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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO NATIONAL WORKERS COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

PROF M.C. WOODS, Presiding Commissioner
DR G. JOHNS, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON TUESDAY, 24 JUNE 2003, AT 9.11 AM

Continued from 23/6/03 in Brisbane

PROF WOODS: Welcome to the Sydney 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'm assisted this morning by Dr Gary Johns, commissioner, for the purpose of this inquiry. 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 has already travelled to all states and territories talking to a wide cross-section of people and organisations interested in workers comp and occ health and safety. We've 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 their views on future directions. We have now received over 100 submissions from interested parties. I'd 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 already made in the course of this inquiry.

These hearings represent the next stage of the inquiry to be followed by a draft report which will be issued by the end of September. There will be an opportunity to present further submissions in a second round of hearings following the release of the draft. The final report will be signed off by March 2004. 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 for the day I will provide an opportunity for any person present to make an unscheduled oral presentation, should they wish to do so.

I would like to welcome to the hearings our first participants from the Australian Industry Group. Gentlemen, could you please give your names, your titles and the organisation that you are representing.

MR GOODSELL: Thank you. Mark Goodsell, New South Wales director for the Australian Industry Group.

MR RUSSELL: David Russell, senior policy adviser for the Australian Industry Group.

PROF WOODS: Thank you very much, gentlemen. I understand you lodged a submission with us on Friday but unfortunately we have not had the opportunity to go through it to this point. Could you please present an opening statement.

MR GOODSELL: Thank you. Having made the written submission we didn't plan

to go to that in any great detail, just perhaps give an overview of our approach to the inquiry.

PROF WOODS: Yes, that would be helpful.

MR GOODSELL: The first point probably doesn't need making but we would anyway, that both workers compensation and OH and S are major issues for companies generally but particularly companies that we represent nationally who are primarily in the manufacturing, construction, engineering and related sectors. There are issues in all states and from time to time they flare up as issues of great concern, particularly the issue of workers compensation. In relation to workers compensation the issues go to the cost of workers compensation, to the uncertainty and the instability in premiums, which are reflected both in premiums moving about quite severely from time to time and even when they aren't moving, the threat that there is a deficit building up in the scheme that may be to some threat of future premium movements. The third major issue is a sense of lack of control that employees have over their own outcomes.

The second major point we would make in relation to workers compensation is that there does seem to be a major misconnect between injury rates in workplaces and the costs of workers compensation. There appears to be an unambiguous movement over the last decade or so downwards in both all-over injury rates and injury rates for major injuries in workplaces. That was to be expected, given the demographics of industry moving from high-risk industries to more service-based industries and also technology leading to safer work. Yet there has not been a consistent movement downwards in cost of workers compensation and that leads to uncertainty in employers' minds about what their behaviours should be, particularly for small and medium-sized businesses.

Thirdly, our members recognise the importance of the schemes in the overall social safety net, an economic safety net that is provided by the legislation and they recognise the need for reasonable and decent benefit levels, benefit structures and support for injured workers. Fourthly, the outcomes of this inquiry from our perspective would be to try and drive best practice outcomes in the existing scheme structures and also to make sure that there is in place a mechanism of some sort to balance the costs and benefits of OH and S and workers compensation legislation. Currently, that mechanism is a form of competitive federalism, in a sense, when one state appears to be performing particularly well or particularly badly then it, in a sense, puts its hand up for reform. There may be other models that can make transparent the mechanism but that's a mechanism that we have at the moment, crude as it is.

Leading on from that, we do not support a national scheme for its own sake but we do see great benefits in greater national consistency and some form of national

framework within which existing state schemes can work. We would see the opportunity specifically for three things to be achieved within that framework: for best practice standards to be driven in each of the schemes; for there to be transparent performance monitoring of the existing schemes; and thirdly, and importantly for larger companies who operate in more than one state, to lower the compliance cost of dealing with different state regimes. In relation to occupational health and safety specifically we see great advantage in there being more consistency between the state schemes. Again, it would be easier for companies to operate nationally and to provide - in a sense one form of management system, one form of corporate philosophy in relation to OH and S that comply with all state jurisdictions.

Could I just make three observations that are made in the recommendations we have put in our submission that are particularly important. Firstly, there is an implication or an explicit comment made in the terms of reference about concerns about cost shifting from workers compensation schemes to other forms of social benefits. From an employer's point of view they actually see a cost shifting the other way. The nature of the liability that employers have under workers compensation - which is close to, if not, strict liability for injuries that occur at work - the employers perceive themselves in a sense as providing a quasi welfare scheme because it is difficult, we accept it is difficult always, to ascertain the nature of the real cause of injuries that may be manifested at work or in a workers compensation scheme. So to the extent that there is this issue of concern about cost shifting we would submit that actually there is issues both ways in relation to cost shifting.

PROF WOODS: Is that the subject of a particular recommendation? I'm just going through your list of recommendations.

MR GOODSELL: Well, I think it's a - - -

PROF WOODS: Is it sort of an underlying thing?

MR GOODSELL: It's an underlying - - -

PROF WOODS: Okay.

MR GOODSELL: - - - note of caution that the issue of cost shifting doesn't necessarily - - -

PROF WOODS: That's fine.

MR GOODSELL: It's not an acceptance of the cost shifting as one way.

PROF WOODS: Of course, yes.

MR GOODSELL: The second issue relates to the issue of fraud, which is probably not the best label for a class of behaviours that range from non-compliance by employees through to exaggeration and outright fraud by claimants. The point we would make is that it seems to us that a lot of the state schemes, existing schemes, are built on the basis that fraud doesn't exist and that there are mechanisms bolted on at the last minute to deal with fraud or exaggeration; almost as an afterthought. In terms of system design our view has always been that realistically workers compensation is open to fraud. We don't say that it is great but we say that the cost of it can be significant. Therefore the schemes ought to have as a design principle the notion that fraud can occur and that conflict of interest at various points and processes means that it's logical it will occur; and that the systems ought to build in mechanisms to deal with the possibility of exaggeration and the possibility of fraud rather than assume or hope that it doesn't happen and only deal with it as an afterthought.

In particular I think that the reliance on the traditional private patient model of medical care between an individual patient and the GP - which is very efficient in one sense in dealing with a lot of workers compensation claims - it tends to fray at the edges once you realise that employees may have an interest in not necessarily being truthful about either causation of their injury or the nature of their injury or their incapacity. Systems need to bear that in mind in the mechanisms they have in dealing with the medical model and also other issues that go to benefit design that come out of the changes in claimant behaviour you may expect if you assume that from time to time people will be taking systems for a ride rather than just coming purely with clean hands. So in relation to the medical profession and in relation to claimant behaviour there are issues that in terms of system design all the schemes should be - have mechanisms built it. We would see this process as a good avenue for those ideas to be promoted.

PROF WOODS: We might explore that one in a little more depth.

MR GOODSELL: Yes. Thirdly, an issue that has been of interest in New South Wales particularly of late, and that's the issue of underwriting - our view is that - and we express it as a recommendation, in a sense it's an observation in our submission - that private insurance market is neither necessary nor sufficient for a proper operation of workers compensation. We don't think you need to have private underwriting. We don't think private underwriting of itself creates the best scheme. We would submit that the experience both here and overseas is that workers compensation in one sense is inherently unstable and that instability manifests itself regardless of the underwriting arrangements and that whatever underwriting arrangements you have, there are lots of other issues you have to deal with in terms of system design. You cannot rely on the fact that there is private underwriting or a private insurance market operating. You can't rely on that as - major determinant of

success of the scheme. It just does not work like that. You can have successful schemes without it and you can probably have successful schemes with it. There are lots of other issues at play.

Probably a related issue that I would finish on, and that is to add a comment I don't think that we made clearly in our submission, and that is that where there are private insurers involved in a workers compensation market - particularly if it's a market that is semi-managed, and New South Wales is an example of that, where there's no overt price competition between insurers - you tend to get, therefore, a very much - a lack of any other kind of competition. So we would see some advantage in this process identifying mechanisms so that even where there is no - if there is competition between claims managers or insurers, to make sure that there are mechanisms to identify the competitive performance of those firms even if there isn't allowed to be price competition between them, because there are a lot of other things that claims managers or insurers do that affect the eventual price to employers - such as the return to work profile, their ability to help manage an employer to get their premium down over time, their service levels et cetera that quite apart from the starting price can influence the employer's eventual performance. So that's an issue, as I said, we don't make clearly in our submission but we would add verbally. I'd leave my opening comments at that.

PROF WOODS: All right, thank you very much. AIG has always been a very active participant in the Productivity Commission's various inquiries and we're always grateful for the thoughtful contribution you make. Sometimes we have more robust discussions than others on various topics. We'll see how today progresses.

MR GOODSELL: This is our first - my first attempt - - -

PROF WOODS: Is it?

MR GOODSELL: - - - dealings with you, so I can't - - -

PROF WOODS: No, there we go. AIG has a long history of assisting the commission in its thinking. Perhaps in the circumstances we might go through the recommendations in the first instance to see where that takes us. To the extent then - some of the broader issues might remain unexplored we can take those up at the back end. Are you happy with that, colleague?

DR JOHNS: Yes. Yes, thank you.

PROF WOODS: Very good. Some we can probably get through fairly quickly and others we might want to explore in a bit more depth. The self-insurance is your first point that you raise there. You talk about consistent criteria but let's talk about self-insurance generally. Given the profile of your membership are many of your

members self-insurers?

MR GOODSELL: I don't know what constitutes many but I would imagine we would have dozens.

PROF WOODS: Yes.

MR GOODSELL: Rather than hundreds.

PROF WOODS: Do you get any sense of the different performance between those who are self-insurers, recognising, in fact, that self-insurers are those who have self selected themselves out of the - - -

MR GOODSELL: Yes.

PROF WOODS: - - - premium basis on the assumption that they can do better than what the scheme offers, so there's an inherent bias in that process anyway. But in terms of injury and claims management, ongoing relations with injured employees and the like, do you get any feedback from self-insurers versus those in the various state systems as to those issues?

MR RUSSELL: I think the first thing I would say is that self-insurers don't usually want to go back to the other system.

PROF WOODS: Yes. It's not a flood that go back.

MR RUSSELL: Yes. The fact that they've invested the time and the resources into going to a self-insurance model usually means that they have got more sophisticated claims management systems. One of the things the management in those areas particularly like is the sense of control that that gives them whereas sometimes they do not sense that sense of control on it in other circumstances. In terms of asking them to quantify those differences that can be difficult but I know in our submission we certainly - got examples from one large company who recently, through some restructuring operations, could not self insure in Queensland because of changes to their particular circumstance.

PROF WOODS: I think we know that company fairly well as well.

MR RUSSELL: Yes, and they estimated up to close to a half a million dollars in costs going back into the commercial arrangements. So it would be fair to say that those who were in self-insurance don't choose to go back but what they would like to see are some sort of consistency about how you apply the criteria. Our recommendations go to that, which go to saying that things like state-based employee numbers may not be an appropriate criteria for looking at self-insurance. Obviously

there have to be appropriate prudential controls and all of those things if you are to - - -

PROF WOODS: But the prudentials could be looked at at a national level again.

MR RUSSELL: They could be, yes.

PROF WOODS: When it is the one company, irrespective of where it operates.

MR RUSSELL: That's right - - -

DR JOHNS: I just wonder though, are there examples where some have been unhappy with aspects of self-insurance and reported back to you? I mean they may not be jumping back into a premium pool but they may be unhappy with some of the rules and regs in their experience. Do you have any of those available?

MR GOODSELL: Can't recall being made aware of - - -

DR JOHNS: I don't want a nice clean picture here where it's all roses.

PROF WOODS: No, no. Well, I think we would probably find companies who can report that once they have moved to self-insurance find that the savings that they had first hoped for are not there to the extent because the systems they have to put in place are greater than first anticipated.

MR GOODSELL: Yes.

PROF WOODS: That their relations with employees aren't quite as close and clean as they had first expected, there are still other parties, like doctors, who act as a third party process. So I suspect as we explore the self-insurers themselves we will find that first expectations and actual practice are not so totally aligned.

DR JOHNS: Well, why don't we extend that though, I mean because your first recommendation is:

> Self-insurers' licences should be awarded on a consistent basis across jurisdictions -

which would be well and good, I guess. But do you have a preferred model? Is there something that your members are looking for? Their experience is best in this jurisdiction or another. Any thoughts there?

MR GOODSELL: We haven't explored it to that level of detail. What we confined ourselves was to the higher level issues at this stage, which were things like

employee numbers. It doesn't seem to make much sense for a company with 10,000 employees, just because it has only got 50 in one state it can't self insure in that state. That seems to be not a very sensible threshold.

Just going back to your earlier question, there is an issue recently that has arisen, again in New South Wales, in relation to commutations and experience of. For pretty good reasons the statutory scheme tightened up access to commutations but that created problems with self-insurers and I think that came out of - self-insurers because of their - because there is no difference between the employer and the insurer therefore there is no ambiguity about whose interests decisions about commutations are being made, in terms of the financial effect. Self-insurers have a different view about commutations generally, or the availability of commutations, than those who take a global view of a statutory scheme - who in some states are very suspicious about commutations being made widely available because of the effect, the flow-on effects, and the lump sum culture. So there's an example of a difficulty arising for self-insurers in terms of - - -

PROF WOODS: Can you just clarify for me, though, because if you are a private underwriter sometimes there's an incentive to do a commutation just to close the file.

MR GOODSELL: Yes.

PROF WOODS: Which has its own incentive effects in terms of apparent performance for the central government agency. But are you saying that self-insurers generally don't like commutation?

MR GOODSELL: No, my point was that they feel more comfortable with the power to award commutations.

PROF WOODS: Yes. So they can settle their dispute - - -

MR GOODSELL: Yes.

PROF WOODS: - - - with their employee and then move to a new relationship.

MR GOODSELL: Yes, they are comfortable having a discretion whereas the wider scheme that discretion - if there are insurers involved in the wider scheme and the discretion is too wide then we see - experience in New South Wales was that the commutations ended up being just blowing out of all proportion.

DR JOHNS: So - sorry. So there was a loss of discretion, that was the - - -

MR GOODSELL: Well, it was - - -

DR JOHNS: One of the elements.

MR GOODSELL: It was discretion and - there was the issue of discretion and control and very much this combination. In a self-insurer you don't have a difference between the insurer and the employer.

DR JOHNS: Yes.

MR GOODSELL: In other schemes they are two different entities and their views about what is good for the scheme or the company is different. Commutations are a strange phenomenon in that in almost all cases they make very good sense for an individual claim, even to the individual employer and everyone would - most people will advise an individual employer to effect a commutation for an individual claim. But their effect on behaviours in the scheme, broader than an individual claim, has an opposite effect; can have an opposite effect which is - when it's grossed up across a whole scheme can mean that commutations are in fact undermining the scheme because they become part of a lump sum culture.

DR JOHNS: But that's part of a broader problem, I guess, isn't it? That you may self insure and have a degree of control but someone else is really setting the rules about standards of payment and so on.

MR GOODSELL: That was an issue in New South Wales about whether you could have two standards, two - commutations are seen as a form of benefit.

DR JOHNS: Yes.

MR GOODSELL: So that you had different benefit structures, one for self-insurers and one for others. That was deemed as not being acceptable. But that is an issue arising out of self-insurance.

PROF WOODS: Very good. You then move on to talk about the national Occ Health and Safety Commission and OH and S accreditation. We are struggling with pinning down particular reasons why so much time, effort and goodwill from tripartite bodies goes into developing the national guidelines and advisories. Yet when it comes to state level for absolutely rock solid reasons they get finetuned to create a diversity of systems across this one reasonable sized but not large country in the international scheme of things. Can you sort of shed any light on how we can work our way through this process?

MR GOODSELL: I'd like to say yes.

PROF WOODS: I'd like you to say yes.

MR GOODSELL: I suppose the starting point is understanding what is going on at the state level, I suppose. Certainly one phenomenon is - and it's understandable - is a reactionary regulation that if there is a bad accident or a series of bad accidents in a particular industry or on a particular piece of machinery or in a particular environment then there is an - there appears to be a public expectation that there is a regulatory response in that state to that issue. You then get deviations from the grand plan. I think the other issue is that a lot of these things are done in a tripartite manner and there are various interest groups.

PROF WOODS: The different levels.

MR GOODSELL: Yes, and a lot of the regulations - - -

PROF WOODS: And different powers and weightings at the different levels.

MR GOODSELL: Yes, and a tripartite system works with different pressures at different levels of government. So they are probably the two major issues. I don't think we see any great - not our view that there is any great environmental reasons why the regulations should differ from state to state. It's not as if the risks are grossly exaggerated in some areas - in some states rather than others. There's hot work, there's cold work, there's - - -

PROF WOODS: Well, we had that example - - -

MR GOODSELL: All across the country.

PROF WOODS: - - - given to us yesterday that building requirements in Darwin were different from those in Hobart. But surely you could have two subsets of a agreed whole, one of which applies because of particular circumstances in one area and one subset which applies somewhere else. But you could still have them within one totality. So I mean, we agree that's an argument that - it is often put out that it doesn't seem impossible to resolve that. So do you find for members who have businesses operating in the various states and therefore want to mobilise some of their staff from time to time across state boundaries that they are having to sort of undergo or be retrained in occ health and safety procedures applying to the particular state? What sort of impacts does that have?

MR GOODSELL: I think there is a cost. There are two points at which that occurs. I think the first point is when you move workers from state to state.

PROF WOODS: Yes.

MR GOODSELL: Within our industries - that's particularly prevalent within the construction industry.

PROF WOODS: Yes.

MR GOODSELL: The manufacturing industry not so prevalent. But probably the more difficult question is at the management level because managers do move from state to state quite regularly in both industries and yes, there's a level of training that has to be undergone because occupational health and safety is usually implemented by the line management. In particular places it's a fundamental responsibility that they have. So yes, there's a retraining cost every time there is movement. Quantifying that is difficult but, you know, it's a given that the cost is incurred.

PROF WOODS: Yes, thank you. Any more on that?

DR JOHNS: Well, I guess some people use the term "consistent criteria" any number of times, as I go through. Consistency is not much help to an employer who works across boundaries, is it? They want the same set of rules presumably.

PROF WOODS: Yes, uniform rather than just consistent.

DR JOHNS: Or unified. Simple word: the same.

PROF WOODS: The same, yes, yes.

DR JOHNS: It's just you get into these gambits where consistency's a nice thing and we'll set up a committee and we'll work towards consistency and everyone works at it because that's what they're employed to do but it's not the same. It doesn't help. So I wonder, are you really wanting - you seem to be suggesting in some of your points - are you really wanting the same rules to apply at least where companies work across border, more so than just consistency?

MR GOODSELL: I think what we've suggested is in some cases the same rules where there doesn't appear to be any good reason why there would be different rules. The other concept in our submission, is the ability for national companies to apply the same internal standards of management practice which can be deemed to meet all the different regulations even if they aren't the same so - - -

DR JOHNS: That's the device, if you like, for taking them out of the jurisdiction of the states and keeping them - - -

MR GOODSELL: Whether it takes them out of the jurisdiction of the state or whether it just adds an overlay to what the state manages, I realise it's difficult but from the point of view of the companies they often will - they take these responsibilities very seriously, particularly in relation to OH and S and the way they found - the best way to actually perform against these standards is to apply consistent

internal national management systems and not have too many subdivisions. What they would like to be able to do is to be confident that having done that they wouldn't fall foul of small changes that don't appear to make things safer in different states.

DR JOHNS: I guess the only way you know if you fall foul though is if a state inspector tells you you've fallen foul and the only sure way here is to get you out from under a state jurisdiction by signing up to a national set of rules. I'm just trying to differentiate what it is you want.

MR GOODSELL: Well, it's the mechanism, I suppose, up for grabs. The result is to be able to - the result is for the company to be able to apply a national standard of practice that's nationally managed and for the state systems to recognise that as being - even if it is different then still complying with the regulations they have in a particular area. The reason for that is, it is a compliance cost issue but it's also a safety management issue and safety management is about managing organisational behaviour. Large national companies have found that the best way to do that is to have company-wide procedures and processes and management systems. It actually undermines that to have too many deviations at the margins so we wouldn't say it's not a compliance cost issue but it's also an issue in terms of them being confident they're making their best efforts as a management team, to have what can sometimes be quite a large and disparate team, actually working towards the same thing and that is lowering the risk of that total operation.

PROF WOODS: If you had, though, national accreditation to apply to these companies across jurisdictions, do you need a separate spectre because they would be testing them against a different set of standards to those companies who were within the state/territory systems, or at least accredit the state inspectors to be able to also - - -

MR GOODSELL: You could have a separate system or you could do what they do in the industrial relations area and have dual appointments or something like that.

PROF WOODS: Yes, that's a model that could be looked at but the ideal is to just have one national set of standards that are the same in all jurisdictions.

MR GOODSELL: The ability for companies to manage in that way and not trip over at the state level. There has to be an acceptance amongst the state that there is either collectively of separate to the states some sort of regulatory authority who is monitoring the performance of that organisation.

PROF WOODS: Okay. That then moves us onto workers compensation. We seem a little further apart in terms of achieving a national scheme in workers compensation than in occupational health and safety. Would that be a reasonable summary of where things are at?

MR GOODSELL: Yes.

PROF WOODS: You have developed a number of recommendations here. Again you're talking a consistent approach across the different systems but if we can reread that as that you would have some priority areas where you want the same to apply, in others maybe less important or somewhere down the track and in fact one thing I do want to explore with you during this discussion is what would be your prioritisation because one model, and we have to look at framework models, one model might be a progressive implementation of uniformity or the "sameness", commissioner, across a range of things and maybe starting with definitions of employees, employers and work relatedness. You know, that might be number 1 and number 8 might be dispute resolution and something. If you could put in the back of your mind at the moment that we can explore what - that list and what that prioritisation might look like as we go through your various recommendations at the moment.

You talk about a consistent approach for notification of injuries, definition of pre-injury weekly earnings and consultation mechanisms. I can understand that but where do they fit within this sort of overall - I assume they're here mainly because that's where they popped up in the text as you went through it, rather than that's the number 1 issue in workers comp.

MR RUSSELL: The submission follows the format of the issues paper. There's no particular order of priorities.

PROF WOODS: No, you've just - yes, that's fine. I understand that. Assistance of funding for employer awareness? Presumably that has to come from somewhere. Are you suggesting that the taxpayers fund businesses to become aware of their obligations or - - -

MR GOODSELL: Yes, we think these areas are important enough and complex enough.

PROF WOODS: Yes, all right. Nationally consistent test of what constitutes work. I think this is starting to get to the heart of it. You are concerned about the spread of who gets captured. I notice there you're referring to some concerns about deemed workers. So when you look at the various state schemes and you can have different ends of spectrums. You can have the current Northern Territory system where if you've got an ABN you're out. You can have other schemes which sort of deem quite broadly. Given that your members do have an incredible diversity of relationships with those who aren't PAYE employees but are subcontractors, labour hire companies, personnel - quite a variety - where do you sit in this definitional issue? I mean, to whom is the business responsible for covering and providing rehab and compensation in the event of an injury?

MR GOODSELL: It's a difficult area. As you say, the legislation currently is framed around the concept of contracted employment or contracted for service, contract of service, with exceptions. The labour market as you've identified has moved way beyond that. The touchstone has to be the control of the risk. Whether that lines up with particular legal definitions like labour hire - market definitions like labour hire or contractor, I'm not sure. The real issue is, does the person you are asking to take on the liability actually control, substantially control the risks that the person who is covered by the compensation scheme will be subjected to? The term subcontractor, if you subcontract someone and they come onto your premises in your environment then pretty clearly you've got a very high degree of control over the risk.

If you subcontract work out under the true meaning of the term subcontract, where they're in fact in a legal sense assuming control and risk and that manifests itself in the workplace conditions, then we would think it's dangerous for them to be covered by workers compensation because really you're paying their personal insurance in a sense, their personal cover. That's the difficulty, is what are the labels that delineate between the first case and the second case. I don't think subcontractor does. It's really a function of the conditions under which the work is carried out. However, it's not efficient obviously to have to assess that in every case. This issue has come up again in state schemes as they've been revised. There's been issues of compliance, about employer compliance, that's thrown this issue up about, well, what should employers be paid for?

One option, and we're not putting this as a submission, but trying to be helpful I suppose about a very difficult area. One option is the issue of self-selection, is if people - if the worker, using the term generically rather than technically, if the worker knows the consequences are being one or the other, then they can up-front at the beginning of the relationship sort these issues out with - and ideally document with the so-called employer. You would have to have an understanding about the risk arrangements and you would also have to deal with inequality of bargaining power I suppose. But that's one option - - -

PROF WOODS: Yes, well, that is an important point.

MR GOODSELL: - - - is that people knowing the consequences of being one or the other make an informed decision outside the normal - I'm saying employees can put their hand up and say, "I don't want to be covered by workers compensation," but I'm just talking about the cases in the middle.

PROF WOODS: Your inequality of bargaining power I think is an important one. What I take it is that you're acknowledging some asymmetry both in terms of information available and capacity to bargain rights in these circumstances. I mean, if you're an employee looking for a job and the employer says, "Well, take it or leave

it, these are the situations," then there is some asymmetry between the two parties.

MR GOODSELL: Or conversely if you're a tradesman in the Sydney building market and it's particularly short of - - -

PROF WOODS: And different parts of the cycle.

MR GOODSELL: And you were only going to offer yourself for work under certain conditions, so the asymmetry can work both ways.

PROF WOODS: Yes, different parts of the business cycle can favour different elements. I mean, the complexity I guess was brought home to us yesterday of a situation of a rigger who worked for a labour hire company but was required to then work for a crane operator and that crane operator working on a building site operated by yet another party. There are all various - there's the training and awareness obligation of the labour hire company, there's the provision of appropriate safety and working conditions by the crane operator and then there's safe working site requirement of the builder, all of which unfortunately conspired unintentionally to injure this particular worker. Trying to sort out who has what liability in that little arrangement.

MR RUSSELL: Which would vary depending on the injury, of course.

PROF WOODS: Yes.

MR RUSSELL: Whether it had to do with the site or the crane or - - -

MR GOODSELL: Well, using the framework I laid out earlier that will be a case where objectively the worker didn't have control of the risks but the control was spread over three or four other parties.

PROF WOODS: Yes, precisely.

MR GOODSELL: There tends to be - state schemes - an inclination to sort of nominate a party to say, "Well, you're it."

PROF WOODS: But are you happy with that nomination because in many cases your members would be nominated - - -

MR GOODSELL: Yes.

PROF WOODS: - - - but don't have absolute control.

MR GOODSELL: I think there's a trade-off between what is right in an objective

sense and what is efficient and what gives certainty.

PROF WOODS: Yes.

MR GOODSELL: Certainly there's a value on certainty.

PROF WOODS: Yes.

MR GOODSELL: There's clearly a value on certainty, particularly in an area like this where litigation can produce strange results. So I think we would accept a trade-off between the principle I outlined earlier and certainty, provided the certainty was fairly robust.

PROF WOODS: Well, certainty then carries a price and that price can be then reflected in negotiation between parties for the overall cost of deliver of service, can't it? Once you have that certainty you can then say, "Well, that certainty will cost me X in premium," or whatever.

MR GOODSELL: Yes.

PROF WOODS: "Now, I'll carry that particular cost into the bargaining relationship between the various parties and then see to what extent I can sort of lay it off as part of the totality of the contractual relationship."

MR GOODSELL: But the limitation of that model, of course, is you then - there's nothing about control of risk in that. You're basically saying, "For the sake of certainty I will accept liability." But if the nature of our contract and the nature of - the practical nature of the work being done is, "I can't control the risk to the extent I normally could," then that's when you're getting - so I suppose you would have to monitor that that certainty is not drifting over into an area where the costs actually outweigh the benefit of the certainty.

PROF WOODS: Certainly.

MR RUSSELL: One example - - -

PROF WOODS: That's why you were saying robustness is important.

MR RUSSELL: One example that I have thought of in response to the rigour example was that - large manufacturing facility might be putting in a new line. That might actually involve a fairly significant project management exercise to be done, usually done by outside contractors. They're coming onto the site so in theory there's an issue about control there. But what they're actually doing, because of the sophistication of what is being put in - it's not actually feasible for the client to be

controlling that risk in that circumstance and it could be very very difficult. Whereas if you have a production worker coming in from a labour-hire agency onto the site, well, you're talking about a very difficult example. But there are many examples that fit between the sort of two extremes that we're talking about here. But what we say is the fundamental principle is that control of risk.

PROF WOODS: Yes, okay. So control, certainty, robustness are all sort of elements that need to be reflected in - - -

MR GOODSELL: I suppose this is an area where because it is so complex and there are significant compromises being made, to have the same compromises being made in each jurisdiction would be an advantage.

PROF WOODS: Yes.

DR JOHNS: You'll wish us well, won't you, on that one.

PROF WOODS: Yes. Just moving through, being aware of the time. Journey to work; you don't support it. Not a large cost though, component of the workers comp premium?

MR GOODSELL: It doesn't appear to be a big issue. It's a totemic issue.

PROF WOODS: Yes.

MR GOODSELL: In a sense, going back to that control. But we have taken a very pragmatic view that there is - going back to your priorities issue it's not a priority issue.

PROF WOODS: Not a high cost but your point is the employer doesn't have control over the - - -

MR GOODSELL: In a normal broad sense.

PROF WOODS: Yes. I mean if during the day they are required to move from site to site that's a different matter than the journey to work from home.

MR GOODSELL: This is where the scheme sort of - probably most openly revealed to be that quasi social welfare, you now.

PROF WOODS: Yes.

MR GOODSELL: Someone - you know, "Who is covering for journey? Let's put it on the employer." That's a sort of reluctant acceptance that's part of the game. We

wish it wasn't there but it depends on the whole mix as to the level of tolerance for that.

DR JOHNS: And it's not just being held literally responsible. It's being assumed to be managing a risk which you can't manage or to be telling the employee how to govern themselves outside the workplace.

MR GOODSELL: Well, it's only really manifest in the worst cases.

DR JOHNS: Yes.

MR GOODSELL: In a funny sort of way if a person is injured on the way to or from work an employer doesn't have a problem with workers compensation. It's not normally greatly aggrieving to them that the person is covered by their policy. But if it is a claim that they don't feel is justified then journey claims are the worst things in the world.

PROF WOODS: Yes, okay, understand that. "Consistent benefit structure" - step-downs you have coming in early at 12 weeks. Is that because you think that there is an incentive benefit through step-downs? Does that say something about motivation of employees to return to work?

MR GOODSELL: That's based on our experience. What we understand is - studies have shown that except for seriously injured people the overwhelming majority of people who are injured in the course of work and who are able to return to full employment will do so within six to nine weeks. There appears to be a phenomenon that regardless of the seriousness of the injury if a person is away from the work environment and the work relationship for longer than that something changes. It becomes more - there are more social effects going on than it being purely a work-related injury.

Now, what we are saying is that benefits are a touchy subject. But the one issue in which we think there is a system design principle that ought to be more broadly adopted is recognising - if that principle is accepted that I outlined, that studies show et cetera that should not - the benefit and the process of benefits being awarded or assessed be more closely aligned to that kind of timeframe rather than go on, as they do in some jurisdictions, to six months or 12 months before there's any systemic response to the length of the injury.

PROF WOODS: Fair enough. Light duties or return to work. Many of your members really aren't in a position to offer light duties, I would have thought, for injured workers. Given the profile of your membership I can imagine a number of small and medium enterprises that just don't have that flexibility. Is that the case? In which case, how do you get around that?

MR GOODSELL: Certainly small companies, because of the structure of their workforce and the range of duties that they have, do have great difficulties with alternate or light duties. I think over time, over - perhaps certainly from personal experience over the last 15 years a lot more companies attempt to provide alternative duties than in the past. That's a product of a better understanding of their importance in the injury management process and changes in various legislation. But yes, there is a problem with small companies because the relative cost of providing an alternative duties job that probably isn't terribly productive - it is good in the injury management sense but in the pure sense of getting widgets out the door for the company it's not adding greatly. The relative cost of that for a small company, say with five or 10 employees, is massive, compared to a job like that being buried in a company with 300 employees. So you have got a difficulty with the principle of light duties being - incentives for smaller companies to - the cost benefit for that.

DR JOHNS: What sort of incentives did you have in mind? You say "provide incentives for workers". Who should provide the incentive and - - -

MR GOODSELL: Well, there have been attempts, I think, in various jurisdictions to provide some job matching sort of pooling. They don't seem to have been terribly successful, from what we can see. We might be misguided in that view but the feedback we have got is that there hasn't been a lot of community spirit or - whatever the issues are, "That injured workers are your own responsibility." The incentives that we - the other incentive model that we put on the table here is to say, "Well, if small employers are finding it difficult to offer alternative duties then probably there are a lot of cases where they could but they don't, and that has a cost." That has a cost to the scheme. If we try and quantify that cost and then re-channel it back as some sort of incentive to minimise that or to reduce the marginal cost to the small employer of taking on alternative duties, that would be a constructive proposal.

We would have to be honest and say that we have no way - we don't know which way the numbers would fall on that. But it is an idea that in principle has some soundness about it because we do know that, particularly in smaller companies, if there's an aversion to alternative duties - we know alternative duties are a part of injury management - then injury management must be suffering because of that phenomenon and that must be a cost to schemes. So crystallise that cost and turn it into an incentive is our suggestion.

PROF WOODS: Good. Commutations I think we dealt with before. Common law, you're quite categorical there and it should not be included in any moves to national consistency. What, in a thumbnail sketch, are your key objections to common law?

MR GOODSELL: If a scheme is based on strict liability or close to strict liability

and there are strong statutory benefits schemes, we haven't seen any scheme that has had an overlay of common law that has survived any period of time without completely undermining the stability of the scheme. The culture of the adversarial approach in common law works against injury management.

PROF WOODS: Is this based on sort of documented evidence from your membership that felt their relations with their employees have degenerated because of the adversarial nature of common law?

MR GOODSELL: Yes, we have plenty of documented cases of - put it in a nutshell - claimants' behaviour completely changing once a common law claim is lodged. At the early stages of a claim it was all about treating the injury, getting back to work. The minute it became a legal process involving quite large sums of money, possibly at the end, the claimant's behaviour changed.

PROF WOODS: Can you, separate to today's proceedings, draw on some of that material for the commission?

MR RUSSELL: Yes.

MR GOODSELL: We can. Some of it was - we make a reference in here, the most recent examination of that issue was by Justice Sheahan in New South Wales.

PROF WOODS: Yes, we've met the good justice.

MR RUSSELL: I think we also put a number of examples in our House of Representatives submission to the Back On The Job report that was released.

PROF WOODS: Yes.

MR RUSSELL: On 10 June.

PROF WOODS: Yes, and where they deal with that.

MR RUSSELL: Provide you with examples - - -

PROF WOODS: As well.

MR GOODSELL: Good information, yes.

MR RUSSELL: - - - on that.

PROF WOODS: That's fine. Anything further you want to say on the common law?

MR GOODSELL: No that's - no, no.

PROF WOODS: Or are your views quite clear on - they're certainly - - -

MR GOODSELL: Our members views are quite clear.

PROF WOODS: Yes.

MR GOODSELL: Yes.

PROF WOODS: I can read that. Establishment of a consistent test of work being the major contributing factor. Is the "the" deliberate ie to give primacy? Or could that also be just read as being "a major contributing factor" and this is just an accident of drafting?

MR GOODSELL: I think our preference would be "the". We recognise the implications of that. In a number of these areas - I mean the ultimate design factor is a combination of a whole range of factors. Our position on that issue, and that issue alone, would be that it would be "the". But if other elements are in place - we realise the difficulties that creates in terms of some elements of fairness and some elements of attempting to do what the workers compensation system does. We would accept that in reality - I think the existing schemes all revolve around the word "a" or a version thereof. But just in isolation our position - on that point our position would be that.

PROF WOODS: You mentioned in your opening comments, and again it comes up here, about your concern that employers are not feeling that they have an involvement in the medical process; that there's the relationship, and reasonably so between their employee, however defined, and that employee's GP, but you're looking for an opportunity for the employer to be involved in that dialogue and to bring an awareness to that relationship of broader issues.

MR GOODSELL: I think there's two issues here: one issue is, and this is sort of a layman's explanation of what goes on in the diagnosis process not a medical view, but in the normal process of consultation between a patient and a doctor I would imagine a lot of the information that the doctor makes his decision on comes direct from the patient. I've heard figures as high as 80 per cent of the information that the diagnosis is made on is basically asking the patient questions. There is a phenomenon in workers compensation that because the patient-doctor relationship has this halo around it that all other interests are excluded while that dialogue is going on and we don't think that is right.

We think in relation to a couple of specific issues, in relation to any suggestion

about examination of causation and in relation to the nature of the work that's being done or could be done by that employee back at the workplace, doctors have a habit of tripping over into those areas in the initial diagnosis and making observations about those issues which in our view they shouldn't be making without input from the employer. They are probably critical to the injury management process but they shouldn't be critical to the examination of whether the person is actually injured or not. It may be relevant to whether they're fit for work. So we think that the systems ought to acknowledge that when you're talking about the medical relationship, doctor-patient relationship, in relation to some issues there is a legitimate interest or a legitimate source of information that the employer should be able to provide and should be the source and the system should build that dialogue in.

We have lots and lots of cases of employers complaining that doctors will not contact them and when they actually ring up doctors because they actually want to help the person come back to work, and they just do not want to know about them. We can only assume that's because their training and their methodology is aimed at concentrating on the patient. That's one aspect of it. There is another aspect of it that's just floated straight out the other side of my head but I'll come back to that when I make a note of it.

PROF WOODS: See if you can capture it otherwise come back to it subsequently. I guess the final one that I want to pick up out of your list; dispute resolution. You identify a number of principles: authorities should screen and stream, tribunals should utilise binding medical panels, no legal representation, enhanced conciliation, minimised participation of legal representatives. I think we do have the Law Council of Australia coming next so maybe we can pursue this with them. Strictly limited legal costs regimes for matters determined by the tribunal. Do you have any views on which of the various models in the states and territories have useful experience and modus operandi? Is there one that you currently favour as top of the pops?

MR RUSSELL: I wouldn't say there's one we favour. I mean, we're interested - one thing about the changes that have happened in the New South Wales schemes in recent times is that we think it's a move along the right direction but it's too early really to judge the results because it's only been in effect really now for 18 months.

PROF WOODS: But in terms of its underlying principles and procedures to date, you are comfortable that it's an improvement?

MR RUSSELL: We're not getting a lot of objections from our members who have been participating in the approach so far but we would reserve judgment given the fact it's in its embryonic stages.

PROF WOODS: Okay, so it's in a possible but not definite category. Yes, any other systems that come to mind?

MR RUSSELL: We didn't get a lot of feedback on that particular issue across the rest of the states where we operate so I wouldn't venture a view on that at this point.

PROF WOODS: It would be interesting if, in the course of our inquiry, you did come across the views of your members in various jurisdictions that had experience of this.

MR GOODSELL: I suspect the ones that favour it would be the ones where they have no view because it's not, not at all a prominent issue.

PROF WOODS: That's right, you only hear the complaints. In fact if you could tell us those that find the most complaints generated that would help us by exclusion, in our deliberations.

MR RUSSELL: Certainly the New South Wales system prior to the most recent reforms.

PROF WOODS: Yes. If I can then come back to a broader issue and that's of prioritisation; again, that might not be one that you want to sort of fully deal with this morning but if you could come back to us with some assistance in developing one of the possible national framework models which is a progressive evolution of uniformity through the various characteristics of workers compensation, which ones you would choose first and some guidance on what is your preferred model and some of that is already here in the sense that if you look at definitions we can turn to this bit and say, "Well, this is your view on that" or other features; whether common law is in or out, et cetera. So we have some guidance already on those but a prioritisation of them would help. There are various models open to us to explore but that is one that we're conscious of and your assistance there would be most helpful. Have you got any other - - -

DR JOHNS: No, I haven't.

PROF WOODS: Are there any other matters that we haven't covered this morning that you particularly want to put on the record today? I mean, your total submission is part of the record.

MR GOODSELL: The other issue that I was going to make in relation to medical providers was the objectivity of the GP as the claim goes on in terms of - the best example is, if a workers comp claimant goes to his family GP and that GP has been dealing with that person and their family for 10 to 15 years, how objective are they about - not about the person's injury per se, but about all the other issues that are surrounding income support and the options for income support, et cetera. There is no doubt an efficiency gain from having all GPs involved in the workers

compensation scheme for short-term claims. The question we would raise is, is there a point in a claim where that's not the best option?

PROF WOODS: Yes, which brings in the medical tribunals and your point there about binding results and the like.

MR GOODSELL: And for disputation particularly.

PROF WOODS: Any other matters that you particularly want to highlight this morning?

MR GOODSELL: No, I think we've traversed the ground fairly well from our perspective.

PROF WOODS: Thank you. We do thank AIG, as I said at the front end, that you've always actively participated and haven't always then fully endorsed our recommendations but that's all part of that process. But you're always there providing a well thought through view, so thank you very much for your time this morning.

MR RUSSELL: Thank you.

PROF WOODS: We welcome our next participants, the Law Council of Australia. Gentlemen, if you could please, for the record, provide your name, position and organisation you are representing.

MR VANDERVORD: I'll go first. My name is Charles Alexander Vandervord. I am the co-chair of the personal injury committee of the Law Council of Australia. I'm also representing the Law Society of New South Wales.

PROF WOODS: Thank you.

MR MURPHY: Gerry Murphy. I'm the other co-chair of the - I think it's now called the standing advisory committee of the Accident Compensation and the Law Council of Australia. Mr Scarlett.

MR SCARLETT: I'm David Scarlett and I chair the national insurance lawyers group of Law Council of Australia.

PROF WOODS: Thank you.

MR GREENTREE-WHITE: James Russell Greentree-White and I work in the secretariat of the Law Council as a lawyer legal and policy.

PROF WOODS: Thank you very much. We have the benefit of your submission, signed off by your secretary-general we note and you've been taking us through a number of points in it which we can raise in discussion and then you attach various matters including submission to labour ministers' council and a paper, as I recall it - yes, by Neville Norman back in 1997. Thank you for bringing those materials to our attention. Do you have an opening statement you wish to make?

MR VANDERVORD: Yes, the opening statement is that we adhere to what we've presented to you both currently and on the prior inquiry and we are to some extent bemused that we would be back here again dealing with what we would see as being very much the same ground and the same considerations that were dealt with previously and that's addressed in our supplementary submission. Our view is that whilst there are some advantages in commonality, neither a national compensation scheme which you say you're not looking at at this point in time, but national consistency, is something that can really be dealt with by the individual authorities in each of the states and territories looking at problems as they see them arise.

The heads of WorkCover authorities meet frequently and of course it was their report that initiated the earlier inquiry. Arising from their discussions matters that are germane and relevant to the individual states and territories are normally, on my understanding, certainly in New South Wales raised with the - in our case in New South Wales - the board of WorkCover and more importantly in some respects the

advisory council that is in place, comprised essentially of stakeholders and both employers and unions and other experts who advise in relation to general matters but also have occupational health and safety and other skills. I sit on that advisory council and I can assure your inquiry that matters that are considered to be innovative and worthwhile are raised there, they are discussed, research is done on them and then if appropriate it's enacted into our state legislation.

We've had considerable legislation in the last two years, implementing issues that are seen as being advantageous. We don't see that this system is in any way deficient and we consider it to be superior to a set of rules that may be laid down at a higher level, at a commonwealth level, because if that were to be in place and there were any need for change you've obviously got considerable delays because you would then have to acquaint and perhaps obtain consent from the other bodies representing the other states and territories. So that's the position that we come from, that we see each of these various schemes, whether they're Queensland's or New South Wales' as being separate, each having their own individual advantages and representing the aims and the requirements and aspirations of those states and territories. I don't know whether anyone else on the panel wants to add something more. That is the opening.

PROF WOODS: Thank you very much for that and I think that fairly neatly encapsulates the perspective that then is in your submission. We do have representations from a number of business organisations and I must say also from a number of employees who operate in more than one jurisdiction, that there are costs involved in having diversity. Now, it applies both to occupational health and safety - and we have employees telling us that they have to go through retraining to understand the particularities of the individual jurisdictions, even though they themselves are performing the one job across a range of jurisdictions, and employers who wish to move staff from location to location and they must retrain them, that they themselves must interface with a multitude of jurisdictions, pay premiums, incur costs of administering the various schemes.

Is it your view, however, that those costs are considerably outweighed by the benefit of, you know, in one country of 20-odd million, parts of that country having different laws, regulations, guidelines, et cetera. I take it you've sort of come to an on-balance decision that the diversity would outweigh those other costs?

MR VANDERVORD: That's correct. We consider that diversity is justified because it's not looking at a country of just 20 million people, it's looking at a confederation of states each of which have a different employment and industry base, different geographical ties, what may be very appropriate occupational health and safety for industrial states such as New South Wales, with cities such as Sydney and Wollongong and Newcastle - would be very, very different, we would put to you, than say the Northern Territory with their industry base and their population spread.

That can be extrapolated backwards and forwards across the various states. So whilst there may be an extra cost in retraining it is justified on the basis that where that person may be transferred to those skills would be needed to comply with the environment and the industry in the area that they're going to.

PROF WOODS: Could that not be resolved in part through there being various subsets that relate to particular conditions? There's as much diversity I would have thought in metropolitan Sydney versus many towns I've visited in western New South Wales, whether they be Mungindi or Broken Hill or White Cliffs. That diversity is probably almost as great as between Sydney and Katherine or - - -

MR VANDERVORD: Yes, I suppose the question is how much industry are in those more far-flung towns or whether it's just - - -

PROF WOODS: Broken Hill has got some but yes.

MR VANDERVORD: Well, as you would well know Broken Hill is not a very active industrial city at the moment.

PROF WOODS: Been there recently. I can concur with some of that.

MR VANDERVORD: I've done a lot of litigation there and I've seen it decline over the 30 years that I've been going there and perhaps that's not an excellent example but I understand you talk of somewhere like Dubbo or somewhere like that where you have got an industry base - or perhaps Orange. I think if you're looking at it from that point of view you could relate the conditions in Sydney or Newcastle or Wollongong to those major centres in the west. I'm not sure how it could really be relevant to look at some of the very, very tiny amounts of industry that are in the balance of New South Wales, out west.

PROF WOODS: I don't think we need explore this point too much further except I would like to reinforce that this inquiry is attempting to explore national frameworks that apply as equally to rural and regional Australia in its collective sense as distinct from its jurisdictional sense as to the metropolitan areas and - - -

MR VANDERVORD: I appreciate that.

PROF WOODS: - - - you're obviously as cognisant as we are of the importance of that for developing those frameworks.

DR JOHNS: Could I just have two bobs worth of that?

PROF WOODS: Yes.

DR JOHNS: I mean, I read your discussion and you make the point that consistency is no sort of principle to hang much on at all and I agree - consistency for what purpose, okay? I also agree that the states are responsible jurisdictions in a legal and political sense, whether they behave responsibly is another matter.

PROF WOODS: Sovereign powers.

DR JOHNS: But if I were to design you a national system that could act in competition with the states and had unfettered access to the common law as one of its key design principles, would you buy it? I'm not quite sure whether the Law Council are federalists in this instance. I'm not quite sure why you have that interest in things.

MR VANDERVORD: So the price of a national scheme would be that there would be a common law bolt-hole. Is that - - -

DR JOHNS: No, I'm just saying what if some bright spark came up with that idea, what would the Law Council's view be then? Would you say, "Well, hang on, that sounds like a good system" and would this then begin to turn your mind on the federalist view that you have? It's not a trick question. I'm trying to pull it apart and say, "Well, what - - -"

MR MURPHY: Subject to the premiums and subject to the benefits, you know. The one view that the Law Council favours very strongly is if there's any move at all towards a national consistency or a national scheme it can't work to the detriment or the disadvantage of any worker in any jurisdiction.

DR JOHNS: So it's the overriding power that worries you most?

MR VANDERVORD: Mm.

DR JOHNS: I'm trying to get to the nub of the thing, yes.

MR VANDERVORD: Yes, that's right, it is - but the other thing is, we would also see that the individual schemes in each state represents the needs and the aspirations of that state. The fact that New South Wales does not effectively have any common law, whilst it's unfortunate, would not be motivatingly sufficient for us to say that we would prefer to have a nationally consistent scheme because that in itself would have weaknesses that its name doesn't indicate because each of these states have got very different pressures and impediments either way, but they've got to try and achieve what the state requires. For instance, the New South Wales scheme is very different to the Queensland scheme yet the Queensland scheme is funded, it provides less benefits in the statutory scheme, but it achieves what that state requires.

DR JOHNS: And for an employer sitting in a state not doing business elsewhere, not doing business that involves occupational health and safety, workers compensation, that's the extent of their world and they've had 100 years of experience and negotiation with the unions or whoever to arrive at that point. I understand that. I've sort of had an insight into some of that. But for an employer who works across many boundaries their needs are different and their needs perhaps - I mean, could they be satisfied by getting access to a scheme that is not one of the six or eight available? I mean, it's a question that they're asking us. They're saying, "Well, this is not a federalist versus unitary argument. We want someone to help us."

MR VANDERVORD: Well, perhaps I can put it to you this way: the three eastern states have already reached an agreement in relation to cross-borders, which is one of the problems that a lot of the employers would have and if that can be extrapolated by a consent with the other states then we've overcome what had been sought to be achieved and which the law council did support from the original report that was put forward that would overcome that problem.

DR JOHNS: The cross-border one as I understand it is really more a matter of assigning a worker to a particular jurisdiction, isn't it? I mean, if someone kept jumping back and forth over the Tweed and working in two places, they say, "Well, for the purposes of this injury, for the purposes of this contract we'll assign Joe to New South Wales," but that doesn't help the national employer who says, "I have to run six different systems of compliance with OH and S and understand six different benefit structures et cetera, et cetera. So I mean, that's one element of it but there are others.

MR VANDERVORD: If I address that problem for you, I mean, of those major companies, they were not transferring their staff from Melbourne to Sydney on week 1 and then to Brisbane on week two. The numbers that are being transferred are not of major proportions. The employment force is by nature of where they reside is fairly static. So I think when that's raised it's raised to a greater extent than its real risk and problem is. Now, in terms of understanding occupational health and safety in the various states, well, those regulations are in place, that legislation is in place, to address the problems that are in that state and you would be very strange if you had a situation where they were exempt from that because they happen to have come from another state. So compliance is required so it's equal to all and the companies, if they are major companies, would have in each state their own experts in terms of compliance with the workers compensation scheme or more importantly the occupational health and safety scheme.

PROF WOODS: They do. What they're asking is to have one culture of safety throughout their company that applies in all jurisdictions and to have one body of expertise that is situated in the various states and territories but is commonly trained and is interchangeable so I mean, yes, they require with the requirements in each of

the states but they would like to roll out a common safety culture and a common body of expertise throughout their various operations and that's limited only to a degree. We're not talking about wholesale differences but there is a limitation to a degree and to the extent they can do that.

DR JOHNS: Which is acknowledgment that their world is different, their world is - - -

PROF WOODS: Yes, and this ultimately does come to a judgment as to the importance of the particular characteristics of each jurisdiction, versus the ability to derive national guidelines, frameworks and the like and we are cognisant of the goodwill that exists at the national occ health and safety council, and the very good work that is achieved there. It's just then it gets translated into variations which is the prerogative of the sovereign bodies. We don't dispute that point, we're just exploring to what degree that has an impact on firms that operate in a number of jurisdictions in developing our national models.

MR VANDERVORD: In terms of compliance or - - -

PROF WOODS: In terms of their ability to provide the best safety environment for their employees which as a minimum includes compliance with the particular requirements of each of the jurisdictions.

MR VANDERVORD: Which would be the maximum. I mean, if they complied with the occupational health and safety provisions in each of the states they would be achieving a lot. The thing is everyone falls, I think regrettably, somewhat short of that.

PROF WOODS: We have heard evidence from - it's now on the public record - Optus said to us that the approach that they take because of this diversity is to pick the highest standard on each particular aspect, whether it's heavy lifting or electrical safety or, you know, other matters from each of the jurisdictions and then roll that into their one national culture. That on face value is quite commendable and that's no doubt how it actually happens in practice. What they then say is however they have to be constantly vigilant as to the minor variations that are occurring in the eight jurisdictions to ensure that their own national standard is consistently picking up and correctly including whatever variations are occurring in those eight jurisdictions and they would prefer to monitor one jurisdiction than eight.

MR VANDERVORD: Yes, I appreciate what you're saying.

MR SCARLETT: But, commissioner - - -

PROF WOODS: Yes, please?

MR SCARLETT: - - - so far as that's concerned, to the extent that the Robens' style approach to OH and S applies and you are talking in terms of what has been a requirement on an employer to guarantee the safety of people at work, it seems to me that would require looking at minimum standards rather than looking at maximum standards which by the nature of guaranteeing would almost inevitably ensure that the regulatory standard which is a minimum is met or exceeded regardless.

PROF WOODS: Yes, well, they're making the point that they exceed the majority of regulatory requirements in the majority of jurisdictions because of the fact that they pick the highest level of standard of safety of each of them as it applies in the various parts of their work, but I understand.

DR JOHNS: It's not the standard but the cost of compliance I think.

MR MURPHY: Well, that's really what it comes down to, doesn't it; compliance cost?

PROF WOODS: Exactly, which is where we were at before. It's a trade-off.

MR MURPHY: Yes. Well, our bottom line on that would be that that's a price that they have to pay for operating in sort of seven or eight different jurisdictions in Australia.

DR JOHNS: Yes, that's the debate, yes.

PROF WOODS: It's consistent with some evidence given to us yesterday by - - -

MR VANDERVORD: It's got a familiar ring, has it?

MR SCARLETT: Well, the bottles that you get in New South Wales - talk about the six cents that you get back in Adelaide, there's an awful lot of things where people comply nationally for one state.

PROF WOODS: I mean, that debate in occupational health and safety is by degree a very different debate when you can then apply it across to workers compensation because the diversity there is so much greater and on those issues you are quite clear in your views for instance that the Law Council does not consider it likely that the states and territories would accept an expanded Comcare-based scheme, nor a scheme which does not reflect the individual issues of states and territories. As we progressively conduct this inquiry around the various states and territories I think we would agree with your underlying statement that the various states and territories attach considerable importance to their own particular scheme to the extent that it represents at any one point in time - noting that they do change over time - a balance

between the interests of the various parties.

MR VANDERVORD: That's correct.

PROF WOODS: That there seems not to be a degree of concerted endeavour between the various jurisdictions to come to a single, national scheme in that respect; that they attach great importance to that local resolution of competing interests.

MR VANDERVORD: That's what our information reveals and that's why we've put it as we have.

PROF WOODS: We note and fully understand your point there.

MR VANDERVORD: Would it be of any assistance if there was any comments made in relation to Comcare because Comcare is not perhaps seen as the viable or desirable alternative, even if the various states changed their stance, which would be surprising if they did, but if they did, because Comcare itself we see as having very serious shortcomings and to that extent - - -

PROF WOODS: That would be helpful.

MR VANDERVORD: - - - we would not be advocating it.

PROF WOODS: Please.

MR SCARLETT: Basically, commissioner , I think that - whether you've reached it or not we're not sure, but the submission of the New South Wales Bar Association from 1.20 to 1.32 encapsulates very much the view that the Law Council has of the Comcare scheme, that whilst it may be held up as an exemplar it is an atypical population of workers and the figures that it produces as outcomes are far from the shining light that should be held up as an example for the rest of Australia. It's a referral of you to those sections which encapsulate very neatly the view that the Law Council would wish to put.

PROF WOODS: Yes, I do recall that and you're making the point in particular of an employment profile that relates to it and characteristics such as its long tail and the like. So yes, I do - - -

MR SCARLETT: And the costs.

PROF WOODS: Yes. So yes, we are familiar with that and thank you for that. I think maybe - - -

MR VANDERVORD: Perhaps I can just add this: I'm not sure whether in the Bar

Association's submission it's indicated that the increase, bearing in mind as you say the employment base which is very much clerical, of some 27 per cent. So certainly we can't see that as being - if there were to be a radical change, that being the vehicle to adopt.

PROF WOODS: Just on that one point, of course percentage increases always depend on the base that you're starting from and Comcare as much as any other scheme goes through cycles, somewhat long, of the periods of low premium and then for various reasons go through a period of higher premiums reflecting perhaps a change of management culture in managing safety or managing rehabilitation or all sorts of reasons that can lead to that result. But it has been coming off a low base and therefore the percentages need to be looked at in that perspective. Nonetheless it is going through a period of increasing premiums. That's in itself without doubt.

MR MURPHY: And at the risk of again reiterating something that was said yesterday, but just for the record, I mean the other concern we have about Comcare is the cumbersome nature of the dispute resolution process and the high dispute resolution process in that and second - lastly, the matter that you referred to; the lack of common law and therefore the long-term tale which we say the evidence and all the other schemes eventually sort of puts the schemes into oblivion. That's how - - -

DR JOHNS: But I suppose that - sorry, Gerry - I suppose the question though is, nice to have some responsibility for Comcare but it's okay, I don't have to love it or hate it or anything. Never made a claim on the scheme.

MR SCARLETT: Not eligible, sir.

DR JOHNS: But whose choice is it? I mean, if a national company for instance decided to sign up to it under certain circumstances, et cetera et cetera, and they thought it was a smart idea who are we to say they've made the wrong decision.

MR SCARLETT: Sir, the - - -

DR JOHNS: Again, no-one's talking compulsion I don't think, but choice. If someone said, "Well, yes, the premiums are shooting up but then again I think I'll get a better deal here than I would elsewhere," well what - - -

MR SCARLETT: Sir, on that Mr Murphy has already made the point that the Law Council's view would be that if there were to be such an approach it should not disadvantage the worker. Whilst there may be the option of the employer to look at Comcare as a superficially attractive scheme it has a very strong potential to disadvantage workers from different jurisdictions in different ways and it's the variety of arrangements which are today made for a job of work to be done which leads to an almost infinite variety of circumstances relevant to the local situation and

persons striving to get things done through outsourcing and seeking greater efficiency and those drivers which have led to changes in the way in which the task is performed, which goes away from the sort of bond servant, the classical definition of worker as a master-servant relationship - the Asian reference to the iron rice bowl. We're now looking at an enormous variety in the arrangements between individuals to get the task done.

DR JOHNS: I understand that. I guess my point was that, well, employees by and large don't determine these things in the first instance. They don't sign up to national schemes but there are legal mechanisms whereby companies can propose to come in under a scheme so that just happens to be the mechanism. But certainly, yes, you would want - all sides would want to know whether there are any losers and winners, but the point being who would decide - well, if some groups said they wanted to sign up we'd have to say well, there must be something in it for them but does that necessarily mean a loss on the other side. We get a bit binary in this I think: workers v bosses, I know.

MR MURPHY: Could I just make one point, Commissioner Johns, in relation to your statement that - "no compulsion". I mean, what we're dealing with is a compulsory insurance/social welfare scheme and while you say it's optional for the employer to choose the Comcare, I mean, it's still the sovereign states who determine what benefits have to be paid under that. It's a compulsory scheme that we're talking about and the compulsion is that the states, the sovereign states, lay down the benefits that are payable to people under that scheme.

DR JOHNS: Well, you have a choice of compulsions I guess is the - - -

PROF WOODS: And also for the record I don't recall any of those who have approached the inquiry seeking to have access to Comcare of extolling its many virtues as being the perfect scheme but that on the balance of costs and benefits have identified that having one scheme, the only one currently potentially available to them being Comcare, outweighs any disadvantages Comcare might in itself has as to its profile. So they're not voting for it solely on its merit as a scheme in itself.

DR JOHNS: And in a - I mean we're not even talking of Comcare. This is a - - -

PROF WOODS: No.

DR JOHNS: It is a theoretical case. But it's one we want to - - -

PROF WOODS: Because it happens to be a model.

DR JOHNS: - - - work through to get the sense of who makes a choice and why.

MR MURPHY: Okay.

PROF WOODS: Yes.

MR MURPHY: Okay, well, we've made our position on it - - -

PROF WOODS: Yes.

DR JOHNS: Yes.

PROF WOODS: We're very clear on your views.

DR JOHNS: You can come along to Melbourne if you like.

MR MURPHY: If necessary, we shall.

PROF WOODS: Don't encourage them.

DR JOHNS: There are stalking laws that we might - - -

PROF WOODS: Yes. The previous participants, the Australian Industry Group, in one of their recommendations says, and I quote from their submission:

> Common law claims should not be included in any moves to national consistency.

Perhaps just for the purpose of the record if you would like to state your views on the merits or otherwise of having common law available to workers.

MR VANDERVORD: Well, perhaps I should speak on behalf of the Law Society of New South Wales.

PROF WOODS: Thank you.

MR VANDERVORD: We reject that submission. We appeared before the Sheahan inquiry. It's still the view that we hold and that a number of other stakeholders have that common law is desirable and from a philosophical point of view we put it on the basis that if someone is hurt through the employer's fault and suffers injury and incapacity, they should be benefited in a more generous way than someone who is injured at work either through their own fault or through no-one's fault. It's that philosophical basis that we come from in terms of saying you should have common law.

We don't say that common law in all its aspects is perfect. It does have a

number of very very real advantages. I looked at the paper, Get Back To Work, which was a much more substantial report than we've seen for awhile. That was looking at those issues and it suggested that there were some problem with rehabilitation where there was common law in place, in those jurisdictions where it was there. We would refute that as well. In most of the states now with case management in litigation the time between injury and resolution is very very short. The years past when there were long delays have, in the jurisdictions that I'm aware of, long since past.

So certainly from the Law Society of New South Wales's point of view we say it is very important both to the benefit of the person who has the misfortune to be hurt - to the employer, to some extent, because it brings a resolution of that matter. But it also focuses their minds on the fault that occurred and the cause of the injury without necessarily the imposition that is now in place - because we don't have common law in any real sense, of the occupation and health regulations which exposes the employer to a substantial fine; common law would ameliorate that kind of problem. The only thing we would say is that there would be some argument in favour of a commonality of assessment of damages in relation to the various causes of action.

MR MURPHY: And the one further aspect again, at the risk of repeating myself, is the argument about the lump sum versus pension-type mentality. But I think that's on the record - - -

PROF WOODS: Yes, we have that on the record. You did make reference to past experience where there were long delays in settlement. Was that a reference to the uncertainty that that creates for the worker undertaking the common law action and any effect that may have on rehabilitation during that period of uncertainty?

MR VANDERVORD: Yes, the report that I was referring to uses that as an example. But rehabilitation in itself is something that in my experience of 40 years doing litigation is brought in very quickly. It normally has a finite period of time in which it can be of benefit and then I think it ceases to be a benefit. So where you've got that running in conjunction with fairly speedy resolutions of common law rights they both work together rather than against each other.

PROF WOODS: Thank you very much. Do you have other - - -

DR JOHNS: No. No, I don't.

PROF WOODS: Are there other matters that you particularly wish to draw to our attention this morning while you are here? Or otherwise you, of course, are most welcome to keep monitoring our inquiry and we look forward to ongoing submissions from you on particular points as you see fit. We do have access to

previous inquiries and submissions and the parliamentary inquiry recently reported and the like.

MR VANDERVORD: No, thank you, commissioner. I think if there is anything that comes up from others who are presenting before you that you would seek to have any views from us on we will undertake to provide them to you promptly and as fully as we can.

PROF WOODS: Thank you very much.

MR VANDERVORD: Thank you.

PROF WOODS: Most appreciate your contribution to this inquiry. Thank you. A brief adjournment for morning tea.

PROF WOODS: Our next participants are the National Meat Association of Australia and of the New South Wales division?

MR JOHNSTON: That's correct.

PROF WOODS: Thank you. Could you please each give your name, position and organisation you are representing.

MR JOHNSTON: Garry Johnston is my name, national director IR and legal matters with the national office.

MR McKELL: My name is Ken McKell from the National Meat Association, the New South Wales division, and I'm the HR manager for that division.

PROF WOODS: Thank you very much. We had the benefit yesterday of the Queensland perspective and national issues. Are today we primarily addressing the New South Wales or are we doing both national and New South Wales?

MR JOHNSTON: There's just some points to clarify as a result of yesterday.

PROF WOODS: That would be helpful. How do you want to do it? Do you want to clarify your points and then we do an opening statement of New South Wales?

MR JOHNSTON: That might be better, yes, commissioner. We were asked yesterday concerning whether there's evidence of lawyers and whether there's any detriment in relation to common law matters. We did say that we gave cases, case studies of those matters and they are in the parliamentary submissions, in submissions 1, 2 and 3 of the NMA, and they're also in the evidence of the NMA which I think went for about an hour and a half before the parliamentary inquiry. I'm not going to repeat those. They're there.

PROF WOODS: No, that's fine. We have access to those.

MR JOHNSTON: The second matter is, perhaps we ought to just clarify. We do object to people having access to common law claims, as we said yesterday, save and except, as we've always said in recent times, save and except for the major impairment. An example was put to us in that recent inquiry whereby the difference between what happens if a person is injured at a shopping centre, a mere citizen, and a worker employed by the shopping centre is injured, and the person asking the question was forcing the proposition that there should be no difference between those two people. We of course take the view in that simple example that of course the employee is subject to a statutory scheme and the mere citizen is not. We do believe that the statutory scheme should be the overriding concept, save and except for severe impairment.

PROF WOODS: On that question of severe impairment, do you draw attention to any particular scheme operating in the states and territories as the model that you most favour?

MR JOHNSTON: Only the New South Wales one, which I think is 15 per cent for total incapacity.

PROF WOODS: Total body impairment.

MR JOHNSTON: Yes. The second matter was the test of injury - - -

PROF WOODS: Sorry, while we are on that topic, from your experience with that scheme, how confident can you be that the medical profession is able to objectively differentiate between a sort of a 13 per cent and an 18 per cent total impairment, because these triggerings do become important in that respect.

MR McKELL: I suppose they get very technical, as such, in that determination. I won't say that I'm obviously directly involved with that, but understandably you would hope to think that for those that are professionals that are appointed in those positions to determine that would be on a consistent basis.

PROF WOODS: I guess my question was more have any of your members expressed concerns or support as to whether consistency is achieved in that process?

MR McKELL: Part of the submission I was going to put in relation to that was the difficulty of it's still at an early stage. I suppose from that point of view that it would be, from the feedback from the industry, there's been nothing at this stage specific about inconsistency as by the commission, as such. Obviously the Compensation Court is still continuing until the end of this year, but they have indicated, as far as the Compensation Court situation, is that there is a fairly large degree of inconsistency in decisions that have been made in common law cases.

PROF WOODS: Okay, thank you.

MR JOHNSTON: The second matter, commissioner, was simply concerning the test of injury, and of course I've reviewed the internal papers leading up to the submission, and it is the test of the major and substantial cause of the injury, for all the reasons we've put in the submission and - - -

PROF WOODS: No, no, that's fine. We were just trying to clarify whether it was a creation of drafting or a very deliberate position.

MR JOHNSTON: Yes. The other general particular matter, and the phrase we use

that members take the view that from a practical point of view there should be consistency amongst the jurisdictions and a national framework concerning employee, employer and the injury and the benefits, and we've put that, and the phrase we used was simply that we don't want to see, on the behalf of our members, the best of the best, and we were questioned about that yesterday. Or perhaps another way of putting it and the proper way to put it, what we're trying to say is that there's got to be a proper balance between if there's a national framework between the obligations and responsibilities of the employer and employees under any system. That comment also relates to page 21 of our main submission concerning the benefits, of a percentage of benefits for a certain period of time and not having regard to the anomalies that we put on behalf of our membership that people on a compensation system receive more than people who are at work. I think we've made that point, so there's no need to go over and repeat it.

PROF WOODS: Yes, you talk about substantially reducing the percentage for a period from six months to 12 months.

MR JOHNSTON: Yes, we made the point yesterday that there are various industrial instruments in place whereby that there are legal obligations in relation to the amount of remuneration that an employee gets at the base level under those instruments, and they operate in all states.

PROF WOODS: Thank you.

MR JOHNSTON: I think that's all I wish to say at this stage, and perhaps my colleague can address the paper put on behalf of New South Wales.

PROF WOODS: Thank you for your prompt response. I trust we also allowed you some time to sleep in between yesterday and today. That's very helpful to have that immediate feedback. Thank you for that. New South Wales division, we have a submission from you. Do you wish to make an opening comment?

MR McKELL: Yes, commissioner. As outlined, there is attached the overall submission from the association. It's probably best if I just go through a number of points of the subject matter.

PROF WOODS: Yes, thank you.

MR McKELL: As has already been mentioned about the definition, particularly in relation to injury, I won't elaborate too much on that, only to say that New South Wales is of course of the same opinion as has been discussed yesterday in Queensland regarding the fact that the definition, it would seem, quite inconsistent between the states, and I will say in particular with New South Wales that it does leave it open to a degree about what actually is an injury, to what extent the

circumstances and the causation of the injury would prompt or would be allowable for workers compensation. But understandably, I suppose in past practice it's a case-by-case basis, but there should be strict guidelines and strict definition regarding what is an injury for the purposes of workers compensation.

Equally, I think it has been discussed before, mentioned before about its relationship of workers compensation legislation with occupational health and safety legislation, only to say that in New South Wales, under the current 2000 act, that there is no specific definition of injury. So I just go back to say that there should be a connection between both pieces of legislation, if it be a national structure that would recognise again what the true injury would be for the purposes of eligibility.

The other area that has of course come up again, and obviously it was mentioned in the previous submission, was relating to common law claims. Obviously it's a fairly big one, or maybe one of contention from various parties, but as was mentioned, in New South Wales we do have this degree of permanent impairment of an injured worker of 15 per cent total body. Understandably the initial submission before it became legislation was up to 20 per cent. The feeling in New South Wales was it should have been left at that particular level, if not more. However, legislation was decided. For the purposes of the feeling of New South Wales on a general sense is again the fact that common law should not be existing in the current scheme. However, the exception to that would be extreme cases of injury or illness.

PROF WOODS: And you're saying that you'd accept 15 because that's where it finally was legislated to in New South Wales but that your preference would be 20 per cent.

MR McKELL: Well, the higher up would be the preferable, that's correct.

PROF WOODS: But the general principle you support that where there is significant permanent injury then - - -

MR McKELL: Correct again. An appropriate, I suppose, determination would have to be determined by the appropriate bodies.

PROF WOODS: Sure.

MR McKELL: But on the basis of the common law aspect, again we would state that the primary focus should be in relation to a statutory scheme, and as has occurred in New South Wales, there has been the shift back to the statutory scheme. There has been adjustments as to the actual limit, or the amount of payments. A certain amount have gone up. That, to a degree, would be acknowledged, but again it depends upon the extent of the injury. On the point of the national framework, in

New South Wales we've got the situation, as was expressed, of a workers compensation commission. There was a report that was put out by the president, Mr Sheahan, which I'm not sure whether you've had an opportunity of seeing that.

PROF WOODS: We've had meetings and read reports.

MR McKELL: Which I believe was a 12-month report since its inception, and from that it seemed to have, I suppose, done a 180 degree approach as far as matters that go to arbitration. I can only go off the statistical information that was contained which I've put in our New South Wales submission.

PROF WOODS: Thank you. We noted that.

MR McKELL: But also the fact that in that report it indicated that a significant turnaround has occurred in matters that have been conciliated and resolved, as opposed to the previous situation with the Compensation Court which were quite literally settlements on the steps of the court. So it would seem on the face of that, taking that report into consideration, that that's the direction that as far as our industry's concerned, or in New South Wales at least, is keen to see the system go. As to whether that is the ideal situation for a national framework, I can only say that the structure of it seems correct. Proof in the pudding, in a sense, would depend upon time. It is still early to determine its successes or failures.

PROF WOODS: Okay, in that respect though, I mean, yes, we are seeing some early statistics and you've brought some of those to our attention this morning, but we also had in addition some anecdotal, however early, support from the Australian Industry Group, and do I take it from your submission that your own members would encourage you also to say that at this stage the commission is working in accordance broadly with their expectations and is a superior model to the previous.

MR McKELL: Well, based on the information and the report, I'd have to say yes. Again I'll say that I'm not directly knowledgeable about our members to the extent of being involved with the commission at this stage. However, I think I can speak for our membership in saying, yes, they would be supportive of this approach. Their main concerns and gripes et cetera had been the continuity of claims going beyond times that they should have been not being resolved, communication channels between parties being restrictive and the principal situations of say doctor shopping and contested medical reports from two, three or four different doctors as such.

PROF WOODS: Okay, thank you, that's helpful.

MR McKELL: With respect to workplace injury management, which we have highlighted, and talking about return to work rehabilitation of injured workers, the main points that I've listed in that report which has been specified as

recommendations - well, the first one there, "greater obligations upon treating doctors and specialists." The purpose of why that was put there - and again, I'm just talking from New South Wales's point of view - was the fact that members of ours have continuously contacted me and been frustrated with the fact of the communication between all the normal parties for return to work. But the prominent one that stood out was treating doctors.

To be quite honest I even had an email this morning from a member who has had a person off for 12 months, just over 12 months - and not questioning the genuineness of the actual injury, it was work related - but more the case that up until, I think, the last three or four months the person has been to physiotherapists, their treating doctor, chiropractor and a number of other specialists and all of them, including the rehabilitation provider, have indicated from their point of view that the injury no longer appears to exist. As such they directed a return to work program. At this stage the employee has not returned to work. He is not complying with the return to work program. The point they are saying there, of course, is - asked the question, "Where do we go from here?" They've raised the aspects of termination et cetera but obviously are very cautious about that. But on the basis of the treatment of the person on that example they are saying that there seems to be a difference of opinion they have had from the feedback coming from doctors - and there was a difference of opinion with one of the doctors - and what they are getting from the applicant.

On another point I've had another member ring me in the last few weeks saying that they just have problems communicating with the doctor. It has generally been by telephone conversation but it has been very short, very specific and don't seem to go into the aspects of determining a return to work program. Now, there's a lot of cases of the communication aspect with treating doctors and/or specialists. The other - - -

DR JOHNS: So what's the problem with the worker who has been off 12 months and some specialists or medical workers say that he should return, who is holding it up other than himself?

MR McKELL: In that example the employee themselves.

DR JOHNS: So what are the steps to have that person return to work or otherwise dealt with?

MR McKELL: I suppose the point, why I've put that as an example, is that there is no compulsory requirement at the moment in New South Wales for all parties to come together in a meeting to formulate this. Now, this particular example might be beyond - because all other medical reports, advice et cetera has said, "This person can come back, prepare a return to work program," even the return to work

coordinator. But in that example at this stage there has been no action as such taken against the employee who has not returned to work.

DR JOHNS: Just so I understand, who has to take the action against the employee to return to work?

MR McKELL: The requirement would be - in a sense if there was a stand-off situation - that it should go back to WorkCover, that there would be, I suppose, coming up to the WorkCover commission - - -

DR JOHNS: So you're just concerned that they are not intervening in a timely manner?

MR McKELL: That's correct.

DR JOHNS: Yes.

MR McKELL: It hasn't been progressed in a timely manner.

DR JOHNS: Yes, I see.

PROF WOODS: But underlying that is the broader issue of communication between employer and employee and treating doctor.

DR JOHNS: That's correct.

PROF WOODS: That's a theme that has been emerging from a number of employers who are concerned that - I mean they don't want to interfere in the personal relationship between the patient and doctor but want to be able to provide information to the doctor that would assist the doctor in sort of fully assessing the ability to return to work or take on light duties or even to understand the circumstance of the particular injury.

MR McKELL: And I would add to that - that particular example was a fairly large abattoir. So we're not talking about two, three or four-man operation. There is a degree of flexibility in having that person do other duties. In this case the person was a slaughterperson, which is one of the extreme physical positions at the plant. On an equal note - without diverging too much - on an equal note the majority of our members, and I would have to think the industry, meat-processing industry, do have an arrangement where they get as many people back into the workplace as possible for rehabilitation purposes; so except for extreme circumstances. But there are the cases that do come up where there is a problem with the communication aspect, whether it's the local doctor or treating doctor or specialist where it creates a delay, a problem as such.

PROF WOODS: Is some of this in part the different management techniques of the employers? I mean, is there variation in the approach and attitude of employers toward the relationship with the employee and the rehabilitation? I'm trying to work out whether the problem is solely, you know, with the doctors or the employees, or is there some - do you notice amongst the different employers, variations in attitude, approach and therefore success in achieving return-to-work and rehabilitation?

MR McKELL: I suppose everybody has a different attitude at times, but the approach that I get back - we're talking about plants who do have even resident nurses. We do have people who are specifically appointed as occ health and safety officers, and some occasions separate for workers compensation. So you do have dedicated people there that concentrate specifically on these particular issues. As far as consistency, I would say, in my view, yes, there is consistency. There is aspects of culture or attitude that do arise about workers compensation. There is arrangements, because we're talking about regional Australia, primarily, with meat processing plants, that there can be and is a good association with the local doctor - because there is a limited number, of course - with the company and working towards that.

But I'll equally say that I've had reports from employers that have said that there are local doctors who employees, or all the same employees go to the same doctor to get the same result as far as medical reports or otherwise. So in that sense, as far as the culture, or if there's a negative culture or a different culture out there between employers, employees and doctors, I would say, yes, there is a degree of mixture, but in the majority of cases there is or should be a good relationship between them. But what we're equally saying is that in a town you may have a designated doctor who is working towards a rehabilitation program, but there is no compulsory requirement on a treating doctor and/or specialist to directly communicate and/or maybe even visit the other parties in the rehabilitation process, and that's where it has fallen down.

On a separate note, I know I've mentioned meat processing plants, obviously our organisation covers wholesalers, smallgoods manufacturers and even the small retailers, so the actual message, the smaller the business, the more likely there is the problems of communication that are occurring. On another point, which I haven't mentioned, of course, was in relation to insurance companies' claims managers. I've even heard comments of saying, "Look, we have quite a few cases." They are quite busy. I've even heard comments from some sources that have stated that the problem might be the experience and qualifications of claims managers to deal with these cases, to chase them up, and that might be the problem. There might also be the situation where the rehabilitation at the early stages that everybody is keen and involved with it but as time goes on, complacency starts to occur. To be quite honest, I'm not saying from the employer point of view. Generally there can be

views out there of employers saying, "Look, we want to get them back to work, otherwise if they can't come back to work, we can't put them in an alternative position, then termination might be the best option." But obviously employers are very cautious about - I'm getting a bit emotional about termination aspects - but employers are very cautious about putting people off altogether. But I would add that in relation to insurance companies' claims managers, they may very well do a good job, but it might be a case that that is where a certain degree of the problem is occurring as well, of again the communication aspect with the appropriate persons at the workplace and the employee themselves.

PROF WOODS: Is that compounded by the regional location of a number of your members, if the insurance company and the majority of their rehab providers and claims managers are located in the major areas than accessibility to them in some more of your rural and remote areas?

MR McKELL: It may very well be. Understandably insurance companies would have their branches, but we're not talking about the plants being in major regional centres even. However, the comments that I've received from members over the past number of years have been that, yes, that has been a problem as far as the tyranny of distance, the fact of communication is by the telephone or letter or email. But as far as the face-to-face dealing with a particular claim, again it is a problem.

PROF WOODS: You mentioned in part - this is under dispute resolution - that medium to large employers should be given more autonomy in the rehab of injured workers. Is that a related issue coming from this that you're saying that where you have a third party intervening that some of that relationship is distorted, or the flow of communication is interrupted?

MR McKELL: I would have to say yes on the last point that you've mentioned. The reason why I've included that is mainly to say medium to large employers do have dedicated people on site. They do have fairly good communication channels. To a certain degree a number of them are experienced in the medical areas. As I say, a lot of them have nurses on site and have, in a number of cases, doctors coming to their site for things like Q fever vaccinations et cetera as a group. So when it comes to the point of where it's taken, to a degree, taken out of their hands and put over to, whether it be the claims manager or it be the treating doctor, then it opens it up for a conflict of situation, or at least a delay in getting that person back to work.

Now, that might equally be a case of where the employee is there, maybe doing suitable duties, but there's this thought that there's another third or fourth party outside that may be controlling it and determining it. That's why I was saying it should be to a degree for those type medium to large organisations, operations, a more "at home" or "closer to home" approach as far as sitting down and looking at the rehabilitation. Not to say that rehabilitation is not structured as far as sitting

down with the employee and the rehab provider, but sometimes, from the comments that I've got from members, is that it can still be forestalled by this thought of "it's being controlled by outside bodies". I'm not talking total control, I'm just saying a bit more autonomy so that employers don't feel restricted in what they're trying to do at the workplace level.

PROF WOODS: Are there particular features of scheme design that could encourage that, compared to the scheme as it currently operates in New South Wales, or is in fact self insurance the option there for members where they do want to have that autonomy?

MR McKELL: My understanding with self insurance, obviously it's a fairly detailed and intensive approach. My understanding is there's only two processes in New South Wales that are self-insured, and one of them is only recently started off. As such, I would tend to think that in the majority of cases they possibly would find that a bit too cumbersome. It would probably be a better approach if it was as a group structure, as say a specialist insurer for the industry. However, as far as what the future holds with individual plants going into self-insurance obviously that's for their discretion and based on their concerns about the system as it currently exists.

PROF WOODS: Would it be possible for those two members who are self-insurers to be able to relate some of the benefits, the costs and the consequences of moving to self-insurance to help us understand what's involved in that process? I mean, presumably because they've self-selected as wanting to be self-insurers they've come to a judgment that it's in their overall commercial interest, that it would be interesting to understand where the savings are; whether it was premium driven or whether it was the ongoing relationship with employee driven; the fact that they may have had medical and other staff already out there anyway and therefore why involve a third party in the process. Also, what have been some of the costs and consequences? You know, they may have found that having to set up is more time consuming - I think cumbersome is the word you used in that respect - than they had first anticipated. So some of that understanding of the process of going to and operating within self-insurance would be helpful.

MR McKELL: I suppose taking the consideration, confidentiality and privacy concerns, obviously we can't speak for them today but obviously that would be an area that we would look at as far as how they've progressed. I believe the - as I said, one of them has only just taken it on, say in the last six months. The other processing plant I think has probably had it in for a number of years. So it would be interesting to see how they compare, if they're prepared to provide us with that information. If that was possible then, yes, we would be more than happy to supply that information.

PROF WOODS: Thank you, we'd appreciate that.

MR McKELL: You reminded me, another area that occurred in New South Wales about 18 months ago, just prior to the government's last amendments to the legislation, New South Wales legislation, was to run two pilot programs and one of those was held out in the central west, which did involve a couple of our members and in a nutshell the pilot program was to look at return to work rehabilitation and what that culminated in was a much more direct arrangement where you had all the applicable parties to rehabilitation coming together in a face-to-face structure. Now, as I understand it the results of those particular pilot studies in the central west was very successful as far as getting people back to work compared to the current system. That pilot went for about 12 months, though I'm not totally au fait with the after-effects, but during that 12-month period from our members at least, apart from other industries, it was very successful.

DR JOHNS: From whose point of view?

MR McKELL: I believe from all parties' point of view.

DR JOHNS: I mean, it's a bit of a fascination. Why hadn't someone done that before? I mean, there's - - -

PROF WOODS: Why isn't it now done everywhere?

DR JOHNS: Yes, it is at the point at which the injury and the follow-up occurs that presumably all the action should take place. I can understand the concern of an employee who doesn't want to be pressed by some big, burly meat employer to force him back to work - - -

MR McKELL: Inappropriately.

DR JOHNS: Inappropriately, but nonetheless it just seems peculiar that it's taken a long time. Anyway, can we get some information about that pilot or should we go to WorkCover or - - -

MR McKELL: No, that's not a problem. It's available freely from WorkCover.

DR JOHNS: Okay, I'll go back through it.

MR JOHNSTON: I should just point out on that, it's a fairly difficult task. We've undertaken a number of programs, as I said yesterday, over the last decade and the programs don't come cheap when you're talking about someone leading in training and regional Australia where we've got to visit and cost, and we try to - industry puts in as much money as it can and we try to go to outside bodies, even WorkCover, to obtain money. Some of the money is forthcoming, some it's not, but they do take

time, these particular programs. If money was freely available everyone in every industry could do it.

PROF WOODS: Presumably if there's a net benefit then the investment is worth it.

MR JOHNSTON: Absolutely.

MR McKELL: I suppose if I just concentrate on the aspects of talking about compensation payments, understandably in the report there was four main issues that arose. I won't harp on the aspects about what is inappropriate compensation, other than to say that it was previously mentioned from the association's point of view with current incentive structures that are occurring in processing plants, that people are getting paid more when they're off as opposed to if they're physically working at the premises and more particularly if you have situations as is occurring now with the drought situation that a lot of people are stood down because of shortage of stock and as such you have a situation if a person is on workers comp that they are getting paid.

Equally in New South Wales under the current legislation you have it where a person gets a double payment when they're on workers comp because they also can take their annual leave, long service leave or even public holidays that fall. They get doubly paid for those particular days. So I suppose the point there is to add that it should be a structure whereby the leave is used at other times for other purposes. Again, it's an added cost to the business. The last issue I wanted to touch on there was in relation to where a claim is proved either false or discontinued by the applicant because of evidence and information that's brought to their attention, that the money that has already been paid out not only can't be recovered by the employer but impinges upon their workers comp claims' history and therefore their premium which we say quite clearly is not fair.

I suppose the other area that I wanted to refer to was in relation to the premium. Coming up at the end of this week New South Wales has had an adjustment to its workers comp premium structure, under the ANZAC coding system which it has so for 12 months. Of course now we've got an expansion of the definition of wages to equal the same as payroll tax so it means that things like superannuation guarantee, FPT, lump-sum payments on termination, are now suddenly covered under that definition. Suddenly the percentage is on a wider pool of money.

PROF WOODS: Presumably the percentages are going down to reflect that so its cost would be.

MR McKELL: Well, we would add on the basis that - we would add that because across the board all industries, that the government have minus 10.3 per cent from the adjusted figure, that we would have to say it's very sceptical about it being equal

to the incurred costs. We have had discussions with members even before the actual percentages came through that 10.3 per cent is not sufficient to cover that. We just use that as an example of where it's not comparative with the cost that industry, if not the individual employer, is incurring. Without going to the rhetoric of the purpose of why it was brought in we would just say that it's not a good model so far as - it's not so much the ANZAC coding system; obviously how it went from the old system to the ANZAC coding broke it down and reduced cross-subsidisation but there is still the problem of cross-subsidisation within those categories and it raises the other issue of, how do you address the poor performers and not affect - not negatively affect the good performers.

PROF WOODS: I think your views are quite clear on that point. Can I backtrack to the point prior to that; the sharing of workers compensation costs. You've got a statement there that I don't quite understand. You say, "In New South Wales workers compensation and occupational health and safety legislation don't require the injured worker to contribute to the cost of workers compensation payments or premium, therefore employers should be given assistance to reduce these costs, particularly if it is supposed to be a no-fault system." "Should be given assistance," what do you mean there?

MR McKELL: I suppose that can cover a number of areas but the main area I was getting at there, obviously if it's not looking at the aspect of reducing an injured person's compensation payment, which invariably obviously would affect up to the premium, that in New South Wales there is a number of subsidy arrangements that are made for employees to reduce their premium discount scheme. Other aspects to lower the essential cost on their next three years' premium, what I'm saying there is that there should be some, I suppose incentive, some sort of direct benefit because there is a number of hoops you've got to follow for the premium discount scheme, to at least assist employers who were quite clearly doing the right thing for rehabilitation of the injured worker.

Under the current structure the frustration responses I've had from members is it doesn't matter how much we implement occ health and safety management system and return to work programs and try to get the parties back as soon as possible, they are still incurred for the cost at the end of the day. I suppose it's more a case of saying that the employer is subjected to the total burden of the workers comp claim. Now, a lot of people say, "Well, obviously the injury has occurred at work and therefore should be subjected to the employer." However, that's not always the case and it gets back to the definition of injury. So I suppose just to state from what I've said there, that the purpose is to give some sort of assistance, whether it was an incentive, whether it was a discount or whatever it might be, directly for that employer.

PROF WOODS: Somebody has to pay for it somewhere.

MR McKELL: Again, I'd say that with the current structure - hopefully it will change in the future - the current structure is that the premium incurred by employers, at least for our industry, is more than what is outlaid for actual cost claims. So invariably the employer is paying well more than what it has cost as far as the injury and even projected injury for that injured person.

PROF WOODS: Which is why some are self-selecting to self-insurance.

MR McKELL: Well, I won't say that's the reason without getting that information but that would be part of the - - -

PROF WOODS: That could be a driver.

MR McKELL: Yes.

PROF WOODS: Dr Johns?

DR JOHNS: In the National submission there's a very nice paragraph here and I'm looking for an example - top of page 3, "For decades workers compensation systems have tended to be reactive and OH and S systems proactive. Any defects of the workers compensation system or unwanted complexities have found their way into the OH and S process and outcomes," which is a nice - you know, we're looking I suppose for illustrations of the link between the two. Have you got any in mind, any examples where because something hasn't worked sufficiently in the workers comp system you get a fix later on in the OH and S system? You mightn't have straight off but it's a nice paragraph and it deserves an illustration; that's what I'm after.

PROF WOODS: Think of a box in the Productivity Commission's report, and we're happy to receive subsequent submissions that can - - -

MR JOHNSTON: I can certainly give examples, one comes to mind in Victoria where there was a workers compensation claim but it was really an OH and S issue and the workers compensation claim was absolutely reacted because it was supplanted by discrimination matters as well involved in the matter. One of the tactics of the employee, and I've been critical of the employee, was to immediately the discrimination matter arose concerning allegations, was to obtain a certificate from a doctor. Now, from then on the matter which lasted a period of three months was absolutely reactive concerning the way it should have been dealt with and if one was dealing with the OH and S problem as it should have been looked at it could have been resolved fairly quickly by mediation.

Now, they are the sorts of examples we're dealing with and that was a plant of five or 550 employees with I think three HR and OH and S people on the site. It

wasn't a small plant but that's the type of area we're talking about in the example we're giving. I'll take it on board and see whether - - -

PROF WOODS: If you could.

DR JOHNS: There's another one on page 7. It's a similar issue. You have a dispute played out in workers compensation that really stems from something else; it might be an OH and S thing or a discrimination thing but on page 7 is this example you have here of the young worker who, was whilst on accredited light duties, recovering from an injury, got up to tricks and was dismissed but it was WorkCover who decided whether or not grounds for dismissal were sufficient rather than, I don't know, some industrial relations sort of law.

MR JOHNSTON: That example was in South Australia. where of course WorkCover wholly regulates and runs the scheme and that there's no access to common law. That was the situation where the employer had industrial instruments on place other than the award, federal industrial instruments. The industrial instruments said that this particular person who was on probation, that there could be summary dismissal; the usual things you find in industrial instruments, whatever type of agreement they be, and it was WorkCover that said, and I should say simply by not hearing the matter, simply by an exchange of letters - and I think there was one conversation on the phone - decided that this particular incident was not one of summary dismissal and, "You shall put the employee back and not dismiss the employee at all. We don't care what happens if the employee comes off light duties, because the industrial instrument is then not subject to state legislation in that sense, because the person's not on workers compensation and not receiving workers compensation benefits."

The member got onto us and said, "What can you do?" The only thing we could suggest was that, "You have got to seek a review of the decision by WorkCover from the higher authority." Now, they did that but I don't know whether it's taken place. I don't think it has yet but I don't know what the end result is.

DR JOHNS: Okay. It's just I guess there are many, many examples where an issue in one jurisdiction really bleeds into another and of course you've got to be conscious in this game that really there are a lot of things being played out there which are called workers compensation issues and often aren't.

MR JOHNSTON: Well, I mean, we've said it before. We didn't repeat it here in terms of submission or write paragraph after paragraph out of it, but we did say to the parliamentary inquiry and we had evidence that where there's a wholesale redundancy takes place at a particular plant and we're talking about five to 10 or 15 or 20 people off, workers compensation claims for those people seem to increase exponentially and there's claims put in for injuries that go back one, two, three, four,

five, six months. Now, from the employer's point of view - who is our member - from an evidentiary point of view, how can he obtain the evidence if a matter's five months gone and to know what to do and to know what took place? It's sometimes - it may be a situation where the injury is genuine in the sense that the employee wanted to work. It just seems strange that in - Mr McKell knows - in New South Wales jurisdiction as well, where there's things like redundancies the claims seem to go up.

MR McKELL: Can I just add to that point just raised about notification and again, obviously it's an obligation on all parties, but in New South Wales there's a period within six months - you have six months from the injury - that you should notify the employer. In New South Wales under the current legislation you don't even actually have to tell the employer directly. The injured person as such or somebody they know can get in touch with the insurance company or whatever through, say, a trade union. Now, there might be reasons for that that justify that - they can't speak directly to the employer at the time - but under the current legislation they're supposed to notify the employer if it happened at work, in most occasions other than a journey claim, to notify the employer on that day.

However, under the current legislation it puts an out where it says, "Unless it was due to mistake or" - trying to think of the other word, "mistake or ignorance." They're actually worded under the legislation. I suppose the response from our membership is that they feel - they have a little bit of a giggle thinking - well, a serious giggle, as far as thinking something like that is in there when of course the workers compensation and the information two-way street that goes on, that it is quite clear as to if somebody does suffer an injury, other than one that may not be detected till later - - -

DR JOHNS: Yes, disease for instance.

MR McKELL: In the vast majority of cases it should be purely on the matter of the day that the injury occurs. So it raises this aspect, whether it's for a stand-down because of the drought situation et cetera, that you would ask the question, why would it take a month, two months or even up to six months. I think even in some other states it's 12 months. So quite rightly we'd say on that basis that clearly it would have to be looked at under a national structure.

PROF WOODS: You could understand hearing losses or disease or things but cuts, breaks, sprains; different category.

MR McKELL: Yes.

PROF WOODS: Good, thank you. Are there any other matters that you want to draw to our attention while you're here today?

MR McKELL: No, I think I've taken down in note form what matters we may have an opportunity to address if we can - - -

PROF WOODS: Yes, if you can assemble some of that supplementary information and provide it as a supplementary submission that would be most helpful to us. Thank you for the time that you've already invested to assist our inquiry.

MR McKELL: Thank you.

PROF WOODS: Thank you. Our next participants are Injuries Australia. Could you please for the record give your name, any position you hold in the organisation that you're representing.

MR COOPER: George Cooper, director, Injuries Australia.

MR TAYLOR: Robert Taylor. I'm a private person associated with Injuries Australia.

PROF WOODS: Thank you very much. We have a one-page contribution from you at this point. Am I correct in understanding that you're going to be providing a further submission to this inquiry?

MR COOPER: Yes, Mr Woods. Regrettably we run into a copyright problem. We had a proposal that we wanted to put up and we had it checked and we might have been infringing on somebody else's ideas that had been copyrighted. So I had to alter things very abruptly last night. Like a fool I only bought one copy but you may have it. But what I have brought is a lot of other things, bits and pieces here, that goes back to where we've been in my case over 30 years in this whole broad workers compensation thing.

Just for the benefit of everybody, ours is a nonprofit registered company. The purpose is not only work injuries, we look to assist people with any type of injury. So we have people with motor vehicle injuries, acquired home injuries, sporting injuries. We're able to, where possible, help them. But it's in the field of workers compensation that we've just found nothing but never-ending problems. As I was speaking to somebody outside, one of them that's really getting us down is the suicides. Nobody wants to hear about it. You get calls - we have an 1800 number which is off at the moment. It will start in July again. We start and stop it really for costs. We can't keep it running. We advertise in the Sydney paper and people ring at all hours and, you know, they've got the pills, "I'm going to kill myself," and others, "What WorkCover did to me," and, "This is what the insurance company did." Well, we have a way of settling people down, I'm pleased to say. We think we've had a lot of success there.

When we approached the New South Wales government WorkCover about this, they laughed at us. Nobody wanted to know about it. Joe Riordan, the chairman, laughed at us. But we ourselves didn't know what we had hold of. So we did a Wesley course which is a recommended - I'd recommend it to anybody, on suicide recognition and prevention. What was the first thing the lecturer said, "When people start talking about it, be very careful, because those that talk about it, there's a percentage would actually attempt it and what the percentage was that would actually do it, be successful."

Here are people who are paid to look after people who are legislated responsible for what's going on and they laugh at you. So that probably gives us a good picture of New South Wales government WorkCover, but I'd like Bob to have a lead, please.

MR TAYLOR: I'm a former employee of WorkCover. I was coordinator of the actuarial unit and I have responsibilities to inform the board and the minister and the executive on the financial operations of the New South Wales Workers Compensation Insurance Scheme.

PROF WOODS: Up until what point in time?

MR TAYLOR: This was from 1991 and I ended work in early 1999.

PROF WOODS: Okay, thank you.

MR TAYLOR: There's a variety of legislation for WorkCover and to empower WorkCover. The WorkCover Administration Act operated from 1989 through to 1998 when it was repealed and replaced by the Injury Management and Workers Compensation Act. The function of WorkCover is specific management of occupational health and safety and rehabilitation. But one of the functions was to ensure the financial viability of the WorkCover scheme. From the 1991-1992 year, WorkCover levied premiums which were less than the expected cost of claims for the scheme. There had been excessive premiums charged up until that point because it was a new scheme and actuaries are conservative and there have been reserves of about $1200 million built up.

Now, the actuaries did make these recommendations but they cautioned WorkCover about the problems which would continue if they didn't charge premiums which covered the cost of claims. Nevertheless, WorkCover and - I don't know how this operates but if you look at the WorkCover annual report you will see that the actuaries are not consultants. The premier's memoranda and WorkCover internal memoranda differentiate between consultants and contractors. With contractors you are able to direct them as to what they do; with consultants they're supposed to be independent consultants and they are relied on to give independent professional advice.

The WorkCover annual reports over this period, up to and including the current year, show the main actuaries to the scheme - or does not list the main actuaries of the scheme as consultants. So presumably they are contractors and subject to a direction by WorkCover. Both of the acts for the administration of WorkCover give the minister the power to issue directions to the WorkCover board and the general manager and I attempted to get information on the directives under freedom of information, although I was unsuccessful in this. Even up to the stage where

WorkCover was on the verge of insolvency they continued - and even after the insolvency - to levy premiums which were less than the cost of claims.

It's on the record that the minister intervened on one occasion, and perhaps two occasions, but it's inconceivable that professional managers with the best professional advice would manage the insurance scheme in such a manner as to render it insolvent. It is not subject to the APRA guidelines and legislation and I see that that's a major deficiency in workers compensation and compulsory third party. In the Reserve Bank Act there is the requirement there that any directives are tabled in parliament - and I think that would be something that would be appropriate for workers compensation legislation as well.

There's been a multitude of reports into WorkCover. It started I think in 1996, in recent times at least, with council on the cost of government and effectively the recommendations were circumvented there and it just seems that WorkCover has really been immune to being transparent and being accountable for its actions. I think it's easy to focus on the problems of the insurance scheme as failures in the insurance division of WorkCover, but ultimately it gets down to occupational health and safety. I think these operations, they're hard to measure their success but I think they have been less than successful, and rehabilitation and injury management, that has also been deficient.

For the commission I think there's problems with the different jurisdictions. It's impossible to get an Australia-side database which allows proper investigation to be done or to compare one state with another state. You know, something has to be done to try and get adequate data so that sense can be made of differences between states and the effectiveness of various campaigns. I also mentioned the prudential regulation of workers comp and third party. I think they were important.

There are a couple of matters which we've discussed before about workers compensation premiums. There was a dated reference but the National Bureau of Economic Research in the United States - I'm not sure of the date, 1991 - looked at across America at workers compensation and wage rates and they found that wage rates were differentiated according to workers compensation premiums and that the system works quite rationally that they look at the all-up cost of wages. So it's sort of immaterial whether the employer pays the premium or whether there's a joint way of funding workers compensation. Perhaps there is some benefit in having a joint funding but that's a personal view of my own.

With premiums in New South Wales, the definition of industries essentially was completed in 1926 and the definitions have effectively not changed until 99, 2000 when the ANSIG definitions of wage or adjusted definitions, ANSIG definitions were brought into effect. There was a speech by the minister in June 1999 which mentions cross-subsidisation and before the ANSIG premiums there was

rampant cross-subsidisation. There were internal studies by WorkCover showing what the premiums would be on an ANSIG basis and these - I was aware of studies done in 1997 but they were just ignored, and very sizeable cross-subsidies between different industries existed.

In the minister's statement to parliament he acknowledges that there are cross-subsidisations in the new scheme and that they should be reduced over time. Now, I'm unaware as to the success in reducing those but that's quite an important point. Also the matter with premiums, the experienced premium calculation considers the cost of the claim over three successive periods and is the expected cost of the claim. The actual cost of the claim can turn out to be greater or less than the expected cost but there are many cases where the expected costs of claim is very substantial - and there's one instance where it was $200,000 for a claim and the claim was ultimately settled for $25,000.

There is no mechanism for errors in estimates there to be corrected and the proper premiums paid, and I think that's a very major problem. The Institute of Actuaries submission says it's ineffective to punish people for too long for bad performance but we are looking at cost recovery and with computer systems now you can ensure that these systems do take into account the proper cost of claims and that would be very easy to fix. Also the Institute of Actuaries submission mentions that often injured workers are willing to accept less than the true cost of compensation if they are offered a lump sum payment.

Obviously there is a certain attraction for lump sums but basically these agreements are entered into because of ignorance on the injured worker's part. I have a document again from 1997 where WorkCover, with the New South Wales Insurers in a meeting chaired by an actuary, mapped out a strategy for offering to settle claims for 60 per cent of the true cost of the claim and there was a profit-sharing element to benefit the insurance companies if they were able to settle claims within that framework. Legally I'm not qualified but it sounds very close to fraud, in my understanding, that if one side knows what the true cost of claims is then negotiating with an ignorant party - and they presumably have got best estimates as to the cost of claim. People in desperate situations are quite likely to just want to settle the claim and end the trauma and get out of it, and I think this is, you know, completely unfair, and at least there should be proper information, a database available to injured workers or their legal representatives to see what the historical payments have been and how they compare to the estimates. Anyhow I'll pass over to George.

PROF WOODS: Thank you very much.

MR COOPER: Have you got any questions for Bob?

PROF WOODS: I think the material that you've put to us is - - -

DR JOHNS: I've just got perhaps a couple.

PROF WOODS: Yes.

DR JOHNS: First just to clarify is Injuries Australia an advocacy group? I mean, do you speak on behalf of injured workers from time to time?

MR COOPER: Yes. We try to. You know these never-ending talk fests on rehabilitation and OH and S. We're never invited. We only were invited to one and were never invited back because we put the worker's sides, and all of these other people in the industry making money out of it, but what we do is because of contacts and members - you know, we're lucky to have some very qualified lawyers and doctors in our organisation. We can ring them up, "I can't answer the question. Can you find any answer to this?" - and they do. What that does, it might settle the matter there, and then for that fellow - he's happy, and I might direct him to where he can go to get what he needs.

DR JOHNS: Good. I wanted to learn more about you. Robert, are you saying in this discussion about premium setting that a difficulty is that premium setting is subject to political interference?

MR TAYLOR: I'm not aware of that side of things. I can only surmise, but each year WorkCover would react to complaints or letters to members of parliament, and presumably the minister, for reviews of industry performance. This would be where that industry group felt that it was being charged too much compared to its claim experience. Each year, three or four or perhaps five of those groups would be investigated, and this was part of my work and I - first of all, we were restricted to data up to that point. Say we're looking at five years' historic data, effectively any conclusion we come to is two and a half years out of date, and I wanted to use some time series analysis to update this, and look at various trends of categories of industries, and WorkCover just prohibited this.

Any statistical analysis within WorkCover, fundamentally it was erroneous based on very poor data where the correct data was available, but how it was marshalled and, you now, from senior levels of WorkCover, the message got down how to do this, and this led to the board being misled, and there is at least on instance where the general manager of WorkCover made submissions to a parliamentary commission, and data which he presented was totally misleading - - -

DR JOHNS: Misleading in the sense it was out of date.

MR TAYLOR: No, it wasn't out of date. It was just statistically they were able to show a regression and a graph, but if you did a proper regression on it and looked at

the sensitivities, it showed no trend at all, where this was purported to show that WorkCover was achieving success with its occupational health and safety policies, but this was just blatantly presented, presumably because, you know, anybody on such a committee would expect that people were acting in good faith and wouldn't - you know, perhaps wouldn't even think to question analysis which they were shown.

DR JOHNS: Thank you.

PROF WOODS: Mr Cooper, I understand you are going to be preparing a formal submission to us.

MR COOPER: I'll leave this with you, yes, and then I'd just like to talk to some of these here and leave some of it with you.

PROF WOODS: I think that's probably the best way to treat that. Thank you.

MR COOPER: Our definition is what is workplace safety and after-injury care - and we say it is not a market transaction - they are a social contract between the elected government and all of the people, and expresses the political intent of that government. Far too much of the whole thing has been so commercialised that all people talk about is money. They forget about people. People is what it's about. We prepared some statistics that we could gather. You can't get accurate statistics on work injury in Australia. The National Medical Research Foundation in 99 on their first ever on injuries - that's all types of injuries - commented about the poor quality of the data available.

One interesting thing is that they commented, too, there seemed to be an alteration to the figures for Aboriginal people injured at work, and that fits with our own experience, but we've said in there just to briefly read from it is if you compare what happens in Australia, we've got the present WorkCover people running around and saying that ours is a great OH and S scheme. We've got the spokesperson Jaeger from the Labour Council saying it's world's best practice. It isn't. If you compare different injuries in the workplace in Australia to other countries, it exceeds that of the United Kingdom by two - a factor of two; US by a factor of three, and Japan by a factor of 10. The Japanese aren't 10 times smarter than us, they practice accountable safety, and that's what we've not got in Australia.

We've got OH and S which was captured and made into a multi-billion dollar industry, but nobody is accountable. When people get killed, "What went wrong? We'll write a report."

DR JOHNS: Sorry, could I just ask, whose figures are these you are quoting from?

MR COOPER: I got those from the Faculty of Injury Medicine, and we looked at

it again. If you look at what we're doing - and we like to use this one where we do get the chance to address - in the 12 years of Australia's involvement in Vietnam, 510 Australians were killed. We kill that number each year in Australia immediately and violently. On top of that, we injured probably - we don't know the full figure - at least 200,000, and another 2700 will die of poisoning and injury each year from what they've got in the last few years.

In this recent war in Iraq, we're fortunate that there were no casualties, but while that was going on, 35 people died in Australia at work. We can only estimate that maybe another 20,000 were injured and another 200 died from old injuries and disease. It's an epidemic and OH and S is not fixing it, and the reason it's not fixing it is because it's not accountable. Without OH and S it would be dreadful, and we do give great compliments to companies that we have been involved with because we get a lot of contractors to help get people back to work and things, and they do a great job, but if you look at what is going on, it's not good enough and it certainly isn't, as the New South Wales government claims, the best practice.

I'd like to bring up something different; it will probably not get mentioned, but we're very disappointed that intelligent people would use the AMA Guides to evaluation of permanent important. Comcare was the first to do it, and we can't understand why. Three years ago, two of us went to the United States to a World Injured Person's Conference, and we got an awful lot of information. Over there the constant battle - not all of the states will use it, but they did send us this document where major physicians - their names and qualifications are all there - condemn the AMA Guides for what they are; useless. They say in the document, "It must never never never be used for monetary reasons of a compensation claim." It's so inaccurate and it's so unfair, but I think you should read it, and I think if we have a national scheme which we would applaud - we've wanted it forever - the AMA Guides - we've asked the Australian Medical Association, "Come on, you guys are just as smart. Can't you come up with a better guide system than this and one that fits Australia."

We had correspondence to say that this AMA Guides was cooked up in the United States as a deal between their AMA and the insurance companies to lower the premium on doctor negligence insurance. Possible, but the history of WorkCover in this state starts with this letter in 1996 when the then premier Barry Unsworth wanted to introduce the WorkCover system. The Insurance Council of Australia put a gun at his head, and they all signed it. They said, "If you do that, we're going to pull out of workers compensation immediately and leave you with the baby." With an election on his hands and the government wasn't in good stead with the community, he caved in and gave them what they want, and what happened that was so wrong is that they got the funds management and they got the injury management.

They've taken the funds management off them because of the nice mess they

made of it, but they left them with the very most important, the management of injured people. Insurance companies, it's not in their psych to even compare and consider people. It's nothing to do with people. It's about money. I've worked for one, and I can assure you that it's not about it.

The return to work, we keep hearing it and everybody pressing it, and the local minister says, "We're on about it." Here's their 1987 document with the then minister saying that, "This return to work is essential and we'll ensure that it happens." They've been tipping as many as 10,000 people a year onto the dole or anywhere as they get it in 1998 when they did that deal. To dump people off the system, there's such a backlog, they did a deal with the insurance companies and put them on 8 per cent - and we've got the documents to show you - 8 per cent of what they saved, and that 8 per cent turned out to be 40-odd million, and all these people were pushed off the system.

All the requirements of legislation were never carried out, and what you're looking at is - and this is brought up - and it's in the Hansard or the state parliament because it was asked in the upper house, and if you look at Department of Social Security figures then, you'll see that since 1990 when the WorkCover scheme got really under way Australia-wide, where there was about 20,000 people a year getting a disability pension, it rocketed to 120 thou. It just kept going and going and going, and this is where they're coming from. It's still no difference here today. Previous speakers were talking about dispute resolution being very quick and everything fixed up, great, but are the people back at work? If they're not back at work you haven't fixed anything.

To emphasise the back to work - I mean, there's a good example. We leave you with a man that was nine years on compensation, poisoned at work, and he got 116,000. He paid back Social Security 96,000. He had to pay the Department of Health another 4. He was left with bugger all, and the whole thing that you've got to realise, that was called compensation. It wasn't compensation at all. The New South Wales government had clearly shifted their costs onto the federal government, and then when the federal government quite correctly want their money back, they shift the cost back onto the injured worker.

We did a lot of work for that man, and I must say that there were some good things come out of it, but that's the Newcastle Herald's report of it. That's just typical. We get these things all the time. I know we're running a little late. If you want to know how bad it's been, there's a WorkCover letter dated 97 when we asked them how many people a year do they prosecute for breaches to the Workers Compensation Act, "Dear George, we were that busy. We didn't have the resources and we never pinched anybody in the first six years." The whole act which even had written in it at the time what the penalty would be - they never.

I was one of those running around at the time trying to get some sense out of them myself, and they were sending me to Parramatta and writing letters to this - they weren't even investigating anything. I mean - and then when they started to investigate it, it works out about one-tenth of 1 per cent of the claims. I can assure you there's more than that, but that's just how we have seen the whole thing and we keep trying.

Now, the idea is to help everybody, and WorkCover will never, never, never work with us. We haven't had a reply to a letter in two years. The manager that has just left, she had made an appointment to meet us and discuss things and then at the last minute, without a reason, cancelled it and that's the last communication. It's obvious that they don't want to talk. But if you look at how good they do the job, there's the auditor-general's report. Since they've been managing the funds themselves, over a billion dollars lost punting on the overseas stock market in the last two years, while they cut back the help to the injured people. I mean, are they the people we should have running our scheme? I don't think so.

MR TAYLOR: That investment losses is really quite significant because, you know, over the last two years, insurance companies and, you know, the whole market has become increasingly risk averse and has retreated into fixed interest securities and low-risk shares. WorkCover New South Wales devised a new investment policy at this stage which increased the risk. Their recommended portfolio is absolutely inappropriate for a private, let alone a public, insurance company, and the consequences were that in the period June to December 02, they lost $600 million. I think they lost a large amount in the previous six months, and they forecast continuing losses throughout the remainder of the 2003 year.

It just shows totally ineffective management within WorkCover, and to counter that, each year in the annual report of WorkCover, there is a performance statement given for the general manager and the assistant general managers for occupational health and safety, insurance and corporate governance. Now, these individuals have had absolutely glowing performance reports over this whole period when the scheme lapsed into insolvency and, you know, when the other problems of the scheme emerged. One of these people was dismissed from the position related to an ICAC investigation. The performance report for her in that period was, you know, absolutely glowing. There was no hint that anything went wrong, but the actual performance was so bad that she was dismissed from her job, you know, I understand on the basis of corruption.

MR COOPER: If I can go back to the Commonwealth's subsidisation of insurance companies and WorkCover - this is a report done in 1991, the University of New South Wales. I've only copied relevant pages, but you can still get a copy from them. My friend has phoned and found the author and had a yarn to him. It just shows you how big it was, and they were pointing out that Social Security was carrying a huge

amount of the cost, and still is, have no fear. The New South Wales government had an upper house inquiry and a standing committee on workers compensation. This is a copy of our reply to their questions - - -

PROF WOODS: Thank you.

MR COOPER: - - - all of which was totally ignored. The medical doctors were quite concerned at the fact that so many people with a work injury were not getting back to work but people with a like injury, when it happened anywhere else - maybe at sport or at home - they didn't lose their job, and there was some sort of innuendo that the doctors were swinging the lead. So they had an inquiry themselves. The main issue is, there is good evidence suggests that people who are injured and claim compensation for that injury have poorer health incomes than people who suffer similarly.

They established a set of questions. We replied - there it is. We attended the final thing. But the whole thing was filed, but instead of paying for it themselves, they got NRMA Insurance, WorkCover, which is an insurance, and a motor accident authority, to pay for it. So the whole thing was really hobbled right from the beginning. When the last lot of changes to New South Wales WorkCover, which were one of those protesting points formed that - "By all means, make it solvent, do what you've got to do, but hang on, there's more; it's not just the injured people you should be following." That appeared in the journals thing - Della Bosca is accused of cooking the books, and he never done a thing. He never applied. He ignored it. So we must assume that's true.

At that same debate - that's a copy of Hansard where the Democrats' representative in the upper house, Arthur Chesterfield Evans, for 20 years before going there, he ran his own injury practice, and there would be nobody in any parliament in Australia would know more about the problems of injuries, and I can tell you he gives them a nice serve there of what they're doing wrong, but they have never used him in any of these inquiries and never include him. It doesn't happen. This one here is another bout of mismanagement; I'll leave it with you. This is a copy of the original, as I said. This was handed out to me as an injured person, WorkCover mission, WorkCover guarantee of service - get me back to work, get me great rehabilitation, get me nothing. But you get that, you believe it, so that's it.

That's from a defence lawyer, talking about the system. Now, that's the other side of the fence, and he, looking at it as a rational man and a fair man, no doubt, considered what was there and said that the system is on the nose. It's no good. That's the plaintiff's lawyer view of the last lot of change, and this is one that we would really consider when these people talk about common law. Why should injured people or injured workers, who have been injured for the negligence or what have you of somebody, be the only people discriminated against to have common

law? Here we leave - some minotaur or somebody sues because they were left out on a good deal for some millions, so they can use common law. GMAO itself sues its boss to get back 9.4 million - that's quite all right - and another one, compensation for gold shareholders. They got 28.5 back in a common law case. But injured workers can't do it.

I mean, you're not a sinner, you're not a thief, you're not a - what are you? What it is. That's an extract from a previous paper. I'll put it there. That was part of what was submitted. This only turned up on 17 June from the United States, knowing that we're involved in this, but they've just published over there - where an independent body looked at each state's workers compensation system, and they had six conditions that they looked at. They've published it. These people said that they will buy us a copy and send it. But nothing like that has ever happened here. The head of Compensation Commission get together, but, I mean, they're only the top roosters in the chook farm. They're only getting together. They're not anybody outside having a look at it. What they looked at, the key conditions, is quite interesting. You may like to have that in case you want to get a copy for yourselves and read it, because it puts an idea of - as we change, I hope, into a national system, that things that other people have got to offer are considered.

Part of what we did in the revamping was saying that we want to get away from the word "workers compensation insurance" and "OH and S". We put a very brief description in there. As I said, there is somebody else, lawyer people, they've been looking and had a similar scheme out, and we had to be careful. So we had to really guard it, you know. But one of the things we recommended and what we'd seen in the United States, they had in their various - some of the jurisdictions, a research and oversight council of workers compensation, and outside body, not appointed by the minister, sort of put there by themselves, and this came back then, only 6 June.

But to tell you, the Texas Workers Compensation Commission, the employers go three people, the employees have got two and there's an executive director. Nobody from the insurance industry, nobody from the government. Then they come up and have a look at the problems and make recommendations. If we could get such a thing here in Australia - indeed, that very name, that research and oversight council, it will keep certain people honest. Things that Bob was talking about wouldn't happen.

Finally, so that we can all get away, I think, perhaps, this is the ABC talkback radio, which was after the doctors' seminar on why aren't people getting back to work. The law report, one of our - actually, our chairman was invited. It's interesting to read what other people had to say on that there, because it did create a lot of interest at the time. Finally, that's an example of what they do in so-called under-developed countries. That's just one of the rehabilitation centres that they have

for injured workers. Inside of it, there it shows you what's going on, and unfortunately I can't read Thai. But it's an absolute prime example of taking the accountability and responsibility or whatever it was. Don't just push it over there to the public hospital system and the doctors. They've taken it on themselves, and they've got pictures of people with hands missing and legs missing and all learning a trade and getting back to work.

It's interesting that with this particular program that we're trying to sell, produce, has been picked up by a UK university and wants us to go with them into Asia to put it in, and as recently as yesterday, another Asian country - I've been asked to stand-by and be available by Thursday, because they want to adapt what we had to say for their disabled people. They weren't particularly looking at workers compensation, they were looking at disabled. Now, if these people can see the worth of what injured people in Australia can offer, why can't the people in Australia? We don't say we've got all the answers; we haven't. But if you don't ask the people who use the service how it is, how are you ever going to find out?

If we get a national scheme, and I - you know, some people have suggested it may take on a Comcare scene. Well, I said it's not without fault because we've got members who are Comcare customers. One case has been running eight years. But it does give - and they would also have a problem because they have never handled heavy industry. You know, we've got several thousand saw mills in Australia, all that sort of thing. They haven't handled it. But if we have it, I can't see why it can't be very simple, very neat. I've brought a WorkCover annual report there. WorkCover works under something like 12 acts of parliament and 24 regulations. The dust, disease, the firefighters - there's that - are all workers. Why have we got to have all this complication, because that's when things will go wrong.

The best thing that we can offer anybody asking what can be done - if people said, "If you were given the - you were the boss for the day, what would you change?" We said we're not interested in more money. We never have advocated more money for people - compulsory return to work, unless you're TPI, totally and permanently incapacitated, and there use the same standards as the Veterans Affairs use to judge it, and you've got a fair thing. But this lack of return to work is what destroys people and just makes a fraud of the whole thing. I just wish this inquiry every success and hope that you can come up with the answer that will help every Australian, and most of all, a safety system that works; one that is accountable.

PROF WOODS: Thank you, Mr Cooper, and thank you to Injuries Australia previously for assisting the commission in its initial round of discussions with industry. You've provided us with a wealth of material there for us to reflect on - - -

MR COOPER: I've got more. I would have needed a truck to bring it with me.

PROF WOODS: - - - and learn from, and any subsequent submissions that you wish to make would be most welcome.

MR COOPER: Okay.

PROF WOODS: Dr Johns, any - - -

DR JOHNS: No, I don't have any more questions.

MR COOPER: Well, anything we can do in the future - if there's anything, just ask. I mean, we would very much like to get involved if there's going to be some sort of a cobble together to make an idea, to look around it, because there are other organisations in New South Wales and in other states like our own - I'm sure they would be in it. But the thing is, if there's not a balanced view.

PROF WOODS: Our next participants are QBE Insurance. Gentlemen, could you please, for the record, state your names, your positions and the organisation that you are representing.

MR FAGAN: I'm Colin Fagan. I'm the general manager for workers compensation for QBE in Australia.

MR McDONALD: Grant McDonald. I'm the national claims manager for workers compensation for QBE.

MR DRIESSEN: I'm Bert Driessen. I'm the national corporate manager for workers compensation.

PROF WOODS: Thank you very much. We have the benefit of a somewhat lengthy and extensive submission from QBE. Thank you for whoever put in the time and effort to put that together for us. It does raise a number of issues that we'd like to explore, but do you have an opening statement that you wish to make or a precis of where you're at?

MR FAGAN: Yes, thanks very much for the opportunity to speak today. We thought that we'd give some very brief opening observations because it has sort of been our experience that at these type of public hearings that there's probably more to be gained from being able to respond to questions, so - fairly short and sharp.

PROF WOODS: You never know which way we're going to go.

MR FAGAN: Yes, exactly. I think the most important thing is that QBE advocates and supports the development of a nationally consistent framework, believes it is achievable, regardless of whether the scheme is run as a government monopoly or essentially as a managed fund or privately underwritten schemes. So we see that the current structure of the current diversity in the different schemes throughout Australia is not necessarily an impediment to creating a national framework, as such. The overarching objective very much of a workers compensation scheme is to ensure that the opportunities for returning an injured person to work are maximised and that equally the cost structure is affordable to employers. We think that is something that might have been lost in some of the workers compensation schemes in Australia in the last decade and something that needs to be considered as the central thrust or the central drive behind any scheme changes or any observations or any thoughts with respect to creating a nationally consistent framework as such.

We actually don't believe that there is any major structural impediments if the political dynamics and the desires of the vested interests are aligned. We believe that this is very much a doable objective in that there can be a national framework established. However, the major impediments have been political or vested interests

in the past.

The major principles that QBE supports, with consistent framework, is clarity, so ensuring that the objectives of the scheme is understood for everybody that's involved in the scheme and ensuring that that is aligned. There is equity - equity between the two major stakeholders, the injured worker and the employer. Sustainability - we've seen consistent - in fact, the only thing that has been consistent is the schemes have been chanced in the past five to 10 years. That suggests that the schemes haven't been designed durably. They haven't been designed with keeping those two major objectives firmly in the forefront of the design. We would suggest that they have been, at times, designed for short-term political reasons and not for long-term objectives for the injured worker or for employers. Ensuring that the focus of legislative change or a framework of a nationally consistent workers compensation scheme is firmly built around the workplace as the focus and that administrative efficiency is built into the design.

We see a number of changes that have evolved in workers compensation throughout Australia in the past decade and we've seen a number of processes that have been designed to take away the focus from actually trying to get a person back to work, which is what workers compensation is designed for. So as an insurer we constantly see our resources misaligned and not being allowed to be innovative in getting people back to work and having to be sort of diverted into not meeting overall scheme objectives. That's something that has unfortunately fed into a number of schemes and we've seen increased in regulation, which actually hasn't assisted in meeting those major aims of the scheme. That's probably our major overarching philosophy behind our submission.

PROF WOODS: Thank you. I must say that I appreciated the logical structure with which you developed that submission and that you'd identified your principles and brought them down through the various elements. I may not always agree with the conclusions you come to on it but at least I understood the framework, the logic and the approach you took. Just to help us understand your perspective, are you a private underwriter in any of the states, Tasmania or ACT?

MR FAGAN: Sorry, just to explain more fully QBE. QBE is involved in workers compensation throughout the world for four major continents.

PROF WOODS: Yes.

MR FAGAN: QBE has been involved in workers compensation in Australia for approximately 100 years. Our current portfolios we operate in every jurisdiction in Australia, in both the four underwritten jurisdictions and the managed fund environments through either QBE's companies or through joint ventures we have with Mercantile Mutual. We also have excess of loss coverage for self-insureds in

various states throughout Australia. We also provide claims management services to self-insureds, where we're able to provide our expertise and our scale economies to some of the self-insureds in various states throughout Australia.

Our networks internally involve our businesses in South America, so in both workers compensation and in employers' liability in Europe, in Asia, in South America - so we're pretty heavily involved in workers compensation. It's very much a core product of QBE.

PROF WOODS: Yes, no, and that's really helpful because that - given your various roles in - in the various state jurisdictions you're in a very good position to be able to assist us in understanding the consequences of some of the scheme characteristics and we appreciate the time you're making to assist our inquiry. For instance, you mentioned in the opening comments a somewhat indifference to whether schemes were privately underwritten or government monopoly run in terms of focusing on the ultimate outcomes, which is, sort of, you know, good occ health and safety and good rehabilitation.

MR FAGAN: Probably to explain it more fully - - -

PROF WOODS: Yes, that would be helpful.

MR FAGAN: QBE's preference would be for privately underwritten environments. However we accept that the current or the status quo at the moment is a mixture of various environments and, probably in the context of this inquiry we don't see that as an impediment to a nationally consistent framework.

PROF WOODS: That's what I thought you said.

MR FAGAN: Our policy is for underwritten environments and that would be QBE's preference. However, understanding the way the schemes are structured at this point in time, we don't believe that the mixture between managed fund, government monopoly and underwritten environments would be something that would stop a nationally consistent framework being established.

PROF WOODS: No, and that's quite helpful. Do you - from your perspective though, as distinct from your business interests - consider that private underwriting provides a better product, better defined I guess in terms of both the premium to the employer and the rehabilitation compensation to the employee and, if so, what are the dynamics of private underwriting that do that, if that is the answer that you come to.

MR FAGAN: My observations of the Australian market at the moment, comparing managed funds to underwritten environments, is that the underwritten environments

tend to be much faster at observing and building into account the price drivers to an employer when they improve their industrial relations management, their occupational health and safety management, their behaviours with respect to helping people get back to work. I think the insurer is able to observe that through having a close relationship with the injured worker and the employer and, in that, a face to face relationship, so that we're able to observe some of the things that may not feed through, through a claims history, through the measurement of the claims costs and for any of the premium.

The managed fund environments tend to be not as reactive and, I think, not - have a much higher degree of cross-subsidisation in the schemes so that we don't see the price indicators with respect to an individual employer being as much as an accurate measure but, more importantly, it doesn't send a positive signal to an employer who is improving their workers compensation management or equally, is not improving their workers compensation management. I think we see - my general observation in the schemes throughout Australia is there is much more opportunity for innovation in the underwritten environments. There is much less prescriptive management from regulators and as such we're able to produce better outcomes.

PROF WOODS: In that respect I guess you're saying that the price signal carries a lot of information and your price signals can be better tuned to the circumstances of the individual employer.

MR FAGAN: Yes. In an underwritten environment, for example, if we know that an employer is generally unlucky, that there was an accident, they have a good industrial relations record, they have good occupational health and safety practices. The reality is that there is human error involved in some workers compensation claims. If they're generally unlucky we can discount that in our pricing if we know more information and understand that that employer is proactive in their workers compensation management. If that happens in a managed fund environment we have no opportunity for taking that into account for an individual employer's productivity. Or, equally, if they're not being proactive we can't use price as a tool to get them to change their behaviours or attempt to change their behaviours or to be an accurate measure of risk.

PROF WOODS: So you are, in effect, willing to take on some of the risk if, in your assessment, the circumstances of the particular injury or accident, in its generic sense.

MR FAGAN: There's a degree of probability in it and it helps us also spread - for example, in small business, where you couldn't pass on the cost to small business. It would be prohibitive. They wouldn't be in existence for any length of time.

PROF WOODS: Mind you, it's also difficult for small business to pass on the

benefits of consistently good behaviour as well. It is standard understanding that whereas you can be more price sensitive for the larger businesses it gets more problematic.

MR FAGAN: Some of our larger employers we have policies where we set a maximum and minimum premium and they are responsive on the claims history in between those two amounts. So that becomes a direct incentivisation for the employer. Or there's others where we may give back premium at a period further down the track if their claims history has been positive and the claims experience has been positive.

PROF WOODS: Another area where you're well positioned to be able to assist this inquiry is to understand the impact on some of the smaller jurisdictions if there was an increasing number of businesses who self-insured or otherwise withdrew from the local pool to join some national alternative if such a model was adopted. Some of the smaller jurisdictions are privately underwritten in Tasmania, ACT, Northern Territory. They're three examples of that and you're a participant in that market. What would be your view as to the impact on those markets if there was a significant withdrawal of anything that was sort of, you know, medium or large medium up.

MR FAGAN: If there was a material movement of employers out of a scheme it would lead to an increased expense structure in that scheme, where you'd be pushing increased fixed costs into them. Tasmania is currently one of the most expensive schemes for the costs of regulation in that scheme and the costs that we have to pay to the regulator in funding the regulator as such. So what you would see would be an increased expense structure that would have to be spread across the smaller business to cover the fixed costs involved in any one scheme the way it is currently structured. We tend to try to segment our pricing models between employers of different sizes as such, as well as by industry type. So I don't think you would necessarily see that much movement in the risk rate as such but the expense structures might change quite substantially.

PROF WOODS: Because you'll have a smaller pool against - over which to spread.

MR FAGAN: Yes, particularly the fixed costs. The variable costs obviously move with - - -

PROF WOODS: Yes.

MR FAGAN: - - -that employer.

PROF WOODS: Although some of those fixed costs could be still also recovered from self-insurers by way of a payment of a fee or levy or some other device of that

relevant government to ensure that they're contributing to occ health and safety, say.

MR FAGAN: Yes, or to the regulator - cost of regulation etc.

PROF WOODS: Yes, although where they're not being regulated, presumably.

MR McDONALD: I think there still is a degree of regulation within self-insurance. You have to ensure that the financial stability of the organisation - - -

PROF WOODS: Prudentials and - - -

MR McDONALD: Always remains foremost.

PROF WOODS: - - - and also monitoring their safety records and those elements. So yes, there is still some ongoing - - -

MR McDONALD: The other thing of course is that self-insureds are still participants in the scheme, particularly if the scheme funds the dispute resolution process. So there's a requirement to contribute to that as well.

PROF WOODS: Yes, okay, so those parts of the system that they continue to draw on or intervene in - costs could be attributed to them. But - so interestingly you're not predicting the demise of the schemes as they would remain but you are - - -

MR FAGAN: I don't know if that would be - I see there's various options available and I see that that type of option is probably particularly politically unpalatable at this point in time so it's not a realistic option.

PROF WOODS: Which option?

MR FAGAN: The option of a nationalised scheme as such.

PROF WOODS: Or increased availability of self insurance.

MR FAGAN: Increased availability of self insurance, I see that as a possibility. However, at times I am concerned about what is the absolute long-term view with respect to the prudential margins of some of these organisations. Workers compensation is a long tail class where you write a policy today and you may be paying claims for 40 years.

PROF WOODS: But isn't that why they take out top-up insurance, to - - -

MR FAGAN: Yes, but that's only for individual large claims. It's not necessarily for the total amount of the claims.

PROF WOODS: I see what you mean.

MR FAGAN: That's normally for claims above a certain amount. So I do at times worry about what will be the long-term ramifications on the true self-latency claims, on the disease claims that come through. We still get claims for New South Wales before it became a managed fund every month to ensure that that security is there for the people that are injured today or are open or end up with diseases from today's activities to ensure that they have coverage or that it isn't being met by the wider community somewhere further down the track.

PROF WOODS: So the asbestosis situation - - -

MR McDONALD: Asbestosis or something like that. And it might require the establishment of a separate fund that everybody contributes to to manage that. I guess the other issue with self insurance is that it probably only applies to a reducing number of employers, those that are at the top end of the market. The majority of workers compensation policies are held by small to medium business. If that's 80 per cent of where the benefits and the claims are occurring then that's really the area that should be addressed.

PROF WOODS: And by definition they're not going to be anything other than premium payers anyway. I mean, just because they can't take on their risk they don't have the prudentials - - -

MR FAGAN: Yes, that's right.

PROF WOODS: - - - the impact of any one claim on any one company is significant et cetera et cetera. So by the very nature of their characteristics they won't be self-insurers. Mind you, you can have collectives of small, like-minded businesses. I'm thinking, say, of the pharmaceuticals industry. The pharmacy industry, where you could have a collective insurance pool or local government. So small business can - - -

MR FAGAN: Generally the ones that have been established overseas have been for extremely high risk industries. They haven't been done for the more core, everyday retail sector, for example. They have been set up primarily because of market failure. I don't believe we have a market failure situation at all, so I think that there is also - there's longer term cross-subsidisation, and for organisations entering - the failure rate in those type of industries for small business is quite high. So what you're seeing is cross-subsidisation over time through different industries. So to have organisations setting themselves up 10 years down the track and paying for today's claims is pushing cross-subsidies over time, which will be the eventuality. So very few of those schemes actually work for the long term.

PROF WOODS: Okay, so coming back to the original point, if you're not predicting doom and gloom if there's an alternate national scheme because you'd only envisage that that's a likely option, but a self-insurance option is only picking the larger employers so you're leaving the bulk of business in the jurisdictions - - -

MR FAGAN: I believe that is what would be more long-term stable for the workers compensation environment at this point in time.

PROF WOODS: Yes. Dr Johns?

DR JOHNS: Yes, this business of their being innovation, I guess particularly in this major area of return to work and the necessary business part that I understand, I guess. I guess you're saying that innovation is more likely in say - is more likely in an underwritten environment I guess as opposed to regulators sitting around a table looking to the next state for good ideas. So under what circumstances do we get the best innovation and what are the sort of - when don't you get good innovation? When do things not produce good change?

MR FAGAN: We've seen very much a trend in some Australian markets for process-driven measures, process-driven incentivisation, which is not aligned to getting people back to work and is not necessarily even aligned to reducing employer's premiums over time. So the best opportunities for innovation are where there is alignment of the key objectives of the scheme, and that is in getting people back to work and minimising employer's premiums over time and keeping those two objectives as the firm objective of any level of regulation.

DR JOHNS: What's an example of this process oriented?

MR FAGAN: Process oriented? Where we measure on strict time frames for our remuneration by various managed funds and if we miss those time frames or a proportion of time frame-based activities they - we're able to - we can be significantly penalised with respect to our income. But equally the innovation is required on that 20 per cent of claims in workers compensation that have all the risks, that have all the costs. There is 20 per cent of claims. Our statistics suggest that about 17.5 per cent of claims go past four weeks duration. These are the people that need more help. These are the employers that need more work with them. However, a lot of our measures are not designed so that we can divert our resources to looking after those high risk claims. They are treating all claims equally and all claims in time frames. So we have to divert our resources and our best resources to ensuring that we're managing those few claims that have all the risk, have all the potential for people being off work for an extended length of time. So we see various measures in various states where we have to go through a process so that somebody can come and measure us, literally 9 to 12 months later, instead of us

being able to divert our resources into getting a person back to work, which is what we're there for.

PROF WOODS: So you're driven by the incentives of the scheme designed.

DR JOHNS: Yes.

MR FAGAN: Well, to some degree or will be in a loss position - - -

DR JOHNS: You'd rather be measured by what, some other form of outcome.

MR FAGAN: We believe that we should be measured on return to work rates and things of that nature, those forms of outcome.

MR McDONALD: The other issue is that innovation, if it occurs, is - they took a good idea and then they try and apply it to everything and what - what happens in workers compensation is that you're actually working with an individual. You can have two people in the same workplace doing the same job with the same injury but the response that they require to get them back to work can be very, very different. There are a whole range of factors that will come into play. But if you have a standard model and process that you're applying to everybody one will succeed and one will fail. What we're finding is that in the underwritten jurisdiction we have the flexibility to be able to adapt our capabilities and throw the resources at those claims where they're best directed rather than saying, "Well, we've got people that can do this function and we've got people that can do that." We have the flexibility and that enables us to not only provide tailored solutions but learn from those experiences not only in one state but from all the other states.

DR JOHNS: So - I mean, you're saying two workers in the same workplace might produce a different outcome. I presume, similarly, you could have two different schemes, different level of benefits which, in a sense, are irrelevant to your ability to return a person to the workplace.

MR FAGAN: They are very relevant. The major factor that drives - apart from the underlying cost structures and entitlement structures - - -

DR JOHNS: Yes.

MR FAGAN: - - - you have the other major relative and relevant issue is the lump sum culture that's in a scheme and the lump sum entitlement structure.

DR JOHNS: Yes, yes.

MR FAGAN: We may have firmly in the forefront of our mind the objective of

returning a person back to work but the realities are that if you have a lump sum scheme or lump sum incentives in a scheme your effectiveness is dulled because there is the potential - - -

DR JOHNS: Sorry, so what benefit features are most productive of a return to work, not having a lump sum?

MR FAGAN: The minimisation of lump sum entitlements.

DR JOHNS: Yes. What other elements have shown - proved themselves, in a sense - step down - - -

MR McDONALD: All the schemes feature a range of step downs on the presumption that if you take peoples' money away it gives them greater incentive to return to work. I haven't seen anything that has actually demonstrated that that's a true motivator to get back to work.

DR JOHNS: Right.

MR McDONALD: At the end of the day most people have an injury and there is a desire to return to work. It's the response by the stakeholders to that injury that determines how successful the return to work would be, not how much they get at the end of the day. What you do find is that if there is a lump sum mentality sitting in that and it delays the return to work process people get their lump sum and then they move out of the scheme. It's the way that the scheme responds to that that really is quite a determinant in terms of the success.

MR FAGAN: The schemes - - -

PROF WOODS: Sorry, so if someone moves out of the scheme what's your problem?

MR McDONALD: Yes. Well, let's say they have an injury and they get a finite amount of money. Because there's not a return to work focus within the scheme - the focus has been on the achievement of the lump sum - they get their lump sum. They don't have a job. They may well have a requirement for ongoing medical treatment. They've probably got no support network around them. They're not told how to manage their funds. How they manage them is then up to them. That might last them one year, two year, five years, during which time it's difficult for them to re-enter the workforce. So they end up in the social security system and in public health.

PROF WOODS: A cheeky question, but why is that an issue for QBE?

MR FAGAN: Because we see part of our objective is the wider benefits to the wider community. We believe that we are here to get people back to work and we have a wider community objective.

PROF WOODS: Just picking up on that common law, I notice in your submission on page 58 you were talking about common law also introducing an element of uncertainty. Does that uncertainty impact on the workers then during the common law proceedings and does that effect their rehabilitation during that period?

MR McDONALD: We've had a number of experiences where return to work programs have been progressing and making really good progress but then people have become entangled in the litigation process and one of the key features of litigation is that you will be rewarded for or will be compensated for the loss that you have. So if you don't return back to full-time employment then you have clearly demonstrated a loss. But if you do get back to your full-time employment then your loss is greatly diminished. So if people have a desire to get a lump sum then they've got to do the best that they can to demonstrate that they have that loss.

We've had occasions where people have changed rehabilitation providers on a number of occasions simply because the return to work program was progressing too rapidly and not fitting in with the litigation process. So they were positioning themselves so that when their litigation was determined, that they had the greatest opportunity to demonstrate an economic loss.

PROF WOODS: You've dealt with that at a fairly high level here in your submission. But if you were able to encapsulate some of the actual case experience on that in a short piece to us that would be most helpful. As you can understand we've had strong representations from others and the law council of Australia comes to mind immediately that, you know, common law does not interfere with the process of rehabilitation, in fact that the two can go hand in hand. So if you can sort of encapsulate your experience into a succinct set of arguments that will help us understand the various perspectives on this issue.

MR FAGAN: What I must say is that we don't see our role as necessarily stating what a benefit structure and entitlement structure should be. Ours is to just give the background and what is our experience and the wider community is there to establish what the affordability of an entitlement structure is and what it should be.

PROF WOODS: And your submission is quite clear on that. In fact, because it's principles based we understand the logic and things. But if you do have some case experience that can come to bear on this particular point that would be helpful. Can I then go back to your other point - - -

MR FAGAN: Yes, yes.

PROF WOODS: - - - which was the innovation that you were talking about, because again in your submission you talk in a couple of places about the beneficial competition between schemes in areas such as prevention rehab, return to work, promoting competition between states and territories in delivering ongoing improvements. This is an area of particular interest to us because we are having a number of representations from major organisations who say, "Yes, but we want one scheme that we can be part of." They may even be an organisation that is a self-insurer in all of various jurisdictions but they say that's good in itself but while ever you have variation you have additional cost that must be incurred and some, to their credit, have gone to some trouble of detailing that out for us.

Offset against that is this concept, which I also understand and have some attraction for, of if you have one national scheme but it's the wrong scheme then everyone is suffering equity - I guess that's equity but it doesn't do much for efficiency, but it also is - or may not lead to innovation. So you may not get the dynamic efficiency in such a process, or you'd have to at least design it in such a way that it encouraged dynamic efficiency, maybe a periodic review or whatever, bring the Productivity Commission for scrutiny to it perhaps. So there is some benefit in this idea of competition between schemes and the innovation that it can draw - but at what cost, I guess.

MR FAGAN: What we suggest in our submission is that having a national framework with not necessarily more than just slashing all prescriptive regulation built around it, will not dull that opportunity for innovation, and equally not dull the opportunity to get some application of that throughout Australia and just see some of the differences. At the moment, we're constantly trying to analyse and benchmark our business, and as soon as you compare one state to another, you've got so many variables coming into it that it puts a fair degree of uncertainty into our numbers. The statisticians and actuaries love it, and the rest of us aren't as keen because it puts so much uncertainty into what is the true drivers behind the scheme, what is the true outcome/effect, how effective are we being if we change different aspects of our management? If we innovate in different ways, what is the true effect of it?

Equally the underlying factor in that is that most pieces of legislation have changed in the last three years, so they're all at different levels of maturity, and there's very few that haven't changed just in the last three years. So to have one scheme and one - not necessarily one scheme but one framework built around the country, that can be operating that way, we feel that there's much more opportunity for bringing the innovation, as long as the incentivisation structures are allowed to remain there. In privately underwritten environments, the incentivisation structures are there to get people back to work, to minimise - the cheapest claims are ones where people are back at work. So that is our objective in reducing costs, which can then be passed on to employers over time. We see that in those environments all the

time.

PROF WOODS: Okay, and we understand incentives and the powerful force that that constitutes, but I'm just not quite sure I understand your perspective of a national framework. Ultimately, wherever there is divergence between the schemes, there is cost to a national employer, because they must then track, follow and adhere to the various schemes. So without a single uniform scheme that is the same in all respects, you are going to suddenly incur additional costs for national employers or employers who have staff in various jurisdictions, because they must then deal with two, three, four, five variations of particular attributes.

But your perspective of a national framework, would you see that there are some things that should be uniform or the same, such as perhaps definitions of what constitutes and employee and a workplace and a work-related injury, but other things where there could be variations reflecting economic circumstances, perhaps by way of benefit levels or other differences, say, in dispute resolution mechanisms or - I mean, where is the focus on uniformity and where is the focus on a more general consistency?

MR FAGAN: The major areas for difference are probably where we have different wage levels in different states, that's a reality, and some of the different - the different economies we have within Australia. Most of the other areas, I think you could form a consistent methodology, the definition of "worker", "dispute resolution method". There's no reason why they have to different in any jurisdiction in Australia.

PROF WOODS: So there are some things that you would prioritise as warranting being the same across all jurisdictions, whereas other things you would acknowledge the variations not only are permissible but might in fact be appropriate?

MR FAGAN: I think that the variations come through competition and through innovation in trying to ensure that we target getting back to work.

PROF WOODS: Management procedures or - - -

MR FAGAN: Yes.

PROF WOODS: - - - or rehabilitation systems or - yes.

MR FAGAN: But generally the definition of structural components of workers compensation, there's no reason why that can't be designed consistently throughout Australia, the definition of a worker.

PROF WOODS: Could you give some thought to that following this presentation and see if you can devise what you would constitute core elements of a national

framework, and perhaps even without that, some prioritisation, so that if there was some evolution towards such a framework - I mean, we are tasked with looking at national framework models. One such model might be to have a framework that has core same elements, but within that, an evolution of them, so a progressive implementation. So if you could prioritise which ones you'd tackle first - and other elements which are non-core - I said "core" - "non-core". Yes. Those non-core elements which could vary then between jurisdictions, that would be helpful to us. Any other heading - any next point in particular?

DR JOHNS: Well, I just in some ways - I mean, the states don't compete with each other, they just - people operate separately. One of them might look over the apparent number of what Queensland is doing or New South Wales. The only true competition would be if you had the option to choose another scheme.

MR FAGAN: There's a number of state governments - - -

DR JOHNS: Which wouldn't be a national scheme - sorry, if you had a uniform, single national scheme, there would be no - that would be it. If you got it wrong, you'd be in trouble. So the only real competition occurs presumably when someone has a choice to jump in or out of the scheme.

MR FAGAN: There's a number of state governments that currently advertise their workers compensation costs as an attraction for businesses to relocate or set up within their states, so - - -

DR JOHNS: Bit messy.

MR FAGAN: - - - they're seen as a competition.

DR JOHNS: I mean, if you've got 1000 costs and that's one of them, who is to say that was the critical cost?

PROF WOODS: I'm sure business make a judgment on whether that's a relevant factor, but there is also a fact that some states do wave the flag.

DR JOHNS: Yes. It's a very rough approximation, I guess. But anyway, I do like your focus on the notion that it seems to me that you're looking all the time at the circumstances under which you get the best return to work, and those circumstances can vary. The design of the schemes can be quite different. But it's how people actually operate, so that's - well, that's something that I sort of think about a great deal, because we're not just talking about the design of the scheme, I don't think, but those practices that allow people to get on that don't inhibit searching for innovations.

PROF WOODS: All right.

DR JOHNS: Thinking out loud, sorry.

PROF WOODS: Think away, commissioner. You make a statement on page 25 that says:

> There are compelling reasons for employers to implement effective injury management and return-to-work programs. The presence of such programs can contribute a safe work environment, reducing incidence of other injuries, and at the same time reducing employer costs. Employers and employees both gain from all of this.

True, I guess, but what is it that then leads to a degeneration of relationships between employers and employees. I mean, does it happen in some case because there are third party intervening, whether they be medicos, whether they be rehab providers or, dare I say it, even sometimes insurers who get between those two parties? Because I noticed a bit later on you talked about the inherent primacy of the relationship between the employer and the employee.

MR FAGAN: We, in the last three years, have introduced our claims management philosophy and models, which is called QBE Connect, and it is built around ensuring that we have open communication with the employer, the injured worker and the original treating doctor. We see ourself as a facilitator in ensuring that there's open communication between those three parties at the earliest possible stage and the earliest intervention in bringing them together. Sometimes we have to be the conduit to bring them together, and to facilitate that at the earliest possible stage, we have found it is most effective in getting people by the way. It isn't something that necessarily happens naturally, and it is something that generally leads to a breakdown in communication, which then starts to bring in the general - the Australian psyche tends to bring back in the general fear that somebody is a malingerer or that, "My employer no longer wishes to look after me and therefore owes me something." So you see that build-up fairly quickly in a claim.

So we see our objective is actually in the fastest possible time frame, facilitating bringing those parties together to ensure that they have open communication and there's information being exchanged. The reality is the treating doctor probably knows very little about the workplace. Less than 5 per cent of a GP's practice is involved in workers compensation. It isn't their core business. You have employers who know how to build their widgets but they know next to nothing about workers compensation - that's a generic statement - and you have injured workers who don't have claims all day every day. Nobody understands the process necessarily or thoroughly, and that is an insurer's role; to educate, to ensure that we influence to get people by the way at the earliest possible stage and we give the

information to the employer, the treating doctor and the injured worker; to make sure that we form that communication mould between the three and that we're effective in doing that, and these are the things that help get people back to work. It isn't necessarily knowing how a piece of legislation reads or what an entitlement structure is. There's actually understanding the interactions of all those different components.

PROF WOODS: But is QBE Connect in a sense an admission that past practice may not have always - - -

MR FAGAN: Definitely. We feel that we need to be continually improving and that there is significant areas for improvement, and we believe that a primary area for insurers to improve in has been their methods of communication and their methods of bringing those parties together. Yes, we identified that about four years ago.

PROF WOODS: It's certainly been a theme of a number of employers, hasn't it, the frustration of loss of relationship directly with the employee now. Some employers may not be model employers, may have contributed to that, but in other cases you can sense the genuine frustration of - if a third party takes over the process, or third parties, and they therefore lose that relationship.

DR JOHNS: But let's say you'd discovered the Holy Grail. What prevents you, in some circumstances, from making the connection, getting stakeholders together and so on? What are the features that get in your way?

MR McDONALD: I guess some of the features, the reputation that the insurance industry has - it's certainly not one of the most favourable. People have a lot of preconceptions about what's going to happen when the insurance company gets involved. It's usually, "They're going to take statements so you don't want to say anything to them. They're going to put surveillance on you. If you would send an investigator out there, they're going to intimidate you and collect statements." They're some of the things the medical profession, those experts that we engage as independent assessors - sometimes they assist us, sometimes they don't. The role of the rehabilitation provider - they've got a real conflict. Their obligation is to work with the injured worker, but they also have a contractual obligation with the insurer, and then they have their obligations to the employer, and they've got to balance all of those. Then you've got the case manager trying to bring it all together.

Then you have the role of a solicitor who represents an injured worker. His role is to demonstrate the negligence. So he has to go into the workplace and start pointing the finger at everybody, looking for why an accident happened. Workers compensation is not about fault, and that's one of the things that we've really got to move away from. So when all these people come in and say, "Well, you should be doing this," or, "You should be doing that," and it creates the air of uncertainty. Then if the benefits aren't sufficient to compensation these people, if you look at one

of the states, you might initially start out at getting $800 a week, and then after, say, 12 weeks or 26 weeks, you're down to $250. For a lot of people, that's a substantial disincentive to return to work and opportunity to pursue litigation to compensate yourself for the loss.

DR JOHNS: Take me through that again.

MR McDONALD: So after 26 weeks.

DR JOHNS: After 26 weeks, I don't - - -

MR McDONALD: But you - you're out of pocket $450 a week.

DR JOHNS: So that really drives them to go up to some - - -

MR McDONALD: Well, it either actively encourages them to go back to work, but if they don't have the physical capability to do that, then they have to remain on their lower benefits. The only way that they can make up the difference is to pursue litigation or look for a lump sum through a permanent impairment, but then again, they might not have permanent impairment. They might just have one of those injuries that does take a long time to recover.

MR FAGAN: Some of the other impediments are delay in reporting. We often - at some stage we don't get claims till an average of 25 days after the accident date. Sort of the thing we like to say at our office is, "We can have the best claims department in the world but we don't know about the claim, there's not much we can do about it." So we're constantly talking to employers about earlier reporting and earlier reporting message, then to get the communication happening at a fast rate. We've literally had one of our staff members have to sit in a doctor's surgery for five hours last week because the doctor refused to make an appointment and refused to see us to discuss the claim as such.

So there are various improvements that need to be required in getting faster reaction and faster intervention and a greater understanding of each other's roles, and we see that as primarily our role, to get a greater understanding through all the different participants involved in workers comp.

DR JOHNS: And a lot of it doesn't have much to do with rules, but someone in there negotiating around the players by the sounds of it.

MR FAGAN: And treating each claim as an individual claim because that's what they are.

DR JOHNS: Yes.

MR FAGAN: There's an individual person who has been injured. There's an individual employer.

DR JOHNS: Who are you perceived to be working for?

MR FAGAN: We see both our clients as absolute equals: the injured worker and the employer.

DR JOHNS: How do they see it?

MR McDONALD: Varying degrees. The employer sees us on their side but quite often the injured workers will see us as an advocate for them, to try and get them the best possible outcome in a return to work.

MR FAGAN: We have numerous examples of both.

MR McDONALD: Our case managers will go out to the workplace and they will literally work with the employers and say, "They have the capability to do this. You will make alternative duties available for them. Not only do you have a legislative obligation but you have a moral obligation to assist these people, they are injured at work, and do your bit."

DR JOHNS: So in terms of the cost of running your operation you have to know about eight different schemes. So you'd prefer the simplicity of a single scheme.

MR FAGAN: Yes. That would enable us to divert resources into case managers. It means we'll be able to employ more people on the ground to get out and manage more claims.

DR JOHNS: Yes.

PROF WOODS: Would you be able to do a bit of a calculation - and to help you in that respect I think there's of another submission that is publicly available that attempts such a thing. If you could replicate that to say if there a single national scheme what would be the costs that you currently incur that could be diverted to improve claims management or shareholder profit, or whatever else you chose to do with it?

MR FAGAN: Yes, we can look at that. It's a difficult number. We've tried to assess it numerous times. It's a difficult number to put a - - -

PROF WOODS: Someone else has made a stab at it, if you want to look at their methodology. It may be good, bad or indifferent and you'd adopt your own

ultimately but that would be helpful to us. The last one I want to raise is dispute resolution. Again you're in this position of operating in all of the jurisdictions and therefore you see the outcome of dispute resolution processes. Do you have a view as to any of the jurisdictions representing sort of better practice than others?

MR McDONALD: I think they all have strengths and weaknesses. I don't know that one is operating any better than the other.

PROF WOODS: Really? If that's the case then that's interesting because it would mean that all of the time, trouble, angst and effort that goes into designing these various schemes is really of no consequence.

MR McDONALD: I would say that our experience in Western Australia, when they introduced their conciliation and review process, has been really probably one of the better results that we've seen. But it's interesting that they've now, I guess, changed the framework to actively encourage solicitors back into the process and we think that is - - -

PROF WOODS: Is that a particular trade-off perhaps though in a circumstance?

MR McDONALD: It may well be. But in our experience there were skilled advocates for insurers and representing injured workers, and as an alternative dispute resolution process it seemed to work very, very well. One of the better features of it was that it wasn't billed on the fundamental tort principles; it was about dispute resolution. But my observation would be that there is a tendency to build any dispute resolution process relying on the tort principles by bringing in the judiciary and the legal profession, and not really looking at alternative dispute resolution methodologies and approaches.

PROF WOODS: That's interesting. Various participants have commended to us the New South Wales Workers Compensation Commission. But when we were in Western Australia they weren't quite as forthcoming about that model and referred to their own. So your views support, to some extent, the perspective that they were putting to us.

MR McDONALD: The New South Wales system does have a very strong focus on narrowing opportunities for appeal to purely questions of law and I wonder whether that, in essence, is perhaps preventing natural justice, because sometimes the facts are wrong and considered wrong, and there is no recourse there.

MR FAGAN: It is also fairly immature, the New South Wales system, so - - -

PROF WOODS: Not yet mature, yes.

DR JOHNS: Yes, early days.

MR FAGAN: Not yet mature, sorry.

PROF WOODS: I hadn't quite thought of referring to it as immature. No, that's helpful. That has been very good. Have you got any other - - -

DR JOHNS: No, it's excellent, thank you.

PROF WOODS: Thank you for the time and particularly the way you have structured the submission and have a consistent logic base through it. That is quite a useful contribution to this inquiry. If you could pursue those couple of matters for us that would help as well. Are there any matters that you would like to draw to our attention that we haven't otherwise covered?

MR FAGAN: No, I think it's fairly comprehensively covered in the document.

PROF WOODS: It is, it's a good document. Thank you very much for the time and effort and we look forward to your ongoing contributions inquiry.

MR McDONALD: Thank you.

MR FAGAN: Thanks very much for your time.

PROF WOODS: The next participants are Westpac Banking Corporation. Could you please, for the record, give your name, position and the organisation that you are representing.

MR O'REILLY: Thank you. My name is Phillip O'Reilly. I represent Westpac Banking Corporation. I am head of employment policy and communication at Westpac. I'll let my colleagues introduce themselves as well.

PROF WOODS: Thank you.

MS GEEST: I'm Angela Geest. I also represent Westpac Banking Corporation and I'm the national manager for occupational health and safety.

PROF WOODS: Thank you.

MS CROMPTON: And my name is Alexandra Crompton. I represent Westpac and I'm the legal counsel for employee relations.

PROF WOODS: Thank you very much. We have a submission from you and, thank you, it's a very, very helpful submission and you've provided us with a lot of very useful case study material. Do you have an opening comment that you wish to make?

MR O'REILLY: Sir, we intend to make a very, very brief few statements and let questions take most of the time. Simply to say a few obvious things, Westpac is one of the largest employers in Australia. We have employees in every state and territory and we are self-insured in every state and territory, and have been so in many of those states for many decades. So we have a long history and commitment to self-insurance and all of the advantages that we think that brings to our organisation. For the reasons outlined in our submission we believe very firmly that there should be a single national system for occupational health and safety and workers compensation and the reasons we make that statement are outlined in our submission, and we're happy to answer questions about that submission.

PROF WOODS: Thank you. As I said at the start, it's an extremely helpful submission because it spells out a lot of detail that makes your points quite powerful. I guess to start at a level of principle though you say for a number of reasons which you outline, "Westpac advocates creation of a national uniform, not merely consistent, scheme for workers comp and occ health and safety for multi-jurisdictional employers." A lot of the debate has been around the word "consistent" and it has been interpreted variously, but you're unambiguous in that, that you're saying unless it's the same scheme in all respects in each jurisdiction then you lose a lot of the benefits.

MR O'REILLY: Correct, that's what we think.

PROF WOODS: Quite helpful there,

MR O'REILLY: The simple reason, sir, is that if it's simply consistent it will inevitably get inconsistent over time, as night follows day, so that's why.

DR JOHNS: "Consistent" is a weasel word I think, isn't it, for a negotiator to have?

MR O'REILLY: We wouldn't say that.

PROF WOODS: I'm not sure I'd even say that. If I can just raise one - not in any order of importance because it just happened to come first in your submission. The journey to work, you drew on that as an illustration of the fact that in some cases there is an entitlement. In other cases, such as Victoria and WA, there isn't. In those areas where it is an entitlement, how important is it as a cost component for your self-insurance?

MS GEEST: I suppose it has an impact for us in terms of that in one state it's something that is compensable and in another state that it's something that is incompensable. So it means in terms of cost point of view it's about the fact that then we need to make sure that we have experts that understand the legislation in each of those states. So I suppose that's where it comes in, in terms of cost.

PROF WOODS: But also in terms of actual claims costs how significant is that?

MS GEEST: It forms a significant component of our costs in New South Wales.

PROF WOODS: In New South Wales. By significant are we talking sort of 5 per cent?

MS GEEST: Probably more than that, probably more around the 30 per cent as a guess.

PROF WOODS: Whereas in the other states where it is compensable it's not as high a level of claims costs.

MS GEEST: Where it's not compensable that's where you would not - you would see less cost.

PROF WOODS: No, but I mean in the other states where it is, the level of claims costs as a proportion of your total claims cost is less than - - -

MS GEEST: That's right.

PROF WOODS: Significantly less? I mean, is the average of the others like Northern Territory, Queensland et cetera - are we talking there more five or 10 per cents or are they still closer to New South Wales?

MS GEEST: They're probably less, like significantly less, than New South Wales because you've got - you know, people in New South Wales being able to claim compensation for injuries that arise on their journey to and from work and motor vehicle accidents. For an organisation like Westpac that generally is a fairly low-risk organisation I suppose one of our areas of key risk is actually people's travel to and from work and when they're out and about doing their lunchtimes.

PROF WOODS: So for a manufacturing organisation or an abattoir or something where the other claims are significantly higher, journey to work becomes a very minor thing. But because of your profile with employment which is predominantly clerical in nature, journey to work therefore assumes a higher profile.

MR O'REILLY: Yes.

MS CROMPTON: I think it's either the first or second most common type of claim in New South Wales. I mean, I was recently looking at our stats.

PROF WOODS: Okay, thank you for that. That's quite helpful. If in fact you are able to clarify some of those figures for us subsequently.

MS GEEST: It would actually be the first. It's our most common mechanism of injury in New South Wales.

MS CROMPTON: Yes, I thought it was the highest, yes.

PROF WOODS: Okay, well, a bit of extra detail on that. Do you, for those states where there isn't journey to work Victoria, WA - as an employer do you provide that as an insurance cover separately for your employees anyway?

MS GEEST: No, we don't.

PROF WOODS: You have an absolutely fascinating table on page 4 which spells out various costs of self-insurance licence fees, bank guarantees, actuarial costs, audit costs and the like, which is quite useful to this inquiry. Do you have or would you be able to make any estimate that if you were under a different scheme, say Comcare for example, because under the Comcare legislation you compete with a former authority of the Commonwealth - do you have any idea what the sorts of costs would look like under Comcare?

MR O'REILLY: We've never really done that study, sir.

PROF WOODS: I don't want to put Westpac to too much additional effort but if some of those were easily calculable that would be helpful.

MR O'REILLY: Yes, we can do that, and of course the important point about that table, sir, is that those are simply the green dollar cheques we write out to third parties.

PROF WOODS: Yes, actual costs.

MR O'REILLY: It doesn't include our own internal sort of time which is significantly more than that.

PROF WOODS: No, I understand this is dollars out the door tables.

MR O'REILLY: Exactly right.

PROF WOODS: Not internal costs. If you were eligible to be a self-insurer under a single national scheme - and I only pick Comcare because - - -

MR O'REILLY: Yes, it exists.

PROF WOODS: You know, it may potentially be available to you.

MR O'REILLY: Yes.

PROF WOODS: You would only be meeting one of those costs, not all of those costs. I guess while we're talking Comcare though, whether Westpac is able to say whether they have ever considered seeking application to be a self-insurer under that scheme, and depending on what your answer is whether the costs relating to that scheme in terms of its benefit structures etcetera in itself would outweigh the costs that you incur by being self-insured under the various other schemes.

MR O'REILLY: It may be a useful thought for me, sir, to come back to you with some detail on that. I do recall that we have in the past had a look at the Comcare scheme and I recall that we didn't go there and I just don't quite recall why not. But it's probably best that we perhaps just do some work on that and come back to you, because it's a reasonable question: well, if you want a national scheme why don't you just go with Comcare? It's a reasonable question.

PROF WOODS: It seemed a reasonable question - I think look for a reasonable answer.

MR O'REILLY: Yes.

PROF WOODS: How you answer that, you know, is entirely in your hands but the more detail you could give us as to the underlying analysis subject to your own confidential requirements, the more helpful it will be to us.

DR JOHNS: I guess there's two elements. There's the sort of trade-off in costs, if you like, but also a sense in which you might think, "If we sign up to it then we're going to have an industrial relations fight in Western Australia," because they're so wedded to a particular benefit that doesn't occur in the national - you know. So you need a bit of that as well because the lawyers were directing us to that, weren't they?

PROF WOODS: Yes.

MR O'REILLY: Yes, and as I say, I don't recall exactly what the debate was because it happened a while ago and I've sort of banished it from my mind.

DR JOHNS: So it's not just the straight costs - gives us a sense of what Westpac will be in for.

MR O'REILLY: Yes, I can do that.

PROF WOODS: Yes. There are a multiplicity of issues. We have on the record evidence from Optus as being an applicants for a licence under the Comcare arrangements as a self-insurer and they drew attention to a number of issues involved in the decision-making process their own, some of which being what would be their claims costs under the Comcare benefit structure versus under the various jurisdictional structures, some being industrial issues that would be brought to bear in coming to that. But also then what are the internal savings, and these are some of the issues that you've identified here of, if you could only operate under one jurisdiction rather than the others.

MR O'REILLY: Yes.

PROF WOODS: Incidental costs on the top of page 7 dealing with administrative complexity and duplication in self-insurance, you talk about, "Duplication of the costs in retaining auditors, lawyers, administering schemes and complying with audit requirements, providing legal advice on claims," et cetera. So here you're talking overhead costs as well as per unit claim costs.

MR O'REILLY: Correct, exactly right. They're difficult to quantify otherwise we would have put them in the table, but it's just hard to say.

PROF WOODS: No, I understand that. But they are a set of overheads that you

have to keep retaining which are in addition to these.

MR O'REILLY: Precisely - whether or not claims occur, quite right, yes.

PROF WOODS: Yes, thank you. Gary, have you got any - as we're going through?

DR JOHNS: Yes. I presume, like so many employers you have this focus on return to work, getting people back to work as quickly and as well as you can. So in what jurisdictions is that most difficult?

MS GEEST: It's probably no more difficult in any particular jurisdiction that I could say. I suppose as a multi-jurisdictional company the most difficulty we have is administering that in different environments. Say for example we come to write our injury management and rehabilitation policy and we need to think about the different requirements of each of the different state regulative authorities, so we can't just say, "This is the way that we're going to do it in Westpac as an organisation." We need to say, "Well, in Queensland we'll do it this way. In WA we'll have to do it this way. In New South Wales we'll do it this way." So yes, it's not as though we could say that one state is particularly difficult. It's the fact of having to think about all of the different requirements in each of the different states.

DR JOHNS: So you would have to respond severally all the time.

MS GEEST: Yes.

DR JOHNS: But I'm a bit surprised, I guess, that one set of rules or one set of benefits or one set of procedures in one state consistently causes you to put in more effort or delays you.

MS GEEST: I mean, in New South Wales the requirements are probably more onerous than the other states in terms of the requirements to do injury management plans and things like that. Those requirements aren't as onerous in the other states. In Westpac we very much have, I suppose, a culture of assisting the person to return to work as early and as timely as possible. So I suppose that very much matches up with the spirit of most of the legislation. So we don't have those issues that you were talking about with QBE in terms of issues with our employees so much, in terms of helping them to return to work because that's what our goal is and that's the spirit in which we deliver injury management services as a self-insurer.

DR JOHNS: I suppose you're as close as anyone can get to the game.

MS GEEST: That's right.

DR JOHNS: You're the employer and you're self-insured so presumably you're as free as any individual can possibly be to manage your own resources.

MS GEEST: Yes.

DR JOHNS: If you were even freer what would you prefer?

MS GEEST: I suppose we would prefer having one set of rules that we can deliver our injury management services against.

PROF WOODS: But you don't have a preferred model for those rules? I mean, there isn't one jurisdiction that you say, "Well, if we were to choose between the eight jurisdictions at the moment it's that model that we'd implement across our system"?

MS GEEST: No.

MR O'REILLY: It certainly doesn't - the conversations that we have aren't around, "Gee, if only it was all like West Australia we'd be happy." The conversations are, "Gee, if we just had one set of rules we'd be happy." That's really the burning issue and the differences between the states is really a 10 per cent issue as opposed - and the 90 per cent issue is the number of them. So we don't have any brilliant ideas or insights for you about, you know, you should adopt a West Australian model or something.

PROF WOODS: Even for something like common law, you don't see that as the major issue that sort of defines some schemes compared to others?

MS GEEST: No, I don't - - -

MR O'REILLY: There may be some - we can go away and actually talk to our state people to see - and put some work into that. I mean, I must say we haven't really thought hard about that but we're happy to go away and do some thought on it and come back to you with some ideas.

PROF WOODS: Yes, and if you could sort of span the various issues, whether it's dispute resolution or rehab or common law or whatever, obviously you'd make some large cost savings if you didn't have journey-to-work in New South Wales. Yes, some perspectives on that would be helpful. I understand you have relationships with each jurisdiction and how you express that is a matter entirely up to you.

DR JOHNS: Which would include the condition for becoming - the requirements for becoming self-insured.

PROF WOODS: But even if you could come back to us with a view on that 10 per cent, 90 per cent, if on reflection it's either that figure or some other figure, but whatever figure you put to it, if on reflection from your perspective the variations in all these attributes between the scheme designs is only a 10 per cent or some other percentage issue, then that in itself is immensely instructive to us.

MR O'REILLY: Yes.

DR JOHNS: And we wouldn't want to force that if that's the real story.

PROF WOODS: No, as I say, whatever position - - -

DR JOHNS: We haven't got a book on which scheme is preferable.

PROF WOODS: But if the variation across them all still is only a small issue, not a large issue then that very much helps us understand where to direct our energies in talking national framework.

MR O'REILLY: Yes, I understand.

PROF WOODS: You make the blindingly obvious point that the various approaches to date have failed to deliver registered uniformity desired by the multi-jurisdictional employers and - true. What conjunction of events or interplanetary alignment is needed, do you think, to create some level of national uniformity or will they actually just accept the Productivity Commission's recommendations that's going to go forward? I mean, where are the drivers, where are the incentives for the various states. Perhaps we need to differentiate between occ health and safety and workers comp, because occ health and safety at least has a national framework that it operates under, whereas workers comp systems are very divergent.

MR O'REILLY: I'd say this; that we've tried to concentrate a little bit in this submission on what does this mean for employees. So, sure, it's helpful for us to have a national scheme, without question, for all the reasons that are outlined and pretty obvious, and we could concentrate on cost and productivity benefits all we like. We also think it's good for employees to have a system that they can understand and that they know they're going to be treated in the same way, no matter where they're employed in Australia, in terms of their outcome and the way that their injury will be managed.

So I guess if I could think of a silver bullet, if I was trying to persuade people to say, you know, "A national scheme is a good thing," I'd say primarily that the schemes that currently operate don't actually help employees much either. So don't just think about it as being, "Gee, it's good for big companies like Westpac to have

these things." Undeniably that's the case, but why is that? Well, why it is, is that it will be better for our employees to have this, we think; secondly, it will encourage us to have best practice. A great example of that is actually annexure C. I mean, we raised that just as a classic example. It made me laugh when I got that report across my desk.

PROF WOODS: I've read it with interest.

MR O'REILLY: I asked Angela to put it in the submission because it was just such a cracker, because here we are thinking about something as simple as a first aid kit, trying to standardise that. So we're thinking about best practice and first aid kits and we're chasing our tails because we don't whether to put 15 bandaids in there or 25 or whether they've got to be blue or white or red or green. That's the classic of the problem with the current approach that it's hard for us to think about great outcomes for our people when we're thinking about how many bandaids we've got to put in the first aid kid. So I'd say that those are the kinds of silver bullet arguments that I can come up with; weak though they might be to the states, I don't know. They feel pretty strong to me.

A single national scheme is going to be better for employees and it's going to lead to companies like us concentrating on best practice much more than we currently have the time and resource to do because we won't have to worry about how many bandaids we put in the first aid kit.

PROF WOODS: And you're so busy monitoring eight varying schemes - - -

MR O'REILLY: Correct.

PROF WOODS: - - - to ensure that you're constantly cross them, at least meeting if not exceeding them. I can see a subtitle for our report coming out of the first aid kit. There's one forming in my mind but I'd need to consult with my fellow commissioners in this respect. But, no, it's very powerful, very powerful. Thank you. Certainly your other annexure on the time spent on audits also, there's some nice hard data there that's very useful to us.

MR O'REILLY: Yes.

PROF WOODS: You do say there would be many benefits for Westpac and its employees.

MR O'REILLY: Correct.

PROF WOODS: Is there an on-record statement from your staff associations that would support that view?

MR O'REILLY: No, there is no such statement from - we have no staff association. We have the Finance Sector Union that covers Westpac.

PROF WOODS: I'm speaking generically.

MR O'REILLY: Yes, that's right. They have no - I'm not aware of their view and you'd have to ask them, but I suspect they would also say that better outcomes from employees has got to be a good thing, but I wouldn't want to put any statement on the - - -

PROF WOODS: No, just in case they had actually put something on the record. I think I've probably come to the end of my particular questions.

DR JOHNS: Yes, I don't need to ask any more.

PROF WOODS: Can we thank Westpac for the time and effort you've put into this submission because it deals with the nitty-gritty of it, and if you could supplement that with some of the other material that we've sought from you, subject to the resource intensity of so doing which we appreciate, that would be very helpful. Now, are there particular points that we haven't dealt with that you'd like to reinforce or raise?

MR O'REILLY: Sir, only to make this final point to you: thank you very much for your kind comments about the nature of our submission. We've put time into it because we feel strongly about it. We feel strongly because I see it every day and my team sees it every day - the frustrations of the system that we have to operate under, the kind of head-scratching and frowning that it draws upon us day by day as we try and think about how to swim through the system. So that's why we put the effort into the submission and I can only thank you very much for the opportunity to come here and talk about it today.

PROF WOODS: Thank you. We'll be putting out a draft and we would recommend that you take close note of the draft and give us the benefit of your further thoughts.

MR O'REILLY: Thank you.

PROF WOODS: A short adjournment while we have afternoon tea break.

PROF WOODS: Our next participant is the Risknet Group. Could you please state your name, position and organisation that you are representing.

MR GILLEY: Richard Gilley, Risknet Group. I'm the managing consultant for that group.

PROF WOODS: Thank you very much. You have a presentation you wish to make to the commission.

MR GILLEY: I do indeed. It was originally based on a PowerPoint presentation. I'm sorry we don't have the technology to utilise that but I've made copies of the slides that I intend to speak to and I've put a copy of the presentation on a computer for the other participants to view.

PROF WOODS: Thank you. Would you like to take us through that submission?

MR GILLEY: I will. The first half dozen slides or so are statistical information to demonstrate a couple of points. The first one is that there is a lack of statistical data available to us in Australia to tell exactly or precisely what is happening at any particular moment in workers compensation or occupational health and safety. The first slide you'll see is a comparison of fatal injuries per 100,000 employees between Australia and a number of other countries in the world. As you can see, we don't perform particularly well. The second slide is based on New South Wales information which shows the fatal injury frequency rate, which is per million hours over the last 10 years or so. As you can see, there has been very little decline in the number of people killed at work in New South Wales. Whilst these statistics are obviously based in the jurisdiction in which I operate, I suspect that they're mirrored throughout the rest of Australia.

The next slide is the New South Wales all injury incidents rate. Now, on the face of things that looks as though a slight improvement is being made, but like all statistics they tell different stories if you drill a little bit deeper into them. You'll see that in 1996, 97 the downward trend commenced. Those were the years when hearing loss claims were regulated, such that only claims with 6 per cent hearing loss or more could be registered as a claim. So all of the smaller claims were dropped out of the system. So in effect we haven't reduced the number of injuries even though the statistic will tell you that we have all we've done is change the rules for reporting.

PROF SLOAN: So that table should really read, "All Reported Injury Incidence Rate."

MR GILLEY: Well, all injuries that fit the workers compensation reporting system in New South Wales indeed, yes. The next line is taken from some work done by the National Occupational Health and Safety committee work group. Admittedly it's a

bit dated but nothing that I've found has updated that. But it shows that the overall cost of Australia's work-related injury and disease back in 1995 was about $37 billion, according to the work group that produced this information. They're saying that the actual direct costs are in fact - or should be multiplied by at least a factor of four to reflect the forecast.

So the following slide, which is of a poor quality I'm afraid but I had to lift that off the internet - if we multiplied each of those jurisdictions by that factor of four we'd come up to $37 billion. It just shows where the majority of the costs are being sustained in 1991, 92. Now, some other work was done by the New South Wales Premier's Department in 1999 which showed the relationship between direct costs and indirect costs too, is one to three. Now, if we take either of those figures and apply them to the New South Wales current claims cost, which is the next slide - - -

PROF SLOAN: Can you just - what's in the term "indirect costs"?

MR GILLEY: Those are things like the administration of the system, the lost productivity, extra employment required to make up for injured workers not being at their place of work, you know, those sorts of other costs which aren't insurable.

PROF SLOAN: Okay, so you're talking about really the costs to the employer as opposed to - you're not talking about the indirect costs on the worker?

MR GILLEY: Not just to the employer. Not just to the employer because a number of these costs are borne by the injured workers as well.

PROF SLOAN: Yes.

MR GILLEY: So it's really more to the community, I guess.

PROF SLOAN: So the direct costs are picked up in what, the claims paid or - - -

MR GILLEY: I guess they're insured, the direct costs - - -

PROF SLOAN: Yes.

MR GILLEY: - - - so whatever the funding arrangement is for the insurance process picks those up. The next slide, as I say, just develops that theme a little bit more, taking last year's New South Wales claims' payments of 2.9 billion, multiplying them by a factor of three puts New South Wales at 8.7. If we multiply it by a factor of four it puts it to 11.6 billion. So we're not talking about chicken feed in the total costs of the workers comp and of health and safety experience in Australia.

The next couple of slides are again - I won't dwell on these. They're for information purposes only. They just show the history of New South Wales performance over a number of years. I guess I put them there more to show you that there hasn't been any remarkable improvement. In fact, if you look at them closely, you'll see that there's been a deterioration in things like the average time lost per claim and the average cost per claim. So whilst numbers might be trending down a little bit because we changed the rules, the costs certainly aren't.

PROF SLOAN: Although the number of permanent disabilities seem to have gone through a funny pattern.

MR GILLEY: Sorry?

PROF SLOAN: If you look at the number of permanent disabilities - - -

MR GILLEY: Yes, yes.

PROF SLOAN: - - - they seem to kind of peak in 95, 96 and then kind of fall.

MR GILLEY: Well, again, permanent disability picks up hearing loss there. See, hearing loss was dropped out of the system in 96, 97, so trending down there is probably a reflection of that. It's interesting to note that the average time lost has sort of pretty much gone up every - - -

PROF SLOAN: Has gone up.

MR GILLEY: - - - single year until the last year. My final comment I'd guess I'd like to make on statistics, just to put it into perspective, is that we seem to care more about polluting the environment, price fixing in the corporate world, the random acts of terrorism which haven't occurred on our shores yet and hopefully they don't, false and misleading advertising in the community - we care more about those than we do about killing and maiming people at work - or seem to. The following slide will give you a further indication of that. The average fine in New South Wales for a breach of occupational health and safety legislation or workers comp legislation is a paltry $20,000.

PROF WOODS: Is that unsurprising though, because presumably the great number of breaches would be for minor infringements? So it depends how you're defining your average. I mean, if it was just a simple division of numbers into total you'll have a few which are very high fines representing very dangerous breaches and a very large number of fines representing minor infringements. So is that an unsurprising figure?

MR GILLEY: I suspect not. I'm not qualified to speak on this, frankly, but I

suspect that the regulator takes the view that we need to get the best bang for the buck, so to speak. So we're only going to raise prosecutions where they're going to make some sort of statement. The New South Wales jurisdiction has one of the highest strike rates in the criminal system. It's 91 per cent. So they don't raise prosecutions without a very, very good chance of it coming through and I suspect that they don't waste their time on these very minor things. They would be doing those with on-the-spot-type penalties. So I suspect that is a fair reflection of what is actually - is a fair reflection of some fairly high - let me step back - fairly significant events.

PROF SLOAN: So what's the interpretation you're placing on that table. I mean, to me, look, the average size of the prosecution has gone up dramatically.

MR GILLEY: Well, the penalties on the statute books are, in New South Wales, maximum fine for a first offence is $550,000, okay. Second offence it's 825, two years in jail. If we're going to get serious - - -

PROF WOODS: They're the maximum fines.

MR GILLEY: Sorry?

PROF WOODS: They're the maximum fines.

MR GILLEY: Yes, maximum fines. If we're going to be serious about this, as we are in those other things that I mentioned, like polluting the environment, surely the sanction should represent that. Of course, they don't. In fact, New South Wales has the highest penalties on the statutes, compared to the other jurisdictions. Jurisdictions of Queensland, South Australia are very, very low, comparatively.

PROF SLOAN: It looks as though they have been more aggressively targeting sort of bigger cases.

MR GILLEY: We're moving up. We're moving up, I would hope, yes.

PROF SLOAN: Mind you, that begs the issue of what this - that sort of thing does. I mean, because none of your other figures are supporting any improvement, so - - -

MR GILLEY: I suspect because that it's not seen as a big issue. You know, if you severely hurt somebody at work it's a slap on the wrist, "Naughty boy, don't do it again" - that sort of sanction. The next slide I think is important to your considerations going forward because I'm sure you're going to be presented with a large number of people saying, "Compliance across various jurisdictions is a significant burden." I'm not going to dispute that. I'm just, again, trying to put this in perspective.

The next slide shows the distribution of, I guess, employer size in premium terms across New South Wales, its date of scheme - I've dated taken over a seven year term. As you can see, the vast majority, vast majority of employers in New South Wales are small to medium enterprise. In fact, very small to medium. There are a very small number of large corporations for New South Wales. Now, this table represents a third of the employers in Australia. So I suspect what you're seeing here is mirrored across every other jurisdiction.

So some of the conclusions that may be drawn from other people giving evidence are going to be very personal in the way they see things. From a scheme-wide perspective the vast majority of compliance and other burdens that are placed upon us are borne by the small employer in jurisdiction by jurisdiction. Perhaps we can sort of keep in mind this slide as we go through the rest of my presentation. What I've sought to do is try and follow the issues paper that you've put out and make a few comments on a number of those issues. On national self-insurance I suspect the very - - -

PROF WOODS: Sorry, can I just go back to that slide?

MR GILLEY: Yes.

PROF WOODS: We seem to have some cross-subsidisation, if I read that table correctly - - -

MR GILLEY: Yes.

PROF WOODS: - - - that the largest employers, although they're paying 19.78 per cent of premiums, are only responsible for 17.61 per cent of claims costs - - -

MR GILLEY: That's correct.

PROF WOODS: - - - whereas at the small end small businesses are paying 26.3 per cent of premiums but are incurring 31.64 per cent of claims costs.

MR GILLEY: Yes, there is a significant degree of cross-subsidisation there. The other thing that you perhaps need - if I can draw your attention to it - is the average claim size.

PROF WOODS: Yes.

MR GILLEY: You'll notice that - I don't think you can get any stronger evidence that SME's can - well have a great deal of difficulty in managing the claims

effectively whereas large corporations do, and much of our attention is directed in that sector in the same way that we direct that attention into the larger sector and that's why we have some political success. I'll talk a bit about that as I go through to the rehabilitation return to work.

PROF SLOAN: Well, it might be worth - yes, holding that thought and going back to that. I mean, it seems to me there are some legitimate reasons why they're no good at it, because they don't have the experience, they can't offer graduated return to work and things like that.

MR GILLEY: No, exactly. But that's what we're trying to impose on them as part of the system.

PROF SLOAN: Yes, it's a bit one size fits all or something.

MR GILLEY: See, the - I think statistically the claims frequency for a small to medium enterprise is one claim every 17 man years. So of course they never gain any skills.

PROF SLOAN: But that table also tells you why the larger ones have an incentive to try and get out through self-insurance, doesn't it, because there's nothing much in it for them to subsidise the smaller ones.

MR GILLEY: No, but that's because of the way the premium system has been derived. One of the things that I'd like to see is a more equitable premium system where we have differential rating so there's a differential system for large and smaller employers to take those sorts of aberrations into account.

National self-insurance. I suspect that very, very few employers are actually eligible for a national self-insurance scheme but I do believe that it should be permitted and I think Comcare is probably the ideal instrument to allow that. I suspect that because the minister can direct the Safety Rehabilitation and Compensation Commission into inviting organisations to apply for a licence, it wouldn't be legally difficult to allow Comcare to be the insurer or national self-insurance system. I could be wrong there, but I suspect it wouldn't be that difficult. Of course, national self-insurers would then have to be prepared to pay the Commonwealth benefits, which are probably the best available. However, if they do the job well, it shouldn't really matter to them. But that's another issue which I'll talk to you in a few moments. These anomalies in the various jurisdictions are obscene, quite frankly.

PROF SLOAN: Your point that very few employers are eligible, would that be because there are actually relatively few national employers?

MR GILLEY: Yes, relatively speaking.

PROF SLOAN: Or is it that also they're not going to be able to meet prudential requirements?

MR GILLEY: Well, the prudential requirements that I'm suggesting here would stop them, stop very large - other than the very large and very committed ones from doing it.

PROF SLOAN: Yes.

MR GILLEY: The reason I believe that they should be meeting APRA licensing requirements is that we've had a number of failures and the community has had to pick them up. Occupational health and safety model - again, I don't have a lot of experience in other jurisdictions but what little I do have shows that the general obligations on first persons, places of work, are reasonably consistent across all jurisdictions. Most jurisdictions have now moved to this duty of care concept. There's also regulatory consistency in a number of high-hazard areas such as manual handling, hazardous substances regulations, noise, those sorts of things. There appears though to be a relatively high degree of inconsistency in relation to the use of the plant and equipment, and certainly in relation to penalties which are applied, referred to earlier.

Now, in this I'd just like to state that I do not believe there is sufficient sharing of responsibility for health and safety at work between employers and employees. I think the onus is placed too heavily on employers. There's none of the "own your own life" concept for employees in occupational health and safety. The maximum fine in New South Wales, for example, is about $3300, for a significant breach of occ health and safety legislation.

DR JOHNS: By an employee?

MR GILLEY: By an employee.

DR JOHNS: Has anyone ever been fined?

MR GILLEY: Yes, they have been fined, but mostly the regulator uses the on-the-spot type fines, rather than the court process, to deal with employee breaches. I believe that needs to be strengthened - and again, consistent - - -

PROF SLOAN: I mean, part of the trouble is that all these systems have kind of curious underlying concepts, and in many ways the workers compensation system is based on the notion of strict liabilities. So it's all the fault of the employer in respect of what has happened.

MR GILLEY: I think we need to move away from that, because if - - -

PROF SLOAN: I'm not denying it, but I'm telling you that they're a kind of - - -

MR GILLEY: So that was based on work that was done in 1974, for goodness sake, by Robens in the UK. You know, we've moved on a quarter of a century and it's time to update these concepts.

PROF SLOAN: We'd hope so.

MR GILLEY: So some national standards for newly recognised risks are required, I suspect - psychological injury, violence at work, fatigue management, working in domestic premises. Now, that's a big one. I'm not just talking about people working at home; I'm talking about people actually going into work in domestic premises, such as tradesmen. Now, at the moment it's very, very difficult to legislate for a safe place of work for self-employed persons, particularly when they're working in domestic premises. But it's something that needs to be addressed, in my view. Again, as I say, national standards for applying sanctions really are needed.

Also, standards for training are required. The pieces I'm quoting here - 30 per cent of employers are unaware of their legal responsibility. I think this was done by PWC a year or so ago. Training in safe work practices are only given to 54 per cent of new employees, and only 40 per cent of supervisors in places of work have any formal occ health and safety training. Well, no wonder we're getting it wrong all the time we've got no standards, national standards for that. Otherwise, my view is that the individual jurisdictions sort out their own problems.

Reducing the regulatory burden and it confines costs - bit of a furphy, in my view. 95 per cent of employers are small to medium enterprises and operate in a single jurisdiction. So the cross-jurisdictional issue will be obviously experienced by some very, very large employees, but they're small bickies in the overall scheme of things.

PROF WOODS: Not for them, no.

MR GILLEY: Indeed, not for them, but - - -

PROF SLOAN: And they do account for more than 5 per cent of employment.

MR GILLEY: I suspect they do, but - - -

PROF SLOAN: They do.

MR GILLEY: - - - what exactly is it that they do stand for in terms of

employment?

PROF SLOAN: Yes. I mean, it becomes a bit complicated too, because - - -

MR GILLEY: Jurisdiction by jurisdiction, you can't - - -

PROF SLOAN: You know, you've got all those franchise businesses. I mean, do you count them as stand-alone, because, you know, obviously a franchise business only operates between one jurisdiction? In fact, what a franchise business could offer is some corporate centralisation of occupational health and safety and workers compensation, except there is no national system.

MR GILLEY: Did you hear the news yesterday?

PROF SLOAN: I'm always hearing the news, but, yes.

MR GILLEY: McDonalds, $70,000, franchise system - - -

PROF SLOAN: Yes.

MR GILLEY: Look up on the WorkCover web site, see how many prosecutions have been recently lodged against McDonalds. I suspect that the jurisdiction should be left to look after its own, in those cases, those franchise cases. It's only the very large corporations like the previous people who gave evidence who should be really worried about the regulatory burden.

PROF SLOAN: All I'm saying is that I think you need to drill down. I think that to say 95 per cent of employers are only essentially dealing with one jurisdiction might understate the costs defined in other ways.

MR GILLEY: I believe the definition in excess and coverage - definition of "worker" should be aligned with occupational health and safety requirements; in other words, all people at places of work, that includes visitors. I don't see why my child going into a garage to help me pick up my car shouldn't be protected in the same way that I am at that place of work, just because she's not a worker. Now, she wouldn't get obviously weekly benefits if she were injured, unless she was working, in which case it would be a different situation. She should certainly be able to get things like medical costs through the workers comp system.

PROF SLOAN: But wouldn't that be covered by public liability? I mean, isn't that - - -

MR GILLEY: Sorry?

PROF SLOAN: That's covered by - - -

MR GILLEY: Yes, but I've then got to go and prove my case. I then have to go and show negligence, that somebody was at fault, whereas workers comp systems in Australia are no-fault schemes. It happened at the place of work. The place of work is regulated in occupational health and safety terms for everybody being there, so it should be workers compensation. Workers comp benefits should follow.

PROF SLOAN: But then if your child comes and visits my house and slips over, they're not covered by anything - - -

MR GILLEY: No, they're not in a place of work.

PROF SLOAN: - - - and, I mean, what's the equity of that? But why? Why would you want to make any distinction?

MR GILLEY: Then why do we impose occupational health and safety requirements at places of work on employers for visitors and children? It's inconsistent. If we're going to have this national approach, we should try and gain consistency across it, so instead of having one system telling you one thing and another system telling you the other, particularly when they're so closely aligned - - -

PROF SLOAN: So when I take the 15-year-old work experience student on, they should be covered by it?

MR GILLEY: Yes, indeed. Scope of cover needs to be consistent across all jurisdictions; I think everybody recognises that.

PROF WOODS: How do you define "consistent"? Are you saying "the same" or are you saying consistent in the sense of within an agreed set of parameters?

MR GILLEY: I'd like to see the same. I'd like to see the same.

PROF WOODS: What would be the incentive son jurisdictions to actually sit down and achieve that?

MR GILLEY: I'm not sure that you can answer that question, to be quite honest with you. I think you've got to look at what we as a community want to achieve for the time. In a couple of slides - I'm not sure if it's the next one - the next couple of slides are an illustration of just how frankly obscene it is that we value life greater in New South Wales that we do in the Commonwealth jurisdiction of Tasmania. I'll show you that in a moment. So I think it should be the same, and silly little things like are we covered for journey injuries or not. Well, my view is that you shouldn't be. But, you know, these are inconsistencies across jurisdictions. It should be

realigned.

The other thing that I think some simple thought needs to be given to is what is an injury. Our injury definition really started in 1910 and has been developed since then over a number of years, and it's now so broad to encompass just about everything, and what we're seeing more and more of nowadays is injuries which are lifestyle-related. Now, is it the intention of a workers compensation system to pick those injuries up, or should it be a much broader scheme that does that? We're seeing more of the injuries like, "I was walking up the stairs and my knee went." Now, that's got - no employer can possibly prevent that sort of thing happening without doing daily pre-placement medicals or something. It's just silly that we are incorporating those sorts of injuries, because they happened at work, in the workers compensation schemes. So perhaps we need to redefine what an injury really is for workers compensation purposes, and some of these lifestyle-related things really should be perhaps precluded.

PROF SLOAN: So does that also then apply for disease? I mean, that seems to be even more problematic that injury.

MR GILLEY: Yes. It's going to be problematic, I know, but over time I think we should be moving towards that. We should recognise somebody who is grossly obese and has hairlines fractures in their lower limbs because of their extra weight isn't going to recover as quickly as somebody who has taken care of their fitness.

PROF SLOAN: Tricky.

MR GILLEY: Access and coverage - again, this sharing of responsibility doesn't happen in workers compensation. I believe it should. I believe there should be a deductible applied to - like every other insurable concept, there is a deductable. Why should workers comp be different? So the small injuries would probably be picked up by sick pay. Small, minor complaints shouldn't be part of the system. There should be a sharing there between the employer and the employees. Only apply to cases at work - that means it cuts out the journey injuries. OH and S arrangements - - -

PROF WOODS: Is that on the grounds of control of the environment?

MR GILLEY: Indeed. Indeed.

PROF WOODS: Thank you.

MR GILLEY: OH and S arrangements don't deliver safe workplaces for self-employed, except in some construction products, has been my experience, hence my comments about national standards for domestic workplaces, and that doesn't

include working at home. It includes people going to work in somebody else's home, and maybe we can get some sort of system, a sort of a check list being mandated before people start work. Now, you're talking about consistency. If we look at the benefits structure - again, this is a bit dated, in July 2000 - the value of a life. Well, if you're in Cameron Corner, for example, you'd be silly if you fell in the Queensland jurisdiction or the South Australia jurisdiction. You'd want to fall into the New South Wales jurisdiction if you were killed. Now, that's just crazy stuff. It really is. It's obscene that, you know - anyway, I won't make any more comments on that.

PROF SLOAN: We do tolerate that in a lot of other aspects of life.

MR GILLEY: I know, but we're talking about human lives here.

PROF SLOAN: You look at public liability claims. They vary dramatically across the states.

MR GILLEY: Yes. Yes. Benefit structure - I believe any workers comp scheme, whether it's national or state-based, should be a pension-based scheme, with controlled access to commutation.

PROF WOODS: Do you see, however, there being a role for commutation for long-term, low-level payments to wrap them up, pay them out and - - -

MR GILLEY: Yes, that's what I mean, but controlled access, not open slather.

PROF WOODS: No.

MR GILLEY: No.

PROF WOODS: But there is a role - - -

MR GILLEY: Yes, most definitely.

PROF WOODS: - - - to move the life and the relationship on.

MR GILLEY: Most definitely. I don't believe common law should be allowed. It doesn't act as a deterrent.

PROF WOODS: Is that based on evidence?

MR GILLEY: Sorry?

PROF WOODS: What evidence do you draw for that bracketed conclusion?

MR GILLEY: Common law claims are picked up in the workers compensation schemes like any other claim. They're not - just because you're getting a million dollar claim against you doesn't mean that your premium is going to alter significantly, particularly in New South Wales jurisdiction - all of these things are capped. There's a large claim limit. Even where you've got privately underwritten schemes common law claims may act as a deterrent in a couple of years but they soon drop out because of the competitive nature of the scheme. In other words, if you don't like what one insurer is telling you you go to another one and get a cheaper premium. So they don't act as a deterrent.

PROF WOODS: But that's only one of the reasons put forward in support of common law, others being the right of a day in court, the opportunity to demonstrate negligence of another party other than yourself, a whole range of different reasons.

MR GILLEY: Yes, indeed, but if we're talking about an equitable scheme, just because you can demonstrate negligence that means you get a bigger reward - whereas the fellow next to you who can't demonstrate negligence gets treated differently?

DR JOHNS: That's the definition of equity, the lawyers would say. I wouldn't debate it. I'm just saying they're very different - - -

MR GILLEY: No.

DR JOHNS: - - -definitions.

PROF SLOAN: Well, it's also how a system based on, sort of, the law of torts sits rather uneasily with a system that's actually based on strict liability, you know, so it is a bit mixing oil and water, isn't it?

MR GILLEY: Some of the schemes that have been common over a number of years, making up pay, I don't believe should be allowed. I think they should be abolished. I know that there's a lot of people - - -

PROF SLOAN: You'll be popular with Trades Hall.

MR GILLEY: Yes, I know a lot of people disagree with me, but they defeat the - a number of the other incentives that are built into schemes.

PROF SLOAN: Yes, the incentive - the step down.

MR GILLEY: Yes.

PROF SLOAN: I don't know what you can do about it. I mean, is that not the right

of unions to negotiate on behalf of their employees?

MR GILLEY: Indeed it's the right. I can't deny that. But I'm just saying my view is that they should not be permitted.

PROF SLOAN: On the face of it, it looks as though it's become quite popular through enterprise bargaining.

MR GILLEY: Yes.

DR JOHNS: Unless you have something on the insurance side which says unless otherwise made up or something.

PROF SLOAN: I mean, they were always common in mining and construction and parts of manufacturing, the heavily unionised areas, but I think that it's become quite a common topic for enterprise bargaining more generally.

DR JOHNS: Early intervention, rehabilitation and return to work - proving the law of diminishing returns.

PROF WOODS: Yes - what is that?

PROF SLOAN: We believe in the law of diminishing returns.

MR GILLEY: See, if you look at the next slide - - -

PROF WOODS: Okay, okay.

PROF SLOAN: Okay.

PROF WOODS: We're a bit quick.

MR GILLEY: Workers comp claims, you see numbers trending down and I've explained to you why I believe that. You see costs trending up. Then look at rehabilitation payments over a decade, the following slide.

PROF SLOAN: Are they to the rehab providers?

MR GILLEY: Yes.

PROF SLOAN: Yes, okay.

PROF WOODS: Is that indexed?

PROF SLOAN: So what is the answer? Can you tell me the answer to this conundrum?

MR GILLEY: Let me bolt through this slide, yes.

PROF SLOAN: Okay.

MR GILLEY: Well, maybe I can - - -

PROF WOODS: Sorry, is that just nominal dollars?

MR GILLEY: Yes, yes.

PROF SLOAN: Obviously a good industry to be in.

MR GILLEY: Then you'll look at return to work performance. I've already showed you that slide where you see the average time lost has been increasing. You look then at the New South Wales claims finalisation rate. Bear in mind that we're talking there of all open claims at any one particular period in time. It gives you a feel, though, that we still have 22.7 per cent of workers comp claims in the New South Wales jurisdiction open after 12 months. So all of the money that we're investing in rehabilitation isn't having the dramatic impact that it ought to be having. I guess that's what it's telling you.

A couple of hurdles, the following slide. Late reporting of injuries is a very major hurdle and I suspect that the way to overcome that is to introduce some form of punitive sanction on an employer if it is their fault that the injury is reported late to the insurer or whoever the agency is for managing the claims. The same applies to an injured worker who doesn't report the claim on time. It's a cultural change that's needed there.

PROF WOODS: With some allowance for degenerative - - -

MR GILLEY: Of course, of course. I'm being fairly general here, as you could probably gather.

DR JOHNS: What are some of the reasons for a late reporting of a kind?

MR GILLEY: Employers just don't bother. They shove it in the bottom drawer and then forget about it.

DR JOHNS: What about the worker - - -

PROF SLOAN: Or do they have that they won't have to report?

MR GILLEY: Sorry?

PROF SLOAN: I mean, there clearly must be some non-reporting.

MR GILLEY: No, no, they've actually got - I've seen them with claim forms in the drawers, just - - -

PROF SLOAN: So just hopeless.

MR GILLEY: Yes, hopeless. Same with the employees. "Oh, I didn't bother." You know, laissez-faire. So I suspect that you need to introduce or would need to look at introducing sanctions to improve the late reporting rates. I also think that the hierarchy of rehabilitation goals which has been forced down our throats over the last decade or so needs to be re-looked at and needs to be a lot more flexible so that we're not constantly trying to get people back to work same job, same employer. We need to be assessing how realistic that goal is very, very early on in the peace. I'm talking within the very first eight weeks to three months of a claim's duration, assessing whether return to work, same job, same employer is realistic. Not waiting until we've tried to get them back to work for 12 months and failed. I think there's an awful lot of that going on, being pushed by the regulators through their various agencies.

We also need to remove all of the benefits anomalies which act as a disincentive. For example, if you have 10 children and you're totally incapacitated the chances are you're getting exactly the same money sitting at home looking after the kids as you would be if you were going back to work.

PROF SLOAN: You could say if I had 10 kids I'd get back to work.

MR GILLEY: What was that, I missed that?

DR JOHNS: They're saying work looks good.

PROF SLOAN: I had two and I went back to work.

MR GILLEY: So there are a number of other anomalies as well which do not maintain the incentive for getting people back to work. Dispute resolution. I'm sure you've seen this - I hope there are no lawyers here, are there? I suppose the room is full of them?

PROF SLOAN: We don't care.

MR GILLEY: Never mind. Legal fees of percentages of all payments in the New

South Wales and other jurisdictions there - that has, to some extent, been fixed in New South Wales. I'm not sure about other jurisdictions.

PROF WOODS: Because of the change to the Workers Compensation Commission?

MR GILLEY: Because the dispute resolution mechanism has been changed, yes.

PROF WOODS: Yes. Where do you think that bar will head down to?

MR GILLEY: I would like to see it heading down to around the sort of 4 to 5 per cent and even that's not good enough, because the one thing that we didn't fix in New South Wales was that - we introduced binding medical panels for permanent impairment but the really costly part of the scheme of dispute resolution is the disputes over fitness for work. We've still got a sort of a fairly adversarial approach to that now. I think if we could bring in the binding medical panels it would just put the icing on that cake.

Then a properly constituted workers com court for all other disputes, but within event-based costing on both sides, and all professionals involved in the system to be seen to be qualified so that we're not getting the high street lawyers involved in workers comp and they don't know the system. We're not getting the high street doctors involved in workers comp who don't know the system. Premium setting - - -

PROF SLOAN: Would you have a licensing system though, so, you know, like if you're going to be involved in workers compensation you'd have to have - - -

PROF WOODS: Have done your professional development or some other sort of - - -

MR GILLEY: Yes, there would have to be some sort of - whether it's done by a regular or whether it is done by the college or the professional association people belong to I don't know, but there should be some qualification before you get into - - -

PROF SLOAN: Well, I mean, there are plenty examples of that. I mean, in the accounting profession if you want to be an auditor you have to have some kind of licence.

MR GILLEY: Yes.

PROF WOODS: Architects?

PROF SLOAN: Architects are not a good example.

MR GILLEY: Moving on. Premium setting - must represent the risk whilst recognising small to medium enterprise difficulties. In other words, we can't wipe out small businesses through the premium algorithm, okay, some differential rating there.

PROF WOODS: No, but does differential mean cross-subsidisation, looking at your next point?

MR GILLEY: Within small premium pools, yes, I think you've got to accept a degree of that.

PROF WOODS: Within, as distinct from between.

MR GILLEY: Yes, with - - -

PROF SLOAN: You're going to have to have industry rating, aren't you?

MR GILLEY: You have industry rating but you - - -

PROF SLOAN: And that must involve some cross-subsidisation because it's too expensive to risk rate them al.

MR GILLEY: Within the distribution size.

PROF SLOAN: Yes. I love point 3.

MR GILLEY: Free from political interference, which is going to be extremely difficult to achieve, I guess. The setting agency should own the risk. One of the major problems we have is that none of the financial incentives in the system that I operate in in New South Wales are properly aligned. Nobody owns the risk. Insurers don't. WorkCover doesn't. The employers do, according to the minister, but I don't think the employers recognise that fact. If you don't - - -

PROF WOODS: Don't recognise it or don't want to recognise it?

MR GILLEY: They just don't recognise it.

PROF SLOAN: Employer's don't?

MR GILLEY: Some, I suspect. Is Mr Brack here? Yes.

PROF SLOAN: I think the employers do. I think the employers are terribly worried.

MR GILLEY: I think some employers are. I'm a small to medium enterprise. I don't give a monkeys, frankly, about the 3.5 billion or whatever it is that's - - -

PROF SLOAN: Aren't you? Because don't you realise that - - -

MR GILLEY: No.

PROF SLOAN: - - - that will be in near term, probably, reflected in - - -

MR GILLEY: Yes, but it's not on my balance sheet, nor it never will be. In larger companies it could be, and in fact it probably ought to be.

PROF SLOAN: That third dot point though is that if you have a state monopoly premium setting scheme how can that ever be free from political interference and premium setting.

MR GILLEY: Set up a rating bureau like we did in New South Wales.

PROF SLOAN: You don't think this constitutes a case for private underwriting? Isn't that the only way you'll ever remove the politically - - -

MR GILLEY: I'm an advocate of private underwriting, yes. Yes.

PROF SLOAN: It seemed to me that one of the experiences - not that the Western Australian experience is littered with good stories, particularly, as a matter of fact - but the premium-setting arrangement is relatively unfettered there because there's private underwriting and the government realises that parameter, they can't interfere with, otherwise the private underwriters will run away.

MR GILLEY: If governments restrain themselves to benefit structures and scheme design and let the funding of that be taken over by the private sector, one of the major issues that we're dealing with in New South Wales wouldn't be there - and that's this deficit.

PROF SLOAN: Yes, exactly.

MR GILLEY: There would be no deficit and it wouldn't be growing. You've probably seen these things before - the political interference occurred in 1991, 92, I think, firstly, when John Fahey began this concept of fixing premiums, and that's just been carried through by every other industrial relations minister since. Even now they're fixed.

PROF SLOAN: So who owns the deficit, in your opinion?

MR GILLEY: I would like to think the regulator does but they don't have that view. In fact - - -

PROF SLOAN: The deficit just sits out in the ether, does it?

MR GILLEY: If you spoke to every or to most small to medium enterprise operators and said to them, "Are you buying insurance?" they would say, "Yes," because that's what they understand workers compensation to be. If you then turn around to them and say, "Did you know that the business hasn't been run all that well and we're going to have to come back and ask you for some more money in the future," what we're doing is we're stealing from future businesses in New South Wales, for goodness sake. It's nonsense.

PROF WOODS: Mind you, some of those future businesses will be past businesses who may not have paid sufficient premium.

MR GILLEY: Indeed.

PROF WOODS: True?

MR GILLEY: Yes.

PROF WOODS: Thank you.

PROF SLOAN: But how are they expected to know that, Mike?

PROF WOODS: No, I'm not saying - - -

PROF SLOAN: How are you expected to know? How, as an HIH customer are you expected to know that they weren't charging you the right premium?

PROF WOODS: Yes, in good faith you paid the premium that you were asked to pay.

MR GILLEY: Well, again I'm not going to debate the HIH system but, you know, if other regulators had their eyes open, as they should have done, maybe it wouldn't have happened.

PROF SLOAN: But isn't part of the trouble now with New South Wales was that it looks as though it's got relatively high premium rates by - in state standards anyway.

PROF WOODS: And not a lot of room to move.

MR GILLEY: Well, if you look at - the benefit structure is a reflection in - it's an exact reflection of that, combined with the claims experience. Private insurance, you asked a question about private insurance. As I said earlier on, I'm an advocate of private insurance. Major benefit is cost shifting from out of the community to the private sector, rather than what is happening at the moment, from one jurisdiction to another. The other benefits are realised from competition and ownership of the risk. People tend to behave a lot differently when they actually own the liability than they do at the moment.

PROF WOODS: Indeed. Thank you for your time.

MR GILLEY: Right on time too. How about that.

PROF WOODS: We haven't quite finished with you. We've asked a number of questions on the way through but are there any remaining questions, Dr Johns?

DR JOHNS: Well, I really want to know who you are - what you do for a quid. Gives me a sense then - - -

MR GILLEY: Okay. I run a risk management consultancy. My clients range in size from businesses which pay $32 million in premium down to businesses which pay $10,000 in premium. They range across federal government employees, state government employers and a range of business and industries. I also give advice, occasionally, to other groups who call me in and I've been involved in workers compensation and occupational health and safety since about 1978.

PROF SLOAN: What's your discipline background?

MR GILLEY: I have a diploma in occupational health and safety.

DR JOHNS: Good, thanks.

PROF WOODS: Anything else.

PROF SLOAN: No, I thought it was very interesting. Might be able to steal some of these tables for our report.

MR GILLEY: Is it possible to release this to anybody else who would like copies of the - - -

PROF WOODS: Well, it will be part of the transcript so it will be available to the public, such as is constituted here and elsewhere.

MR GILLEY: Thank you.

PROF WOODS: Thank you for your time.

MR GILLEY: If I could call forth the next participants, Employers First. Thank you.

PROF WOODS: We welcome our next participants, Employers First. Could you please, for the record, give your names, your positions and the organisation you are representing.

MR BRACK: Garry Brack, chief executive, Employers First.

MS ALLEN: Jill Allen, manager research and policy, Employers First.

PROF WOODS: Thank you very much. Do you have an opening statement you wish to make to this inquiry?

MR BRACK: A very broad one only. To the extent that this inquiry is about the notion of some kind of national consistency or harmonisation we would support the proposition that we move to that in principle but in principle only. We don't believe it's something worth pursuing for its own sake. We think that there are a lot of details and a lot of principles that would have to be got right before you could say that harmonisation would be the appropriate way to go; that's the first point.

The second point is that when it comes to something like occupational health and safety we say that the New South Wales model is fundamentally flawed and we wouldn't go down that track, nor would we accept national consistency that revolved around adopting the New South Wales approach. The whole standard of care, the duty of care as set out in the state system, the New South Wales system, is wrong. It is different from the internationally accepted position. It is different from the common law position. It is harsher than those. We have higher penalties in New South Wales than anywhere else, twice the number of prosecutions of the UK, 42 times the number of prosecutions in Alberta, Canada, from which the minister for labour was invited to come here and talk to the Safety Summit in New South Wales last year.

So we have a very high level of experience when it comes to pursuing those kinds of enforcement arrangements, high levels of fines. A lot of resources are being diverted to try and deal with a standard of regulation which is factually impossible to deal with, an absolute duty of care subject to defences in the legislation where the defences themselves are almost useless, meaning that being able to defend a prosecution from an employer position is almost impossible: a 91 per cent success rate in prosecutions. Out of the remaining 9 per cent you could say that 5 to 6 per cent failed because of poor documentation by WorkCover or its lawyer agents, leaving perhaps 2 to 4 per cent of potentially successful defences to prosecutions.

That's not to say that we look for a system which doesn't obviously look at trying to improve safety because obviously we hold those kinds of goals fairly highly. But if it's going to work it has to be a practical system that is implementable. The figure of $10,000 mentioned by the last person in his clientele represents the top

5 per cent only of businesses. It's a very important part of the game and a useful service is provided in that quarter but we've got to recognise that the other 95 per cent are paying less than 10,000. Typically a small business will have one claim in the workers comp environment on average every five to 10 years and therefore internal expertise in those businesses is not capable of being garnered. They can't afford to have it on board.

Even if the owner trains or has a senior manager trained to try and deal with that sort of stuff, by the time they come to deal with an issue either the ground rules have changed, the law has changed, their knowledge has disappeared, it's no longer relevant, they can't afford to get the assistance on board. So for them, if we're looking down the track at what you do when you get a claim, there needs to be a system which provides assistance to them. There are some around, something like the WIM approach, Workplace Injury Management. I think you're aware of them. They've got a submission in here - that injury management-type of approach, a term we utilised from, say, the mid-1990s in New South Wales to indicate something distinct from claims processing where you're in there with early intervention, all that kind of stuff.

So we support that intensive case management model. So looking at occ health and safety you've got to shift fundamentally before you've got the ground rules right for national consistency. But for large businesses and those who operate in multiple jurisdictions there has to be some move to rationalisation because they are exhausting significant resources trying to keep up with what happens in differing states jurisdictions or alternatively the very largest businesses pick the toughest standard and try to adjust all of their state operations to the toughest standard. That again is essentially a waste of resources unless you can accept that the toughest standard is right and we don't accept that proposition.

So for those businesses there needs to be something that allows them to run a system that's uniform and one that has got the right rules around it. When it comes to workers comp there should be a system that allows them to be self-insurers across Australia on relatively uniform grounds, but again one that's affordable. You can't go too far down necessarily I think into the self-insurance market. But I think on average self-insurers do well. A lot of large businesses are self-insurers. They've got the advantage of a close relationship with their own staff. They know the people directly. They run intensive case management and they filter out those they think they can never settle. So the model obviously has advantages that can't be applied perhaps across all sizes of business unless you bring in standards of expertise that are not available to them financially. I think that will do for a start.

PROF WOODS: Thank you. Are you intending to provide a formal written submission?

MR BRACK: We are. I'm afraid time caught up with us, but we will.

PROF WOODS: We would encourage it as soon as you're able to finalise it so that we can adequately reflect on it before we complete our draft report, if you could keep that timetable in mind. occ health and safety, you mention the need for various improvements before tackling the question of national consistency. We note the good work that the National Occ Health and Safety Commission does in its tripartite environment of developing guidelines. But then they come to the individual state jurisdictions and at that point in time they're not always then unanimously adopted. They get renegotiated, amended, adjusted at the individual state level. I presume you're part of that process then at that state jurisdiction level of - - -

MR BRACK: At both levels I think it's safe to say.

PROF WOODS: At both levels in fact. How justified - and that's a subjective statement I understand, but are these various amendments at the individual jurisdiction level, given the impact they have particularly for multi-jurisdictional employers, compared to just acceptance of whatever is the guideline that comes out of the NOHSC process?

MR BRACK: I think we need to go back a step.

PROF WOODS: Please.

MR BRACK: And challenge the presumption that WorkCover is necessarily an appropriate environment in which to develop national standards and does it indeed do the good job that you might presume, because - - -

PROF WOODS: Well, not WorkCover necessarily - - -

MR BRACK: Sorry, not. I'm not satisfied that that proposition is actually correct. It is a political environment. It is dominated by WorkCover authorities and the ACTU in terms of the voting strength and it does, on significant occasions, pursue a political agenda not founded on scientific evidence. The stress debate is a significant part of that. But if you look back to critical example throughout history there was a patently political exercise over synthetic mineral fibres where the ACTU decided that in Australia we should have a standard that was twice the international standard, where the standard in the UK was at the international standard and they were thinking of halving the relevant threshold so as to make it less stringent than it then was.

The ACTU ultimately got NOHSC to a position of adopting a standard twice the international position when the rest of the world was moving away from all of that. I think there is ample evidence to say that NOHSC has its own problems. The

real question is whether you can make it work effectively but it is a political environment,

PROF WOODS: Remind me though, the employer bodies are represented on that commission?

MR BRACK: Yes, but that doesn't mean that simply because you are represented that this is anything other than a political environment. I'm not satisfied, I have to say, that you come out with the right answer simply by being represented. Otherwise I'd say that any representation in New South Wales produced the right outcome. Patently it doesn't. The real question is: what capacity do you have to actually influence the final position? There are some things that perhaps it does well but there are significant numbers of issues where it doesn't handle them well and therefore it's problematic. Let me deal with the second part of it: are the changes made appropriate?

Well, I think like political structures everywhere, in the state jurisdictions there will be another set of political structures. But again with labour governments there will be a tendency to listen to the trade union movement and pressure will be placed on WorkCover authorities to produce particular outcomes. The standard of regulation in New South Wales is appalling for the extent to which in occupational health and safety it has adopted trade union positions which are inconsistent with a reasonable and balanced view. We don't seek, I have to say, employer advantage in this area. We just seek balance and something that is implementable and practical for employers to have to comply with, not something which has an absolute standard.

So those changes at the state level, if there is any kind of balance that comes from NOHSC you can expect at the state level either whims and fancies to be negotiated because there's a political power to change the document, or for other reasons, and I have to say that when there is a different political complexion in a state jurisdiction there is a more laissez-faire approach from governments and others then and WorkCovers are allowed to run and they will frequently, even then, have a position that picks up trade union positions because of the complexion of WorkCover authorities and their own staffing.

PROF WOODS: So at what level do you consider that occ health and safety guidelines, procedures, regulations should be set, nationally or individual jurisdiction level? What would produce the guidelines?

MR BRACK: No, I don't think there's any reason not to have them set nationally, assuming for a moment you could be naive enough to believe that the political balance would be right and that we would actually be proceeding on the ground of scientific evidence and a rational approach trying to get safer workplaces. Now, what we have at the moment, which is not being played out in this room necessarily

but is a very fertile political debate that is taking place - well, perhaps it is being played out in this room as well - the ACTU wants reduced hours. They want compression of working hours. They want to adopt the EU working time directive. This jurisdiction is being used as much here as they are attempting to use it in Europe.

In Europe the reason for using occ health and safety is to try and satisfy the Germans and their flagging economy because they can't cope with the cost pressures. Here it's being used where they're trying to adopt the EU working time directive for an example and other things on stress because they have industrial agendas and in what you do I think we've got to ensure that we don't wind up with a national system that is naive about what the realities are and which does actually move to put on a pedestal the notion that we've got to be objective and try for safe workplaces, not for industrially satisfied workplaces, on either side. We don't argue for advantage to employers either on this issue even though we're an employer organisation.

PROF WOODS: What structural change would you make to the operation of setting the guidelines? I mean, presumably you would say NOHSC itself is the wrong model, that there's some other model?

MR BRACK: It's a question of who is on the relevant NOHSC committees, at the moment dominated by representatives from WorkCovers plus ACTU and then you have an ideological position. So I'd simply change the number of representatives representing the various interest groups. I'd downgrade the NOHSC. You might say that politically naive and it may well be, but if you're going to get acceptable regulation you've got to have a shift towards some kind of intellectual balance and consistency, and there is not that necessarily at the moment.

I might say when you get to something like stress - which is one of those terms used so broadly in the community - everything is stress whether it's the car that cut in front of you there or the fact that your employer gave you a bad result in your evaluation or assessment et cetera and those things are being said more and more to lead to some kind of injury, even to the extent where a South Australian judge recently says, "This stress caused that person's cancer." There's no scientific proof. For most of this stuff it's the legal system that is prepared to accept that in a contested environment in court where a judge simply has to make a decision on what's before him or her and they make the decision and then everybody says "work does cause stress which does cause disease."

As I've said to you, I think on a prior occasion, if you look at the leading research in the world on this issue or what's said to be the leading research on this issue, it's fundamentally flawed. Yet we are grappling in the workers compensation environment with the political desires of various players, whether they be in business as psychologists or in industrial relations as trade unions or in politics as politicians,

where they're seeking to have us accept that work is stressful, that it causes disease, and the way to salvation is reduced working hours and a whole lot of re-control over the workplace, without evidence, I have to say, or with evidence that's entirely challengeable. In this environment, leave aside what you're trying to do, when it gets out there back to NOHSC we've got to change that balance. That's our view.

PROF SLOAN: I mean, of course if you think of this historically there always has been that - whatever you call it - cross-contamination or cross-fertilisation between industrial relations matters and workers compensation matters. But it seems to me as the trade union movement has declined - I mean objectively it has declined - that this is an area where they're possibly focusing even more. I mean, I personally find it interesting that the trade union movement are so interested in workers compensation given that at any point in time a relatively small fraction of their membership are affected. So there are two points: they're kind of seeking a place in the sun, as the sun is setting, but also a means of trying to implement their industrial agendas.

MR BRACK: I think there are those who watch the sun setting and say, "This is the road to salvation. It's a marketing strategy. If we can reduce hours on the back of workers comp and occupational health and safety and reduce working hours and goodness knows what, then we'll actually regain the clientele we've lost in the past." You can't blame people for having a marketing strategy and a goal in mind to increase their businesses but not on the back of this issue. We should structure a system so as not to provide that opportunity, nor indeed should we provide an opportunity for business to exploit an unsafe situation for competitive advantage.

So there are issues of legitimacy in the trade union movement and there are employers, like any environment, the 80:20 rule operates, and there are employers who cut corners and will take risks with people's lives because it means a buck in their pocket. We've not advocates on their behalf but we are advocates of balance.

PROF SLOAN: I'm not making a judgment on this but you have got very strong views about how the New South Wales system of occupational health and safety policy and management has developed. I mean, it seems to me that what you're saying is that it has swung away from a system whereby the occupational health and safety within Australia's bureaucrats might have been able to provide consulting and advice to businesses to one that's now focused on fault-finding and seeking penalties.

MR BRACK: There is no doubt.

PROF SLOAN: But my question is, is that really a deterrent effect? I mean, there's still quite a small number of - I mean, it's kind of hundreds of cases that are prosecuted and penalties. I mean, arguably policing strategy is based on there being a deterrent effect. Do you think there is a deterrent effect?

MR BRACK: We've just run 27 seminars and briefings across the state, from Coffs Harbour to Cooma to Wagga - goodness knows where else. So we've talked to a lot of employers on this issue and we have painted for them a fairly clear picture of what the obligations are under the act and their exposures. We've looked at the stuff, not just here but in the UK, America and where goodness knows what, and the standards here are tougher. So many of the smaller businesses respond to that by saying, "Why the hell would you employ anybody with these kinds of exposures." You have exposures you cannot ameliorate and yet it doesn't apply anywhere else. Now, if you could say that our standards here were so much worse than everywhere else you'd say there is room and reason for having this either deterrent or hang business approach, but our standards are not worse.

We don't have a poorer performance than elsewhere, so you would have to ask on what basis can you justify - if it's merely a deterrent effect - standards which are leading these people to say, "I cannot comply." Yesterday in Newcastle, a marine engineer - they go out and they repair boats. He said, "You open up the hatch and there's the engine. The fanbelt is whirring away and the pulley wheels are there and I can't make it safer. I mean, I know there's a risk there but I cannot make it safer. You cannot encase that stuff because you need to look at it and work out how it's functioning before you can actually operate on the machine."

In New South Wales there is no fall-back position. It is absolute safety and the decision is in - the state commission here dealing with prosecution says, "Liability is absolute subject to the defences in the act," and I can analyse the defences for you but I won't take up your time, they are useless. They are designed to be useless because the courts say, "No, thank you. I see your attempt to try and rationalise but there is no ground to move."

PROF SLOAN: Well, do employers therefore just plead guilty?

MR BRACK: Absolutely. The number of successful defences of cases is down around the 2 to 4 per cent and all the professional advice that goes to people - I mean all of it - says, "Look, better think about pleading guilty early, because if you plead guilty right up-front you can get a 25 per cent discount on the penalty that might be awarded and then we mitigate like mad, meaning, rectify everything but in fact we go a thousand miles beyond that. We do everything you could ever have thought of - things that you would never have done in real life - but we've got to demonstrate to them that our concern was such." That's the strategy of defence. The reason there is that strategy of defence is because there is no defence.

PROF SLOAN: So your point is that national models are great but let's not have the New South Wales model as the national model. But that is a broader issue, isn't it? It's all very well thinking of a national model but if it's a bad national model that's possibly worse than the situation we've got now.

MR BRACK: Let me take you one step further. If you adopted the common law model it would be better than New South Wales. However, I think it is fair to say that judges did a lot of damage to the common law model, duty of negligence, in connection with those who had deep pockets in the public liability area. I mean, this is really a big issue to tackle but if in the end you have a common law model where any deep pocket will be savaged then you end up with every claim or prosecution getting up. In New South Wales it's just absurd because it's even worse than that. You've got to look at what they're doing with the common law model.

In the UK, frankly, they are more sensible than they are here in the common law duty of negligence jurisdiction, not totally sensible but, am I biased, no, of course not. So you've got to look at that until you get a rational position on that - and we haven't got it here - and then you can't actually finally bed down the model that you would choose, but I would choose that before you choose the New South Wales model. Other states in Australia largely follow that model which, by the way, even though we call it the common law model is actually generally the internationally accepted position. "Take reasonable care, identify foreseeable hazards and risks and then do what is reasonably practicable in mitigation" of all of that stuff and they interpret "reasonably practicable" more beneficially in the defendant's interests internationally than it is interpreted in Australia.

Just one little aside which I may have told you before: when I was at the ILA some years ago there was a discussion about health and safety in construction and we had massive problems with the Europeans, not with the Brits. The Brits, the Americans and us were all arguing the same thing because they were saying you had to ensure health and safety in tunnelling operations. We were saying, "You can't do that. Do you know anything about that? You can try your best and do everything in the world but you can't ensure, as our system interprets it, because that means guarantee." The Europeans were saying, "No, no, there's no problem." As it transpires in their legal system, the courts actually interpret "ensure" as meaning to do all that is reasonably practicable; in other words, a much easier test.

PROF WOODS: Dr Johns.

DR JOHNS: Yes, well, I guess it's along those lines. I get the impression that when people sit around in order to establish a new standard for the movement of goods, the handling of them and so on, there's a competition to set the best standard. Then you have to say, "Well, with respect to what?" I guess the regulator would say, "To minimise risk of injury." But I guess we tend to forget - does anyone ever sit around and say, "Well, risk at a given cost," or "risk in the light of foreseeability and practicability" and so on and so forth. What are the sort of discussions that go on at your tripartite meetings? It seems to me that they tend to be at one level. "Let's see if we can achieve the highest standard of risk minimisation," as if that was the goal.

MR BRACK: If it's a tripartite environment, the question is what power do you actually have on that body. We used to have an advisory council in New South Wales which actually had the power to tell WorkCover, "You do X." That was taken away by a subsequent iteration of government, a new minister and what have you. So now in the New South Wales Workers Compensation and Workplace Occupational Health and Safety Council, we sit there and hear reports and nod politely and look at the data and shake heads. We've actually got no power to determine outcomes, so it's tripartite discussion but not tripartite decision-making.

The WorkCover Authority here actually makes the decisions and we're the recipients of whatever wisdom they may have. But I think importantly what we look at is, "Is it capable of being implemented? Can you do it? Can you achieve all these things? If you can't achieve it then the first threshold is not met. Next question: what price safety?" Now, they're ideological positions and we have ours and the trade union movement has its, and one of its catchcries is, "What price safety?" But there are people in the trade union movement who are also realists as well.

PROF WOODS: What's your definition in that respect?

MR BRACK: What price safety?

PROF WOODS: Yes.

MR BRACK: Well, if I can give you an example. The Nippon Steel Corporation some years ago was reputed to have an injury threshold around zero - steel industry. Nobody internationally could understand how in God's name you could get to that. So everybody from around the world trooped over there - and I went over there with a bunch of people from the steel industry - and what they found was that they had completely redesigned the whole operation to remove people from any contact with the product. Contact with product essentially is what caused a lot of injuries. They had redesigned, worth billions of dollars. They achieved their outcome. Other people were saying, "The investment in that" - I mean, there are a lot of little things that they looked at and they said, "That's not a bad idea," but these were micro things.

But the total investment they said would kill them competitively. It might be desirable. So in the end you can indeed hermetically seal people away from any risk exposure and sometimes you do it at the price of the existence of the business. A lot of these people that we've talked to in these 27 things were saying, "What am I to do? Do I just take the risk, because I know that if I have to do all this stuff, I haven't got the money to do it. So it's either shut the business or take the risk, what do I do?" They say, "What are you telling us all this stuff for because we can't do it?" and I said, "I'm the messenger. We've been arguing about this issue with government and

we want some better standard."

Now, do we want poorer safety and is the difference that we're talking about - is there a difference between tough regulation and good safety or more reasonable regulation and bad safety, and I reject the proposition. Because there is no evidence that the tough safety standard theoretically in this legislation actually produces better outcomes. There is no evidence of that at all. So if you can't say that it's delivered it doesn't then become a question of what price safety at all, it becomes a question of how implementable is the outcome. In Victoria there's a crowd down there that has released a couple of papers - and this is really getting down to the nub of it, I suppose - on the operation of forklift trucks, a very mundane issue but there are some important questions about how stable they are, how fast you can drive them, how big a load, what kind of ramp angle and goodness knows what.

There's nothing like this in New South Wales, I have to tell you, but on their web site you can pick this stuff up. It's done by Monash University and it's quite readable and understandable, and it is daunting when you think of what you've actually got to look at to work out whether or not your truck on your shop floor in your warehouse can actually take that load in those circumstances.

PROF WOODS: That's why people are certified as forklift operators and all that.

MR BRACK: Well, it would be nice to think they actually knew what it was, but I suspect the answer is they don't. We've got a little example of a car wrecker's yard, a nice picture, which has got slippers on the tines of the shafts that come out there. The slippers, you know, are way, way out there like that. It's about three time as long as the original times. So they apply the magic of physics, say, "If you extend the times, you've got to increase the counter-balance at the back." Now, that's good logic. WorkCover comes in and says, "Now you've lateral instability." They say, "What? We've increased the" - so they did what they thought was the right thing but they didn't know enough.

But here's Victoria, in a practical example. Victoria also provided $200,000 to the carpet manufacturing industry several years ago to put somebody in place to examine the things that were going wrong in that industry, the occupational health and safety things. One of them was the big looms they had, and they had to lift up bolts of material or whatever it was to put on the rollers so they could be part of the process. That was done by team lifting, and manual handling. It was a dangerous operation. So they looked at that, at, you know, a hundred other things, and the nub of it is what they practically did was to identify the risk and then design a relatively low-cost, low-tech solution that the industry then started to put in place, ie small investment, better outcome. Practical solution, I think.

Of course, you've got to accept that there's a slower road. You can legislate

tomorrow and say, "Thou shalt have a perfect workplace in terms of safety," and you won't get it ever because people are daunted by the level of liability and they can't achieve the standard. Or you can adopt a more practical road to regulation by taking that kind of Victorian approach. Now, I'm not saying adopt Victoria at all but I am saying that we are not actually talking about a trade-off between enforcement, tough standards, high funds, deterrent effect and good safety on the one side, and on the other side, you know, lower penalties and poor standards of safety. You can actually achieve good standards of safety with practical examples that work on the shop floor.

DR JOHNS: We're looking at the injury statistics that were presented by the Risknet Group, which indicated between 1993 and 2000 in New South Wales, the injury statistics across fatalities and permanent disabilities and so on have not gone down. I presume you'd say across those seven years, the standards in OH and S have gone up but haven't resulted in - is that what we're saying - haven't resulted in any greater safety?

MR BRACK: I think if you look at the figures you'll find that from the late 70s and maybe earlier - we've only looked from the late 70s - the figures have been coming down across the country in all categories, with the exception of soft tissue, low back type stuff. Hearing loss went through a massive surge when it became the vogue and the opportunity for significant money on retirement - and then they introduced thresholds across the nation. Stress and things like that, those things went - - -

DR JOHNS: So the nature of the injuries claimed is changing and - - -

MR BRACK: Yes, that's right.

DR JOHNS: - - - that's holding the numbers up, I guess.

MR BRACK: And I think it's fair to say also that the numbers of people in manufacturing industry, heavy machinery, large risk - the numbers of people in that industry are declining, so that also is a partial explanation of the changing distribution of injuries. But during the period you're talking about, there was an enormous surge in hearing loss claims. If you look at back injuries, they have continued to go up, you think counter-intuitively perhaps, but they've been going up. So that's another area that would perhaps tend to have offset some of that data and explain why you might not get the fall. Has it been better occupational health and safety? I think gradually there have been improvements. Fatality figures are coming down. Now, is that just the industry redistribution? It's partially that and other things. But it's perhaps not because governments are legislating better.

DR JOHNS: But because?

MR BRACK: Well, I think change in distribution of industry is one important

factor, and the change in distribution of the nature of the claims being made.

PROF SLOAN: Also the workforce has grown quite a lot over that time, so it's essentially - - -

DR JOHNS: Yes, the figures are - - -

MR BRACK: Are you talking about absolute figures or are you talking about rates?

PROF SLOAN: These are absolute.

MR BRACK: Are absolutes, right.

PROF SLOAN: So as a percentage - but the average size of the claims has gone up.

MR BRACK: Yes, and I think we also ought to take account at the moment that there is a very strong political push to try and find other ways of pushing these figures up. So these figures - unlike most countries overseas where they get their figures by survey, here the figures are either workers compensation figures, numbers of claims, and interestingly the ABS has just done a survey to ask people, "Have you had an injury at work and did you make a claim?" and ostensibly found that there were a swag of people who didn't make a claim, and 56 per cent of that number that didn't make the claim, as I understand the figures, said, "I thought it was too small to make a claim. Oh, that's terrible." Now, why you would actually want the figures to go up, you might ask, other than for political purposes, would be an interesting thing to know. So those survey figures - and then the ACTU wants us to adopt hospital reports, doctors' reports and a whole load of other things as a source of data, so that you would actually push the figures up to show that we are deteriorating, not improving. This is for political purposes that that is happening at the moment.

PROF SLOAN: Although I think you might find that large self-insured employers, they really insist on an awful lot of data being collected, including incidents that don't lead to claims because that is part of how they manage the process.

MS ALLEN: It's not the amount of data. We're all in favour of data, but better evidence-based data, data that can be relied on and good decisions made. Our point here is that the data that is being put is not necessarily good data. For example, the Beech survey, which you may be familiar with, or hospitals' admission data, and even the coronial data. The work-relatedness of all of those sources is highly questionable, and that's an area which I think you might find worthy of exploration. Another related area is just who is covered by this data. There have been quite a few submissions which have said, "Look, there are a very large number of people who

are not employees and who aren't captured by workers compensation data," but when you look at the definition of "employee" or who is a deemed employee, there would be very few employees who are outside of the workers compensation system and certainly outside the ambit of OH and S legislation these days.

MR BRACK: I think the self-insurer stuff, if they're looking at all those things, that's laudable and I wouldn't be critical of that proposition.

PROF SLOAN: Can I talk about not so much occupational health and safety and workers compensation, but it seems to me one of the things that is interesting some employers, some of whom are self-insured at the moment, not all, but move into a different system. You know, so many of the state systems are now running significant deficits, and employers therefore are very wary about the likely cause of premiums in the future, and are therefore thinking, "There must be a way out of this." I mean, once you're - - -

MR BRACK: And therefore self-insurance is ostensibly a way out. Is that what you're saying?

PROF SLOAN: Yes.

MR BRACK: Well, I think - - -

PROF SLOAN: Well, anything to get out of the premium setting schemes.

MR BRACK: Well, they can't necessarily do that. If you seek to become a self-insurer now in New South Wales, there is a negotiation that goes on at the point of departure.

PROF SLOAN: Okay.

MR BRACK: So either they are capable of saying, "You need to pay us X to escape, or alternatively, you need to run off all your existing claims and manage those out to finality, in which case you carry your risk with you, and you try to improve from here on." The question about the deficit turns - - -

PROF WOODS: Despite the fact that you've paid the premiums that were required of you during the preceding period?

MR BRACK: Well, the presumption, I suppose, is that despite the fact that you paid premiums, there is this deficit and somebody has got to pay the thing and it sure as hell ain't going to be the government. I think that's a kind of prevailing view from all treasurers in New South Wales, or the treasurer in New South Wales. If you actually look at the historical figures, I think we were at one stage close to $2 billion

in surplus in New South Wales. John Fahey had his own political reasons, I suppose, for providing additional benefits which ate that away to virtually nothing, and then the new Labor government came in at a point where the surplus was down to almost zero, and then you had a new government which did its own bit but tried to manage that historical growing deficit. It's been beyond just about everybody. That's not to say that their system now is right, but it's still there.

So those who want to escape I think can't necessarily escape here, and indeed, we would be opposed to them escaping because it would give leave to the residual - assuming that you say that they are going to be responsible for the cost, it would leave it to them to pay. My view, I must say, is that the scheme is capable of being managed down in terms of its deficit, and we've been a strong advocate of trying to make adjustments to the scheme over time, until you get to the point where the average cost of the scheme is equal to an average revenue, and then you move slightly beyond that and get average costs below average revenue, but you maintain a subsidy. Now, the free marketeers will perhaps rail against that notion, but you use then the surplus premium to wipe out the deficit over a period of up to 10 years.

For those who say future generations pay today's cost, I say, yes. The alternative is to jack premiums through the roof now, wipe out the deficit, but pay a very heavy price in terms of what businesses have to do today in order to try and cope with a very large slug, and if I can just perhaps make a comment on the question of should we go to private insurance and will private insurance cure everything. This is not really insurance. I know we mull over the notion and we've got people out there doing massive calculations and getting paid very big fees for doing all of that work and working out rates of premium and goodness knows what, but this is really intensive case management. That's what this is about.

Insurance is the vehicle for trying to distribute the cost of running the scheme, in some kind of equitable fashion, over a range of businesses, and sure, that may be the notion of insurance, but in the end if you can't control the benefits you are providing as the insurer and you can't control the premium that you're paying out, and if somebody else is telling you what standard of service you're going to provide, then as an insurer, you're up the creek without a paddle and trying to run a business, and I'm afraid insurers, because they are loss adjusters culturally, don't do well when it comes to the question of intensive case management because it's acultural. It is not consistent with the way they function.

They're into responding to the rules, like any business. "We will pay you X for opening a file and Y for closing a file." "Okay, let's open lots of files, but we get paid less for closing them, so let's never close them." You might say that's unhelpful but that's what they're being rewarded for. Now, that's a historical example, a literal example. Now they would be rewarded for different things and they're responding differently, but not necessarily effectively, and I think WorkCover in this state, as in

perhaps all non-private insurance states, try to make rules that will produce outcomes but they don't necessarily design them particularly well and therefore you get insurers responding to those rules which doesn't necessarily aid the skills you've got to bring to intensive case management.

However, there are some insurers who are now trying to move more to a culturally attuned intensive case management strategy, and you should look at EMI as an example, which is doing that, and they're having, I think, some good results. QBE is also trying that and I'm sure all the others will jump on that wagon. But there is a case for non-insurer organisations who are skilled in intensive case management to try and move in, because those skills are sorely missing.

PROF WOODS: Prof Sloan, have you any - - -

PROF SLOAN: No, that's fine.

PROF WOODS: That seems to exhaust our questions at this point, but we do very much look forward to your submission in a timely manner.

MR BRACK: Thank you.

PROF WOODS: Are there any final points that you wish to raise today to us?

MR BRACK: No.

PROF WOODS: Well, thank you very much for the time you've made available. It's been very helpful.

MR BRACK: Thanks for inviting us here.

PROF WOODS: We now have a presentation from Pacific National and the New South Wales Self-Insurers Association. Is that correct?

MS RIEGELS: It's really from the Self-Insurers Association. I work for Pacific National but - - -

PROF WOODS: I see. Okay. No, that's fine. Thank you. If you could each give your name, position and organisation you representing for the record.

MR YOUNG: Okay. Ken Young, executive officer of the New South Wales Self-Insurers Association, and I am also a member of the New South Wales Advisory Council and state delegate on the National Council of Self-Insurers.

MS RIEGELS: Gem Riegels. I'm the chairperson of the New South Wales Self-Insurers Association. I'm the manager, workers compensation, for Pacific National and I am the secretary of the National Council of Self-Insurers.

PROF WOODS: Thank you very much. We don't have a submission as such from New South Wales Self-Insurers Association.

MS RIEGELS: No. New South Wales has provided information to the national council and the council's submission will be representing New South Wales as well.

PROF WOODS: Very good. That's an efficient way of doing things. We've also heard from various organisations who are self-insurers in their own right as well as now also through the association. Self-insurance in New South Wales - do you have an opening statement that you wish to make?

MR YOUNG: Yes, I would. As far as self-insurance goes, our association is made up of - currently we have 62 members, and a number of them, of course, are national representatives that operate in more than one state, and I guess over a period of time, one of the major bugbears for them, if they operate in every state and territory, they currently have to do eight applications and renewals of licences, eight different types of security. So there's an enormous administrative procedure that they are forced to do under the regulators, and we believe a better outcome would be, if we're heading down the track of a possible national regulator, national WorkCover - what you might wish to call it - whereby our members could ensure one licence across Australia, or if that wasn't to be the case, they would have the opportunity to apply in one state, have their licence renewed and that would be valid across Australia.

It can also be said that some of our members that operate in multiple states may not be able to obtain a licence in certain other states because they don't meet the criteria, and that generally would be the number of employees. So we would say to those organisations, they should be able to self-insure across the board. The benefits

of self-insurance are not just financial. That's the bottom line. We pride ourselves in having appropriate and as good as we can get occupational health and safety systems, claims management, where we believe we manage claims far better than insurance companies, and we also have a far better working relationship with our employees. We know our workers, we're able to return them to work in suitable duties, eventually ending up in pre-injury duties, and we have a greater care attitude towards our employees. So the benefits that flow-on from that, of course, end up being financial benefits. For the worker, it's getting those workers back to work, into some productive outcome.

PROF WOODS: Thank you very much. One of the points that you mention is the better working relationships with employees. When we were in Queensland yesterday, we had some evidence from the Queensland Council of Unions in which they expressed some opposition to the concept of self-insurance. Now, if self-insurance is reflecting itself in part in better relations with employees, one would expect that to flow through then to the attitude of the union movement on behalf of employees. So we're a little confused as to why that - now, I don't know the situation in New South Wales, because I haven't actually asked that question of TLC.

MR YOUNG: The only comment I would make on that would be the fact that self-insurance in Queensland is only new.

PROF WOODS: Yes.

MR YOUNG: It's only been up and running, I think, probably about three years, and perhaps in the change to self-insurance, the unions may not have been prepared for the cultural change away from the previous system that was in place, and taking into account to that when self-insurance was opened up there, you only had to have 200 employees to get a licence, and I think within 12 months, that was actually increased to 2000 to prevent further employers exiting the scheme and going into self-insurance. Now, I think if the unions were asked the same question in maybe three or four years' time, I'm sure their views would be considerably changed.

PROF WOODS: As we were reflecting on it, we were also thinking the newness of the scheme might be a contributing factor in that - - -

MR YOUNG: It is a big cultural change, and generally you find that unions are more than happy - if they have a commitment from the employer to look after their members, and that's proper care, medical treatment, providing them with whatever medical opportunities they need to get them back to work, quick payment of benefits so that employees are not out of pocket. I think you would find, as I found in New South Wales in particular, that the unions are very supportive of the self-insurance.

PROF WOODS: Do you find from time to time that your membership pays

benefits over and above the statutory requirements? For instance, they might top up pay to some higher level or - - -

MR YOUNG: Yes. It's one of the attributes, I guess, to self-insurance. Our main aim is to get that worker back to work, and if it means spending an extra few hundred dollars for some extra physios or medical treatment in whatever kind, then our members are happy to pay that, because the outcome is far greater. We have a human resource that we can get back to work and start productivity again, rather than have them sitting at home doing nothing, and the longer they're off doing that, the lesser hope we have of getting them back into the workforce.

PROF SLOAN: I'm interested in this idea that - well, I know this to be a fact, that there are some companies that only qualify for self-insurance in a number of the states in which they operate and not others, because there are different requirements and there are a number of requirements. I mean, what about the model whereby a company could be self-insured across the country, where they basically opt to take, say, the self-insurance arrangements in their home state, okay, and then just extend that to employees in other jurisdictions but agree to comply with the requirements of that home state? I mean, that to me seems like a workable model. It seems a bit silly that you might be self-insured in New South Wales and Victoria but because you've only got 150 employees in Queensland, you get roped into the premium setting arrangement up there.

MR YOUNG: That's right. We would like to see some consistency in that area, and it would be interesting to determine - and I guess one basis could be that you get your licence where your head office is.

PROF SLOAN: Yes.

MR YOUNG: And I think that's probably what most of our national members will seek, because if you self-insure in four or five of the states and you can't in the other two or three in which you operate, then, looking at it from the global side, you've got a group of employees getting better service, better benefits et cetera here, but the rest of your employment are getting different types of claims management, medical treatment, benefits et cetera. So from the employers' viewpoint, it's far better to have some sort of uniformity and consistency.

PROF SLOAN: You were probably here when you were talking about what sounds like a significant deterrent in New South Wales at the moment for people to seek self-insurance in the sense that they've been basically told that they have to take their tail with them. Is that an issue?

MR YOUNG: Not really. The taking of the tail has not been resolved in New South Wales. We are currently in negotiations with WorkCover, and this is as a

result of the 98 legislation whereby any employer that became a self-insurer after 1 July 98 may have two options: one, to either take over their tail, or, in the event of a levy coming in, pay the levy. Now, we started negotiations with WorkCover last year and we are still currently negotiating to resolve that issue, because one of the areas of contention was, in the legislation, the way it is currently written, if an employer changes its name, under the legislation they have to actually apply to WorkCover to take over their tail, even though they've been self-insured for 30 years. WorkCover would say, "Well, you have no tail," and in the event of a levy coming in, they would be exempt from the levy. So we've asked that that legislation be changed so that it applies only to new companies that obtain a licence on or after 1 July 98. Now, as far as the - - -

DR JOHNS: Sorry, so WorkCover are worried that a company that changes its name is seeking to avoid its responsibility?

MS RIEGELS: Probably a case in point is my own employer. Pacific National was formed in February last year following the sale of National Rail and Freight Corp. Freight Corp was a self-insurer under the New South Wales jurisdiction and always had been. However, we had to apply for a new self-insurance licence for Pacific National. Now, because we applied for that self-insurance licence after the date that this provision came into force, we are technically liable for an exit fee because we've left the scheme. However, we've never actually been in the scheme. We've been self-insured since inception. So our argument is that we should not be subject to an exit fee for something that we've never actually been in.

PROF SLOAN: And what's the outcome of that?

MS RIEGELS: There is no outcome at present. It hasn't been clarified.

PROF SLOAN: You could always pay an exit fee of nothing.

MS RIEGELS: Well, I'm quite happy to do that.

PROF SLOAN: But is this - I mean, this does sound like a complicating factor for those contemplating the move to self-insurance.

MR YOUNG: Well, for some employers, I guess - - -

PROF SLOAN: Or is it just the lesser of two evils?

MS RIEGELS: I think probably the main issue is that it hasn't actually really been set down, what the formula is for how a tail is to be calculated, what sort of fees are going to be charged across, you know, from one to the other. So at the moment, an employer who is looking at self-insurance is having to just take it on faith that at

some point in the future, they may be asked to pay an exit levy but they don't know how it's going to be calculated and they don't really know what the basis of it is going to be or when it is going to come into force.

PROF WOODS: Doesn't that sort of make the business case for deciding on that somewhat uncertain?

MS RIEGELS: It does, yes.

PROF WOODS: And is that therefore inhibiting it? I mean, have people moved - putting aside your type of example, which is a technical change, not an actual move, but have there been any moves to self-insurance in that period since 98?

MS RIEGELS: Certainly, yes. Yes, I think - - -

PROF WOODS: So they're sitting there with that somewhere on the balance sheet as a question mark?

MR YOUNG: They may. I mean, if you applied and got a licence, say, in 99 - here we are four years later. Depending how many claims you had, they could be dwindling away, and some companies would say, "Well, we paid our due premium, we paid our three-year premium when you look at the hindsight - the claims experience," and if and when they do have that option, they might say, "Look, we're more than happy to take over any tail because we believe we can manage it better," notwithstanding the fact that since that legislation came in, we have had commutations which allows a lump sum settlement to finalise a claim be withdrawn. To get a commutation these days is extremely difficult, because you have to get over a 15 per cent threshold and have gone through a number of procedures. So that would be - - -

PROF WOODS: And that applies equally to self-insurers as to premium payers.

MR YOUNG: Yes, it does, and whereas employers are in the scheme generally, once they've paid their premium for their three-year period that's the insurer's responsibility. They have the tail to manage then and some of those employees could be being managed by the insurers for 10, 20, 30 years. A self-insurer has that liability in total. So if we have someone that is injured at age 30 theoretically we could be paying them till age 65, which is another 35 years.

PROF WOODS: Which is why prudential requirements are important.

MR YOUNG: Yes.

PROF SLOAN: An issue in Victoria is that you kind of pay for the privilege of

being self-insured. This is not anything to do with the tail. It's just that, you know, it's kind of an ongoing opt-out fee, I'd say.

MS RIEGELS: Are you talking about contribution levies to WorkCover?

PROF WOODS: Yes.

MS RIEGELS: Yes, we pay levies to WorkCover as well.

PROF SLOAN: It seems to cause a bit of angst because what are you paying for?

PROF WOODS: Is there a transparency in what services you're getting for a self-insurance licence fee?

MS RIEGELS: There's not a lot of clarity on how it's calculated. I believe it's something like 4.3 per cent of your tariff rate. So we, for example, have a tariff rate of 8.8 per cent so 8.8 per cent of payroll times 4.3 per cent, that's pretty much what our levy is. What that actually goes to is not detailed at all on the invoice. I believe it was years ago but it certainly isn't at the moment and we don't really know where it goes. I believe it goes to the health and safety area, contributes to audits, because WorkCover audit us every three years.

MR YOUNG: Yes, licensing, administration. Probably one of the biggest areas that part of the levy goes to would be the inspectoral division because, as Gem says, WorkCover continually are doing OH and S audits on self-insurers.

PROF WOODS: Yes. Even though you're a self-insurer you're still subject to the occ health and safety laws of - - -

MS RIEGELS: Yes.

MR YOUNG: I mean, self-insurers are happy to meet their obligations under the act as far as OH and S goes. But we strongly object to an OH and S audit being linked to us retaining a licence because we believe a self-insurer's licence surely should be based on claims management and the ability of the employer to manage claims and have that financial back-up. We don't think having an OH and S audit attached to whether you get a licence or not is relevant.

PROF SLOAN: Do you think there's then any truth - and you may not have a view on this, I don't know why you would actually - to the kind of fear that if you allowed open slather in terms of self-insurance then the premium setting schemes will be imperilled? So if you allow too high a proportion of employees to become self-insured - - -

MR YOUNG: I think there's two things there. Self-insurance is not for all employers. There's a level where if you did an assessment of whether it would be financially viable to do it, it wouldn't be. So you wouldn't venture down that track. For other businesses a lot of employers believe, "We're not in the insurance game. We're here to put goods on shelves." Then you're left with other employers that may be curious enough to initiate discussions and see, "Well, is this an option for us? What are the benefits?" and we have people coming to us to talk about self-insurance and see whether it may be a viable option for them. But not all of them walk away saying, "Great, let's get a licence." Some go away thinking, "Well, maybe it's not the way we want to go. Maybe we're better off staying in the scheme but improving our in-house systems," because my first focus is: you've got to look at your OH and S and prevention of injuries.

If you can get that in order self-insurance may not even be an issue for you because your premiums would be down. Your claims experience drops and you might find yourself pretty much in line or even paying premiums that you never even dreamed of.

PROF SLOAN: Although if you looked at Mr Gillies' figures there does look as though there's a kind of cross-subsidisation going on in the premium setting scheme from the large to the small.

MR YOUNG: There is to some degree.

PROF SLOAN: No, it wasn't overwhelming but - - -

MR YOUNG: Yes. Eventually that will be wiped out because we'll eventually get to the true risk rate for all employers and that will be picked up partly by the grouping provisions which come into effect from July next year.

PROF WOODS: Now, it's interesting that you raised occ health and safety in that context, that you're saying that's the number 1 focus, because you didn't see a relationship between being accepted as a reasonable risk for self-insurance, that it was appropriate to examine your occ health and safety record. How do you resolve those two different perspectives?

MR YOUNG: If you've got a good OH and S record and your claims experience is low and you have the financial ability to become a self-insurer, provided you meet all the other requirements, then sure, go for it, because you may be able to achieve slightly more financial savings. You have to look at the overall picture. It's not just, "Can we operate at half a million dollars better by becoming a self-insurer?" because you do have additional costs. You've got to weigh them all up before you even think about applying for a licence. If your OH and S history is poor, your claims experience is high, then you've got a lot of work to do in adjustment before you even

think about talking about self-insurance and this is probably an area that we believe that WorkCover should be a bit more outgoing and looking at employers with poor claims history and poor OH and S records, rather than self-insurers.

PROF WOODS: But why isn't it then a consideration for them as to whether they grant a self-insurance licence to an organisation, to take into account whether their occ health and safety performance is at a good standard?

MR YOUNG: Before an employer gets a licence WorkCover does do an OH and S audit.

PROF WOODS: But I thought you were saying that that shouldn't come into the consideration, in your earlier evidence.

MR YOUNG: Yes. We're talking more about the ongoing audits rather than the initial one to see if you're okay to get a licence.

PROF WOODS: True, but you would want to monitor performance over time. It's one thing to scrub yourself up before you get your licence and then let standards slip.

MR YOUNG: Yes. We're currently in discussions with our own members about the possibility. We've also had talks with WorkCover, that we would like to see an option available to self-insurers in New South Wales whereby instead of the WorkCover inspectors putting on their audit hat and doing an OH and S audit that we have independent auditors and the self-insurer would have that option of whether they would like to continue with a WorkCover inspector or go to an approved company on, say, a panel approved by WorkCover to do an independent audit of which the results could then go to WorkCover, who would then peruse those results and make a determination, "Yes, this is satisfactory," or maybe once every three or four years they might come in and have a look.

MS RIEGELS: Ultimately we do not dispute the benefit of OH and S audits. You know, they are of benefit to an organisation to have an audit and to see where your problems are and how you can improve. What we do dispute is the necessity of them being linked to our licences, where at present you have WorkCover coming in and doing your audit and you know that that audit is ultimately going to affect the future of your licence. Now, that's going to be a problem straight up, that if you know that poor performance is going to affect your ability to continue accessing that licence, then you may not be as free and outgoing with your information.

You may be trying to hide your problems and the whole purpose of having an audit to improve your safety performance is immediately going to be cut down. Now, as I said, we are perfectly happy to have audits and we think that they are beneficial. But having them linked to our licence is something that we are having

ongoing dialogues with WorkCover over.

DR JOHNS: I would have thought the position would be, the first audit is the price of getting into the system. Thereafter you're on your own and if you're not managing well then the costs go directly to your business.

MS RIEGELS: Well, that's right. I mean, self-insurers see every single dollar that poor health and safety costs the organisation. I mean, we see those claims. We know exactly how much poor health and safety costs us. So you would be hard-pressed to find a group of employers that are much more aware of the importance of health and safety.

PROF SLOAN: But I suppose the point that Ken is making, which is an important one, is that self-insurers do look like a very good model of occupational health and safety, claims management, exit rates and the like. But that's not surprising because there's a very strong self-selection. You don't go into this unless you've got a lot of these things right from the start.

MR YOUNG: That's right, yes, and I think if I could point out, I've actually collected statistics measuring self-insurers against the fund scheme since the early 90s and I have figures up to - I think it's the years 01-02 going back to 92-93. When you look at major injuries and that's workers that are off work more than five days, the average number of weeks lost in the scheme generally is between 10 and 11 weeks. Now, that has been fairly constant over the 10-year period. But when you look at the self-insurers we're around two and a half to three and a half. So we're roughly about 70 per cent better which means that we're getting people back to work. We don't let them sit out there and lose touch. We get them back into the workplace quickly and we go through all the procedures: rehab, retraining, work trials, whatever we need to get those people back, because it all affects the bottom line.

PROF WOODS: Thank you for that. Any matters that we haven't discussed that you would like to draw our attention to?

MS RIEGELS: I don't think there's really much that you would have already covered in your hearings and certainly I know that Darryl Turner, who was representing the National Council in South Australia, would have raised pretty much all of the issues.

PROF WOODS: In a most competent manner and he read well from his script.

MS RIEGELS: Indeed, I believe he would do. I mean, just to give a case example on the administrative burden that having different state schemes is costing, if I may draw on an example from my own experience with National.

PROF WOODS: Please.

MS RIEGELS: As I said, we were formed from the sale of National rather than Freightcorp, that Freightcorp was under the state scheme of self-insured. National Rail was self-insured under the Commonwealth scheme. So at present we actually run two self-insurers' licences, one for the former National Rail employees under the Commonwealth and one for the former Freightcorp employees under the state scheme. We also have insurance policies in the ACT, Victoria and South Australia for those few Freightcorp employees that we have.

PROF WOODS: Not too many in the ACT, I wouldn't have thought.

MS RIEGELS: Two. Now, as part of that when we took on the Commonwealth licence I came from the former Freightcorp. So I had never been exposed to the Commonwealth before and I had one year of a very steep learning curve trying to get my head around the Commonwealth system and basically that entire year has been completely revamping all of our policies and procedures going through the legislation for injury management for workers compensation, for OH and S, making sure that we meet the most stringent requirements of both sets of legislation.

We've had to go out and retrain 65 rehabilitation coordinators across Australia to make sure that they are aware of the requirements of the new sets of legislation that they're coming under because we have to make sure that they know both Commonwealth and New South Wales because they could look after anyone covered under the two systems. Now, obviously we're a fairly unique example. There's not many other organisations out there that have a Commonwealth self-insurer's licence and are also operating under the state schemes, but it's given me an insight into how those national organisations that have to operate self-insurer's licences across every state in Australia must be trying to cope, getting stringent requirements out of each piece of legislation.

As I said, I mean, I've basically spent my entire year working on getting the most stringent requirements for every set of legislation and putting that all together. It's a huge administrative burden because you have to monitor every piece of legislation and make sure that any time there's a change you look at your policies and procedures and make sure that they're all up to date. Certainly, there is going to be a separate submission going in from Pacific National, jointly with our parent companies Toll and Patrick and we're going to be pushing very strongly the idea of some sort of national consistency, because the administrative burden was huge.

PROF WOODS: Do you have an idea of the timing of that submission?

MS RIEGELS: I believe it's currently in draft form. We have consultants working on it.

PROF WOODS: Could it move itself along?

MS RIEGELS: It's definitely being moved along. Don't worry, I'm ringing up every couple of days asking how it's going. It will be in soon.

PROF WOODS: You can take home the urgings of the commission in this matter.

MS RIEGELS: I will.

PROF WOODS: An interesting point though. If National Rail had taken over Freight Corp you might have been able to have stayed within the self-insurer under Comcare but neither of you took over each other, you were both collectively taken over by somebody else.

MS RIEGELS: Under the Commonwealth system we are still able to maintain our access to the SRC Act while we maintain the old ABN that National Rail held. If we ever give up that ABN then we forfeit all right to access the SRC Act. Now, those employees that were under that ABN can still access the SRC Act but we can't bring the other employees under it because they're not employed by that ABN. Now, we are looking at whether we are able to bring those employees under the other ABN and come under the Commonwealth scheme, but various sale arrangements mean we can't even look at that for the next two years anyway because there are job guarantees and all sorts of fun stuff involved in there as well. But, yes, certainly we're lucky we've got a little loophole that gives us the access to the SRC Act. The SRC Act has its own drawbacks in some ways.

PROF WOODS: You will be in an excellent position to advise us - and hopefully you do in the submission - of the various merits of being a self-insurer under Comcare versus a self-insurer under the SRC Act but generically - - -

MS RIEGELS: Unfortunately, you're just that little bit too early for us because we've only been operating under both jurisdictions for a year. If you were asking for this in two years' time we'd be able to give you a very comprehensive study. But certainly - - -

PROF WOODS: First impressions would be helpful.

MS RIEGELS: First impressions.

PROF WOODS: We don't want the definitive study but just a sketch.

MS RIEGELS: Look, first impressions, there are swings and roundabouts with every set of legislation; no one legislation has got it perfectly right or has got it

perfectly wrong. The biggest issue with us under the Commonwealth scheme is that the benefits are so completely - they're incredibly generous compared to the New South Wales legislation. You're looking at 45 weeks on average earnings as compared to 26 weeks on award earnings for people who are off work.

PROF WOODS: Plus a long tail.

MS RIEGELS: Yes, plus a very long tail. Now, because we can't commute under New South Wales any more, you're looking at going on forever under both sets of legislation. But certainly the biggest concern for us is the benefits at the moment. Because we have relatively good injury management procedures and we can bring people back to work fairly quickly, we may be able to mitigate that. Obviously if you get people back quickly, then whether it's 26 or 45 weeks it's not that much impact. But certainly for those people that do stay off work for a long time that unfortunately working in the railway industry you do have some bad injuries and it is hard to find suitable duties and bring people back to work.

So there will always be those people who will be going on ongoing benefits and that is obviously one of our biggest concerns in that the financial impact of having much higher benefits under the Commonwealth scheme will affect our decision to go under the SRC Act or the New South Wales Act.

PROF WOODS: It would be interesting to work through - and no doubt you have got clever people who are doing that - as to where you sit within the provisions of the SRC Act which allows former Commonwealth authorities or competitors of former Commonwealth authorities to apply under that act. You're sort of competing against yourself because you were the former authority but only in part. But no doubt somebody is working through that little conundrum.

MS RIEGELS: I understand from the commission that there are a couple of companies that are using us as their competitor to try and get into the SRC Act, so it would be interesting to see how that comes out.

PROF SLOAN: This issue of commutation, is that quite a big issue?

MS RIEGELS: It's a very big issue, yes.

MR YOUNG: An enormous issue.

PROF SLOAN: It seems that we have a lot of support out there - employers regard the judicious use of commutation as an important way of - and it has become difficult in New South Wales.

MR YOUNG: Extremely difficult, because to get over that 15 per cent threshold is

very, very hard.

PROF SLOAN: That's an impairment test, is it?

MS RIEGELS: Whole person impairment.

MR YOUNG: I mean, once you've gone through all of the procedures of trying to get someone back and you can't, then theoretically you could stop payment to them and then it will go - the worker will go and see a solicitor, there will be a dispute, it will go to the commission, they will end up with an award. So you're back where you started.

PROF SLOAN: So some negotiated a payout.

MR YOUNG: Yes.

PROF SLOAN: An employer must, by and large, be keen to do this too.

MR YOUNG: Extremely keen.

MS RIEGELS: Definitely. One of the biggest concerns - - -

PROF SLOAN: What's the policy objection to it?

MS RIEGELS: It's the pot of gold metality.

PROF SLOAN: So people will sell themselves short?

MS RIEGELS: People having received that pot of gold and they were deliberately not coming back to work as quickly or they were taking longer to recover.

PROF SLOAN: Or people sold themselves short.

MR YOUNG: No, not really. They get legal advice. I mean, workers comp is the only type of insurance where the two bodies come together, come to an agreement and that's it. Workers comp, it seems to be different.

MS RIEGELS: But there's certainly, from my point of view, an argument for commutations purely on the basis that when someone is on workers compensation - and I've seen it several times in our own employees - they start becoming dependent on the system. They're getting all these people ringing them up. They've got this person organising their medicals, this person organising their job seeking - - -

PROF SLOAN: Hard to get on with their lives.

MS RIEGELS: They start defining themselves in terms of their illness. They have other people running their lives for them and they aren't take any responsibility for themselves any more. They can't take responsibility for themselves to a certain extent.

PROF SLOAN: We've had some injured workers speak to this inquiry and to give them their due, they've often - you know, they've been scared to go and hang out the clothes because they're worried that there will be cameras there. So they're kind of forced into putting their lives on hold too, when in fact that might be part of the rehabilitation to hang out the clothes, you know.

MR YOUNG: Yes, could be.

MS RIEGELS: There's no fun being on compensation. It's horrible for anyone concerned. I have every sympathy for people that are on long-term compensation because, frankly, I think it would be horrible. But I think for those people where realistically there is no further to go, the best thing for them is to make that break with the compensation scheme, be able to move on with their lives. Certainly the other impact with self-insurers is that for some people, certainly for stress claims, that ongoing contact with the employer can provide ongoing distress for them. For employers that are under insurance companies, that's okay, because you cease the employment and the insurance company maintains the contact.

For self-insurers, as long as that claim is going on, the nasty, bad employer that caused the problem is continuing to have contact with them and that can provide ongoing distress and I've certainly seen that in some of the stress claims that we've had to handle.

MR YOUNG: Also under the system of commutation, since 98 it was up to the insurer really to decide on looking at a particular individual claim where it might be suitable for a commutation. It wasn't as in the past the worker could actually go to their legal representative and approach the insurance company to look for a lump sum. So whilst some people say there is a lump sum mentality, I don't believe that' 100 per cent right because the insurer might look at a claim and say, "Right, this is not one that we want to commute. We believe we can do this with this worker," and of course if the worker doesn't participate down the track, going to medical treatment or work trials, retraining et cetera, then of course the benefits cease. So every claim has to be looked at individually and a proper assessment made. It's not just, "Here's a hundred claims, let's go and redeem them."

PROF SLOAN: Very interesting. Thank you.

PROF WOODS: Any other final comments?

MS RIEGELS: I think we've covered it pretty much.

PROF WOODS: That's terrific. Thank you very much for your presentation this afternoon and we look forward to seeing written submissions as well.

MR YOUNG: Thank you.

PROF WOODS: We'll take a very brief adjournment.

PROF WOODS: Our next participant is Woolworths and we have a submission from you and thank you. Could you, for the record, please state your names, positions and organisation that you are representing?

MR REID: We are Woolworths Ltd. My name is Gary Reid. I'm the general manager of business development and the executive committee member responsible for risk and safety and occupational health and safety in the organisation.

PROF WOODS: Thank you.

MS PASHEN: I'm Rhonda Pashen. I'm the risk and safety manager for northern zone of Woolworths.

PROF WOODS: Thank you.

MR DIPIETRO: I'm David DiPietro, group risk and safety manager.

PROF WOODS: Thank you very much. We have the benefit of your submission and thank you for preparing it for us. Do you have an opening statement you wish to make?

MR REID: If it's appropriate I would like to take five or 10 minutes just to go over some of the key points in the executive summary - - -

PROF WOODS: That would be helpful, thank you.

MR REID: - - - and then leave it open to questions in context.

PROF WOODS: Indeed.

MR REID: I'd just like to say Woolworths is currently a self-insured workers compensation employer in all states except the ACT, where we have an application pending. Then the opportunity for a company like Woolworths to self-insure is essential as it promotes management culture and ownership and accountability of safety and rehabilitation of injured workers. It goes without saying that preventing accidents is the first priority, but in the event that the accident hasn't been prevented well then this is primarily what our submission is about.

I would just like to summarise the view in several areas, which are covered in our executive summary and then in the text of our submission anyway, but I'd just like to cover some of the key issues. There are several areas relating to process and systems if an accident occurs that we believe require some review and some change. We heard the previous presenter talk about consistency and we're very, very conscious that a good self-insurance scheme - and in fact any insurance scheme - needs a

national consistency. I think it's more - it's not just peculiar to workers compensation. It's for all national employers wherever we're involved in a legislative process or a process where others create the basic rules and the basic go forward administration. It needs to be consistent across all jurisdiction and at present we operate in eight different occupational health and safety requirements and are subject to eight different audit tools and eight different processes for reviewing either our compliance with legislation or the ongoing maintenance of our self-insurance licenses by way of whether they're yearly, bi-yearly or tri-yearly reviews that are carried out by the various authorities.

In any go forward circumstance to us one of the primary activities that must be focused on is the environment and the climate that's created for rehabilitation. If a worker is injured the most important thing is to get them back to work as quickly as possible, either in their old duties or in modified duties that can be temporary, or, if the circumstances are such that they are unable to return to their old duties, in a prescribed plan and a process for going forward to introduce the person back into the workplace in suitable duties so that they become an active member of the workforce as quickly as possible again. The concept of being off work and not moving back towards that sort of circumstance is really an unacceptable outcome, either an employer or an employee.

Commutation was spoken about previously and I'm sure you'll ask us some questions about that, but we believe there is a case for commutation under certain circumstances. Certainly not an open slather or open book arrangement but certainly commutation is a component of the tools that are necessarily to finalise some of these issues. It needs to be well structured and it certainly needs to be at the back end of any process where return to work, alternative duties, rehabilitation and all the other alternatives have been effectively exhausted because again, it shouldn't be an alternative to return to work. If return to work is doable then it needs to occur.

Our submission makes some comments about the merits of common law payments and we basically believe that in a well-structured environment where the statutory process and the statutory regulations and a prescribed series of payments around injuries is effectively implemented, that common law is not required. We're a strong believer in the right to self-insure. There are certainly lots of hurdles, lots of balance sheet issues and lots of evaluations that need to be undertaken, both by the employer and the parties responsible for the legislation in whatever the jurisdiction is. But from Woolworths' point of view there are several - and we've detailed them, I think, on page 6 of our submission and I won't read them word for word - but there are several key components in there and a focus between management, employer and employee that quite clearly self-insurance.

Having now had experience in, say, Victoria - which I think was our first self-insurance location for in excess of five years - we see a much better environment

and operated in a much better environment today than we did. Under the concept of "pay a premium" a worker has an injury - unfortunately the management of it becomes more the insurance company's issue than it does the employer and the mentality that exists - and this is the environment we see under self-insurance and operate under. We see it's far more productive and far more focused on the human elements and getting the person back to work and minimising the costs and minimising the bureaucracy associated with that so I won't read those but they're there in the submission.

We strongly support the concept of a national self-insurance licence scheme. It clearly has to take into account both best practice of existing schemes as well as take a balanced view towards the approach that it takes to the emphasises on return to work, rehabilitation, balancing against creating long tails that are unmanageable, how commutation works and coming up with a well-struck solution that is quite likely a mixture of a number of the activities that our out there are present in various jurisdictions, as opposed to one in particular. We don't believe there is any one out there at present that is the perfect model at this point in time. There are, certainly in two or three jurisdictions, components of them which, if they were brought together, would make a better model as a national model.

PROF WOODS: And we can explore some of those.

MR REID: From the point of view of a quick summary and overview I'm quite happy to leave it there because I think - - -

PROF WOODS: Thank you.

MR REID: - - - that they cover the main headings and I'm sure that the commission will get into the detail we'd like to.

PROF WOODS: Yes, thank you very much. You do talk about the management culture of ownership and accountability as one of the features of self-insurance. Can I just clarify, you used the word consistency but, in so doing, are you meaning uniformity, ie the sameness of benefits, definitions et cetera.

MR REID: Administration order processes, systems, yes.

PROF WOODS: Yes, so not consistency in a broad sense of within a national framework. You're talking about the one application system across.

MR REID: Oneness approach, yes. Particularly with the view that it gives a oneness approach not only for the employer but the employee so that you could - an employee that's injured in South Australia gets the same opportunity or outcome as an employee that's injured in Queensland.

PROF WOODS: You seem strongly supportive of step-down structures in benefits. Is that because, through your own experience - or maybe it's a characteristic of your industry sector - that you need some further incentive if this in fact provides that for employees to return to work.

MR REID: The short answer to that is yes, but it's also indicative, I think, of the flow of a process of a potential claim going through in that that assumes that there is also the tool of commutation somewhere down the track, to resolve an inability to return to work as well. So it would be a part of a process over a number of years to get to an end outcome.

MS PASHEN: I think, if I could just comment, experience within the various states is that when you get near a step-down level there, either as the motivation or the willingness of an employee to consider options which previously were thought to be not something they wanted to think about, you will see them focus on it. You see them pick up an option and you'll see return to works just prior to those major step down - obviously the longer you go the less likely it is. But anecdotally, within our organisation, I think there's strong experience that it does have significant impact.

PROF WOODS: Is there any data, you know, a sort of time series that would demonstrate that that you know of, somewhere lurking in your administrative systems?

MS PASHEN: I think there is data we could find which would demonstrate some of it. It's not immediately to hand but we'd be happy to have a look at it.

PROF WOODS: Provided it's not sort of causing significant resource allocation, but if there was something on that point - - -

MR REID: We'd be more than happy to look and see what we can find amongst the data we've got.

PROF WOODS: Remember the QBE people were arguing the opposite - - -

PROF SLOAN: Yes, exactly.

PROF WOODS: - - - that there was an opposite effect. Did you hear the - - -

MR REID: No.

PROF WOODS: QBE people were saying that really, for someone who is quite injured and they approach the step-down period, they weren't encouraged to go back to work. They were encouraged to hang out further for a major payment, it sort of

drove them the other way. So there may be examples where you get perverse outcomes, if you like, in your terms, I guess.

MS PASHEN: I guess it's important to say up front we largely work in an industry where we don't have as much serious trauma - - -

PROF WOODS: Yes.

MS PASHEN: - - - as other industries.

PROF WOODS: I guess these are for people who really thought they were just not coming back.

MS PASHEN: Yes, and so - - -

PROF WOODS: So they went for a large payout.

MS PASHEN: We're fortunate - - -

PROF SLOAN: You're not the construction industry.

MS PASHEN: We have a lot of sprain/strain injury.

PROF WOODS: Yes.

MS PASHEN: And we have a lot of, you know, relatively minor sprain/strain injury.

PROF SLOAN: Slips injuries.

PROF WOODS: Yes.

MS PASHEN: I think that may be something that would give us a different experience to some other industry.

PROF WOODS: Yes, that differentiates.

PROF SLOAN: I'm interested - because I think your submission is very clear so it's a bit hard to know what to ask you, to tell you the truth, but one of our other participants is an academic. He's actually very big on the point that it's almost impossible to conduct effective occupational health and safety management in the context of a workforce that is largely casual and works short hours, different hours. But it seems to me that you're a nice case study. I mean, by virtue of being self-insured you've had to think a lot about occupational health and safety, but in the

context of that kind of workforce. I mean, so clearly it's not an impossible thing to do at all.

MR REID: No, clearly it's not and I might let Rhonda add after I've - - -

PROF SLOAN: Yes.

MR REID: Our workforce is about 145,000. It's roughly a third permanent, a third part-time, a third casual.

PROF WOODS: Part-time permanent?

MR REID: Part-time permanent. So stable hours. Same hours, same days, same weeks.

PROF SLOAN: Yes, but part-time.

PROF WOODS: Scheduled roster.

MR REID: You can negotiate changes but there's a system that you negotiate that with. A fairly large percentage of our casual workforce is fairly young, high school, after school or university employees and I believe that the responsiveness to the systems and the processes and what we go through is reasonably similar whether they work part-time, full-time or casual. It's about as much, as anything, the simplicity of the training, the pointedness of the approach in picking the two or three key components that people stop and listen to and then the interaction and the accountability and the responsibility to the supervision/management whichever that they work for. Because, coming back to one of the benefits that we've articulated in here is, quite simply, that there is really only two parties involved, the employer and the employee. If we're talking about the safety systems now, the prevention side, that's where it happens because that's where the productivity is created, that's where the relationships are built and in most workplaces there's a good working relationship between the supervisor and the supervised.

PROF SLOAN: Yes.

MR REID: It doesn't matter whether it's about a new cash system, a safety system, a security system or a procedure for merchandising, they are all rolled out in that relationship in that environment, so - - -

PROF SLOAN: And you're not making any distinction in your duty of care to those different types of employees, are you?

MR REID: Absolutely not, no.

PROF SLOAN: No, no, so it's not impossible to deliver good occupational health and safety training to a casualised workforce. Is it?

MR REID: We believe we're a working example of it happening.

PROF SLOAN: Yes.

PROF WOODS: What happens if a sales rep - one of those nice people who wear the visitor's badge and go and check whether the biscuits are shelf 3 or shelf 4 - if they injure themselves who is responsible there? The company that they work for or you because you've not provided a safe workplace or - - -

MS PASHEN: Well, they're not our employee.

PROF WOODS: True. But if they trip over a bucket that - - -

MS PASHEN: We're at risk in the public liability sense.

PROF WOODS: Yes.

MS PASHEN: So we still wear a cloth, so we need to have the system appropriate to look after their safety. But it's also one of the relevant components in the occupational health and safety management system we must have place as part of our self-insurance licenses. So we do have to, you know, be able to demonstrate a system to a certain level, which we do, and there is a cost impact at public liability.

PROF WOODS: So you pick them up only as public liability.

MS PASHEN: Sorry?

PROF WOODS: You pick them up not under workers comp but under public liability.

MS PASHEN: Yes, they're not employees.

MR REID: They belong to their employer's workers compensation.

MS PASHEN: I think that's just one point I'd make about the comment of the casual workforce. Our casual workforce is at least contained.

PROF WOODS: Yes, you know who they are. You pay them.

MS PASHEN: I think that's the issue sometimes when you look at workforces.

Ours are employed in large - well, not all large - but relatively large workplaces on the whole with a casual workforce. So they are somewhat easier, I guess, to have be able to train rather than a casual workforce which is widespread. So I don't know in what context the other comment came.

PROF WOODS: Yes.

PROF SLOAN: Mind you, there are sort of crossover - because the Productivity Commission was involved in public liability claims management study in - and I think Woolworths certainly - because you self-insure in public liability too - - -

MR REID: Effectively by the excess we take.

PROF SLOAN: It seems to be that there are - - -

MR REID: We have a policy with the excess.

PROF SLOAN: Exactly, yes. There are lessons that kind of swing from between those two areas like, for example, putting carpets around the fruit and veg because that's where all the slips and trips occur because it gets slimy.

MR REID: Well, in actual fact there is no difference between the safety environment grading, whether it's workers compensation or public liability. We have tens of thousands of invitees in our business every day.

PROF SLOAN: Well, let's hope so.

MR REID: We have the equivalent to the Australian population walk through our door every week.

PROF WOODS: Is this an ad? Let the records show.

PROF SLOAN: I mean, on the face of it, as I recall with public liability stuff, you have actually had to think quite a bit about it, improve your performance.

MR REID: Absolutely. We went into self-insurance on the basis of a very deep review into the pros and the cons, but ultimately as much as anything, a recognition that the only ones that could help themselves were us and we had to help ourselves, so we started moving through that process and it's very much a basis of managers accountable and responsible and it works through the organisation and we're there as much as anything to help ourselves.

PROF WOODS: That deep review, if some of that could, in whatever form you were able to reveal to us would be helpful. I mean, presumably one level would be

to say, "Well, what would be the cost to us compared to the premiums we're paying?" so that helps part of the self-selection process. But another is, "What are the administrative savings to us? What are the better outcomes that we would achieve by way of having a direct relationship with our employees, compared to having a third party become the claims manager or take over our employees in the rehabilitation process?"

MR REID: In the financial sense, are you thinking?

PROF WOODS: Well, it would have financial ramifications in terms of potentially delayed return to work, if they've got into third party hands, whereas you're talking about more immediate return to works that can be translated into wages or benefit payments or the like, so any of that that could be revealed. We do have other organisations who have done some of those calculations for us. I draw your attention to the Optus and Westpac submissions to date. If Woolworths Ltd was able to also reveal some of that figuring to us that would be helpful.

MR REID: I believe we'd be happy to do that. I presume there's a confidentiality basis we could do it on.

PROF WOODS: Well, there's two ways: if it comes through as confidential then we become aware of it but we can't draw on it to use it to justify our positions. To the extent you can make it public then we can quote it but we can also demonstrate that our reasoning is based on good, sound evidence. Other organisations have chosen to reveal quite a reasonable amount publicly and that's helpful, so take that into account. I mean, we can go both ways.

MR REID: I wonder whether we might produce the dollars on a confidential basis but the percentage relationships - - -

PROF WOODS: Well, yes, you work through what you can best do.

MR REID: We'll certainly look at that. We'll certainly come back with some - - -

PROF WOODS: The other point is that you're arguing for a single national scheme. If you were to produce some calculations on again what further benefits you would achieve - and they would be administrative largely - you'd have one set of audits, rather than eight sets of audits; you would have one set of insurance for catastrophe rather than eight sets, and all of those various savings. Again, if you could do some sums there that demonstrate the importance to you of having a single national scheme. There will be some intangibles like the question of training people across eight schemes versus one scheme.

MR REID: Or another is to transfer somebody between one jurisdiction and the

other. They have to adjust their management habits and in fact sometimes don't know they've done something that's inappropriate until it happens because it was the appropriate thing in one jurisdiction and isn't within the guidelines of the next one.

PROF WOODS: So to the extent you could track through those issues and present in effect a business case as to why the one single national - I mean, a lot of the material is covered in here but if you could tie some of that down that would be most helpful to us.

MR REID: We'll add some more support to that.

PROF WOODS: You make mention, by way of example, of diversity, the travel to work issue. Is that a significant issue for you in terms of claims payments in those states where it does apply, or is it a minor issue?

MS PASHEN: It's not that significant. It rates in the under 10 per cent category of your total payments.

PROF WOODS: Across all of those jurisdictions? We had a report that New South Wales was one that was actually reasonably high but for the others it was in the under 10.

MS PASHEN: Okay. I think it's pretty much on par in the numbers of claims between the states. Sorry, the percentage of our table where journey claims are still allowed in. I mean, I know the Queensland scheme best but, you know, the New South Wales payments for journey plans I don't think - I think they're relatively on par with the number of claims.

MR REID: The potential there is if the actual payment forms part of your claims process calculation and therefore impacts your accruals and your other balance sheet and there is an inconsistency in the one that that's dealt with as well.

PROF WOODS: Any clarification of quantum would be useful. You talk in terms of defining injury as being the major significant factor as your preferred definition. The word "the" is that deliberate or a feature of drafting? I mean, are you talking about "a" major significant factor or do you deliberately mean "the" major significant factor?

MS PASHEN: That was deliberate. That was a definition that was in existence in Queensland till about three years ago. I guess the difference in acceptance rate of injuries at that point varied by about 2 per cent. So having that definition seemed to take out about 2 per cent of the players than you would have under "a" significant factor. But it's the nature of those claims that we were dealing with which we thought - and I think we have given the example of merely walking down an aisle at

work et cetera - the major significant factor took those plans out of the workers comp scheme, was the experience - for the amount of time was left in legislation which was only about two, three years. Basically I guess on discussion, you know, our view is that query the employer liability associated with such an act.

PROF WOODS: We have quite a diversity of definitions, a significant contributing factor, a contributing factor et cetera. Interestingly you say that - and this is in broad terms - the difference between using the major contributing factor and a major contributing factor is about 2 per cent of the claims, although I take it from that you're suggesting that the value of claims might be more than 2 per cent.

MS PASHEN: Not necessarily, no. They're not necessarily large claims.

PROF WOODS: By being a self-insurer in all jurisdictions you may be able to assist us with a view on just how important the different definitions are in terms of their impact on claimed levels, because there are two issues there: one is diversity of its own nature causes difficulties for you because you have to be conscious of and apply the different rules but separately if different definitions lead to major or minor changes in claims levels, if all the diversity of definitions in fact still don't significantly impact on the value of claims, you know, if there's only a 5 per cent difference between the worst and the best definition, then we're able to more clearly focus on what's the issue at hand which would be more the diversity for its own sake issue, and the actual wordings of definitions, not so important.

But if in fact the spectrum of value of claims arising from different definitions is quite large, then the actual form of the definition itself is in itself a major issue. So any perspective on that, given you're well placed to have experienced the situation under all the various jurisdictions would be quite helpful.

MR REID: Can we take that one on board and come back with - - -

PROF WOODS: No, I'm not asking for an answer today but you are an organisation well placed to assist us in understanding - - -

MR REID: We're quite happy to come back with a commentary on it.

PROF WOODS: One other thing I have is, in looking at a national self-insurance system - and you make a plea, "Let's not pick up some of the characteristics of" - as you say - "the larger states, eg, New South Wales and/or Victoria, because they don't adequately address the objectives that Woolworths has outlined in this submission," do you have a view as to, if you were able to self-insure under any one of the various state schemes and could choose which one it would be or whether in fact self-insuring under another scheme, eg, Comcare would be even more or less desirable?

MR REID: Earlier today we asked ourselves a question - we thought we'd get this question so we had a discussion about it.

PROF WOODS: Very good, and the answer is?

MR REID: The response is that we believe that a scheme that looked like the Queensland statutory scheme with a scale of payments for defined injuries that replaced common law or adequately substituted for the need for common law activity, with commutation after specifically defined periods, where those periods have been reasonably long, is the bones of a system that we would see to be the best. So the Queensland statutory system, defined injuries payments and then quite simply a basis that a time frame, whether it be two or three years, if all the other avenues of redress for rehabilitation, return to work et cetera, then there was the opportunity to commute - mutually agreed, it shouldn't be one-sided - mutually agreed commutation.

PROF SLOAN: So I can take it from that you're unhappy with the restrictions on commutation in this state.

MR REID: Yes, and we actually wrote to the New South Wales minister a couple of times when that legislation was being considered, what, 18 months ago it would have been now, and put our position quite strongly that we believe that commutation was still had a role in the process. It certainly wasn't the lead role but had a role in finalising and allowing people to package up whatever the unfortunate circumstances were they had; draw a line in the sand and move on.

PROF WOODS: Now, the Queensland Council of Unions sort of advocated the Queensland system as being the best. Mind you other union bodies in other jurisdictions think that theirs is pretty good too. But would you expect employee support for such a move, or do you think employees, and their associations, are wedded to the particular system applying in their own jurisdiction, or do you think employees, provided they have a good relationship with the employer, would be happy to live within a scheme such as you've outlined?

MR REID: I would be of the view that the answer is yes but it needs to be adequately communicated, a reasonable explanation and consultation involved at the same time with the emphasis on what are the primary motives and the primary aims and the focus on that it's a social and a human issue as much as it's anything else, that people need to be adequately compensated for issues that occur, not over-adequately, and that the intention is always - the social intention - to get people back to work if at all possible in their old duties; if not in new duties with a rehabilitation process that gets them the quality of life and gets them on with their lives as well. So the answer is yes, but it has got to be a package, it's not simply without communication

because - - -

PROF WOODS: You can't issue a circular tomorrow that says - - -

MR REID: It's not "send an email and it's fixed".

PROF SLOAN: I would imagine that if you asked most workers what their entitlements are under workers compensation they wouldn't have a clue. I mean, it's only something that you gather information about when you need to, don't you?

MR REID: I think their representative bodies, the unions, would have fairly strong views, and in a lot of cases that's where they gain their first message from.

MS PASHEN: Yes. I think with the unions it's always a complicated issue, as you say. People tend to be wedded to their own state legislation. On the whole, the current system in Queensland, number 1, it pays reasonably from day one, it's not bad with its up-front benefits, which is important, but it does retain common law as it currently stands which is often an important issue. It can be an important issue - an issue for unions.

PROF SLOAN: Not always; some of them don't like it at all.

MS PASHEN: That's true. Certainly the unions in our state, I guess, in Queensland, have always been - but certainly you do find both sides of the equation there as you move around, I guess. I think the one thing the union in Queensland particularly does support is the platform for rehab and that it is a state where - I mean, it's ingrained in legislation that you will have qualified resources to a certain extent and that there's a fairly simple review mechanism for that, if people are happy with that approach. I think that up-front, rehabilitation certainly is something we have very good experience with the unions in the Queensland state scheme at the moment.

MR REID: It's probably worth noting that the one concern we have about Queensland is that there is some activity in common law starting to appear and that there is no threshold in the way that's established. So you can have it defined by a medical professional, a zero or 1 per cent impairment and still proceed with a common law activity.

PROF WOODS: Yes. You make mention of Queensland in your submission there to "obtaining quite significant lump sums for economic loss under common law have nought to 2 per cent impairments."

MR REID: Yes.

PROF WOODS: That covers the particular questions that we'd like to ask, although we have identified some other areas where if you could support your submission with some data - and I would urge you to the extent you can make it public then it's of the most value to us. The commission does put great emphasis on its transparency so that all people can see what material we have and therefore can judge us on the basis of the evidence put to us.

MR REID: We'll endeavour to answer them as openly and as fully as we can from a public information point of view.

PROF WOODS: Are there any other matters that we should be aware of that haven't been raised in discussion?

MR REID: No, I think we've had an adequate opportunity, thanks, and we just want to thank you for the opportunity in being able to present it.

PROF WOODS: It's been very helpful to us because you're in a very good position to assist the inquiry to understand some of these factors.

MR REID: Notwithstanding the questions that have been asked, if there's anything else the commission would like to ask us about, we're quite happy to respond.

PROF WOODS: Thank you very much. We may well take up that opportunity and we look forward to you reading our draft and responding on that basis.

MR REID: We look forward to reading it.

MS PASHEN: Sorry, can I just clarify, this data that you want for us to backup, is there a time line for that?

PROF WOODS: If it came in by the end of July that would be most helpful. Earlier is better but that would be okay.

MR REID: No, we'll achieve that time frame and better it.

PROF WOODS: Good. Are there any persons present who have not been scheduled who wish to make a statement? There being no persons in that category, I hereby adjourn it till the morning.

AT 6.09 PM THE INQUIRY WAS ADJOURNED UNTIL
WEDNESDAY, 25 JUNE 2003

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