been reported to me.

Ms LEE RHIANNON: In the case of the worker refusing to wear the harness, and later tragically died, you did not proceed with that case. Was that the case of the employer's evidence

versus the employee's evidence? Or was there back-up for the comments by the employer about the refusal of the employee to wear the harness?

Mr COWDERY: The person who was subject to consideration for charging was the supervisor, I think. I will check my papers for any more detail. Sorry, he was the employer and he had instructed the worker to wear the equipment. The equipment was provided, it was physically there, and the worker said he was not going to wear it.

Ms LEE RHIANNON: Were there any other witnesses to back up what the employer said?

Mr COWDERY: On the information I have, I do not know. I do not have the whole brief of evidence here. I assume that the equipment itself was found in situ when the matter was investigated, but I am only guessing.

Ms LEE RHIANNON: The Committee has heard of a number of cases in which a matter does not go to prosecution for manslaughter. Is it your assessment that the law is weak or because collectively society is very unlucky that insufficient evidence comes through in those cases?

Mr COWDERY: The offence of manslaughter is quite well understood to the courts and the law. It is a common law offence that has been developed over centuries. Relevant to workplace deaths it is necessary to prove gross negligence; that is, negligence which the courts have said takes the matter beyond mere compensation between individuals and projects it into the realm of criminality. So there has to be something approaching, but not quite there, recklessness or deliberate disregard for proper standards on the part of the accused. It is a rather high test to meet, but I would suggest that there should not be different classes of manslaughter. In other words, it would be contrary to principle to introduce some lesser kind of test, some lesser standard of manslaughter, for workplace deaths than applies generally to motor vehicles or other ways in which manslaughter can be committed.

Ms LEE RHIANNON: In the case of Chun Lin? would it have been any different if it were not a workplace death, but a truck accident?

Mr COWDERY: No, the same test would have applied had the matter occurred on a public street or in someone's backyard, a paddock or a workplace. The test was whether, in this case, it was able to be proved that the driver was grossly negligent. And the evidence simply did not come up to that test.

The Hon. DAVID CLARKE: Mr Cowdery, would it be correct to say that the reason for the lack of successful manslaughter prosecutions involving workplace deaths is because the standard of proof required has not been reached and it has nothing to do with whether it is a workplace or not?

Mr COWDERY: Yes, in all of the cases there has not been evidence sufficient to prove beyond reasonable doubt that the accused has been grossly negligent.

The Hon. DAVID CLARKE: So if the death occasioned was not workplace related but, say, the death of invitee such as a shopper in a shopping centre, the result would be exactly the same?

Mr COWDERY: The same test is applied, yes. The conduct of the individual or, if we ever get one, the conduct of a body corporate, has to be judged by the same test.

The Hon. DAVID CLARKE: To put this beyond any doubt, the reason that we are not getting these convictions, successful prosecutions for industrial manslaughter as it is referred to, has nothing to do with it being worker related or not. It is related to the standard of proof which is required for manslaughter, no matter the circumstances in which it occurs.

Mr COWDERY: Yes, subject only to this; that the circumstances of the matter and the facts that have to be proved, arise out of the conduct in the workplace.

The Hon. DAVID CLARKE: To get slightly away from that and to address corporations being prosecuted for manslaughter, would it be true to say that if we cannot find anyone in the

company who can be successfully prosecuted for manslaughter it will be even harder if we bring in an offence of manslaughter against the corporation?

Mr COWDERY: Yes, unless you have something like the import of corporate culture idea from the model criminal code, the Commonwealth code, which has been taken up to some extent in Canada. Unless you add on some other way of including other circumstances, the answer is yes.

The Hon. DAVID CLARKE: The only way we can really do that is lowering the degree of proof individually?

Mr COWDERY: Yes, and, as I said, I would certainly not support a view that there should be different classes of manslaughter.

The Hon. DAVID CLARKE: Because manslaughter is manslaughter and there is one set of principles that apply to it and it should not be varied from one situation to another?

Mr COWDERY: That is right.

The Hon. DAVID CLARKE: Workplace or not workplace?

Mr COWDERY: That is right. Manslaughter is all culpable homicide other than murder and it can be committed in a huge variety circumstances.

CHAIR: You are opposed to any ideas of having industrial manslaughter if it has the same level of proof because it will not be reached and you are not happy about having a lower level of proof. Could the offence have a different name then, instead of industrial manslaughter, something less than manslaughter?

Mr COWDERY: There would have to be great care given to the definition of a new offence if that were to be contemplated. Arguably, in the Australian Capital Territory, because it imports the corporate culture idea from the criminal code, the ability to prove the guilt of the corporation is made easier. I did not express that very elegantly but I hope you know what I mean. It has become easier by looking at other matters to attribute the negligence to the corporation but you still have to have the negligent conduct by individuals to get you to the first step.

CHAIR: What is your view on the Australian Capital Territory legislation? That was apparently based on some model developed by the Attorney General. Do you see some merit if we go down that pathway?

Mr COWDERY: It will be interesting to look at that after there has been some practical experience of it, I would suggest. It is a bit early to tell because it only came in on 1 March, but the change that that really brings is to the introduction of the corporate culture aspect of the matter, which then enables you perhaps more easily to sheet responsibility home to the corporations, but you still have to have the gross negligence of the agent or agents of the corporation to take the next step.

The Hon. CATHERINE CUSACK: In the case of a motor vehicle accident, if there is not a sufficient standard of proof to prove manslaughter, there are lesser offences that people can be charged with. Do you think there is scope to do that in other areas such as workplace related accidents?

Mr COWDERY: Well, there may well be, yes. In motor vehicle cases prosecutions for manslaughter these days are pretty rare. They do happen where there is a flagrant disregard for the safety of road users, an extraordinarily high degree, and we have had some in recent years, but mostly those sorts of offences where death or grievous bodily harm is caused, the prosecutor has dangerous driving causing death or grievous bodily harm, and there is a large number of those prosecuted every year.

The degree of fault in the dangerous driving offences is not as high as the degree of fault for manslaughter and that, I suppose, is reflected in the penalty that is prescribed as well, which is slightly lower. In the workplace context, yes, perhaps it would be possible to define an offence which does not

require the proof of the elements of manslaughter but which establishes culpability of the actor, whoever it may be, whether it be an individual or corporation.

The Hon. CATHERINE CUSACK: When you prosecute a case, I suppose the tradition is that you are prosecuting individuals, and trying to establish facts about what those particular individuals did. In the case of corporations and industries, which seem to be at risk, in the cases you have talked about, are the cultures of those industries mitigating circumstances that you need to consider?

Mr COWDERY: We do not presently, as the law exists, talk about culture. Culture is not strictly a relevant consideration. What we are looking for is the proof of facts and if it can be proved that a direction was given to somebody that was reckless or contrary to all good practice or something of that kind, that may well be a relevant fact to be proved. We look at the individual facts that can be proved from the actions of people, from their words, from documents, from practices that are put in place in a directed form.

The Hon. CATHERINE CUSACK: I am thinking about the fellow who did not wear his harness. Other witnesses have told us that it was common not to wear harnesses because it slows them down and they do not feel comfortable. Cracking down on an individual case could be an example of the law being pro-active to lift the standard in terms of saying that even though people are not wearing their harnesses, it is not an excuse. On the other hand, could the fact that people do not wear their harnesses be a defence?

Mr COWDERY: It would be. If you have a supervisor who says, "Put on your harness before you go up there" and the worker says, "No, I'm not going to", and this is repeated three times and the supervisor says, "If you don't put on your harness and you go up there, there's a risk you're going to fall off and kill yourself", and yet the worker does exactly that, how can the supervisor be made responsible for that in a criminal legal sense?

The Hon. CATHERINE CUSACK: In terms of the cases that you have mentioned, the 1990 case about the worker who fell through the hole in his roof, are you aware whether that a case against an employer?

Mr COWDERY: No, that was against a co-worker.

The Hon. CATHERINE CUSACK: The crane operator driving machine that dropped a hook was obviously a co-worker?

Mr COWDERY: Yes.

The Hon. CATHERINE CUSACK: The man who fell from a roof and was not wearing a harness, I understand that was the employer?

Mr COWDERY: Yes.

The Hon. CATHERINE CUSACK: The overloaded crane?

Mr COWDERY: That was the supervisor of the crane, supervising the crane operation.

The Hon. CATHERINE CUSACK: An employee?

Mr COWDERY: Yes.

The Hon. CATHERINE CUSACK: The truck driver—the student, just a contractor?

Mr COWDERY: I think he was a contractor. I think he was bringing a forklift on the truck. I think that is what happened.

CHAIR: Just the driver of a truck?

Mr COWDERY: Yes.

The Hon. CATHERINE CUSACK: I will not ask you about the sixth case. The case of the carnival operator, which was 1994, he was a self-employed contractor. WorkCover has spoken to us about the committee that has been formed to look at the problem of members of the public who have had what could be work-related accidents, such as the David Selinger case, which seems to be a grey area as to whether it is occupational health and safety or public safety. Are you involved in that?

Mr COWDERY: No, I am not, and to the best of my knowledge my office is not. We have a very limited role in these things. We are prosecutors so we rely on a brief of evidence and we conduct prosecution proceedings and give advice.

The Hon. PETER PRIMROSE: In each of the cases you have discussed, can you ask how it was determined who the potential defendant would be in each matter?

Mr COWDERY: I suppose the person with the closest possible responsibility for what happened or involvement in what happened.

The Hon. PETER PRIMROSE: So some degree of proximity?

Mr COWDERY: Yes.

The Hon. PETER PRIMROSE: For example, one of the matters we are discussing in relation to industrial manslaughter—and it is a moot point as to whether other cases are initiated or brought to your attention because of what was raised with the us, the sheer fact there was no point in commencing the action given the current state of the law, but that aside, part of the concern is the degree of culpability of those in a hierarchy, such as in a corporation. You have alluded to what happened in the Australian Capital Territory.

Because of the current state of the law in New South Wales the person or individual in the immediate proximity, or a person such as a supervisor should have responsibility. It has been put to us that, because of the current law in New South Wales, we also ultimately have to take account of who in the corporation would have a degree of responsibility for ensuring that workers did not go on a job site without, for example, wearing a safety harness.

Mr COWDERY: The issue of corporate liability extends beyond liability for things that happen in the workplace. It is a matter that I think could well profit from proper examination. Take for instance the area of corporate fraud—the sorts of matters that are prosecuted by my Commonwealth colleague. It is a troubling area. It has been troubling the courts for a long time. It would be good if somebody could do a proper examination and make authoritative recommendations about it.

CHAIR: You said earlier that this whole matter of corporate responsibility must be clarified. You suggested that the Law Reform Commission could, as a priority, investigate that matter and then report on it. But you are positive about a move in that direction of corporate responsibility?

Mr COWDERY: Yes. It is not for me to say what the Law Reform Commission does, but it is the sort of issue that requires that extent of examination because it raises some pretty fundamental principles and there is a lot happening around the world in this area. People are coming to slightly different conclusions in different places very slowly. So for my part, yes, I think it would be a valuable exercise. If such a reference were made I would certainly be interested in making a submission.

Ms LEE RHIANNON: You said earlier that considerable evidence is required before you are able to charge an employer with manslaughter, or to proceed on a charge of manslaughter. I refer again to the Chun Lin case. In that case why did you not go for the lesser charge of dangerous driving?

Mr COWDERY: Because the evidence that was available was not sufficient for there to be a reasonable prospect of success on such charge either.

Ms LEE RHIANNON: A truck goes out of control and somebody dies and there is not sufficient evidence? Does that mean there were not sufficient witnesses?

Mr COWDERY: It means that there was not sufficient evidence to prove criminal liability in the truck driver. Our test is that there has to be a reasonable prospect of conviction on the basis of legally admissible evidence. In this case there was not of any offence.

Ms LEE RHIANNON: Do you not put up some cases just to test how they will go?

Mr COWDERY: No.

Ms LEE RHIANNON: You do not do that at all?

Mr COWDERY: No. My resources are limited enough to cases where we believe there is a prospect of success. We do not allow ourselves the luxury of just making a point by prosecuting somebody where we do not believe there will be a success.

Ms LEE RHIANNON: Do you make recommendations at any stage when you can see that there are gaps in the law?

Mr COWDERY: Oh yes. We are constantly corresponding with the Criminal Law Review Division of the Attorney General's Department. We are consulted when law reform proposals are put forward and we take that role very seriously. We provide—I hope and I believe—extensive information and assistance.

Ms LEE RHIANNON: Have you made any recommendations within the area that has been identified by the Committee—that is, that members of the public die on work sites or near to work sites and there is are no prosecutions?

Mr COWDERY: No, we have not made any submission on that. As I said early on, I think the law, as it presently exists, is adequate and proper for individual liability. There is this area of corporate liability that I think needs to be addressed, but it is not something that I can address in a submission to somebody. That is something that has to be looked at thoroughly and with the benefit of international experience as well.

Ms LEE RHIANNON: So you would still say it is adequate, even though prosecutions are not happening?

Mr COWDERY: Yes. There is nothing wrong with the law. It is just that the evidence that has been provided has not been of a quality that would either produce a conviction in those two cases that actually went to trial, or enable me to say that there is a reasonable prospect of conviction. We can only prosecute on the evidence that we are given.

Ms LEE RHIANNON: So you are saying that there is inadequate evidence. Are you taking that back to WorkCover or to the police?

Mr COWDERY: No, it may be that the evidence simply does not exist and that nobody can find it. It is not there to be found by anybody.

Ms LEE RHIANNON: Are you saying that that is the case, or is it just your assumption that that could be the case?

Mr COWDERY: No. In the cases that I have dealt with that has been the case. There simply has not been the evidence. There has been evidence of events produced to us but it not of such a kind as to establish criminal liability.

The Hon. DAVID CLARKE: Mr Cowdery, I wish to ask you a couple of questions about Australian Capital Territory legislation. Does Australian Capital Territory law allow corporations to be prosecuted for manslaughter in workplace situations?

Mr COWDERY: I believe so. I have read very quickly just a summary of what applies in the Australian Capital Territory.

The Hon. DAVID CLARKE: That is your understanding?

Mr COWDERY: That is my understanding.

The Hon. DAVID CLARKE: That being the case, I refer to Australian Capital Territory legislation and to a situation that resulted in a successful conviction for manslaughter. Let us take the same set of facts but, instead of it being an employee, it is the employee's wife who is in a shopping centre. Instead of the corporation being an employer, the corporation is the owner of the shopping centre. As I understand it, in that situation a corporation could not be prosecuted for manslaughter because it is not a workplace situation. Is that your understanding?

Mr COWDERY: I do not know.

The Hon. DAVID CLARKE: If that were the situation would that not appear to be an injustice? The death of an employee—the husband in this case—could result in a successful prosecution of the corporation, but the death of an employee's wife in similar circumstances would not lead to the corporation being prosecuted for manslaughter.

Mr COWDERY: Yes. On the basis of what you have said that would seem to me to be a gap that perhaps might be filled if that is the case.

The Hon. DAVID CLARKE: Does it not basically boil down to this: If corporations can be prosecuted for manslaughter, in effect, that means a lowering of the bar or a lessening or changing of the standard of proof that is needed?

Mr COWDERY: I do not think that the standard of proof is altered and I do not think it changes what has to be proved; it provides for another way of proving it. As I said before, I would certainly not recommend the introduction of a lesser degree of negligence that had to be proved in order to constitute manslaughter. If you want to create a different offence of some kind and have different elements in it, that is a matter for the Legislature, but so far as manslaughter is concerned that is not.

The Hon. DAVID CLARKE: Assuming that we look at the possibility of prosecuting corporations for manslaughter, should we not prosecute corporations in all situations of manslaughter, not only in regard to workplace manslaughter?

Mr COWDERY: Yes, and not only in manslaughter but in all cases of crimes by corporations, because the same principles would apply whatever the nature of the crime.

CHAIR: Thank you for agreeing to appear before the Committee. We know that you are busy and we thank you for the time that you have given us and for the research that you have done.

Mr COWDERY: Thank you, Mr Chairman.

(The witness withdrew)

KAREN MARGARET ILES, Apprenticeship Officer, Construction, Forestry, Mining and Energy Union, 12 Railway Street, Lidcombe, sworn and examined:

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

Ms ILES: As a representative of the union.

CHAIR: Would you like to make a brief opening statement?

Ms ILES: Yes. I am the apprenticeship officer for the New South Wales branch of the Construction, Forestry, Mining and Energy Union. My role at the union is to work with apprentices in the industry to educate them about their rights at work. I assist apprentices and their employers to understand and resolve issues relating to occupational health and safety. My work spans both the commercial and cottage sectors of the industry. The union has employed an apprentice officer, a specialist for apprentices, in response to the fact that apprentices are particularly vulnerable in the building and construction industry.

Apprentices and young workers are vulnerable to injury in the workplace. The National Occupational Health and Safety Commission found that one-third of all workplace injuries and accidents happen to young and inexperienced workers. Apprentices and young workers deserve particular attention with employer, government and non-government assistance in the area of workplace safety. Apprentices are often young workers. Often the apprenticeship is their first job after leaving school at the ages of 15 to 18 years, and we saw that with the death of Joel Exner, which I think has been raised at this inquiry. They have little or no understanding of their rights in the workplace, nor the obligations of employers. This is true for matters pertaining to their wages, employment conditions, roles of different government and non-government organisations in the workplace, and occupational health and safety. This makes apprentices and other young workers particularly vulnerable in the workplace.

As new entrants into the work force, they often have an expectation of being looked after by their employers. Many look up to their employers as parent figures and they trust them. This is particularly the case in smaller workplaces where the employer is directly training and supervising the apprentice or young worker. Again, this makes apprentices and young workers particularly vulnerable in the workplace. While apprentices receive substantial training at TAFE, there is still a marked lack of training. Many apprentices do not receive direct on-the-job training from tradespersons, although it is required by the Apprenticeship and Traineeship Act. Others who do receive training from a tradesperson may not be trained in the correct way. That is to say that they might be trained in the tradesperson's bad habits.

While training at TAFE is comprehensive, it is delivered over a three-year time span, sometimes leaving apprentices ill equipped to carry out the immediate tasks requested by their employers, particularly in the early stages of their employment. Unfortunately, the attitude of some employers that I have encountered is that TAFE delivers the formal training and that the apprentice should be able to work competently because of the training that is provided by TAFE. The recent death of Joel Exner in particular highlights the lack of training both off and on the job that is given to apprentices and young workers as new entrants to the workplace. Joel did not receive the proper training from his employer prior to being asked to perform certain types of work, and I would say that this played a part in his death.

The building and construction industry State award provides that apprentices should have a proportion of tradespeople working with them and that that shall not exceed one apprentice to two tradespeople. The Apprenticeship and Traineeship Act also stipulates that apprentices should be supervised. However, I have encountered many circumstances where employers are not properly complying with those relevant specifications. This is particularly so in the cottage sector of the industry. Often I have encountered apprentices who are left alone or sent out in a work vehicle by themselves to conduct a job by themselves. Sometimes this is for days at a time, and sometimes it is for weeks at a time. This is also counterbalanced with the fact that I am now starting to encounter apprentices who are being employed on ABN numbers, who are being expected to in effect be there on employers. Again, I would say that that is a breach of the Apprenticeship and Traineeship Act, but

these kinds of things are starting to happen in the industry, which means that apprentices are left by themselves on jobs completely unsupervised. Of course, accidents will happen in those situations.

The building industry also has a particular culture that is important in understanding the high potential for accidents among apprentices and young workers. A culture exists, despite attempts to alter it, that is a macho culture. It is a culture often of initiation and harassment, and apprentices are still often given the lousy job so that no other workers want to do. I am aware of many attempts to change that culture, but it is still alive and well in the building industry today. Young workers who are new to the work force are looking up to employers and coworkers as role models and they want to fit into the workplace culture. This makes apprentices particularly vulnerable to carrying out unsafe jobs or being placed in unsafe situations at work. Due to the combination of inexperience in the workplace and the culture of the building and construction industry, young workers and apprentices find it difficult, once educated about their rights, to assert their rights.

Once they are educated enough to know that a work practice is unsafe, they may not understand the role of the safety committee, for example, on their site, if one exists, or they may not feel comfortable raising the issue with them. Further to that, many young workers and apprentices are intimidated by the workplace culture, so they simply put up with it, or they are afraid of getting the sack if they raise an issue regarding working methods. Another issue to note there is with workers compensation. What I have encountered is particularly in the smaller sector of the industry, the cottage sector. Many apprentices whose employers have not even insured them for workers compensation or again they are employed under an ABN number and the apprentice does not realise that they are not covered by any workers compensation policy and that when they do so either they do not have the insurance and then often as they try to pursue a workers compensation claim through WorkCover the employer victimises them or even when they simply try to assert their rights to make a workers compensation claim, often the apprentice is told, "Don't put the claim in."

It is a big issue, especially for young workers who are inclined to trust and believe their employers because their employers are father figures for them. Within the building and construction industry, particularly in the cottage sector—I have just touched on this—exists an attitude of contempt towards WorkCover. The attitude that WorkCover is something to be dodged and causes trouble rather than assisting workers is claimed by many employers. This attitude is passed on to apprentices and young workers who view their employers and coworkers as role models, often as father figures. Further, WorkCover in the sector is viewed as a toothless tiger that is easily dodged. If we look at the example of WorkCover's actions around the high profile deaths in that industry, the attitude rings true.

For example, the employer of Dean McGoldrick received a fine that was not paid. I am aware that the same problems that caused Joel Exner's death still existed on the site for some weeks after. As for the death of Peter Cruickshank, again there was no prosecution. When employers, especially in the smaller sectors, see these high profile deaths in the industry and then view in those particular circumstances the actions of WorkCover, the message that is sent out to the union is that you can get away with it, just make sure that when WorkCover is there maybe bash up some handrails, you just need to duck around them and if you get fined you just do not pay it back anyway. The poorly actioned response of WorkCover in these high profile fatalities has permeated the industry and has contributed to employers' sense that they are able to successfully dodge WorkCover and dodge their responsibilities to provide a safe workplace.

The electrocution of apprentice painter Peter Cruickshank in 2001 is a tragic example of the points I have just raised. A lack of training and supervision, along with little regard for occupational health and safety, all contributed to the fatality. Further, the non-action of WorkCover—there was not one prosecution—has become widely known, particularly in the Newcastle area, and proves to employers that they can literally get away with murder. I think apprentices and young workers deserve a WorkCover authority that is proactive, well resourced and that applies the law to its fullest. This group of workers is the most vulnerable in the workplace. WorkCover needs to be resourced sufficiently so that is no longer a reactive body. It should have the capacity and the capability to prevent accidents through education, for example, rather than responding after the deaths of young workers.

There are many decent laws and regulations relating to occupational health and safety in New South Wales and I believe WorkCover should be relentless in upholding them to the fullest.

Employers should be fined to the maximum and prosecuted for accidents and near accidents. If WorkCover did this effectively its image as a "toothless tiger" would suffer a blow and employers may be dissuaded from dodging their responsibilities to their workers. In addition, new laws relating to industrial manslaughter not only need to be created but need to be enforced, followed up and prosecuted by WorkCover. Without that, it is just a law. In support of my evidence today I have taken the liberty to print some figures from the WorkCover web site relating specifically to workers aged under 25 in the construction industry. I tender those to the Committee.

Document tabled.

CHAIR: Thank you for your comprehensive statement; we appreciate your hard work. You referred to the culture of initiation and harassment and it occurred to me during your presentation that young women and girls could be particularly affected. Have you noticed that there is more pressure on them?

Ms ILES: I think women in the industry have issues with sexual harassment, in particular. Having said that, at the moment I am dealing with a sexual assault case involving a young man in Newcastle. The issues are obviously magnified for women in the industry. However, I think one way of fixing that is to get more and more women into the industry to create more of a critical mass to support other women in the industry.

CHAIR: Do you think pressure sometimes forces young people into a dangerous position—they do not want to take a risk but feel that they have no choice?

Ms ILES: Absolutely. They have older employers or workmates around them whom they look up to as father figures—they are mainly men. I have found that many do not raise problems because they say, "I don't want to get my boss into trouble. I don't want to get into trouble and I don't want to end up getting the sack. It's just not worth it for me to raise the issue." As a result, young workers are often placed in situations that they should not be in.

The Hon. DAVID CLARKE: You said in your opening remarks that your role at the union involves working with apprentices in the industry and educating them about their rights at work.

Ms ILES: Yes.

The Hon. DAVID CLARKE: Do you also believe you should educate them about the adverse effects of alcohol and drugs on safety in the workplace?

Ms ILES: Yes, that is one component of my work. The union has a drug and alcohol policy on some sites. Obviously my work with apprentices is not just with union members; it is with all apprentices who come to me with a problem. However, my attitude to the drug and alcohol issue is that if you have had a bit of a big weekend you need to be responsible at work. If you are at work and you cannot work in a safe manner, you should not be at work. That is what I say to apprentices.

The Hon. DAVID CLARKE: That is your view. Is it also the union's view? Does a particular part of your education program involve educating apprentices about the adverse effects of alcohol and drugs?

Ms ILES: The union has, through the building trades group of unions, associated with a foundation called the Building Trades Group Drug and Alcohol Program. That foundation has a number of education officers that go to building sites and educate all workers. They focus on apprentices and educate them about safe work methods. If you are intoxicated at work you should not be working because you pose a risk to other workers. That is the message we send to the industry through the association that the union is involved with through the building trades group.

The Hon. DAVID CLARKE: Does your union have an overall policy regarding the use of alcohol and drugs in the workplace?

Ms ILES: As far as I understand it—I am not an organiser; I deal specifically with apprentices—the individual site adopts a policy. We recommend the policy that, if workers are

working unsafely, they should be counselled and sent home. But it is up to the workers and employers on the site to work it through on an individual site basis. That is my understanding of the situation.

The Hon. JAN BURNSWOODS: You cited the frightening statistic about the number of injuries that occur among young workers. How does that figure compare with the percentage of young workers in the workplace? Is it markedly high compared with the percentage of young people working in the building industry?

Ms ILES: I have provided the numbers and statistics. They are being photocopied.

The Hon. JAN BURNSWOODS: If the answer is in the documents we can read it there.

Ms ILES: The statistics look at the situation over three years from 1998 to 2001, for example—I think it is based on the financial year; perhaps someone from WorkCover could assist in deciphering the figures—and show how many workers were killed, how many were permanently disabled and how many received a disability that they recovered from.

The Hon. JAN BURNSWOODS: I have put some questions on notice to WorkCover about that.

Ms ILES: For example, in 2000-01 67 workers aged 15 to 19 years—I assume that that is the number recorded and reported to WorkCover; many more cases would go unreported—had a permanent disability arising from a workplace injury. It also gives fatalities. In the same year, there were 189 permanent disabilities in the age group 25 to 29 years and 142 for those aged 20 to 24 years. Any fatality or any injury to a young worker is absolutely devastating. If a 15-year-old receives a permanent disability they must live with it for the rest of their life. They have just entered the work force; they are about my age. It is absolutely devastating for them.

The Hon. PETER PRIMROSE: On the issue of drug and alcohol counselling, you mentioned that the union is involved in education. Is it also involved in rehabilitation?

Ms ILES: Yes. I did not mention that, apart from education on site to prevent such incidences arising, the union is associated with the building trades group of unions, which runs Foundation House, a rehabilitation centre for building workers and their families. If an apprentice or an apprentice's mother, father or brother has an addiction and needs treatment, the union will support them in dealing with it.

The Hon. PETER PRIMROSE: It is a pretty strong commitment?

Ms ILES: Absolutely.

CHAIR: If an apprentice suffers a serious injury or death, do you have some role in that from the unions point of view? Are you involved in meeting with the parents of the brothers or sisters?

Ms ILES: Yes.

CHAIR: Can you explain that to us?

Ms ILES: Absolutely. For example, when there is an accident, union members who are apprentices may come forward and seek legal advice. If they are having problems getting their workers compensation claims going, they can see our solicitors. There is rehabilitation that the union persists with and again apprentices are referred to that to get them rehabilitated and back into the workforce successfully, and then there is the contact I have with the apprentice and the family in supporting the apprentices getting back to work as soon as they can.

CHAIR: If they come to you for help, do you go out and see them or do they come to your office?

Ms ILES: Either or. I visit sites, and I visit workplaces. I visit family homes if I am requested to, or the apprentice may come in and meet me in the union office.

CHAIR: Do you think there is a need for WorkCover to have someone like you?

Ms ILES: I think that would be fantastic. Young workers just do not understand what the role of WorkCover is. If someone from WorkCover was going around dispelling the myth that WorkCover is something to be avoided and that WorkCover is going to help apprentices, that would be fantastic. You do not get enough information on safety getting out to young workers. That would be good.

The Hon. CATHERINE CUSACK: You seem in your evidence to be suggesting that apprentices may be being exploited as cheap labour on some sites?

Ms ILES: Yes.

The Hon. CATHERINE CUSACK: Is that a widespread problem?

Ms ILES: I would say it is widespread. In my experience I have travelled to a lot of areas in the State. An apprentice's wage is \$5.57. For example, the brick industry training scheme is one I have been working with recently. They employ indentured apprentices and pay them \$5.57 and I have found numbers of those apprentices working as brickies labourers not as bricklaying apprentices.

The Hon. CATHERINE CUSACK: The situation about ABNs, which I take is a way of avoiding costs, is that legal?

Ms ILES: Under the Apprenticeship and Traineeship Act you need to have an employer. How can you be an apprentice and learn the trade from someone when you are the boss? It does not seem to gell.

The Hon. CATHERINE CUSACK: The Federal Government is making some payments into the scheme, so there is some financial relief, is there?

Ms ILES: Yes.

The Hon. CATHERINE CUSACK: I think some people are having their cake and eating it in regard to apprentices. If that is not legal, we should be cracking down on it.

Ms ILES: I think in that case, for example, where an apprentice has an ABN, I doubt that the employer is claiming a subsidy in those cases. For example, there were two last year at Granville TAFE in the bricklaying course. In that case the employer had not registered them with the New South Wales Department of Education and Training as apprentices. So, effectively their time as an apprentice was not counted either, and I doubt whether the employer in that case would have applied for the Federal subsidy because they were not registered as an apprentice. There is the ability under the New South Wales Department of Education and Training for those two apprentices to manage, when they finish their trade, to fix it up and get their trade qualifications, but it is pretty hazardous. I would not go through four years in the workplace and maybe get the qualifications at the end.

The Hon. CATHERINE CUSACK: Do you have a system of employing people to work as apprentices so that as a community we can be satisfied that the employers themselves have the training, understand the system and know the right thing to do and what their responsibilities are? I share your concern about people coming out of the school situation and changing into the employment situation. I wonder whether just anybody who wanted to put their hands in their pockets should be allowed to take responsibility for those people?

Ms ILES: At the moment, as far as I am aware, there are not any counterbalances and checks. There is, through the Department of Education and Training, if an employee gets a few black marks against their name they can be prohibited from having apprentices. I understand that is quite a rare occurrence, for employers to be blacklisted, so to speak, from having apprentices.

The Hon. CATHERINE CUSACK: Is that the Department of Employment and Training?

Ms ILES: The Department of Education and Training.

The Hon. CATHERINE CUSACK: Who in the department administers that scheme? Is it a TAFE scheme?

Ms ILES: No, there is a vocational training tribunal set up under that.

CHAIR: Are you aware of apprentices getting any safety training during their TAFE course, or are they supposed to get safety training?

Ms ILES: There is safety training provided at TAFE.

CHAIR: Is that sufficient, in your opinion?

Ms ILES: It is sufficient in some areas; in others not. For example, I am aware that even on one of the bigger jobs in the city about a month or two ago a first-year apprentice was using a power tool. At TAFE you do not get taught how to use that power tool until second year in that particular course that he was studying. His employer was expecting him to carry out those tasks and he had had no real training from TAFE on how to do that. Then he ends up having an accident because of it.

CHAIR: And if he objected, he probably feels he would lose employment?

Ms ILES: Yes, absolutely, or he thinks "Yes, I can do that", and goes at it gung ho.

The Hon. KAYEE GRIFFIN: Can I just continue on about this issue of apprentices being employed under ABNs. If an apprentice is in that situation, how much information do they have about their employer? If there is an occupational health and safety issue and the apprentice has an accident, particularly if, as you said, they are being sent out on jobs alone, if they have tried to do the right thing about an accident or notifying issues under occupational health and safety, how do they do that in those circumstances?

Ms ILES: Good question. With a lot of difficulty. Many apprentices seek advice from the union, many seek advice from WorkCover, just how you go about tracking down exactly what insurance policy you are insured under, if any, and then how you go about making a claim through the WorkCover safety net is quite a difficult process for someone who is 16 years old to go through. I think it would be useful if there were some additional educational material on how apprentices make workers compensation claims. I think the main problem is the lack of knowledge about the benefits that exist and the intimidation they receive. I think the crux of the matter is often the intimidation they receive from their employer not to put in a workers compensation claim, or other workers.

The Hon. KAYEE GRIFFIN: How much background knowledge do they have about the person or the group that is employing them in those situations? If you can relate any experience you have had with it?

Ms ILES: I think it would vary from case to case. In the case I referred to previously about the two bricklayers I came across that were working under an ABN, they had very little knowledge. They did not wish to proceed with anything because they felt the law was going to crunch down on them rather than the employer who was putting them in that situation. When I questioned them about the proper business name of the employer or the ABN of the employer they had no idea. As far as they were concerned it was a mate of a mate.

The Hon. KAYEE GRIFFIN: What is your experience dealing with occupational health and safety issues with apprentices who are employed by one person or group on the site where there is a maze of subcontracting?

Ms ILES: One instance that springs to mind is a lot of apprentices are now employed through group training schemes. So you have the group trainer who is the employer who then ship the apprentice out to a host employer. Instances that I have encountered with that is that the group training scheme—the legal employer—should be providing supervision and ensuring that those host employers are adequate host employers; that they are delivering the right training and so forth. Often

that link is not happening. I have come across schemes where the apprentices might see their training officer maybe once a year at the annual picnic day. I think that is a bit of a missing link.

(The witness withdrew)

JON BLACKWELL, Chief Executive Officer, WorkCover Authority,

JOHN WATSON, Acting General Manager, Occupational Health and Safety, WorkCover Authority,

PHILLIP REED, Acting General Manager, Corporate and Governance Committee, WorkCover Authority, and

BERNADETTE GRANT, Director, Legal Group, WorkCover Authority, on former oath:

CHAIR: Do you want to make an opening statement?

Mr BLACKWELL: We have just tabled answers to questions. There was evidence recently in relation to young workers and we are very concerned about young workers and their safety. We have a range of resource materials which I have already tabled which are available for young workers. We are particularly concerned about young workers in the construction industry and have had a number of campaigns in relation to that particular issue. There are other issues which we want to take a few moments to look at in relation to evidence given earlier today.

Mrs Boland appeared and was clearly obviously very upset and concerned: it was a very tragic case. However, I think it is worth nothing that Mrs Boland has received all the appropriate compensation to which she is entitled. She has a lump sum and ongoing compensation being paid. Also, we have looked at our files and there have been no less than 17 documented discussions with Mrs Boland by our inspectors. So I just want to point that out because there might have been some confusion about those issues. I will ask John Watson to say a few words because Mr Welch raised some issues.

Mr WATSON: Alan Welch and I have maintained quite a close relationship over the past 18 months or so and have spoken on many occasions. Mr Welch indicated that he was concerned that I did not pass on his contact details to Mr Ferguson when Mr Ferguson requested them of me. I should make it clear that in my position I should not pass on personal details of individuals who contact WorkCover. However, I attempted to contact Mr Welch at the contact details he had given me. He has since informed me that he had moved from that location some time ago and did not update his details with me. He has done that just this morning when we were talking following his giving of evidence.

I guess the other aspect that I want to cover is that Mr Welch indicated that WorkCover went to the wrong site initially when we received a complaint about the site where his wife was unfortunately killed. Can I say that we did receive a complaint from an Andrew Symonds. That complaint related to premises at 273 Mona Vale Road which is a retirement village. Those who actually know this area of St Ives know that the premises are on the other side of the Link Road from the premises where the accident occurred.

The inspector attended that site and examined the issues that had been raised by the complainant that were traffic control issues and found that there was no issue at that particular site. Mrs Welch was killed outside 277 Mona Vale Road. The inspector rang Mr Symonds, the complainant, and indicated what he had done, and the complainant was satisfied with the response that was given. Subsequent to that we received information from the police and Mr Welch in respect of the site and we then proceeded with the investigation, and I think that is the subject of evidence already recorded before the committee. I thank the committee for the opportunity to clarify those issues.

Mr BLACKWELL: Those are the only statements we want to make at this stage. I would appreciate the opportunity to make a closing statement.

CHAIR: Do you want to comment on the answers you have provided?

Mr BLACKWELL: No.

Ms GRANT: The issue was raised about the Coroner and the protocol that is entered into with the Department of Public Prosecutions and the police. For clarity, I together with the chairperson of the working party, Mr George Thompson, attended a meeting with the Coroner. At that meeting he

indicated that because of his judicial independence he could not be a signatory to the document but he certainly put forward recommendations that are actually incorporated in the document and was an active participant in the process. We welcomed his contribution.

CHAIR: Was the impression that he was unhappy with the situation correct?

Ms GRANT: That is not correct.

Ms LEE RHIANNON: But he is not actually a signatory so he does not have the same status?

Ms GRANT: No, the Attorney is the signatory to the document. The Coroner quite correctly took the view that because of his judicial status it was inappropriate for him to be a party to the document. But he actually endorsed the concepts that are referred to in the document.

CHAIR: Do you have any objection to the committee taking these answers as part of your submission and making them public?

Mr BLACKWELL: No, I do not. After today we will be preparing a final submission, if you like, but my answer still stands in relation to the answers to those questions.

CHAIR: When will the final submission be supplied?

Mr BLACKWELL: Depending on what happens today, probably in a couple of weeks, something in that order.

CHAIR: The secretary is of the opinion that two weeks is adequate for us to keep within our timetable. Thank you for supplying those answers to the questions which we, and I am sure other people, are happy with.

Mr BLACKWELL: We have been as thorough as we possibly could.

The Hon. CATHERINE CUSACK: I want to pursue the issue of the interdepartmental committee and the grey area of safety of members of the public at workplaces.

Mr BLACKWELL: That committee is the responsibility of the Premier's Department; they are running it. The best we can do is to take questions on notice in relation to that because we do not have carriage of it. We are a member of that committee.

CHAIR: Is the chairman of the committee an employee of the Premier's Department?

Mr BLACKWELL: It is someone from the Premier's Department.

Ms GRANT: They are the lead agency.

The Hon. CATHERINE CUSACK: Who could we contact to obtain more information about the committee and its progress? It seems significant in terms of addressing some of the relevant issues.

Mr BLACKWELL: Probably through Col Gellatly would be the best way to do that. He is the head of the Premier's Department.

The Hon. CATHERINE CUSACK: You have been participating in the committee for 12 months, is that right?

Mr BLACKWELL: Yes, it commenced early last year.

The Hon. CATHERINE CUSACK: Are you able to name the other members of the committee?

Mr BLACKWELL: We have addressed that in the written answers we have given you.

CHAIR: We heard evidence earlier from Mr Cowdery about the protocol, that is, cases do not come to him except through the police. Prior to the protocol there was a case that came through to him through WorkCover. Are you pleased with that situation? Do you believe there is a situation where WorkCover should have the right to proceed directly to the Director of Public Prosecutions [DPP]?

Mr BLACKWELL: I might ask Bernadette to comment also because it is a legal issue. As a lay person it would seem to me appropriate that a case should go via the police, who have conduct of the initial investigation anyway, or from the Coroner. It seems to me to be reasonably appropriate that if the matter is going to be in the criminal jurisdiction it should come either from the police or through the Coroner, because we investigate from an occupational health and safety perspective, if you like, rather than a crime perspective.

Ms GRANT: I think that is essentially the attitude of the DPP, from my discussions with them when they were developing the protocol. They have always had a longstanding relationship with the police in terms of evidence-gathering and the production of admissible materials and they have preferred for the purposes of crime matters to continue that relationship with the police. The process is not intended to delay a prosecution. We would refer a matter to the police and then they would investigate it and seek advice, if necessary, from the DPP before they lay charges. It is always open to the police to lay charges without going to the DPP, but in terms of indictable matters they tend to actually seek that advice first.

CHAIR: There may be situations where WorkCover is criticised because employers are not prosecuted and it is thought that you have that responsibility. Are you pleased with the protocol?

Mr BLACKWELL: We always have the ability to prosecute under the Occupational Health and Safety Act anyway. That is still open to us. In cases where the DPP has decided not proceed, if we are within the time frame we can commence our own prosecution.

Ms GRANT: We do not wash our hands of the matter merely because it is referred to the DPP. We would monitor what was happening in case they decide not to proceed. We would need to have the opportunity to commence our proceedings.

CHAIR: That means you would have to keep watching the two-year period so that you do not run out of time.

Ms GRANT: That is correct.

CHAIR: Obviously you have been and will be monitoring that closely?

Ms GRANT: Yes.

The Hon. DAVID CLARKE: In your written answer 2.2 you say that of the prosecutions per year approximately 75 per cent were conducted by external legal service providers.

Mr REED: That was for 2001-02. There is a lesser figure for 2002-03.

Ms GRANT: It is about 49 per cent in house and whatever the difference is outsourced at the present time.

The Hon. DAVID CLARKE: In 2003 at least 50 per cent was outsourced?

Ms GRANT: That is correct.

The Hon. DAVID CLARKE: What is the process to decide on the legal service providers?

Ms GRANT: An open tender process was conducted in 2001. As a result of that tender process a number of firms were selected for appointment. It has been my experience since I came into

office in 2002, and given the time that has elapsed since the tender in 2001, that we probably need to go out again and refresh the panel. We closely scrutinise the people who we give our work to. There have been occasions when we have thought, "We will not give them any more because we are not happy with the way they do our work."

Mr REED: I might just fill in here because I was involved in the tender process at the time. The tender process followed the guidelines set by the Attorney General. In fact, we had the Attorney General's Department involved in chairing our internal group to ensure that we ended up with an appropriate external scrutiny.

The Hon. DAVID CLARKE: Do you have a set of Attorney General guidelines?

The Hon. DAVID CLARKE: It is whole-of-government guidelines on outsourcing of legal services.

The Hon. DAVID CLARKE: Is a copy of the guidelines readily available?

Mr REED: I am sure that we can provide you with a copy.

The Hon. DAVID CLARKE: Would you provide a copy?

Mr REED: Yes.

CHAIR: According to the chart in your written answer 2.22, there seems to be quite a turnover of the solicitors. You say that many solicitors, including senior solicitors have limited experience in WorkCover's criminal law practice. Are you concerned with the possible lack of corporate knowledge? If so, what are you doing to encourage solicitors to stay longer, unless they are being headhunted by other corporations?

Mr BLACKWELL: It is not always easy to recruit solicitors to the public sector, as you may imagine. I might hand to Bernadette to take that question.

Ms GRANT: It has been my experience since I came to WorkCover after a long period in government that for some reason we have gone out to recruit on several occasions without necessarily getting a particularly good field back in. So we have gone out yet again, because we are not going to appoint people just for the sake of it. We are looking for experienced practitioners. Whilst the chart may give the impression that there has been a high turnover, it is not that high, particularly since I have been there. I think we are slowly getting a bit more stable in terms of our officers. One point I would like to emphasise is that there is a suggestion to be a good practitioner in this area you need necessarily have criminal law experience. I do not necessarily follow that view. That is not underestimating the skills required to be an occupational health and safety practitioner. It is a niche area in the market, although the profession is opening up with the drying up of other civil work. It has been my experience that if you have good litigation skills, a number of years experience in court work and good analytical skills you can come to grips with this work in a fairly short period of time. The people who are in the branch at the present time, particularly in the fatalities unit, I think have very good skills and are very committed to what they are doing.

Ms LEE RHIANNON: Do you have a strategic approach to prosecution? Is your decision to prosecute based, one, on the chances of winning the case or, two, a more strategic approach with a view to running test cases?

Ms GRANT: I think in one of the answers here—I cannot remember the number off hand—we set out some of the considerations that we take into account in deciding to prosecute. One of the considerations we take into account, as does the DPP, is a reasonable prospect of conviction, and public interest is another one. I think the comment made by Mr Cowdery in his evidence today was "We do not run test cases." You run cases where you have reasonable prospects of conviction. I think that is a very sound argument to run with in terms of deciding whether to prosecute. You may get coincidentally the same arguments together in the one matter. You might have a case where you have reasonable prospects of conviction but it is also a case that would test the law in certain areas.

Ms LEE RHIANNON: Would you call the case involving the death of the truck driver a test case?

Ms GRANT: Which one?

Ms LEE RHIANNON: We had evidence about it earlier.

The Hon. CATHERINE CUSACK: The Grafton case.

Ms GRANT: In fact, we are running that matter in the industrial relations court at the present time.

Ms LEE RHIANNON: There have not been any convictions in that area before. Is that the only example of a test case?

Ms GRANT: Again I would not call it a test case. It is a case where we are prosecuting the director of a company that is in liquidation for the death of one of its employees who happened to be driving on a long-haul trucking exercise.

We looked at the facts of that matter and took the view that there were reasonable prospects of conviction, based on the material before us. The fact that it may also assist to establish that a roadway and vehicle on a roadway is a place of work is probably an add-on to the main issue: that is, prosecuting in respect of that particular offence, based on the facts.

Ms LEE RHIANNON: Considering the nature of work is changing so dramatically, if you are going on the basis of whether you have a chance of getting convictions, would you not be limiting the cases that you take on, because there would be many areas where we do not know how it is going to go? You have just given the example of the truck driver. Many drivers have died on the roads, and now you are doing a case.

Ms GRANT: I do not think it is the role of a prosecutor to be a law reformer. We prosecute under the law as it exists at the time. If there is a need to reform the law to reflect a particular area, such as long-haul trucking or whatever, then that is a matter for the legislature to turn its mind to. But we prosecute on the law as it stands at the time.

Ms LEE RHIANNON: I want to pick up one of the matters that Mr Clarke asked questions about, outsourcing. Where there is outsourcing for lawyers for WorkCover, is that because WorkCover does not have sufficient experienced lawyers?

Ms GRANT: No, it is not. It is just the sheer volume of prosecutions. At the present time we have 639 active prosecutions. To run an in-house practice to sustain that level of work would require probably 50 or 60 people, and I do not think that would necessarily be the best allocation of resources. Outsourcing in the public sector is not uncommon. Most government agencies outsource their work and have panels. For example, the Department of Education and Training has a panel that includes both the Crown Solicitor's Office and private firms to do its work. So the fact that we outsource to private firms is not indicative of lack of in-house skills, but it is indicative of the sheer volume of work that is coming through. Since August 2002 we only outsource the less serious matters. So the bulk of the CIM matters will be with outsourced agreements. Fatality matters, since the establishment of the fatality unit in September 2002, remain in-house. We also have a policy of other serious but non-fatal matters staying in-house too.

Ms LEE RHIANNON: Have there been instances where outsourced lawyers used by WorkCover in one case have in other cases appeared for a defendant?

Ms GRANT: That can arise. We can have firms that have acted for us as prosecutors but in different and unrelated matters can also act for a defendant.

Ms LEE RHIANNON: Is that a matter of concern for you and your established protocols to try to lessen any damage impacts?

Ms GRANT: Most firms that we outsource work to do a conflict check on receiving instructions, and there have been occasions when they have returned the matters to us because they have identified a conflict because they have acted for the defendant in other matters. Conflict is essentially a matter for the practitioner to identify to us, and failure to identify that can ground a professional misconduct charge. So I have found that the outsourced firms are quite vigilant in terms of notifying us of any conflicts.

Ms LEE RHIANNON: I want to ask about problems that you confront when you are prosecuting a company, say a labour hire company. Do you prosecute the labour hire company as the employer? What is the practice there?

Ms GRANT: We do have a couple running at the present time prosecuting the labour hirer under the section 8 (1) charge and the host employer under section 8 (2).

Ms LEE RHIANNON: So they are the host employer?

Ms GRANT: The labour hire company would be the employer for the purposes of the section 8 (1) charge; the host employer would be the employer who is responsible for safety issues for non-employees at their place of work.

Ms LEE RHIANNON: Does that present problems for WorkCover? Is that something that needs to be resolved to get successful prosecutions?

Ms GRANT: I note the cases running at the present time. I have not heard that there have been any problems experienced with that. I do not think they have come to a hearing at the present time. Is that correct?

Mr WATSON: There are a number of cases that are now reported—Warne International, Drake Labour Hire—where we proceeded under the old Act, in the same terms, and with great success. So the legislation is quite clear in respect of relationships between employers and employees and non-employees within a workplace, and we do not have any great difficulty in respect of labour hire firms.

Ms LEE RHIANNON: So it is not preventing you from being successful in your prosecutions?

Mr WATSON: No, it is not.

Ms LEE RHIANNON: You would be aware that this inquiry has heard about a number of cases where a member of the public has died on or near a work site and, it appears, WorkCover did not initially recommend prosecution. Do you consider there is a culture in WorkCover not to prosecute in cases involving members of the public?

Mr BLACKWELL: Not at all. In relation to those two cases, one is already being prosecuted and another is under consideration now.

Ms LEE RHIANNON: There are three: Selinger, Welsh and Chun Lin.

Mr BLACKWELL: Selinger is the only one where we are not taking any further action.

Ms LEE RHIANNON: What is the position with Chun Lin, to clarify again?

Mr BLACKWELL: Chun Lin, as you know, went to the Director of Public Prosecutions, and the Director of Public Prosecutions has only just recently indicated that it is not going to support a prosecution under the criminal code. We therefore have taken advice in relation to that.

CHAIR: In evidence this morning Ms Panagoda referred to situations where the two-year limitation period may be extended, where the case was before the coroner. Could you clarify for the Committee the circumstances in which the two-year period may be extended?

Ms GRANT: Under the legislation, if either from the proceedings or from the coroner's findings there is an appearance of an offence, the two-year period runs from the end of the proceedings or the publication of the findings, and that is how we are able to extend the period out following an inquest. But there has to be an appearance of an offence, and that can either be from the findings or from the proceedings.

CHAIR: Is there any average period for which it would be extended? Would it be extended for twelve months, six months, or indefinitely?

Ms GRANT: It could be extended up to twelve months.

CHAIR: Question 2.2.7 of the questions that we gave you earlier specifically asked whether you have any statistics on the number of prosecutions. There does not appear to be an answer to that question in the file that you have just supplied to the Committee. Could you give us a figure on the number of cases contested in the courts?

Ms GRANT: There are 639 current and active prosecution matters in WorkCover. As to how many of those involved guilty pleas or not guilty pleas, there would be a lot in the CIM that would be guilty pleas. Unfortunately, we are not able to give you the precise number. Our data has not got a field that identifies that quickly. You would expect in the CIM there would be a large number of guilty pleas, and a certain proportion also in the IRC.

CHAIR: Could you still follow that up, perhaps, and see whether you can give us some details?

Ms GRANT: It is very hard, I would have to say.

Mr REED: It would mean going back to all the individual files, and it would involve a substantial amount of work.

CHAIR: You cannot do that through the court system itself?

Ms GRANT: No.

CHAIR: They will not do the work for you.

Ms GRANT: I do not think they have the data.

The Hon. DAVID CLARKE: You have a process to decide who will comprise the panel of law firms to which you refer cases. What process do you go through in allocating cases?

Ms GRANT: The manager of litigation, Wendy McMichael, allocates them either to in-house practitioners or to an outsourced firm. She keeps a list of the outsourced firms to which work has been allocated to ensure that it is done on an equitable basis.

The Hon. DAVID CLARKE: Is there a problem in producing a list of outsourced firms?

Ms GRANT: No, that would not be a problem.

The Hon. DAVID CLARKE: Can that be provided?

Ms GRANT: Yes.

The Hon. DAVID CLARKE: The number of cases should be distributed fairly equally.

MS GRANT: I mentioned earlier that we established the panel, and we are contemplating refreshing it. You will notice that some of the firms will not have matters against their names because we have ceased giving them work. That is based on experience and who does the best work.

Mr REED: The panel was established not simply for prosecutions but for nine or ten areas of law. The firms selected were appointed on the basis of their work in some or all of those areas, not solely for prosecution reasons. We obtain illegal advice on a raft of matters. Some is provided in house and some is provided by external bodies.

The Hon. DAVID CLARKE: Can you specify the matters referred to particular firms?

MR REED: We identified in the original selection process the areas of law in which we were seeking expertise.

The Hon. DAVID CLARKE: Can you produce that list?

MR REED: Yes.

The Hon. CATHERINE CUSACK: I put some questions on notice about the agriculture industry. Thank you for the responses. I understand from the answers that preliminary data for 2003-04 indicates that you have achieved a 50 per cent reduction in traumatic fatalities in agriculture. That is a stunning result. I am interested in what is best practice in terms of being able to achieve that kind of result and creating a workplace environment that is much more concerned about safety than in industries experiencing unacceptably high numbers of fatalities.

Mr BLACKWELL: The answer that we have provided lists a range of initiatives we have used to bring occupational health and safety to the forefront in rural areas. We have looked at high-risk industries such as forestry and targeted State Forests. We have targeted an industry and sectors that have issues and we have provided incentives in relation to rollover protection, shearing safety and so on. We also do a lot of work at field days and similar events. We have a very successful strategy dealing with occupational health and safety in small businesses—most rural industries are small businesses. Our inspectors have spoken to hundreds of people in small country towns about safety. A range of initiatives has assisted us to educate the industry to such an extent that we are experiencing this decline in fatalities and injuries.

The Hon. CATHERINE CUSACK: Do you agree that changing the culture of an industry will save the most lives?

MR BLACKWELL: I do not know whether I can apply a percentage. However, I think that is correct; there are issues of culture. We heard earlier about the culture in the construction industry. To some extent there is also a culture in the rural industry. It is a romantic culture that does not take proper notice of occupational health and safety issues. Culture does play a major part in some industries.

CHAIR: Mr Watson, the committee has received a submission from Terry Perkins stating that some of the information you provided on 17 February was not accurate. You may need to check your files. You said that he was provided with one-on-one training to up-skill him in the areas in which he believed he needed to be up-skilled and in which he felt he did not have adequate training to carry out the duties of an inspector. He claims that that is not correct, that he did not receive one-on-one training and that that could be verified by contacting his immediate supervisor during that period and his team co-ordinators. He provided their names. Can you take that question on notice?

Mr WATSON: I can provide some clarification. I answered that question on the basis of what I knew about the situation. I was involved with Mr Perkins when he was employed as an inspector with us. I had extensive involvement in making attempts to return him to work. He claimed he was unable to undertake his duties, primarily because his skills did not match the job we were asking him to do. We went through a process of identifying the skills gaps that he perceived, particularly in the area of the construction sector. We developed a training program for him involving his being buddied in the field with a senior construction inspector from the Newcastle office. Mr Perkins chose not to be involved in that process. In fact, he proceeded to take long-term sick leave and eventually was medically retired. The opportunity provided for him to undertake direct one-on-one training was somewhat dissipated by that fact that he went on sick leave and was later medically retired.

CHAIR: You are saying that he was provided with the opportunity but he did not take it.

Mr WATSON: He was an experienced inspector and under a previous structure he was a manager in the inspectorate. The office in Toronto, which is now our Maitland office, had an experienced group of inspectors to assist him. His manager was an experienced field inspector who was able to provide assistance on the matters about which he had concerns.

The Hon. DAVID CLARKE: Did he give any reason for not attending the further training?

Mr WATSON: As I understand it there were medical issues. He provided us with doctors' certificates stating that he was unable to undertake his work, which eventually resulted in his medical retirement.

CHAIR: You stated in paragraph 2.1 of your answer that victim impact statements have not been used. Is there any reason that you did not use them when they were being used in other jurisdictions? Legislation now covers all the courts.

MS GRANT: The relevant provision affecting the Industrial Relations Commission was inserted to coincide with the commencement of the 2000 Act. It came into force on 1 September 2001.

CHAIR: That is when you started introducing them.

MS GRANT: That is when the legislation became effective. The first two matters giving rise to the need for a statement will occur in April and several more will occur throughout the year.

CHAIR: Is there any resistance to them?

MR BLACKWELL: Not at all; in fact, we are very keen.

MS GRANT: We have a package ready to send to people. As I said this morning, I will be contacting the relatives and speaking to them.

MR BLACKWELL: It is a simple matter that no prosecutions relating to fatalities have reached that stage.

The Hon. CATHERINE CUSACK: I refer to the questions about the manslaughter recommendations made to the DPP not being pursued. Is there scope for a lesser set of penalties that could be used in those cases in which the DPP feels that manslaughter cannot be proven to the necessary standard? It seems that we go from manslaughter to nothing.

Ms GRANT: I will have to take that on notice, because it is one of significant policy.

The Hon. CATHERINE CUSACK: Are any other options available at the moment?

Ms GRANT: I think Mr Cowdrey answered that question, and he said "no".

Mr BLACKWELL: We mention again that four senior counsel are looking at those particular issues and will advise the Government in relation to it.

CHAIR: Following up the answer to question 2.20 on notice, asked by Mr Primrose, you have listed a number of cases. Can you provide the Committee with the outcome of the cases listed? Was WorkCover successful in its appeal, unless you want to take it on notice?

Ms GRANT: Could I take that on notice, please?

The Hon. JAN BURNSWOODS: I wanted to follow up on the answer in 2.10, in relation to the questions I asked about the incident at St Peters a couple of days before the last hearing. I realise that sometimes these are difficult. I mentioned two surnames used by this person, now I find two company names. I have reason to believe that under whatever entity or under whatever name this person had previous fines. I think there was a case in Manly, possibly a company with the name of

Columbus in it. David Barr, the honourable member for Manly, knows a lot about this person as well. It may be that need to take it on notice.

Mr BLACKWELL: I think we would in those circumstances.

The Hon. JAN BURNSWOODS: It seems as if it is a case of people who take advantage of numerous personal and company names.

Mr BLACKWELL: We would be happy to follow up any such information.

The Hon. JAN BURNSWOODS: This is a matter of interpreting the answer. Part of my question was whether there were unpaid fines, and you have reference to four fines being issued in 2001 at Arthur Street, Homebush. I am not quite sure whether it means that they have been paid.

Mr BLACKWELL: Can we take that on notice?

Mr REED: Questions 2.53, 2.54, 2.55 and 2.56, page 34, relate to the St Peters matter as well.

CHAIR: There is quite a lot of detail there.

Ms LEE RHIANNON: Returning to the case of Mrs Welch, it was reported in the *North Shore Times* that the former general manager, Kate McKenzie, stipulated that the case could not be pursued because of jurisdiction and occupational health and safety. But in September of the same year, four to eight weeks later, it was reported that your officer said that WorkCover was commencing an investigation. What changed in those four to eight weeks?

Mr WATSON: The location of the incident in relation to the actual building site became clear to WorkCover and we received further information from Mr Alan Welch in respect of the matter, which enabled us to re-examine our original decision not to investigate it and then conduct a full investigation with a view to revealing any breaches of legislation.

Ms LEE RHIANNON: You are satisfied now that it comes within your jurisdiction?

Mr WATSON: Yes, we are. I should add that the matter is before the courts.

Ms LEE RHIANNON: When we were together on 17 February you mentioned blitzes in different industries, and the Minister is on the record speaking quite proudly about them. Given that there is no power in the Act to undertake safety audits and that inspectors do not have powers of entry unless they have reasonable suspicion of an offence, such as acting on a complaint, can enforcement be carried out legally by such random inspections?

Mr WATSON: The way in which we interpret the right of entry for an inspector is we have right of entry to all workplaces at a reasonable time and with a limitation in respect of domestic dwellings, which gives us power where it is likely that a breach may occur. There does not need to be a breach for us to have right of entry to a workplace. We can enter a workplace even without complaint. And we have absolute right of entry, that is we do not need to be called by any person from that workplace to enter the workplace.

Ms LEE RHIANNON: If you are challenged do you have to have good grounds for entering that workplace?

Mr WATSON: Yes, we do and we have been challenged in the past and employers have taken legal advice and have withdrawn the challenge.

Ms LEE RHIANNON: You do not think it is limiting you in any way with regard to the legislation?

Mr WATSON: I do not believe so. The powers we have as inspectors are very broad and are amongst the most powerful in Australia.

Ms LEE RHIANNON: In your evidence of 17 February you spoke about prevention programs. I am still trying to explore this issue of what I understood to be a lack of power to enter into and undertake audits. When WorkCover has no knowledge or suspicion of offence, how can WorkCover inspectors implement such prevention programs?

Mr BLACKWELL: I think the answer is the same.

Ms LEE RHIANNON: You are undertaking audits even when there are no complaints; you are going into workplaces and undertaking audits?

Mr BLACKWELL: Clearly, when we do a blitz that is exactly what we are doing.

Ms LEE RHIANNON: You are doing audits at that time?

Mr BLACKWELL: Yes.

Ms LEE RHIANNON: Perhaps you are saying you do not think it is necessary, but do you believe that an audit and inspection power should be placed in the Act to enhance WorkCover's enforcement powers?

Mr BLACKWELL: We might have to take it on notice to answer it more fully, but it does not seem to be inhibiting us at all as this particular point in time.

Ms LEE RHIANNON: I would appreciate it if you would take that on notice because that is what I am trying to explore.

Ms GRANT: Section 50 of the Occupational Health and Safety Act 2000 provides that an inspector, for the purposes of the Act or the regulations, may enter the premises the inspector has reason to believe is a place of work.

CHAIR: It would be very difficult to expand that. Following up on one of the answers to question 2.16, which relates to Newcastle BHP, when an inspector is away on leave is there a process under which another inspector is automatically assigned to a workplace? If so, is there a handover where the departing inspector alerts the temporary inspector to any issues that may arise during his or her absence?

Mr WATSON: In respect of the question the first thing is it is important that we do not have powers to supervise workplaces. That is the responsibility of the employer. Second, inspectors are supervised by team co-ordinators who have an overview of the work that is in their particular area. When an inspector goes on leave there is a handover with their team co-ordinator about the files they hold or issues they have been dealing with. The team co-ordinator has a working knowledge of the matters that are going on within that particular district. For example, in the case of BHP it would be the Newcastle office of WorkCover and the area surrounding Newcastle, and team co-ordinator to supervise that particular area. Inspectors have regular meetings with their line manager, the team co-ordinator, to talk about the work that they have on hand.

CHAIR: I imagine that the team co-ordinator would not necessarily go on site, so he is not fulfilling the role of an inspector or replacing the missing inspector. Would the team co-ordinator physically go on site?

Mr WATSON: If an issue comes up on a site—for example, on a project like BHP—an inspector would be assigned to that matter, as they are assigned to deal with matters on a daily basis. On occasions team co-ordinators do go on sites if a matter is a particular sensitive one, to deal with issues on sites. In fact, I should indicate that even on occasions the general manager of occupational health and safety in WorkCover goes on sites when the matter is particularly sensitive.

Mr BLACKWELL: We do not routinely assign inspectors to particular sites.

CHAIR: We are trying to clarify what happened with the Newcastle BHP site, which we have raised in question 2.16. It appears that the Newcastle BHP site was not visited by WorkCover inspectors during the 15 days in August-September 2002 while Inspector McMartin was away. Is that correct?

Mr WATSON: Yes, that is correct.

CHAIR: That is not a matter of concern to you?

Mr WATSON: The BHP site would be visited if an issue that we needed to attend to came to light. If we received a complaint or a particular matter had occurred, we would attend that site. In respect of the activities that were taking place on that site, we have a licensing system in respect of demolition which has quite a regime in respect of that site. That was a very large site, and WorkCover has a range of initiatives; it maintains a legislative regime over the site.

I cannot emphasise enough that WorkCover inspectors do not supervise sites. Under the legislation the employer has the primary responsibility to maintain a safe place of work for their employees and those who attend the work site.

CHAIR: But you would agree that the BHP site demolition was potentially a most dangerous exercise—different from simply a factory where an accident may occur?

Mr WATSON: That is why we had the particular regime of approval processes in respect of how demolition should be undertaken.

CHAIR: You still do not think it was necessary to have an inspector on site?

Mr WATSON: Not on every day, no.

CHAIR: In retrospect, do you think it would have been better if an inspector had been on site, that an inspector may have been able to anticipate a serious accident?

Mr WATSON: For me to answer that we would have to talk about details of particular matters which are before the court, and I think that would be dangerous at this time.

The Hon. JAN BURNSWOODS: I have now had a chance to look at the answers to those other questions, and it now makes a little more sense. We would appreciate your checking whether the fines issued in 2001 at Homebush have been paid. As I said, my information is that fines have also been imposed at Manly, but I am not sure whether it was one of the individuals' names or the various company names.

My information is that this man and his companies have had action taken against them in a whole variety of ways—for example, by way of apprehended violence orders, Fair Trading matters and various building matters. There must be a lot of people who have offended in various ways under various pieces of legislation and various departments. I am anxious that sometimes these people are falling through the cracks because of the difficulty of different agencies following them up. If you know how common this sort of thing is, and that a relatively small number of people are coming up against the system in many different areas, it is not until something overwhelmingly serious happens that it is all put together. Do you have any ideas about how we might resolve these issues?

Mr BLACKWELL: Clearly, we only take action in relation to our own legislation. There has been discussion previously in relation to immigration and so forth. I would have to take the question on notice. I would not want to make any comment about these people.

CHAIR: We would be interested to know whether there is any exchange of information, or whether someone builds up a file on a particular company, as you do with particular individuals who commit various offences.

Mr REED: Apart from our prior conviction database, which we obviously refer to, no.

Ms GRANT: And "prior offender" is defined under the Act.

Mr BLACKWELL: So anything outside our Act could not be taken into consideration on the issue of penalty.

Mr REED: I draw members' attention to question 253B, which talks about the Manly worksite. Our answer specifically addresses the Manly worksite.

The Hon. JAN BURNSWOODS: I read that. I gather there were multiple Manly worksites. I realise it is very difficult to generalise. My concern is that where people are coming up against the law in a whole variety of ways over a long period of years, somehow or other these things are never put together. That is not a criticism of WorkCover; it is a criticism of the system.

The Hon. DAVID CLARKE: On the face of it, AVOs would not have much relationship with workplace offences.

Mr BLACKWELL: Firstly, we take this very seriously. We do not want to see our inspectors abused, assaulted, or anything like that. Whenever these unfortunate incidents occur, we take appropriate action. In doing that, it may well involve the police and other services anyway, and there can be an exchange of information at that stage if the person is known to the police. I guess that is more informal than formal, and we will try to address that issue in some way.

Mr WATSON: Because of the nature of our business, obviously we come across some people who are less inclined than others to comply with the law. Certain people come to our notice, and where that is known to us we will make the inspector generally aware of the situation so as to minimise the risk to his health and safety when he is visiting a place of work. That is an informal arrangement, and it needs to be that way given the nature of information we are talking about.

Ms LEE RHIANNON: I refer to problems with companies that reinvent themselves and continue with the way they treat workers and their jobs. Have you considered sending a copy of the conviction certification of the director to the Australian Securities and Investments Commission, so that when a convicted director appears to open a new company it will trigger an ASIC response?

Ms GRANT: We have not adopted that practice to date, but it sounds like a pretty good suggestion. Obviously, ASIC has specific powers in relation to serial offenders. Since I have been with WorkCover I have not known of a matter in which we have done that, but certainly that is open to us.

Ms LEE RHIANNON: Considering that a number of companies move interstate, is a protocol in place with the WorkCover bodies in other States so that you can share databases—say, your conviction database? If it is being kept up to date, would that not be a fairly easy way to have a memorandum of understanding so that that is shared?

Ms GRANT: The problem with it, and I think we touched on this the last time we were here, is that the charges as between the different States' legislation are not necessarily the same, so you might get a conviction for one offence in Victoria which does not translate into the same degree of culpability in New South Wales, and vice versa. While it is interesting to know that a particular company or an individual may have offences in other States, it will not be taken into account in terms of penalty in this State but it may well go to the issue of credit, should credit arise during the course of the prosecution. It is information that could be used, but it will not be taken into account for the purposes of penalty.

Ms LEE RHIANNON: Would you agree that that would be useful information to have?

Ms GRANT: Yes.

Mr BLACKWELL: I have some information which may be of assistance in relation to phoenix companies in particular. As part of the response to the Cole commission into the building and construction industry, the Government, including WorkCover and the Office of State Revenue, is participating in a working party which includes State and Federal law enforcement agencies to share

information and intelligence concerning phoenix companies. The working party also includes the Commonwealth Treasury and the Australian Securities and Investment Commission [ASIC]. As such, WorkCover has asked Commonwealth agencies including the Treasury and ASIC how we can help them to enforce the Corporations Law to target phoenix companies, so there is really active stuff going on.

Ms LEE RHIANNON: I address this last question to all of you: Had you ever been asked to provide information on occupational health and safety matters in marginal seats prior to the 2003 State election?

Mr BLACKWELL: No, I have not.

Ms LEE RHIANNON: Anybody else? Have any of you been asked to provide information?

Mr REED: No. I mean, the chief executive officer [CEO] said that we were not.

CHAIR: That brings us to the end of the hearing. We thank you again for attending. Mr Blackwell would like to make a brief closing statement.

Mr BLACKWELL: Yes, I would like to make just a short statement, if I may. Firstly can I say that we have supported this inquiry. We have put a fair amount of effort into it and it has taken many hours of our staff time to put our submissions together, et cetera, and we still have some work to do.

CHAIR: Yes, we appreciate that.

Mr BLACKWELL: Thank you. However, my view is that this has been an important inquiry. One of the reasons that it is a very important inquiry is that it actually does give a public profile to the issue of occupational health and safety. The more people talk about it, the more people think about it, the safer workplaces can become, so I do not have a problem at all with this inquiry. I am more than happy to be here and have my staff provide whatever information. I think it is an important debate. It is a debate that the whole community needs to be involved in. It has also given us the opportunity to listen to all witnesses, including the victims' families, which has been very moving, and other witnesses from industry and from the unions and so forth. Everybody can always learn and our organisation certainly can, and we are willing to listen to what other people say, their suggestions and so forth. I think that that is part of improving the system.

Some of the witnesses have acknowledged that WorkCover has been responsive to the issues that have been raised. We have already been through a whole range of initiatives which were either in train before the inquiry or have been commenced in more recent times. I was talking about the counselling situation, the co-ordination of that, the fatalities protocol with the police which got an airing today, the fines enforcement protocol with the State Debt Recovery Office [SDRO] which is on the verge hopefully of being signed, the workplace fatality investigation unit which was established in 2002, and so we have had a whole range of things. I think it is fair enough to say that there were areas where we needed to improve. I believe we have either got those in train or they have already been completed. We will provide supplementary submissions, as I indicated to you at the beginning of today's hearing, in a fortnight. I hope I did not put too much pressure on everybody in relation to that though.

CHAIR: It is 29 March, at 5 p.m.

Mr BLACKWELL: I know the date, yes. I am sure the Committee's deliberations will lead us along some constructive ways. If there is any way that we can provide further assistance—and maybe the Committee wants to recommend something so it may be worth talking to us about it, not to change the recommendation but to talk about how it could be implemented—or do whatever might be useful. We make that offer. There has been a lot of discussion about statistics and whether the deaths are increasing or not. The data for 2002-03 indicates there has been a 20 per cent reduction in the number of workplace fatalities. There was a spike in 2001-02 but it has come down again. Finally I guess I would like to say that there has been a fair amount of criticism of WorkCover during the course of this hearing—some of it justified, most of it I do not believe has been justified because we

have taken a number of steps, as I indicated. You have heard witnesses from our inspectorate. I thought Rick Bultitude's evidence was very telling in the sense that you can see that we do have very good, very dedicated and very professional inspectors who take their jobs very seriously. We have a legal branch which takes its job seriously as well. You heard from our legal people too. In my mind there is no doubt that we prosecute whenever we can and we prosecute to the maximum that we can.

I believe that WorkCover does a good job in sometimes very trying circumstances. We were just talking about those a moment ago. It is not always easy for our inspectors and it is not always easy for our legal staff either. To my mind, what WorkCover does is an incredibly important job for the community. We prevent workplace deaths and we prevent workplace injuries. If it was not for our staff and our efforts, there would be many more of both of those. I am very proud to work for WorkCover, and I am very proud of my staff. I would just like to make that as a closing statement.

CHAIR: Good. Thank you very much for appearing as witnesses. I am sure under your leadership as the CEO, WorkCover will continue to improve. In some ways you have had to take a few brickbats for previous years, over which you have had no control, but I am sure that you are on top of it. I will be looking forward to working with you in the preparation of our final report.

Ms LEE RHIANNON: The 29 March date related to answers to questions upon notice?

CHAIR: Yes.

(The Committee continued to deliberate)