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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO NATIONAL WORKERS COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

PROF M. WOODS, Presiding Commissioner
PROF J. SLOAN, Commissioner
DR G. JOHNS, Associate Commissioner

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON MONDAY, 8 DECEMBER 2003, AT 9.33 AM

Continued from 5/12/03 in Sydney

PROF WOODS: Welcome to the Canberra 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 in this inquiry by Dr Gary Johns and by Prof Judith Sloan.

As most of you will be aware, the commission released its interim report on 21 October. In that report we set out a proposed pathway for reform. Our terms of reference is available from our staff. Prior to preparing the interim report, the commission travelled to all states and territories, talking to a wide cross-section of people and organisations interested in workers compensation and occupational health and safety national frameworks. We also held formal hearings throughout the country.

We have received nearly 200 submissions from interested parties. I would like to express our thanks and those of the staff for the courtesy extended to us in our travels and deliberations so far, and for the thoughtful contributions that so many have made already in the course of this inquiry. These hearings represent the next stage of the inquiry, with an opportunity to submit any final submissions by Friday, 30 January. The final report is to be signed by 13 March.

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 today, I will provide an opportunity for any persons present to make an unscheduled oral presentation should they wish to do so.

I would like to welcome to the Canberra hearings our first participants from the ACT Chief Minister's Department. Could you please for the record state your names, the organisation you represent and any position you hold.

MS SHAKESPEARE: Penny Shakespeare, director, Office of Industrial Relations in the ACT Chief Minister's Department.

MR SIMMONS: Craig Simmons, senior manager, industrial relations policy, Office of Industrial Relations, the Chief Minister's Department.

PROF WOODS: Welcome. We don't have a submission from you but do you have an opening statement that you wish to make?

MS SHAKESPEARE: Yes, thanks. The ACT government will be making a written submission to the commission. However, it's still being cleared by the government so it will be submitted by 30 January next year. Today we'd like to provide a general overview of the ACT arrangements for both occupational health

and safety and workers compensation and make some comments on some of the recommendations of the interim report that are particularly of concern to the ACT government, relating to workers compensation.

In the ACT all employees are covered by ACT legislation regarding occupational health and safety. That's the Occupational Health and Safety Act 1989. So we have a common framework for OHS regulation. Regarding workers compensation, we have two schemes operating in the ACT. Private sector workers are covered under ACT legislation, the Workers Compensation Act 1951. Public sector workers are covered by Commonwealth legislation, the Comcare scheme set up by the Safety, Rehabilitation and Compensation Act. So we have got fairly complex workers compensation arrangements operating here at the moment.

The workers compensation scheme for the private sector covers roughly between 90,000 to 100,000 workers and we have probably between 16,000 and 17,000 public sector workers covered by the Comcare scheme. Both of them are fairly small then in general terms. The Chief Minister's Department, my area, is responsible for reviewing and developing legislation, but the ACT legislation is regulated by ACT WorkCover, so we have a split between regulatory and policy responsibility in the ACT government.

Our workers compensation scheme is privately underwritten. The government has little involvement in matters such as premium setting. Private sector insurers set premiums and also manage claims, so we have a fairly fully privately underwritten scheme. Do you want to make some points?

MR SIMMONS: I suppose in terms of the way the scheme operates, we're often compared with New South Wales in terms of what the premium costs are for employers. We obviously suffer because of the substantial unfunded liability in the New South Wales scheme, which we believe artificially gives a different rate in the New South Wales scheme, against a fully-funded scheme like the ACT's is. We've noticed over the last few years that insurers across all the privately underwritten schemes have been adjusting premium to move to what we believe is a full funding situation.

The information provided in the comparative performance monitoring report shows that for each of the privately underwritten schemes over the last few years, at least in one year there has been a substantial increase in premium to cover costs, so we think that our privately underwritten insurers are, if not at, very close to fully funding their liabilities in this area and have taken a much greater role in looking at what the costs are, rather than any cross-subsidisation that may have previously been believed to be existing.

In terms of the way the market is, we've got eight insurers. We now have eight private sector insurers. Four of those insurers cover between 75 and 80 per cent of the market. There are four smaller insurers that cover the bulk of what's left of about 20 per cent, and there's a couple of per cent worth of self-insureds. We have nine self-insured businesses. The bulk of those self-insured businesses are organisations like the Commonwealth Bank and New South Wales Uni operating out at ADFA - organisations like that that we've got self-insured. We only have really one large substantive ACT business that self-insures, so we have a very small amount of self-insurance. Because our pool size is relatively small, we're concerned about the amount of money that is available to make sure that premium price doesn't get out of control.

MS SHAKESPEARE: Our particular focus for the ACT private sector scheme in recent years has been amending the legislation to encourage focus on injury management. We had quite substantial changes to the legislation. That commenced operation on 1 July 2002. Obviously it's still early at this stage, but we think that the data so far shows that there have been some substantial improvements in reporting of injuries, and I suppose the rationale behind the changes was to ensure that there was early reporting to insurers who are managing the workers comp scheme for us, so that they can intervene in claims before they reach long duration. So we have been trying to bring down the costs of claims by ensuring early intervention and early injury management.

Some of the new legislative features to encourage this include: there is no reimbursement of employers' wages paid to injured employees if they don't report the injuries to the insurer, so they've got a 48-hour window after the injury occurs. If they don't report within that 48 hours, they only get that first two days reimbursed by the insurer until they report the injury. We've seen quite a substantial drop in the time taken just in the last 12 to 18 months for employers to report injuries to insurers.

MR SIMMONS: I suppose the other thing about the scheme design is that the ACT has not been what you would describe as a data-rich scheme. Prior to self-government there was no systemic collection of information about how the workers comp scheme functioned, so data which was available to us came in in pretty much a piecemeal manner up until recent years, so when we got to actually reforming the workers comp scheme here, there was a series of first principles taken about workers comp, they being: early reporting enables early intervention, and early intervention means early treatment and early treatment is early return to work.

What we then did was to look around the other jurisdictions to see what other jurisdictions were doing in those areas, and once you start at that level of detail, our view is that there is in fact a high degree of uniformity already existing in the states with the other jurisdictions. The other jurisdictions all have similar requirements for

early reporting. The efficacy of that may vary but at its core we all want the same things, which is early reporting to enable early interventions; early treatment; early return to work.

For example, our rehabilitation process is copied from the New South Wales scheme. Often we've got employers that are operating that may have workers that go temporarily into New South Wales or have operations that are shared between the ACT and New South Wales, so there is a high degree of sense in having uniformity across the border on those key issues. Whilst our benefit structures are fundamentally different because - for various reasons those benefit structures are different but, putting benefits aside, in terms of what happens to somebody there is in fact already a high degree of uniformity.

In terms of what happens, our processes are very similar. As we've become more active in reforming this area over the last few years, we've spent a lot more time with the other jurisdictions, through the heads of workers compensation authorities and through meetings that occur for the comparative performance monitoring projects; actually talking to the other jurisdictions, finding out what does work and, more importantly, what doesn't work, and then putting those elements into the mix in terms of our legislation and monitoring much more closely to see how those things change.

MS SHAKESPEARE: Back to requiring early intervention, early injury management: we also have incentives for injured employees. Once an injury has been reported to the insurer, there's a requirement - if it's going to be a significant injury, one that goes for more than seven days - a requirement for three-point contact to be initiated by the insurer. That's speaking to the employer, the injured worker and the injured worker's doctor, so they obtain information about the injury from those three sources and ensure, I suppose, that it all tees up.

After that, a personal injury plan is developed for each injured worker, and if the injured worker does not comply with the terms of the injury management plan, then their benefits can be suspended, so there are incentives for both employers to participate in the injury management process at an early stage but also incentives for the employer and injured worker to participate too. So we think that we've actually managed to develop a legislative scheme that encourages injury management, and we'd be concerned about, I suppose, parts of our scheme moving to the Commonwealth, where we don't see that same incentive, same focus on injury management.

MR SIMMONS: As we've changed - one of the elements is trying to get - it is the Workers Comp Act 1951 and it did spend a lot of time without a great deal of reform taking to it, so there were some very deep cultural expectations around here. We

had, for example - if you look at us comparatively, the recourse to the legal system happened at a much higher rate and was much more expensive than other jurisdictions - breaking down some of those cultural elements; about actually encouraging injury management and return to work.

One of the things that we've done in terms of permanent impairment injuries, for example, is that whilst they are statutorily available so they're no fault, the payments on those can't be made until either the worker has had a durable return to work, which we define as being back at work for three months or two years of injury management has elapsed. The evidence from the medical and rehabilitation industry is that if you've had somebody in active rehabilitation for two years and you haven't got them back to work, then they're not coming back, so that's the point at which they're then able to access their statutory benefit, the lump sum statutory benefit that's available for permanent impairment.

Of course there is the out, which is for catastrophically injured or if the person is near death, then the court is allowed to make an award much earlier in the process, but once again this was about saying that the money is there and there's no question about that, but it comes when you come back to work because our focus is on putting people back into the workplace. That's the scheme design, and the scheme focus is about putting people who get injured at work back to work, not into some other system where they're going to be out being medicalised or being talked to stay out of the scheme. We actually want them back to work, we want them reconnected with the workplace and we want that connection with the workplace to be maintained and not to break down, and that's what the scheme design is.

We've got much better processes put in place now to monitor the ongoing performance of the scheme and talk to the scheme participants to try and make those things happen. One of the advantages we get - and it's an advantage for some of the larger jurisdictions - is that because we are a small jurisdiction, then if we make a mistake we can correct it. It's a bit easier for us to correct because we don't have quite the mass of trying to change a New South Wales scheme, but if it works then it's also something that's useful to the other jurisdictions, and that element of competition in terms of what happens is useful to the other schemes as well. For example, the element about early reporting: the data shows it's quite a substantive change and it's a really sharp turnaround in the amount of time taken from the point of - to the point where the insurer actually can start to do something about it.

That changes really quite significantly in some of the - it's been commented on in at least one of the submissions to you earlier about that change. Now, at the comparative performance monitoring meetings, that has also come out as an issue that other jurisdictions look at and say, "Well, after a year, that has been the change." If that's sustained, then that is actually something to look at, whereas if you commit

in Victoria or New South Wales to a change of that magnitude, the commitment is massive and it's much harder to do. The risks of getting it wrong are much larger for those jurisdictions than they are for us. The smallness of our scheme enables us to try things that may not able to be tried in other jurisdictions, and we'd be worried about losing that - in the national scheme of losing that capacity as well.

PROF WOODS: Can I just clarify, though, that in promoting a national alternative we are not, for any jurisdiction, suggesting that they must of necessity themselves disappear. There is a separate concern about size of jurisdiction and what impact. We can debate that when you have finished your presentation.

MR SIMMONS: I suppose that's our real concern - that it's not going to take much for us to lose the critical mass, where we wouldn't - - -

MS SHAKESPEARE: The scheme would become unsustainable for a couple of reasons. That is our primary concern about the recommendations of the interim report. We have a small scheme. It has a small premium pool and allowing large employers to move out of the scheme would have a disproportionate impact because of the proportion of the ACT workforce. It is actually employed directly by the large employers.

MR SIMMONS: We've got 20,700-odd businesses.

MS SHAKESPEARE: And 700 of those are categorised as large employers. We generally don't have medium-sized employers; the rest of them are small and micro businesses. But those 700 out of the 20,700 employ about 50 per cent of the workforce, so it's a very large proportion of wage and salary bill and would impact quite substantially on our workers compensation premium pool. Now, if those large employers were to move out, we would either be left with a situation where we would have substantially increased administration costs because, even though we've got a privately underwritten scheme, the insurers still need to cover their administration costs through the premiums that they charge, so premiums to the remaining employers would increase substantially, and that's substantial increases to small and micro businesses.

We also think that there is a serious potential for a number of insurers who are currently operating in the ACT private scheme to just leave the scheme, because they wouldn't have the incentive to stay. A lot of them, we suspect, are here to service their national customers and, with those national customers no longer operating in the ACT, I think that there would be less incentive for them to actually operate here at all.

PROF WOODS: Do you want to finish your presentation, and then we can pick

that up?

MR SIMMONS: The last time the insurance council did some relativities for us with some data that they had, which was about 80 per cent of the scheme, for the ANZIC divisions that we look at in the ACT, 60 per cent of the four-digit codes experienced 10 claims or less over a five-year period and, in total, some 86 per cent of the codes have experienced no more than 10 claims a year on average, which is really small numbers. In terms of the cross-subsidisation, for huge chunks of our industries it's unsustainable to do anything but cross-subsidising. Certainly, within the industry, there's about five of our industries where the total employment is less than 1 per cent of the work force, so the numbers are very small in terms of trying to get an underwriting risk profile that's actually solid and is not subjected to one-off claims that can be take our averages all over the place. There is quite a deal of potential volatility in those very small - we are plagued by that issue.

PROF WOODS: Does that conclude your submission?

MS SHAKESPEARE: Yes, thanks.

PROF WOODS: Let's pick up some of these issues. I guess I should declare at the front end that I'm a member of the Canberra Business Council, so I have some understanding of it from the private sector and had some understanding previously when I was Under-Treasurer here, so I know a bit about the ACT system. The size of scheme obviously features prominently in your concerns but, interestingly, you mentioned that you had eight insurance companies, four of which accounted for 75 or 80 per cent of business. But that's a larger number of companies than operate in Tasmania as private insurers and yet you're a smaller pool, so there's no clear correlation between size of potential pool and number of companies operating. You're the smallest of the private operators, private underwriters - and then there's the Northern Territory, Tasmania and WA - and yet you have large numbers of insurers. Any comment on that? I notice you made one comment that perhaps some of the companies were here because they have national clients and, therefore, they're here. But does that account for the small ones, or for the large insurers?

MR SIMMONS: It accounts for the four small ones. In terms of scheme size, we are nearly double the size of the Northern Territory and we're within striking distance of Tasmania, where our premium pool now, exclusive of GST, sits at about 105, as opposed to about 120 in Tasmania.

PROF WOODS: But even the Northern Territory survives as a private underwriting pool, even though it's even further down the - - -

MR SIMMONS: They're down to four insurers, of which one is the state.

PROF WOODS: Well, GIO is slightly different. In effect, you have four predominant insurers, so that brings that back a little. Now, in terms of self-insurance for national companies, you're saying that will largely take out, potentially, up to 50 per cent of your employment pool that would be then available.

MS SHAKESPEARE: Potentially.

MR SIMMONS: Because we're using a definition of large business of greater than 500.

PROF WOODS: Of course, 500, under such a framework as we're proposing in the interim report, means that in the ACT, in fact, they may have only 50 or 100 employees, as long as nationally they meet the prudentials and, of course, we're not actually promoting a minimum employee number - focusing more on prudentials, occ health and safety, injury management capacity, et cetera, et cetera. They may, in fact, have small numbers here but, because nationally they meet the prudentials, those small numbers would go with them as part of national insurance. Now, the consequences of that are several, I guess: one is whether that reduces the amount of business to the extent that you don't have competition left in the ACT market. When you look at the Northern Territory, somehow they still have competition, even with much smaller numbers. Secondly, an insurance company will provide a range of products if it wants to keep its clients. It's not looking at workers comp in itself as an entity but as part of a product range to keep insuring that company in its totality.

There are specific workers comp overheads - to have claims managers and all the rest of that - but, nonetheless, insurance companies are motivated by a range of things, only one of which is the workers comp bit in itself viable. Then there's the distribution of overheads, your overheads. The question there is whether, by taking out those who self-insure nationally, what remaining overheads are left, what impact that would have on premiums or SMEs, and ME is more the ACT profile than S is - no, S is rather than M, the smalls and micros, not the mediums. So, if you could just elaborate a little on what you think would happen to premiums and why for the small and micros, if those who are eligible for national self-insurance went out, that would be helpful.

MS SHAKESPEARE: Our businesses do consider that they have to pay high workers compensation premiums already. Generally, they do make this comparison with premiums in New South Wales, and we explain to them that this is because you are paying for the true costs of injuries to your workers, as far as we can ensure that, through legislation, that is how insurers are setting their premiums.

PROF WOODS: They could take on part of New South Wales' deficit if they want.

MS SHAKESPEARE: Well, yes. Most businesses are looking at paying a 4 point something per cent premium, and businesses across the board are paying a couple of percentage points less. I think that there would, inevitably, be increases in premium costs if large employers were to leave. I suppose Craig can give you more information about the proportion of the pool that are paying, the large employers. There is some cross-subsidisation going on and, while we try to minimise that, it's clear that large employers are cross-subsidising smaller employers in the ACT.

PROF WOODS: Why is that in a privately underwritten system? If you're an insurer who wants to get a particular business's business, how can you then go along and say to them, "Well, I'm actually charging you more than your experience warrants, because I want to use some of that excess that I'm taking from you to pad up a premium that I'm charging someone else"?

MR SIMMONS: There are some assumptions about the way the market actually functions, about what is knowable in terms of - it's a small market. If I know, for example, that a business is particularly risky, if I'm an insurer and I know that a particular business has a particular risk, I can pretty well know how much I can come in under, still maintain my profit and get that business. If you, as an employer, rock up to an insurer and the insurer must quote, the insurer can over-quote you. If the insurer doesn't want your business, the insurers are quite capable of being self-selective about the business by the way they quote. So, they can price themselves deliberately out of the market.

If you're a particular type of business in town that does not have a great deal of mass in terms of the employees in it and there's only one insurer that's actually prepared to take that risk, then everybody else is going to price themselves out of the market for you, so you can get an upward pressure.

PROF WOODS: But there's surely not collusion.

MR SIMMONS: No, there's clearly not collusion, but there's an acceptance about what part of the market I want to be in.

MS SHAKESPEARE: We do also have some statutory powers for the minister to seek information from insurers who provide quotes that don't seem consistent with the premium-setting principles under the legislation, too.

PROF WOODS: Do you exercise that?

MR SIMMONS: The powers have been in existence now for 18 months and, on the anniversary of the scheme, the minister exercised the power for the first time.

PROF WOODS: Who is the minister?

MS SHAKESPEARE: The Minister for Industrial Relations, Katy Gallagher.

PROF WOODS: The power was used to inquire but not to interfere with the premium.

MS SHAKESPEARE: That's right.

MR SIMMONS: That's correct.

PROF WOODS: Prior to that, was there ever a power for government to intervene in the premium-setting process?

MR SIMMONS: There is a general power that the minister can set a maximum rate in a determined category. That power has been exercised only once and was exercised at the will of the assembly, not at the will of the minister. In the previous government, there were some issues around the premium that was being requested of group training companies for apprentices in the construction industry, and the majority of the assembly passed a motion that the minister of the day was to declare a maximum rate for that industry for a period of two years, which the minister duly did. That's the only time in its 50-odd year history that that particular power has ever been exercised, that we're aware of.

DR JOHNS: Thanks.

PROF WOODS: Is it an option for the ACT to look at other jurisdictions and say, "Well, let's go in partnership with jurisdiction X" - and given the liability of sitting in New South Wales, probably not - X equals NSW, but X could equal SA or Tasmania or something else, or Queensland, because they're not privately underwritten - but to say, "Let's collectively agree on a set of workers comp principles, processes and have insurers being able to operate competitively across two, three, potentially four jurisdictions."

MS SHAKESPEARE: I think the ACT government definitely supports greater consistency and national arrangements for workers compensation and that would include national insurance. However, we would say that that needs to be done through bodies such as the heads of workers compensation authorities, and there is quite a bit of work going on.

PROF WOODS: Is that on the basis it will never happen?

MS SHAKESPEARE: No. There are substantial differences even between us and the other privately underwritten jurisdictions.

PROF WOODS: Yes, there are indeed.

MS SHAKESPEARE: Such as in Western Australia - we don't have the ability to declare premiums the way that they do in Western Australia, so there are quite substantial differences.

PROF WOODS: And you've got unfettered common law whereas - I think you are about the only one who does these days.

MR SIMMONS: But on average we have lower common law settlements than other jurisdictions.

PROF WOODS: Yes.

MR SIMMONS: Because there is no hurdle to jump, there is no price premium on jumping the hurdle.

PROF WOODS: Yes, that's quite an interesting phenomenon.

MS SHAKESPEARE: But there are certainly aspects of, I suppose, administration of our scheme that we are keen to take on a greater role in sharing with other privately underwritten jurisdictions in particular. I mean, we do want to talk to other privately underwritten jurisdictions about collecting data and providing data to insurers because it's a fairly high cost to a small jurisdiction such as ourselves, but yes, I think that does need to happen through more collaborative approaches through organisations such as HOWCA.

PROF WOODS: Yes, we've seen good intention and in fact we've spoken to current chairs of such bodies who have all expressed that there is strong intent around the table; it's just actually achieving anything is what defeats them. We have the good example of the cross-border arrangements which took 10 years to debate but they only finally happened because Queensland stood up and said, "We're doing it anyway," in which case New South Wales had to stand up and say, "Well, we'd better do it as well," in which case Victoria stood up and said, "Me too," and it's now going around the others.

MR SIMMONS: Except that the three states got together and decided they were going to do it and presented a fait accompli at one of the HOWCA meetings to the rest of us. The interesting thing being, of course, that the actual resolution of the cross-border is beyond what Queensland, New South Wales or Victoria had initially

proposed. In fact, because those three jurisdictions - because of the way they approach that - couldn't get the choice of laws model up, it was - nobody sitting around the table denies that it required that trigger point in terms of those three jurisdictions, and Victoria went to an election so it had to step out when it got to crunch time, but that triggering event actually created a much better piece of legislation and it cracked the issue after many years of the Commonwealth's involvement and the Commonwealth going - I remember going to the first meetings supported by (indistinct) about the WRMC trying to get this resolved.

PROF WOODS: Yes, great stuff.

MR SIMMONS: In the end the jurisdictions managed to not only work it out but work out a model which sorted the really tricky one, which had been the issue of choice of laws.

PROF WOODS: But only because somebody stood up and said, "It's going to happen."

MR SIMMONS: Yes, but there's something else.

PROF WOODS: What we're searching for in these frameworks is - - -

DR JOHNS: It's the trigger.

PROF WOODS: Yes, these dynamics. Do we need some ministerial drive? Do we need some jurisdictions to stand up and say, "We're going anyway, and come along for the ride"?

MR SIMMONS: There are what we would identify as five key issues in national uniformity for workers comp, and outside of those five there's a high degree of uniformity on a range of other things that actually happen already in workers comp, like the underlying philosophies are all the same.

PROF WOODS: Yes.

MR SIMMONS: We apply different methods to get there.

PROF WOODS: With different results.

MR SIMMONS: Yes, and overall for pretty much about the same sort of premium. So it's interesting to see whether they work or not, but with those what the trigger point was - at the last couple of heads meetings we have sat down and we have discussed this issue, that there is the Productivity Commission and that you provide

one of the triggers to a sharpening of the focus around some discussions. What we spent the last year doing was doing cross-border and we know that having done cross-border there are these other issues and it's the priority - we decided halfway through this year that national uniformity on the definition of a worker was the next thing that we clearly needed.

If we get worker, we get employer, and that's two out of five, and then we've got uniform definition of wages to worry about; uniform definition of injury and then uniform definition for some of the administrative arrangements to support cross-border, which are things like certificates of currency, so you know - it will be easy to know somebody who is supposed to have a policy actually has one. The heads know that. Those issues are already on the table. We meet again in February to get to the nuts and bolts of who is a worker.

The cross-border put enough of the right people in the room at the right time to get a deal. Having been in those rooms for a number of years now, it's this particular group that managed to crack that one and they've got a willingness to work now, but there could be some more support for that. There could be more direct ministerial support to say that that's it, that's the methodology to go down, but I think you've actually got a lot of these things happening.

PROF WOODS: I don't want to paint a picture of gloom and despair and never-ending nothingness, but there are some elements of it - - -

MR SIMMONS: Although I've been to some meetings like that.

PROF WOODS: Yes.

DR JOHNS: I suppose the issue that interests me about uniformity is it doesn't have much meaning. Rules are only sufficiently uniform if a company who deals across a number of borders thinks it's cheaper to stick with the differences that are uniform than go into a single system. In other words, "Thanks for the uniformity but I'm still dealing with five different state systems in my company where I have workers in five different states, but I still have to learn the systems to understand the minute differences that characterise" - do you know what I mean?

MR SIMMONS: Yes, I hear you.

DR JOHNS: And get into a debate where they just say, "No, no, just give me the one set of rules." So we've got to respond to that; I'm not saying we're responding to a constituency, we are simply responding to an argument that says, "No, let's work on a single set of rules, not a uniform set of rules."

MS SHAKESPEARE: I think uniformity is probably ultimately an incorrect term to use here as well, because we've all got Westminster systems of governments. The executive does not control what is passed by legislation. In our jurisdiction we've got a minority government and we can't - - -

PROF WOODS: And have had for many years.

MS SHAKESPEARE: - - - by agreeing, even through a ministerial council, guarantee what's going to come out the other end of the legislative assembly throughout the debate. So unless there was referral of powers from state and territory jurisdictions on these matters to the federal government, you are not going to have uniform legislation or one set of rules. I mean, that may be achievable.

PROF WOODS: But we can have an alternative set of rules that applies nationally.

MS SHAKESPEARE: I think that you need to look at how fair that is, though, if it's only accessible to one set of employers.

PROF WOODS: Ultimately, though, we propose a step-down, so that you start - you can immediately tomorrow allow in the door those who meet the prudential and other regs who are or were competitors with Commonwealth current and former entities, et cetera. The next step, step two, says anyone who is able to meet the prudentials, et cetera, can self-insure, but step three says, "Here is a national privately underwritten scheme that micros, anyone, can choose if they so wish," rather than their own local. So I mean, that step three, if it ultimately came about, would provide that non-discriminatory nature. The only question is if the states and territories have all got their acts together by then, maybe the feds don't need to go to step three.

DR JOHNS: Maybe no-one buys into it.

MR SIMMONS: Or the worst thing is that you would get step one and step two and the drivers - the big employers with the access - turn around and say, "We're satisfied. Why do we need" - the drive to go to three never happens. That's the fear. So you end up with effectively two tiers of what we can do in small and mediums, because we will get the price down and the way we'll get the price down is we will cut back benefits, because in that system what we'll have to do is if the price pressure keeps coming up, we will have to cut back on benefits and we will end up with two - - -

PROF WOODS: Or be more efficient in the process.

MR SIMMONS: We can be - there are limits to that capacity. You get to a critical

mass issue where there is just - some of those big employers provide not just - what their premium does is it also provides the capacity to administer those operations working here.

PROF WOODS: But premiums shouldn't be single-mindedly driven down. Premiums should be whatever is the level required for an efficient scheme for what society determines is an appropriate level of benefits. Whatever then that premium is, is what that premium is.

MR SIMMONS: Yes, except price for business is going to be one of the determinants that push the control for a range of other things.

PROF WOODS: It has to be affordable.

MR SIMMONS: Otherwise businesses aren't in business, if these things have a capacity to push them over the edge.

PROF WOODS: That's why it's a balance.

MR SIMMONS: Coming back to that issue about what happens nationally for those national companies, with some scepticism I come to that debate. The opposite argument to what you run is run for us in terms of the industrial relations scheme. Since 1991 it's been not that we need - we had a national uniform scheme in the industrial relations scheme. We've now got enterprise bargaining, not just broken down by jurisdiction, broken down by sites - you know, companies within sites with different enterprise agreements are far more complex things in terms of working out pay, terms and conditions for the HR units they have got to work it out. They've got incredibly complex things to work out. You can have a multiplicity of enterprise agreement on one work site but that's quite manageable.

MS SHAKESPEARE: That seems positive.

MR SIMMONS: And a positive thing, but because there's a couple of differences, they're opposites.

DR JOHNS: To me it's all about, what do you want. I think in industrial relations, if I can remember it all, it was all about getting a conversation about productivity and the conversation used to take place between representatives down in Melbourne, and the rest of the workforce were left out. So our betters thought it would be better to have a conversation amongst 10 million workers and their bosses about productivity. So, in other words, divergence and thousands of conversations and tens of thousands of different outcomes were of benefit. Anyway, that's what I recall.

MR SIMMONS: But they've given those companies the capacity to deal with these differences at that level.

DR JOHNS: I agree, but in this case the argument that impresses us is one that says if a company only operates in one state, they won't be opting into the Commonwealth, I wouldn't think, unless it was beneficial, of course, but for those companies who operate across states and have to face a number of different rules, if there is sufficient savings for them in just dealing with a single set of rules, they can opt in and it's not compulsory. So I don't think we are designing something that's much more than providing the possibility of a company choosing to operate under one set of rules. Our main concern, and my main interest today, I guess, is to see the impact it might have on the smaller pools. Beyond that I don't think there is much of a debate in my mind.

MR SIMMONS: Except that the companies could themselves choose to operate on one set of rules. They don't have to take the lowest common denominator approach to the schemes.

PROF WOODS: In occ health and safety - - -

MR SIMMONS: But the same in workers comp.

PROF WOODS: No, but occ health and safety - many companies come to us and say, "Look, we look at all the various state systems and we try and pick across the top so that we can just roll out the one culture, the one set of rules across our company." Now, they say we still have to be wary of individual quirks but we minimise that to the extent we can, and that's fine in one sense, but workers comp is very different.

DR JOHNS: So the savings are in the similarity rather than dropping down the standards, for instance.

PROF WOODS: Yes. But workers comp is very different because they have different reporting requirements. They have to be audited in each of the different states, they have to go through their injury management procedures. They have to be more consciously aware of the detail in each of the states in workers comp, as they report it to us. If you can show evidence that that's not true, then that would be a very valuable contribution to this inquiry.

MR SIMMONS: One of the largest workers comp insurers in the country did just that a couple of years ago when it relaunched itself. That's the presentation they gave to us. They looked around the country and said, "We're trying to manage all these different schemes. We just cherry-pick the lot," because if you turn around and say

the reporting requirement in the ACT is 48 hours, and say it's five days or seven days in New South Wales, if a New South Wales employer says, "I'm going to report in 48 hours all the New South Wales injuries," they are still complying with New South Wales and they are complying with us. It's no great deal. It's only a great problem for them if they say, "We want to apply the seven-day reporting requirement in the ACT instead of the two-day." They can choose.

PROF WOODS: Are you happy in your written submission to demonstrate to us how you could operate a workers comp scheme nationally that is consistent without the costs involved in needing to ensure compliance with each of the individual jurisdictions?

MS SHAKESPEARE: Subject to available resources. We have a very small jurisdiction.

PROF WOODS: I know.

MR SIMMONS: Patricia over there and Penny and myself look at the entire policy unit of workers comp.

DR JOHNS: But the challenge is more in principle than in practice.

MS SHAKESPEARE: We could outline some areas where we think that could occur, yes.

PROF WOODS: It's just that a number of companies have come to us and said, "Look, occ health and safety? We can largely do this. Workers comp? We're beaten. It's too hard, too different, involves cost." You know, if somebody is happy to stand up and say, "Well, maybe they're not being totally forthright with the commission," we'd be very happy.

MR SIMMONS: If you look at injury management, benefits aside, the insurers are going to pay that. They're going to reimburse the employers for whatever happens, whatever the scheme. Whatever the scheme requires their reimbursement to be, the employer will be reimbursed to that extent by the scheme. It's really about how we're going to manage the injuries. The differences aren't really insurmountable in terms of injury management. We, for example, pretty much run, "If you comply with New South Wales, you comply with us." Our act actually has the name of the sections of the New South Wales act that were lifted completely. They were just cut and pasted out of New South Wales so that it was uniform, so that there wasn't that issue.

PROF WOODS: But even how to define - we've had payroll people come along to us and say, "Look, defining what's in and out for premiums, if you could just get that

consistent across the states, that would be fantastic." They say, "Look, we've got all these different permutations that keep creeping in in different schemes and it just adds cost."

MR SIMMONS: The issue of what's in and what's out of premium is a huge issue for everybody because there's lots of people involved in the accounting profession whose job it is to figure out what goes in and what goes out and try and make really interesting advice on what gets in and what gets out. We know that; but we've had a discussion with New South Wales, they've got a new model of their wages and earnings guide, and we're having a very close look at it, as well as other jurisdictions. I think that issue, for example, is not far off a resolution either.

PROF WOODS: That would be excellent. We'll wait and see.

DR JOHNS: I don't believe it.

PROF WOODS: We come at it with a healthy scepticism.

DR JOHNS: Well, I think it's a movable feast.

MR SIMMONS: It always moves because there are new decisions that the Tax Office might give a ruling - but that's the dynamic element of workers comp. You are constantly monitoring the scheme to see what's going on. If somebody comes up with a new way of saying, "That's not wages or earnings, that's something else," as they find some directors of companies being paid 100 per cent superannuation contribution - they don't actually get any wages, so all of a sudden there's a whole class of people whose premiums disappear out of the scheme. Then you're going to have to adjust pretty quickly to get those things - or if there's a new way to pay people if their redundancy payments disappear out of the scheme or reappear and want to be tracked later.

PROF WOODS: We understand the creativity of parts of the profession.

MR SIMMONS: But in terms of our definitions, our definitions are not demonstrably different bar pre-injury earnings.

PROF WOODS: The payroll specialists tell us it's a nightmare. Maybe they're exaggerating.

MR SIMMONS: It's not going to be a nightmare for the vast bulk of people. They get paid their wages. Every fortnight or every week it comes out and looks pretty much the same.

PROF WOODS: Yes, but the differences are proportionally more costly than the commonalities. The commonalities are easily dealt with.

DR JOHNS: That's where the bulk of people get paid.

PROF WOODS: Yes, but they don't add to the cost; it's where they're different. Anyway, I look forward to your submission putting this evidence. We are open to all advice and expertise to help guide us in this matter. Is there anything else from your side?

MR SIMMONS: No, that's very useful.

PROF WOODS: Is there anything that we haven't covered that you'd like to pursue?

MS SHAKESPEARE: We would like to raise one issue about superannuation. This is probably not an area of specific concern to the ACT but it is something we think that possibly should be covered by the Productivity Commission - that is, the loss of superannuation earnings while people are injured. It seems to be an area of considerable cost shifting at the moment that is probably going to increase substantially in the future and probably needs to be addressed on a national basis.

PROF WOODS: If you could put some notes to that effect in your submissions?

MR SIMMONS: It's essentially the definition in the Superannuation Guarantee Act which is the problem.

MS SHAKESPEARE: We haven't really commented to any extent on occupational health and safety issues today, but we don't think there are as substantial issues dealing with OH and S. Again, we would have some concerns about enacting uniform occupational health and safety legislation, simply for the practical reasons that we don't control what legislation is passed. Consistency in OHS legislation is probably the goal.

PROF WOODS: Commitment to template legislation does create some level of control over what gets passed.

MS SHAKESPEARE: Yes, and the ACT government is attempting now to review its OHS laws to bring them as far as possible into line with laws in New South Wales.

PROF WOODS: I think I agree with you that occ health and safety doesn't have as far to travel and is not, therefore, as big an issue in terms of reform. I've enjoyed the

debate as well.

DR JOHNS: Yes, indeed.

PROF WOODS: Thank you very much. We'll just have a very brief adjournment.

DR JOHNS: Let's commence. Commissioner Woods is unable to be with us at the moment, but Herb Plunkett will assist. I'm Gary Johns. Now, Geraldine, you've been before the commission on a previous occasion, so just mention your name again, and you have someone with you - you might introduce yourself as well - and then you can commence.

MS SPENCER: My general comment on - - -

MS HENDERSON: Introduce yourself.

MS SPENCER: Geraldine Spencer, and I'm here on my own behalf, but I'm a member of Canberra ASH and have been for quite a long time.

MS HENDERSON: Terri Henderson. I'm assisting Geraldine Spencer. I'm a long-time member of Canberra Action on Smoking and Health and I'm here to help her, and also because Canberra ASH supports her contentions about the rights of workers to have a smoke-free workplace.

DR JOHNS: Thank you, Terri.

MS SPENCER: A general comment about the whole inquiry is how few of the contributors have taken any concern over occupational health and safety. I can understand the concern of those involved in administering the workers compensation and all the horrific details and inconsistencies, but there's been almost no contribution from any of the unions. There's one or two supplementary ones, and in two of the supplementary, yes, a concern that the findings, the results of workers compensation, should be translated into improvement in safety and health - you know, be proper coordination of all the findings. In the preliminary report, again there seems to have been a lot of recommendation but very little action.

DR JOHNS: Geraldine, are there matters specific to the ACT that you might like to talk about?

MS SPENCER: Yes. Well, my primary concern has been that all places of work should be entirely smoke free. The main concern is over environmental tobacco

smoke, which is exceedingly harmful but also there are fire risks from smoking, and injury risks, smokers handling things, but it's the ETS, and the worst affected places are the clubs, pubs, where those employed in these places get very heavy dosages. For somebody on an eight-hour shift in a bar, it's equivalent to double the amount that the heaviest smoker would smoke in one day.

There was a recent award in New South Wales, Maureen Sharp, who worked for a workers club and for the RSL. Well, she developed cancer of the throat. That is in remission but she's no longer able to work. She has been provided with compensation but nothing has been done whatsoever by any of the organisations or government to prevent such a happening occurring again. They go along claiming that that's the only way they can make money, by allowing their patrons to smoke. In fact, that's not true. In Canberra, some of the smoking places are doing very badly indeed. The workers club, which became the Canberra Club in Civic, recently closed. It wasn't doing any business. Customers who have a choice stay away.

MS HENDERSON: On that issue, Canberra ASH are actually going to come in in a couple of years' time - three years' time, I think, in 2006. We're in favour of that. We think the delay is far too long and in the meantime that the workers don't have coverage.

DR JOHNS: Just explain. This is ACT legislation to ban - - -

MS HENDERSON: Ban smoking in clubs and pubs. The original proposal was about six or seven years down the track. There's been new legislation introduced, which I think is 31 December 2006, which we view as far too long but a lot better than the six or seven years. We do have concerns about that lead time and the coverage of workers.

MS SPENCER: Yes.

DR JOHNS: Which catches up to other states. Other states have - Queensland does.

MS HENDERSON: Not in clubs and pubs.

MS SPENCER: What is appalling about the local situation - - -

DR JOHNS: Sorry, restaurants, I suppose; most enclosed areas, I think.

MS SPENCER: - - - is that exemptions, not just looking the other way, but exemptions have been issued, despite the well-known hazards, and they have continued to be issued. It has recently been impossible to get an update. I've

requested several times of the exemptions, but they were being reissued long after Maureen Sharp and all the other ever-increasing evidence - - -

DR JOHNS: Now, these are exemptions for businesses?

MS SPENCER: Mm.

DR JOHNS: What was the nature of the exemptions?

MS SPENCER: Well, the ACT was early on in an act to prohibit smoking in enclosed public places, but it wrote into its act specific exemptions. Licensed premises were allowed an exemption. They have to have special equipment, airconditioning, but this was known to be ineffective. It merely moved the air around faster and the exemption was limited to 50 per cent, but somebody smoking over there - he isn't, thank goodness - I'd experience it here. My brief, going around and looking at these places - just imaginary lines between the smoking and the nonsmoking, and a grave lack of any signage or any enforcement. Yes, I find this appalling. And the people suffer. Another group of sufferers are nightclub entertainers. It's a case of accept that job or go without. Many of these people may find it very difficult to move to another occupation.

The one in Wollongong, Maureen Sharp, had a young family to look after. I don't know any of her other circumstances but it might have been very difficult for her to find a job with equal remuneration. Croupiers are another - and they don't like it, and also might find it difficult to get a job of equal status. They're specially trained for that type of work. And even though there might be signs up, a table might be labelled nonsmoking, but a customer stands there - his cigarette - - -

MS HENDERSON: The Canberra casino has improved on that and has kept the smoking away from the immediate vicinity of the tables now, which is some improvement, but there is still smoking in the room.

MS SPENCER: Yes, but the level of supervision in any case still is (indistinct) yes, it's not within a certain distance of a bar. Well, most people aren't very good at off the cuff recognising what's a metre from the bar. In any case, it's ignored. They're still reissuing. They're not phasing out even - they're still reissuing them. As I said, the argument of money - well, it's a pretty awful one, anyway - but it isn't true. Restaurants found that. They did far far better when made smoke free. Many had already done so when the law came in: happier staff, less dirt and more custom.

DR JOHNS: In this proposed new legislation, will there be exemptions as well to argue?

MS HENDERSON: No, the exemptions will be phased out. However, there are still some concerns; for example, the definition of an enclosed place. Up in Ginninderra Village there's a restaurant which doesn't have an exemption but it's set up an area outside which has a doorway inside but it's like a tent outside. Because they can roll the windows up when it's fine weather, it's not considered an enclosed place, yet when it's raining, every bit of it is covered and closed and people can smoke there. So getting rid of the exemptions doesn't completely solve the problem. Although we do have some good things in the definition that are stronger than other jurisdictions, it's still not enough, and loopholes are always being found, and I think from ASH's point of view, overall, the emphasis has to be on the right of the employee to have a smoke-free workplace, and that would get around a lot of the definitional problems of buildings.

MS SPENCER: There's another iniquity in the local law, special exemption. You don't have to apply for it. It's just written into the act - for smoking on stage. Well, I'm one of these nasty people who investigates. Smoking has been included on stage where it is not in the original production, so there's no excuse there, and it has also been vastly exaggerated. I don't know whether you know The Winslow Boy.

DR JOHNS: Well, yes.

MS SPENCER: I checked up on that. There were five cigarettes smoked in the initial act, and that was as it would have been in the days when the events happened, which was shortly before the First World War, and that could be typical of the time - the person was offered a cigarette. In the performance locally, I was reliably informed everyone, but everyone, smoked, and continuously. Even the boys smoked. Well, that was totally out of keeping with the thing as written and totally out of keeping with the time. Yes, in a local production a few years ago, the consul in Butterfly was required to smoke. He was very much a nonsmoker but the producer insisted. Well, in the original, it doesn't smoke. Puccini may have killed himself smoking but he didn't expect his singers to smoke.

DR JOHNS: Yes. Now, are there any other matters really that you want to address to us that you've found in our interim report?

MS SPENCER: This of course is specifically - smoking anywhere is a hazard. It's a fire hazard and I don't think anybody who's working should be allowed - an electrician climbing up a pole with tools in one hand and a cigarette in the other is not acting safely.

MS HENDERSON: On the grounds of OH and S, any other employer who put a worker into a dangerous situation would surely be responsible for the problems and have a lot of OH and S issues, but directors of movies, directors on the stage who

require their actors to smoke, seem to be exempt from any of that and you never hear of any prosecution for that sort of dangerous situation.

MS SPENCER: Well, the law is different everywhere. I don't think any other state has even remotely considered providing exemptions. They haven't yet covered the situation, but they don't go out of their way to say, "Yes, you can do it." Clearly, in all aspects there should be consistency between the states, and the best possible practice observed. Victoria was losing its trade to New South Wales because New South Wales, just across the border, allowed smoking; at least Victoria had prohibited it and was probably doing much better. 80 per cent of the population does not smoke, and most of that 80 per cent avoid it, wherever possible, and increasingly so - the fewer who smoke, the easier it is to avoid and the less acceptable it is to smoke. Those who still smoke now are generally accepted.

DR JOHNS: Thank you very much for addressing us - and be sure to read our final report early next year.

MS SPENCER: Thank you for having me. I look forward to the success of the recommendations.

DR JOHNS: Thank you. I think we will suspend the hearing now.

PROF WOODS: We welcome the next participants, the Australian Rehabilitation Providers Association. Could you please for the record state your names, the organisation you are representing and any position you hold in that organisation.

MR GORDON: Robert Gordon, vice-president, Australian Rehab Providers Association.

MR HALLWOOD: George Hallwood, president, Australian Rehab Providers Association.

MS CROWLEY: Ros Crowley, treasurer, Australian Rehab Providers Association.

PROF WOODS: We have had the benefit of I think three contributions which have all been very helpful; had a weighty front end and concluding with a submission, 13 November. Do you have an opening statement you wish to make?

MR GORDON: We do. The Australian Rehab Providers Association is the peak body representing occupational rehabilitation providers throughout Australia. As a professional industry group, ARPA has significant experience in all aspects of injury management and injury prevention throughout each state and territory jurisdiction. ARPA council members and their respective state bodies hold membership on numerous advisory councils, commissions and boards, and have significant experience in the day-to-day operations of the workers compensation schemes throughout Australia.

As a resource to the Productivity Commission, the ARPA council is well placed to draw on these resources and play a fundamental role in the design and implementation of a national scheme which embodies best-practice principles to injury management and injury prevention. The ARPA council fully supports the Productivity Commission's initiatives in regard to the potential for a national workers compensation scheme and, in particular, to moves to reinforce injury management as a key facet of scheme design.

Whilst ARPA supports the interim recommendations from the Productivity Commission of (1) early intervention, including the early notification of claims and the provisional assessment of assignment of liability; (2) workplace based rehabilitation where possible at the pre-injury workplace; and (3) return-to-work programs developed and implemented by a committed partnership of the employer, employee, treating doctor and rehabilitation provider where required, we strongly recommend to the Productivity Commission that the third recommendation is fundamentally flawed and has demonstrated in various jurisdictions that it is both ineffective and costly.

Typically schemes, while adopting the fundamental need for rehabilitation to improve social and economic outcomes, adjunct and subordinate it to a claim function. The decision of "where required" is usually made by an unqualified claims officer. The decision on the need for rehabilitation is the most critical in the return-to-work process. It is essential that decisions on the requirement for rehabilitation are made by rehabilitation professionals to ensure a committed partnership is initiated with all stakeholders to achieve a safe and durable return to work.

Without rehabilitation, no commitment occurs. The underlying function is one of coordination and facilitation. If this is not done, nothing happens. It is better to have skilled rehabilitation providers doing this because their real skill is in offering the solutions derived from lots of cases to removing barriers to return to work. As conditions change they can make decisions to apply the correct processes to achieve a result, whether final or a milestone along the path. In effect, we are project managers. It is hard to imagine a system where project managers are called in at a random point and then handed over to a group at another random point to finish it off.

An example of an inappropriate referral mechanism and a lack of focus in the occupational rehabilitation role is in the comparison of the ACT and Western Australian systems. In the ACT, early intervention mechanisms ensure referrals are made to occupational rehab providers within seven days. 85 per cent of injured workers are referred for rehabilitation assessment and determination of program requirements to assist in a successful return to work. The statistics for return to work in the ACT are the highest in the country.

In Western Australia an injury management model was introduced in place of an existing system in May 1999, which required consultation by the doctor, employer and injured worker on the merits of a referral for injury management prior to a referral being initiated. This clumsy referral mechanism has resulted in the delay to referral blowing out to now average 285 days, with a median of 123 days post-injury. Occupational rehab providers in Western Australia have highlighted the system flaws since prior to its introduction in 1999 and also sought research from Prof Nick Buys on the proposed referral mechanism. Dr Buys strongly criticised the proposed injury management model that was to be introduced into Western Australia, and his predictions and concerns have all been legitimised. A copy of Dr Buys' paper can be provided to the Productivity Commission, if required.

PROF WOODS: We have seen some of his research.

MR GORDON: In the meantime, the WA system continues to struggle with increasing delay in referral and increasing long-term claims costs. The WA example

demonstrates the danger of a system that was designed and implemented without any consultation with occupational rehab providers. ARPA recommends a change to the third recommended principle from page 158 of the report as follows: that the return-to-work programs be developed and implemented under the guidance and management control of skilled occupational rehabilitation providers with the capacity to make decisions at any time as to the most appropriate course of action to facilitate a successful return to work.

The occupational rehab providers are fundamental in removing barriers to return to work, whether it is in the resolution of workplace conflict, or in arranging help in workplace duties. The occupational rehab providers should be accountable for outcomes and be used in the majority of cases where injured workers are unfit for work for greater than seven days. In all situations, the coordinated and facilitated function that the occupational rehab provider provides should be included in any return-to-work approach, regardless of which stakeholder - that is, employer, employee or treating doctor - performs it.

ARPA also believes that state arrangements should not continue to remain in place at the expense of the success of a national scheme. ARPA believes that a preferred national model with best-practice rehabilitation injury management and injury prevention principles should be in place within each jurisdiction to allow injured workers to have the best opportunity to return to work, regardless of which state they reside in. ARPA believes that there should be a single licensing system for occupational rehabilitation providers which operates on a national basis with outcome-focused key performance indicators. ARPA members encourage measurement of their performance, providing appropriate early intervention systems and systems which support injury management are in place.

As indicated in the Productivity Commission interim report, page 142, Dr Nick Buys identified early intervention as a key component of the workers compensation scheme. It is critical that a scheme and its benefits be designed to fully support early intervention and not have the early intervention concept tacked onto the scheme to simply satisfy the requirement. The method of guaranteeing an early intervention safety net for injured workers has often failed because the focus has been on tacking it onto a claims function.

A recent example in South Australia is a proposal to have claims agents classify claims that are of some risk within five days of receipt of the claim and have a return-to-work plan drafted within eight days of receipt of the claim. Interestingly, there were no measures of rehabilitation support or intervention, only the preparation of paperwork. We are yet to see the results of the trial. However, it is not difficult to see that the benefits of early intervention will be moderately severe by the focus on paperwork. Particularly, agents' financial bonuses are linked to the paperwork time

frames.

ARPA has attached to its briefing paper a clear outline on the role of occupational rehab providers in the system and how their role interacts with the associated stakeholders in case management. We encourage the commission to read and understand the role document, as it is fundamental in the design of scheme responsibilities. In closing, ARPA cannot stress strongly enough that changes are needed. However, now is the time to ensure that it is not the devil that is left in the detail. It is critical that a successful workers compensation scheme is built with injury management, injury prevention and workplace-based early intervention as fundamental principles of the scheme design.

In a scheme that is structured around the provision of rehabilitation, ARPA must have a role in the design, implementation and ongoing development of the scheme. A function of rehabilitation must be built in - if not compulsory - in a way that guarantees a safety net. A single national rehabilitation licensing regime should be included to coincide with the implementation of a national scheme. Authority and responsibility for rehabilitation outcomes should be with the providers of the rehabilitation services. ARPA is grateful for the opportunity to present before the Productivity Commission and welcomes the opportunity for its national council to be involved in ongoing initiatives for scheme design and implementation in the future.

PROF WOODS: As I said earlier, thank you for the various submissions. I was particularly grateful for your fairly early follow-up from last time, when you did a summary of the different types of schemes, and your views on early intervention and workplace-based rehabilitation and return to work, et cetera. That was quite helpful to us. You have drawn attention to the ACT versus WA as two ends of a spectrum, and what happened in WA with the 99 reforms. Are there any features of some of the other schemes that you particularly support? I know that you talk about where it is state underwritten and administered, and there's only one of those that I can think of.

However, there you talk about it being the slowest referral of rehab. State underwritten, agent administered, you talk about reasonable levels of workplace-based intervention. The interesting thing about WA and the ACT, though, is that they are both privately underwritten, and yet you're saying they have gone two different ways. So it is not the macro scheme design that determines, in your view, how successful they are at early intervention rehabilitation. It's within the scheme design. Sitting here, looking at big frameworks, doesn't get down to the level of detail that actually generates the results, as you see it. Is that right?

MR GORDON: Commenting on the WA system, I think the approach needs to be that rehabilitation is fundamental to the successful scheme design. One of the

problems we have in WA is that rehabilitation is seen as a cost rather than a benefit. There are a lot of moves within the WA scheme to try to cut costs rather than to provide it as a benefit. A lot of the literature that's in the document looks at the cost benefit of providing rehabilitation from anything from one to one, to one to 35, whereas in the WA scheme they see it purely as a cost and do not see it as a benefit, so they're trying to reduce it where possible.

PROF WOODS: But isn't some of it about designing appropriate incentives? If you saw it as a cost you would want to cut it out; if you saw it as a benefit you would want to generate an incentive structure so that it was used minimally, sparingly and efficiently, but productively. Now, what are the sorts of incentives that you see being effective in various scheme designs that involve rehabilitation providers early but provide incentives for that service to be used as efficiently and as sparingly as possible?

MR HALLWOOD: Certainly the early intervention is very easy to build into a scheme and could just be a matter of days built in, as South Australia has just done. The tricky part comes down to how you guarantee that rehab providers do not just take advantage of having all claims referred to them.

PROF WOODS: And it is not only rehab providers. It might be allied health professionals. It might be a whole plethora of those who are in the system.

MR HALLWOOD: That's correct.

PROF WOODS: I'm not picking on rehab providers in this sense, but I am just using you as the case study.

MR HALLWOOD: The trick with it really is to provide authority to rehabilitation providers to deliver the outcomes and to hold them responsible for it, so the measurement is in terms of outcomes. There is some potential, I suppose, for outcome-based fees. However, that hasn't worked very successfully because it's very easy to triage them and say - - -

PROF WOODS: A bit of cream-skimming going on.

MR HALLWOOD: That's right, yes. So probably the real success is about the measurement of outcomes and the public measurement of outcomes, so that choices can be made as to the people who can provide the best outcomes and the work to be sent in a capitalist way, I suppose, to the people who deliver the service and the outcomes.

PROF WOODS: I'm fundamentally attracted to outcome-based payments, but you

have to feel confident that the intervention for which you are paying is contributing significantly to the outcome. Many injured workers are highly motivated to go back to work. Many employers are highly motivated to provide proper medical care, good return-to-work services and care for their workers and are committed to that end.

One could argue that, even perhaps without the doctor, the outcome would be a successful return to work. Why does another party in that process get paid on recognition of something that is exogenous to their input? How do we know that it's the rehab provider who has created that situation and produced that good outcome and that it wasn't just the fact that we had highly committed principal parties?

MR HALLWOOD: I suppose you do it by comparing schemes, and this comparison of Western Australia and the ACT is one of many examples that demonstrates that in the ACT a couple of things have happened: one is that rehab providers have been very much involved in the process of making decisions about the detail of the scheme, and so the scheme is designed around how rehabilitation can get better outcomes. The other thing about the ACT, contrasted with Western Australia, is just the involvement of rehabilitation, and not the involvement of rehabilitation to develop paperwork but the involvement of rehabilitation at the work site - buy the office chair that's needed because somebody is sitting on something that's not suitable for them with their back condition. It truly is rehabilitation intervention early, as opposed to, in Western Australia, hundreds of days before rehabilitation is involved. So, I suppose in some ways it is taken on faith, on the basis of outcomes that exist around the world to demonstrate that it's a model that works.

PROF WOODS: We're not disputing in the report any of the benefits of early rehabilitation, however provided, and the focus on a successful return to work. We're putting graphs, stats, and various things. That issue is not under debate, it is how you provide correct incentives to other than the principal parties to deliver efficiently whatever services contribute to that end.

MS CROWLEY: It's the rehab provider that pulls everything together. They're the ones that do the liaison between the GP, the work site and the worker, and they pull it all together in one package. They're able to direct or control how little or how much intervention is involved. They do the assessment, and they can determine whether or not intervention is actually required at that stage. That's what gets the outcomes.

DR JOHNS: I'm not sure that answers your question. You have to prove somehow that that intervention pays for itself.

MR HALLWOOD: Yes, absolutely.

MS CROWLEY: Yes.

DR JOHNS: Again, we're not disputing it, but it would be nice to be reassured. I was just reflecting on your rewrite of our third dot point. I guess, naturally, I think here's a profession and they ought to write themselves into the picture, of course, and that's what your rewrite sounded like.

MS CROWLEY: We don't want to be written out of the picture.

DR JOHNS: No, I agree, but we have a similar debate with the lawyers: they want to write themselves in.

MR HALLWOOD: In fact, more than that, perhaps if we put that back.

DR JOHNS: The question comes right down to that it's not even the broader design of the thing but how do you add value? Can you prove you add value and under what circumstances do you best add value?

MR HALLWOOD: If you take a step back, all the schemes in Australia at the moment are rehabilitation-based schemes. Unfortunately, I suppose most of the schemes developed from a non-rehabilitation focus to a rehabilitation focus almost overnight in the mid-eighties. So, rehabilitation was tacked onto a claims-focused scheme. What we're saying is that if rehab is fundamentally a successful scheme - both socially and financially - then it needs to be built in fundamentally and that, by building it in fundamentally, from experience around the world, where it is and where it's involved in the process of the scheme design, as it is in the ACT, the results are the best as well. There are some higher costs for rehabilitation but the overall scheme results are the best, because rehabilitation is what drives the scheme results.

PROF WOODS: What we're looking for, I guess, is a marriage between the Western Australian desire to reduce costs and everyone's desire to get good rehabilitation, and so it's a matter of what's the most cost-effective way of achieving that outcome. I don't know where we can go further in this discussion.

MR HALLWOOD: Our firm has designed a national database, which is in its infancy at the moment. One of the things we want to look at is what is actually being saved by rehabilitation being involved, not just what is being spent. But there has been no national study done on that, and there has been no data that's been consistent across the states where comparisons can be made. You've got some states that have common law systems and you've got privately underwritten systems. Probably the most national approach would be the Comcare system where, clearly, there's benefit for rehabilitation being involved, but that in itself is quite a unique system because

you're dealing with Commonwealth government entities, and return to work is a different way.

PROF WOODS: A somewhat homogenous large employer.

MR HALLWOOD: Yes, exactly.

DR JOHNS: Are you confident you can put together a database?

MR HALLWOOD: No, the database has been designed. We're currently putting data into the database and developing the functional capacities of the database, but one of the key measures or uses of the database is to demonstrate what is saved by rehabilitation being involved, not just what's being spent.

MS CROWLEY: We can demonstrate the database as well, if you're interested in a demonstration.

MR HALLWOOD: We recognise that one of the things that's always put to us by administrations and the jurisdictions is: what is the benefit?

PROF WOODS: Yes, a reasonable question.

MR HALLWOOD: Yes, absolutely. That's the reason we've designed the database - to actually do that.

DR JOHNS: So what can you present to us before 30 January?

MR GORDON: We could have Michael Hall from Transformation present our database.

PROF WOODS: I'll get one of the staff to make contact, and they can pursue that. Self-insurers, that seems to be a group which, on various evidence to us, is keen to have its employers rehabilitated and returned to work in the most efficient manner, that you don't have the problem of third party interventions, whether it's an insurer, WorkCover, or something, and that there's a direct relationship. What's your profession's experience with self-insurers? Because of their drivers, do they come to you first up? Is it a mixed experience?

MR HALLWOOD: Self-insurers largely have in-house rehabilitation. The majority in Australia seems to have in-house rehabilitation, and the advantage that they have is that there is management support for early intervention and early return to work, so they get better results, on average, than the schemes do. From our profession's perspective, it doesn't look good because here are in-house people

getting better results than the rehabilitation industry.

PROF WOODS: But aren't they employing the same concepts and disciplines?

MR HALLWOOD: They are employing exactly the same concepts, and it's because of the early intervention - true intervention - and the lack of complex paper trails that they are getting really good results.

PROF WOODS: Perhaps you need to do a bit of professional recruitment through the self-insuring companies.

MR HALLWOOD: They're an example of addressing it, in many ways.

DR JOHNS: You have to close a gap in the statutory systems between the players, who are separated by the game, whereas under self-insurance it's a closed loop.

MR HALLWOOD: The down side for the self-insured is that often injured workers and their representatives feel that the workers don't get the opportunity to choose somebody who is not just representing their employer. The majority of self-insurers have a positive focus towards rehabilitation, and there are very few complaints, but there are those few that are very claims focused and cost-control focused, about whom you would no doubt have heard during this process. That's the down side of having in-house rehab and it appearing as though it's part of the employer.

MR GORDON: Where self-insurers tend to use rehab providers most is in assisting with redeployment, where someone who is injured under a self-insurer's employment can't return to their pre accident-type employment and require assistance in redeployment outside the company. Rehab providers are often used in that situation to assess redeployment potential and vocational capacities and then to assist with that return to work with a new employer.

PROF WOODS: But, in a sense, they're a demonstration of people who use some of your disciplines. Now, because their not accredited members, they don't necessarily have that - - -

MR GORDON: Some of them are.

PROF WOODS: Which is good. As I say, genuinely, I would have thought you would be in there busy recruiting and ensuring that the professional standards are those to which you aspire.

MR GORDON: In fact, there have been a number of talks between ARPA., its

state members and SISA, the self-insured group, to put together a code of practice and some qualification standards for rehabilitation providers with the self-insured.

PROF WOODS: That's exactly the initiative I was thinking of. In relation to common law, do you have a view as to whether common law or its presence assists, delays, defers or confuses?

MR GORDON: Perhaps I can speak on behalf of WA, because we have common law structures there.

PROF WOODS: Yes, indeed.

MR GORDON: It certainly doesn't assist in rehabilitation. WA has looked at several changes to the common law scheme over a number of years. The problem for rehabilitation is, if somebody is potentially going to get more money for being less able to return to work, therein lies a problem, particularly if the rehab provider's initiative is actually to return someone to their full function and capacity for work if possible. If assessments are made in the WA as to someone's inability to work and thereby get more money under common law because of their inability to work, it's at opposite points from a rehabilitation point of view, so it makes it more difficult.

PROF WOODS: That puts you at odds with the legal fraternity, who haven't argued that before us, have they?

MR GORDON: Only with the plaintiffs' solicitors, not the defendants.

DR JOHNS: Yes, that's right. The Queensland argument was that the common law is brought to bear later on in the process. I think the worker has to go through some sort of process first where may they rehabilitate and so on. There was a concern, though, remaining that, nevertheless, there was still access to a payment at the end and that it might affect a rehabilitator's role.

MR HALLWOOD: I think right across the country, from a rehabilitation perspective it is agreed that common law has far more disbenefit than benefit. Even sometimes it could be said that somebody gets their retribution and moves on, and that might be a way of shifting somebody that's really entrenched from a rehab perspective, but that rarely happens. Our experience in general is that people never feel as though they have received retribution, and often it has taken so long that nothing really matters what happens - when they have their day in court anyway.

DR JOHNS: But are there ways in which the common law is less harmful to return to work, or does assist in some ways other than the outlier case, where it's better to close it off?

MR GORDON: There are. It can be used as an incentive, if you like, for employers to be more able to assist in the return-to-work process. If duties are not made available to a person and they can't return to their pre-accident employment, then the likelihood of them returning to work elsewhere and seeking common law damages will increase, so the employer is in a situation where they say, "Well, I'm actually going to save us some money by having this person back and assisting with their rehabilitation." So it's an incentive for an employer to say, "Well, I really need to take the rehabilitation process seriously."

PROF WOODS: Do you have a comment on the Queensland system, though, where they say that because common law doesn't come in until a period and then there is an election, that in effect rehabilitation has time to work. I notice when you were describing a system where the state underwrites and administers that you put in here "the slowest at referral to rehab services". Are the two somehow related or unrelated?

MR GORDON: The thing is, if the process of early intervention is in place, then the accessing of common law after a period of time hopefully would have allowed rehabilitation to have had a chance. If we get cases at 285 average, then it's hard work at that point to change someone's mindset. By that stage they would have certainly investigated the common law avenues to see what was available through that process. I think the philosophy is that the day a person is injured at work, they're still very keen to return to work. The longer the period goes on that they're not at work, the more they're likely not to return to work.

MR HALLWOOD: And generally the issues are not medical ones.

MR GORDON: The longer the process goes.

PROF WOODS: Yes.

MR GORDON: So it sort of reinforces that early intervention approach.

PROF WOODS: Are there any matters that we haven't covered that you would like to pursue? We note your suggested rewrite and we will reflect on it.

MR GORDON: I suppose just stressing the point again that with any scheme design, if we could be at the table to assist in that process, we would see that as something that would be beneficial.

MR HALLWOOD: And a number of schemes have adopted a standards committee of sorts that include - - -

PROF WOODS: Yes and we're aware of those initiatives. Anything else?

MR GORDON: We will send a soft copy of our document to you.

PROF WOODS: Thank you very much. I appreciate your time.

PROF WOODS: If I could call our next participant, Ms Terri Henderson. Could you please for the record state your name and any organisation you may be representing?

MS HENDERSON: Terri Henderson. I'm an injured worker and just representing myself.

PROF WOODS: Thank you, very much. We have the benefit of an early submission from you, and a previous discussion. You now have the benefit of seeing our interim report. Do you have an opening statement you wish to make?

MS HENDERSON: Yes, I do. Comments throughout the interim report - for example, the table on page 116 referred to changes in the composition of the workforce and working arrangements. I was disappointed to see in the report that there was no mention of the issue of employees injured during a period of part-time employment. There is still an emphasis in the report on having periodic payments linked to pre-injury earnings without widening the scope of what is meant by pre-injury earnings. I think it's a really important issue, given the number of people who do, for example, take part-time - particularly women in the workforce who are coming back from maternity leave.

As described in my initial submission, I believe really strongly that at least where the occupation, duties and employer are the same, the pre-injury earnings should take account of the full working history and not just the hours being worked at the time of injury. The fact that you have a proportion of your income paid as weekly benefits is fine, but that's not very good if you happen to be earning, say, 20,000 a year instead of 50,000 just for one year. You have no access to common law for economic loss and basically you can be - it doesn't matter how many hours you increase over and above what you were doing at the time of the injury, if you happen to have a week off because of your injury you are forever and a day going to be compensated at the hours you worked at the time of the injury. I think that's a little bit unfair.

I note also from references in the report concerning additional insurance that, as double-dipping is prohibited, it doesn't seem that taking out additional insurance would be an option for people in those situations. So I think - particularly women but also people on study leave, working part-time for a year or two - there doesn't seem to be any option than they have to protect themselves. In general, no policy or national framework is going to work if at the grassroots level it's not implemented the way it's supposed to be, or if the policies are ignored. As an example, Comcare expects suitable duties to occur. Well, the reality is that they often don't. Retraining is non-existent. Redeployment doesn't seem to happen.

Another example is that definitions in the report of "durable" - my own experience was that a durable return to work and a successful return to work meant that I was doing 10 hours a week less than I was at the start of a return to work and I don't think that's appropriate and I don't think it's statistically very valid. Another example is that my workplace has policies that say I have a say in choosing a rehab provider. In practice that's a load of rubbish and it's never mentioned and never discussed or offered. So I don't think the employee really has a choice and, whatever the guidelines say, it doesn't always happen. Return-to-work programs are frequently mentioned in the report.

Any compensation scheme needs to deal with employees who are not going to return to work full-time, whose injury has stabilised and are basically partially invalid. It has to avoid leaving them on reduced hours year after year. I don't think the report covers that. I don't think it covers the difficulties of moving between schemes and employers, that nobody is really going to want to take you on. Even the South Australian scheme in the report says that after one year that protection finishes. In injuries like RSI it's not uncommon to have a one or two-year break. If you have an 18-month break, when your employer's responsible, you still find it difficult to move between schemes.

I think in cases where you're on reduced hours, year after year, there has to be an end date and there has to be something put into a national compensation scheme to deal with this so that people can't be left on a continuous return to work or reduced hours indefinitely.

PROF WOODS: Is that through some commutation?

MS HENDERSON: Yes, I can cover that a little bit later as to whether it can go into superannuation. The scope of the inquiry refers to a consistent definition of workplace - work-related illness, injury, including aggravation, acceleration, deterioration, exacerbation and recurrence. Those definitions are really important for injuries that may have long periods of latency, such as RSI. I think it's problematic. For example, Comcare seems to view a continuation of the same injury as a completely new occurrence, which has a number of implications for people, for their injury, for their rehabilitation, for moving different jobs and for financial issues as well.

I apologise for this all being rather scatty. Because I have a problem writing, I have had to do various bits at various times. I also note on page 164 of the report that in Tasmania an election to pursue common law has to be made within two years of weekly benefits being payable. My own experience of the time it takes for an injury such as RSI to settle enough to determine a good degree of permanent injury makes me wonder how people can actually go to common law at all, because they

have to have a requirement to have a minimum injury threshold before they can have access to common law. And how do you do that if you've also got a two-year time frame and your injury hasn't stabilised enough to make that determination? So do you have a de facto preclusion from common law because of that?

The report talks about addressing issues such as pain management and depression, on page 147. Schemes such as Comcare thwart this by requiring a second claim to be lodged in order to have these issues addressed at an early time. The initial claim is only for physical injury, therefore any psychological consequences can't be covered, even if they're a direct consequence of the injury. Since employees are reluctant to put in another claim, it means that treatment can't be got at an early stage and basically you end up getting worse and worse before you end up saying, "Well, I'll put in another one or I'll just leave."

The long-term nature of Comcare is of great concern to me. The interim report talks about the cost to the community of complementing or supplementing existing workers compensation arrangements and the potential for cost-shifting. It also talks about superannuation on page 193 and is not in favour of lump sums. Whilst I am not particularly in favour of lump sums at all, I wonder if there is a role for closing cases where it's in everybody's interest to do so. One of the problems of having an injury like RSI is that you don't meet the criteria for invalidity if you have a residual capacity for work, but there may be no duties available or that can be found in your department to place you in. And you can, as I have been told, have to twiddle your thumbs for the rest of your working life. You get paid but that's not very satisfactory and it can lead to an extremely stressful situation where you have absolutely no control over your working life and, to an extent, home life as well.

I have wondered whether linkages between schemes such as ComSuper and Comcare would be a way of dealing with this and also limiting some cost-shifting. That could be maintaining superannuation contributions, as the report mentioned, but perhaps also some form of lump sum payment as a commutation of your benefits into the compensation scheme; in fact, like a proportional invalidity, because at the moment you don't have access to full invalidity - you're stuck where you are - and maybe a proportional invalidity saying, "Well, you have this sort of injury and this is the level that you can work at," would be an option. It could be cost-effective to everyone and a way of resolving intractable cases.

I think it would have to be dealt with with a lot of care, so that employers didn't abrogate their responsibilities and so that employees didn't feel so pressured that they unfairly traded off their rights to compensation. It could be a way to resolve some cases and provide freedom of choice to employees. I actually did some figures on my own case which I would be happy to talk about afterwards, to show you how cost-effective it can be for people, and the impact on the employee, but I wouldn't

want to present them formally. I wondered if in such a cases there would need to be a tribunal of the superannuation, Comcare, perhaps a psychological assessment to make sure you weren't being pressured into it, to make a determination where it was in everybody's interests.

My own experience has been that there is too much emphasis on staying in the same work environment and, whilst it might be laudable to bend over backwards to try this in the early stages, when it hasn't worked time after time then there has to be some change in emphasis and that doesn't happen, regardless of what the schemes say. The report appears very much in favour of step-downs. However, step-down is where an employee is thrown into financial stress, has a negative impact on the injury, as an employee battles to stay at work to avoid worsening the situation, but ends up worsening the injury. When you're on a return to work, you don't have reduced expenses. An employee working four hours, five days a week still has exactly the same expenses. They still have to pay their superannuation on a full salary; they still have to pay a full day's parking; they still have to pay a full day's child care. They just get a reduced income as a result.

The report refers to many employees not reporting injury for reasons of just paperwork. This would also include occupational health and safety hazards. I have previously avoided reporting any workplace hazards because of multi-page forms required, the detail required, and the need to be a contact for a work area that may be nothing to do with me, when I just happened to walk past and see a hazard. One experience of all that was quite enough. However, recently I had occasion, since verbal requests weren't actioned, to fill in a hazard form about a fire door that was being constricted. To my surprise, my department had changed the form to a simple one-page form requiring little detail, and I felt that that was a really positive step in the area of occupational health and safety, allowing staff to be proactive, and I'd like to see a lot more of that, making it as simple as possible to report any problems before accidents occur. I'd also like to see it made just as easy to lodge a report on an incident or injury which appears to cause no lasting damage. At present, at least in the federal system, there's little scope to report accidents without filling in detailed and complicated claim forms.

Something that has come up for me recently is the introduction of a fact-finding service by Comcare. I was quite interested to see this, though I'm still taking it with a pinch of salt to see if it's totally independent. Are you aware of the fact-finding service? I can give you a copy of this or you can get it from Comcare. Basically, they employ an independent person who would have psychological qualifications, not to determine the validity of the claim but to get facts about things that are in conflict. They are allowed to interview people, both yourself, the workplace and any other people that you suggest that they can talk to. When I saw that piece of paper, I thought that was quite a positive step in dealing with conflicts.

Middle-level managers are expected to deal with occupational health and safety and compensation issues. In the public service, they're not given any training to do this. A person will be promoted or act in a position, usually without any training in it at all. People might get asked a question in an interview about occupational health and safety, but realistically they usually just learn a pat answer and put that in. I think it would be good for anybody in a management position to have some training in occupational health and safety, even basic. That's about all my comments.

PROF WOODS: That was a fairly broad-ranging commentary on our interim report, so thank you for that. One thing that interests me is the question of stabilising of injury. We've had various evidence put to us, one that says commutation for long-term ongoing injury is a way of closing the file, releasing the injured person in a sense psychologically from the process, and has some benefit, but that you need some stability. We've had other evidence that says common law shouldn't be accessed until there is stability of injury and a period during which rehabilitation can be pursued, but then ultimately, if somebody is catastrophically or seriously injured and it's long term, then some argue that common law has a role to play there.

You've separately said this morning, though, that maybe even two years isn't long enough to determine whether an injury has stabilised. How do you devise scheme structures that find some mid-ground between an injury that even at two years you were saying may not have stabilised, but yet try and find some solution that is of benefit to all the parties?

MS HENDERSON: My own feeling was that the injury does stabilise. You know that it's not going to be 100 per cent ever again. The medical profession will say, "Well, no, it's got to stabilise so we know what level it's at."

PROF WOODS: Well, that will determine the level of compensation, presumably.

MS HENDERSON: Yes, but you sometimes have to put in a minimum level to be able to do that, and if you don't know whether it's going to be 10 per cent or 30 per cent, it's a problem, but should you be allowed to put in 10 per cent anyway, which is what happens - - -

PROF WOODS: So if there was consensus on at least 10 per cent, that would in part solve it, but it wouldn't really resolve it for those then who were concerned that it may ultimately only stabilise at 30 per cent because they're still then involved in and part of the process, and although I don't think you stated it explicitly, I had a sense that there's sort of psychological issues relating to ongoing involvement in the system as well.

MS HENDERSON: There are. In the Comcare system, if you put in a 10 per cent, you can always put in a subsequent claim for an additional amount and maybe there could be an interim agreement as to a base level of injury, and then just waiting until things happen. But I think I'm talking about several years down the track, when you end up in a situation where you've been through rehabilitation, not just once but three or four times, and nothing is happening, you basically don't have any future, and that's the sort of case I'm thinking about.

I don't really think access to common law is a good option, but is there some other way that it can be dealt with? Without that access or without commuting something into a super scheme or - it was interesting to read structured agreements and structured orders and purchases of annuities - whether those are ways out, but really it boils down to the employee trading off their health against the financial aspects. I think any financial adviser would tell you you're stupid to just leave and lose those statutory benefits that you're entitled to. The employer really should be responsible for a certain amount, but sometimes you just get to a point where you need that closure, and you can't get on with your life, you can't get on with your working life without it, and there needs to be some access to that after a number of years.

PROF WOODS: So if you had closure - you had RSI, you had several periods of rehabilitation and this was a number of years down the track; there was consensus there was at least a minimum level of permanent injury, 10 per cent or maybe even higher - if you had closure by way of some commutation, what would you then do with the rest of your working life? Do you then just find another occupation and employer where, in the state you are in and with the limitations that you have, you can then pursue an alternative, fruitful career?

MS HENDERSON: Realistically, I think you have very little chance, depending on the sort of injury you have, of finding other permanent employment with a base level of income. I think there is a chance that you can see other alternatives - for example, casual and temporary work - and I think there's more chance of an employer taking you on because realistically it's a bit easier for them to get rid of you if you have a flare-up, if you're just doing that for a certain amount of time.

PROF WOODS: So part of it is concern by the subsequent employer not to contribute to the aggravation of the injury and therefore be up for a workers comp claim themselves.

MS HENDERSON: Yes.

PROF WOODS: So you're saying that casual is one way where they can dismiss you for other - or at least terminate your employment.

MS HENDERSON: Realistically, yes, and I think if you take the level of statutory benefits that you're entitled to, and you take into account any superannuation and a top-up between the difference of them, and what you would be able to earn, maybe it is a way that everybody can crawl through some sort of hole to get out of a mess that's not helping anybody.

PROF WOODS: You could also come in and out, depending on your physical condition at the time. If you were having a bad spell, you could lay off.

MS HENDERSON: Yes.

PROF WOODS: If you were feeling fit and well, you could go to the extent you could achieve.

MS HENDERSON: Yes, but I think it's a real problem that you can't take the risk of - unless you've got a lot of superannuation or you have a partner who's working - maybe some people are in situations where they can choose to take that option and take the risk of finding long-term casual work, but I think the risk when you don't have that backing behind you, of leaving secure employment with very little chance of going to an employer, is too high.

PROF WOODS: So you're trapped in the system.

MS HENDERSON: You're trapped in the system, yes.

PROF WOODS: To the benefit of anyone?

MS HENDERSON: No, to the benefit of no-one. And another of the problems is that - they talk about redeployment, but it turns out, from what I understand, when you're redeployed at a different level you get reassessed anyway, so financially there's an incentive to stay where you are and not be working at all, on Comcare, which is even worse for everybody.

DR JOHNS: It's a delightful summary of the difficulties of designing these schemes to the benefit of all.

MS HENDERSON: Yes. I think there needs to be - - -

DR JOHNS: Which we haven't attempted to do, of course.

PROF WOODS: No, we're not here to design the perfect scheme, but we are here to look at some of the principles.

DR JOHNS: Or even an imperfect one.

MS HENDERSON: In the public service, it boils down to the fact that you've got Comcare and Comsuper. Comsuper deal with the invalidity, Comcare deal with the statutory benefits, and you can't sort of top up your super. Comsuper don't want to invalid you out because why should they when Comcare is going to pay you and you've got a capacity work anyway? Though in some ways that's an option as well, because all that happens, if you do happen to be successful in finding work, is you get your invalidity reduced anyway, so nobody really loses out, yes, but the fact that there are two schemes and is there some way of marrying the two in proportion - - -

PROF WOODS: So you're quite happy to avoid the double dip in the process?

MS HENDERSON: Yes.

PROF WOODS: I don't have anything further. Dr Johns?

DR JOHNS: No.

PROF WOODS: Anything else you'd like to cover with us this afternoon?

MS HENDERSON: No. The only other thing I noticed in the report concerned the Taxation Department with commutations, where they were commuting it - say taxing it in the same year, whereas it's supposed to be something that covers you for a number of years, which I think is problematic, and whether taxation can be amended so that it is a lower rate is a possibility.

PROF WOODS: All right. If you have any further thoughts that you would like to commit to a written submission - I notice we have a typed version of your earlier handwritten submission, so we can do this; we have the technology. So any further thoughts would be greatly appreciated.

MS HENDERSON: Thank you.

PROF WOODS: Thank you for your time. We will adjourn until 2 pm.

(Luncheon adjournment)

PROF WOODS: Our next participants are from the Australian Nursing Federation. Could you please for the record state your names, the organisations you are representing and any position you hold in those organisations.

MS COWIN: Gerardine Cowin, assistant federal secretary of the ANF.

MS GILMORE: And Victoria Gilmore, federal professional officer for the Australian Nursing Federation.

PROF WOODS: Welcome, and thank you for taking part in our inquiry. We had a submission from you, 16 June, which we have been through and we took into account when we were developing our interim report, but have you got an opening statement you wish to make?

MS GILMORE: Yes, we do. Thank you. We did prepare a short submission at the time that the initial call for submissions went out from the commission, and really our aim today is just to raise some of the issues or to elaborate on some of the issues that were raised by the interim report. We are preparing a comprehensive response on the interim report and we will be forwarding that to you.

PROF WOODS: Excellent.

MS GILMORE: Because obviously it's a wide-ranging discussion that I am sure you will get a lot of feedback on.

PROF WOODS: We are already.

MS GILMORE: Just a reminder; the Australian Nursing Federation has nearly 130,000 members in all states and territories. We represent registered and enrolled nurses and assistants in nursing and other under-licence health care workers in both the public and the private setting. While the majority are employed in the public sector - that's nearly 70 per cent - many nurses work for small employers such as aged care providers, general practices and Aboriginal community controlled organisations. They are also employed by private hospital owners and aged care providers who function in more than one state or territory.

Occupational health and safety and workers compensation schemes were developed to compensate workers and their families following an occupational injury, illness or death. Our concerns is the interim report concentrates on costs associated with insurance schemes, and the ANF is very disappointed that this appears to be the starting premise rather than workers health and safety. Taking this approach, in our view, reinforces the view that occupational health and safety and workers compensation schemes are weighted towards employers rather than workers

for whom the schemes provide protection and assistance.

Workers face many obstacles, starting at the local level, when they have suffered an occupational injury or illness and the commission's report does not demonstrate that these barriers are broken down. It is already obvious that significant under-reporting of occupational injuries and illnesses is occurring. We are disappointed that the interim report fails to provide any recommendations in this area which would assist worker representatives as they seek to enhance the safety of workplaces and to look after workers who become ill, injured or die at work.

Cost savings can be made by investing in occupational health and safety. The interim report fails to demonstrate that the best way to reduce costs is to provide a safer workplace. Reducing premiums and giving employers another way to spend less money on occupational health and safety will not lead to a safer working environment and adequately compensated workers who are injured or become ill as a result of their work. As we flagged in our original submission, employers have demonstrated that they can legitimately reduce claims by working with their employees and technical experts.

The Victorian Nurses Back Injury Prevention program supported by the Victorian Department of Human Services found, for example, that nurses accounted for 54 per cent of occupational injury compensation claims by health workers; workers compensation premiums in the health industry were $50 million, with nurses' back injuries being half the claims. The Victorian Back Injury Prevention project cost $7.7 million but reduced injuries by 74 per cent from 2856 days lost due to back injuries to 754 days lost, halved compensation claims both in number and cost and will save $13 million of public funds every year for claims by nurses.

It's expected, according to the Department of Human Services, that the insurance premiums will also be significantly reduced as a result, but most importantly this project, which is one example of an effective occupational health and safety campaign, resulted in less nurses having their personal and professional lives adversely affected by a preventable injury. Another point that we wanted to make as representatives of a large group of health and aged care workers is that industrial relations and occupational health and safety are inextricably linked.

I wanted to draw your attention to the issue of accidents when driving to and from work, which you have raised several times in your report. The commission' interim report makes several references to the difficulties associated with claims in this area and, while we don't disagree that care must be taken when investigating these claims, fatigue is a major issue for shift-working nurses. The effect of fatigue is often seen as nurses drive home from a shift at work, duration of shifts, rotations onto night duty, overtime, breaks between shifts - they are just some of the claims

made and successfully addressed during industrial negotiations.

The purpose of these claims is that nurses report that they are placing themselves and their patients or clients at risk if their working conditions do not facilitate fatigue management. Removing the link between occupational health and safety and industrial process, in our view, will lead to continued erosion of effective workplace conditions that are aimed at supporting the health and safety of workers. The ANF is not opposed to greater consistency between the occupational health and safety and the workers compensation legislation in all jurisdictions.

If the National Occupational Health and Safety Commission was given the role and the resources, it is our view that they could more effectively contribute to national consistency in both occupational health and safety and in workers compensation. The tripartite board structure, however, must be maintained. The ANF would be happy to see technical advisory committees provide the expert assistance that board requires for effective decision-making, but we are opposed to this type of expert technical committee taking on board like responsibilities as recommended in the interim report.

Occupational health and safety decision-making relies on more than expert knowledge and there is significant advantage in demonstrating a cooperative approach to change that includes representatives of all of the relevant sectors. The ANF recommends that the National Occupational Health and Safety Commission be a commission to undertake a broader role aimed at achieving consistency in both workers compensation and occupational health and safety legislation. The ANF is also concerned that the final step in the workers compensation recommendations will result in employers choosing the jurisdiction in which they wish to operate.

It's possible that employers will move between jurisdictions based on cost rather than implications for the workers that they employ. Again, this would be a disappointing outcome of the inquiry. This is another demonstration, in our view, of the focus on improving the system for the employer rather than the employee. Finally, I just want to reiterate that the ANF does not support the limitation or removal of access to common law damages. This should be an option for any injured worker or ill worker, as it is the case for other members of the community.

Just in conclusion, we have reviewed the ACTU's submission and support the majority of the points that they make in relation to the interim report. So thank you very much.

PROF WOODS: Apart from that, you're happy with the report?

MS GILMORE: Our comprehensive response will be coming through any time

now.

PROF WOODS: The points you raise we do take seriously. There is a position that leads you to those views that we need to understand and make sure that we have worked through. I guess one initial comment I would make is that we do take seriously that occupational health and safety is about prevention. I, just while you were talking, went back to our key points and our second key point there is a common objective underlying the myriad statutes in Australia to prevent workplace injury and illness, and we came to the conclusion that there aren't compelling arguments against uniform occupational health and safety being rolled out across the countryside, but we share your view that that's the principal purpose of it.

I don't think there's too much debate in the field of occupational health and safety other than the structures that we proposed, and I will deal with that in a minute, whereas on workers comp there is more debate because there is more diversity and there are more entrenched views. There is a commonality in occupational health and safety that we have found wherever we have gone, that everyone is focused on how can we prevent, wherever possible, injury, illness in the workplace. So what frustrates us is then that some of this diversity continues to exist and that there are different approaches to it; why can't we just agree on what are the best practices to achieve this and deliver it.

In terms of the organisational structure that we put forward, the ACTU - perhaps even slightly more strident in their views to us on their reaction to it, and we have got ACCI coming along in half an hour.

MS GILMORE: Yes, we saw that.

PROF WOODS: And they will have similar views. It's nice to see you working so closely with the employer body. But we've taken some of that on board and whereas we recognise the tripartite importance - because, after all, occupational health and safety is all about what happens on the floor between the employer and the employee; that's fundamental, so we are rethinking some of that to see how we can broaden out and keep that tripartite constituency up higher in the process than where we had put it. So allow us to think through that and if you want to elaborate further in your written submission, we will read that carefully and with interest.

Some of the other issues that you do raise, I guess, common law would be one. You're, in your professional capacities, in a fairly unique position to observe the progressive rehabilitation of a number of injured employees. We've had organisations come to us, mainly in the allied health fields but elsewhere as well, who say that the holding out of a common law lump sum, some two, three years out doesn't do much to promote rehabilitation. I'm not quite sure whether you're

speaking from an industrial perspective on behalf of your members or in a professional capacity in your experience in rehabilitation.

MS GILMORE: No.

PROF WOODS: And if you could just clarify for me where you're coming from on that, that may help me understand your views.

MS GILMORE: It is as representative of our workers, that that's the case, that we do support access to common law. Certainly professional experience both as a manager in the health system and as a nurse, I think that people assume that claims against common law start in people's minds at the time the accident occurs, and in my view that isn't the case. Most people are hoping to return to work and hoping to return to their professional life, for example, for nurses. I guess that's one of the disappointments in a lot discussion about occupational health and safety; people don't actually assume that that's the case, that people with back injuries, for example, don't actually want to be able to lift their kids up and work as a nurse in intensive care and do the whole range of things that they would want to do.

It's our view that there are some instances where processes don't support - or where that is not going to happen, where people are not able to return to a reasonable professional and personal life, and that through the compensation systems they are not going to be appropriately compensated to pay for the rest of their lives, and that nurses should be able to access common law when it gets to that catastrophic point, and that's our view - is that that is, and that often happens well into someone's injury. It doesn't happen at the time that the injury occurs is I suppose our view of that. And that worrying about common law claims at that point is actually stopping people, even thinking through all of the processes that go into what happens when someone is injured at work.

PROF WOODS: So if there was a system structured so that the emphasis in the first couple of years was rehabilitation, return to work, but for those for whom the level of injury stabilised at a severe level, then some form of lump sum payout, cut your loss, move on - does it need be common law as such? Why would you restrict it to those who can only demonstrate negligence on the part of an employer? Why wouldn't it be something that all of those who are in the catastrophically injured category need?

MS GILMORE: I think the biggest difficulty is that some of the systems don't accommodate. I suppose we do look at it just being in that catastrophic event where the employer is negligent, but we actually haven't restricted it to that. I mean, if there is some sort of dispute, which is what often happens between employers and employees, then the worker has the right to follow through all appropriate legal

avenues in our view, because just saying that the system, well, it's all been set up so it's fair and equitable - what we find is that for the worker who has been injured or becomes ill, that isn't actually accommodating all of their issues.

Unfortunately, all of these decisions are often made at a time when the worker is ill or injured and is struggling with fairly significant issues going on in their lives and are often in negotiation with people whose main aim in life is to limit the payouts that they're providing to workers. If it was that both sides had equal power and influence in a discussion, then we would certainly say that the systems in place protect the worker. But our view is that there's a small group of workers for whom a common law claim is their only way of getting what they think they deserve as a result of an accident at work.

PROF WOODS: But it is a subset of the total set of catastrophically injured who need some financial assistance, isn't it.

MS GILMORE: It's our view that it's even a very small group of those who would make a claim. We worry about removing access. They're often major claims, I don't deny that; but when you look at the number of claims that are made, worrying about access to common law and taking that right away from a very small group of people for whom perhaps the system that we have in place has not provided appropriate compensation is cutting off a fair avenue that is open to someone else who might be in a car accident that is on their way to work, for example.

DR JOHNS: We could go on, I suppose, inasmuch as the last 15 years has been about how to rope in access to common law, and to whom it should apply.

MS GILMORE: We've been aware of that.

DR JOHNS: To only the worst cases or after a certain amount of impairment or over a certain dollar amount, et cetera; so a lot of the debate has been about how to allow workers to get some use from the common law but not have the common law drive the cost of the whole thing. Keep in mind, though, that common law is two things. It's a process but it also sets the rules, and the rules it has set have really meant that workers compensation in most cases means that the boss is to blame. If something takes place in the workplace, then you get the money. Common law doesn't add value to the whole notion of proof of negligence any more. That's what I think you're saying. Why would you want a system where you have to prove it in order to get your money? These are the sorts of debates we don't rule out.

MS GILMORE: One couldn't deny that common law processes actually set in train a better system or an opportunity to negotiate prior to actually getting to the point where you go to court, for example. Certainly sometimes it actually needs putting

that out to get that fair negotiation between what sort of compensation is appropriate for the injury or illness that has occurred. I think that, as I say, if it was fair on both sides and each had equal influence and power, then you wouldn't need it and we would be very happy. It's an incredible cost from our point of view as well.

DR JOHNS: I guess we should reflect, because as part of the interim report we've said, "Should the Commonwealth go down the path of a national scheme they would start at point 1, the Comcare scheme."

MS GILMORE: Yes, I saw that.

DR JOHNS: Which has an election up front to go to common law. Do you have comments on those features of the Comcare scheme or much experience with it? You might not.

MS GILMORE: No. We do have members who access Comcare obviously, but we haven't gone into any detail in that.

PROF WOODS: ACT public sector nurses would know Comcare.

MS GILMORE: We've also had some through the SEATO process.

PROF WOODS: Right, and DVA.

MS GILMORE: That's correct, yes.

PROF WOODS: There are a few.

MS GILMORE: There have been over time, obviously, nurses who have been employed by the Commonwealth - at different times.

MS COWIN: But just pockets.

PROF WOODS: Deeming is one area where you were saying that casual employees, contractors, whatever, should be deemed to be covered. Is that comment driven by, if there's an imbalance in power that those who wish to be brought under workers comp should be able to be? But what do you do when an individual and a host employer, or however best described, arrive at a contractual relationship for a whole range of reasons - it might be tax, it might be whatever - but workers comp knowingly is excluded from coverage, without duress by both parties? Presumably you don't want to rope them in?

MS GILMORE: Obviously if the employment contract has accommodated

workers compensation being part of the responsibility of the contractor - because we talk as representatives of nurses, the majority of our contracted workers would basically be agency staff. I mean, that's the type of employment relationship that we're talking about. I think that the worry sometimes with the language is that people don't actually include them when they're talking about some of the - yet, in our view, they are basically employees for that eight and a half hours or 10 and a half hours or whatever.

MS COWIN: Often that's the view of the agency as well.

MS GILMORE: That's right, and it is our view also that the employer has to responsibly provide the safe workplace, whether the person has come in to do an eight-hour shift or is a permanent employee, obviously, so that's why we want some consistency in language that accommodates our members, for example.

PROF WOODS: So it's all about certainty of coverage.

MS GILMORE: That's right.

PROF WOODS: That's fine. I understand that.

MS GILMORE: There would be a very small group of nurses who would enter an employment contract as you've described, but language actually can then talk about the majority of our members who might be working for labour hire companies, for example.

PROF WOODS: I understand that. Self-insurance is always a good topic to raise. I don't detect a whole lot of enthusiasm. Do you want to elaborate?

MS GILMORE: We haven't made too many direct comments about self-insurance, mainly because there are certainly some criticisms of it that we're aware of.

MS COWIN: That it reduces the pool of dollars overall in the subsidisation, which is basically what the ACTU has put. We support their comments, basically, on self-insuring from that perspective.

MS GILMORE: And it would be interesting to see the evidence that - - -

MS COWIN: It increases efficiencies.

MS GILMORE: - - - as you've construed, it does actually improve occupational health and safety for workers. I mean, we haven't seen any of that evidence, that it does have that impact. What we often see is that people are being encouraged not to

make claims, for example, because of the impact on the company and that type of thing and the worry, I guess, about whether companies are able to, if something comes up - for nurses, for example, if it's a chemical exposure where potentially people aren't going to know for 20 or 30 years the outcome, and yet every nurse, for example, has been exposed to glutaraldehyde or whatever, that's our concern with it. Is it a system that can actually look after workers, both for the short and long term? We haven't seen anything that actually tells us that that's the case.

PROF WOODS: While you're here, if I can broaden the discussion out a little, a policy issue that Australia is starting to face is that of the ageing profile. The nursing profession is caught up in two ways. One is the increased number of people, just numerically, who will be in aged care, although that's not going to rapidly accelerate until us baby boomers fall into the category in about 20 to 30 years.

MS GILMORE: You'll all have looked after your health and welfare so well you won't need it, so that's okay.

PROF WOODS: That's good. Or in our particular cases, our wives will still look after us.

MS GILMORE: That's right.

PROF WOODS: But it's the wives who, when we've popped off - somebody needs to look after them. You already have a wage differential, and arguably some conditions differential, between acute care nursing and aged care nursing round the countryside, yet there's going to be a need for more people. Also, if you look at the profile of nurses in aged care nursing, they're themselves baby boomers or just younger. They're in their 40s or 50s primarily. I think that's a reasonable generalisation. So there will be those situations, so what's the nursing profession thinking about in that area? How will we cope with the increased demand, the change in your own labour force demographics, the fact that those who are already in it will themselves be passing out of service in that area. Where to from here?

MS GILMORE: There's a range of issues. I think if you even look in relation to occupational health and safety of older workers - because nurses' average age is in their early 40s, and obviously and unfortunately there's a decreasing proportion of nurses aged under 25. Over a third of our workforce will be retiring in the next 10 to 15 years and nursing is a physically stressful occupation. The impact on occupational health and safety of older workers I think is something that is a real issue. It is an issue that we've raised, especially if you look at the pay and working condition differentials. There's a government inquiry at the moment looking at a review of pricing arrangements in residential aged care.

PROF WOODS: The Hogan report?

MS GILMORE: That has been one of our key drivers to say, "You need to look at how you provide adequate funding to small business operators" - which is what aged care providers are - "to make sure that you are paying people in line." I mean, recruitment of nurses into aged care is already a critical issue. There have been some interesting approaches to occupational health and safety in the aged care industry over the last few years, with encouraging aged care providers to up the ante and to try and reduce occupational injuries and illnesses. I think that's slowly taking effect.

MS COWIN: It's one area where the link between industrial relations and workplace safety legislation is certainly important for us, because a lot of what we've achieved through that is through the industrial relations process: no lift, you know, and certainly ensuring that the workplace is safe. The hours have been very long and we're currently working on ratios, patient ratios and things in aged care in certain areas. That's one area where the link is very important.

PROF WOODS: I think if you could continue contemplating this area over the next five years, because from the commission's perspective it's not central to this particular inquiry - but as a broader topic.

MS COWIN: What in particular?

PROF WOODS: There are a whole lot of workforce planning issues. There is a funding issue.

MS COWIN: Absolutely.

PROF WOODS: There are occupational health and safety issues.

MS GILMORE: We're certainly pushing that through a whole range. Unfortunately people see nursing - for example, they see every cost increase multiplied by the 200,000 working nurses that there are, and it seems that people are constantly trying to actually reduce costs, rather than how do we provide quality of care?

PROF WOODS: There has to be a trade-off, you would have to admit. There's a balance to be struck.

MS GILMORE: Yes, there is a balance to be struck, but I actually am not sure that people are doing the balancing appropriately. They're just looking at the cost implications. I have to say you can bring in occupational health and safety and what the cost implications are in aged care for providers, what the insurance claims are if

they don't have safe systems in place. It is actually adding costs in other areas. Effective workforce planning is very important in order to make sure that there is a labour force for older people, but also the acute sector as well.

MS COWIN: And that we protect the labour force we have.

MS GILMORE: But unless we factor in that nurses become ill or injured as a result of poor practices, then the cost equation will always not be accurate.

PROF WOODS: Which does get us back to that very central point - that occ health and safety is all about preventing the injury in the first place and, therefore, all the cost structures that follow.

MS GILMORE: Absolutely, yes. That's the whole approach that we take, because we do see nurses who are injured or ill as a result of work, and their lives are destroyed. For us to say that, yes, we're happy to go a step backwards is - - -

PROF WOODS: No, I don't think anyone is proposing that.

DR JOHNS: Can we perhaps go back to your earlier example of the investment in prevention of back injury in Victoria, that particular scheme. You gave us some figures on the expenditure. I was interested that, although all that sounds good and proper, you have to keep it up as each new nurse comes in and has to be trained or retrained. What is the ongoing program?

MS GILMORE: They are certainly doing that, as part of the project is that sort of continuation of it. The first stage was in the public sector, and they got all their educators upskilled with training in manual handling, for example. They purchased the appropriate equipment, and obviously there will be ongoing costs with maintaining that and replacing it as necessary. But a lot of it is about making sure that there are local on-the-ward programs that are actually - - -

DR JOHNS: When you say "equipment", this is a different design of beds and so on?

MS GILMORE: Beds were looked at. Most of it is in lifting equipment, having easy access. The old days of being able to share one lifting machine on one floor of a major teaching hospital, nobody uses it; they haven't got time. Their workloads have increased to the point where that's not going to occur. So, some of it was purchasing, but a lot of it was in training, education and ongoing education and support. There certainly will be an element, but it's our view that most of that will be covered by budgets of, for example, the public hospitals in which these programs are being run. They are being rolled out into the aged care sector as well.

DR JOHNS: Who has made the investment and under what guise has this investment been made?

MS GILMORE: It's under the Department of Human Services of the Victorian government.

MS COWIN: There was a grant.

DR JOHNS: And they're going to follow it through some years so that 10 or 15 years down the track they can look at the return on their investment.

MS GILMORE: They have looked at it over several years already. There is a report, I think, of the first three years of the program, and they have actually rolled it out in the aged care sector as well in training and providing some resources and support for it. The expectation is that, because public hospitals can see how much money they are saving - $13 million in public funds every year in claims by nurses - the reduction in insurance premiums, of which I am sure you are already aware, is a huge issue, as is the amount that each hospital plays in insurance premiums. They are having to demonstrate how they use the money to keep going some of the strategies that they have under way, rather than turning around and putting their hand back out for centralised funds. They are able to demonstrate that they have made savings and that the cost implications of keeping the program going are not so extraordinary. Some time and effort certainly needed to be put in to start the system off - advertising, education and some purchasing of equipment, obviously - to get everyone up to a similar level of equipment.

MS COWIN: What we found in Victoria is that it has become ingrained and cultural, so nurses look for it now. They go in knowing that it is a no-lift hospital. They prefer to work in no-lift hospitals. They are familiar with the equipment from undergraduate training, so it has become ensconced in the system. There are also unmeasured benefits. Patient satisfaction has increased dramatically through the use of the equipment, and there is less fatigue, which no-one measures.

DR JOHNS: It seems that you need a very large investment for these programs, so it has to be either the public sector or a very large private employer.

MS GILMORE: We are not actually sure that that is the case. It is about identifying that, if you do some strategic things early on, you can make a big difference, and sometimes it is looking at a budget, for example, across a longer period. Our view is that lots of hospitals, for example, had huge amounts of equipment that weren't used appropriately. Certainly, some of our public hospitals in Melbourne looked at their equipment pool and found that they probably had enough

equipment to put in places where it was needed but it was in the wrong cupboard, or it was out the back and it hadn't been maintained appropriately.

MS COWIN: And no-one knew how to use it.

MS GILMORE: I think that people do get locked into thinking that they're going to have to invest a whole lot of money to start with, but sometimes it is just having a good look around, a bit of an environmental scan, and to say, "What have we got? What do we need?" Unfortunately, our view is that that is not happening and that people do say, "We need $7.7 million." We don't think that most places do need $7.7 million. Aged care providers are doing it within their budgets now. They haven't had the $7.7 million. They have had the information and the resources to be able to say, "How can we make this a safer working environment?"

PROF WOODS: Are there things that we haven't covered?

MS GILMORE: No. We urge you to really look at the interim report again and, as you indicated, you have had some feedback about the fact that it doesn't look like it's prioritising the worker who might be injured or ill. I think that that is certainly something that we would like to see happen so that, if it is an improved system, and we are not so sure that some of the detail will result in that, it is an improved system for the worker and not just for the employer because, in our view, that would certainly be a backward step.

PROF WOODS: Thank you very much for your submission. We look forward to your formal written submission.

PROF WOODS: I'd like to welcome the Australian Chamber of Commerce and Industry. For the record, can you state your names, the organisation you are representing and the position that you hold in that organisation.

MR ANDERSON: Peter Anderson, director of workplace policy, Australian Chamber of Commerce and Industry.

MR SHAW: David Shaw, manager, occupational health and safety, Australian Chamber of Commerce and Industry.

PROF WOODS: Thank you very much. We have the benefit of a number of submissions from you, for which we are grateful, and they started before July. We have had a response in writing from you in response to our interim report, dated 1 December. Helpfully, you have gone through all the various recommendations and given us your views on those, but do you have an opening statement you wish to make?

MR ANDERSON: Yes, thank you, Mr Chairman. I'd like to make a few opening remarks and thank you for the opportunity to appear before the commission again. We have given some considered thought to the interim report, both its recommendations and its content, and found it to be an extremely useful document, not just for the recommendations that it makes, which we can discuss and debate, but also for the picture that it paints of the current status in terms of frameworks for OHS and workers comp in Australia, and that in itself provides a useful resource for industry.

Our response to the interim report, which you mentioned you have received, represents our interim response, as it were, given that the report is an interim report. It has been prepared as a collective view of multiple business organisations and so, in that sense, it seeks to come to some general consensus view on a number of key issues. Our response supports the broad thrust of the interim report and its recommendations, particularly its focus towards a more national direction to occupational health and safety regulation and its more limited approach to national frameworks in respect to workers compensation. But in neither respect - neither the OHS nor the workers comp respect - does our position go quite as far as the report recommends in both of those areas.

In terms of occupational health and safety, we were particularly pleased that the interim report did note that occupational health and safety performance in Australia by and large is improving. Certainly, the trends seem to be moving in the right direction. There is considerably more investment by industry in occupational health and safety. I think that it is far too easy for generalisations to let some of those aspects slip through; the report does not do that, and we were pleased with that.

However, one aspect of the report which I think is a real challenge for the commission and certainly for us as we work through the recommendations is to try to marry the fact that industry is so diverse. We are dealing with a profile of industry that ranges from the biggest to the smallest, and this is a real challenge in looking at the recommendations and trying to see how these recommendations fit, because they seek to be for all purposes, and yet we have such diversity. In a number of respects, we would say that the particular impact on the small and medium enterprises is an area where the report really does not quite cut to the chase.

The other aspects on OHS that we looked towards, where the report does not quite go as far as we would say, are in respect to the issues of both the quantity and the quality of OHS regulation. We bear in mind, though, that this is an inquiry into frameworks, not an inquiry into substantive content. Yet, when we talk to employers and industry bodies about the report, it is very much interrelated in terms of the way in which they see appropriate structures and frameworks, as to how they would fit in terms of the content and quality of regulation. As the report itself notes, for so many employers it is not even a question of where the regulation comes from: it is what the regulation is and its quality, and whether it is a national body, a state body, a state parliament, a national parliament, the bulk of employers want to know what it is and why it is, not who made it.

The issues of the quantity of regulation I mentioned in our earlier hearings, and I won't repeat that other than to point out that we continue to have this multiple stream of both regulatory instruments and amendments to regulatory instruments.

PROF WOODS: We were just trying to provide an opt-out so that you would have to concentrate on only one - - -

MR ANDERSON: I can certainly see that in terms of what you say in terms of some capacity for national regulatory structures. The other aspect to bear in mind is that, as the report points out, multi-state employers employ about a quarter of the Australian workforce, and that is significant. The flip side is that intrastate employers operate three-quarters of the Australian workforce, and so the issue of national frameworks, whilst significant and appropriate to be tackled, is not the highest issue for so many Australian employers, notwithstanding the need to tackle some of these questions.

PROF WOODS: We agree, but we are not conducting an inquiry into best practice occ health and safety and workers comp. We are dealing with our terms of reference.

MR ANDERSON: Exactly, and I accept that.

PROF WOODS: But I agree. If you a sheetmetal worker in Dubbo, you're worried

about what it is that you have to do, how you comply and how your workers are being looked after in that context. They really don't care about a national framework - and reasonably so.

MR ANDERSON: Where there is a relationship is how that national framework is established and how industry inputs into that national framework. That brings us to some of those recommendations about the nature of industry input. our basic position is that, if we are to be regulated by OHS regulation - and we accept that there needs to be a minimum standard in respect of OHS regulation in Australia - we, as industry, believe that we should have a seat the table, where we have a direct say on both the nature of the regulation and the capacity to implement that regulation.

I think that when we come to look at those recommendations about restructuring of NOHSC it is a really difficult question for this reason: in a sense you're being asked in your terms of reference to put square pegs in round holes. I say that for this reason: national structures for something which is currently state regulatory responsibility - that is, OHS - over private workplaces is marrying a number of concepts that don't quite easily fit together. National structures, over something where the states have jurisdiction, and by their very nature operate within that jurisdiction according to their political and their parliamentary structures, is a very ambitious target.

PROF WOODS: Do you want to go through your opening comments and then come back to this or do we want to debate this all the way through?

MR ANDERSON: We'll come to that. Let me turn to just some very brief comments on the workers compensation aspects. We think that there's quite considerable merit in going down the path of step 1, and with some reservation or some qualification in step 2, as you recommend. We don't accept that step 3, which is effectively the establishment of a national workers compensation infrastructure, is necessary let alone desirable; certainly not at the moment. The policy content of a workers comp system, whether you have it in a national framework or in multiple state frameworks, and the recommendations that deal with issues of content - we have a lot of common ground with the recommendations in those respects.

PROF WOODS: I know.

MR ANDERSON: I can work through those. Our submission, just in brief terms, touches on those. We don't unreservedly agree with every aspect of the principles outlined, but overwhelmingly the type of content that you see for an appropriate and efficiently operating workers compensation structure. Our proposition is that we would accept.

PROF WOODS: I think we might have got about a 90 per cent success rate.

MR ANDERSON: You've got about a 90 per cent success rate on that, but on the idea of creating a national workers compensation structure.

PROF WOODS: No, I understand. We'll get back to that.

MR ANDERSON: Or a national workers compensation advisory body and the like. I might leave my opening comments at that.

PROF WOODS: All right.

MR ANDERSON: Then we can perhaps work through some of the specific recommendations?

PROF WOODS: Why don't we tackle one of the more contentious ones at the front end. It's interesting to note how close you are to your brothers and sisters in the union movement on this particular one; a tripartite involvement in occ health and safety.

We've had argumentation from ACTU and from a number of other bodies that have asked us to rethink part of that. In the interim report we recognised explicitly the importance of the employer-employee relationship for occ health and safety because, after all, that's where it's practised; in the individual work environment. There has been sufficient weight of evidence from both yourselves and from others for us to re-examine our proposals on an NOHSC structure. I guess basically with occ health and safety the frustration is that, as we go around the various states and territories and talk to the stakeholders, there is common agreement that what we are all on about is preventing workplace injury and illness in the first place. There is complete unanimity on that. Everyone signs up to that prospect and does so genuinely.

The frustration is that, despite that and despite NOHSC existing for quite a considerable period of time, we still have this diversity. Now, some national employers get over that by saying, "Well, we'll just pick the tops across the system and roll out a single system." But even they then say, "But you can't do that completely." You still have to look out for the quirks that sort of appear above that common system that they try and develop, even if they pick up the Australian standard. So from our perspective, just a single, national scheme would solve all of that and so it wouldn't matter whether you're a multi-state employer or a single, 20-person outfit in some provincial centre, you would all comply with, and abide by, the same system.

How you develop that is the issue. The current system, despite every best intention in the world, hasn't produced that outcome, so we were looking for some more active driver of the process. It's been put to us that you could marry the two concepts. One way through that might be to continue with our proposal for a smaller body, which may include persons with capacity in employer matters and in employee matters and some who have experience in the states, which in a sense would represent the current executive committee on NOHSC - you know, the subgroup - and that they could then have available to them a consultative forum which, in effect, would replicate the current 18-member board. In a slightly more formalised way that may achieve more of what we're trying to get to than the proposal that we currently have in the interim committee.

So we're rethinking how to get an outcome. I mean, there are the best endeavours and good intention and sign-up at the moment, but it's not delivering the outcome. Now, we recognise that this is a matter for states; it's patently obvious that it's a matter constitutionally for the states where these things happen within the state boundaries, and so be it. But template legislation, if they all collectively agree, can at least create a uniform system. For those who want to sign up to a national scheme, if the national government so wishes it could introduce legislation that allows them then to also sign up to the national OH&S system, but hopefully they would all look the same, which is what we're trying to achieve.

So we're reflecting on the various views but we're not convinced that just sticking with what we've got at the moment is going to do more than where we've got at the moment, which isn't the perfect outcome.

MR ANDERSON: Your last words there "the perfect outcome" I think cut to the core of this. If you accept my thesis that fundamentally you're being asked to put round pegs in square holes, you'll never get the perfect outcome because you don't have two things which naturally have synergy.

PROF WOODS: Which two things?

MR ANDERSON: On the one hand the fact that there is no national regulatory power. In whatever regulator or whatever body is established - it is not going to be able to deliver national, uniform legislation.

PROF WOODS: Only by uniform commitment.

MR ANDERSON: Only by uniform commitment. The capacity to deliver on that commitment lies outside of that national infrastructure.

PROF WOODS: But we have models of it elsewhere in the Australian economy.

MR ANDERSON: You do.

PROF WOODS: Corporations, law and others.

MR ANDERSON: The exception, not the rule.

PROF WOODS: We're working on it.

MR ANDERSON: Before answering your question I should disclose my interest. I'm a member of NOHSC and a member of the executive NOHSC.

PROF WOODS: I'm aware of that.

MR ANDERSON: Our support for a tripartite NOHSC structure is not because we're some slave to tripartism at all. It's not a question of principle. It's a question of what is the best way that industry is able to have some influence over the regulation that is imposed on it; real influence. Secondly, how can we or industry at that national leadership level be a bridge between the regulation and those in the workplace? Our judgment in the OHS area is that a tripartite structure is the best way to achieve those goals because there is no perfect solution and because it is easier to look to table 3.2 in the report, which is the status of adoption of the priority NOHSC standards, and say, "Well, that really is not satisfactory." We would agree with that for the reasons we say.

It's very easy to put up an alternative framework which one thinks could provide a better outcome. But we're not convinced that the alternative framework, as recommended, would provide a better outcome at all. I'm pleased to hear that there's some reconsideration of that. The Workplace Relations Ministers Council is not a body that can be expected to deliver that outcome; it isn't. You've got ministers at the Workplace Relations Ministers Council who can't even bind their governments, let alone their parliaments, on an outcome. I mean, you've got ministers who will have to say, "I'll need to go back to my cabinet and seek cabinet endorsement for X, Y or Z." It's not even a body that is there, structured to actually debate, discuss and commit to. It only meets twice a year to start with. In any event we know the fate of plenty of government legislation, even in state jurisdictions - it's lost or amended or buried in upper houses.

So whilst it is right to say that we don't really have sufficient state implementation of the priority NOHSC standards, I don't actually think that's a reflection on NOHSC. I think that is more of a reflection on the states and the states'

attitudes to NOHSC. But be that as it may, from an industry point of view the key thing is how to be best heard and how to best influence, because unless we're heard and unless we can influence, then there is going to be more distance between the workplace and the regulator or the framework. If there's more distance then there's going to be less capacity for the two to be relevant to each other. So is there going to be a capacity to be heard and to influence if the decisions are going to be made by ministers meeting a couple of times a year behind closed doors?

PROF WOODS: On advice. I'm sure ministers can rise for the occasion. I don't know. I think ministers have this sort of capacity to work through the issues and, provided the advice is well-founded and if there is strong will and support on the part of the relevant stakeholders, I'm less pessimistic about ministerial capacity than perhaps you are.

MR ANDERSON: I'm not an optimist - that it can be delivered through the WRMC process. The NOHSC process does not provide a perfect solution at all. But we must distinguish between that as a product of the NOHSC process or not. From our point of view the NOHSC process is not easy at all. It is frustrating for us as participants in it. I'm sure that the ACTU and governments say that as well. But that is a product of what we're actually trying to deal with. We are trying to deal with issues where there is plenty of common ground between employer and employee interests. But on core questions, like what should the nature of regulation be, there are differences. There will be differences in the advice that is given to ministers on those questions.

PROF WOODS: But even within your constituency we have uncovered quite strong differences. A number of those from small and medium enterprises come forward saying, "Give us clear, prescriptive regulation because then we know exactly what it is we have to do," whereas if you're a large employer who has a whole framework and capacity and overhead within their organisation, they say, "Give us outcome-based regulation and we will interpret it and we will produce the outcome you seek." So even within the body of employers there is debate, and both sides reasonably so. If you're a very small operator, what you want to know is exactly what it is that you have to do and comply with, because that's all the capacity you have to deal with, and you have 10 other things that are equally pressing, whereas if you're a large employer, you flick it off to the OH&S or personnel or whatever section and let them work it through. I understand that.

MR ANDERSON: There are those two perspectives that come within industry, but I think even on the SME side, whilst there is more of an interest in the certainty and simplicity, it's not certainty and simplicity at any cost. You will have SME saying, "We are not happy with the content of regulation," if all of a sudden that certain and simple regulation becomes onerous or commercially unrealistic, so there is still the

need for those positions to be put, which I think brings out another difficulty with trying to create a smaller structure, and that is if you have a smaller structure with an industry expert, it's of great challenge for any industry representatives, let alone an industry rep expert, to be able to speak for all.

There are people whose perspectives are drawn from their experience in national companies; people whose perspectives are drawn from experience in dealing with SMEs, and I know that in the state jurisdictions when they constitute their OHS consultative bodies or committees, or however they structure their state frameworks, they themselves have quite some debate with governments about the nature of industry representations simply because they want to try and reflect the proper diversity of industry, and I think certainly, as it was recommended here, I think a body of five - it will be very hard to get five who could generally reflect the diversity of industry, let alone five that could generally reflect the diversity of - - -

DR JOHNS: They're not meant to be representatives. That's the whole point. Just give me two bob's worth of this. I don't think that whatever design we come up with or governing NOHSC will change the dynamics much - that's what they say - because the constituencies are diverse. NOHSC doesn't set rules for its own constituency. There are just multiple constituencies. So part of our other path here in this whole exercise is to allow by choice those organisations who want to access a national scheme to do so, and they will be the constituency that will pick up and run with national OH&S, and I presume in time they will be the ones who will be writing the laws. So we're really talking about two parallel processes.

MR ANDERSON: Yes.

DR JOHNS: We accept, and we've heard other discussions on the unions' side, that they're uncomfortable with this design, and we've heard that. We've heard you, but just to keep in mind, there is this other most important driver that we're trying to introduce to say if some organisations can benefit from using a single scheme offered by the Commonwealth, then a discussion amongst those employers and their employees will be quite different. They will be talking about their own scheme rather than trying to marry everyone else's scheme together, which is a terribly hard thing to do, and I know how difficult it is for both sides to come up with national rules when you're really doing it for someone else, not for yourself. I think that's our - - -

MR ANDERSON: I think the concepts of, as you say, the two streams has a certain logic, because one can't deliver a perfect outcome, nor can the other, but even with the concept of a capacity to elect in or to operate by choice under a national scheme for OHS regulation means that you're going to have to deal with a range of new policy issues that arise, quite tricky policy issues, about who is eligible to move into

such an infrastructure, whether - you pick and choose. Once you're in, are you in for all purposes, for all time - the capacity to move back or not? You wouldn't want a situation in terms of good policy to be able to pick and choose what you might see as the most beneficial structure because, if we're talking about structures which have certain minimum standards, then by and large you should be applying those minimum standards and not being able to play one off against the other.

PROF WOODS: I don't see those as fatal flaws in the system.

MR ANDERSON: No, but I - - -

DR JOHNS: I don't see them as flaws.

MR ANDERSON: No, they're not flaws but, all of a sudden, you have to start demarking the interaction between two regulatory structures. That has its own regulatory complexity. That's the point I'm trying to make. The other point about that is that it's quite right to say that national companies could look towards that second stream as a better way to integrate a whole national approach to OHS in their businesses and deal with their employees on that basis. I accept that. That would be less of an imperative if we were able to achieve greater national consistency between the state systems, and that comes through in your report. That is our position: to try and do the things that need to be done to drive national consistency. We're not with you in terms of national uniformity. I think one of the recommendations is - - -

PROF WOODS: We distinguished between occ health and safety where we talk uniform - just one single occ health system rolled out - template legislation by all jurisdictions through common agreement. With workers comp, we fully agree that in every state there are dynamics between the employers, the employee bodies, the governments, the lawyers, the doctors, the rehab providers and everyone else who wants to have a say in it, and there is a long history in each one, and you will never - if we said, "Let's also assume that in workers comp we could achieve that," that's whistling in the wind - back here in 10 years and have another interesting discussion. So we recognise that.

We think it may be possible to get greater consistency, because there may be agreement like with the cross-border arrangements, that if you then started to look at even something really simple like, "What is the definition of a payroll for the purpose of premium calculations?" that there may be an attempt to get some degree of commonality between the various parties, but we're not holding out hopes. The challenge we're offering though is if the various jurisdictions and their stakeholders can increase the level of consistency on workers comp, that maybe step 3 will never need to be progressed with; that the feds might say, "Gee, look at that. The states have all got their acts together and there is now a sufficient degree of consistency

amongst them that step 3 really doesn't need to be pursued." There's your challenge.

We're setting out a pathway. This isn't a report that sort of deals with today and tomorrow. We're trying to write a report that in five years time people will still look it up and say, "We've got to this point. Where do we go next?"

DR JOHNS: Or very few companies sign up to steps 1 and 2. It will have to prove itself to that extent.

MR ANDERSON: I think that's right. I'm happy to comment further on those steps 1 and 2.

DR JOHNS: Yes.

PROF WOODS: Why don't you.

MR ANDERSON: Step 1 is relatively uncontroversial, from our perspective. It's not extending, as we understand it, the current regulatory frameworks. It's effectively saying that there are current capacities under federal legislation for licences to be issued and, if the competition tests are met, then those licences can and should be issued, and the report provides what we regard as quite satisfactory commentary on what that might mean for state OHS systems, which is a major concern of ours and our members.

PROF WOODS: State OHS or state workers comp?

MR ANDERSON: Sorry, state workers comp systems, and a matter which the report itself recognises is important. So step 1 is relatively uncontroversial. Step 2 goes that next step, and it's generally supported, but there is a degree of nervousness that emerges for this reason, and I don't think it's fatal in any sense to the step, but it really is something which needs to be put more directly for examination, and that is this: once you provide an infrastructure for national self-insurance, then you need to certainly consider the implications for that on the state workers compensation schemes. That is not just with respect to the issues of premiums and the nature of cross-subsidisation within those schemes. They are for us very important issues, but also the extent to which the absence of national companies alters the claims profiles in those schemes.

If it is correct, and there is some evidence to suggest that the national companies have better claims histories than the overwhelming bulk of the businesses in the state workers comp schemes, then you do possibly run the risk of pulling out the healthier, less costly employers out of the scheme, and that alters your claims profile, particularly if it alters the claims profile in respect of the length of claims.

National companies who are self-insurers in the schemes tend to manage claims more frequently. That reduces the costs of claims and therefore that can distort claims profiles.

PROF WOODS: But if they're all experience rated at that top end, why would that have any impact on those remaining, unless there is some cross-subsidy that hasn't been revealed?

MR ANDERSON: There are two aspects to that. The issue is whether or not - if they are all currently self-insured under state schemes, and I think in that circumstance they just pay - - -

PROF WOODS: Except for their contribution to - - -

MR ANDERSON: They pay an administration contribution.

PROF WOODS: Yes.

MR ANDERSON: So there's a small impact there. If they are not currently self-insured, schemes do operate with degrees of cross-subsidy, and we're not quite with you on your recommendation that says there should be no cross-subsidy in any workers compensation scheme. We accept that there are some arguments in principle for that proposition, but the nature of insurance does generally involve some degrees of cross-subsidy.

PROF WOODS: No. We're trying to distinguish between risk pooling, which is the essence of insurance, so that those of like character but unpredictable nature of claim can pool their premiums. So if one claims this year, they're not hit with the total cost and they spread it across the others. That's fine. That's the essence of insurance. But cross-subsidisation is between different risk profiles such that an entity that, or even body of entities, would deserve one premium are slugged an extra tax to subsidise another group of common risk nature. So let's keep separate risk pooling, which is insurance, and which SMEs will always belong to, because that's the nature of their business - they have to - as distinct from cross-subsidisation, which is slugging one group to the benefit of another.

MR ANDERSON: Drawing that distinction then as a matter of principle, there's sense in the proposition you put, because transferring costs from one industry pool to another industry pool, in principle, doesn't make good sense and certainly doesn't drive the incentives that you need. So that makes good sense.

PROF WOODS: I'm glad.

MR ANDERSON: There have been some schemes though where they have got some elements of cross-subsidisation between industry groupings and they rationalise that on the basis of saying if they can provide a cross-subsidy to manufacturing or to labour-intensive industries, then that could attract labour-intensive industries and, from that, from a manufacturing industry profile, then certain other economic benefits flow.

PROF WOODS: If that's a government industry policy, they should be doing that transparently and openly.

MR ANDERSON: Yes. I'm not saying that is right. I'm saying that there have been elements of that - - -

PROF WOODS: You may well be correct.

MR ANDERSON: - - - in the state schemes.

PROF WOODS: But it's not a system that we would sign up to.

DR JOHNS: I don't think any of them are owning up to that, are they?

PROF WOODS: No. I haven't heard - - -

MR ANDERSON: It has been part of some schemes.

DR JOHNS: Nothing in evidence.

PROF WOODS: But we thank ACCI for exposing it.

MR ANDERSON: We can only expose a certain amount about the inner workings of government, because even the inner workings of government go above and around us all at some point. The other aspects of the recommendations on workers compensation systems or the steps was the third step, and you've noted that if steps 1 and 2 go in particular directions it may be that step 3 is not necessary.

PROF WOODS: No, more particularly if the parallel drive to consistency amongst the states is going satisfactorily the feds may not need to pursue steps.

MR ANDERSON: I think there are some advantages in having some differences between workers compensation systems. I don't think that one should look at this in terms of a black and white situation.

PROF WOODS: There is no one answer in workers comp. It will always be -

however uncomfortable - the resolution of very strong forces in a political environment at any one time, but we talk about that at some length in the interim report.

MR ANDERSON: Yes.

PROF WOODS: We're not seeking or expecting uniformity in workers comp. We also recognise that to change any one element in any one scheme has ramifications for all the other elements and in fact you really don't know what the outcome of that will be for five years down the track.

MR ANDERSON: Having said that, there are some issues which lend themselves to, and should lend themselves to, national consistency.

PROF WOODS: Absolutely.

MR ANDERSON: And we've outlined some of those in our submissions to you and we are generally in line with the position that you outline in recommendations 5 through to 14 which talk about the key principles that should underpin workers compensation frameworks, whether you've got those frameworks operating out of individual state jurisdictions or through some national infrastructure, and when one looks at those principles we start from the proposition that industry is currently paying on the figures that are in the report but they are 2000 and 2001 figures, so it would be a higher figure than this, $6 billion a year in compensation costs, and of that just under 3 billion goes in medical expenses and administration.

So we have not only a massive economic cost to industry but you have a real need for the schemes to be structured in a way that addresses issues of administrative inefficiency, and that's claims management, dispute resolution, and deals with issues of the blowing-out of medical costs, and when one looks at the way the state systems are operating at the moment, apart from the impact of lower investment returns, which for reasons we all understand has occurred in recent years, the biggest area of concern that is being reported to employers in those jurisdictions is the blowing-out of medical and, to a degree, legal costs.

So unless you have principles which tackle those questions then you're really not going to achieve the efficiency and therefore the outcomes that the report points to. The principles you outline by and large are directed to try and create those efficiencies. We are a bit concerned, though, with one recommendation and it may be something we are reading into it which is not there, but I would like to draw it to your attention. It's in relation to medical costs and it's recommendation number 6 where the principle that you recommend is one which says:

> Definition of illness in industry should provide comprehensive coverage of recognised medical injuries and illnesses, and include aggravation, acceleration, deterioration, exacerbation or recurrence of a medical condition.

PROF WOODS: I noticed your focus on the "recognised medical injuries and illnesses" component.

MR ANDERSON: Yes, comprehensive coverage sometimes is code for taking coverage to the nth degree, the absolute degree of the debate about what a particular recognised medical injury or illness is. As employers we have developed a fair degree of cynicism about just how far something can be described as injury or illness and the boundaries that they can be taken to, because we are dealing with the whole range of potential injuries, illnesses, subjective feelings about hurt, subjective feelings about distress and bullying and whatever else. So we think that left as baldly as that, that could be used unintentionally even to take coverage of the schemes out to every potentially defined medical condition.

PROF WOODS: Can I just say on that one that we noted your views when this written submission came in and we are rethinking through it. We think the principle of where we are trying to get to is right but the wording - we're happy to - - -

MR ANDERSON: Good. We're on all fours then by the sounds of that.

PROF WOODS: I'm not sure.

MR ANDERSON: Maybe not on all fours, but we're making our point.

PROF WOODS: You have made your point, yes.

MR ANDERSON: Thank you. Allied to that is the issue of the work-relatedness causation, which is 6.2 of your recommendations, and this is a real dilemma for us as employers, particularly in the areas of exacerbation or recurrence or aggravation, where you have non-work-related injuries recurring in the course of employment or aggravated in the course of employment and the employer then being responsible for the relevant claims. The proposal in recommendation 6.3 to tighten the definition of attribution is fully supported.

PROF WOODS: Yes, I thought you'd like "major" rather than "significant".

MR ANDERSON: It's not just "major" and "significant". It's the word "the" is actually quite important.

PROF WOODS: Yes.

MR ANDERSON: Not just "a"; "the".

PROF WOODS: We had considerable debate between "a" and "the", so we assure you - - -

MR ANDERSON: So we would urge you not to drop the word "the" because it's got quite some meaning in that context.

PROF WOODS: We totally agree. In fact I think in our draft we made sure we pointed out that that was not an accidental phraseology.

MR ANDERSON: That's right. So our apprehension about recommendation number 6 in the concept of comprehensive coverage of medical injuries is ameliorated somewhat by the direction that you are taking in recommendation 6.3.

PROF WOODS: Mind you, in 6.3 you will notice that we also come back to a more pragmatic position.

MR ANDERSON: You've got a broader position, but even then a significant contributing factor is better than what exists in a number of the jurisdictions.

PROF WOODS: Yes.

MR ANDERSON: I mean, "arising out of or in the course of employment" is a traditional causation test which has been taken to extremes beyond what you would have thought could fit within a workers compensation scheme, and I say that because we are dealing here with a no fault scheme. I mean, we are not dealing here with issues of fault. We are dealing here with employers picking up $6 billion of costs for injuries which occur, whether they have been responsible for them, contributed to them, caused them, directed against certain things happening but nonetheless they have happened.

PROF WOODS: It's no fault.

MR ANDERSON: I mean, we are talking about something which is no fault, and that gets lost I think - not in the report, but it gets lost in the public discourse about the extended employer responsibility for injuries in the workplace. We are picking up the tab for anything that occurs in the workplace which can be categorised as a medical condition.

PROF WOODS: Okay. Can I just clarify one point that was earlier? Where we

are talking about step 2, it would of course be for any company that meets the prudentials, irrespective of whether they're single state, multi-state. It was just a passing question that you had in your submission.

MR ANDERSON: Yes, and we raised that because obviously if you cover the intrastate operating company then - - -

PROF WOODS: Anyone who meets the threshold.

MR ANDERSON: That's right, and then you have that potential to impact more heavily on your state operating scheme. One way in which you could have a midpoint between step 1 and that full implementation of step 2 is only to apply that concept of national self-insurance to national operating companies.

PROF WOODS: It wouldn't take long to create a state registered subcompany though in another state with an employee of one or something. People would devise ways of getting around it. Why don't we just avoid it and allow it to apply to all? Can I also point out in this respect that of course if we took, say, Tasmania, this would not only impact on those companies primarily based in Tasmania or even solely based in Tasmania who meet the requirements but would also apply to the 50 or 60 employees in Tasmania of national companies elsewhere.

So it will have wider ramification than some people are interpreting here because in a number of states national companies may only have 10, 50, 100 employees, but those employees would come out of those state pools - I mean, they can't self-employ those at the moment because they don't meet their 500 or 2000 or whatever threshold, but they would come out because of the fact that nationally they meet the prudentials and other tests. So we're trying to make sure the people understand that it actually has a wider impact than some are interpreting.

MR ANDERSON: Yes.

PROF WOODS: But I think there would be such gaming, if we tried to say only for those who exists in several jurisdictions. People would create all sorts of artifices to get around that, so why would you bother.

MR ANDERSON: It's a question as to whether or not the business would see merit in moving to a national structure.

PROF WOODS: They get that choice now anyway. If they see merit in it, under our proposal, they would move to it. If they don't see merit in it, they wouldn't. But if they saw merit in it and couldn't because we'd constructed an artifice they would construct their own. Anything else you want to draw our attention to?

MR ANDERSON: I haven't mentioned - just going back to the OHS debate - that we are working within the NOHSC structure to try and bring out the issues of national consistency. I mean, I think that it is tempting to say that good things are not trying to be done in this respect, and just to say that because we haven't got all the yeses in table 3.2 that we want that it's simply not capable of happening. Now, there are issues of political will and capacity to do things and deliver on outcomes at a state level which we've talked about, but even in a national level we are put up to the commission and attempt to agree on the structure of a national OHS regulation, because if you can agree the structure of a national OHS regulation then you have less likelihood that you are going to debate structures when the issue comes into its implementation in the states.

You might debate content, but structures - and to us there is a lot of sense in a national OHS regulation being written at a national level as a model regulation with an underpinning code of practice and some underpinning guidance material. If it's like a pyramid you keep content minimal at the top of that pyramid and you let more content diffuse down into your guidance material. If we can agree on some sort of framework for regulation through the NOHSC process, then we might be able to give some leadership to the states when they go back and they are not being asked to implement 200 pages of a regulation on noise or 200 pages of regulation on manual handling, and then they have all arms of the bureaucracy and all arms of the union movement in the state and all arms of industry in the state poring over problems with, you know, page 84, and then it just gets lost in the detail, which is one of the reasons why these things haven't happened.

If you've got the actual regulation that they are being asked to implement - much simpler, much smaller, much tighter and allowing issues of detail to flow through into codes and guidance material then they may be more likely to adopt the regulation; may even be prepared to adopt the code and adapt some underpinning guidance material to deal with the particular profile of their jurisdictions or the particular nuances of their political and parliamentary context. So there are ideas being put forward. That is the point I'm trying to make. I don't think that we've got unrealistic views about that. We have to work through all of those things through the NOHSC process, and that is a difficult process but it will not be any easier if we are having to work through four or five advisory committees to WRMC.

PROF WOODS: Where you want to get to and where we're trying to get to is not dissimilar. We just think it can be driven a little harder.

DR JOHNS: I think too from our point of view it's who benefits by consistency. Consistency of itself doesn't have a great benefit, it seems to me, but the one group who would provide us a decent test is a multi-state employer. If they are satisfied

that the state rules are sufficiently consistent, that it doesn't cost them extra to operate, then everyone will be happy, but if one of them steps over and chooses a single set of rules versus the most consistent set of rules among the six or eight, then theirs is the test, surely; not whether the NOHSC committee says they are consistent. It's whether an employer says they are consistent enough so that they can't make savings by shifting over to a single model plan. Anyway, that's my measure of benefit.

PROF WOODS: Could we just clarify the structure that we are actually putting forward there? We're putting forward a structure there which is a standard which is performance based but they're putting forward a nationally consistent code and guidance material. As a result of that we are giving the opportunity for major employers to operate across all states to use a nationally consistent standard which is performance based, but the bottom end of that we have guidance material which is industry based or hazard based, which is giving the smaller employer the opportunity to have advice as to what needs to be done and how to do it. We're trying to get a mixture of that which will provide all of that and at the same time if we in fact use model template regulation within that structure we would, we believe, be able to influence the states to pick up that kind of structure, and that's what we're working on at the moment.

DR JOHNS: And good work should continue for those whom it may benefit.

PROF WOODS: All right. Is there anything else that you want to draw to our attention?

MR ANDERSON: Just before I say not, just give me 30 seconds to go through my notes.

PROF WOODS: Can I repeat again, it was helpful that you went through recommendation by recommendation because that way we can track your views.

DR JOHNS: Yes.

MR SHAW: You did make a point about timing at one stage of whether WRMC should be tied to some time framework.

PROF WOODS: Yes.

MR SHAW: The only point we would make about that was that when you get to the stage of having a standard which is endorsed and agreed by WRMC, the question of implementation - it would be very valuable and useful if WRMC actually set itself some time frame for each of the states to meet that, rather than go through this tortuous process two years later of finding out who has and who hasn't.

PROF WOODS: Yes.

MR SHAW: So we would like to pick up that point.

MR ANDERSON: We have made some comments in our submission in respect of recommendation number 7 dealing with return to work, particularly on the issue of provisional assignment of responsibility. That's the only reservation we've put in respect of the recommendations and it's not that there is anything wrong with issues of provisional assignment of responsibility, in fact it's certainly got a role to play, but it is important in respect of that issue to recognise that provisional assignment of responsibility needs to accept that that occur in circumstances which also cater for the potential for fraud and the like.

PROF WOODS: Yes, it's got to have the right safeguards.

MR ANDERSON: So we have to have some safeguards associated with provisional assignment of responsibility if that is to be a part of any proposed scheme. We'll leave it at that.

PROF WOODS: All right. That's been a very helpful discussion.

MR ANDERSON: Yes.

PROF WOODS: Thank you very much and thank you for your ongoing participation in this inquiry. We will take a short adjournment.

PROF WOODS: We call forward our next participants, the Minerals Council of Australia. Gentlemen, for the record can you state your names, the organisation you are representing and the position you hold in that organisation.

MR HOOKE: Mitchell Harry Hooke, Chief Executive, Minerals Council of Australia.

MR RAWSON: Rob Rawson, Director, Safety and Health, Minerals Council of Australia.

PROF WOODS: Thank you very much. We have had the benefit of a couple of submissions from you, but do you have an opening statement you wish to make?

MR HOOKE: Thank you for the opportunity to appear before you in relation to this inquiry. From our submission and our repeated consistent public declaration and, indeed, the industry's performance, particularly over the last decade, you would be aware that the safety and health of our people is the industry's number one priority and is not subordinate in any way to productivity. As our chairman said only last week, with the absolute confidence of other members of the Minerals Council of Australia, he simply did not want to work in an industry that was not prepared to make every effort to avoid harming its employees.

In the context of this inquiry, by way of opening remark, I underscore our fundamental points. Our focus is on before-the-fact prevention more than after-the-fact compensation. We don't consider compliance with minimum prescribed standards sufficient in itself. We welcome the move towards the regulatory requirements of companies to have plans for preventative safety assurance systems founded in proper risk assessment and management. We consider it far better to engender an attitude of voluntary investment in desirable outcomes than to impose dictatorially - some often refer to it as "the big stick" - a regulatory regime which often gives rise to minimum standards, lowest common denominator outcomes and arm's length ownership.

We know that the industry can be hazardous. We know that it can involve high levels of risk, but it need not be dangerous. Risk management founded in preventative safety assurance systems structured around leadership for a profound culture of safety and health throughout the workforce is, in our view, key to continuous improvement towards our number one goal of zero fatalities, injuries and diseases. We address the operational safety and health considerations of our employees from the perspective of safety and health, not industrial relations. We simply refuse to sanction the politicisation of safety and health for industrial relations objectives. To that extent, we think that the recommendation to work through a system that would give us national consistency through the workplace relations

ministerial council is good idea, but perhaps that is not the right Ministerial Council forum, certainly taken with the model, having had a similar experience in regulating the food industry.

We consider the onus of responsibility for safety and health of employees rests primarily with the company; therefore it is the company's responsibility to identify the hazards and to determine appropriate risk management strategies. We accept shared responsibilities with governments and, in that sense, let me make two fundamental points. First, as you note from our submission, we strongly advocate a nationally consistent framework that recognises the constitutional jurisdictional responsibilities of the states and territories, but in such a way that the jurisdictional boundaries, do not delineate the nature of the industry's commitment; do not differentiate compensation schemes in individual jurisdictions for otherwise equivalent workers; they do not introduce unnecessary complexity for companies operating across jurisdictions; and they do not impose unnecessary duplication in operational systems and compliance reporting systems, which add unnecessary costs.

The second point in this shared responsibility is that we strongly advocate a more effective intersection between regulation and the market and, more specifically, we are after arrangements that do not impede companies' access to privately underwritten insurance and self-insurance, where the latter works within a regulatory framework. There are still impediments to self-insurance in some states, and there are also restrictions based on a number of employees and some anomalies in defining what are corporations. In New South Wales, not all companies have the capacity to self-insure, and strategies to limit liabilities in moving from the coal mines insurance scheme to a national or mainstream scheme would need to be addressed.

Secondly, in that vein, we want arrangements that provide for premiums to reflect performance and, therefore, risk - that is, improved performance should be inversely correlated with premiums. We have a member company operating in Western Australia that has reduced its premiums from 4.4 per cent to 2 per cent when it switched to self-insurance. It is paying a premium of $1400 per employee, averaged over underground and open-cut operations, which is about 2 per cent of wages. Self-insurance coal companies in Queensland have premiums near $3000 per employee. Now, conversely, the CMI scheme operating in New South Wales has seen premiums double over the last four years, even though there has been a significant improvement in safety performance. For New South Wales coal mines, the average premium is $16,000 per employee, with some mines upwards of $30,000 per employee, which is around about 28 per cent of gross wages. We have three of our members paying a total of almost $60 million in premiums last year in that state alone.

The third point in that vein, in terms of more effective intersection between regulation of the market, is that we want to eliminate disincentives to return to work. In New South Wales and Queensland, the provision of effective rehabilitation of jured workers has had the effect of removing the flexibility required to achieve the result of an early return to work.

Given the above, it comes as no surprise to you that we support the wind-up of the coal mines insurance scheme. We believe that coal industry workers in New South Wales should be treated the same as all other industry workers. It is a scheme that hasn't been exposed to the legislative reform applicable to all other industry sectors. It retains a number of negative motivators and disincentives to rehabilitation and return to work. There is no basis to the claim that hazards in the New South Wales coal industry are so different from other industries and that a special scheme is required. The record shows otherwise.

Payments for claims under the scheme are 40 per cent higher than normal workers compensation payments, and the average lump sum payment per case is in excess of $200,000. Ninety-six per cent of cases are settled without judicial finding, and virtually no cases have been conciliated before the court. We see a potential conflict of interest in that the union has part ownership of the CMI scheme but has put up no equity.

We recognise the essentiality and adequacy of existing criminal law provisions for gross negligence or reckless indifference. However, we are opposed to the current system in New South Wales, where alleged breaches of criminal law in respect of occupational safety and health are heard in the arbitration courts rather than in the criminal courts.

The first point is that it is at odds with our focus on differentiating safety and health and industrial relations. It tends to emphasise the industrial relations aspects of prosecution rather than any allegations of negligence in safety and health. The fact that there is a restriction on the right of appeal to the Appeal Court in the state or the High Court surely must constitute a denial of natural justice and gives rise to perceptions of conflict of interest, when the prosecutor - whether it is the regulator or a union - can institute prosecution and can receive a moiety, or 50 per cent share of any penalty imposed. This could be perceived as encouraging a prosecution rather than a preventative focus, which I referred to earlier.

In a similar vein, the final point is that we reject any consideration that the determination of regulatory frameworks governing the safety and health of operations be transferred to agencies with responsibility for workers compensation. It simply confuses the before-the-fact preventative systems approach that we advocate with the after-the-fact compensation. The skills and expertise needed to

understand specific safety and health risks associated with the minerals industry are currently located with the minerals departments and should be enhanced and retained. Secondly, a transfer of responsibility for safety and health in the minerals sector from the minerals departments to WorkCover would diminish this focus on prevention and drive down the prosecution route.

PROF WOODS: Thank you very much. A couple of points come out of that: one you make at the front end of your presentation today, the strong point about the drive for sound occ health and safety practices in your companies. Does that mean that companies that operate across several state and territory jurisdictions have such a high level of occ health and safety standards that they don't need to worry about the differences between the jurisdictions, that they are not down chasing the minimum in each but are up at such a high level that in fact they can roll out a single occ health and safety culture in their company, irrespective of differences between the states and territories?

MR HOOKE: The answer is yes and no. The yes part of the answer is that many of our companies are actually trying to achieve that globally, as well as nationally. The culture is one aspect, and driving for way above the minimum standards is certainly where they're going; in fact, many of them have got there. Continuous improvement both in fatalities and lost time injury frequency rates are testament to that, but we are still short. We still had 12 deaths last year, and that is totally unacceptable. So that is the yes part. The no part is that there are still compliance requirements in conforming with the regulatory regimes that can be differentially applied, and not just within Australia but, of course, globally. That is in terms of reporting, in terms of whatever other specific aspects. Compliance and reporting would probably be the biggest stand-out - that is, they have six or seven different levels of jurisdiction that they have to report to.

MR RAWSON: The indication I got was that it is costing some of our major companies 50,000 to set up systems in each jurisdiction. That is a significant cost across the seven, whereas one scheme would lead to greater efficiency.

PROF WOODS: Not only what the systems are and how they are different but how they keep changing.

MR HOOKE: Correct. There is the monitoring, making sure that you conform. If I may digress, we are currently going through how we operationalise the sustainable development principles and frameworks that we have set up internationally. As a member of the international executive, we have put a lot of time into how we are going to do sustainable development in all its manifestations, including safety and health under the social banner. We are working through how we operationalise that in Australia but in a way that is consistent not only across Australian jurisdictions but

globally. Companies that are structured on global lines do not want to have to have a whole set of different reporting and operational requirements in every jurisdiction.

There are many who exhort us to apply our standards and practices observed here in Australia offshore. We think the best way to do that is to continue to work down this path, such that we recognise the sovereignty of the nation state and do not compromise it but can rise up to the levels that you're talking about.

PROF WOODS: When you look at occ health and safety and compare that with workers compensation, in your industry do you see the same or different challenges in terms of achieving consistency of operations across the jurisdictions for workers compensation? Is it a more complex issue, or is it the same issue?

MR HOOKE: My colleagues are saying that you probably run a parallel line with the exclusion of the New South Wales aberrations.

PROF WOODS: For coal in particular?

MR HOOKE: Yes; the Coal Mine Insurance Scheme.

PROF WOODS: As to self-insurance, there is the New South Wales collaboration, but do you envisage that your members will generally want to pursue a national self-insurance option, or are you content to pursue self-insurance wherever available at the individual jurisdiction level? If you were pursuing self-insurance nationally, what is your reaction to Comcare as being in any way suitable or not suitable as a basis to work from for your industry?

MR HOOKE: Rob may have some specifics on this but, to pick it up at high level principles, I wouldn't want to try to second-guess the commercial determination or decisions of a company. However, the first word that hit me was "option"; the second one is "capacity" and that means - some of our companies have the capacity to self-insure, and you wouldn't have to be a Rhodes scholar to work out which ones they are, but some of them don't. They just simply don't have the capacity within their own internal capabilities to actually provide self-insurance.

PROF WOODS: Do you think some conclude that they're better off being in a premium pool because of their performance?

MR HOOKE: That's probably a fair point, but the other one is just simply having the liquidity to do it.

PROF WOODS: Yes. No, there are different motivators, but some may fall - - -

MR HOOKE: No, that's a fair point. But the other thing is I think in terms of consistency, that goes more to the issue of the framework, the regulatory framework. In other words, the simple points eg everybody has to have an external actuary. Everybody has got to have this kind of an amount put aside to cover off their liabilities, the contingent liabilities; in other words, all the bits and pieces that make up for this effective intersection between the regulator and the market. So there will be things like fees and charges that you would want to have regulated. You would want to have some of those things set down so that there is a consistent framework. Companies have the capacity to choose, but the other point you made is that there is an option for companies who don't have sufficient liquidity, to look elsewhere or to go outside.

MR RAWSON: There are a number of companies that don't have the internal capacity at the moment to self-insure. I'm thinking particularly of those that are involved in the coal industry in New South Wales where they have actually made up-front payments to cover future liabilities. If they were to withdraw from that scheme to self-insure, they would want to get some return of that investment. Otherwise they're very exposed.

PROF WOODS: Do you have any knowledge, views or understanding of whether Comcare is a framework for workers' benefit structures that might meet the needs of the industry, or is that outside of your understanding?

MR HOOKE: It's certainly outside mine.

MR RAWSON: Yes. We're a little bit unclear as to when - in your interim report you mentioned self-insurance under - - -

MR HOOKE: Under Comcare.

PROF WOODS: Under a benefit structure that is similar to that which Comcare, as an insurance entity, currently offers. So it's the benefit structure, not a premium paying under Comcare as such.

MR HOOKE: Well, the members that I've spoken to certainly didn't have any concern about going down that route. In fact, they thought that would be an option.

MR RAWSON: Yes, that's it. It's the option. If you mandated that we would be concerned, but providing an option is a different issue.

PROF WOODS: That's exactly what we're wanting to provide. So for those who see that that is a way through to a single national workers comp and occ health and safety operation for them, then provided they do their analyses and work out whether

the benefit structures and the like are more or less favourable, and the savings they make by being under a single national scheme, they can make the choice.

MR RAWSON: I think the point has been made to me very clearly by our members though that they don't want to go down the route of a national scheme if that means that they still have to comply with all of the state schemes.

PROF WOODS: No.

MR RAWSON: It has to be one or the other.

PROF WOODS: Yes.

MR RAWSON: Rather than just another layer.

DR JOHNS: Mitchell, earlier on you talked about the coal miners' insurance scheme wind-up. Were you saying you preferred it? Did you think our report would somehow wind it up and have people move to the national scheme? I may have misheard you.

MR HOOKE: No.

MR RAWSON: We wanted to - - -

MR HOOKE: We just want to wind it up.

DR JOHNS: I know you do. Okay. I know you do and we heard from your New South Wales colleagues last week.

PROF WOODS: And we have made some commentary in our interim report.

DR JOHNS: No, I just wanted to clarify that because - - -

MR HOOKE: I didn't see it as a stepping stone.

DR JOHNS: - - - really we have just had that conversation. We're really offering another product. It's up to people to choose it, that's all.

MR HOOKE: Absolutely. We would like to see the other one de-mandated and then it would die.

MR RAWSON: You have probably got that message from - - -

DR JOHNS: No, we had a good - - -

MR HOOKE: It's a good word, actually. I might look that one up. I must admit I was taken with your third point. You know, one of your key points about a reformed national body and a point on the basis of merit, consultation, et cetera. The only thing that had severe question marks is whether or not the Workplace Relations Council was the way to go, or whether you would do it under some other banner. The reason I was taken with that is my experience in the food industry was one of the Hawke initiatives to establish a national food authority which subsequently became - - -

PROF WOODS: FSANZ?

MR HOOKE: Something or other. It's now the Australian and New Zealand Food Authority and now it might be FSANZ. That's it, FSANZ.

PROF WOODS: Yes. Indeed.

MR HOOKE: Now, if you think about all of the competing interests among the states in terms of jurisdictional responsibilities governing food labelling, food laws, safety, health, all of those aspects, to be able to get that to a point where there was a common agreement and adopt it into law without modification, without change, that's not a bad model to be looking at.

PROF WOODS: We have pursued that in our interim report. That and transport are the two that we've drawn on by way of illustration the states, territories and the Commonwealth can actually on some of these matters sit down and come to a conclusion. Now, neither of those have been perfect, but - - -

MR HOOKE: No.

PROF WOODS: - - - they have progressed things further than has happened in workers comp.

MR HOOKE: Well, it depends on where you think life starts or finishes. Probably one of the better models is the one for ag and vet chemicals which is actually run as a single national body and the states have in fact devolved power to the feds, or the federation, to determine the toxicological and epidemiological and all the other efficacy aspects of agricultural and veterinary chemical use in this country. That is probably, in terms of consistency and effectiveness, the better way to go. But I suspect I'll be long gone before the states devolve constitutional responsibilities for occ health and safety to the federation. So therefore we live in the real world and my Council would be comfortable with the path you're going down.

PROF WOODS: Yes. You made reference to rehabilitation preventing effective return to work. What lies behind that commentary?

MR RAWSON: It related more to the problems being experienced in Queensland and New South Wales where more prescriptive approaches to the way rehabilitation plans are developed and endorsed. There is a concern that increasingly before governments will even look at rehabilitation plans and return-to-work strategies there not only has to be consultation with unions, but actually agreement, particularly in New South Wales. So I think the concern is that it's not good enough to just leave it to the companies; the view that there has to be this - an increasingly prescriptive approach to that development and agreement before they will even consider and then endorse such plans.

I think the self-insurance route being pursued by one of our members in WA - he said that that provided an increased ability to really actively manage injuries and that has resulted in a significant reduction in the cost of claims to the point where for a company with 800 employees, they've got the claim costs down to $10,000. Now, that compared with one of our members in the New South Wales coal industry where he said - well a figure was given to me of $225,000 was the average cost. So it's that prescriptive approach that we were referring to in our submission.

PROF WOODS: All right. Gary.

DR JOHNS: Earlier in the day the rehab providers were comparing Western Australia and the ACT and their systems of how early on in the process you get rehab providers involved. They were saying in the ACT it happens very quickly, but in Western Australia it was very slow. Was that the right memory?

PROF WOODS: Yes.

DR JOHNS: But you're saying in Western Australia - perhaps it's just the self-insurers - - -

MR RAWSON: Well, I'm generalising. I was talking about one company so I'm - but it's one of our significant members in - - -

DR JOHNS: They gave us a very dark picture about the Western Australian - - -

MR HOOKE: Was that under the same schemes? This is self-insurance.

DR JOHNS: I'm just wondering whether the rules are somewhat different for self-insurers.

MR HOOKE: Were they talking about that from the minerals perspective?

DR JOHNS: No, across the board, but it just struck me as very different, that's all. Perhaps it wasn't self-insurers.

MR HOOKE: Coming to the minerals sector from food, and before that agriculture - you know I've only been here a year and a half, I was really quite taken with the massive shift in culture. Ten years ago, in 1996, this was an industry that had one of the worst industrial records and even the Coal Royal Commission picked it up and said, you know, you want a beacon about who's doing it well. This is an industry that's got its act together. The industry declared in 1996 that safety was going to be its number one priority. We don't start a meeting without a safety briefing. There is no way you would be in here without a safety brief about how you get out. You don't walk in the building without safety awareness. You don't go in a mine site without a complete briefing about the safety procedures: what you do, how you go through it. As people walk around the mines if they see something that is out of order they sit down and go through it all with the employees.

There is an absolute culture that says there is no acceptability for any breaches in health and safety. That feeds over into their work culture. So you only have to go around some of these mine sites to see what they were doing with 2, 3 or 4 thousand employees they are now doing with 500. And that this shift in attitude to productivity improvement and safety and health improvement, where the onus of responsibility is with the company working in partnership with the employees, there is a huge cultural shift over that period, that decade period. This is a sector that has out-performed productivity growth than any other sector in Australia and out-performed any other sector in terms of its improvement to safety and health record and they put the two together.

DR JOHNS: I suspect all that occurred regardless of the scheme under which you were operating.

MR HOOKE: That's probably fair - - -

DR JOHNS: Which may be good, but we're here to try and design - - -

MR HOOKE: It's a fair point.

DR JOHNS: - - - a scheme and there was something - - -

MR HOOKE: What we're now trying to do is get to the - - -

DR JOHNS: - - - external that shook it up, maybe 50 years - - -

PROF WOODS: Maybe there is another increment that you can get from national - - -

MR HOOKE: Well, I think it was actually internal. It was the CEO's leadership. They decreed that this was not on. What I am trying to say is all that has happened as a consequence of the culture. What you're now seeing is the culture is shifting, as I was saying earlier on, to the preventative safety assurance, rather than how much money you can get after you've had a problem. And then how you can be rehabilitated back into the workforce. So that shift in culture is now manifest in the way companies are operating.

DR JOHNS: That's the puzzle for us. You have happened. We're not quite sure how and we're trying to design some rules to - - -

MR HOOKE: I understand that.

PROF WOODS: At least provide the right incentive structures.

DR JOHNS: Yes.

PROF WOODS: We would be the first to admit that no matter what structure you have, you can either have it well managed or poorly managed and you can get different results from that. The structure in itself isn't sufficient to guarantee that you're going to get the right outcome.

MR HOOKE: I concur with that. I think institutions are only as good as the people in them and invariably if the people aren't right, the institutions won't help you. It goes back to the point that Gary just asked and that is what was it. It wasn't anything external. It was purely and simply an internal commitment of the industry's leadership that this just simply wasn't good enough. Now, that culture has pervaded the industry and it's featured not only in terms of the safety and health performance, but it is also a factor in terms of their productivity, it's a factor in terms of their rehabilitation back into the workforce in terms of the compensation arrangements, but it does come down to people.

PROF WOODS: Tell us about common law then. Where does that fit in?

MR RAWSON: Well, common law the way it's being used in - well, that's mainly in New South Wales, is our concern here, where workers comp because that is capped there is a bit of a play-off, if you like, one to the other. There is a bit of a bidding war, is what goes on there between the claimant, their lawyers and so forth, so that there might be a common law action initiated which is seeking damages

above the cap, but then when there is an agreement reached out of court which falls in under the cap, the lawyer can demonstrate that a real saving has been made and a real benefit to the employer, but of course it's being used artificially, is the view of the employers, to push up the settlements in fact.

So common law, we don't believe that that is appropriate for it to have that adversarial system operating where - you know, it doesn't really encourage the sharing and so on of experiences and spreading those lessons learnt around the industry. The other thing is that common law does tie up individuals, their careers, their futures. The uncertainty that hangs over common law actions - because they do drag on for many years. I have personally been involved with them in another area and it's not unusual for some things to drag on for 10 years and so on in common law actions. It doesn't lead to that certainty and quick resolution that we're looking for here and so that the rest of the industry can learn from what has actually happened.

DR JOHNS: But you can also have a statutory scheme that pays someone a pension and keeps them on for years and years and years too. Again you get terrible results from the same scheme and good results from - - -

MR RAWSON: We're not saying common law doesn't have its place. We believe in very serious cases then it would be an appropriate mechanism to use, but it would not be the norm. It's horses for courses.

DR JOHNS: So it's used wisely in its time and place.

MR RAWSON: That would be the view.

MR HOOKE: Yes. I don't have anything to add there.

PROF WOODS: Anywhere else you want to go?

DR JOHNS: With respect to this?

PROF WOODS: I can offer suggestions.

DR JOHNS: No. Unless you have any comments specific to the scheme we're attempting to build.

MR HOOKE: We think you're heading in the right direction.

PROF WOODS: Very good. We're happy to leave it at that point. We've got the benefit of your submissions that you provided before, where you put out an interim report. Are you intending to turn that into a formal submission?

MR HOOKE: If you wish.

PROF WOODS: That would be helpful, if you want to elaborate on any points that have come up in discussion.

MR HOOKE: We'll certainly elaborate a little further on the common law. I think Rob summed it up pretty well, but we've got some figures and stuff we can put in there and do that. That's not a problem. I can do that.

PROF WOODS: By 30 January would be much appreciated.

MR HOOKE: Yes, we'll have it done before Christmas or you don't get it.

PROF WOODS: Thank you very much.

PROF WOODS: If I can ask our next participant to come forward, the Australian Physiotherapy Association, if you could please, for the record, state your name, the organisation you are representing and any position you hold with it.

MS GRANT: I'm Margaret Grant. I'm representing the Australian Physiotherapy Association and my title is national special group unit manager.

PROF WOODS: We had an early submission from you back on 5 June, for which we were grateful. We went through a number of issues that we took into account as we prepared our interim report. Do you have an opening statement for today that you wish to make.

MS GRANT: Yes. I guess broadly speaking the association is supportive of the interim report and the strategies and suggestions put forward by that, in particular the nationally consistent approach to workers compensation legislation. There are still some areas that were in our submission that we'd like to see addressed within that. Looking in the first instance at prevention of injury, so focusing on the occ health and safety end of things, certainly injuries can be prevented by risk identification within the workplace and where necessary eliminate the tasks or eliminate what's involved; but sometimes things just have to be done.

One area that physios are very active in, and that there's evidence of efficacy, is in assessing individuals within the workplace. You can have the most wonderful ergonomic set-up, tasks can be done, but there can be individual factors that may contribute to injury. I guess an analogy would be the sporting environment. Our submission referred to work-hardening programs, so looking at the specific task at hand, there may be general health factors. One that comes to mind is obesity. Obviously there are areas of sensitivity around that with employers, but if the framework put forward had some way that there could be assessment of individual workers who are performing at-risk activities - given that some activities have to be performed and there's a recognition that they are at risk.

Teaching people - I guess the way a physio would describe it is teaching people how to move their body within the work space and to perform the tasks that are required, so it's very individual. We would like to see somewhere in the prevention model the notion of prevention of injury to individuals - as opposed to prevention of injury in the workplace - addressed, recognising that there is a complex interplay then between the environment, the organisation and the worker, and that those things would need to be teased out.

In terms of the compensation side of things, we'd like to see included in the model the provision or a strategy to provide information to workers when they're first injured. Feedback from our members suggests that some of the yellow flags can be

minimised and also that there can be better compliance with early intervention and rehabilitation if workers at the outset of their injury were provided with education about what the compensation process involves.

There's a level of anxiety and, depending on personal experience and experience of peers and family, different people can go into that process and have different concepts of what's going to occur - so, in introducing a new framework, to have a strategy that clearly outlines how that individual will be, for want of a better word, processed through the system and what they can expect of the system and equally what the system will expect of them during that course; as I say, partly to address some of those yellow flags that contribute to poor return to work later on.

PROF WOODS: By yellow flags, the psychological - - -

MS GRANT: The psychosocial, yes. There's a lot of uncertainty and anxiety.

PROF WOODS: We've actually referred to that in our report on the yellow flags as psychosocial risk factors, I notice.

MS GRANT: I guess what we're doing is suggesting a strategy that could help to minimise those at the outset for workers, that there's a standard document. With a nationally consistent approach it makes it much easier to have a standard document that's handed to an injured worker, explaining to them what's going to happen in terms of their claim, in terms of them, who they're likely to meet along the way, what different people's roles are - just to address some of those unknown factors; and also to some extent to place in the mind of the individual a concept of getting better, from the start. That education about the system can also, implicitly within it, create a pathway in that person's mind of where they're going, which is back to work as opposed to somebody who's working with a culture - as I said, peers or family - where going back to work isn't generally what occurs. We would see that as a useful strategy.

DR JOHNS: Can I just intervene there? How can you do that as a physio? Typically, I presume, the injured worker comes to you in your rooms so you can perform physio, which is after the fact. I'm interested in this. You're talking about having some sort of education or some sort of information to them before it happens or immediately after it happens. How does the physio get involved in that?

MS GRANT: I would see that physio would contribute to the content, but that it would either be something that the employer provided or that - you know, the first point of contact.

DR JOHNS: Right programs and information.

MS GRANT: Yes, but there would need to be medical input, there would need to psychology input, there would need to be lots of different people's input to the document. We're not suggesting it as something that's purely physio. We're looking at the continuum of care of the injured worker.

DR JOHNS: Have you seen evidence in the various systems of such educative material, such documents, any good examples?

MS GRANT: Yes, certainly one of our members in Victoria - and I'm happy to try and source some information for you - has had experience where this has been used and reports good compliance in terms of the rehabilitation process, better compliance than other workplaces where that perhaps hasn't been provided. To my knowledge there's no hard-core research been done on it, or comparative study.

DR JOHNS: So is that just a tack that particularises - is it the Victoria WorkCover Authority officers who distribute this material and your people think it's good material, or is it a particular employer?

MS GRANT: Yes, I think it's a particular workplace. It would have been either a residential aged care facility or some type of health care environment.

DR JOHNS: It's a bit of a theme in this inquiry. We find gems but they're not necessarily related to the specific system that they come out of. You just find them around the place. They're contributions by good professionals or whatever.

MS GRANT: I think sometimes people see a need and make something to fill that need in their own situation.

PROF WOODS: And it's nice to give them a bit of airspace if we can, if they are working and we can shine a brief light on them.

MS GRANT: Other things are, in terms of claims management, which is obviously discussed in a fair amount of detail in the interim report, just the need to facilitate the claims approval to address barriers. Again that is dealt with in the interim report, but just to support that there is a need for that, as is highlighted. There are at the moment, within the different systems, different lengths of time before people get into having treatment and clearly there's evidence that the earlier the early intervention occurs, the more likely they are to return to work and the faster they return to work. We would certainly be supportive of, within a national scheme, minimising the barriers to actually receiving treatment and perhaps adopting a model such as that within New South Wales and the ACT where people can actually receive treatment prior to the liability being accepted by the employer.

PROF WOODS: That certainly seems to be breaking through a lot of the legal and procedural issues.

MS GRANT: Yes. In stating that, we would also suggest that there be some type of guidelines for early management, particularly of something like low back pain. The NHMRC either later this week or early next week are releasing evidence-based guidelines for management of acute musculoskeletal pain. That includes low back pain. Those guidelines have been developed over the last three years and certainly at their release they contain the latest evidence in terms of best practice - highlighting, for example, with low back pain the importance of continuation of activity and education in the management.

We would also suggest that within any framework, given that soft tissue injuries represent almost 66 per cent of workers compensation claims, and there's across the world now a variety of evidence-based guidelines for management of soft tissue injuries and acute musculoskeletal injuries - that the framework somewhere within it incorporate use of guidelines where they are available, as much as anything to ensure best practice within the system and to minimise or avoid inappropriate treatment.

PROF WOODS: That would be good.

MS GRANT: Probably another area of concern for the association in the guidelines is the apparent focus on the role of the doctor in case management. In a classic case management approach, there's a variety of disciplines - perhaps a physio, psychologist, social worker. You're probably aware of that. Depending on the individual needs of the client, one or maybe more people within that case management team may be the most appropriate person to manage that case. We would want to, I guess, highlight the fact that there's an apparent emphasis at the moment on the doctor being the case manager, when in fact in some cases it might not be appropriate for the doctor to be the case manager. Obviously the doctor would be part of the case management team, but it may be a physio, it may be a psychologist, it may be an OT who is actually the case manager.

PROF WOODS: The rehab providers assured us they were the ones who should be the case managers.

DR JOHNS: Yes, who decides that or what the mix is? Who do you go to first?

PROF WOODS: You don't want to engage in any interdisciplinary warfare?

MS GRANT: No. I think different clients have different needs. Not all injured

workers wind up with a rehabilitation provider. That would be the other thing, I guess, to have a system that catered for - - -

PROF WOODS: That's their point, though - that they should.

MS GRANT: I think we'd have a different view to that.

PROF WOODS: That's the joy of an inquiry. You get a whole range of different views.

MS GRANT: The other thing is that there can be parallels drawn between a return-to-sport model and a return-to-work model of care.

PROF WOODS: Absolutely. I think that's a very good point.

MS GRANT: Whilst obviously there's a different psychology, if some strategies are implemented early on - in talking about incentives I think that it might be possible to actually try and draw parallels between the return-to-sport model and the return-to-work model.

DR JOHNS: What's the incentive, I wonder? If I perchance get injured, I want to go back to golf but not necessarily back to work, so what incentive can you give me to go back to work?

PROF WOODS: Hey, this is so much fun. Why would you not want to be here?

MS GRANT: This is personal, so this isn't something that I've discussed with my colleagues, but I would see it more as perhaps trying to identify what are the incentives at the moment not to go back to work and develop strategies to minimise those and perhaps speak to workers who do get back to work early and find out where their drive is.

DR JOHNS: They love their job.

MS GRANT: I think there's some uncharted water there.

DR JOHNS: I think it's a significant issue but it might be so fundamental - like, the worker doesn't want to go back - that it can't be solved in a simple framework.

PROF WOODS: Interestingly, there are some other incentives on the employer - that if you're the manager of a sporting team that desperately depends for its success on one or two key players, then irrespective of their incentives your incentives are to get them back on that court or in that playing field or whatever as quickly as you can.

Not all other employers might necessarily share the same view for the totality of their workforce. So there are a whole range of different incentives.

DR JOHNS: I suspect the contract with the professional sportsmen is pretty tough. They have to get back.

PROF WOODS: Yes.

MS GRANT: Especially if they've got match payments.

DR JOHNS: Not nearly as tough for the normal employee, I suspect.

PROF WOODS: Talking of incentives, though, that's a very good topic to raise because what is the right incentive structure to make sure that the number of physio sessions is that which is efficient, effective and at minimum cost as distinct from an ongoing but enjoyable experience for the injured employee? I could hypothetically consider a situation where an employee actually thinks, "This is terrific. I'm being funded to go along and I'm enjoying the physio sessions and I'm generally improving my overall health and welfare," and the physio thinks, "This is terrific. I've got a client here who doesn't actually have to pay themselves," so neither party is funding the bill. Purely hypothetical; but how can you construct incentives that avoid such an outcome?

MS GRANT: I think without developing prescriptive clinical pathways - because it's not appropriate in the area of musculoskeletal injury - broadly speaking, having expected pathways for people to progress through following injury and, as part of those, appropriate outcome measures. There's gradually become more and more documentation in terms of appropriate outcome measures for different problems. The majority of physios, if someone is not getting better, will either have to stand back and look at what they're doing and do something differently, or call in a second opinion.

In the end, the use of appropriate outcome measures - and they may be individual outcome measures that the physiotherapist themself has designed for that particular client for their needs - is probably a good way of trying to minimise inappropriate or unnecessary treatment. An outcome measure - an example would be if somebody was driving a truck and they had a knee injury and they needed to be able to climb back into the truck to go back to work, rather than measuring degrees of flexion of the knee and reporting that from the physiotherapist, the height of step that they could step onto at the time would be a more appropriate outcome measure in terms of monitoring progress of treatment for that person.

I must admit, within the profession at the moment we're having a large

education campaign about outcome measures because there is some misunderstanding. But I think encouraging professionals to use measurements that have got direct relationship to the return-to-work activities of the injured worker rather than clinical measurements - obviously a physio is still going to take clinical measurements such as the range of movement of the knee; but in order to link in also with the mind set of the individual, the injured worker, to be measuring tasks that have a very valid relationship between what the person needs to do at work and what they can actually do, without going to the model of having prescriptive guidelines or prescriptive outcome measures which remove the clinical autonomy of the practitioner to utilise their own clinical reasoning in deciding what to do. Again, across the board I think motor accident as well as workers compensation across the globe - that's a challenge at the moment.

PROF WOODS: Are there matters that you want to raise that we haven't covered?

MS GRANT: No, they were really the main ones. The main ones were: the prevention of workplace injury in terms of the individual; the need to improve information provided to workers at the time of injury; claims management and removing barriers; using evidence-based guidelines; and not having the doctor as always being the case manager.

PROF WOODS: A good summary. Thank you very much. Is there anyone present who wishes to appear today before the commission? That being the case, I conclude these hearings on the interim report.

AT 4.42 PM THE INQUIRY WAS ADJOURNED ACCORDINGLY

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