SPARK AND CANNON

Telephone:

Adelaide	(08) 8212 3699
Hobart	(03) 6224 2499
Melbourne	(03) 9670 6989
Perth	(08) 9325 4577
Sydney	(02) 9211 4077

TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO NATIONAL WORKERS COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

PROF M. WOODS, Presiding Commissioner
PROF J. SLOAN, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT HOBART ON TUESDAY, 10 JUNE 2003, AT 10.35 AM

PROF WOODS: Welcome to the Hobart public hearings for the Productivity Commission inquiry into National Workers Compensation and Occupational Health And Safety Frameworks. I'm Mike Woods. I'm the presiding commissioner for this inquiry. I am joined in this inquiry today by Prof Judith Sloan.

As most of you will be aware, the commission released an issues paper in April setting out the terms of reference and some initial issues. The inquiry explores the opportunities to develop national frameworks for workers compensation and occupational health and safety. Our full terms of reference are available from our staff. The commission as part of this inquiry has already travelled to all of the states and territories - we were here in Hobart not long ago - talking to a wide cross-section of people and organisations interested in these topics. We talked to groups from a diversity of backgrounds and met directly with government organisations, unions, employer bodies, insurers, service providers and others, listening to their experiences and to their plans for the future. We have to date received over 20 submissions from interested parties and welcome further submissions to assist us in this inquiry.

I would like to express our thanks and those of the staff for the courtesy extended to us in our travels and deliberations so far, and for the thoughtful contributions that so many have made already in the course of this inquiry. These hearings represent the next stage of the inquiry. Following the hearings and our considerations of the submissions, we will issue a draft report by the end of September. We would encourage all to very closely examine that draft report and provide comment and submission to us on that. Following that, we will have a second round of hearings to examine the issues that arise. The final report will be signed by March next year.

I would like these hearings to be conducted in a reasonably informal manner, and remind participants that a full transcript will be taken and made available to all interested parties. At the end of the scheduled hearings, I will provide an opportunity for any persons present to make an unscheduled oral presentation should they wish to do so, and I encourage those who are here today in the audience that if they do wish to step forward at the end of our scheduled proceedings, they are most welcome to make comment as part of the formal proceedings of this inquiry.

I would like to welcome to the hearings our first participant, Mr David Skegg, federal president of the Safety Institute of Australia. Could you please state your name and title and organisation that you represent for the record, please?

MR SKEGG: Mr Commissioner, my name is David Skegg. I'm the national president of the Safety Institute of Australia.

PROF WOODS: Thank you very much. Do you have an opening statement you

wish to make?

MR SKEGG: Yes, I do. By way of introduction, the Safety Institute of Australia is the professional body representing safety practitioners. It's been in existence since 1947 and is a national body. It has divisions in each state and has chapters for special interests such as aviation safety. The Safety Institute has a number of membership levels, from affiliate for those with an interest in safety generally, associate for the new and inexperienced graduates, members for the appropriately qualified and experienced practitioner, fellow as a senior practitioner and chartered fellow, which is a grade by examination for the senior professionals. We've have stolen the medical model to a very large extent. Our patron is His Excellency the Governor-General of Australia, who confers our fellowships in person at a ceremony each year in Canberra. The fellows of the institute form a college headed by a dean and supported by a scientific board to set and safeguard the standards of the institute and to advance the science of safety.

In August of 1964, a popular Australian magazine, the Australian Post, published an article entitled Safeguard in a Factory, and I have attached a copy of that article for you. What the article tells us really is that in the intervening 39 years nothing has changed. Industrial safety is still seen largely in terms of human error, which is comforting for managers, as it implies there is little they can do about it. At best, it leads to the notion that all problems of injury and consequential compensation can be avoided by simply telling people to be more careful. This is at odds with the legal model in Australia, and leads to successful prosecutions in civil litigation which, in the present day, has become a focus for those who cannot see any other solution to prevention, the industry that surrounds tort actions and the opportunistic victim mode mentality activity so often referred to in public discussions on compensation.

Many stakeholders have conveniently forgotten that there is a science to safety. The notion of physical reality and accident causation stems from work in the 1950s, and the basic techniques, such as fault tree analysis, arise from that same era, so we're talking about a science that's been in existence for over 50 years. There have been courses at tertiary institutions for at least the last 25 consecutive years in Australia, but still the practice of safety is often left to the unskilled and unqualified but well-intentioned worker, given the job by the employer and encouraged by the statutory creation of workplace health and safety officers or safety representatives existing in state legislation.

That industry will accept advice from an unrecognised practitioner which, if wrong, could cost them their company, is a testament to how wrong we have got the politics of safety and how we follow urban mythology instead of science, and there are many examples of that.

The structure of the event process and how it impacts on compensation: there are essentially two aspects to the way in which an accident or, more correctly, an event evolves. Firstly, there is a series of events prior to losing control or the preventive mode, and secondly damage mitigation and repair, or the reactive mode. Compensation is peculiar to the reactive mode and yet arises from the failure of prevention. At present, there is no real feedback loop between the two that has any meaning or significance.

I agree totally with Dr Wigglesworth in his submission to you, that without proper data collection we have no real idea of what we are doing, and that must lead us to ignoring what should be the targets for action. Dr Wigglesworth's comparison of performance at page 3 of his submission to you is the ultimate story of how we have got it so wrong. How else could we go from a ratio of 5:2 deaths from infectious diseases versus accidental injury, to 5:16 in the same period of time?

The law: under the present Australian safety legislative systems or, more correctly, the way in which the concepts have been implemented, the science of safety has been disenfranchised to the point that on present trends there will be no research into what is costing the industrial sphere alone $21 billion a year, according to the estimates made. The best way of describing the situation is by allegory. We have legislation based on the Robens report in the United Kingdom. As we have implemented those lofty aims, if we applied them to, say, cardiac surgery, when you presented to the hospital to see if you needed that surgery, you would be met by a member of the hospital management, a union representative and somebody from the health department, but no surgeon.

We enforce this legislation with law enforcement inspectorates who in all states also have the role of adviser to industry, leaving the ridiculous situation of, "I'm from the government and I'm here to help you but, if you're wrong, I'll prosecute." Under the legislative framework, if you were to ask for instance, "How high should I build this handrail?" the answer might be, "As high as you think it should be and, if you're wrong, I'll prosecute."

No wonder industry wants to revert to prescriptive legislation, and there is good reason. The aviation industry is highly regulated and has an enviable safety record. Why, then, do we ignore the obvious? If it works in that industry, where the consequences of failure are seen as unacceptable, why would it not work in other high-risk industries, as described by the appalling death rates.

These might be seen as cute stories, but they explain in simple terms an essential truth. Law enforcement is otherwise dealt with in our society by police, and they have already established a precedent in the case of fisheries work, to take on

what might be considered non-traditional roles. Why, then, do we not enforce the will of parliament in the issues of industrial safety? This would fix the problem of clashing roles for an inspectorate and put beyond doubt the enforcement of adequate safety measures. In any case, the inspectorates have no hope of doing their job according to the legislation, any more than does a manager. It is a simple sum to take the number of workplaces and divide it by the number of possible inspector visits, and see how many years it must be before an inspector can visit a workplace. That is why the inspector of duties are in the reactive phase of event evolution, by and large.

A manager is in a worse plight. For some years now, the market has been putting the frighteners on managers by hammering the duty of care they owe to their employees, the public, and so on. It's not whether the duty of care exists or not that should be the focus. It's the standard of care that should apply in that circumstance. To establish that standard requires a technical and professional input.

The way in which prevention of unwanted events can be best managed is largely a matter of engineering and design, and this applies to any field. On this morning's news, New South Wales has announced a campaign of prosecutions in school zones as a road safety measure. This was on the Channel 9 news today. This is certainly one approach, but the design of schools to remove the children from road traffic areas is another and arguably better mechanism, as it reduces the opportunities for an event to occur, or the exposure data that is incorporated and described as "likelihood" in the Risk Management Standard AS4360, and which is the major variable in most instances.

I temper these remarks on road safety in the recognition they have got their politics right, and we have not. The decline in road deaths has occurred, whereas the industrial deaths do not enjoy the same history. Being scientifically correct does not mean success. It's the old Beta versus VHS story again! You might have a better product but if you don't get the marketing right, you don't go anywhere.

The compensation schemes: as no doubt you will hear from others and discover from your research there are a number of models we could follow. Most would be preferable to the state-specific schemes we now have, especially in these days of the mobile workforce and company structures and the effects of the information technologies. The popular notion at this time is to have a single insurer scheme for the whole country. This could be as wide as the ACRC in New Zealand or an amalgam of the existing schemes, including Comcare.

Our interest is different, although I must say that there is a clear and present danger in leaving the matter to those whose primary interest is the sale of premiums, as is evidenced by the staggering effects on our society of that approach in the public

liability and professional indemnity markets at present, which are based on the same legal notions, incidentally, as injury and disease. Our interest is to see that performance feeds back to the prevention, so that we can get a continuous improvement loop.

At the moment the basic statistic used in safety generally is the lost time injury frequency rate. That figure has probably done more damage to the advancement of the science of safety than any other. It tells us nothing about what happened, it tells us nothing about the management intentions, it tells us nothing about causation. In statistical terms it's not even a frequency rate. In fact, if it measures anything at all, it might be the mood of the certifying medical practitioner at the time of the consult. Hence, Dr Wigglesworth's plea to do something about our data. While this is all we have, we will misdirect and waste resource and effort.

In my view, it's time Australia took a long hard look at other models of compensation to deal with this lack of feedback. In particular we should look closely to see if we can transplant the German Berusgenoffenschaften scheme, which is an industry based insurance scheme that funds prevention and compensation, and adjusts premiums according to the balance of activity and outcomes in both sides of that equation. I urge members of this inquiry to make those investigations and form an opinion.

There are obvious inequities in the way in which compensation is paid to the injured parties in Australia. More worrying, however, is the restriction and removal of the common law mechanisms to determine values ascribed to various conditions, and the Liberace scenario, canvassed some years ago, is still valid: what's a finger worth? It depends on whether you are Liberace or not. I subscribe to the argument that if you restrict or remove the ability for values to be set by the common law you have removed society's ability to determine those values, and the alternative is that you end up with a table of maims set by a bureaucracy that must, of necessity, fail to recognise the individualistic efforts and effects of loss.

Any compensation scheme that does not support continuing research into the causes that give rise to the need for compensation as of right is flawed. If the prevention of injury and disease does not form part of the compensation mechanisms, then it must ultimately fail.

My submission is not a fully referenced academic paper. It is meant to be a wake-up call to look at some fundamental issues affecting the lives and wellbeing of those who are lucky enough to live in our country, and to direct your minds to the reality of managing risks as opposed to appealing to the platitudes so prevalent in today's world of safety. There is a science to safety. It's been largely ignored. It needs to be funded. Recognising the lack of attention to the science is what gives

rise to the need for compensation and must be fundamental to your considerations.

PROF WOODS: Thank you very much. You've raised a number of fairly important issues in that opening statement, and we are grateful for the time that you've put into preparing it, and I understand you will submit that to us as a formal submission so that will appear on our web site, once received in that capacity. You've traversed quite a field. Our primary focus is on the development of national frameworks but, nonetheless, I think it's important to understand some of the details that you raise, and perhaps if I could ask a couple of questions and then my colleague Prof Sloan will then take up some of the others.

You mention what you perceive to be an inherent conflict of interest in the dual roles of the occ health and safety inspectors, that of assisting, educating industry and then of prosecuting. From your experience, do you want to elaborate on whether it is possible to live with such a conflict or would you propose a model whereby those two roles are attributed to different personnel?

MR SKEGG: Certainly. I should preface my remarks by saying the comments I make are those of a personal nature. They are not the considered collegiate remarks of the institute as a whole.

PROF WOODS: Thank you.

MR SKEGG: It's my view that if you think about the fact that most of Australia is small business and "small" is not necessarily the ABS definition. It's much smaller than that.

PROF WOODS: Yes.

MR SKEGG: But if you get a visit by an inspector it is usually because something has happened and that has to happen because there is no other way that they can operate. There is simply no resources, to do it any other way, so if you have got an inspector turning up and you know that they can prosecute - and those prosecutions are now being advertised quite widely - you would immediately and, I think, realistically, assume that you're about to get hit with a fine, and most people are fined or prosecuted when they have already suffered loss; sometimes a loss that is so tragic that it affects the owners of the business because they have lost or damaged a friend and colleague, as well as an employee.

It becomes a little unbelievable, I think, that the inspector says, "I'm here to help you." That would require a lot of time to establish a trust relationship between the inspector and the owner-operator of the business, which simply they don't have the time to do, because they are basically responding to either accidents that have

occurred or complaints and there just simply isn't the time to do that, in my view. There have been attempts in the major states of course to have the prosecution separated but, if this is enforcing the law, why wouldn't we give law enforcement to the police?

I mean, they do it for fishing. If you take a fish of the wrong size you'll get a policeman there, and you'll get a fine. You don't get the fisheries people trying to educate you about the dangers of catching the wrong size or with the wrong equipment - they are two quite distinct functions - and I don't see any reason why we shouldn't examine that a lot further and have the enforcement by the law enforcement agency.

PROF WOODS: The organisation that employs the inspectors does spend a lot of time and resources though on - if people could avoid that that would be helpful - in providing educative material by way of pamphlets, brochures, guidance notes, seminars, et cetera, so that educative role does exist, which you would acknowledge, I assume?

MR SKEGG: Yes.

PROF WOODS: And where your particular point lies in those who actually turn up at the door of the factory workshop - as to what role they should be playing as distinct from the broader need for education, which is conducted by the organisations that employ those particular inspectors.

MR SKEGG: If the resources of the regulator are put towards the education and production of that material which we see - and which, I must say, is becoming much more correct over the years - about what a hazard actually is, rather than some motherhood statement - then surely they are diverting resources away from the inspector function to prosecute, where they are determining whether or not there ought to be a prosecution or whether they are examining in detail what might be a low-value consequence - a near-hit, if you like - so that we can learn from the lessons.

I mean, if you take the aviation industry as an example - very heavily regulated. You don't need an aircraft to fall out of the sky to trigger a major investigation. You only need people to understand that the accident process is in place for that investigation to be triggered, even though there has been no outcome; for instance, in Australia the incidence of high-speed runway incursions is of great concern and is being addressed in a very serious way, even though nothing has hit anything on the runway. The consequence of failure is very high. We don't seem to follow that. If the resources of the inspectorate are going to say - I don't know what the split is state to state, but let's say it's a fifty-fifty split.

PROF WOODS: It varies.

MR SKEGG: That they are going to spend 50 per cent of their resources on trying to educate the public at large in the industrial scene, then that can't be used for their other functions. In some states - and my understanding is in this state of Tasmania, for instance, they have multiple roles - it's not just industrial safety.

PROF SLOAN: Doesn't though the aviation industry give you at least some explanation as to why in so many industries so little emphasis is placed on accident prevention? It is because the consequences are often relatively slight, whereas if of course a plane falls out of the sky they've got something horrendous, so basically there is a kind of model going, "What's the probability of something happening and what are the consequences if it happens?" Hence the sort of devotion to say the aspects in aviation. I'm not justifying it, but it kind of - - -

MR SKEGG: I think there are two aspects. The first is that Geoff McDonald in Queensland, for instance, has the model of the paradox of safety, because you get a lot of events happening but not to an individual, so they don't see the need to do that. The second thing is that the aviation and some other industries share their information very willingly. They don't see that as being a commercial disadvantage, so they do share it in one form or another and certainly it is pretty well known.

I don't think that that actually applies, although I would have to say that in recent times the mining industry has started to share their information quite well, and that is occurring at the same time as they are mechanising, particularly in underground, so the notion of somebody laying on their stomach with a pick in their hand and the roof falling in on them might be what the mental imaging is for the mining industry that they're overcoming, but the reality is that you're driving 120-tonne trucks underground. Their rates are falling for those two reasons, I think: one is that they understand their industry and they share the information and the other is, of course, they are mechanising their industry and the worker is being taken out of that hazardous area.

PROF WOODS: I just want to extend this a little further because, a little later, you were talking about feedback loops and the importance of learning from performance, to feed back into prevention, but prevention requires education and awareness. I am just a little concerned that you are wanting to put a lot of resources into the inspectorate side for the prosecution but, at the same time, arguing that you want feedback into prevention and education. I can't quite grasp where you see the weight of resources should apply.

MR SKEGG: Without doubt, in my view, the weight of resources should apply in

prevention which, to me, is separate to prosecution because of failure. It's not so much the weight of resources on either side of the equation. I mean, you actually want to reduce the whole equation, don't you? If you looked at the total cost of risk, it's what you spend in prevention to stop things going wrong, plus what you spend because they have gone wrong.

PROF WOODS: Absolutely.

MR SKEGG: You should be trying to reduce the quantum. The balance between those I think is yet to be determined, but it is fairly well described in literature.

PROF WOODS: And it varies from time to time because states go through cycles where they will move to a greater emphasis on prosecution at a particular period in time and then they will move to an emphasis on prevention and education, so as we observe each of the jurisdictions, they do tend to move in some form of oscillation.

MR SKEGG: Yes, they do, but I guess what I'm saying is that it sometimes is misdirected and sometimes academically unsound, because if you have a TV campaign - and I have personally been critical of those - and then your research is directed to, "Have you seen the ad?" Well, of course you have because it's been saturation television at peak times, but has it had any effect on what you actually do, is a completely different question and, in my view, the statistics would not show that that form of spending money to educate the public is the best way of doing it.

It is one way of doing it, but not necessarily the best, and that exists within the context where we are doing no research in Australia. We are not examining the issue. We are not even counting things to examine. In our data set, for instance, in 1985, the Australian standard, we have one classification which is, "Slips, trips and falls". If you put that to say that is "bites" - it could be the bite of a mosquito, the bite of a crocodile or the result of either. I mean, it's a nonsense. Then, just to add insult to injury, we have, "99 - not elsewhere included." What sort of a taxonomy have we got?

I mean, that means the only data we have got is the best we've got and we have to use it, but we have to recognise that it's flawed. I don't really understand why we have managed to go on so long without examining what is such a huge issue. There are many, many examples of urban mythology taking over and a whole lot of resources applied to what is in fact a non-issue and, when you go to look for the evidence - "Why are we doing this?" - the evidence just simply isn't there? It has been drummed up perhaps by the media as a real issue and there are always some stories on both sides about that - or driven by a large judgment when those systems were in place - but it doesn't necessarily address the fundamental issue that's going wrong. My comments about the inspectorate are: I think they have tried very hard to

do that, but their resources are very thinly spread over a number of areas and, surely, there is one area where you could remove the workload, even if you have to transfer the resources to another area, so that they can then concentrate on the remainder.

PROF SLOAN: I must admit though, I am a bit puzzled - and maybe I misrepresent your position that safety is essentially a sort of scientific/technical issue - because I would have thought you could have two workplaces with essentially the same technical layout and the same kind of safety advice - same scientific safety advice - but they could have quite divergent outcomes in terms of safety because, when I think of my research experience, I would have thought the workplace culture would matter quite a bit; you know, how people are managed, the kind of teamwork, the kinds of attitudes that are encouraged in certain workplaces. Am I misrepresenting the first bit of your story, that essentially safety is a sort of technical issue?

MR SKEGG: Not at all, Prof Sloan. I think what you are actually doing is articulating what most people are saying.

PROF SLOAN: That's how I am wrong. Okay.

MR SKEGG: I think the reality is somewhat different. Behaviour arises from attitudes and attitudes arise from beliefs and culture. The notion of addressing a culture is probably quite correct, but changing human behaviour is an extremely expensive sort of an exercise, and highly unreliable. I mean, the nice thing about us humans - and Prof Easson has done a lot of work there - is that we make mistakes, but we make them at a fairly constant and predictable rate and, if you factor the human error rate into your design, then you are allowing for people to make mistakes. A pilot makes mistakes every day of his life, but the aircraft doesn't crash.

PROF SLOAN: Okay.

MR SKEGG: He is surrounded by systems that says, "Do you really want to do that, you idiot?" If you take your two workplaces and they are properly engineered, it is physically impossible to injure yourself unless you put your hand, for instance, into a damaging energy space and, if you have various engineering things in place - on both factories - that's not going to happen, so where your failures come in - if they were both of a high standard - would be where people defeat the guards that are put in place, or the guarding mechanisms that are put in place.

PROF SLOAN: Okay, yes. Essentially you are saying that you actually have to build - technically, scientifically build - a system which allows for human frailties.

MR SKEGG: I believe so. For instance, in this room - the way it's set up - you

have a taped cord between the two tables, and that is to stop people from tripping over it. The problem is not the cord. The problem is the people going over the top of it. Somebody at some stage decided, by design, for this sort of an arrangement that the plugs and cords and things would be in those locations; in fact that was probably by omission rather commission, wasn't it?

PROF SLOAN: Yes.

MR SKEGG: But the realisation that what you are trying to prevent is the number of opportunities for a person to trip rather than the cord itself leads you to a different form of thinking about what the problem really is and most of your solutions will come from the original design and build and the engineering.

PROF SLOAN: Okay. Speaking of an analogous situation: my husband is an obstetrician and he would say that major medical catastrophes generally occur after about five or six things have gone wrong, so they have kind of gone through essentially five or six safety barriers, and that in a sense is how they prevent it. They have kind of mechanisms in place - checks, other people involved in the system and the like - and you're saying that that's not a model that's typically applied to workplace safety.

MR SKEGG: The models do exist, but they haven't been commonly accepted and some of them are limited. Some of them are just plain wrong. I don't think it is any coincidence that clinical risk management is using the same tools as you use in industry to design something.

PROF SLOAN: Yes, they do.

MR SKEGG: The methodologies are the same.

PROF WOODS: Can we look at the situation where though, as you yourself pointed out, the vast majority of businesses are small business. A number of them are undercapitalised, a number of them are using old or second-hand equipment. The businesses have been started up by those who were good at something and have grown organically and taken on a few workers and got a bit bigger and found a niche and doing a few things. Now, that's the practical reality of a lot of small business in Australia. Commendably, they've shown enterprise and growth.

It seems unlikely that each and every one of those would have best practice in a technical sense with multiple trips to failure that would prevent an accident from occurring. But if there is an ability to invest some resources in imbuing in them a strong culture of safety within the limitations that they are operating, surely that would have some benefit in itself? I'm just a little worried that you're sort of putting

forward one paradigm only but that it may not be practical or achievable, maybe even in the short to medium term for a very large number of workplaces.

MR SKEGG: I'm not quite sure what you mean by safety culture. If you take for instance a delicatessen, and I'm now speaking from some close experience, you design and build this thing and you do your best within the budget that you've got available, because safety is a very expensive commodity. You buy a slicer which is a certain configuration. You know the thing is dangerous because if you make a mistake you'll take your finger off as well as a piece of the ham. Yet the design of those slicers has now been changed so that becomes less likely - you can't have zero risk, of course, but it's less likely.

If the fundamental concepts don't exist in your mind - that is, the mental imaging of what causes things to go wrong; and I guess that should start in primary school, which is where I'd like to see a lot of money spent - then you wouldn't recognise, for instance, that a bench that is 15 millimetres too low will destroy the upper spine of the people working on it over a long period of time. You wouldn't recognise, for instance, that the sources of energy in a kitchen, be it domestic or commercial, are there for everybody to see but only if you're looking for them. That's why people hurt themselves in kitchens and workshops. There are more opportunities to do so.

Now, that's a different way of thinking to telling people to be more careful. In industry that's translated to the point where you send somebody out on a hazard hunt. Well, what do they take? A shotgun or a net? Because if they don't precisely know what they're looking for, they only know what they're looking at.

PROF WOODS: I understand that technical side of it but surely it isn't to the exclusion of all else is my only point.

MR SKEGG: But the culture will arise from a whole lot of inputs over a long period of time. I don't think it's something you can address and change. It's a very long-term thing and I would suggest that it's somewhat unreliable. The reading that I have done on safety cultural programs I have yet to see, even though some of them are extremely expensive, that they actually work. They reduce the lost time injury frequency rate and I've already commented on that, but the death rates don't change very much. You still blow the place up and people still die. So I'm not sure that - yes, it needs to be done in the longer term but it needs to be in the context of we've got some other serious issues to deal with first.

PROF WOODS: So it might be a matter of emphasis?

MR SKEGG: Well, it's also a matter of economics, I think.

PROF WOODS: Absolutely. If we could pursue a different issue at this point, you mentioned common law and you raised a number of arguments in favour of it. I didn't hear any commentary from you on what any downsides might be on common law. Is that because you see now downsides?

MR SKEGG: I'm not a lawyer.

PROF WOODS: No. It's just that you raised one side of the argument but I'm not sure if therefore in your mind there is only one side to the argument.

MR SKEGG: I think the rejection of the common law mechanism has been brought about for the wrong reasons. My view is that it has arisen over a long period of time, hundreds of years, starting off with judges swapping stories in hotels, perhaps; but nevertheless, it has been created over a long period of time as a good system. I don't see that removing that, and there are plenty of stories about the effect of that removal, is a better system. It's perhaps only an attempt to try and cut costs and I'm not sure that that's where all of the costs are, anyway. They are a reflection of costs through a particular mechanism which may otherwise not be seen.

If we don't have the common law available to us, how do we then set our values? How do we change those values? What's a leg worth yesterday versus tomorrow - and the Liberace argument, of course.

PROF SLOAN: Yes, but I mean there are some counter-arguments. I think if you're going to have a common law compensation system then you can't run with the notion of strict liability on the part of the employer and therefore there's always the possibility that the employee is found to essentially have contributed to the accident and therefore, notwithstanding the fact that the employee might have lost a finger or a leg, will get nothing. So that seems to me an argument against it and I think - well, that's one. I mean, there are very high transaction costs in determining the level of compensation via court cases as opposed to some prescribed flow of benefits.

Is one of the points you're making, though, that the employer has to wear the true costs, the appropriately valued costs of the injury - there's an argument economists would have some time for - in order for that to provide the right incentives for the employer? The table of maims or flow of benefits, that's all just kind of an average, really, that's regarded as sort of vaguely fair.

MR SKEGG: Yes, I'm not sure the hurdle is fair. The difference between 29 and 31 per cent is hardly fair. The cost has to be borne by society, if you take the broader view, of which the employer is part. The costs to the employer are quite often things that you cannot see, because if you take a corner shop with three people - mum, dad

and one employee - and the employee gets hurt, that can devastate both families. That's a cost to society which would be reflected and very difficult to actually put a number on, I would think. The common law system, my understanding of it is that it does a better job of recognising that sort of thing than does a defined table.

If you have a no-faults scheme, apart from the fact that it might be an enormous bill to the company - that is, the company of Australia Inc - it might also increase that $21 billion a year to something that's even more frightening and we would actually discover what the true cost is. It's a bit like the argument of smoking if you remove tobacco, isn't it, that the hospitals would be to a large extent empty? But society has some values that they accept. I mean, it's the perception of risk and the acceptability of risk. I don't believe that we have reached that level that we are just shrugging our shoulders and saying, "Well, we will accept what we've got at the moment."

PROF SLOAN: You seem to be making the point that safety or accident prevention and compensation don't mix particularly well.

MR SKEGG: I think they're inextricably linked, because you can only have one if the other fails.

PROF SLOAN: Yes, but you're saying that in the current arrangements they're working at odds with each other. I can see examples where that's true. Well, an accident has happened. You've got a state based, premium based system. You know? Let the former - - -

PROF WOODS: Take your premium and let the insurer worry about it.

PROF SLOAN: Yes, it's then the insurer's problem; it's not your problem. Was that not one of the points you were trying to make?

MR SKEGG: Yes, it is, because if a claim for compensation comes up and they say, "Oh, well, that's an insurance problem," they flick it on. That all goes horribly wrong because that is in fact not what our law says, is it? It's not delegable. Only the payment bit you can do that with but the causation bit is non-delegable.

PROF SLOAN: Yes, well, you kind of wear some penalty to your premium, but I think there are some rather weak incentives for employers to basically continue to own the problem, so to speak, because they regard the compensation as being handled by a third party. I think that is a legitimate criticism of the system.

MR SKEGG: But also isn't it the concept that that's what the prosecution is for? To demonstrate quite clearly that it is your responsibility - but that's a separate issue

from the payment of compensation.

PROF SLOAN: Yes. I mean, the vast majority of compensable cases never generate prosecutions. So basically people, employers, are able to handball this on to a third party.

MR SKEGG: Isn't that a good question to ask why?

PROF SLOAN: Yes. I think it's a weakness of the system but I think that how you achieve feedback particularly in the context of small business and the like is quite problematic.

PROF WOODS: If we look at the larger end of town, particularly those who are self-insurers, is that a model that you would favour where they have the financial and management capacities so to do because of the more immediate feedbacks between performance and prevention?

MR SKEGG: I believe when managers have the ability to manage and they take control of an issue, the issue gets managed. So self-insurance I think is probably a good way of going but probably within a broader scheme because there are a lot of people who will not be able to match the prudential requirements and the administrative requirements of such a scheme, so one would have to coexist with the other. Having said that, the notion of self-insurance I don't think has been pursued hard enough. Where the rules exist for it to occur it has been made so difficult that people won't go down that path.

PROF WOODS: How do you solve the problem of small and medium businesses to replicate those feedbacks given that inherently they're unable to be self-insurers? They just don't have the prudential capacity, they don't have the management overheads, the resources to be able to apply to it. Do you see any models around Australia in terms of a premium-paying business that does give more immediate feedbacks?

MR SKEGG: I guess there are a number of models and I'm not sufficiently expert to say what they all are and which is the best, but the sort of issues that come to my mind is firstly the German scheme which does take account of that. Secondly, the industry peak bodies could become "self-insurers", if you like, so they could represent the small businesses that are their membership, if they were allowed to do so by the scheme itself. That could soak up a fair bit of that.

PROF WOODS: The pharmacies is one example.

MR SKEGG: Yes, pharmacies would be one. Fish and chip shops would be

another one.

PROF WOODS: You know, pharmacy guild, then they have a scheme like that in some jurisdictions. Pharmacy guilds are self-insurers on behalf of the collective body.

MR SKEGG: Yes. As to how far that goes, what it actually looks like, I don't really have a view.

PROF WOODS: Local councils again in some jurisdictions have self-insurance status on a collective basis, so there are some models that will explore that.

PROF SLOAN: You seem perhaps surprisingly pessimistic about what has actually occurred in the field of safety prevention. I mean, after all we've had NOHSC going for really quite some time and they seem to have been busy. How would you assess some of those government initiatives in promoting better occupational health and safety?

MR SKEGG: In some areas I would suggest that they've had an effect. For instance, the national standards on things like manual handling brought the issue to the front of mind for a period of time and it was picked up enthusiastically by various sectors of the community. As to whether it made any difference, I have some doubt because certainly in my life as I wander around watching what people do, nothing much has changed. I mean, why on earth do we have bags of cement the same weight that they've always been when you could reduce the size of the bag and reduce the number of injuries from weekenders? Why on earth is it that we have people going out at the weekend - we call them in Tasmania the weekend woodhookers. They're the people who are slicing themselves up as opposed to the people who do that for a living, I would suggest.

I don't know what the data is, except from some old data at hospital admissions. The effect of those programs, I think, has probably not been measured, so maybe that is just another question. I mean, the fact that there is very little, if any, research going on, within three years - on the estimates I have been given - there will be none, means that we don't actually know and, if we're going to solve a problem, surely we have to understand it.

PROF SLOAN: But standards, are they - I mean, NOHSC has been quite keen on trying to - I suppose "promulgate" is a strong word, isn't it?

PROF WOODS: "Issue guidelines" is better.

PROF SLOAN: Issue standards, national standards. I mean, has that been - - -

MR SKEGG: I think its greatest contribution is trying to get some standardisation around the country so that people keep pointing to the same thing. There is a danger of course that in the publication of standards you become a publishing house. There is a further danger that by changing a standard because it is picked up in law you might actually change the law whereas you didn't mean to. If you take a careful look at a lot of standards they are very advisory. They're not terribly helpful for the guy on the corner store, or something like that.

PROF SLOAN: So is prescription more helpful, do you think, for - - -

MR SKEGG: I think the smaller the business, the more prescription they look for.

PROF SLOAN: Yes. It certainly became unfashionable, I think, prescription, and it was that - - -

PROF WOODS: Yes, performance-related guidelines rather than prescription.

PROF SLOAN: Yes, general duty of care.

MR SKEGG: Yes. Prof Fels has a wonderful slide, where he shows the pushing uphill of continuous improvement and, of course, quality assurance was supposed to be the chock at the back of it - a small chock with a big wheel was the intention. What we ended up with was a large chock with a very small wheel. I think the enthusiasm for some of these things, whilst they are conceptually quite nice, get translated a little differently.

PROF WOODS: So from your observation of the work of NOHSC, what would your advice be as to where those energies should be directed?

MR SKEGG: The national commission, in my view, has a role - particularly in the education - from the children onwards. Give me the money that is spent on television campaigns and put it to the primary schools and, whilst you wouldn't see the result very quickly, I believe it would have a much better result. The Victorians, some years ago, put out a kit for their VCE students, and it was all about how safety ought to be integrated into what they were learning - because that is one of the keys to successful prevention. It's the way you do things. It's not an after-market add on. They produced some very good material, but it was funded for a very short period of time and disappeared off the market. I believe that that and the Catholic Education Office in Queensland did something similar, but it was short-lived. That sort of activity from primary school onwards, I think, would have a much better effect as a national push.

PROF WOODS: Doesn't that take us back to where we started and a little bit of a debate about safety culture and awareness and things?

MR SKEGG: Yes, it does, but I don't think I am saying anything that is contrary to what I have said earlier, because to establish or change a culture is a very long-term objective.

PROF WOODS: Yes, we all fully agree with that, but I am glad that we at least have come back around to that particular issue.

MR SKEGG: The other part of the national body is, to me, not only collecting the data but actually doing something with it, and that really does mean some pure research and some applied research.

PROF SLOAN: Yes, of course.

PROF WOODS: You'll get no argument from us about the need for data. As we have been undertaking this inquiry it has been quite instructive to work through what data is available and what there could be but isn't, so we agree with you in that respect. Are there other particular issues that you have raised that you would like to dwell on a little further or do you feel that we have canvassed the matters that you - - -

MR SKEGG: I am in your hands, Mr Commissioner. I think there is probably an exit point from the room before other speakers come to mind.

PROF WOODS: No, no, that's all right. We are taking the opportunity to pursue all issues while we have you available and we certainly thank you for the time that you have put forward to not only prepare the submission but to come today.

PROF SLOAN: I found it very interesting.

PROF WOODS: Thank you. We appreciate that. We'll take a short break for a minute and then call our next participant. Could I also remind those who are present that after our next participant we do have a little time so if people have matters that they have been thinking through and would like to make a short presentation to us, they would be most welcome. I will just briefly adjourn.

PROF WOODS: Our next participant is Ms Anne FitzGerald, clinical psychologist. Welcome to these hearings. Could you please give your full name, title and position?

MS FITZGERALD: Anne FitzGerald. I am a clinical psychologist with Merse, FitzGerald and Nichols. I have worked in the area of chronic pain for quite some time now.

PROF WOODS: Thank you very much. We have the benefit of a submission from you. That has been posted to our web site and we thank you for the work you have put into that. Do you have an opening statement that you wish to make?

MS FITZGERALD: I have come to the view of the importance of early assessment and intervention from many years of seeing people get very caught up in a system and become very disabled. In some situations - particularly with soft tissue injury, low back in particular - perhaps the disability may be greater than it needed to be, but has developed over time and becomes a very entrenched pattern. I think early intervention - there is quite a bit of research coming from overseas countries, where they have attempted that. One particular trial in Nova Scotia with their workplace authority has shown very good return-to-work rates in an at-risk population.

I guess what I would be wanting to see happen is early assessment to try to determine who are the at-risk people. The natural history of soft tissue low-back injuries is that within three to four weeks the majority of people return to work with or without any intervention. Approximately 15 per cent remain occupationally disabled at six months and many of them will become permanently disabled. There are indications that we could probably tell at four to six weeks who those at-risk people are. To get in early and try to make a difference early on, before that pattern becomes entrenched, would be useful.

PROF WOODS: Your experience is Tasmania-specific or - - -

MS FITZGERALD: Yes.

PROF WOODS: So you're operating within the jurisdiction and the legal framework of workers compensation in Tasmania, although it has gone through various reviews and reforms, as have all jurisdictions, as we have discovered as part of this inquiry.

MS FITZGERALD: Certainly.

PROF WOODS: In fact a further review of progress to date has just recently been announced by the minister. We're aware of that. To what extent does the design of

the workers compensation scheme encourage or inhibit early intervention? I mean, how big a part of the total process is scheme design as distinct from the skills and capacities of the claims managers and the employers and the employees and the - - -

MS FITZGERALD: I think the key to early intervention has to come through the primary carer, the GP, and certainly with many GPs I have spoken to about trying to get early intervention, they seem to see that this would all be too much hassle with the insurers this early - to be starting to talk about an issue this early - and so they sort of tend to think, "We'll sit back and see what happens."

PROF SLOAN: That is really one of your major points - which is a very strong point - that you know here you have got a predictive tool based on, I suppose, psychosocial assessment - - -

PROF WOODS: Did you do it? I had a quick flick through the questions.

PROF SLOAN: No, I didn't personally do it, but by and large it's not used actively enough - that people are allowed to basically linger - you know, collecting their weekly benefits - but the kind of second bit to your story, which I think also makes it a strong bit of the story - that basically these schemes are in trouble because of the tail.

MS FITZGERALD: Because of the?

PROF SLOAN: The tail. The fact that there are people who don't return to work and, upon not returning to work for actually not a very long time - I think it is about four months - once someone has been in receipt of benefits for four months, they may be in receipt of benefits for four years or 10 years or 15 years.

MS FITZGERALD: Yes.

PROF SLOAN: There's clear prediction in that.

MS FITZGERALD: Mm.

PROF SLOAN: Is your point that it would be better to have a more disciplined and active approach to assessment because you've got a good predictive tool and - - -

MS FITZGERALD: I must say that that's a new tool, so I guess it hasn't really been able to be used up until this point and there has been recent - there is a reference alluded to just - a publication, the Clinical Journal of Pain, this year, again suggesting that that's a valid predictive tool.

PROF WOODS: Yes.

MS FITZGERALD: Yes, I think so, because I think, clearly, with early intervention a large number of people are not going to require it and are going to get back to work without a lot of intervention, and I can understand that to spend money them - on people who are not going to need it and who get back to work anyway - is not going to be efficient and effective, but to use a tool that can predict the people who are likely to still be off work at four months and six months and two years, and to really target effort there, would I think have good results.

PROF WOODS: So what changes would you need to make to the incentives facing insurers, claims managers, employers, doctors, to adopt such a tool early in the process? I mean, if they are not at the moment, is it only because it is new but, as soon as everyone sees the light, they will suddenly grasp it and administer it and things will improve dramatically, or do we need to change the incentive structure and, if so, what incentives need to be changed?

MS FITZGERALD: I would hope so. I think with soft tissue injury, at six weeks if there is not progress to return to work that should ring bells and to look at, "Do we need further assessment?" Probably people are aware that within the field of pain they talk about "the red flags" and "the yellow flags". The red flags are the clear medical conditions that need to be picked up and acted on. The yellow flags are more the biopsychosocial things, and yet they're actually more powerful predictors than a physical medical problem. I think clearly we need to be looking there and I think that now we are beginning to have treatment programs being developed that are shown to be effective. I think that makes a difference - if we can see that this program is likely to be effective rather than something a bit airy-fairy.

PROF SLOAN: That's a key point, isn't it? I mean, it seems to me that it is all very well being able to predict people who will develop these fears and not return to work. I mean, the second point is, are there effective programs which enable providers to intervene in that cycle and make a difference?

MS FITZGERALD: There's one - the pain disability prevention program - that has just been trialed in Nova Scotia with good outcomes. They claimed a 60 per cent return-to-work success rate, which 45 per cent had actually returned to work, 15 per cent were making moves to return to work at the end of - that's a 10-week, just once-a-week program, once-a-week consultation, so not a really expensive program. That was in an at-risk population and their historic return-to-work rate had been 12 per cent, so that's a very marked difference there.

PROF SLOAN: So the sort of mentality that develops as described in your paper is capable of adjustment, I suppose?

MS FITZGERALD: I think so. I know the Victorian authorities have been encouraging people to stay active, and they have their billboards all over town, which I think is a really good move, but also the research suggests that just telling people to be active isn't enough. We have to look at what the psychological barriers are to becoming more active and returning to function, so it's a combination.

PROF WOODS: Some of this has to do with the distribution of costs amongst the various parties. It seems to me that a lot of the psychosocial characteristics of the employee are brought to the workplace from family, other interactions, their make-up early on and the like, and the soft tissue injury demonstrates how they cope with such a situation. But then I'm not sure that you can necessarily conclude therefore that the employer must try and correct, not only the soft tissue injury that may have occurred in the workplace, but deal with the fundamental characteristics of the person as distinct from the employee. Yet, without dealing with one, you're not solving the other. So I just would be interested in your views on how those costs should reasonably be apportioned and to what extent is the employer liable for the psychosocial make-up of its employees.

MS FITZGERALD: Yes. It is a very complex situation, because clearly at the day of injury people have coping strategies or not in place - coping with life in general, not just with an injury. I think the programs that target specifically the pain experience where they're targeting catastrophisation; how they're seeing their pain; what meaning are they making of their pain; fear of pain and reinjury, and I think this is a very powerful one. There was a survey presented at the recent Christchurch Australian Pain Society conference; a survey of people at two months after the first consultation with their GP for low back pain, and I think I may have the figures. It was 60 per cent of people felt that they may become disabled.

PROF WOODS: Yes, I remember those figures.

MS FITZGERALD: By that, when you question them, they mean, "I might end up in a wheelchair." So I think it's quite understandable that if that's a person's belief, whether it's well-founded or not, if that's their belief, they are going to be very reluctant to move into the outside lane and hold - so I think anything that helps them to increase activity within a framework of feeling safe, in that that's okayed for them; their GP is happy for them to be doing those sorts of things - encouraging them to do that. I think we've underestimated how important people's fears are and I think to try to get in early with that - and certainly the sort of current thinking of that fear-avoidance model of chronic pain where people get into that situation where they are fearful of moving and so they become less and less functional, and more deconditioned and more disabled as it goes on, and it becomes a perpetuating cycle, I think the earlier we can break into that the better.

PROF SLOAN: Is the GP then the right person to be, I suppose, soothing the worried brow of these fearful people? It seems to me that when I go to the GP they have every incentive to get you in and out in six minutes, and that doesn't sound like the kind of time it would take to involve yourself in any early intervention program which is trying to, I think, comfort people.

MS FITZGERALD: I think that this program involves - - -

PROF SLOAN: Is that part of the trouble? It might be easier for the GP to actually more or less feed the fear rather than - - -

MS FITZGERALD: Yes. If they're doing the assessment - - -

PROF SLOAN: "Don't do too much," sort of thing.

MS FITZGERALD: I think so, yes, and if we can try and turn that around and where we are suggesting activities, but getting that run by the GP so that the person feels confident that, "This person I've trusted over many years thinks it's okay for me to do this, then I'll feel okay to do it." I think the way that this system would work in our jurisdiction here - I'm not too sure about other jurisdictions - I think it would work better with a few modifications to the Canadian one where at the beginning of that 10-week program at week 1 they met with the psychologist and the GP and the whole idea of increasing activity and function is discussed - a bit like the sports medicine model too, the injured athlete; that we're keeping people moving but in a modified way, so that they have got the feeling that, "Yes, my GP is supporting this and backing it. It's okay for me to try these movements."

The assessments of catastrophising and fear of pain and a view of disability are done at the beginning and again at week 4. People at week 4 who haven't made any changes at all are at even greater risk. I think at week 4 to be starting then to look at, "Well, we're doing these activities at home" - there are probably some work-based activities that would fall into a similar sort of category as these and to be starting to incorporate them into the program as well. Then, all the way through, this is geared to looking at what are the barriers to becoming more active and more functional. I think to have the workplace involved as early as possible, so that you're also looking at what are the workplace barriers and trying to get them sorted out, highlighted and resolved as much as possible by week 10 of that program.

PROF SLOAN: It's a pity that it's not more available, but the sort of return to work on light duties, would that be a helpful component of these kinds of schemes?

MS FITZGERALD: Yes. I think incorporated into the program - rather than

return to work, as incorporating work-based activities into the daily - it's very behavioural. It's planned - "These are the activities for the day" for the person and then looking at, "What were the barriers? What do you think prevented you from being able to do those things?" I think that would be really valuable to bring the workplace into that as well.

PROF SLOAN: There is quite some insight - you mentioned sports injuries. Some of these footballers seem to come back from the most extraordinarily serious injuries - you know, knee replacements - in a very short space of time. Clearly, they have extraordinarily strong motivation.

MS FITZGERALD: Yes, and lots of encouragement.

PROF SLOAN: And lots of encouragement, but there must be some lessons in that.

MS FITZGERALD: Yes, I think so and I think this is really taking that - - -

PROF SLOAN: And they're presumably not encouraged for a minute to remain immobile.

MS FITZGERALD: No, and this is what I think the early intervention program should be doing, but within the context of safety. I guess the injured footballer has the team doctor and the coach and they're all working in conjunction - - -

PROF SLOAN: And the psychologist probably.

MS FITZGERALD: Yes, I imagine so. So that whatever they're doing is still within what they have perceived as a safe framework.

PROF WOODS: In that respect, you mentioned that many of the reasons people may develop erroneous beliefs, and your very first one was pessimistic predictions from health professionals about their ability to return to work, so that's targeting on that point, in fact that the GPs or other health professionals - you didn't identify any particular stream of profession there - being overly cautious on behalf of the worker as to what they can do and being more limited in the return-to-work model than you would be promoting. Is that what's behind your comment there?

MS FITZGERALD: I think they need a thorough understanding of the workplace and the types of duties the person is doing, and I don't know that that always occurs.

PROF WOODS: What's your experience? Do you find that some GPs have built up a practice, say, that gets to have a good understanding of certain particularly, I

assume, large workplaces and therefore can more sensitively but more effectively develop return-to-work programs?

MS FITZGERALD: I think if that's well understood in the workplace as well, I think the view of the workplace is vital in this.

PROF WOODS: In common law where the legal profession also then becomes involved, what's your experience there? Do you find that lawyers are encouraging their clients to rehabilitate quickly and get back to work as soon as possible or are there other incentives operating in that scheme?

MS FITZGERALD: I think that varies enormously. I think there are many who do. I also would have to say there are probably some who don't.

PROF WOODS: So in that latter category, what sort of incentives are operating there?

MS FITZGERALD: I think that sort of issue of, "Is it really going to be good for you to become too active and too functional?" I guess the difficulty of the system, that in some ways - I guess how I see it is that somebody who can become 100 per cent fit again, then fine. There is certainly a great incentive to do that. For people who are aware that they're probably not going to become 100 per cent fit, no matter how hard they try, they will have some remaining disability, the system is quite difficult for those people. They are probably better to be very disabled than only moderately disabled.

PROF WOODS: In terms of the dollar compensation, but not in terms of their lifestyle.

MS FITZGERALD: In terms of the dollar situation.

PROF SLOAN: What you were saying to me though before, which I thought was an important point, that some previous high-fliers and star workers can, notwithstanding, get themselves dragged into this sort of fear cycle, can't they, in your experience?

MS FITZGERALD: Sorry?

PROF SLOAN: You were saying to me that injured workers who get themselves into this kind of cycle of fear and therefore inability to recover and the like, they weren't necessarily the poor performers.

MS FITZGERALD: No.

PROF SLOAN: That you actually see previously very good workers and high performers, notwithstanding - - -

MS FITZGERALD: Yes. Again, there certainly are people who have been high performers, very hard workers.

PROF SLOAN: To me that's an interesting observation.

MS FITZGERALD: Some of their major problems in adapting and adjusting is that that's the way they work and they tend to not pace themselves sufficiently and push too hard and have a pain flare-up. So then they shoot back to being quite disabled and fearful. So when they push themselves again they push themselves to the limit and again have those sorts of pain flare-ups. So it's that finding somewhere along that spectrum that they will be able to function, maybe not to the level that they were before, but more than they are at this moment. Again, for those high-fliers, it's not motivation that's lacking. I think it's fear.

They are people who have always pushed themselves very hard and when they try to do that their pain flares up and they read their pain as a sign of further damage rather than a flare up of damage that has already been done. I think if they're interpreting any increasing pain as, "I must be doing more damage," and they also have a fear of, "I might become disabled," I think they become quite paralysed by that and are not likely then to do anything that's going to push the pain to that level.

PROF SLOAN: It seems to me that if you look at the various jurisdictions they have spent a lot of money trying to prevent outright fraud but I think one could at least hypothesise that in fact there's a lot of this cycle of fear in those long-term claimers. It's not fraud. Presumably, in your experience, this is very real for people.

MS FITZGERALD: Yes. I would have to acknowledge there are probably some cases of out and out fraud but I think a lot of what we see as abnormal illness behaviour is fear, really.

PROF SLOAN: Untreated, it's quite debilitating.

MS FITZGERALD: Yes. In fact, some of the newer treatments, the way in Holland and Sweden, they're beginning to handle that high level of fear is as a phobia. It's a phobia to movement, so they're treating it in a desensitisation program, much the same as we would any other phobia and that's producing some good results.

PROF WOODS: You've mentioned GPs. What about claims managers in

insurance companies? Do they need a greater understanding that this can be part of the tool kit for treatment?

MS FITZGERALD: I think so. I feel we have to acknowledge that this is all relatively new research and probably a lot of people are not going to be aware of it, and I think too, I can well understand the sort of perception of early intervention, "How do we know this person really needs it?" but the problem with waiting until you know that person really needs it, they're already entrenched into that cycle, so I think the combination of using a good predictive tool - and I would think that for insurers, you know, for anyone they've got, it's six weeks. Where it seems it's a soft tissue injury - I mean, clearly, if there's the indications that it might be more than that, that's not appropriate. But if it seems to be a soft tissue injury and people are still off work at six weeks, I think then we should be really looking at that.

PROF WOODS: Clearly if all employers had supervisors who were model managers and helped sort of create balanced and happy employees who were also balanced and happy people, then the soft tissue injury wouldn't lead to a lot of these things. But I think we might be expecting a bit much of the employers to go too far down that path. At some point there has to be some personal responsibility in this process as well.

MS FITZGERALD: I think so. I think we need a lot of education both of injured workers and within the workplace and within the insurance system. I think actually the New Zealanders are beginning to do this quite well. Have you seen they have - I've brought some of these along. They've got their Guide to Assessing Psychosocial Yellow Flags and actually the measure there was developed for them.

PROF WOODS: Yes. I assumed that question about, "Were you born in New Zealand?" was not directed at any Australian-based workers.

MS FITZGERALD: Were you born in New Zealand? No. That's able to be reproduced but not altered but I'm sure - I mean, I am in email contact with Steve Linton. I'm sure with his approval that could be changed. But they have these sorts of publications for workplaces which are giving very good guidelines to workplaces as to how to handle those sorts of situations. I think there needs to be lots more education in the workplace.

PROF WOODS: On the basis that prevention again is much better than - - -

MS FITZGERALD: Both prevention and management when people return. I guess the problem with low back, it's things that may seem - this person should be able to do this - I mean, this should be being sorted out on a return-to-work program but some of the things that actually are not going to be good for a soft tissue low

back seem quite easy. So without education, workplaces could well expect people to do things that purely because of the position that puts the person in, whilst it's not hard work, is not going to be good for them.

PROF WOODS: Given that the majority of businesses are small and medium businesses around Australia, including - it's no exception - Tasmania, how do you reach employers who come from a diversity of backgrounds and skills themselves and have set up or taken over small businesses to educate them in this way? Are the educative tools currently sufficient or would you be looking to some other way of reaching employers?

MS FITZGERALD: I think that's a really difficult one. I think that should be done through the Workplace Standards authority or - - -

PROF WOODS: Yes, or its equivalent.

MS FITZGERALD: That would be the logical body to do that but I guess again with small businesses they're usually built up by somebody who's worked exceptionally hard themselves and that's their view of how one should work. They probably don't have their OH and S person who can take an afternoon off to go along to a lecture or whatever. I think material presented in the sort of language that a small employer would understand would be very useful and some clear flow-lines, if you like, of these are the steps so it is fairly straightforward. I guess, you know, a flow-chart type of thing. If at this point, then this sort of intervention or referral or whatever.

PROF SLOAN: That issue of accessibility I think is important, isn't it? Remember we heard that case study about shearing. Shearing is an inherently unsafe thing to do. It is. I think in Victoria they kind of got it down to several steps and it was on a laminated sheet which was there in the shearing shed, you know, whereas there was a 55-page booklet in New South Wales which no-one read. So that issue of how you communicate becomes really - language, yes.

MS FITZGERALD: And language that person can understand. I think it's very easy for professionals - - -

PROF SLOAN: Yes, to use the vernacular.

MS FITZGERALD: - - - to use professional jargon and it means nothing outside the profession. I guess we should be checking that out with the people who are going to use it to see what do they make of it? What meaning do they make of it?

PROF SLOAN: Very interesting and it was a good submission.

PROF WOODS: Yes, we appreciated it. Are there any particular points that you've felt we haven't covered this morning that you'd like to draw to our attention?

MS FITZGERALD: No, I don't think so. I think if - actually, the world experts in all of this area will mostly be in Australia in 2005.

PROF SLOAN: Really? Well, our inquiry will be able to assist them.

MS FITZGERALD: Yes. I think it's maybe - if we really wanted to get serious and look at their outcomes - the International Association Study of Pain meeting is in Sydney in 2005. The major researchers will be coming to that.

PROF WOODS: Thank you very much. We appreciate the time you've taken to come to us this morning and of putting the submission to us earlier. It is available to all who wish to explore our web site.

MS FITZGERALD: Thank you.

PROF WOODS: Can I at this point ask are there people currently in the audience who would like to come forward and make some points or draw some matters to our attention that they feel might not otherwise be dealt with. They are most welcome. We have a short break before we need to adjourn for lunch.

PROF SLOAN: Because we don't bite, actually.

PROF WOODS: No. We're quite tame.

PROF SLOAN: You've probably noticed that.

PROF WOODS: If I could welcome you to the table there and if you'd like to give your name and title and organisation.

MR PEARCE: Unfortunately, Mr Commissioner, my introductory remarks might be longer than the issue I want to talk about.

PROF WOODS: That's fine. Could you give your name please?

MR PEARCE: Robert Pearce, director of policy, planning and services at Workplace Standards Tasmania which is a division of the Department of Infrastructure, Energy and Resources. I am also the Tasmanian National Occupational Health and Safety Commission member.

PROF SLOAN: You can tell us all about it.

MR PEARCE: I must predicate - my comments do not reflect the policy of either of those organisations.

PROF WOODS: They're just an educated set of comments for which we're grateful. Thank you very much.

MR PEARCE: The issue I'd like to talk on is prescriptive performance and the role of codes of practice. This is in general in the OHS framework. Our presenter before, David Skeggs, talked about the aviation industry, where you've got a highly prescriptive set of regulations which works and it's enforced by the equivalent of the inspectorate, making sure all the rules are abided by.

The OHS legislation around the nation, which has basically been picked up as a result of work from the National Occupational Health and Safety Commission picking up on the first order of priorities, has a number of high-risk areas identified and there is detailed prescription there - high-risk plants like boilers, large pressure vessels, cranes. There are design, construction and maintenance requirements on those types of - - -

PROF WOODS: That's why you have pressure vessel testers and all the rest of it. Yes.

MR PEARCE: The integrity is verified in one way or t'other.

PROF SLOAN: And in hydrocarbon fuels, too, hydrocarbon mining - there's a lot of prescription.

MR PEARCE: The high-risk areas. In the hazardous substances areas there are

very strict controls over carcinogens and the like, users and operators of industrial equipment, people who erect scaffolding - there is a large degree of prescription. The problem arises though that OHS legislation just covers a plethora of fields and it's, should we have a set of regulations to cover commission proceedings in - you know, meeting room requirements? David quite rightly highlighted the cords. We could go on and say, well, why put the fire extinguisher by the exit door and the lighting levels and the like. It's just not feasible to prescribe, let alone enforce, a totally prescriptive regulatory environment. This leads me to what Tasmania is doing with respect to codes of practice. With your indulgence I'd just like to - - -

PROF WOODS: Yes, please.

MR PEARCE: We have the Workplace Health and Safety Act, which places obligations on a number of persons: employers, employees, other persons - suppliers, designers and the like. Those obligations are supported through the regulations where there are a set of outcomes. You've got to do your risk assessment and the like. The act also allows for the development of codes of practice. Now, those codes of practice have an evidentiary status placed on it by the legislation in that you don't have to follow what's in a code of practice but what you have to do if called on to do so is to do equal to or better than that which is contained in those codes of practice.

We, the inspectorate, have been working with industry with some really pleasing results. Take reinforced plastics codes of practice. We have got to our knowledge all of those industries working on the development of a code. They've come together. They're sharing solutions. It was facilitated by an inspector within the agency. We've got union input, so we've got the tripartite perspective and we're ending up with products which are extremely good. They're excellent.

What we've got to be mindful of in these codes of practice is to make sure we don't run foul of the national competition principles and introduce quasi-regulation, regulation by default. So we've carefully used certain words whereas you can reproduce regulatory requirements into those codes and that's predicated by the use of "must", "is to" and "are to" are the evidentiary, directional-type requirements which you must do equal to or better than if called on to do so. Then that falls down to - next layer is the "shoulds", where it's advisory that you - you know, have a non-slip working environment or give someone a mat to stand on if they're a long time at the one workstation.

We're finding with that blend of the hierarchy of legislative requirements in the one document that we're getting codes of practice which are addressing the concerns of specific industries, specific groupings. We've got one for the abalone divers. They didn't want to comply with the Australian standard for whatever reason. A

compromise position has been reached.

PROF WOODS: This is the Tasmanian abalone divers?

MR PEARCE: Yes, Tasmanian abalone divers.

PROF WOODS: Yet that would only apply primarily, what, to three states mainly?

MR PEARCE: South Australia, yes.

PROF WOODS: South Australia, Victoria and Tasmania. I mean, if we're talking Australian we're not talking of any jurisdictions anyway. It's a topic can I just flag that I'd like to come back to, as to why each jurisdiction on many occasions then doesn't adopt the national standard but gives a slight twist and variation which - I mean, in each case you can go through sort of detailed argument as to why but the overall effect is therefore to reduce that.

MR PEARCE: And I'd like to pick up on that in that the codes of practice being developed by the national commission are not as helpful as they could be. They're not capable of being picked up and put into the workplace and used, understood or used. They're just - - -

PROF WOODS: But isn't the national commission basically you and your colleagues?

MR PEARCE: Yes. I am but one.

PROF SLOAN: Just before you go back to that point, though, in principle do these codes of practice in a sense mimic what David was talking about, which is the need for industries to share information?

MR PEARCE: Yes.

PROF SLOAN: That's it's actually unrealistic to expect any one enterprise to be able to come up with best practice - - -

MR PEARCE: Correct, and I'm putting - - -

PROF SLOAN: - - - and therefore if you have a code of practice, in effect you have a system whereby you're getting that sharing of information?

MR PEARCE: Yes. I'm suggesting that that's where our energies should be targeted.

PROF SLOAN: And that's unlikely to emerge in an unregulated situation, with some exceptions. There will be some industries that decide it's better to cooperate on this stuff. When they're hazardous and there is a small number of players, I think you will find there are some. I think the oil and gas industry does cooperate a fair bit on safety matters, because there aren't that many players.

MR PEARCE: Right. An example which springs to mind is the hairdressers code of practice, which is at an advanced stage. That will be a poster that goes up on the wall and in plain English it will give you a step-by-step identification of the major hazards in those workplaces. We wrote out to all the hairdressers in the Yellow Pages and got one or two responses. The Hairdressers Federation and the union were able to get together, and with the facilitation by one of our inspectors we were able to progress this.

PROF WOODS: Is that a Tasmanian or a national?

MR PEARCE: No, Tasmanian.

PROF WOODS: Tasmanian. Now, we do have hairdressers in other states.

MR PEARCE: We do.

PROF WOODS: On that basis, if you've done this work, why wouldn't the other states then just roll it out?

MR PEARCE: We share our information. The basis of this document was from publications put out by New South Wales. There is a very strong information-sharing network that is used, but we could be doing it better.

PROF SLOAN: But is that just - sorry to disagree with you, Mike, but if you're kind of hanging around for a national response and you could get on and do something which is sensible for hairdressers in Tasmania, aren't you better to get on and - - -

PROF WOODS: Why wouldn't you do it anyway?

PROF SLOAN: Bearing in mind that you probably don't want to be reinventing the wheel, so you might go and have a look what at else has been done.

MR PEARCE: The benefit of this process is that it enables an inspector to target a far broader range of enterprises and to get agreement with industry associations sitting down with the unions and getting agreement, and they actually can help better

that industry.

PROF WOODS: But if somebody is a hairdresser in Tasmania, is it reasonable that then if they are up in Melbourne for 12 months for some other reason and pick up some part-time work, they've got to understand a different set of guidelines and codes. Why would we want that to happen?

MR PEARCE: This is an issue that's rolled out quite regularly. The commonality between the OHS legislation around the nation is very close.

PROF WOODS: Why can't we just give in and have one?

MR PEARCE: In a number of areas you - - -

PROF WOODS: I am just wanting to test some of these issues.

MR PEARCE: The national standard on demolition talks about bringing down multistory buildings, driving excavators round in circles and pushing the rubble down the lift shafts, et cetera. It's not applicable to Tasmania.

PROF WOODS: In which case, you don't have to have it, so that's all right.

PROF SLOAN: Because you have no high-rise buildings here. Fair enough.

PROF WOODS: But you do have hairdressers and you do have loggers and you do have abalone divers in common with lots of other states.

MR PEARCE: Yes, and we're leading the national efforts in the forestry industry.

PROF WOODS: But that's a good example because you could take say the wine industry in South Australia, the logging industry in Tasmania. All right, they're going to invest the effort, they're going to put the time in, they're going to develop standards that are quite appropriate, and then the others can sit back and say, "Well, that's terrific. They've invested in that. We'll come in on the back" - in fact, they could even contribute to some of the research and things at the front end, and then you roll it out. We don't seem to get to that second point.

MR PEARCE: We are starting. I think it was an AIDS Hep B code of practice put out by Western Australia, which is being used as a national model code of practice, with minimal changes to it, so there are examples. We need to push the system to get more examples.

PROF WOODS: Yes, I was painting an extreme position for the purpose of

argument.

PROF SLOAN: Isn't this just the slow progress of cooperation in a federation writ large in this example?

PROF WOODS: I think you're quite right.

PROF SLOAN: What about NOHSC? I suppose you can't give us the real lowdown on your view on it. I'd like you to but - it does seem to have taken a sort of change of direction recently, doesn't it?

MR PEARCE: Yes.

PROF SLOAN: Maybe you could describe that.

MR PEARCE: The most recent change I can't really describe, but the impact of the new chairman Jerry Ellis - things are changing there, but that's as far as I'll go on that one.

PROF SLOAN: So less emphasis on research, we understand.

MR PEARCE: "Let's bite off what we can chew and actually do it well" I think is a summary of - - -

PROF WOODS: And that's a collective view that has strong support?

MR PEARCE: There are stakeholders who wish to have their issues put forward as a priority, and that creates a dilemma.

PROF WOODS: From your perspective, is there more progress and more chance of success of having a national framework, to get back to what we're actually inquiring about, on occ health and safety, compared to workers comp?

MR PEARCE: Yes, I believe there is. I believe that we're not far away from it in the OHS area. There are sort of - - -

PROF WOODS: In fact, that ministerial policy document with all the ministers' crests and signatures was actually quite a - - -

MR PEARCE: Well, we've have the national improvement strategy which everyone signed up, and that's seen us following on from the national improvement framework - use that in our business planning, and we've got a large number of those elements worked into our business plans and are actively pursuing it. But it's a

blend. We're a very small jurisdiction.

PROF SLOAN: Sure.

PROF WOODS: But the dynamics in workers comp from your perspective are a bit different?

MR PEARCE: They are. There are different reasons for why jurisdictions would put a position. We're a multiple insurer situation down here, which is different to single insurer government underwritten schemes. There are different issues. But if we could focus on things like commonality of definitions of employers-employees, I mean that would be a huge step forward.

PROF WOODS: That's an interesting point, that maybe with workers comp, that it is a process of small steps and building on them, that's one model to develop a national framework. Another is for the Commonwealth perhaps to open up its own scheme to self-insurers. There are various models that you could pursue. If we took the small steps model, and the two could possibly even coexist, what steps would you take first? You've nominated definitions of employees. Is that your first step? And then what constitutes an injury, what constitutes a workplace?

MR PEARCE: Yes. You'd only try to bite off what is achievable. I'd just like to go back a step where we talked about incremental steps, and this equally applies in the OHS area. There are some benefits about having multiple systems around the place in that the jurisdictions can actually build on the achievements of the other jurisdictions. Our workplace health and safety regulations were basically pinched from the South Australian model and improved upon. There's a lot of really good stuff in the New South Wales health and safety regulations. They pinched a lot of our stuff and built on it.

PROF SLOAN: Well, that's the benefits of competitive federalism.

MR PEARCE: Exactly, and the same applies in the workers compensation area: pinching a lot of the good concepts from jurisdictions to enable us to incrementally improve. It's not all - - -

PROF WOODS: No, no. There would be nothing worse than having one national system that happened to be the wrong system.

MR PEARCE: Yes, and without any impetus to actually improve, there's no - - -

PROF SLOAN: Yes, exactly. But are there fears in Tasmania of there being a more accessible national scheme, let's say through easier access to self-insurance?

Or I could be horrible and say, well, why would you be fearful, because you haven't got any national employers down there so they won't be going off anyway.

MR PEARCE: That is actually a tad incorrect.

PROF WOODS: That was an extreme position you were putting, wasn't it?

PROF SLOAN: It was.

MR PEARCE: I would have a personal fear on our major employers moving out, the large supermarket chains - - -

PROF SLOAN: This is a real central issue for us.

MR PEARCE: The banks.

PROF WOODS: The banks are a good example, if you took the banks out of your pool.

MR PEARCE: That's right. It shrinks our pool and we - - -

PROF SLOAN: You'd have to join with Victoria.

PROF WOODS: Or something.

MR PEARCE: Or something. There would have to be - - -

PROF WOODS: Or them with you.

MR PEARCE: - - - something to go with that exodus out of our scheme, otherwise the viability of our premium pool would be shrunk and could very well become unviable, and how are we going to get them to pay after they've moved out? We're still doing all these initiatives in Tasmania affecting the health and safety of Tasmanian workers who have moved out and we don't have the premium pool to actually draw on.

PROF WOODS: Some jurisdictions are being creative in that respect as to how they should contribute to the occ health and safety side.

PROF SLOAN: Have a fee for opting out.

PROF WOODS: Yes, a fee for opting out and an ongoing fee for being out. So there are models that solve that and, I mean, that is a very real question because OH

and S, rightly so, takes resources and therefore all of those who employ workers here should contribute to that. We understand that. It would be interesting if there was any information or a view that you were able to bring at a later date to us on what would be the consequences if major employers did go out of your pool, and presumably those in the audience, or others who read this transcript later, who are insurers in the Tasmanian pool might also have views as to what would be the consequence if banks, major retailers and others - petrol retailers, et cetera - moved out.

MR PEARCE: Yes. I believe I've mentioned one issue, the shrinking of the pool size. The other issue is if you have workers working alongside each other under a different benefit scheme, under different arrangements.

PROF WOODS: Yes, although to an extent presumably that happens at the moment where, if you're a Commonwealth employee here, you're under a different scheme than if you're under the Tasmanian scheme.

MR PEARCE: Yes, not generally working side by side.

PROF WOODS: That's true.

PROF SLOAN: That's true.

PROF WOODS: Quite right.

PROF SLOAN: And these mightn't be working side by side either.

PROF WOODS: No, because they would be in separate enterprises but there may be more opportunity for them to be working in a team.

MR PEARCE: Yes.

PROF WOODS: That's very helpful. There are other matters? That's actually been quite useful. That's brought forward a lot of issues and we're glad to have captured them on transcript, and appreciate the time, and we did notice your caveat that they are your personal views, although we do respect the experience that you bring to bear to the commission in presenting those views. And we're also very grateful for the time that the government authorities made available to us in our earlier visit down here, so if you could pass that back to those who were involved. Thank you very much.

PROF SLOAN: Thank you, Robert.

PROF WOODS: Are there others who would like to step forward before we adjourn for lunch? A wonderful opportunity! Okay, at this point we will adjourn and resume at 2 o'clock. Thank you very much.

(Luncheon adjournment)

PROF WOODS: I would like to resume the Hobart hearings of the Productivity Commission inquiry into the National Workers Compensation and Occupational Health and Safety Framework, and invite Ms Sharon Hyland to come and give evidence, please.

MS HYLAND: My name is Sharon Hyland and I am a disability support worker and, at this point in time I am wondering what the hell was I thinking when I said I would write a submission, but here I am.

PROF WOODS: We are very grateful for the time that you have given to come and present evidence before the hearing. If you would like to make an opening statement and we can move from there.

MS HYLAND: Thank you. My concerns are that the current workers compensation laws in Tasmania are not working towards creating a safe workplace. They create the opportunity for employers to be self-regulating. There is no real help or support for injured workers. A rehab provider is appointed by the insurance company and works towards their desired outcomes, not the injured worker's needs. The so-called "independent doctors" are rewarded by the insurance companies. Workplace Standards in Tasmania is a joke. They could go on holiday for six months and nobody would miss them.

Injured workers will find it difficult to get legal representation if less than 30 per cent injured. Various acts and standards aren't worth the paper they are written on because they are not enforced. The average person needs an interpreter to understand the basic paraphernalia associated with workers comp, yet alone somebody nursing an injury and experiencing pain, who has no prior knowledge of the system.

With unemployment numbers and union powers being eroded and the casualisation of the workforce, employees have little power to make issues of health and safety. I feel these laws are creating a disposable society and the money saved by reducing the rights of injured workers will only resurface in another area of human behaviour and ultimately cost much more in the long run. Whether a worker is 5 per cent or 95 per cent injured there should still be the right to common law in cases where it can be shown that the employer was grossly negligent. I feel a cost-effective approach would be to make employers accountable for their work practices. This would or should also reduce the number of work injuries. This should be done by an independent body before injuries occur.

PROF WOODS: That's quite a list. I am wondering where we can start. Can you just clarify what organisation you mentioned at the front end? You are a rehab worker?

MS HYLAND: I didn't. I'm a disability support worker and, at the moment, I work with people with acquired brain injury. I did work for a foundation which rehabilitated people who were in car accidents.

PROF WOODS: Right, and so your experience is broader than just workers compensation. It's across a whole range of disability support?

MS HYLAND: Yes.

PROF WOODS: That is quite helpful.

PROF SLOAN: Have you worked with people on workers compensation, who have been injured at work?

MS HYLAND: Yes.

PROF WOODS: Where to start in that list. One thing you mentioned there was making the employers more accountable. I mean, they are, as I read the act, accountable for their actions, but you're clearly feeling that the consequences of injury aren't being brought fully home to them. To the extent that they pay premiums and those premiums change according to their accident histories in the workplace, prosecution is available under occ health and safety legislation, but is there more that you would like to see in terms of this accountability issue for employers?

MS HYLAND: I would like to see employers follow acts and standards - just basic. In Tasmania there are a lot of organisations that totally disregard duty of care towards their staff and the laws we have got are only going to increase and magnify that.

PROF WOODS: So is the problem with the laws or is the problem with the enforcement of the laws?

MS HYLAND: Enforcement of the law and employers willing to gamble - will cost-cut this way; assign inappropriate, dangerous duties even, for the sake of saving money.

PROF WOODS: You are talking about employers as if they're all of one mind. Is there a spectrum of employers? I mean, are there good employers as well as employers who make the trade-off between risk and cost?

MS HYLAND: There are some good employers.

PROF WOODS: What is the model that encourages good employers and how could you convert employers who you feel are performing unsatisfactorily to become good employers? I mean, is it an enforcement issue? Is it attitude? What methods, what actions, would encourage poor employers to become better employers?

MS HYLAND: To look out for the wellbeing of their staff. Bad employers have an attitude that their staff are disposable. If they get injured, no matter even if they're good staff, if they're injured, they will get rid of them because, "We can replace them." There's heaps of unemployment in Tasmania. They just don't follow any of the acts or standards. They just run their organisations as cost-effectively as they can and the employees suffer and, if it's a care establishment - caring for people - the clients can suffer also.

PROF WOODS: By "care establishment" are you bringing up examples of things like nursing homes and - - -

MS HYLAND: Yes.

PROF WOODS: Do you have personal experience with workers in that field?

MS HYLAND: Yes.

PROF WOODS: What is your experience in those areas?

MS HYLAND: I've worked in nursing homes and in those sorts of situations and - I don't know - an employer will say to a staff person, "Go and do something" and they're a casual employee. If they say, "No, that's illegal" or "You need two people" - or something - "to do that job," they're told, "Do you want your job or don't you?" There's just not enough support for employees when there are organisations like that. You can't go to the union and say, "I'm being treated badly at work."

PROF SLOAN: Why not?

MS HYLAND: Because the unions don't have the power.

PROF SLOAN: Or the resources perhaps.

MS HYLAND: Maybe, and CEOs just ignore workplace standards and unions and - - -

PROF WOODS: We have been talking on the occ health and safety side. Looking at the workers comp side, we have been hearing evidence of the importance of early intervention in the recovery process - of getting workers back on a pathway to

recovery as early as possible. Is that your own experience - that where there has been assistance provided fairly soon after an injury that the chance of recovery is greater or not?

MS HYLAND: No. I've had an experience of a worker who had quite a bad injury. Never had a day off work. Tried to do their best to stay at work and do whatever it was that they could. They were abused; assigned inappropriate duties. They had a bad back injury and they were assigned to manual-handling jobs, one-on-one, lifting quadriplegics - with a back injury.

PROF WOODS: That's sort of early return to work, but there are other forms of early intervention and assistance that might be more productive than that, but in that case you are referring to sort of the return to work - you made mention in that respect to doctors who had relationships with employers and you seemed to have some negative - - -

MS HYLAND: Did I? Doctors who had relationships - - -

PROF SLOAN: With insurance companies.

PROF WOODS: With insurance companies, sorry. You are quite right, yes.

MS HYLAND: No, I didn't - - -

PROF SLOAN: Non-independent doctors.

MS HYLAND: Okay, yes, the independent doctors.

PROF WOODS: Yes.

MS HYLAND: I just think "independent doctors" is an inappropriate name. If you look at the definition of what the word "independent" means, how can an insurance doctor be called an independent doctor? I find that misleading to people who are in the system, along with a lot of misleading information.

PROF SLOAN: You're obviously concerned - and correct me if I am wrong in summarising it this way - about how injured workers are treated in Tasmania.

MS HYLAND: Yes.

PROF SLOAN: And your concerns run along a number of lines, including the fact that they may not be, I suppose, given a fair hearing and appropriate treatment by doctors because doctors are running to some funny incentives. You're worried also

about how they're compensated?

MS HYLAND: How injured workers are compensated?

PROF SLOAN: Yes.

MS HYLAND: My main concern is how workers are treated in Tasmania when they get an injury. Their lives are, a lot of the time, made intentionally unbearable by employers, in the hope that they will resign.

PROF SLOAN: Right.

MS HYLAND: And a lot of them do and, with these laws, there is nothing there for people that are mistreated to get any justice.

PROF WOODS: What happens to them when they resign? Do they ultimately just move on to Commonwealth social security?

MS HYLAND: Possibly.

PROF WOODS: Do you have any sort of follow-up contact with any in that category?

MS HYLAND: No.

PROF SLOAN: One of the points you made was, I suppose, your unease at the system here, where common law remedy is only available for those with - I think it is more than 30 per cent impairment.

PROF WOODS: 30 per cent.

MS HYLAND: Yes.

PROF SLOAN: And the point you are making is, "What's magical about 30 per cent?" and - - -

MS HYLAND: My point is, even if it is a 5 per cent injury, if it is due to the employer's negligence something should be done so it is not going to happen again, because it might be a 5 per cent injury this time; next time that same injury happens it could be a 50 per cent injury or higher.

PROF SLOAN: So is that access to common law though in addition to the flow of benefits they receive through the statutory scheme?

MS HYLAND: Beg your pardon?

PROF SLOAN: You know, they get some replacement income when they're injured. Would you regard the common law compensation being in addition to that? It sounds as though that is what you are suggesting where there is employer negligence.

MS HYLAND: What I am suggesting is that if there was access to common law for minor injuries it would make employers more careful with their staff and their practices.

PROF SLOAN: Do you think the legal profession though is going to be particularly interested in taking on a case of 5 per cent impairment? I mean, is that being hopeful that - - -

MS HYLAND: Maybe not, but - - -

PROF SLOAN: Or there is no right at the moment.

MS HYLAND: - - - if an employer is held responsible - where at this - they're not. They can do what they please.

PROF WOODS: In terms of the provision of rehabilitation services for injured workers - I mean, Hobart and Launceston and, I guess, maybe Burnie and Devonport, but the major centres would have services available, but what happens to injured workers in some of the smaller towns and villages? Do they end up having to come into the major centres, and is that a further disadvantage for them because they are dislocated from their communities? Do you have any experience of injured workers outside of the major metropolitan areas?

MS HYLAND: No, but, yes, they like only a little bit of experience where, if they lived in a rural area and they needed to do hydrotherapy or something like that, they would have to travel to Hobart.

PROF WOODS: So that's an added cost and it might be added pain and the like, because it is a real issue. The inquiry has to look at a national framework, which means reflecting not only on the needs of injured workers who are in the major centres - and there are at least a level of facilities available for them - but then when you look at the rural and remote areas the issue becomes even more difficult, because they just don't have the services. They don't have alternative employment. They don't have a whole range of medical support and the like, so we need to take that into account, as well.

In your list then are there other matters you want to elaborate on - that you want to talk through in any more detail? What we find particularly useful is where you can draw on some particular examples - like you mentioned one-on-one lifting with a quadriplegic or your experience in nursing homes and things. Are there other - without naming names or institutions or the like - examples you would like to tell us about that illustrate some of those points?

MS HYLAND: No. I would just like to say that my main concerns are that employers get away with bad practices and, Workplace Standards, what are they all about? In Tasmania they're - - -

PROF WOODS: You made reference to the safety inspectors in a certain form of words. Is that because there aren't enough of them? Is it because the act doesn't give them sufficient power? Is it because they're not exercising the powers they have under the act as it is?

MS HYLAND: Workplace Standards?

PROF WOODS: Yes.

MS HYLAND: They are not exercising their powers in Tasmania. Their hands are tied.

PROF WOODS: Where would you like to see the emphasis in terms of making some changes there?

MS HYLAND: I would like Workplace Standards to walk into organisations unannounced and see that things are above board, like a health inspector can walk into a hotel kitchen at any time. Why do they warn people they're going to come? They're so weak in Tasmania. An organisation can say, "It's not convenient for you to be here now. What is it that you want? Well, come back another day," and they go, "Okay," and then they leave information of what they're coming to look for or whatever, but they only show up if there's a complaint or an injury, and it's even been my experience in Tasmania where Workplace Standards have blamed the injured worker for not staying at home, sitting on the couch and watching television when they could have got paid. Why did they go to work and work inappropriate duties when they had a doctor's certificate saying they were on light duties? It was because the worker was pressured into doing those duties. What support is that? It's wrong.

PROF SLOAN: It doesn't sound as though you're too optimistic though about the potential for change for the better.

MS HYLAND: If employers were made more accountable that would be a change for the better.

PROF SLOAN: But that would require political will, in your opinion?

MS HYLAND: Pardon?

PROF SLOAN: That would require political will.

MS HYLAND: Yes.

PROF SLOAN: There must be a reason, if what you say is right, that the enforcement and the policing is ineffective.

PROF WOODS: Are there any other matters that you want to draw to our attention?

MS HYLAND: No.

PROF WOODS: That list will now be on our transcript of the hearing. So that is quite useful to have your perspective and it will allow others who then read through this set of hearings to respond if they so wish. So I would encourage you to continue to monitor our inquiry. We will be putting out a draft report in September and we would be quite interested in your reaction to that as to whether we have adequately addressed the various issues. So if you could stick with the inquiry and maintain your interests through it, that would be very helpful to us. Thank you very much.

MS HYLAND: Thank you.

PROF WOODS: Is there anyone else in the audience who wishes to come forward and make a statement at these Hobart hearings? That being the case, I will adjourn these hearings to be reconvened two days hence in Adelaide. Thank you very much.

AT 2.17 PM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 12 JUNE 2003

INDEX

	Page
SAFETY INSTITUTE OF AUSTRALIA: DAVID SKEGG	2-19
MERSE FITZGERALD AND NICHOLS: ANNE FITZGERALD	20-30
ROBERT PEARCE	31-40
SHARON HYLAND	41-48